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15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA

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

20 v.

21 GROKSTER, LTD., et al.,
22 Defendants.

23 JERRY LEIBER, et al.,
24 Plaintiffs,

25 v.

26 CONSUMER EMPOWERMENT BV
a/k/a FASTTRACK, et al.,
27 Defendants.

28 AND RELATED COUNTERCLAIMS.

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

**PLAINTIFFS' REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

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

**[FILED UNDER SEAL PURSUANT
TO PROTECTIVE ORDER]**

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INTRODUCTION

Defendants are correct about one thing: this is a "simple case." Grokster Opp. 1. Indeed, "[t]he complex marvels of cyberspatial communication may create difficult legal issues; but not in this case." UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000). Defendants set up, maintained, upgraded, monitored, and are continuously involved in systems designed to provide the same user functionality as, and to replace, Napster. Defendants have succeeded. Their systems are dedicated to the widespread, unauthorized reproduction and distribution of Plaintiffs' principal assets. Defendants profit directly from the "glittering object" that attracts their "financially-valuable user base": the daily distribution and copying of millions of copies of Plaintiffs' works. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 922 (N.D. Cal. 2000), aff'd, 239 F.3d 1004 (9th Cir. 2001).

The uncontroverted facts establish Defendants' liability. None of the "issues" Defendants raise (frequently without record support), is "genuine" or "material." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). Defendants are liable for contributory infringement because they have knowledge (actual and constructive) of infringing activity, and materially contribute to that infringement. Grokster does not contest its knowledge, and MusicCity disputes it only in connection with its meritless Sony-Betamax defense. Grokster does not contest its contribution, and MusicCity devotes only a half-hearted page to it. Defendants also are liable for vicarious infringement. They clearly have the ability to supervise or control infringement, and do not contest that they receive a direct financial benefit from the infringement over their systems. Summary judgment on both these claims is appropriate.

I. DEFENDANTS CANNOT USE THEIR LICENSOR TO SHIELD THEIR INFRINGING CONDUCT

This Court did not grant Kazaa B.V.'s strategic application to have its own default entered, after it had answered the complaint, filed a counterclaim, served

1 extensive discovery, and moved for summary judgment. Kazaa remains a defendant
2 in this litigation (and continues to be involved in and benefit from infringement over
3 the FastTrack system it licenses). Grokster is incorrect in its contention (never
4 raised by Kazaa) that summary judgment against Kazaa is improper, and the cases
5 on which it relies do not support its position.¹

6 The motivation for Grokster's argument is clear: Grokster and MusicCity
7 were essentially business partners with Kazaa for FastTrack; as licensees, they also
8 are (or were) in privity with Kazaa; they operated their FastTrack systems for their
9 own gain; and they are legally responsible for actions Kazaa has taken on its
10 licensees' behalf and for their benefit. See MCA Records, Inc. v. Charly Records,
11 865 F. Supp. 649, 654-656 (C.D. Cal. 1994) (defendant claiming it was only a
12 licensee had proprietary interest in subject matter of litigation and was in privity
13 with licensor, and therefore could be found liable for trademark infringement).
14 Although Grokster contends that "[o]nly Kazaa can dispute many of Plaintiffs'
15 purported factual issues" (Grokster Opp. 3), Grokster knows what the FastTrack
16 system is and does, and manipulates it to its benefit. By characterizing themselves
17 as "mere licensees," Grokster and MusicCity (for its FastTrack phase) now attempt
18 to hide behind their absent licensor. Grokster Opp. 12, MusicCity Opp. 4-5.
19 However, if Kazaa is liable, so necessarily are its licensees, using and profiting from
20 the exact same infringing system. Otherwise, any infringement could be immunized
21 by the expedient of a license and a defaulting licensor.²

22
23 ¹ In Phillips Factors Corp. v. Harbor Lane of Pensacola, Inc., 648 F. Supp. 1580
24 (M.D.N.C. 1986), the court specifically distinguished defendants who appeared but
25 did not respond to a summary judgment motion, like Kazaa, from defendants who
26 never appeared and whose default had been entered. Id. at 1583 ("Regarding [the
27 defendants who appeared] . . . summary judgment is an apt procedural device as they
28 have appeared and answered"); see In re First T.D. & Investment, Inc., 253 F.3d 520,
525 (9th Cir. 2001) (defendant never appeared); Hunt v. Inter-Globe Energy, Inc.,
770 F.2d 145, 146 (10th Cir. 1985) (same); see also Fed. R. Civ. P. 56(e) (summary
judgment may be entered if adverse party does not respond to motion).

² Under their licenses, Defendants could demand changes to the Kazaa source code,
MUS 013095-120 (Borkowski Decl. Ex. 11) (MusicCity license agreement);

1 **II. THERE IS UNDISPUTED EVIDENCE OF DIRECT INFRINGEMENT**

2 Users of Defendants' systems infringe at least two of Plaintiffs' exclusive
3 copyright rights – reproduction and distribution. A&M Records, Inc. v. Napster, Inc.,
4 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster I").³ Defendants' own users
5 repeatedly informed them of infringement of the reproduction right. SUF 3(j); e.g.,
6 I.D. 173503 (Borkowski Decl. Ex. 11) ("I did download some Britney Spears").
7 Defendants' executives committed direct infringement, including popular music by
8 such artists as The Beatles, Michael Jackson, Aerosmith, Britney Spears, Pink Floyd,
9 and Led Zeppelin, and such movies as *Zoolander* and *South Park*. SUF 3(i), (k); see
10 also MusicCity's Third Supplemental Responses to First Set of Interrogatories Ex. A
11 (Borkowski Reply Decl. Ex. 82); Grokster's Response to First Set of Interrogatories
12 Ex. A (Borkowski Reply Decl. Ex. 83). Plaintiffs have downloaded copies of
13 infringing works, confirming violation of the distribution right (SUF 3), and have
14 provided screen shots from Defendants' systems showing further unlawful
15 distribution. Breen Decl., Exs. B-D; Creighton Decl. Ex. 18; see RCA Ariola Int'l v.
16 Thomas & Grayston Co., 845 F.2d 773, 781-782 (8th Cir. 1988) (summary judgment
17 for plaintiffs based on investigator's proof of direct infringement); In re Aimster
18 Copyright Litigation, 2002 WL 31006142 (N.D. Ill. Sept. 4. 2002) at *4; Olan Mills,
19 Inc. v. Linn Photo Co., 23 F.3d 1345, 1348 (8th Cir. 1994); see also Olkin Decl.
20 ¶¶ 6,16 (75% of files surveyed were infringing and owned by Plaintiffs; 90% were
21 infringing or likely infringing); Napster, 114 F. Supp. 2d at 911 (that more than 70%

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24 GR10904-24 (Id. Ex. 12) (Grokster license agreement). Grokster presumably may
also seek contractual or equitable indemnity from its licensor Kazaa.

25 ³ Grokster, at least, is candid enough to acknowledge that its challenge to direct
26 infringement is "an admittedly technical argument." Grokster Opp. 4. Its next
27 admission is obvious and dispositive: "[I]t is reasonable to *assume* that at least some
28 of the works . . . have been illicitly copied." Id. (emphasis in original). In an earlier
filing, Grokster's admission was unequivocal: it "is of course aware as a general
matter that some of its users *are* infringing copyrights." Grokster Summary
Judgment Memo. at 15 (emphasis added).

1 of files surveyed on Napster may be owned or administered by plaintiffs evidence of
2 direct infringement).⁴

3 Making available copyrighted works for copying, by itself, is a violation of
4 Plaintiffs' distribution rights. Napster I, 239 F.3d at 1014 ("users who upload *file*
5 *names* to the search index for others to copy violate plaintiffs' distribution rights")
6 (emphasis added). Defendants speculate, but do not offer *any* evidence, that the
7 listing of a title on their systems may not identify the work. To the contrary, just like
8 Napster, the fundamental functionality of Defendants' systems is based on users
9 searching for and finding works by title and/or author. Napster I, 239 F.2d at 1024
10 ("For Napster to function effectively, . . . file names must reasonably or roughly
11 correspond to the material contained in the files, otherwise, no user could ever locate
12 any desired music."); Napster, 114 F. Supp. 2d at 918 (rejecting argument that file
13 names "cannot be used to distinguish infringing from non-infringing files").
14 Ultimately, each of the copyrighted works identified in Plaintiffs' Amended
15 Complaints, and many others, were physically downloaded and verified. See, e.g.,
16 Breen Decl. ¶ 18; Cole Decl. ¶¶ 2, 3, 4; Creighton Decl. ¶¶ 16, 21, 24, 27, 28, 32;
17 Shock Opp. Decl. ¶ 3.

18 Grokster's reliance on the Audio Home Recording Act ("AHRA") and RIAA v.
19 Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999) is misplaced.
20 The AHRA has no application to peer-to-peer infringement. Napster I, 239 F.3d at
21 1024; Aimster at *9. Further, since Diamond held that computers are not within the
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23 ⁴ Defendants cite Arista Records, Inc. v. MP3Board, Inc. (Page Decl., Ex. A). There,
24 the defendant's website provided links to infringing content. The Court found
25 insufficient evidence for summary judgment that defendant's users downloaded
26 copyrighted files; here the evidence of such downloads is uncontroverted and
27 includes evidence of downloads by Defendants' own executives. Similarly, in
28 MP3Board, the court determined that insufficient evidence had been presented for
summary judgment as to whether copyrighted files were distributed; here, there is no
dispute that Defendants' users distribute millions of copyrighted files per day. In any
event, as Defendants construe the district court's opinion in MP3Board (in which a
motion for reconsideration is pending), it is contrary to this Circuit's law set forth in
Napster I.

1 scope of the AHRA, that statute cannot apply to copying and distribution over
2 Defendants' systems. Diamond, 180 F.3d at 1078.

3 **III. SONY-BETAMAX CANNOT IMMUNIZE DEFENDANTS**

4 The Sony-Betamax doctrine is a narrow one – the knowledge element of
5 contributory infringement cannot be established "merely" because a *product* "may
6 be used for infringement."⁵ Sony Corp. v. Universal City Studios, Inc., 464 U.S.
7 417, 428, 104 S.Ct. 774, 78 L.Ed. 2d 574 (1984). The Court in Napster I reaffirmed
8 this specific holding. Napster I, 239 F.3d at 1020-21 ("We are bound to follow
9 Sony, and will not impute the requisite level of knowledge to Napster merely
10 because peer-to-peer file sharing technology may be used to infringe plaintiffs'
11 copyrights"). Regardless of whether Plaintiffs bear the burden of proof on this issue
12 – as Defendants claim without citation to authority – or Defendants do, as the
13 Napster court recognized (referring to the issue as a "defense," not an element of
14 plaintiffs' claim), Sony-Betamax does not shield Defendants' infringing activities.

15 (a) Defendants' Knowledge of Infringement. "We observe that Napster's
16 actual, specific knowledge of direct infringement renders Sony's holding of limited
17 assistance to Napster." Napster I, 239 F.3d at 1020. The source of knowledge of
18 "infringing material" that the Court held sufficient is precisely the same here:
19 "[D]efendant had actual notice of direct infringement because the RIAA informed it
20 of more than 12,000 infringing files. . . . Although Napster, Inc. purportedly
21 terminated the users offering these files, the songs are still available using the Napster
22 service[.]" Id. at 1022 n.6; cf. Creighton Decl. ¶ 20 (notice to defendants in this case
23 of more than 8 million files).

24 MusicCity's argument -- that to be liable it must know that a particular user is
25 engaging in infringement of specific works and must have "the capacity to act"
26 (MusicCity Opp. 23-24) -- is directly contrary to Napster. It also would immunize

27 _____
28 ⁵ MusicCity "disagrees" with but cannot dispute that Sony-Betamax is not a defense
to vicarious infringement. Napster I, 239 F.3d at 1022.

1 massive infringement indefinitely until a plaintiff located each infringement, notified
2 a defendant, and the defendant failed to remove it (all of which did occur here, in
3 any event). The district court in the Napster MDL case rejected the position

4 MusicCity espouses here:

5 The conduct the court singled out [in Napster I] as
6 "demonstrated infringing use" is merely exemplary. It is
7 not an exclusive list of conduct necessary to give rise to
8 contributory liability. Nor should the court's language be
9 interpreted as mandating a showing of actual knowledge.

8 Id. at *7; see also Napster, 114 F. Supp. 2d at 918 ("The law does not require actual
9 knowledge of specific acts of infringement"), citing Gershwin Pub. Corp. v.
10 Columbia Artists Management, 443 F.2d 1159, 1163 (2d Cir. 1971); Aimster at *13
11 (rejecting argument that defendant must know of "actual specific transfers between
12 specific users"); Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146,
13 1169-1170 (C.D. Cal. 2002) ("general knowledge of copyright infringement"
14 including notice of "generic potential copyright infringement by users" is sufficient);
15 Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679, 686-88 (N.D. Cal. 1994) (element
16 satisfied "[e]ven if Defendants do not know exactly when games will be uploaded to
17 or downloaded from" their service); see also 17 U.S.C. § 512(c)(3)(A)(ii) (notice
18 under DMCA by a "representative list");⁶ ALS Scan, Inc. v. RemarQ Communities,
19 Inc., 239 F.3d 619, 625 (4th Cir. 2001) (DMCA "does not seek to burden copyright
20 holders with the responsibility of identifying every infringing work – or even most
21 of them – when multiple copyrights are involved"); Hotaling v. Church of Latter-
22 Day Saints, 118 F.3d 199, 204 (4th Cir. 1997) ("[N]o one can expect a copyright

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25
26 ⁶ MusicCity purports to reserve its right to claim it is covered by the DMCA
27 (MusicCity Opp. 2 n.1), failing to recognize the inconsistency between its denial that
28 it performs a service and the fact that the DMCA protects only Internet "service
providers." 17 U.S.C. §512(k) (emphasis added). In any event, Defendants never
would be eligible for DMCA safe harbor. See 17 U.S.C. § 512(c), (d), (i), (k); A&M
Records, Inc. v. Napster, Inc., 54 U.S.P.Q. 2d 1746 (N.D. Cal. 2000).

1 holder to prove particular instances of use by the public when the proof is impossible
2 to produce because the infringing [defendant] has not kept records of public use").⁷

3 (b) Defendants Do Not Provide A "Staple Article of Commerce." No court
4 ever has applied Sony-Betamax to a service as opposed to a product. See Aimster at
5 *15; A&M Records, Inc. v. Abdallah, 948 F. Supp. 1449, 1456-57 (C.D. Cal. 1996);
6 RCA Records v. All-Fast Sys., Inc., 594 F. Supp. 335, 339 (S.D.N.Y. 1984). In fact,
7 the Sony-Betamax doctrine originated in patent law, where it applies only to a
8 "staple *article* of commerce." 464 U.S. at 442 (emphasis added). Unlike
9 MusicCity's hypothetical "megaphone manufacturer," whose only contact with direct
10 infringers (like that of the Betamax manufacturer) occurs "at the moment of sale," id.
11 at 438, Defendants concede their ongoing and continuing relationship with
12 infringing users. Grokster Opp. 5, MusicCity Opp. 28. Whether that continuing
13 contact and relationship is called a software "product" or a "service," or if it is
14 maintained through just a few employees as Grokster claims (no more is needed in
15 the Internet age), Sony-Betamax does not apply. See Sony-Betamax, 464 U.S. at
16 437 (imposing contributory liability in case "involving an ongoing relationship
17 between the direct infringer and the contributory infringer at the time the infringing
18 conduct occurred" is "manifestly just").

19 (c) Defendants' Systems Facilitate Viral Distribution Of Copyrighted
20 Works. The private "time-shifting" for home use of free television programs by
21 making a single copy for personal viewing and later erasing it, as was at issue in
22

23 ⁷ Religious Technology Center v. Netcom Online Communication Serv., 907 F.
24 Supp. 1361 (N.D. Cal. 1995), relied on by MusicCity (MusicCity Opp. 24), does not
25 support its proposed knowledge standard. The court did not find Netcom's
26 knowledge insufficient, and in fact *denied* defendant Netcom's motion for summary
27 judgment on contributory infringement. Id. at 1381. The Court in Napster II
28 recognized that Netcom "would not mandate a determination that Napster, Inc. lacks
the knowledge requisite to contributory infringement" (239 F.3d at 1021-1022,
quoting Napster, 114 F. Supp. 2d at 919), and concluded that Napster had sufficient
knowledge. Finally, unlike Netcom, a passive provider of Internet access (Netcom,
907 F. Supp. at 1365), the Defendants here do not provide Internet access at all, but
rather infringing systems.

1 Sony-Betamax, is not the same as the viral distribution of copyrighted works to
2 millions of strangers. This is a distinction *with* a difference. Permitting the conduct
3 at issue in Sony-Betamax was vastly different from permitting global distribution of
4 millions of infringing copies, as the Court in Napster refused to do. At the outset of
5 the Sony-Betamax opinion (not limited to the fair use analysis, as Grokster claims),
6 the Supreme Court marked the parameters of its decision by recognizing that the case
7 before it "concerned the private, home use of VTR's for recording programs
8 broadcast on the public airways without charge to the viewer. No issue concerning
9 the transfer of tapes to other persons, . . . was raised." Sony-Betamax, 464 U.S. at
10 425. No court since has held Sony-Betamax applicable to facilitation of infringing
11 distribution. See Napster I, 239 F.3d at 1019; Napster, 114 F. Supp. 2d at 913-914;
12 Aimster at *16.

13 (d) Defendants' Designed Their Systems For Infringement. If Defendants
14 specifically design, advertise, or promote a system for infringing uses, or can avoid
15 infringing uses while permitting noninfringing uses, there is no logical or policy
16 reason to allow continued infringement. See Sony-Betamax, 464 U.S. at 436; see
17 also Aimster at *16; RCA Records, 594 F. Supp. at 339; Compaq Computer Corp. v.
18 ProCom Tech., Inc., 908 F. Supp. 1409, 1424 (S.D. Tex. 1995); Abdallah, 948 F.
19 Supp. at 1456.

20 (e) Defendants' Systems Do Not Have A "Substantial Noninfringing Use."
21 Defendants' inability to meet the above prerequisites renders the Sony-Betamax
22 defense inapplicable. Even if the facts were otherwise, Defendants fail because there
23 are no commercially significant, substantial noninfringing uses of Defendants'
24 systems. (Grokster does not even *claim* any.)

25 First, Defendants have failed completely to show the magnitude of any asserted
26 noninfringing uses. Their declarants fall far short of meeting the test of "substantial."
27 See Napster I, 239 F.3d at 1021; Abdallah, 948 F. Supp. at 1456 ("insubstantial"
28 noninfringing uses not sufficient); Sega, 857 F. Supp. at 685 ("incidental capabilities"

1 insufficient). See Plaintiffs' Opp. Memo. 14. The uncontradicted evidence is that
2 any such use is miniscule. Plaintiffs' Memo. 49; Creighton Decl. ¶ 25; Creighton
3 Opp. Decl. ¶ 8.⁸

4 Second, Defendants have failed to show that any asserted noninfringing use is
5 "commercially significant." Sony-Betamax, 464 U.S. at 442; Napster I, 239 F.3d at
6 1021 ("commercially significant noninfringing uses"); Napster, 114 F. Supp. 2d at
7 917; In re Certain Personal Computers, 224 U.S.P.Q. 270, 280 (U.S. Int'l Trade
8 Comm'n. 1984) ("commercially significant" use). Rather, the evidence shows that
9 infringement is the key to Defendants' success, just as in Napster.

10 Third, the undisputed, overwhelming, and primary use of Defendants' systems
11 is infringement. 75% of files on the FastTrack system are owned by Plaintiffs, and
12 90% of the total are infringing or likely infringing. See Olkin Decl. ¶¶ 6,16.⁹ Cf.
13 Napster, 114 F. Supp. 2d at 911 (more than 70% of files on Napster system owned by
14 Plaintiffs, 87% infringing); see also Aimster at *15; Sega, 857 F. Supp. at 685
15 (noninfringing uses "have not been shown to be the primary use"); Cable/Home
16 Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 846 (11th Cir. 1990)
17 (defendant utilized devices "primarily as infringement aids and not for legitimate,
18 non-infringing uses"); Atari, Inc. v. JS&A Group, Inc., 597 F. Supp. 5, 8 (N.D. Ill.
19 1983) ("primary use").

20 Ultimately, in an attempt to force the square peg of their infringing systems
21 into the round hole of Sony-Betamax, Defendants distort the "important public policy
22 goals that animate copyright." MusicCity Opp. 21. The Court in Sony-Betamax did
23

24 ⁸ Contrary to Defendants' assertion, Napster I did not hold that "future capabilities
25 were sufficient," but rather that the analysis should include "current *and* future
26 noninfringing uses." 239 F.3d at 1021 (emphasis added). Moreover, nothing in
27 Sony-Betamax indicates that its use of the term "capable" meant anything other than
28 having the current capability. Current uses were the only uses that the Supreme
Court discussed. In any event, Defendants do not provide any evidence of *future*
substantial noninfringing uses.

⁹ MusicCity makes these same files available over its system. See infra.

1 not hold that a single noninfringing use was sufficient or "substantial." MusicCity
2 Opp. 20, 22. Rather, the Court relied heavily on the facts that:

3 (a) plaintiffs represented "well below" 10% of relevant copyright holders,
4 464 U.S. at 443, and "the copying of the respondents' programs represents a small
5 portion of the total use of VTR's." Id. at 434. Here, unlike Sony-Betamax, the record
6 company Plaintiffs represent 85% of the sound recording market (Grokster Opp. 21),
7 the music publisher Plaintiffs constitute a class with over 27,000 publishers
8 representing more than 160,000 songwriters (Sanders Decl. ¶ 6), the motion picture
9 company Plaintiffs represent the U.S. film market and account for the majority of the
10 market for pre-recorded cassettes. Jacobsen Decl. ¶ 2.

11 (b) numerous copyright owners expressly authorized certain copying (Sony-
12 Betamax, 464 U.S. at 443-445) compared to virtually no authorization here; and

13 (c) the "primary" use of the Betamax VTR either was authorized or a fair
14 use (id. at 423), as compared here to the global distribution of copyrighted materials,
15 which is neither. Napster I, 239 F.3d at 1019.

16 The only case cited by Defendants, Vault Corp. v. Quaid Software, Ltd., 847
17 F.2d 255 (5th Cir. 1988), involved the specific statutory right to make a single,
18 "archival copy" of a computer program under 17 U.S.C. § 117(a), which is not
19 implicated here. The court's discussion on the issue of substantial noninfringing use,
20 as framed by the parties, was not directed to the magnitude or viability of the alleged
21 noninfringing uses (which were assumed sufficient), but to whether the copies made
22 by defendant's product were "archival copies." 847 F.2d at 263-267.¹⁰

23 Defendants' position would render Sony-Betamax a bar to all contributory
24 infringement claims. As Defendants argue it, *any* product or system theoretically
25

26 ¹⁰ Vault is unique in its factual and legal context and never has been followed on its
27 application of Sony-Betamax. See Napster, 114 F. Supp. 2d at 916 n.20
28 (distinguishing Vault). The court in Napster I did not cite Vault as relevant
precedent; and Defendants do not cite any other case decided in the 18 years since
Sony-Betamax in which a defendant successfully has invoked that defense.

1 would be "capable" of noninfringing use – for example, in the future Defendants
2 could choose to obtain a handful of licenses from non-party copyright owners, or to
3 themselves seed their systems with public domain materials more readily available
4 elsewhere (such as government websites). Under Defendants' construct, all *current*
5 infringing uses – no matter how massive – are immunized. Neither Sony-Betamax
6 nor copyright policy supports this destruction of contributory infringement law. See
7 Sony-Betamax, 464 U.S. at 442 ("The staple article of commerce doctrine must strike
8 a balance between a copyright holder's legitimate demand for effective – not merely
9 symbolic – protection of the statutory monopoly, and the rights of others freely to
10 engage in substantially unrelated areas of commerce").

11 **IV. DEFENDANTS ARE LIABLE FOR CONTRIBUTORY INFRINGEMENT**

12 **A. Defendants Materially Contribute To Infringement.**

13 Grokster does not dispute that it materially contributes to infringement.¹¹
14 MusicCity merely rehashes Napster's losing arguments, and mis-cites the applicable
15 law, asserting that "a contributory infringer must have acted in concert with the
16 direct infringer." MusicCity Opp. 32-34. The cases it cites do not support that
17 assertion, which is not the law. See Fonovisa, 76 F.3d at 264 ("providing the site
18 and facilities for known infringing activity is sufficient to establish contributory
19 liability"); Napster I, 239 F.3d at 1019-1022.

20 There can be no dispute that Defendants provide the system software, updates,
21 modifications, servers, ongoing support and maintenance, user anonymity, search and
22 resume-search functions, firewall circumvention, moderators and other staff, and a
23 user tutorial. SUF 4(a), (c), (d), (e), (f), (h), (i), (j), (k), (l), (m), (n), (p); 6(a), (b), (g),
24 (j); 8(g); 9(i). Defendants operated servers essential to connecting users to their
25 systems, and server programs that permit Defendants to support and fine-tune their
26

27 ¹¹ Grokster's argument that it lacks control over infringement is both incorrect and
28 irrelevant. Ability to supervise or control is not an element of contributory
infringement. Casella v. Morris, 820 F.2d 362, 365 n.4 (11th Cir. 1987).

1 systems, and communicate with their users. SUF 4(d), (f), (h), (i), (j), (l), (p); 6(a),
2 (b), (g). Going even further than Napster, MusicCity provides some of the actual
3 files distributed – automatically making available for distribution (via its Morpheus
4 2.0) all files in its users' "share folders" from Kazaa or other systems. See infra and
5 Plaintiffs' Opp. 20-23. Defendants organized their systems and are the "but for"
6 cause of their users' infringement. They also promote the infringing conduct over
7 their systems. SUF 3(i), (n); 5(f) and in words reminiscent of Napster's, MusicCity
8 boasts that using its system is the way to "find what you want, when you want it."
9 O'Neil 02470-72 (Borkowski Reply Decl. Ex. 79).

10 **B. Defendants Have Knowledge Of Infringing Activity.**

11 That massive infringements were occurring over Defendants' systems was not
12 news to Defendants; it was part of their business plan. SUF 3(c), (d), (e), (f), (g).
13 The evidence of Defendants' actual and constructive knowledge is at least as
14 compelling as the evidence found sufficient in Napster. Plaintiffs' Memo. 23-30;
15 SUF 3. MusicCity argues only (and incorrectly, see III(a), supra) that a specific type
16 of knowledge is required under Sony-Betamax. Grokster never contests that it has
17 the requisite knowledge.

18 **V. DEFENDANTS ARE VICARIOUSLY LIABLE**

19 **A. Defendants Have The Ability To Supervise Or Control.**

20 Defendants misstate the law when they contend that "actual control" is
21 required. Although Defendants do have actual control, it is the *right and ability* to
22 supervise or control that is material. See Fonovisa, 76 F.3d at 226; Gershwin, 443
23 F.2d at 1161-63; Shapiro, Bernstein & Co. v. H.L. Green Co., Inc., 316 F.2d 304,
24 306 (2d Cir. 1963). That is so because "it is ordinarily fair and reasonable to place
25 responsibility . . . on the person who profits" from the infringement. PolyGram Int'l
26 Publ'g v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1325 (D.Mass. 1994).

27 The requisite level of supervision or control can be demonstrated in many
28 ways. At a minimum, "[t]he ability to block infringers' access to a particular

1 environment for any reason whatsoever is evidence of the right and ability to
2 supervise." Napster I, 239 F.3d at 1023, citing Fonovisa, 76 F.3d at 262. Defendants
3 indisputably have that ability. They also refuse to take any steps to prevent or limit
4 infringement, much less police to the "fullest extent." Napster I, 239 F.3d at 1023
5 ("Turning a blind eye to detectable acts of infringement for the sake of profit gives
6 rise to liability"); see also Gershwin, 443 F.2d at 1159 ("failure to police the conduct
7 of the primary infringer" gives rise to liability). Vicarious liability also is warranted
8 because Defendants promote their systems, provide the suppliers of infringing
9 content (their users), and create their audience. SUF 3(l), (n); 4(b), (j), (n); 5(a), (e),
10 8(b), (c); 10. See Fonovisa, 76 F.3d at 263 ("pervasive participation in the formation
11 and direction' of the direct infringers, including promoting them (i.e., creating an
12 audience for them)"), quoting Gershwin, 443 F.2d at 1163; Napster I, 239 F.3d at
13 1023.

14 **B. Defendants Exercise Actual Supervision And Control**

15 There is overwhelming evidence of Defendants' actual exercise of supervision
16 and control, which is uncontroverted. See generally Plaintiffs' Memo. 35-40;
17 Plaintiffs' Opp. Memo. 18-23, 26-29; Kleinrock and Horowitz Decls.; SUF 6.

18 • Defendants each operated "root" supernodes on their central servers.
19 which, for a period of time, were necessary for new users to gain access to the
20 systems. Smith Depo. 813:16-814:1 (Borkowski Reply Decl. Ex. 76); see also Smith
21 Depo. 177:4-178:7 (Borkowski Decl. Ex. 2); and ID168236 (id. Ex.11). These root
22 supernodes created an index of files offered by the users connected to them, and
23 processed user search requests. SUF 4(j). Smith Depo. 806:25-808:20 (Borkowski
24 Reply Decl. Ex. 76); Kleinrock Decl. ¶ 37(b). They were thus the equivalent of
25 Napster servers.¹²

26
27
28 ¹² The fact that Defendants currently may not use a centralized file index, but instead
"outsource" that function to users' computers (some of which Defendants once
operated), is irrelevant. Aimster at *3 n.6. In fact, Defendants' systems, as Napster,

1 • Defendants operated other servers ("kazaaservers") which registered and
2 logged users into the FastTrack system. Smith Depo. 103:16-104:3 (Borkowski Decl.
3 Ex. 2), 106:14-20 (Borkowski Decl. Ex. 2), 107:20-23 (Borkowski Reply Decl. Ex.
4 76), 120:12-20 (Borkowski Decl. Ex. 2); D. Rung Depo. 87:5-8; 88:11-16; 136:12-
5 137:7 (Borkowski Decl. Ex. 5); M. Rung Depo. 51:2-18, 52:11-53:4, 62:12-25
6 (Borkowski Decl. Ex. 6). By deleting a user name and password from their servers,
7 Defendants admit they could prevent any user from connecting to the system. Smith
8 Depo. 154:11-23 (Borkowski Decl. Ex. 2); Smith Opp. Decl. ¶ 84.

9 • Defendants had the ability to add users to a "banned list" by blocking the
10 user's Internet address. Smith Depo. 302:24-303:25, 304:5-16, 313:18-314:1
11 (Borkowski Decl. Ex. 2); D. Rung Depo. 229:8-230:14 (Borkowski Decl. Ex. 5).
12 MusicCity admits that it blocked the Internet addresses of entities that assisted
13 copyright owners in enforcing their copyrights. Smith Depo. 532:1-13 (Borkowski
14 Decl. Ex. 2) and Ex. 229 (Borkowski Decl. Ex. 11); MusicCity Opp. 14.

15 • Defendants maintained the contractual right to ban users. SUF 6(c).

16 • Defendants (and their licensor) have the ability to terminate every user
17 and to change the protocol and encryption governing all communications on their
18 systems. They did so to block the efforts of hackers (Smith Depo. 318:18-319:15
19 (Borkowski Decl. Ex. 2), 343:7-11 (Borkowski Reply Decl. Ex. 76), 354:17-355:22
20 (Borkowski Decl. Ex. 2); Kleinrock Decl. ¶¶ 49(c) and 63); and again to terminate
21 the ability of all MusicCity users to connect to the system. Smith Depo. 412:14-
22 413:12, 414:3-9, 415:17-416:5 (Borkowski Decl. Ex. 2); Kleinrock Decl. ¶ 65.

23 • Defendants have effected changes to the user programs that altered their
24 functioning (e.g., changing how user programs broadcast search requests over the
25 system). Smith Depo. 101:5-20 (Borkowski Reply Decl. Ex. 76); Kleinrock Decl.
26 ¶ 49. Defendants communicated with user supernodes every 12 hours, and demoted

27 _____
28 undisputedly have both decentralized aspects and centralized server aspects.
Horowitz Decl. Ex. 19; Gribble Decl.

1 them to regular "node" status if they were not running the current version of the user
2 program. Smith Depo. 253:9-20, 254:7-23, 260:25-261:4 (Borkowski Decl. Ex. 2);
3 ID 168312 (Borkowski Decl. Ex. 11).

4 . On numerous occasions, Defendants sent messages prompting their
5 users to upgrade to new versions of the user program. Smith Opp. Decl. ¶ 85; D.
6 Rung Depo. 236:17-239:19 (Borkowski Decl. Ex. 5). This "auto-update" enables
7 Defendants regularly to modify the user program, including in ways directly related
8 to its file copying and distribution components.¹³ Smith Depo 107:3-14 (Borkowski
9 Decl. Ex. 2), 343:7-11 (Borkowski Reply Decl. Ex. 76); Kleinrock Decl. ¶ 50.

10 . Through numerous central servers, Defendants maintain continuous
11 contact and communication with their users, and are able to direct advertising and
12 other content inside a running user application. Smith Depo. 713:3-734:24
13 (Borkowski Reply Decl. Ex. 76); Smith Opp. Decl. ¶¶ 58-59, 86-89.

14 Moreover, the admitted, undisputed facts prove that MusicCity now has *more*
15 control over its Gnutella-based version of Morpheus.

16 *First*, MusicCity now concedes that it has the ability to force any user to accept
17 any upgrade or new application of MusicCity's choosing. Smith Depo. 751:8-752:2,
18 753:6-21, 757:7-21, 771:12-772:17 (Borkowski Reply Decl. Ex. 76); Gribble Depo.
19 363:7-366:1, 428:24-430:4 (Borkowski Reply Decl. Ex. 78); Horowitz Decl. ¶¶ 35-

20 ¹³ One of MusicCity's counsel previously acknowledged the importance of this fact:

21 "Auto-update: Does the use of 'auto-update' functionality in peer-to-peer
22 filesharing software increase the likelihood of copyright liability for the
23 software vendor?"

24 It may. Building auto-update functionality into your code may increase the
25 risk that a court (1) will find that you have the right and ability to 'control' your
26 users (after all, you could disable the software via update, thus effectively
27 'terminating' users); and (2) will have the capability to force you to make
28 modifications to the code, then distribute those changes to your users via
'update' (and also order you to deny service to any previous versions)." EFF
FAQ. Fred von Lohmann, Esq. Borkowski Reply Decl. Ex. 81.

MusicCity itself realized this: "Legally we can't have auto-update servers." ID
1536322 (Borkowski Decl. Ex. 11).

1 39. In other words, MusicCity can compel a user to download and install any
2 upgrade - without giving the user an opportunity to decline it. Smith Depo. 771:22-
3 772:17 (Borkowski Reply Decl. Ex. 76). This "forced upgrade" gives MusicCity
4 complete dominion and control over its users and system - more control than Napster
5 had - including the ability to deploy any infringement-prevention it wants.

6 *Second*, MusicCity now concedes that *it* can and does make the decision to
7 offer for distribution through Morpheus certain categories of files on its users'
8 computers. The current Morpheus application, by design, makes available for
9 distribution all files in the users' Kazaa directories (and any of another half-dozen
10 "file-sharing" applications). Smith Depo. 820:11-15, 823:16-24 (Borkowski Reply
11 Decl. Ex. 76); Gribble Depo. 395:1-396:21 (Borkowski Reply Decl. Ex. 78).
12 Morpheus does this without asking or telling the user – even if the user has taken
13 affirmative steps to prevent distribution of those files. Smith Depo. 825:25-826:23
14 (Borkowski Reply Decl. Ex. 76); Horowitz Decl. ¶¶ 54-58.

15 *Third*, MusicCity built into its current Morpheus system the ability to control
16 aspects of the user application centrally from a MusicCity server, through its
17 "auto.xml" function. Through it, MusicCity communicates directly and periodically
18 with its users' computers, and determines (and changes) the timing and frequency of
19 the communications. The auto.xml feature allows MusicCity to change the behavior
20 and functionality of the Morpheus user application from its central servers. Smith
21 Depo. 683:22-686:21 (Borkowski Reply Decl. Ex. 76); see Horowitz Decl. ¶ 40-49.

22 *Fourth*, MusicCity assigns to and receives from each user an identifier
23 ("GUID") that uniquely identifies each user application. Smith Depo. 719:12-725:15,
24 729:11-20, 730:3-7 (Borkowski Reply Decl. Ex. 76); Gribble Depo 270-76
25 (Borkowski Reply Decl. Ex. 78). MusicCity receives user statistics and other
26 personal user information that it associates with the unique GUID. Smith Depo.
27 724:11-726:2 (Borkowski Reply Decl Ex. 76.)

28

1 **C. Defendants Refuse To Filter to Stop Infringement.**

2 Defendants acknowledge that they now filter (or have filtered) their systems in
3 various ways – for example, to block "adult" or offensive files, viruses, or "bogus"
4 files. Kleinrock Decl. ¶ 69; Smith Depo. 527:12-528:18 (Borkowski Decl. Ex. 2) and
5 Ex. 227 (Borkowski Decl. Ex. 68).¹⁴ However, Defendants have never incorporated
6 means to filter Plaintiffs' copyrighted works, even though it is uncontroverted that
7 they could do so. Kleinrock Decl. ¶¶ 82-97; Breslin Decl.; Ikeyzoye Decl.; D. Rung
8 Depo. 248:14-249:6 (Borkowski Reply Decl. Ex. 77); Smith Depo. 837:22-838:25,
9 839:13-20, 842:12-843:23 (Borkowski Reply Decl. Ex. 76). Defendants admit that
10 they have spent thousands of hours working on technology issues to advance their
11 business interests, but have done nothing to even investigate infringement prevention
12 mechanisms. D. Rung Depo. 248:14-249:6 (never gave any thought to it); Smith
13 Depo. 780:7-781:5 ("not a whole lot" of time on infringement prevention). The
14 reason is obvious: the availability of the most popular copyrighted works is the
15 lifeblood of Defendants' business. MusicCity acknowledged the obvious after a
16 leading file identification company sent it a proposal in 2002:

17 "What this is, is a technology that will allow Morpheus to see what our users
18 are sharing so that in turn we can 'tie into a rights payment infrastructure.' I
19 know this is something we DO NOT want to do, but am not sure how to word
20 that." ID1570734 (Borkowski Decl. Ex. 11) (emphasis in original).

21 Defendants' complete lack of effort and investigation regarding any type of
22 filtering is why their conclusory (and largely unsupported) arguments about the

23 _____
24 ¹⁴ A document just produced by Sharman Networks (successor to Kazaa) reflects
25 Defendants' conundrum:

26 I need to reiterate that the fact that Sharman is able to detect and filter the
27 Benjamin virus will undoubtedly be used by the RIAA and MPAA to argue
28 that Sharman has the ability to detect and/or filter allegedly infringing files. . . .
[E]very time we demonstrate that the KMD [Kazaa Media Desktop] software
can be modified to prevent or limit the exchange of certain types of files, we
incrementally strengthen the RIAA's position on this. SHAR 002307-09
(Borkowski Reply Decl. Ex. 80).

1 "challenges" of filtering cannot create a material issue.¹⁵ However, the undisputed
2 evidence that Defendants could have incorporated mechanisms to filter copyrighted
3 works also comes from Defendants' admissions:

4 For example, in an admission equally applicable to Grokster, MusicCity
5 admitted that - even without the FastTrack source code - it could have written a
6 program as part of its user application (or, more easily, could have used a third party
7 program) to access a user's "share" folder and authenticate each file against a
8 database of copyrighted works. Smith Depo. 424:6-16, 834:12-837:17 (Borkowski
9 Reply Decl. Ex. 76); Gribble Depo. 427:4-428:23 (Borkowski Reply Decl. Ex. 78).
10 In addition, MusicCity admitted that it knew from the start that Kazaa could
11 incorporate a mechanism to monitor files that users were downloading so they could
12 track copyrighted material. Smith Depo. 90:18 - 95:10; see also id. at 68:8-71:8
13 (Borkowski Reply Decl. Ex. 76). Grokster too (as another FastTrack licensee) could
14 have done so.

15 Defendants essentially are left with the (unsupported) arguments that filtering
16 might not be perfect, and that they have "no duty to redesign" their software. The
17 former argument rings hollow coming from Defendants who profit from the
18 infringements they do nothing to prevent. The latter argument ignores that
19 Defendants have changed their systems multiple times in two years -- OpenNap to
20 FastTrack (and MusicCity) to Gnutella. Indeed, MusicCity has modified its recently-

21
22
23 ¹⁵ MusicCity's proffered expert, Gribble, conceded that filtering can be implemented.
24 ("as an instance of filter-in or filter-out now at work, there's a ton of systems that use
25 this capability, including such things as distributed file systems . . ."). Gribble Depo.
26 188:15-21 (Borkowski Reply Decl. Ex. 78). Moreover, he testified that each of the
27 "technical challenges" identified in his declaration also would have been applicable to
28 the filtering Napster was ordered to implement (Gribble Depo. 460:12-24 (Borkowski
Reply Decl. Ex. 78)) - leaving Gribble's opinion legally irrelevant, since the district
court ordered Napster to filter, and the Ninth Circuit affirmed that order. Gribble's
conclusory concerns are entitled to no deference for the additional reasons that
Gribble admitted he knew nothing about the filtering Napster implemented. Gribble
Depo. 458:1-19 (Borkowski Reply Decl. Ex. 78).

1 released Morpheus system more than twenty times in just a few months. Smith
2 Depo. 524:24-525:17, 584:22-585:25 (Borkowski Reply Decl. Ex. 76).

3 Both arguments also ignore the dictates of Napster.¹⁶ Napster was ordered to
4 filter copyrighted works, which it first did through text filtering based on file
5 names.¹⁷ Napster also was required to implement fingerprinting technology. A&M
6 Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1097-1098 ("Napster II") ("The new
7 filter analyzed the contents of a file using audio fingerprinting . . . It was a proper
8 exercise of the district court's supervisory authority to require use of the new filtering
9 mechanism[.]"). The Court specifically rejected Napster's argument (echoed by
10 Defendants here) that requiring it to implement filtering would change its "current
11 architecture." Napster II, 284 F.3d at 1096. Audio fingerprinting was implemented
12 by Napster – and works. Id. ("Napster was able to prevent sharing of much of
13 plaintiffs' noticed copyrighted works").¹⁸

14
15 ¹⁶ Ellison v. Robertson, 189 F. Supp. 2d 1051 (C.D. Cal. 2002) is inapposite. In that
16 case, the district court held that AOL would not be disqualified from DMCA safe
17 harbor protection for providing Internet access to individuals who used that access (as
18 well as Internet access provided by others) to post an infringing work on a third party
19 USENET newsgroup. The court determined that AOL was not liable because the
20 infringing material was "accessed from outside of AOL, and AOL had no ability to
21 effectively control [the user's] infringement." Id. at 1060, 1062; see Hendrickson v.
22 Ebay, Inc., 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001), also cited by MusicCity
23 (DMCA applies to Internet website service used to advertise infringing items).
24 Unlike AOL's passive hosting of a newsgroup, Defendants do not provide Internet
25 access, Defendants' users could not communicate and infringe without Defendants'
26 systems, and Defendants have the ability to block access before infringement takes
27 place. See Aimster at *17, 18 (rejecting Aimster's argument that it engages in the
28 same conduct as AOL).

22 ¹⁷ File name filtering alone (which Defendants have never attempted) will block
23 many infringing files. Defendants, however, are able to do more. Unlike Napster,
24 Defendants already extract metadata from every file offered by users to aid in
25 searching. This metadata would result in much more accurate filtering. Kleinrock
26 Decl. ¶¶ 70-76.

25 18 Grokster spends a lot of time arguing, from one piece of out-of-context testimony,
26 that a fingerprint-based filtering would be inordinately slow. However, the witness
27 clarified that the scope of the filtering Grokster hypothesized in its questioning was
28 vastly overstated and unrealistic. Ikezoye Depo. at 83:15-86:15 (Borkowski Reply
Decl. Ex. 84) (a realistic filtering scenario would require just a tiny fraction of a
second to authenticate a file). Moreover, any time taken to authenticate files would
be invisible to the user, and would not interfere with a user's use of the system.
Kleinrock ¶ 96. Grokster's analysis is otherwise both unsupported and flawed. File

1 Defendants have refused to take any meaningful steps to prevent piracy.
2 Napster I, 239 F.3d at 1023 ("the reserved right to police must be exercised to its
3 fullest extent."); Napster II, 284 F.3d at 1098 ("Napster must do everything
4 feasible"). In the end, it is not for Plaintiffs to advise Defendants how to stop
5 infringing; it is Defendants who are required to avoid infringement. See also Russ
6 Hardenburgh, Inc., 982 F. Supp. at 510-11 ("it is more reasonable . . . to place the
7 cost of protecting against copyright infringement on the parties who provide the
8 system which facilitates infringement, rather than the innocent owner of the
9 copyright").

10 VI. THERE IS NO GENUINE ISSUE AS TO MISUSE

11 Defendants excuse their failure to properly raise the misuse defense and their
12 complete lack of proof by asserting that this issue can be re-argued at some future
13 time. Grokster Opp. 18 n.16; MusicCity Opp. 34-35. Defendants then cite to a year
14 old Rule 56(f) declaration in another case and to facts not before this Court, and rely
15 on "charges" and consent decrees involving unrelated matters (e.g., CD prices), and
16 which recite that each is "for settlement purposes only and does not constitute an
17 admission . . . that the law has been violated." See, e.g., <www.ftc.gov/os/2000/09/sony.do.htm> Defendants invoke a decision by the Napster Court that only
18 permitted limited discovery. In re Napster, Inc. Copyright Litigation, 191 F. Supp.
19 2d 1087, 1102 (N.D. Cal. 2002). Defendants do not even speculate that misuse
20 applies to the motion picture Plaintiffs, and they concede it has no application to the
21 music publisher Plaintiffs. Neither the Napster court nor any other court ever has
22 upheld the narrow defense of misuse under circumstances remotely similar to those
23

24
25 identification systems have been used (Breslin Decl. ¶7) and can be implemented in a
26 peer-to-peer system (Breslin Decl. ¶¶ 19-21; Hyman Decl. ¶¶ 4-8; Ikezoye Decl. ¶¶
27 9-11); the digital fingerprint is small in size and easy to store and send (Breslin Decl.
28 ¶ 9; Ikezoye Decl. ¶ 7); it is fast (Breslin Decl. ¶¶ 15, 21; Ikezoye Decl. ¶ 7); scalable
(Breslin Decl. ¶ 21; Ikezoye Decl. ¶ 12); and, any potential degradation can be
minimized (Breslin Decl. ¶ 21).

1 here. See, e.g., Napster I, 239 F.3d at 1027 ("There is no evidence here that
2 Plaintiffs seek to control areas outside of their grant of monopoly").¹⁹

3 **CONCLUSION**

4 Plaintiffs' motion for summary judgment should be granted.

5 Dated: November 4, 2002

6 By *Russell J. Frackman*
Russell J. Frackman

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26 ¹⁹ Grokster also makes the unsupported assertion that the record company plaintiffs
27 falsely registered their copyright as "works for hire." The same argument failed to
28 impress the court in Napster, 191 F. Supp. 2d at 1100. Grokster then acknowledges
its stipulation to ownership as to all except the Leiber Plaintiffs. As to the latter, the
evidence of ownership (Kalmanson Decl. ¶¶ 9-13) is uncontradicted.

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14 *RCA Records Label, a unit of BMG*
15 *Music d/b/a BMG Entertainment, Sony*
16 *Music Entertainment, Inc., UMG*
17 *Recordings, Inc., Virgin Records*
18 *America, Inc., Walt Disney Records,*
19 *and Zomba Recording Corporation*

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21 AIDAN SYNNOTT
22 THEODORE K. CHENG
23 MATTHEW KALMANSON
24 MELANIE I. BREEN
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Ltd., Songs of Peer, Ltd., Criterion
Music Corporation, and Famous Music
Corporation, Bruin Music Company,
Ensign Music Corporation, and Let's
Talk Shop, Inc., d/b/a Beau-Di-O-Do
Music on behalf of themselves and all
others similarly situated,

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Company, Elektra Entertainment Group,
Inc., London-Sire Records, Ind., Warner
Bros. Records, Inc., WEA International,
Inc., and WEA Latina, Inc.

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the county of Los Angeles, State of California. I am over the age of 18,
4 and not a party to the within action; my business address is Mitchell Silberberg & Knupp LLP,
11377 West Olympic Boulevard, Los Angeles, California 90064-1683.

5 On November 4, 2002, I served the foregoing document(s) described as

6 **PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN**
7 **SUPPORT OF MOTION FOR SUMMARY JUDGMENT [FILED UNDER SEAL**
PURSUANT TO PROTECTIVE ORDER]

8 on the parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed
9 as follows, and taking the action described below:

- 10 ***** BY FAX:** I sent a copy of the above-described document(s) WITHOUT
11 EXHIBITS via telecopier to each of the individuals set forth below, at the
12 facsimile telephone number opposite each name: and
13 **** BY OVERNIGHT MAIL:** I also deposited FULL COPIES of the above-
14 described document(s) with Federal Express in the ordinary course of business, by
depositing the document(s) in a box regularly maintained by Trident Center, 11377
West Olympic Blvd., Los Angeles, CA 90064, or delivering the document(s) to an
authorized driver for the carrier, in an envelope designated by the carrier with
delivery fees provided for, addressed as shown below.

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17 Judith B. Jennison, Esq. (Fax) 415-344-7050 *** **
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20 Charles S. Baker / Lance Lackey (Fax) 512-330-4001 *** **
21 Brobeck Phleger & Harrison LLP
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- 23 *** BY PLACING FOR COLLECTION AND MAILING:** I sealed and placed
24 the envelope(s) for collection and mailing following ordinary business practices. I
25 am readily familiar with the firm's practice for collection and processing of
26 correspondence for mailing with the United States Postal Service. Under that
practice it would be deposited with the U.S. Postal Service on that same day with
postage thereon fully prepaid at 11377 West Olympic Boulevard, Los Angeles,
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27 Jennifer Stisa Granick, Esq.
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Executed on November 4, 2002, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Andrea Petit