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14 UNITED STATES DISTRICT COURT

15 CENTRAL DISTRICT OF CALIFORNIA

16 METRO-GOLDWYN-MAYER
17 STUDIOS INC., et al.,
18 Plaintiffs,

v.

19 GROKSTER, LTD., et al.,
20 Defendants.

21 JERRY LEIBER, et al.,
22 Plaintiffs,

v.

23 CONSUMER EMPOWERMENT BV
24 a/k/a FASTTRACK, et al.,
25 Defendants.

26 AND RELATED COUNTERCLAIMS.
27
28

Case No. CV 01 08541 SVW (PJWx)
(Consolidated with CV 01 09923 SVW
(PJWx))

**NOTICE OF MOTION AND MOTION
BY PLAINTIFFS FOR SUMMARY
JUDGMENT ON LIABILITY OR,
ALTERNATIVELY, PARTIAL
SUMMARY JUDGMENT AGAINST
DEFENDANTS STREAMCAST
NETWORKS, MUSICCITY
NETWORKS, INC., GROKSTER, LTD.,
AND KAZAA B.V.;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: December 2, 2002
Time: 1:30 p.m.
Ctm: The Hon. Stephen V. Wilson

[REDACTED PUBLIC VERSION]

1 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

2

3 PLEASE TAKE NOTICE that, on December 2, 2002, at 1:30 p.m., or as soon
4 thereafter as counsel may be heard, in the Courtroom of the Honorable Stephen V.
5 Wilson, 312 N. Spring Street, Los Angeles, California 90012, all plaintiffs in Case
6 Nos. CV 01 08541 SVW (PJWx) and CV 01 09923 SVW (PJWx) (collectively
7 "Plaintiffs") will and hereby do move the Court pursuant to Federal Rule of Civil
8 Procedure 56 for summary judgment against defendants Streamcast Networks,
9 formerly known as MusicCity.com, Inc., MusicCity Networks, Inc., Grokster, LTD.,
10 and Kazaa B.V., formerly known as Consumer Empowerment B.V. a/k/a FastTrack
11 ("Kazaa") (collectively "Defendants") on the issue of Defendants' liability to
12 Plaintiffs for contributory copyright infringement and/or on the issue of Defendants'
13 liability to Plaintiffs for vicarious copyright infringement.

14 This Motion is made on the grounds that, as to the foregoing, there is no
15 genuine issue as to any material fact and that Plaintiffs are entitled to judgment on
16 those issues as a matter of law.

17 This Motion is and will be based on:

- 18 ▪ this Notice of Motion and Motion;
- 19 ▪ the accompanying Memorandum of Points and Authorities;
- 20 ▪ the Statement of Uncontroverted Facts and Conclusions of Law filed

21 concurrently herewith;

- 22 ▪ the following Declarations filed concurrently herewith (unless otherwise
23 indicated):

24 Mark Eisenberg ("Eisenberg Decl.")

25 Richard Cottrell ("Cottrell Decl.")

26 David Seklir ("Seklir Decl.")

27 Michael Ostroff ("Ostroff Decl.")

28 Derek Ferguson ("Ferguson Decl.")

- 1 Wade Leak ("Leak Decl.")
- 2 Claire Robinson ("C. Robinson Decl.")
- 3 Jeremy Williams ("Williams Decl.")
- 4 Ben Zinkin ("Zinkin Decl.")
- 5 Paul J. Vidich ("Vidich Decl.")
- 6 Frank Creighton (Creighton Decl.)
- 7 Prof. Leonard Kleinrock ("Kleinrock Decl.")
- 8 Patrick Breslin ("Breslin Decl.")
- 9 Vance Ikezoye ("Ikezoye Decl.")
- 10 David Hyman ("Hyman Decl.")
- 11 Linda Bodenstein ("Bodenstein Decl.")
- 12 George M. Borkowski ("Borkowski Decl.")
- 13 Melanie Breen ("Breen Decl.")
- 14 Lamont Dozier ("Dozier Decl.")
- 15 Petersen W. Jaegerman ("Jaegerman Decl.")
- 16 Jerry Leiber ("Leiber Decl.")
- 17 Mike Stoller ("Stoller Decl.")
- 18 Irwin Z. Robinson ("I. Robinson Decl.")
- 19 Michael Goldsen ("Goldsen Decl.")
- 20 Jacqueline C. Charlesworth ("Charlesworth Decl.")
- 21 Charles J. Sanders ("Sanders Decl.")
- 22 Jonathan Cole ("Cole Decl.")
- 23 Gordon Shock ("Shock Decl.")
- 24 Michael-Ann Brown ("Brown Decl.")
- 25 Ken Jacobsen ("Jacobsen Decl.")
- 26 Mary McGuire ("McGuire Decl.")
- 27 Jared Jussim ("Jussim Decl.")
- 28 Scott M. Martin ("Martin Decl.")


1 Holley Leff-Pressman ("Leff-Pressman Decl.")
2 Patricia Villalobos ("Villalobos Decl.")
3 Michael Moore ("Moore Decl.")
4 the depositions of Steve Griffin ("Griffin Depo."), Darrell Smith ("Smith
5 Depo."), Michael Weiss ("Weiss Depo."), Daniel Rung ("D. Rung Depo."), Matthew
6 Rung ("M. Rung Depo."), William Kallman ("Kallman Depo."), Jeffrey Tung ("Tung
7 Depo."), Kevin Bermeister ("Bermeister Depo."), Anthony Rose ("Rose Depo."), Jeff
8 Hardison ("Hardison Depo.") and certain exhibits thereto, all attached as Exhibits to
9 the Borkowski Declaration;

- 10 ▪ Defendants' Answers and Amended Answers in this Action;
- 11 ▪ Defendants' interrogatory and other discovery responses;
- 12 ▪ all matters of which this Court may take judicial notice;
- 13 ▪ all pleadings and papers on file in this action; and
- 14 ▪ any further evidence and argument presented at or prior to the hearing or
15 ruling on this Motion.

16 This Motion is filed pursuant to this Court's July 12, 2002, Order and,
17 consequently, the pre-motion conference of counsel requirements of Local Rule 7-3
18 do not apply with respect to this Motion.

19
20 Dated: September 9, 2002

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION AND SUMMARY OF ARGUMENT

3 *"Morpheus has such a high media content with almost every user*
4 *interested in music in many capacities. If someone were to download a*
5 ***Pearl Jam** song, and then see a banner ad featuring Spin's cover story*
6 *on **Pearl Jam**, the probability of them clicking on that ad are through*
7 *the roof."*

8 MusicCity sales executive soliciting advertising from
9 Spin magazine SUF 3(l); 33782(emphasis added)¹

10 * * *

11 *Q: "I downloaded fast and the furious and mummy returns and i can*
12 *only hear the sound, i can't watch the video. What would i have to*
13 *download to watch movies."*

14 *A: Grokster uses Windows Media Player as its media player. Please*
15 *get it and install from: [link provided]"*

16 Grokster Support response to a user inquiry SUF
17 3(p); GR07574 (emphasis added)

18 This Court has articulated the appropriate framework for analyzing this case:
19 are Defendants' systems more like the infringing Napster system that was enjoined in
20 2001, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) ("Napster
21 I"), or the video recorder product used for time-shifting of free, over-the-air television
22 broadcasts at issue in Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 104
23 S. Ct. 774, 78 L. Ed. 2d 574 (1984) ("Sony-Betamax")? See 6/13/02 Tr. at 3. The
24 uncontroverted facts all point to the inescapable conclusion: Defendants' systems
25 were designed and intended first to emulate Napster and then to surpass it.
26 Defendants have succeeded beyond their wildest dreams. Their systems have more
27 users than Napster (tens of millions by last report) and distribute and copy more types
28 of copyrighted media files than Napster. Defendants also have more of an ongoing
relationship with their users, enable and facilitate much more rampant infringement

1 Citations to Supporting Facts in Plaintiffs' Statement of Uncontroverted Facts are referred to as "SUF." Documents and deposition excerpts are attached to the Borkowski Declaration.

1 of Plaintiffs' songs and movies, and reap far more financial benefit than Napster ever
2 did. Defendants succeeded in reaching their goal: to "Do Napster Better." Hardison
3 Depo. 147:20-24 & Ex. 126; SUF 3(c).

4 The similarity between Defendants' systems and Napster is not accidental.
5 Their systems were designed to "fill the void" left by Napster's shutdown. KZ1448-
6 52; SUF(f). Over time, Defendants have evolved Napster's basic business model – to
7 use pirated copyrighted content as a draw to attract a huge, valuable user base. This
8 is how Defendants make money: they earn advertising revenue by attracting millions
9 of users to their systems by offering them a treasure trove of pirated music, movies,
10 and other copyrighted media for free without any compensation to the copyright
11 owners. Like Napster, Defendants built and are profiting from businesses where
12 infringing content is the "glittering object" that attracts users to Defendants' systems.
13 See A&M Records, Inc. v. Napster, Inc., 114 F. Supp.2d 896, 922 (N.D. Cal. 2000).

14 The undisputed facts (which have come to light in discovery that Defendants
15 sought to foreclose by filing their original, premature motion for summary judgment)
16 demonstrate incontrovertibly that Defendants created, operate, and control
17 sophisticated systems that overwhelmingly are used for copyright infringement.
18 Defendants remain in continuous contact with their users, providing them with the
19 tools for infringement and the anonymity in which to infringe with impunity. In their
20 own words, Defendants provide "an interactive community" – "a community of users
21 not just [a software] application[.]" MJT0374; SUF 8(b). Defendants have refused to
22 take meaningful steps to limit infringement in any way, while at the same time adding
23 features to filter pornography and "offensive content" when it served their business
24 interests. Defendants – who supervise and control their systems – could do much
25 more, but they have deliberately chosen to turn a blind eye to the massive
26 infringement their systems enable, facilitate, and encourage. Instead, "Defendants
27 manage to do everything but actually steal the music [and movies] off the store shelf
28

1 and hand" them to their users. In Re: Aimster Copyright Litigation, slip op. MDL
2 No. 1425 (N.D. Ill., September 4, 2002), at 24.²

3 Rather than seeking authorization from copyright owners to exploit their
4 works, Defendants seek what amounts to a permanent, free license for their
5 infringement. They ask the Court to adopt an unprecedented expansion of the "staple
6 article of commerce" doctrine articulated in Sony-Betamax. However, in the eighteen
7 years since it was decided, Sony-Betamax has never been held to be a defense in any
8 circumstance remotely similar to these or to any online infringing system and
9 network. To the contrary, the Ninth Circuit in Napster I, 239 F.3d at 1020, held
10 Sony-Betamax *inapplicable* to an online infringing system and network, as did the
11 Court in Aimster, at 25-28.

12 Stripped of the Sony-Betamax defense, Defendants' liability is manifest. First,
13 they are liable for contributory infringement because they materially facilitate their
14 users' infringement of Plaintiffs' copyrighted works. Infringement of such staggering
15 proportions would be impossible without the systems and tools Defendants created,
16 maintain, and continue to provide. Defendants also know (actual and constructive
17 knowledge) exactly what their users do on their systems – they infringe massively.
18 Second, Defendants separately are vicariously liable because they benefit financially
19 from the infringement rampant on their systems, and refuse to exercise their reserved
20 right and ability to police and supervise their systems to prevent that infringement.
21 The material facts are few, and they are undisputed or indisputable. Accordingly,
22 Plaintiffs are entitled to summary judgment on the issue of Defendants' liability for
23 both contributory and vicarious infringement.

24
25
26 ² Just last week, Chief Judge Aspen in the Northern District of Illinois issued a
27 preliminary injunction against Aimster, another infringing system that followed in
28 Napster's footsteps and that is very similar to Defendants' systems. In his detailed
opinion, Judge Aspen rejected the same arguments Defendants here are advancing or
could advance. The slip opinion is attached as Ex. 74 to the Borkowski Decl.

1 **II. THE UNDISPUTED FACTS**

2 As demonstrated in the accompanying Statement of Uncontroverted Facts and
3 Conclusions of Law and the evidence that it cites, Defendants' systems enable and
4 facilitate tens of millions of their users to distribute digital files containing Plaintiffs'
5 copyrighted sound recordings, musical compositions, motion pictures, and other
6 filmed entertainment from their personal computers for copying by other users. A
7 user sitting at his computer today may use any of Defendants' systems easily to find,
8 make, and distribute illegal copies of hit motion pictures that are in first-run theatrical
9 release, and of an endless variety of musical works owned by Plaintiffs yet provided
10 for free by Defendants. SUF 2(a)-(c), (e), (f). Users who search for and copy those
11 songs and movies by downloading them into their own computers then make these
12 new copies available for further distribution to even more users in an ever-expanding
13 cycle of infringement. The user experience, and the resulting massive infringement,
14 is the same on Defendants' systems as it was on Napster, except on an even greater
15 scale, and extending well beyond music. See A&M Records, 114 F. Supp. 2d at 905-
16 07; Napster I, 239 F.3d at 1011-12 (descriptions of Napster system); Kleinrock Decl.
17 ¶¶ 17-23 (same).

18 **A. Defendants Modeled Their Systems On Napster's Infringing System.**

19 From their inception, Defendants modeled their systems on the infringing
20 Napster system. SUF 3 (c) Around the time that Napster was enjoined by the Ninth
21 Circuit and began to take steps to block some infringing content from its system,
22 Defendants went into business to fill Napster's shoes. They first built and operated
23 some of the largest infringing "openNap" systems – essentially Napster clones that
24 Defendants based on unauthorized versions of Napster software. SUF 3(c); Ex.
25 145/ID171303 ("We have put this network in place so that when Napster pulls the
26 plug on their free service (or if the Court orders them shut down prior to that), we will
27 be positioned to capture the flood of their 32 million users that will be actively
28 looking for an alternative."); KVO000040-43 ("Initially, we launched our Alternative

1 Napster Network so there could be a solid network that could handle the load of
2 disenfranchised Napster users"); ID171405 ("We have commandeered nearly 35% of
3 all the alternative Napster users."); ID171405 (MusicCity's then-CEO reports to
4 board member that MusicCity's OpenNap "client has similar functionality to the
5 Napster client."); Kleinrock Decl. ¶ 24.

6 Based directly on Napster, Defendants' systems offered users massive amounts
7 of infringing content. MusicCity operated "the largest single non-corporate Napster
8 server in existence," which it promoted as "The #1 Alternative to Napster." SUF
9 3(c); ID281607/Ex. 116; ID171327 (MusicCity refers to their network as "Our
10 'MusicCity OpenNap Alternative Napster Network'"); ID281520, ID281525,
11 ID169135; Hardison Depo. 58:11-22. It openly bragged about this in its advertising
12 and in presentations designed to secure investment capital: "When the lights went off
13 at Napster . . . where did the users go? MusicCity.com"; "Frustrated Napster fans can
14 turn to MusicCity.com"; and "Napster meet MusicCity." Exs. 113, 250; Ex.
15 146/ID169022. MusicCity's openNap system experienced "staggering growth." SUF
16 3(c); Griffin Depo. 117:16-24 & Ex. 250. Grokster's principals similarly operated a
17 large "openNap"-based system under the accurately descriptive name "Swaptor." M.
18 Rung Depo. 17:6-18:14; 22:14-22; D. Rung Depo. 36:24-37(5); Kleinrock Decl.
19 ¶¶ 25-26.

20 Defendants ultimately recognized the risk in operating a blatantly infringing
21 openNap system. As MusicCity's own lawyer warned it: "I recommend taking the
22 current service down *now*. In my view, the service, which has always been risky, is
23 now unbelievably risky." [KV062 (emphasis in original)]. Thus, after they
24 accumulated millions of users to their systems, Defendants "migrated" their users to
25 the even more efficiently infringing "FastTrack"-based system. SUF 3(e); see Griffin
26 Depo. 148:18-24; 152:3-8; Weiss Depo. 598:8-599(3); D. Rung Depo. 221:5-222:24;

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1 M. Rung Depo. 31:10-17. FastTrack was developed by or at the direction of Kazaa³,
2 and licensed by Kazaa to Defendants MusicCity and Grokster. MusicCity (which
3 called its system "Morpheus"), Grokster, and Kazaa all initially ran their systems
4 interoperably on the FastTrack network. M. Rung Depo. 77:80-78:11 (Music City,
5 Grokster, and Kazaa are "pretty much all clones of each other"); Kleinrock Decl.
6 ¶ 31. More and more users flocked to Defendants' infringing systems, which
7 Defendants recognized were competitors of Napster's. Hardison Depo. 12-18; Ex.
8 311 ("I am bringing 5 or 6 Napster users a night into [MusicCity's] Morpheus").
9 Defendants reportedly now have *tens of millions of users* – many of whom are
10 former Napster users –trafficking in *billions* of infringing copyrighted files. SUF
11 5(a).

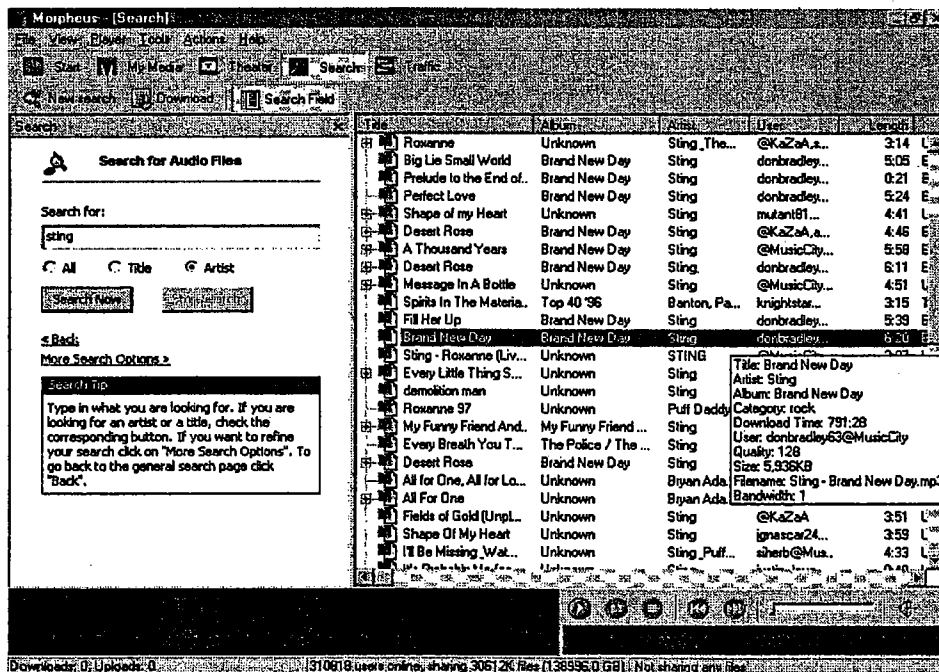
12 MusicCity recognized that "if we do not get the consumers migrated we do not
13 have a company[.]" Griffin Depo. 166:20-167:3 & Ex. 262; ID172786 ("Since
14 data/content on a P2P network is solely dependent upon peers [users], you can have
15 the best technology in the world, but it is of no value without peers and data").
16 MusicCity retained a public relations firm to help migrate existing openNap users to
17 FastTrack "as quickly as possible." SUF 3(e); MUS014521; see also ID174571
18 (MusicCity e-mail to openNap users urging them to make the switch to FastTrack,
19 promising among other things that "[e]verything is FULLY ENCRYPTED to protect
20 privacy"); T001083-85 (MusicCity's then-CEO to a board member: "88% of Napster
21 users polled (sample 3,000) will not pay to use Napsters subscription service and will
22 turn to other 'free' file swapping services ... we are the logical choice to pick up the
23 bulk of the 74 million users that are about to 'turn Napster off'."). Even after
24 Defendants evolved to FastTrack-based systems, they continued to market themselves
25 through comparisons to Napster (although perhaps a bit more coyly, no less
26

27 ³ The evidence in support of this motion is drawn from, inter alia, the discovery
28 obtained from defendants MusicCity and Grokster, but almost entirely not from
defendant Kazaa. Kazaa has refused to obey the Court's July 12, 2002, Order.

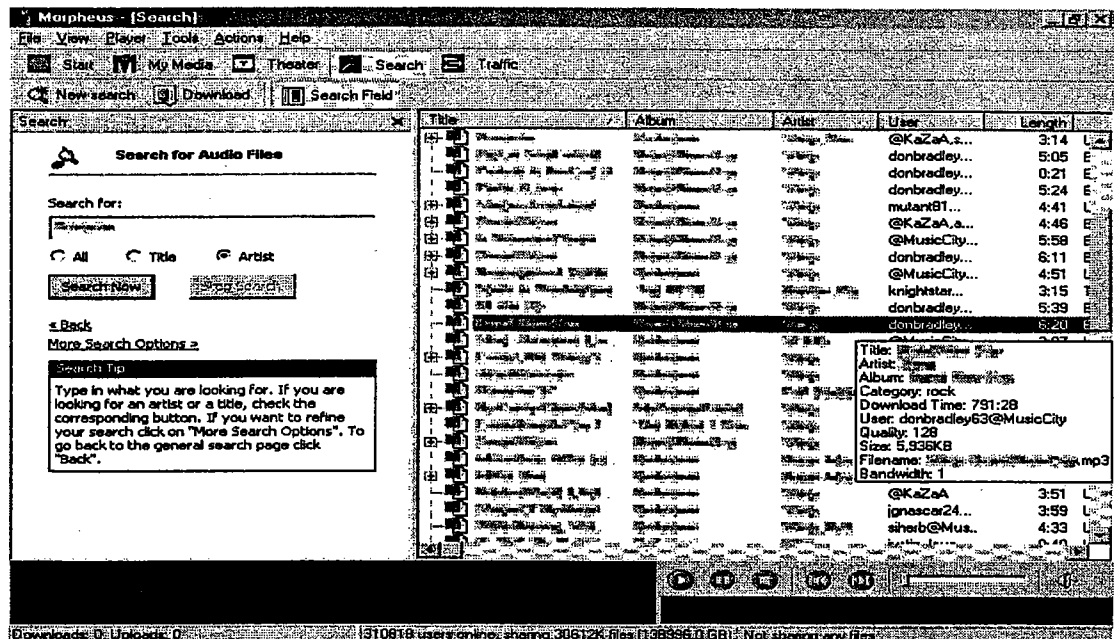
1 blatantly). For example, in its media kit, MusicCity promotes its system with
 2 reference to the following press article headlines: "Morpheus: The Better Napster";
 3 "As Napster Shuts, Others Carry The Tune"; "A Possible Successor To Napster"; and
 4 "Napster Users Fall In The Arms Of Morpheus." SUF 3(f); Exs. 384-389.

5 Once they arrived at Defendants' systems, users found a candy store of free
 6 music, movies, and other copyrighted works free for the taking. As Kazaa boasted on
 7 its web site: "Welcome to the Kazaa community! . . . You can find your favourite
 8 music, movies, pictures, artists, documents and more." Borkowski Decl. Ex. 32. And
 9 indeed, that promise was fulfilled. As Defendants well-know, popular motion
 10 pictures and music abound on Defendants' systems. SUF 2. Songs by top-selling
 11 artists, such as Garth Brooks, Madonna, The Eagles, Jennifer Lopez, Janet Jackson,
 12 Staind, and Eminem are all available with the click of a mouse, as is music that has
 13 not yet been released to the public. SUF 2(a). Motion pictures, many of them still
 14 playing in first-run theaters, also are available, including *Signs*, *Blue Crush*, *Lilo &*
 15 *Stitch*, *Lord of the Rings*, *The Matrix*, *Gladiator*, and many others. Cole Decl. ¶ 4.

16 MusicCity even developed promotional materials featuring infringing content:



1 In a clear recognition of its culpability, MusicCity then blurred the titles of
2 those works – stating "[h]ere is an example of keeping the examples but covering our
3 asses":



15 SUF 3(n); ID169490; ID169502. It is no surprise that MusicCity's founder
16 admitted in his deposition: "I fully understand that consumers are making choices to
17 put copyrighted material in shared folders and share it with other consumers around
18 the world." SUF 3(t); Griffin Depo. 278:5-10 & Ex. 291. This is not quite what
19 MusicCity told the Court when it filed for summary judgment in January:
20 "MusicCity has no particular knowledge, at the time it delivers its product, that the
21 product will be used by a specific consumer for infringing or noninfringing uses." –
22 Music City's January 22, 2002, Motion for Partial Summary Judgment at 2:24-26.

23 Defendants' users feasted on the virtual smorgasbord of pirated media
24 Defendants provided. As one user gushed: "I used to use Napster all the time, and
25 when they began battling in court I decided to look for a new place to look for all the
26 music I love. I wanted to tell you that *I have never had a problem finding any songs*
27 *I want* It is also easy to search by category and even years, so *its easy to find the*
28 *latest tunes*. Great Job people, keep it up!" SUF 3(j); 126794 (emphasis added).

1 Another user agreed: "[we] just started using ur [sic] site and we think its great,
2 better than napster just don't get caught!" SUF 3(j); 127155. MusicCity's advertising
3 agents also knew what the system was all about: "Better Music Programming: ...a
4 search on Morpheus resulted in pages of Madonna tracks, while the same search on
5 MP3.com resulted in only two Madonna tracks." [MUS 007980-81]

6 Against the backdrop of such skyrocketing popularity, and cognizant of its
7 clear liability, Kazaa began to play an international shell game to try to avoid
8 liability. In early 2002, Kazaa and its principals sold Kazaa's name, web site, domain
9 names, goodwill, and certain other assets to defendant Sharman Networks Ltd., a
10 company registered in the South Pacific island chain of Vanuatu. However, Kazaa
11 retained ownership of its most important asset: the FastTrack technology that is the
12 heart of Kazaa's infringing system. KZ 001009-1046; KZ 001048-1055⁴

13 In late 2002, MusicCity had a payment dispute with Kazaa. In response, in
14 February 2002, Kazaa, with Grokster's complicity, exercised ultimate control over the
15 network and disabled *all* MusicCity users from the FastTrack network, rendering
16 them unable to use their software to access that network or even communicate with
17 each other. SUF 6(m); see Smith Depo. 398:2-416:17; Kleinrock Decl. ¶¶ 39, 65.
18 Both MusicCity and Grokster admitted that this constituted control over the network
19 and the systems. MusicCity's Chief Technology Office testified as follows:

20 ***“Q. Did your experience with Kazaa over this period of time evidence to you
21 that Kazaa had ultimate control of the network?”***

22 ***A. Yes, it did.”***

23 Smith Depo. 416:14-17, Ex. 214; see also D. Rung Depo. 257:16-24, Ex. 40.
24 MusicCity reacted quickly to maintain its user base, distributing new user software to
25 continue its infringing system with "Gnutella" technology – another type of peer to
26

27 ⁴ Sharman, Kazaa's principals, and other related parties have been added as
28 defendants in Plaintiffs' First Amended Complaints.

1 peer technology that achieves the same ends as the Napster and FastTrack-based
2 systems. Like the FastTrack-based system that preceded it, MusicCity's Gnutella-
3 based system facilitates searching directories of files available on users' computers
4 and enables user-to-user distribution and copying. Kleinrock Decl. ¶¶ 40-44.
5 Regardless which technology they have employed at any given time, however, –
6 whether openNap, FastTrack, or some other – the systems organized and controlled
7 by Defendants consistently have enabled, facilitated, and encouraged the massive
8 infringement of Plaintiffs' copyrighted works on a scale that far surpasses Napster.

9 **B. Defendants Provide The Same Experience Napster Did.**

10 When a user accesses Defendants' systems through proprietary software that
11 Defendants supply for free, the user enters a protected environment established for
12 making piracy quick, easy, and failsafe. SUF 4(a), (b), (l)-(n). From the perspective
13 of the user – easily finding, copying, and then re-distributing Plaintiffs' copyrighted
14 works – the experience is virtually the same as Napster, except that Defendants'
15 systems provide users not just with music, but with motion pictures, television
16 programs, and other copyrighted content as well. As one employee of MusicCity
17 stated, "I work for Streamcast Networks (aka Morpheus), which is similar to what
18 Napster was[.]" SUF 3(f); Ex. 309.

19 The Defendants' FastTrack-based systems work as follows: A user connects to
20 Defendants' systems using software Defendants have supplied. The systems enable
21 users to make copies of songs and movies available from their computer hard drives
22 to other users of the systems. A user searches for files meeting certain criteria,
23 reviews a list of results, downloads selected items, and then repeats the process as
24 often as he or she wants. For example, a user seeking music by Frank Sinatra would
25 simply click "Audio" (to conduct a search for audio files only), click "Artist," type
26 "Frank Sinatra," and click a search button. Seconds later, a list of audio files will
27 appear, containing numerous Sinatra recordings. Shock Decl. ¶ 22. Clicking one
28 item in the list initiates the downloading (copying) of the corresponding work to the

1 user's computer from that of another user, who must be connected at that time to
2 Defendants' system. A search to obtain a copy of a feature film proceeds similarly:
3 click "Video," click "Title," type "Black Hawk Down," and click a search button.
4 Results showing infringing copies of the hit motion picture will be displayed. Shock
5 Decl. ¶¶ 14-15; Kleinrock Decl. ¶ 28. Again, a click on one such selection initiates
6 copying of the selected movie.

7 Defendants' systems copied or improved on Napster in other ways, some of
8 which are discussed below. See Kleinrock Decl. ¶¶ 28-38 for a more detailed
9 description of Defendants' systems' similarities with and improvements over the
10 Napster system.

11 **C. Defendants Provide And Control The Site And Facilities For**
12 **Infringement.**

13 When connected to Defendants' FastTrack-based systems, much occurs that is
14 invisible to the user. The systems connect the user to a so-called "supernode."
15 Supernodes are other users, running the standard user software, that the systems have
16 determined have significant available computing resources and other relevant
17 characteristics. One supernode typically supports hundreds of nodes (regular users)
18 connected to it. At any given moment, there may be several thousand active
19 supernodes. The systems automatically elevate users from node to supernode (and
20 vice versa) as needed for the systems' efficient operation. SUF 4(m); Kleinrock Decl.
21 ¶ 35.

22 The supernode maintains a composite index comprised of the names,
23 descriptions, and Internet addresses of the files offered for distribution and copying
24 by all users connected to that particular supernode at that time. Kleinrock Decl. ¶ 36.
25 As soon as a user logs on to the system, a listing of the works that user is offering for
26 distribution and copying is added to the index. When a user logs off the system, the
27
28

1 listing of those works no longer is available from the index. Defendants' systems
2 update the indices in this manner thousands of times each day.⁵

3 To enable users to access their systems, Defendants have selected and
4 embedded in their software the addresses of multiple supernodes. SUF 4(i); Smith
5 Depo. 250:6-18, 365:24-367:10, 375:13-376:10; Ex. 174/ID172758 (adding
6 supernode IP addresses into user software was done at MusicCity's request);
7 Kleinrock Decl. ¶¶ 37(b), 48. To ensure the system is functional, Defendants are able
8 to, and do, periodically modify and update this list of supernode addresses. SUF 4(i).
9 Further, the identities and activities of the supernodes are based on directions
10 provided and updated by Defendants. SUF 4(h).⁶ Defendants also have controlled
11 servers that handed out lists of available supernodes to users' computers. SUF 4(h);
12 Smith Depo. 122:15-18, 125:13-17, 125:18-24, 128:8-18; Kleinrock Decl. ¶¶ 37(b),
13 48.

14 As a user searches Defendants' systems for a work, the search is processed by
15 the supernode to which that user is assigned. The supernode then returns the results
16 of the search to the user. Those results identify the users who are offering music,

18 ⁵ Defendants claim that, because the indices of infringing files are available on
19 supernodes (selected by Defendants' systems) and not on a server operated directly by
20 Defendants, this distinguishes their systems from Napster. First, this argument is
21 technically unsound. See Kleinrock Decl. ¶¶ 83-97; Hardison Depo. 215:21-216:5
22 (Morpheus is *not* a decentralized directory). Second, it is a distinction without a
23 difference. See Weiss Depo. 202:12-18 ("supernode acts as a *server* for a
24 neighborhood of servers"). The fact that Defendants may "outsource" the index
25 function (to conserve their computer resources [Weiss Depo. 94:9-19] is irrelevant to
26 their liability for infringement, as was the fact that both Defendants and Napster
27 farmed out the actual storage and transfer of infringing material to their users instead
28 of storing it on their own servers. See *A&M Records*, 114 F. Supp. 2d at 907 ("The
content of the actual . . . file is transferred over the Internet between users, not
through the Napster servers. . . . However, *users would not be able to access the
uploaded file names and corresponding routing data without signing on to the
Napster system*") (emphasis added). As the Court in the Aimster copyright
infringement litigation noted when it issued a preliminary injunction against a service
similar to Defendants', the reasoning supporting its decision "would hold regardless
of whether or not Aimster maintains a central database of files available for transfer."
Aimster at 7 n.6.

⁶ Certain versions of MusicCity's current Gnutella-based system have utilized the
equivalent of supernodes as well. See Smith Depo. 482:4-20; Kleinrock Decl. ¶ 41.

1 movies, and other works for distribution and copying that match the search request.
2 In addition to searching the files of the users connected to that particular supernode,
3 the supernode may forward the search request to one or more other supernodes,
4 which may in turn forward it on further. The scope of this search can be regulated by
5 Defendants' central servers. SUF 4(g), 5(a); Smith Depo. 192:6-193:22, 195:2-23,
6 196:10-19, 197:18-198:3, 199:10-23; Ex. 163/ID168257, 164/176100; Kleinrock
7 Decl. ¶49(a). The search results also contain the IP addresses, or locations on the
8 Internet, of the users' computers that are offering the sought after works for copying.

9 Once a user selects a particular work for downloading from among those listed
10 in the search results, he or she merely clicks on the name of the file containing the
11 work. Defendants' systems connect the requesting user to the computer of the other
12 user offering the desired work and request a download of the music or movie. The
13 work is then copied onto the hard drive of the requesting user's PC, creating a new
14 copy that users can access at any time, "burn" to a CD-R or DVD-R, and/or distribute
15 further. Unless users take affirmative steps to prevent it, they automatically and
16 immediately begin offering the unauthorized works they have copied for further
17 distribution and copying in a rapidly multiplying "viral" distribution. See Universal
18 City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 331-332 (S.D.N.Y. 2000)
19 (describing harm caused through "exponential" distribution of infringing digital files
20 over the Internet).

21 Defendants also provide features that ensure that users will be successful in
22 downloading and copying the music and movies they want. For example, if the
23 download of a work is interrupted or broken, the systems search for other users
24 offering the same work, and resume the download from the point it was interrupted.
25 Additionally, to enhance download speed, Defendants' systems often locate the
26 identical song or motion picture on several users' computers and simultaneously
27 download different parts of it from several users, thereby increasing the speed of the
28

1 download. D. Rung Depo. Ex. 19 (GR 10916); Kleinrock Decl. ¶¶ 78-79.⁷
2 Defendants even provide their users with information about file quality and size and
3 allow users to take this into account when formulating their searches: this enables
4 users to tailor their searches to locate only those files that are of a selected quality or
5 only those that can be downloaded at the desired speed, or any combination of the
6 above. ID545447 (screen shot of search page showing multiple search parameters).

7 Defendants also controlled their systems through their operation of servers that
8 enabled Defendants to adjust the functioning of their systems from a central location,
9 including to fix system performance problems. One way Defendants did this was to
10 initiate "auto-updates" of the user software. In this process, users logging onto the
11 network would receive a notice that an upgrade was available and an invitation to
12 download the upgrade. SUF 4(e), 6(a); Smith Depo. 107:3-14; 151:12-152:4; ID
13 168207; Kleinrock Decl. ¶¶ 50, 52. Another way Defendants controlled their systems
14 was by using central servers to ensure that supernodes were always running the most
15 recent version of the user software. Smith Depo. 254:7-255:16. Users ultimately had
16 to upgrade in order to continue connecting to the systems. SUF 6(a); Smith Depo.
17 318:18-319:15. Each active supernode communicated with Defendants' central
18 servers every 12 hours to check for auto-updates. SUF 4(a); Smith Depo. 253:9-
19 254:23; 260:10-261:4; ID 168312; Kleinrock Decl. ¶ 51. Eventually, Defendants no
20 longer needed these servers in order to centrally affect the functioning of their users'
21 software. Defendants now communicate a control message to supernodes, which, in
22 turn, propagate that message to other supernodes and nodes. Smith Depo. 411-15;
23 Kleinrock Decl. ¶ 53. In addition, Defendants at various times have themselves
24 operated their own special supernodes, known as "root" supernodes, from their own
25

26 ⁷ The fact that Defendants' systems provide for such functions refutes their claim that
27 the systems are designed for "noninfringing uses." Simultaneous downloads make
28 sense only if users are downloading the same content from multiple sources at the
same time, such as popular media content. This feature would have no utility when
"sharing" an individual's home movies, family photographs, or recipes.

1 central servers. SUF 6(g); ID18154; 168335; D. Rung Depo. 87; Smith Depo.
2 122:15-18; 128:13-17. (Even after they stopped, Defendants retained a contractual
3 relationship with their users, who were acting as Defendants' licensees and operating
4 the supernodes for them. SUF 6(c) (Terms of Service).⁸

5 Defendants also monitored the performance of their systems, and centrally and
6 actively worked to address performance problems to improve the user experience.
7 SUF 4(l). Smith Dep. 88-89, 227; Kleinrock Depo. ¶ 54. At a more basic level,
8 Defendants have supervised users of their systems by supporting e-mail help lines
9 and giving technical advice to users on how to use the systems – going so far as to
10 help users download and play infringing music and movies. SUF 3(p), 4(p); GR4524;
11 ID137081; ID144169; ID143398; ID137925; ID136947; ID136945; ID136716 (each
12 showing MusicCity assisting a user in connection with an infringing recording, video
13 or feature film); Kleinrock Decl. ¶ 56.⁹

14 Hand in hand with creating systems for the purpose of infringing copyrighted
15 works, Defendants refuse to do anything to stop, or even decrease, the rampant
16

17 ⁸ Defendants also operate or have operated numerous other central servers. Until
18 early 2002, users of Defendants' systems initially registered accounts on a central
19 server, and communicated with this central server on each use thereafter in order to
20 have their unique usernames verified (SUF 4(d), 8(c); Smith Depo. 106:9-20);
21 Defendants have used central servers to deliver "web" content inside the client
22 application while a user is connected to the network (SUF 8(c); Smith Depo. 117:3—
23 119:5); other central servers, hosted by Defendants or third party advertisers,
24 continually have transmitted advertisements to other windows inside the user
25 software while users are connected to Defendants' systems (SUF 9(b); Smith Depo.
26 298:11-19); at various times, Defendants have provided, also from central servers,
27 chat room, bulletin board and "help" services that users used to seek and obtain
28 assistance on how to use the system (SUF 3(p), 4(p); D. Rung Depo. 64:12-65:6;
134:8-21; 136:12-137:7; 213:22-217:8; M. Rung Depo. 60:21-23; 61:14-23; 70:14-
25; Smith Depo. 75:20-76:8; 142:1-147:2; Kleinrock Decl. ¶ 37).

25 ⁹ MusicCity's current Gnutella-based system exhibits many of the same
26 characteristics of participation and central control, including hourly communications
27 between user nodes and central servers during which MusicCity can centrally change
28 and fine-tune the search priorities carried out by the client applications, frequent auto
updates of user software initiated by a communication with a central MusicCity
server, communication with their users via web content served into and displayed in
users' computers from MusicCity central servers, and a continual and extensive
development effort to improve the features and performance of the systems. Smith
Depo. 484-86, 517-23; Kleinrock Decl. ¶ 57.

1 infringement, even though they have both the legal right and technical ability to do
2 so. Defendants expressly reserve the right to ban or exclude users, and claim to have
3 done so in the past (recently jettisoning that function). SUF 6(c), (k); Smith Depo.
4 17:15-18:12; 154:11-23; 301:19-22; 302:7-23; 303:5-16; 304:12-15; 311:14-19; Ex.
5 190/ID545672; Kleinrock Decl. ¶¶ 60-61. Defendants are able to police their systems
6 by excluding unwanted users, including hackers and others utilizing unauthorized
7 software. SUF 6(i); Smith Depo. 312:18-313:1; 335:20-336:19; Kleinrock Decl. ¶¶
8 61, 63-64. ***Defendants have even blocked content owners and their representatives***
9 ***from locating infringing activity on their systems.*** SUF 6(i); Smith Depo. 211:9-
10 212:2, 214:6-17, 215:5-216:3, 218:10-16, 220:22-25, 221:11-13; 531:1-13; Ex.
11 168/ID545361, 229/ID544361; Kleinrock Decl. ¶ 62. Once again, the true facts are
12 contrary to what MusicCity told this Court in January: "[MusicCity] cannot take
13 action against a particular user based on knowledge that the user has abused the
14 product." 1/22/02 Motion for Summary Judgment at 2:28-3:2.

15 Defendants could operate like legitimate companies, including Internet
16 companies, that deal in copyrighted material and secure licenses for the works
17 distributed and copied on their systems. Defendants also have access to existing
18 technology through which they could identify, and then block, infringing works from
19 their systems. SUF 7(e); Kleinrock Decl. ¶¶ 82-97; Breslin Decl.; Ikezoye Decl.;
20 Hyman Decl. There is nothing about Defendants' systems that would prevent them
21 from taking these steps. Smith Depo. 94:24-95:10; Kleinrock Decl. ¶ 82. Instead,
22 Defendants deliberately chose to base their systems on infringement, building value
23 based on the quantity and quality of infringing content available to their tens of
24 millions of users. In a misguided effort to shield their users – and themselves – from
25 the legal consequences of the rampant piracy on their systems, Defendants maintain
26 the anonymity of their users and also encrypt many of the communications between
27 users and Defendants, users and supernodes, and the users themselves. D. Rung
28 Depo. 138:7-22; Hardison Depo. 167:13-20 & Ex. 126 ("RIAA can't penetrate the

1 Streamcast Networks network to see what files are being transferred because the
2 network is encrypted").

3 They did so for an obvious reason that Defendants themselves repeatedly
4 acknowledge: "the core value of a peer-to-peer network was the network itself and
5 not necessarily the technology." SUF 5(b); ID280697. Thus, Defendants set out, at
6 all costs, "to become the network with the most nodes [users] because in a peer-to-
7 peer world, those with the most nodes will win." SUF 5(b); ID280697. And, as one
8 of MusicCity's Board members aptly put it, "music is just the first huge and pivotal
9 vertical for monetizing" their systems. SUF 5(c); ID166941.

10 **III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT**

11 A party seeking summary judgment has the initial burden of "informing the
12 district court of the basis for its motion, and identifying those portions of 'the
13 pleadings, depositions, answers to interrogatories, and admissions on file, together
14 with the affidavits, if any,' which it believes demonstrate the absence of a genuine
15 issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548,
16 91 L. Ed. 2d 265 (1986). Once the moving party has met its burden under Rule 56,
17 "its opponent must do more than simply show that there is some metaphysical doubt
18 as to the material facts [in question]." Matsushita Elec. Indus. Co. Ltd. v. Zenith
19 Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "The
20 mere existence of a scintilla of evidence in support of the [opposing party's] position
21 will be insufficient[.]" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.
22 Ct. 2505, 91 L. Ed. 2d 202 (1986). "No longer can it be argued that any disagreement
23 about a material issue of fact precludes the use of summary judgment." Cal. Arch.
24 Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).
25 As explained below, Plaintiffs have met their burden and are entitled to summary
26 judgment.

27
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1 **IV. PLAINTIFFS OWN THE COPYRIGHTS TO WORKS INFRINGED**

2 Musical compositions have been protected by copyright since 1831. 17 U.S.C.
3 § 102(a)(2); United States v. Moghadam, 175 F.3d 1269, 1271 (11th Cir. 1999);
4 Sanders Decl. *All* sound recordings – the reproduction of sounds as opposed to
5 musical notation – are protected by either federal or state law. They have been
6 protected by copyright since 1972. *Id.*; 17 U.S.C. § 102(a)(7). Sound recordings
7 "fixed" before February 15, 1972, are protected under state law. 17 U.S.C. §301(c);
8 *see, e.g.*, Cal. Civ. Code § 980(a)(2); A&M Records, Inc. v. Heilman, 75 Cal. App.
9 3d 554, 560 n.6 (1977). Motion pictures and other audiovisual works also are
10 protected by copyright. 17 U.S.C. § 102(a)(6). Each of these works is protected from
11 the moment it is "fixed in any tangible medium of expression." 17 U.S.C § 102(a).

12 The Motion Picture Studio Plaintiffs own or control copyrights in the works
13 listed in Exhibit A to their First Amended Complaint. SUF 1(b). The Record
14 Company Plaintiffs own or control copyrights in the works listed in Exhibit B. SUF
15 1(a). The Music Publisher Plaintiffs own or control copyrights in the works listed in
16 their Second Supplemental Rule 26 disclosures. SUF 1(c). Plaintiffs' copyright
17 certificates constitute prima facie evidence of the validity of the copyrights and of the
18 facts stated in the certificates, including ownership. 17 U.S.C. § 410(c); Transgo, Inc.
19 v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1019 (9th Cir. 1985); Perfect 10,
20 Inc. v. Cybernet Ventures, Inc., 2002 U.S. Dist. LEXIS 7333, *36-37 (C.D. Cal.
21 April 22, 2002).

22 **V. DEFENDANTS' USERS ARE DIRECT INFRINGERS**

23 Defendants' users directly infringe at least two of the copyright owners'
24 exclusive rights: the rights of reproduction (17 U.S.C. § 106(1)) and distribution (17
25 U.S.C § 106(3)). Users who download files containing copyrighted works using
26 Defendants' systems violate Plaintiffs' reproduction rights. *See Napster I*, 239 F.3d at
27 1014; Sega Enters., Ltd. v. MAPHIA, 857 F. Supp. 679, 686 (N.D. Cal. 1994) ("Sega
28 I"); Aimster at 19 ("there is no doubt that input of a copyrighted work onto a

1 computer constitutes the making of a copy under the Copyright Act"). Users who
2 make copyrighted works available in their computer "share directories" to enable
3 others to copy those works violate Plaintiffs' distribution rights. Id.; see also Playboy
4 Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 513 (N.D. Ohio 1997);
5 Marobie-FL, Inc. v. Nat'l Assoc. of Fire Equip. Dist., 983 F. Supp. 1167, 1173 (N.D.
6 Ill. 1997). Evidence of direct infringement on Defendants' systems is overwhelming.
7 Plaintiffs have downloaded scores of their copyrighted works from users of
8 Defendants' systems – works copied and distributed without authorization by
9 Defendants' users. SUF 2. Plaintiffs do not need to sue these direct infringers in
10 order to prevail against Defendants. See Danjaq SA v. MGM/UA Communications
11 Co., 773 F. Supp. 194, 201 (C.D. Cal. 1991).

12 **VI. DEFENDANTS ARE LIABLE FOR CONTRIBUTORY** 13 **INFRINGEMENT**

14 Contributory infringement consists of two elements: "[O]ne who, with
15 knowledge of the infringing activity, induces, causes or materially contributes to the
16 infringing conduct of another, may be held liable as a 'contributory' infringer."
17 Napster I, 239 F.3d at 1019; accord, Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d
18 259, 264 (9th Cir. 1996); Aimster at 20. For the first element, constructive
19 knowledge is sufficient. Napster I, 239 F.3d at 1020 ("Contributory liability requires
20 that the secondary infringer 'know or have reason to know' of direct infringement."),
21 citing Cable/Home Communication Corp. v. Network Prod., Inc., 902 F.2d 829, 846
22 n.29 (11th Cir. 1990); see also, e.g., Sega Enters., Ltd. v. MAPHIA, 948 F. Supp.
23 923, 933 (N.D. Cal. 1996) ("Sega II"); Aimster at 23. Summary judgment for
24 contributory copyright infringement is common. See, e.g., Gershwin Publishing
25 Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162-63 (2d Cir. 1971);
26 Cable/Home Communication, 902 F.2d at 845-47.

27 As the Court in Napster I made clear, traditional copyright law principles apply
28 to the Internet. 239 F.3d at 1021-24. Defendants are not entitled to "special treatment

1 under copyright law"; rather, "[n]ew technologies – from television, to video cassette
2 recorders, to digitized transmissions – have been made to fit within the overall
3 scheme of copyright law and to serve the ends which copyright was intended to
4 promote." Religious Technology Center v. Lerma, 40 U.S.P.Q.2d 1569, 1574 (E.D.
5 Va. 1996); see also UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350
6 (S.D.N.Y. 2000).

7 **A. Defendants Have Induced, Caused, And Materially Contributed To**
8 **Direct Infringement.**

9 As the Ninth Circuit held in Fonovisa, "providing the site and facilities for
10 known infringing activity is sufficient to establish contributory liability." 76 F.3d at
11 264, citing Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59 (3rd Cir. 1986);
12 accord, Napster I, 239 F.3d at 1022 ("Napster provides 'the site and facilities' for
13 direct infringement."); Perfect 10, 2002 U.S. Dist. LEXIS 7333, at *51. Fonovisa
14 involved a swap meet operated by the defendants. Vendors paid a daily fee to have
15 booths at the swap meet and shoppers paid an entrance fee. Additionally, the
16 defendants "supplie[d] parking, conduct[ed] advertising and retain[ed] the right to
17 exclude any vendor for any reason, at any time." 76 F.3d at 261. Some vendors at
18 the swap meet sold counterfeit copyrighted musical recordings, and defendants had
19 been placed on notice of this fact. The plaintiff, whose copyrights had been infringed
20 by virtue of the sale of counterfeit recordings at the swap meet, sued the defendant for
21 contributory copyright infringement. The Ninth Circuit noted that the defendants
22 provided "the environment and the market for counterfeit recording sales to thrive."
23 Id. at 264. "Indeed," the Court further observed, "it would be difficult for the
24 infringing activities to take place in the massive quantities alleged without the support
25 services provided by the swap meet." Id.

26 Defendants plainly satisfy the standard of Fonovisa and Napster I: they have
27 provided the means, environment, and support (including software, software updates
28 and upgrades, servers, ongoing support and maintenance of their systems, explicit

1 instructions and assistance, indexing functions, search functions, resume functions,
2 firewall circumvention, moderators and other staff) that enable their users to access
3 each others' computer hard drives, and locate, distribute, and copy music, motion
4 pictures, and other copyrighted works so that infringement can take place. SUF 4.
5 Defendants are the material and proximate cause of their users' infringements – "the
6 steps necessary to make that connection could not take place without" Defendants'
7 systems. See A&M Records, Inc. v. Napster, Inc., 54 U.S.P.Q.2d 1746, 1747 (N.D.
8 Cal. 2000); Aimster at 24. Defendants' integrated systems are predicated on being a
9 "road map" to find and infringe music and motion pictures. See, e.g., Sega II, 948 F.
10 Supp. at 933 (defendant who "provided the facilities for copying the games by
11 providing, monitoring, and operating the BBS software, hardware, and phone lines
12 necessary for the users to upload and download games" and "provided a road map on
13 his BBS for easy identification of Sega games available for downloading" was
14 contributorily liable).

15 It is only through Defendants' contribution that mass infringement is possible,
16 and their ongoing participation to support and maintain their systems is pervasive.
17 Defendants have:

18 •Provided an infrastructure for users to search for, copy, and distribute
19 copyrighted music, motion pictures, and other works without the authorization of the
20 copyright owner. SUF 4(b).

21 •Provided their users free of charge with the proprietary software that is
22 required to become part of and to access their systems. SUF 4(a).

23 •Engaged in regular communication with users' software from their central
24 servers for the purpose of communicating that a updated version of the user software
25 was available. SUF 4(f).

26 •Provided their users with upgrades and updates of their proprietary software,
27 free of charge, to add features to enhance the user experience. SUF 4(c).

28

1 ▪Modified and upgraded the user software and the various server-side programs
2 that run on their central servers in order to maintain or improve the performance
3 and/or security of the systems. SUF 4(e).

4 ▪Operated from their own central servers server-side programs to handle user
5 registration and login functions. SUF 4(d).

6 ▪Engaged in regular communication with supernodes (up to every 12 hours) for
7 the purpose of causing supernodes to cease operating as supernodes if they are not
8 running the latest version of the user software. SUF 4(g).

9 ▪Operated from their own central servers specialized supernodes, known as
10 "root" or "seed server" supernodes, that have maintained directories of files available
11 from the users connected to those root supernodes, and processed search requests
12 from those connected users. SUF 4(j).

13 ▪Selected and embedded the Internet addresses of multiple supernodes in the
14 user software, and periodically updated this list of supernode addresses, to enable or
15 facilitate users' connection to their systems. SUF 4(i).

16 ▪Employed central servers under their control to monitor supernodes and
17 centrally to increase or decrease the numbers of supernodes on the system to facilitate
18 the efficient performance of the system. SUF 4(m).

19 ▪Monitored the performance of their systems and user software centrally, and
20 actively worked to address performance problems and/or to improve the user
21 experience. SUF 4(l).

22 ▪Affected and/or improved the performance, security and/or functioning of
23 their systems or user software centrally, by modifying variables in programs running
24 on their central servers. SUF 4(k).

25 ▪Taken steps to maintain the anonymity of their users and the secrecy of their
26 activities, and to protect their systems, by encrypting many of the computer-to-
27 computer communications that take place on their FastTrack systems. SUF 4(n).

28

1 •Provided users with various means of technical or other assistance relating to
2 users' use of the systems, including detailed written instructions on how to use the
3 systems, e-mail help services, chat rooms, bulletin and message boards, "help" pages,
4 and periodic newsletters. SUF 4(p).

5 In sum, Defendants have provided their users with fully integrated, and in most
6 instances closed and encrypted, systems that facilitate, enable, and encourage those
7 users to infringe copyrighted material that is made available for unauthorized copying
8 and distribution over their systems. Infringement on such a scale would not be
9 possible without the numerous services and facilities provided by Defendants. As the
10 Court noted in Napster, "without the support services defendant provides, Napster
11 users could not find and download the music they want with the ease of which
12 defendant boasts." 239 F.3d at 1022, quoting A&M Records, 114 F. Supp. 2d at 919-
13 20; see also Fonovisa, 76 F.3d at 264 (accord); Aimster, at 23-24 (same).

14 **B. Defendants Have Knowledge Of Their Users' Direct Infringement.**

15 There is at least as much evidence of Defendants' knowledge of their users'
16 infringements as in Napster. That evidence is overwhelming and indisputable, as it
17 comes largely from Defendants' own documents and words. Discovery has made
18 clear that Defendants' self-serving claims of ignorance are false. See e.g., Hardison
19 Depo. 173:8-20 & Ex. 129 ("Existing users will trade illegal files, sure...").
20 Accordingly, Defendants steadfastly have attempted to deny the undeniable –
21 Defendants intentionally choose to operate businesses that facilitate piracy.

22 **1. Plaintiffs Have Given Defendants Repeated Notices Of
23 Millions of Infringements.**

24 Plaintiffs have repeatedly sent Defendants specific notices of millions of files
25 containing Plaintiffs' copyrighted music and motion pictures being unlawfully
26 distributed and copied on Defendants' systems. SUF 3(a), (b). Around the time they
27 filed suit, the Record Company Plaintiffs notified Defendants of the massive
28 infringing activity taking place on their systems, including specific notice of hundreds

1 of thousands of infringing files. Creighton Decl. ¶¶ 16-18, Ex. 9. Such actual notice
2 by itself establishes Defendants' knowledge. See Napster I, 239 F.3d at 1020 n.5;
3 Fonovisa, 76 F.3d at 261, 264 (letters from sheriff, notifying swap meet organizers of
4 vendors' continued sale of counterfeit recordings); Aimster at 20-21 (repeated notices
5 of infringement); Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, 1348 (8th Cir.
6 1994) ("in light of [plaintiff's] earlier requests that [defendant] cease copying its
7 copyrighted photographs, [defendant] had actual notice that its activities infringed on
8 [plaintiff's] copyrights"); Perfect 10, 2002 U.S. Dist. LEXIS 7333, at *46; see also
9 ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 625 (4th Cir. 2001)
10 (even under Digital Millennium Copyright Act, for which Defendants here do not
11 qualify, notice of a "list of representative works" is sufficient).

12 Thereafter, Plaintiffs notified Defendants on repeated occasions that their
13 works were being infringed on Defendants' systems. Creighton Decl. ¶¶ 19-20 &
14 Exs. 10-17; Charlesworth Decl. ¶¶ 4-19 & Exs. A-P; Breen Declaration ¶¶ 5-10 &
15 Ex. A. The filing of this action provided Defendants with further notice of the
16 infringement occurring on their systems. See Perfect 10, 2002 U.S. Dist. LEXIS
17 7333, at *47 (complaint contained notice of infringement that was evidence of
18 knowledge).

19 Despite these notices, the copyrighted works listed in the Complaints, and all
20 the works from the recent *Billboard Hot 100*, the Top 10 of the Billboard Hot 100 for
21 the past year, and the RIAA Diamond® award works remain available on Defendants'
22 systems. Creighton Decl. ¶ 27.

23 **2. Defendants Deliberately Set Out To Copy And Surpass**
24 **Napster's Infringing Business Model.**

25 From their inception, Defendants patterned themselves after the infringing
26 Napster system. See supra; see also SUF 3(c); Weiss Depo. 126:19-127:22;
27 Kleinrock Decl. ¶¶ 23-38. Once Defendants accumulated millions of users of their
28 openNap systems, they migrated those users to their FastTrack systems with the

1 promise that those systems would infringe copyrighted works more effectively than
2 Defendants' OpenNap systems were capable of doing.¹⁰ SUF 3(e); D. Rung Depo.
3 221:5-222:8; M. Rung Depo. 31:10-17; Weiss Depo. 89:23-91:6. Kallman Depo.
4 78:19-79:1 ("It should be easy to get Napster users to upgrade to Morpheus") [Ex.
5 253]; Weiss Depo. 85:12-18; Hardison Depo. 87:1-25; 122:8-21, 170:17-171:3 &
6 Exs. 110, 115 & 129.

7 After another file-copying and distribution service patterned on Napster, Audio
8 Galaxy, announced that it would begin filtering infringing music from its system and
9 service, Grokster solicited Audio Galaxy users – by offering a free "migration tool" –
10 to begin using the Grokster system, where infringing content is still widely available.
11 (Audio Galaxy has since been enjoined from operating its system in response to a
12 lawsuit by copyright holders.) SUF 3(g); Creighton Decl. ¶ 8.

13 Also, to lure even more infringing users, Grokster inserted the word "Napster"
14 in the metatags for its web site. SUF 3(f); Borkowski Decl. Ex. 31. "Metatags"
15 include hidden text that web site operators place on their sites "to identify or add
16 words to their pages in order to better define or accurately relate the contents of the
17 page for the web crawler search engine." Playboy Enterprises, Inc. v. Terri Welles,
18 Inc., 279 F.3d 796 (9th Cir. 2002). This ensured that Internet users searching for
19 "Napster" through a search engine would be directed to Grokster's web site from
20 which they could download Grokster user software and access Defendants' systems.

21
22
23
24
25 ¹⁰ Grokster, at least, is still involved with openNap, providing access to openNap and
26 other infringing systems (such as Gnutella and File Navigator) on a web site known
27 as "Swaptor," operated by Grokster's principals. The Swaptor web site demonstrates
28 how the system works by using examples of searching for and downloading music by
The Beatles, which is not authorized for distribution and copying on such systems.
M. Rung Depo. 34:19-37:12, Ex. 87.

1 **3. Defendants Collected Information About, And Have Direct**
2 **Knowledge Of, The Infringements On Their Systems.**

3 Defendants promoted their systems with screen shots showing infringing files,
4 including *The Eagles Greatest Hits*, the best selling album of all time. SUF 3(f);
5 ID436042; ID435926; ID17374; ID436409; ID436403 (all showing screen shots with
6 Eagles recordings). Other internal presentations, testing, and demonstration
7 documents are replete with clearly infringing works. See, e.g., ID436988 (screen
8 shots of live sessions showing a search for Sting, and search results including Puff
9 Daddy, Bryan Adams, The Police, and others); ID438121 (MusicCity's CTO
10 showing an example of a software glitch using Shania Twain and Bruce Springsteen);
11 ID545447 (MusicCity's CTO again attaching screen shots of live sessions showing
12 Sting, Miles Davis, Carlos Santana, John Lee Hooker, and others). SUF 3(k).
13 MusicCity employees also acknowledged downloading popular copyrighted
14 recordings. ID143771 ("I just downloaded a bunch of billie holiday songs... very
15 nice"); ID173503 ("I did download some Britney Spears"); ID167007 (Stevie Nicks).
16 Even the "functional overview" documents Kazaa provided to MusicCity to illustrate
17 operation of the systems used examples of searching for and downloading infringing
18 content, such as music by The Rolling Stones, David Bowie, Elton John, and Cher.
19 SUF 3(k); 173643. See Napster I, 239 F.3d at 1020 n.5 (labeling this constructive
20 knowledge); Aimster at 21 ("tutorial" demonstrating operation of system using
21 copyrighted works evidence of knowledge).

22 MusicCity also tested its system by searching it for copyrighted music. SUF
23 3(i); Griffin Depo. 159:2-17, 161:5-162:10 & Ex. 260 (Garth Brooks music). Kazaa's
24 CEO reported to MusicCity's CEO that he had tested a feature of their systems by
25 downloading Plaintiff Paramount's *South Park: The Movie*. SUF 3(k), (l); 545198.
26 See also ID172459; ID168272. Defendants' executives and board members also used
27 their systems to search for and/or download popular, infringing music and motion
28 pictures to their own computers. SUF 3(k); Weiss Depo. 217:7-221:12; 227:8-233:1;

1 234:18-235:19; Griffin Depo. 157:7-12; M. Rung Depo. 73:4-74:17; J. Tung Depo.
2 75:13-77:25. See Napster I, 239 F.3d at 1020 n.5 (Napster executives downloading
3 copyrighted music from the system evidence of knowledge).

4 Additionally, data initially captured by MusicCity from a "search box" on its
5 web site revealed the great majority of user search requests to be for the music of
6 current, popular artists, including Madonna, Metallica, Janet Jackson, Staind, Jennifer
7 Lopez, Eminem, Limp Bizkit, and others. SUF 3(h); ID282784; ID28278; ID250095;
8 ID261564; ID282782; ID261565; ID261566 (reports from MusicCity web servers
9 showing searches for the works of top commercial artists).

10 Further, Defendants' bulletin boards, which Defendants ran, controlled, and
11 monitored, were full of users bragging about infringing copyrights using Defendants'
12 systems. SUF 3(j), (p); Rung Depo. 64:8-15, 152:24-153:8; Weiss Depo. 329:13-
13 331:23. For example: "[m]ost of the movies I downloaded are barely in the theaters
14 and definitely not in the rental places"; "Does anyone hold a clean version of Eve's
15 latest CD, Scorpion? . . . Missy Elliot, Nelly, DMX, and the Ruff ryders would be
16 appreciated"; "so far I have Pulp Fiction. I had [G]ladiator, but the quality was bad";
17 "I'm searching for the movie 'From Hell' starring Johny Depp." SUF 3(j); Ex. 105.
18 There are scores of similar user e-mails. SUF 3(j), (p). See Aimster at 21
19 (Defendants' "chat rooms and bulletin board systems in which Aimster users openly
20 discussed trafficking in copyrighted material and 'screwing' the RIAA" evidence of
21 knowledge).

22 Defendants not only knew of such user posts, they gave users helpful advice on
23 how to download copyrighted works more effectively. SUF 3(l), 8(g); Exs. 311; 312;
24 315-318; 320; ID144169; ID143398; ID137925; ID137081; ID136945 (MusicCity
25 Support giving advice to users on how to download and play motion pictures such as
26 *Matrix*, *Blair Witch Project*, *Tomb Raider*, *Moulin Rouge*, and *Pearl Harbor*); GR
27 06581; GR 04524 (Grokster support giving advice how to download *Lord of the*
28 *Rings*, *Resident Evil*, and *Big Fat Liar*). Defendants know this is unlawful. Thus,

1 Grokster responded to a user's complaint of difficulty in downloading a particular
2 video game as follows: "*And why are you complaining? Everything that you get*
3 *out of our network is free. You could always do the legal thing, and go buy the*
4 *game, we suppose?*" Ex. 38 (emphasis added); SUF 3(j).

5 Finally, it is virtually impossible to read a newspaper, magazine, or online
6 publication about Defendants or "file sharing" on the Internet and not see articles
7 discussing the pervasive piracy on their systems and comparing Defendants to
8 Napster. Kallman Depo. 36:10-25 & Ex. 5; Weiss Depo. 33; Bodenstein Decl. ¶ 3 &
9 Exs. 1-7. Defendants have relished this publicity, maintaining files of these articles.
10 MusicCity posted excerpts from them on its web site (after sanitizing any references
11 to infringement). The quotes MusicCity left off its web site from those same articles
12 included, among others: "I've never been able to cross songs off my must-have list
13 this fast"; "Be aware that much of the material being shared violates copyright";
14 "Already, the choice available on MusicCity is actually larger than on Napster prior
15 to Napster putting the filter in place." Bodenstein Decl. ¶ 3 & Exs. 1-7; Weiss Depo.
16 595:12-596:3, Ex. 24. MusicCity even developed a "media kit" for advertisers with
17 links to these articles. SUF 3(t); Griffin Depo. 434:11-435:19 & Ex. 384.

18 **4. There Is Substantial Undisputed Evidence Of Defendants'**
19 **Constructive Knowledge Of Infringement.**

20 In a candid moment, MusicCity's then CEO recognized that his company
21 would be accused of building "a business on the back of pirated music." SUF 5(e);
22 44757. See A&M Records, 114 F. Supp. 2d at 922 ("The ability to download myriad
23 popular music files without payment seems to constitute the glittering object that
24 attracts Napster's financially-valuable user base."); Aimster at 1 (defendants provide
25 "a service whose very *raison d'etre* appears to be the facilitation of and contribution
26 to infringement on a massive scale.").

27 Defendants' executives are sophisticated in intellectual property matters and
28 have extensive experience in the recording industry and other industries (such as

1 video rental) based on copyrighted content. SUF 3(o); Griffin Depo. 13:2-6; 15:24-
2 16:5; 17:25-18:9; 22:19-22; Weiss Depo. 40:17-42:25. MusicCity officers have a
3 combined 75 years experience in entertainment businesses. SUF 3(o); ID171596
4 (MusicCity's then-CEO discussing his prior music licensing experience); ID169859
5 (evidencing understanding of "bona-fide public domain" material). MusicCity's
6 former CEO even approached record companies for licenses, only to abandon the
7 effort after MusicCity decided licenses would be too expensive. SUF 3(q); Griffin
8 Depo. 273:15-274:15 & Ex. 290; Weiss Depo. 288:5-291:22. Defendants continue to
9 pay lip service to the notion of paying copyright owners when their works are
10 distributed over Defendants' systems; thus, in their words, "creating a 'legal'
11 environment" (ID281525) as opposed to their current, unlawful systems. See Napster
12 I, 239 F.3d at 1020 n.5; Castle Rock Entertainment v. Carol Publishing Group, Inc.,
13 955 F. Supp. 260, 267 (S.D.N.Y. 1997) (where defendants were "sophisticated with
14 respect to [copyright] matters" court found "the record provides clear evidence, at a
15 minimum, of defendants' reckless disregard for the possibility that their conduct
16 amounted to copyright infringement").

17 Ironically, Defendants vigorously protect their own intellectual property. SUF
18 3(s). They post copyright notices for their own content on their web sites, require
19 users to agree to a license agreement in order to use Defendants' client software that
20 prevents users from copying *Defendants'* intellectual property, have filed for patents,
21 asserted trademark rights, entered into licensing agreements with Kazaa for their user
22 software, and entered into licenses with other software providers. SUF 3(s).
23 MusicCity requires its employees to assign all intellectual property creations to it.
24 They also take vigorous steps to prevent the distribution of "hacked" (i.e.,
25 unauthorized) versions of their software. SUF 3(s), 6(i). See Napster I, 239 F.3d at
26 1020 n.5 (defendant's enforcement of intellectual property rights in other instances
27 evidence of constructive knowledge).

28

1 Plaintiffs' copyright registrations also provide constructive knowledge of
2 Plaintiffs' ownership of their copyrighted works. 17 U.S.C. § 205(c); Saenger Org.,
3 Inc. v. Nationwide Ins. Licensing Assocs. Inc., 119 F.3d 55, 66 (1st Cir. 1997) ("A
4 copyright registration certificate ... serves to put the world on constructive notice as
5 to the ownership of the copyright").

6 Ultimately, the overwhelming majority of the works distributed and copied on
7 Defendants' systems – motion pictures, recordings, musical compositions, music
8 videos, and like content, including recently released and even unreleased material –
9 obviously is copyrighted. SUF 1; Creighton Decl. ¶¶ 27-28 & Ex. 23; Cole Decl. ¶
10 4. (current in-theater motion pictures available on Defendants' systems include *Signs*,
11 *Blue Crush*, and *Lilo & Stitch*). See, e.g., Hardenburgh, 982 F. Supp. at 514
12 (constructive knowledge because "Playboy Magazine is one of the most famous and
13 widely distributed adult publications in the world"); RSO Records, Inc. v. Peri, 596 F.
14 Supp. 849, 858 (S.D.N.Y. 1984) (knowledge where "the very nature of [the product at
15 issue] would suggest infringement to a rational person."); Universal City Studios Inc.
16 v. American Invsco Management, Inc., 217 U.S.P.Q. 1076, 1077 (N.D. Ill. 1981)
17 (fact that motion picture was just released in theaters supported inference of actual or
18 constructive knowledge that videocassette copy was infringing); see also Gershwin,
19 443 F.2d at 1163 (general knowledge that "copyrighted works were being performed
20 at [the concert] and that neither the local association nor the performing artists would
21 secure a copyright license."); Sega I, 857 F. Supp. at 686-87 (contributory liability
22 exists "[e]ven if Defendants do not know exactly when [copyrighted] games will be
23 uploaded to or downloaded from [its server]"); Aimster at 22 (specific knowledge of
24 specific works infringed not required for contributory infringement liability).

25 VII. DEFENDANTS ARE SEPARATELY LIABLE FOR VICARIOUS 26 INFRINGEMENT

27 The doctrines of contributory infringement and vicarious liability are
28 independent doctrines with different elements. See, e.g., Demetriades v. Kaufman,

1 690 F. Supp. 289, 292 n.5 (S.D.N.Y. 1988). A defendant is vicariously liable if it
2 "has the right and ability to supervise the infringing activity and also has a direct
3 financial interest in such activities." Napster I, 239 F.3d at 1022, quoting Fonovisa,
4 76 F.3d at 262. "When the right and ability to supervise coalesce with an obvious and
5 direct financial interest in the exploitation of copyrighted materials – even in the
6 absence of active knowledge that the copyright monopoly is being impaired – the
7 purposes of the copyright law may be best effectuated by the imposition of liability
8 upon the beneficiary of the exploitation." Shapiro, Bernstein & Co. v. H.L. Green
9 Co., 316 F.2d 304, 307 (2d Cir. 1963). Knowledge is not an element. See Aimster at
10 28 (citations omitted).

11 Summary judgment for vicarious copyright infringement is common. See, e.g.,
12 Playboy Enters., Inc. v. Webworld, Inc., 968 F. Supp. 1171, 1176 (N.D. Tex. 1997)
13 ("Webworld I") ("Whether a defendant has the required supervisory authority and
14 financial interest are issue[s] of law to be decided by the court."); RCA/Ariola Int'l,
15 Inc. v. Thomas & Grayston Co., 845 F.2d 773, 778 (8th Cir. 1988); Peer Int'l Corp.
16 v. Luna Records, Inc., 887 F. Supp. 560, 565 (S.D.N.Y. 1995).

17 **A. Defendants Financially Benefit From Their Users' Infringing**
18 **Activity.**

19 Defendants reap enormous direct financial benefit from the use of their systems
20 by millions of users to infringe copyrights billions of times. Like the defendants
21 recently enjoined in Aimster, Defendants provide systems "whose very raison d'etre
22 appear[] to be the facilitation of and contribution to copyright infringement on a
23 massive scale." Aimster at 1.

24 The "financial benefit" element of vicarious infringement is satisfied where, as
25 here, infringing activity "acts as a 'draw' for customers." Napster I, 239 F.3d at 1023,
26 quoting Fonovisa, 76 F.3d at 263-64 (infringing activities "enhance the attractiveness
27 of the venue to potential customers."); Aimster at 30 (accord); PolyGram Int'l
28 Publishing, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1333 (D. Mass. 1994) (trade

1 show participants "derived a significant financial benefit from the attention" attendees
2 paid to the infringing music being played).

3 Defendants have admitted that their value is based, at least in part, on the
4 quantity and quality of copyrighted content available. SUF 5(c), (e); ID172786
5 ("Since data/content on a P2P network is solely dependent upon peers [users], you
6 can have the best technology in the world, but it is of not value without peers and
7 data."); MUS014525-41 at MUS014528 ("The key to continued success is to create a
8 solid base of users that never dips below 1,000,000 ... The key is content and
9 community."). An early FastTrack business plan confirmed the goal was to "build a
10 larger consumer base" to create "a critical mass" that could be "leveraged." SUF 5(c);
11 Ex. 390. MusicCity followed the same plan. SUF 5(c); MUS005068-72 ("Quite
12 simply, we are attempting to successfully build a Network of nodes and then leverage
13 a variety of revenue producing applications into the Network."); Hardison Depo.
14 152:14-15 & Ex. 139 (discussing "monet[izing] server traffic"). Its founder
15 recognized that "those with the most users win," and that users can be "monetiz[ed] .
16 . by using your distribution platform to project advertising to them." SUF 5(c);
17 Griffin Depo. 193:2-9; 194:20-24. Defendants also recognized this when they
18 aggressively lured users from their OpenNap services to their FastTrack based
19 services (and when Grokster did so again with Audio Galaxy users). See supra. SUF
20 3(e)-(g). This draw of infringing content has resulted in a user base for Defendants in
21 the tens of millions. SUF 5(a).

22 This economic principle – that "eyeballs" translate into economic benefit – has
23 long been true. See, e.g., Herbert v. Shanley Co., 242 U.S. 591, 595 (1917) (hotel
24 and restaurant owners vicariously liable for permitting infringing performances used
25 to attract customers and profit from the sale of food even where no admission fee
26 charged); Famous Music Corp. v. Bay State Harness Horse Racing and Breeding
27 Assn., 554 F.2d 1213, 1214 (1st Cir. 1977) (race track owner vicariously liable for
28 infringing performances of a band that entertained patrons). It is especially true for

1 the Internet. Napster I, 239 F.3d at 1023 ("Napster's future revenue is directly
2 dependent upon increases in user base."); Hardenburgh, 982 F. Supp. at 513 ("the
3 quantity of adult files available to customers [on defendant's bulletin board] increased
4 the attractiveness of the service."); Webbworld I, 968 F. Supp. at 1177 (copyrighted
5 photographs "enhanced the attractiveness of the Netpics website to potential
6 customers"); Sega I, 857 F. Supp. at 684 (defendants profited by the unlawful
7 activities of their electronic bulletin board because "the existence of this distribution
8 network for Sega video game programs increases the prestige of the MAPHIA
9 bulletin board"); Perfect 10, 2002 U.S. Dist. LEXIS 7333, at *53 (defendant "benefits
10 from the draw posed by the existence of these works provided at a cost far below that
11 provided by the copyright owner.").

12 Unlike Napster, which had no advertising revenue, Defendants have capitalized
13 on their users' involvement, deriving substantial revenue from advertising on their
14 systems – advertising revenue that increases as more users who view that advertising
15 infringe more of Plaintiffs' works. MusicCity had ██████████ in revenue in 2001
16 from advertising. SUF 5(b); Griffin Depo. 446:1-14. As of July 2002, it had ██████
17 ██████ in revenue and projects ██████████ by year's end. Id. 455:7; 456:2-3. It has
18 also received over ██████████ in venture capital investment and a valuation of the
19 company of ██████████. Id. 464:3-465:5, 465:16-22. Grokster similarly derives
20 advertising revenue. D. Rung Depo. 140:21-141:1. In addition, Defendants derive
21 revenue from other software "bundled" with theirs. SUF 5(b); D. Rung Depo.
22 226:12-16. MusicCity has been able to boast that it has been profitable – even after
23 its litigation expenses. SUF 5(b). The financial benefit to Defendants is more than
24 sufficient, although profitability is not even necessary for financial benefit. See
25 Napster I, 239 F.3d at 1023; Major Bob Music v. Stubbs, 851 F. Supp. 475, 480 (S.D.
26 Ga. 1994) (for purposes of vicarious liability, a commercial enterprise "is considered
27 to be 'profit-making' even if it never actually yields a profit"); 17 U.S.C. § 101
28 ("financial gain" includes "receipt, or expectation of receipt, of anything of value").

1 **B. Defendants Have The Right And Ability To Supervise Users'**
2 **Conduct.**

3 As the Ninth Circuit has recognized, "[t]he ability to block infringers' access to
4 a particular environment for any reason whatsoever is evidence of the right and
5 ability to supervise." Napster I, 239 F.3d at 1023; see Fonovisa, 76 F.3d at 262
6 (defendant "had the right to terminate vendors for any reason" and "controlled the
7 access of customers to the swap meet area."); Shapiro, Bernstein, 316 F.2d at 306-08)
8 (element satisfied where defendant department store had "unreviewable discretion" to
9 terminate employees of its concessionaires); Aimster at 29 (Terms of Service gave
10 defendants right to terminate users). Because "the reserved right to police *must be*
11 *exercised to its fullest extent*," Napster I, 239 F.3d at 1023 (emphasis added), a party
12 "may be vicariously liable when it fails to affirmatively use its ability to patrol its
13 system and *preclude* access to potentially infringing files listed in its search index."
14 Id. at 1027 (emphasis added).

15 Defendants need not actually *exercise* supervision to be deemed *capable* of
16 doing so. Where a defendant is "in a position to police the infringing conduct," its
17 "failure to police the conduct" gives rise to vicarious liability. Gershwin, 443 F.2d at
18 1162-63. The Ninth Circuit stated it even more emphatically: "Turning a blind eye
19 to detectable acts of infringement for the sake of profit gives rise to [vicarious]
20 liability." Napster I, 239 F.3d at 1023 (emphasis added); see Chess Music, Inc. v.
21 Sipe, 442 F. Supp. 1184, 1185 (D. Minn. 1977); RCA/Ariola, 845 F.2d at 777-78;
22 Fonovisa, 76 F.3d at 262; Shapiro, Bernstein, 316 F.2d at 306-07. Defendants, of
23 course, never exercised their right to police at all, let alone to the "fullest extent." In
24 light of the financial benefit that Defendants derive from the infringement on their
25 systems, they cannot sit on their hands, refusing to police their systems – and even
26 actively working to *impede* the efforts of copyright owners -- so that they can
27 continue to profit from that rampant infringement. See RCA/Ariola, 845 F.2d at 782;
28 RCA Records v. All-Fast Systems, Inc., 594 F. Supp. 335, 339 (S.D.N.Y. 1984).

1 **1. Defendants Maintain and Exercise Control Over Their Systems'**
2 **Function.**

3 Defendants control how their systems function:

4 ▪Defendants themselves initially operated supernodes. During that period, their
5 systems were identical to the infringing Napster system, in that user search requests
6 and search results were funneled directly through Defendants' own servers. SUF 4(j).

7 ▪Defendants can adjust the functioning of their systems from a central location,
8 and have done so. For example, user computers receive instruction (called
9 "parameter values") from Defendants' servers. In this way, even without benefit of a
10 central log-in server, Defendants can cause update alerts to pop-up on user
11 computers. By sending such instructions, Defendants have been able to fine-tune the
12 performance of their systems. Such central command often is critical, for example, to
13 fix performance problems such as overloading of supernodes that cause "disconnects"
14 from the systems; delays in users' ability to connect to the systems; and searches
15 becoming too slow. SUF 4(c), 6(a) –(f); 8(d). See Kleinrock Decl. ¶¶ 78-79.

16 ▪Defendants have had the ability to control the provision of supernode IP
17 addresses to users, and thus access to the system, (initially) by operating central
18 server "root" supernodes, and (later) by embedding a list of supernode IP addresses in
19 the user software upon installation. SUF 4(h), 6(g). Defendants also are able to
20 update and change the list of supernode addresses contained in the registry of the
21 users' computers, both by distributing new lists along with downloads of Defendants'
22 software, and through specific commands broadcast to all users' computers. SUF
23 4(i). They do so "to insure new users a reliable connection to" the system. SUF 4(j).

24 ▪Defendants have the ability to change, and thus control, the system
25 communications protocol and encryption, thereby preventing user software that is not
26 using Defendants' protocol and encryption from communicating with user software
27 that is. SUF 6(h).

1 ▪Defendants have effective control over all files users download or offer for
2 distribution via Defendants' systems: "all files in download directory (and its sub-
3 directories) are always under KazaaLib control." SUF 6(e); Smith Depo. Ex. 215; ID
4 545105.

5 ▪Defendants have the ability to display any messages or content of their
6 choosing to users inside the users' software for as long as users are connected to the
7 systems. SUF 6(n).

8 ▪Pursuant to their software license agreements with Defendant Kazaa,
9 Defendants have or had the right to request that Kazaa make changes to the software
10 that is the subject of the license. SUF 6(o); M. Rung Depo. 135:6-9. Defendants also
11 can add or remove software from the bundle of programs that users download when
12 they download Defendants' proprietary software. SUF 6(b); Rung Depo. 102:21-
13 103:5; 225:12-226:16; M. Rung Depo. 85:1-6.

14 ▪Defendants provide detailed written instructions to users on how to use
15 Defendants' systems, including a "newsletter" (Rung Depo. 122:4-123:8, Ex. 33),
16 chat rooms and bulletin boards (Rung Depo. 151:16-152:9), and a personalized
17 "support" function through which Defendants respond to specific user requests for
18 assistance (Rung Depo. 97:4-15; 153:16-154:7; 161:7-16 & Ex. 7). For example,
19 MusicCity provided a "patch" to users at Washington State University to allow them
20 to circumvent limitations on downloads that the university had imposed on
21 computers. SUF 4(p); Ex. 321. Defendants contractually agreed, as part of their
22 licenses with Kazaa, to provide "'first-line' telephone, electronic mail, or facsimile
23 support" to their users "and act as the primary customer contact, tracking all issues
24 and questions to their resolution." SUF 6(o).

25 **2. Defendants Control Access To Their Systems.**

26 Having gotten the systems up and running, Defendants are now their
27 gatekeepers. They specifically reserve the legal right and functional ability to control
28 access to their systems. SUF 6(c), (o). Technically, users must be online and

1 connected to Defendants' systems to access, copy, and distribute copyrighted works.
2 Legally, Defendants' Terms of Service state that they have the right to ban users
3 and/or block infringing content from their systems. SUF 6(c). In addition:

4 •In February to March 2002, Kazaa and its licensee Grokster proved that
5 Defendants themselves could totally control – and shut down – these systems by
6 exercising the right and ability to disconnect users. SUF 6(m). In response to a
7 payment dispute between MusicCity and Kazaa, Kazaa disconnected *all* MusicCity
8 users from FastTrack and rendered them unable to use their software to access that
9 system or download any files. SUF 6(m); Kallman Depo. 150:11-24; 151:15-152:8;
10 D. Rung Depo. 241:9-242:12; M. Rung Depo. 103:4-21; 104:23-105:8; 108:12-109:8
11 & Ex. 91; Smith Depo. 397:15-416:17. Both Grokster's founder and MusicCity
12 admitted that such an ability to block access to the systems constituted "control."
13 SUF 6(m); Smith Depo. 416:14-17; D. Rung Depo. 257:16-24.

14 •In their Terms of Service, Defendants explicitly provided for their right to
15 terminate users and/or block unlawful content. SUF 6(c). In fact, Defendants claim
16 previously to have banned users from their systems. SUF 6(c); Smith Depo. 17:15-
17 18:12; Rung Depo. 177:7-178:9; 217:15-218:6; Weiss Depo. 354:11-21; D. Rung
18 Depo. 229:18-230:14; M. Rung Depo. 154:3-157:11. Defendants have also blocked
19 access to groups of IP addresses. SUF 6(c), (e); Kleinrock Decl. ¶¶ 59-66.

20 •Defendants control their systems by deciding which enhancements to add to
21 new versions of their software that they make available to users. Defendants can
22 "auto upgrade" user software by communicating to users on their systems that a new
23 version of the software is available. SUF 6(b); D. Rung Depo. 94:16-96:11; M. Rung
24 Depo. 91:12-98:1. Defendants have the ability to ensure that only Defendants'
25 upgraded user software will be accepted by the system, resulting in the blocking of
26 users from the systems who are running old or outdated software. SUF 6(b); Rung
27 Depo. 236:17-240:10.

28

1 ▪Defendants have controlled access to their systems by changing the
2 communications protocol and encryption in order to block access to unwanted third
3 parties who were trying to reverse engineer the user software. SUF 6(i). In
4 September 2001, computer hackers developed an unauthorized software program
5 called "giFT," designed to allow access to Defendants' systems without exposure to
6 the advertising that Defendants stream to their users. Almost immediately
7 Defendants successfully blocked giFT users from accessing their systems by
8 requiring all users to download a new version of their software. SUF 6(i); Rung
9 Depo. 105:13-104:3; 234:13-24; M. Rung Depo. 99:8-100:7. On other occasions,
10 Defendants have provided their users with "security patches," computer programs that
11 fix weaknesses in Defendants' systems that could allow hackers to infiltrate them.
12 SUF 6(i); Kleinrock Decl. ¶ 63.

13 ▪Defendants have controlled access to their system by adding a layer of
14 security to prevent further access to communications by any unauthorized user
15 software. SUF 6(j).

16 ▪Defendants have exercised control over their systems by taking affirmative
17 steps to prevent access by firms retained by copyright owners to monitor and police
18 copyright infringement on Defendants' systems. SUF 6(l). For example, Defendants
19 have succeeded in blocking from their systems a company known as Media Enforcer,
20 which has been hired by copyright owners to track infringement on Defendants'
21 systems. SUF 6(l); Kleinrock Decl. ¶ 62. MusicCity also has bragged that it is able
22 to block RIAA "bots" (robotic programs that search for infringing content) from their
23 systems. SUF 6(l).

24 ▪Defendants have monitored and exercised control over their message boards
25 by deleting user postings they found objectionable. SUF 6(p). See Napster I, 239
26 F.3d at 1023-24.

27 ▪Defendants have the ability "to disable the Network by disabling its
28 connection to the Network if it deems such action necessary to maintain the integrity

1 of its network or out of concern for its users; for example, if the disconnected party's
2 users are sharing a high percentage of bogus files or in other ways acting in a way
3 that may be harmful or harassing to other users." SUF 6(d); MUS013095-114 at
4 013100; MUS013119-20.

5 Even in the absence of this ongoing relationship with their users, the
6 "supervisory" element of vicarious liability would be satisfied by evidence that the
7 Defendants "promoted" the site where infringement occurred: "[P]ervasive
8 participation in the formation and direction' of the direct infringers, including
9 promoting them (i.e., creating an audience for them)," puts the defendant "in a
10 position to police the direct infringers," thus satisfying this element. Fonovisa, 76
11 F.3d at 263, quoting Gershwin, 443 F.2d at 1163. See also Perfect 10, 2002 U.S.
12 Dist. LEXIS 7333, at *57. It is undisputed that Defendants have gone far beyond the
13 generalized promotional activities in Fonovisa, by, for example, specifically
14 advertising and promoting their systems as ones where "You can find your favourite
15 [sic] music, movies, pictures, artists, documents and more." Borkowski Decl. Ex. 32.
16 Just as Napster did, Defendants "create the audience" for millions of direct infringers
17 who otherwise would have no contact with each other. At bottom, Defendants'
18 efforts to "create the audience" is crucial – because the "audience" is not just
19 consumers of infringing copyrighted works, but also suppliers and distributors of
20 such works, and thus absolutely central to Defendants' business. E.g., MUS012661-
21 69 at MUS012666 ("It is the Company's strong belief and strategic focus that the key
22 to long-term success is a large active user base. ...In a P2P application, the key is
23 number of users. ...The size of the Network provides the ability to create the concept
24 of 'persistence of data' resulting in a high probability that the information being
25 sought is readily available at all times.").

26 Ultimately, Defendants control the environment of their users' experience.
27 Defendants control *what* is copied – only those specific files indexed, selected, and
28 provided by Defendants' systems in response to a search request can be copied; and

1 Defendants control *when* and *from* whom copies can be made – only *when* users are
2 logged onto Defendants' systems, only *when* users are permitted to connect, and only
3 *from* other of Defendants' users accessed through Defendants' systems. See
4 Webbworld I, 968 F. Supp. at 1177 (defendants had control over online infringement
5 even though "the process was automated").

6 **3. Defendants Also Have The Ability To Block Infringement.**

7 As with their claim that they lack knowledge of infringements on their system,
8 Defendants' claims that there is nothing they can do about those infringements is
9 false. From the very inception of FastTrack, Defendants could have implemented a
10 mechanism to monitor files downloaded or offered for distribution, for purposes of
11 tracking copyrighted material. SUF 7(e). This much is undisputed. The KazaaLib
12 API programming guide (the guide programmers would use to write applications)
13 explains unequivocally that the files users download or offer for distribution are
14 "always under KazaaLib control" and the user software (the program Defendants
15 update and modify at will) "can perform operations on these files" including
16 "enabling/disabling sharing." SUF 7(f); Ex. 215/ID545105.

17 Indeed, when MusicCity first launched its FastTrack-based system, CTO Smith
18 specifically inquired of Kazaa whether it was possible to track copyright works:

19 *MusicCity: "The activity we want to monitor if possible are the files*
20 *that users download, so that we can track copyrighted material for*
21 *royalties."*

22 *Kazaa: "OK. As I've mentioned we've designed a system for this, but*
23 *it's not yet implemented. It could be quickly, however."*

24 Ex. 150/ID168124. As Mr. Smith confirmed at his deposition:

25 *"Q. But it's true that during the entire time MusicCity was using a*
26 *Morpheus/FastTrack system, you understood that KaZaA could*
27 *implement for you a feature to monitor user downloads to track*
28 *copyrighted material?*

1 A. *If they chose to implement that.*

2 Q. *You understood that there was no technological impediment to*
3 *their doing do?*

4 A. *It was -- that's correct.*"¹¹

5 Defendants already have the means to identify the content of files on their
6 system. "Metadata" is information that is not part of the contents of the file, but
7 which provides descriptive information about the contents of the file. Kleinrock
8 Decl. ¶¶71-72, 75. As Defendants themselves tout, as compared to systems that
9 match search queries only against file names (as Napster did), extracting and using
10 the metadata allows for much more accurate searches. ID150543 ("Meta data, such
11 as ID3 tags for mp3 files, is automatically extracted from the files you share and
12 made (sic) searchable, which makes for much more accurate searches. You can
13 search for album, title, artist, category, resolution, author, length and much more.");
14 M. Rung Depo. 38-40; Kleinrock Decl. ¶ 76. Defendants also calculate a "hash"
15 value, a computed value that, as defendants acknowledge, can be "[u]sed to uniquely
16 (for practical purposes) identify the file on the network." ID545105; M. Rung Depo.
17 145:16-146:8; Kleinrock Decl ¶¶ 77-79; SUF 7(c).

18 In the normal working of Defendants' systems, when users connect, metadata
19 are extracted and hash values calculated for each file each user is offering to
20 distribute for copying. All that information, together with file name and other
21 information, is communicated to the supernode to be used for searches and other
22 system functions. M. Rung Depo. 90:19-91:1. A user's directory of offered files is
23 scanned for changes approximately every 60 seconds. ID545105. ***This information***
24 ***readily could be used to identify and prevent distribution of copyrighted works.*** M.
25 Rung Depo. 39:13-40:17; Kleinrock Decl. ¶ 74; SUF 7(c).

26 _____
27 ¹¹ Smith Depo. 94:24-95:7. According to Smith, Kazaa was too busy with other
28 development priorities to implement the feature at that moment. Smith Depo. 91:16-
25. MusicCity never asked again. Smith Depo. 92:23-93:2; SUF 7(e).

1 But Defendants need not be limited to metadata or hash filtering. There exist
2 today sound technologies that would allow defendants to identify the content of an
3 audio or video file based on its actual acoustic or visual properties. D. Rung Depo.
4 250:6-251:21; 253:12-254:13. Known as "fingerprinting" technologies, they can
5 significantly improve the accuracy of file identification, even over metadata.
6 Kleinrock Decl. ¶¶ 90, 97. Three companies that offer such file identification
7 technologies have submitted declarations describing their solutions and how they
8 would work within a peer-to-peer environment. See Breslin Decl.; Ikezoye Decl.;
9 Hyman Decl. There are many other commercial enterprises in this business. SUF
10 7(c), (e); Creighton Decl. ¶¶ 29-30.

11 MusicCity passingly looked at one company's technology, but did not follow
12 up and did not undertake any evaluation of any of the major players in the field.
13 Smith Depo. 534:8-538:20. To the contrary, defendant MusicCity again reveals its
14 true intentions in response to a proposal from Gracenote (one of the declarants here):
15 *"What this is, is a technology that will allow Morpheus to see what our users are*
16 *sharing so that in turn we can 'tie into a rights payment infrastructure.'* *I know*
17 *this is something we DO NOT want to do, but am not sure how I need to word*
18 *that."* ID1570734 (capitalization in original).¹²

19 That Defendants may not "want" to know how to identify and filter files does
20 not mean that they do not have the ability to do so. In fact they do. Defendants
21 already filter out (or give users the option of filtering out) offensive and pornographic
22 content, as well as files that may contain viruses or "bogus" content – because it suits
23

24
25 ¹² The approaches of other companies seeking to work with MusicCity toward a
26 "legal" system also were summarily rejected – because MusicCity wanted to try to
27 remain willfully ignorant. E.g., ID37335 ("If we have too much information on our
28 users then we can be accused of having a Napster like relationship with them where
we know what they are doing and specifically what they are listening to, that is when
we are in jeopardy of legal pursuit"); ID428797. See also M. Rung Depo. 129:4-
130:19.

1 their pecuniary business interests to filter in this way. SUF 7(a); M. Rung Depo.
2 131:23-133:21; Kleinrock Decl. ¶ 69.

3 Defendants likewise could filter infringing material. M. Rung Depo. 96:16-
4 98:2; Hardison Depo. 172:7-25 & Ex. 129; Kleinrock Decl. ¶¶ 84-94. Just by way of
5 illustration, after a user connects, but before that user's file names and metadata are
6 transmitted to the supernode, the metadata (or fingerprints) could be cross-matched
7 against a database of works owned by plaintiffs and other copyright holders.
8 Kleinrock Decl. ¶¶ 91-92. To the user, this would be largely invisible: the user would
9 immediately connect and participate in all system activities. The user's files simply
10 would not be offered for distribution until they had been verified as not infringing (at
11 least not of plaintiffs' copyrights). Kleinrock Decl. ¶ 96. In the context of a very
12 similar process of cross-matching against a third-party database for a commerce
13 opportunity MusicCity considered, CTO Smith explained that the entire process
14 would happen "relatively instantaneously." Smith Depo. 64:3-10, 66:1-16; Kleinrock
15 Decl. ¶ 95; SUF 7(d).

16 As set out more fully in the accompanying Kleinrock Declaration -- and as
17 made plain by Defendants' internal documents and testimony -- Defendants can
18 identify the files on their system (and, in fact, already do), and they can take steps to
19 prevent infringing files from being distributed. And, they can do this while still
20 allowing any authorized content to be freely exchanged. See generally Kleinrock
21 Decl. ¶¶ 67-97. "There is nothing inherent in the technology of defendants' peer-to-
22 peer systems that would prevent defendants from taking steps to prevent or greatly
23 diminish the volume of copyright infringement on their systems." Kleinrock Decl.
24 ¶ 82. However, as defendant MusicCity has made perfectly clear, their failure to
25 prevent massive scale copyright infringement is not a result of any technological
26 impediment, it is because they "DO NOT want to."

27
28

1 **VIII. DEFENDANTS' *SONY-BETAMAX* DEFENSE FAILS AS A MATTER**
2 **OF LAW.**

3 With respect to affirmative defenses, "the moving party has no burden to
4 negate or disprove matters on which the non-moving party will have the burden of
5 proof at trial. The moving party need only point out to the court that there is an
6 absence of evidence to support the non-moving party's case." Casey By & Through
7 Casey v. Old Line Life Ins. Co., 996 F. Supp. 939, 943 (N.D. Cal. 1998), citing
8 Celotex Corp., 477 U.S. at 325. Regardless of where the burden is placed,
9 Defendants' defenses are meritless as a matter of law. See, e.g., Napster I, 239 F.3d
10 at 1015 n.3.

11 The only affirmative defense Defendants have emphasized is based on Sony-
12 Betamax. In the first instance, that decision is not a defense to Plaintiffs' claim for
13 vicarious infringement. See Napster I, 239 F.3d at 1022 (Sony-Betamax's "'staple
14 article of commerce' analysis has no application to . . . potential liability for *vicarious*
15 copyright infringement.") (emphasis added); RCA/Ariola Int'l, 845 F.2d at 781.

16 This defense fails with respect to Plaintiffs' contributory infringement claims as
17 well. In Sony-Betamax, the Court was presented with the narrow issue of whether
18 the mere manufacture and sale of a device later used for infringement can give rise to
19 *constructive* knowledge to impose contributory infringement liability. See Sony-
20 Betamax, 464 U.S. at 439. The Court sought to determine whether, under the
21 circumstances where Sony had no "ongoing relationship" with Betamax users, and
22 thus had no actual knowledge of their activity and was in no position to control
23 unauthorized uses of copyrighted material, it was "manifestly just" to impose liability
24 on Sony for the infringing activities of third parties. Id. at 437-38. The Court hinged
25 its analysis on the finding that the "primary use" of the Betamax – private,
26 noncommercial time-shifting in the home – was fair use. Id. at 423. Also important
27 to the Court's analysis was that the use did not involve distribution of copyrighted
28 works – i.e., "transfer of tapes to other persons," id. at 425; and plaintiffs' over-the-air

1 public television programming was something consumers "had been invited to
2 witness in its entirety free of charge," id. at 449; was copied for the purpose of
3 playing once at a later time, then erased, id. at 423; and accounted for "well below
4 10%" of television programming subject to Betamax copying. Id. at 443. Ultimately,
5 it was conceded that plaintiffs had not suffered any harm from the Betamax machine.
6 Id. at 454.

7 The key facts here are diametrically opposed to those in Sony-Betamax: Sony
8 only sold an "article" and had no "ongoing relationship" with its users. Here, as in
9 Napster and Aimster, Defendants provide an ongoing, closed system and are
10 inextricably intertwined with their users' infringements on a continuous basis. While
11 the vast majority of Betamax uses were found to be noninfringing "time shifting,"
12 here, as in Napster, the overwhelming uses of Defendants' systems are infringing.
13 While *distribution* of copies by Betamax users was not an issue, here, as in Napster,
14 viral distribution of copyrighted works by users is an integral component of
15 Defendants' systems. And while in Sony-Betamax there was no harm to plaintiffs,
16 here, as with Napster, Defendants' piratical systems directly compete with Plaintiffs.
17 A&M Records, 114 F. Supp. 2d at 910.

18 The precise holding of Sony-Betamax is a narrow one: the Court held that the
19 knowledge element of contributory infringement cannot be proven "merely" because
20 a "staple article of commerce" marketed by a defendant may be used to infringe. 464
21 U.S. at 439. However, if the evidence of actual or constructive knowledge is *more*
22 than a mere showing that a product *may be* used for infringing purposes, the Sony-
23 Betamax doctrine does not apply. Because Defendants have knowledge of
24 infringement by their users, Sony-Betamax cannot shield them from liability for
25 contributory infringement.

26 It was the existence of the type of knowledge that Defendants possess here that
27 was the basis of the determination in Napster I that Sony-Betamax was "of limited
28 assistance to Napster." 239 F.3d at 1020. As the Napster I Court explained, where "a

1 computer system operator learns of specific infringing material available on his
2 system and fails to purge such material from the system, the operator knows of and
3 contributes to direct infringement." *Id.* at 1021. Because Napster "knew or had
4 reason to know of its users' infringement of plaintiffs' copyrights," the Sony-Betamax
5 defense failed. *Id.* at _____. See also Costar Group, Inc. v. Loopnet, Inc., 164 F. Supp.
6 2d 688, 697 (D. Md. 2001) (construing Napster I as "distinguishing Sony on the basis
7 of Napster's 'actual, specific knowledge' of direct infringement"); Cable/Home
8 Communication Corp. v. Network Product, Inc., 902 F.2d 829 (11th Cir. 1990).

9 Further, Defendants are unable to fit within at least the following additional
10 limitations on the Sony-Betamax defense:

11 First, the defense is limited to situations where a defendant manufactures a
12 *product or device* – a "staple *article*" – and then ceases any contact with or
13 supervision of its customers at the point of sale. See Sony-Betamax, 464 U.S. at 438
14 ("the only contact between Sony and the users of the Betamax that is disclosed by this
15 record occurred at the moment of sale"). By contrast, the Supreme Court itself
16 recognized that imposing contributory liability in cases "involving an *ongoing*
17 *relationship* between the direct infringer and the contributory infringer at the time the
18 infringing conduct occurred" is "manifestly just." *Id.* at 437 (emphasis added). Each
19 of Defendants' systems "is not a discrete product, like a Betamax VCR, to be sold to
20 customers who thereafter use the machine as they see fit. Instead [it] is a *service*
21 more closely akin to the swap meet in Fonovisa." Aimster at 26-27 (emphasis in
22 original). *SUF* 8. Thus, the doctrine applies only to the sale of products that may be
23 used for copying over which the manufacturer is not "in a position to control the use
24 of copyrighted works by" the products' users. *Id.* at 437-38; see RCA Records v. All-
25 Fast Sys., Inc., 594 F. Supp. 335, 339 (S.D.N.Y. 1984) ("The Sony Corp. decision
26 extends protection only to the manufacturer of the infringing machine, not to its
27 operator"); A&M Records, Inc. v. Abdallah, 948 F. Supp. 1449, 1456-57 (C.D. Cal.
28 1996); see also Columbia Pictures Industries, 800 F.2d at 62 (contributory

1 infringement liability applied to company that provided customers with copyrighted
2 movies, video players, and rooms in which to view them).

3 The ongoing interactions between Defendants and their users – and the
4 technical features of Defendants' systems (including their design, construction, and
5 operation) that enable or require such interactions – deprive Defendants of the Sony-
6 Betamax defense. See Aimster at 26-27 (unlike Sony-Betamax, similar infringing
7 system "involves an ongoing relationship between the direct infringers (the users) and
8 the contributory infringers (the Defendants)"). Defendants' litigation-driven
9 argument that all they do is distribute a software product is disingenuous and
10 contradicted by their own documents and executives' testimony. Defendants boasted
11 they were an interactive user experience, "not just [a software] application like
12 WinMX, and other similar applications." SUF 8(b); Ex. 238/MJT0374; see also
13 MUS005049-53 at MUS005052 ("Morpheus is the gateway to the Network ... It's
14 not about the technology—it's about the Network"). Their Terms of Service and
15 other documents repeatedly refer to their systems as "services" and "networks"
16 numerous times, recognizing the ongoing relationship Defendants have with their
17 users, and vice-versa (users agree to indemnify Defendants for claims "arising out of
18 content you submit, post to or transmit through the Service"). Even MusicCity's
19 outside counsel recognized and referred to Music City's openNap system as a
20 "service." [Ex. 130] Grokster's founder refers to it as a "network." [Ex. 38]. SUF
21 8(a). Perhaps the issue of whether defendants are merely selling a product (like the
22 video recorder) or operating an integrated network (like Napster) is best (and finally)
23 put to rest by the reaction of MusicCity's then-CEO when he learned that another
24 potential Kazaa licensee would be interconnecting with the MusicCity network:

25 "We said that we are NOT allowing access to them to OUR network. I have
26 not downloaded their software yet, but they CAN NOT have access to OUR
27 network ... I will not have a potential competitor make claims using OUR
28 network numbers [regarding simultaneous connected users] that are not true."

1 Ex. 178/ID545632 (emphasis in original).
2 Kazaa eventually acceded to MusicCity's demands. Smith Depo. 279:18-280:4; Ex.
3 187/ID545802.

4 Second, Sony-Betamax applies only to devices that permit private home
5 *copying*, not systems that facilitate and enable widespread *distribution* of billions of
6 copies of copyrighted works. See Sony-Betamax, 464 U.S. at 425 ("[n]o issue
7 concerning the transfer of tapes to other persons . . . was raised"); New York Times
8 Co. v. Tasini, 533 U.S. 483, 504, 121 S. Ct. 2381, 150 L. Ed. 2d 500 (2001) (Sony-
9 Betamax inapposite where defendant electronic publishers are "not merely selling
10 'equipment'; they are selling *copies* of [plaintiffs' copyrighted works]") (emphasis
11 added); Aimster at 27 (Sony-Betamax not applicable where defendant "makes each of
12 its users a global distributor of Plaintiffs' copyrighted music for copying by any
13 number of other [of defendant's] users").

14 Third, Sony-Betamax does not apply where a defendant specifically designed a
15 system for infringing use. See Abdallah, 948 F. Supp. at 1456; Aimster at 27.
16 Defendants' systems, begun as replacements for the Napster system, were designed to
17 enable and facilitate the infringement of copyrighted works.

18 Fourth, Sony-Betamax does not apply where the infringing activity can be
19 avoided while permitting alleged noninfringing uses to continue. See RCA Records,
20 594 F. Supp. at 339; Compaq Computer Corp. v. Procom Tech., Inc., 908 F. Supp.
21 1409, 1424 (S.D. Tex. 1995). There is no dispute that technology exists that would
22 enable Defendants to block infringing content from their systems. Defendants have
23 refused to implement any of it.

24 Only if Defendants were able to carry their burden of proof as to *each of* these
25 issues – which they cannot do as a matter of law – would the issue of whether
26 Defendants could demonstrate "commercially significant noninfringing uses" present
27 itself. Sony-Betamax, 464 U.S. at 443. Defendants would be unable to make this
28 showing either. In Sony-Betamax, the "staple article of commerce" doctrine was

1 applied because the videocassette recorder was "*widely used for legitimate*
2 unobjectionable purposes," 464 U.S. at 442 (emphasis added), and the "*primary use*
3 of the machine for most owners" was noninfringing. *Id.* at 423 (emphasis added).
4 Here, the purported "noninfringing" uses of Defendants' systems are trivial and are
5 not the reasons that tens of millions of users flock to their systems.¹³ Defendants will
6 have little evidence that their systems *actually* are used for any of the public domain
7 or government document uses they advance. By way of example, Plaintiffs
8 conducted searches on the MusicCity system for the 187 "public domain" works
9 identified in MusicCity's declarations filed in connection with its original motion for
10 partial summary judgment. Plaintiffs were unable to locate 178 of those works on the
11 system (and only one copy of each of the other located works typically was
12 available). Creighton Decl. ¶¶ 21-26, Exs. 18-20. By contrast, an identical search on
13 the MusicCity system for the 24 recordings in the original MGM Complaint and the
14 Sound Scan "Hot 100 Singles" found unauthorized copies of *every one* of the 124
15 recordings, and an average of 106 available copies each. *Id.* The Music Publisher
16 Plaintiffs repeatedly have found unauthorized works on Defendants' systems. Breen
17 Decl ¶¶ 6, 11, 13-15, 17-18 & Exs. B-E.¹⁴

18 No court has considered absolving a defendant of liability for infringement, let
19 alone massive infringement, without some showing that the product in question
20 actually is used for "commercially significant noninfringing uses." Sony-Betamax,
21 464 U.S. at 442; Abdallah, 948 F. Supp. at 1456 ("insubstantial" noninfringing uses
22 not sufficient); Sega I, 857 F. Supp. at 685 ("incidental capabilities" insufficient); In
23 re Certain Personal Computers, 224 U.S.P.Q. 270, 280 (U.S. Int'l Trade Comm'n

24
25 ¹³ Moreover, to the extent Defendants' systems have "noninfringing uses," those uses
26 can continue. See Napster I, 239 F.3d at 1019.

27 ¹⁴ Defendants know that their systems are not used to obtain any meaningful amount
28 of noninfringing content. MusicCity even considered seeding its system with IRS tax
forms during tax season so that it could falsely assert that it had noninfringing uses.
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1 1984) ("commercially significant" use necessary). As is readily apparent to anyone
2 using Defendants' systems, their overwhelming and primary use is for infringing
3 distribution and copying of copyrighted works. See Abdallah, 948 F. Supp. at 1456
4 ("although time-loaded cassettes can be used for legitimate purposes, these purposes
5 are insubstantial given the number of [defendant]'s customers that were using them
6 for counterfeiting purposes"); Sega I, 857 F. Supp. at 685 (rejecting defendant's
7 reliance on "incidental capabilities" that "have not been shown to be the primary use"
8 of defendant's computer game copiers); Atari, Inc. v. JS&A Group, Inc., 597 F. Supp.
9 5, 8 (N.D. Ill. 1983).

10 **IX. CONCLUSION**

11 Defendants' systems have far surpassed Napster in their sophistication and in
12 the sheer volume of daily infringement that they enable and facilitate. Defendants
13 indisputably are knowing participants in this infringement. They have ongoing
14 involvement with their users, provide the site, service, and facilities for the
15 infringement, refuse to police their systems to prevent infringement, and benefit
16 financially from the infringement. Defendants are not mere sellers of videocassette
17 recorders. They are vast, online, piratical swap meets. As a consequence,
18 Defendants are liable for both contributory and vicarious copyright infringement.

19 Dated: September 9, 2002

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