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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE MARILYN HALL PATEL, CHIEF JUDGE

A&M RECORDS, INC., A CORPORATION; ET AL.,	)	
PLAINTIFFS,	)	
VS.	)	NO. C 99-5183 MHP
NAPSTER, INC., A CORPORATION,	)	
DEFENDANT.	)	
JERRY LEIBER, INDIVIDUALLY AND DOING BUSINESS AS JERRY LEIBER MUSIC, ET AL.,	)	
PLAINTIFFS,	)	
VS.	)	NO. C 00-0074 MHP
NAPSTER, INC., A CORPORATION; AND EILEEN RICHARDSON,	)	
DEFENDANTS.	)	

SAN FRANCISCO, CALIFORNIA
WEDNESDAY, JULY 26, 2000

TRANSCRIPT OF PROCEEDINGS

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WEDNESDAY - JULY 26, 2000 2:05 P.M.

THE CLERK: CALLING CIVIL 99-5183, A&M RECORDS VERSUS NAPSTER, INCORPORATED; CIVIL 00-0074, JERRY LEIBER, ET AL., VERSUS NAPSTER, INCORPORATED.

THE COURT: AND YOU HAVE ALREADY RECEIVED THE APPEARANCES OF ALL COUNSEL --

THE CLERK: WE HAVE.

THE COURT: -- WHO ARE GOING TO BE APPEARING TODAY?

DID I UNDERSTAND YOU WERE GOING TO SUBMIT THIS ON THE PAPERS?

(LAUGHTER)

MR. JOHNSON: I DON'T THINK SO, YOUR HONOR.

MR. FRACKMAN: WE MIGHT, JUDGE.

THE COURT: YOU DON'T KNOW; DO YOU?

WELL, I HAVE A NUMBER OF QUESTIONS AND I DON'T WANT TO LEAVE OPEN-ENDED ARGUMENT EITHER BECAUSE THIS IS A SMALL, VERY SMALL PORTION OF THE PAPERS THAT ARE SITTING BACK IN CHAMBERS AND ELSEWHERE IN THIS BUILDING.

BUT AT LEAST FOR THE TIME BEING, UNTIL WE GET INTO, YOU KNOW, SOME QUESTIONS THAT I HAVE, I'LL GIVE YOU EACH 20 MINUTES TO MAKE THE BEST ARGUMENT THAT YOU CAN MAKE IN TERMS OF THOSE ISSUES THAT YOU THINK NEED TO BE ADDRESSED MOST FULLY.

I MEAN, IF YOU DON'T THINK THAT WE HAVEN'T ALREADY HAD ENOUGH TO DIGEST AND THAT WE OUGHT TO BE CONVINCED ONE WAY

OR THE OTHER ON SOME ISSUES BY VIRTUE OF ALL THE PAPERS, THEN I DON'T KNOW WHAT THE PURPOSE WAS OF FILING ALL THE PAPERS.

BUT WHO'S GOING TO BE ARGUING FOR PLAINTIFFS?

MR. FRACKMAN: YOUR HONOR, RUSSELL FRACKMAN FOR THE A&M PLAINTIFFS AND MR. RAMOS. AND WE'VE TENTATIVELY, WITH THE COURT'S PERMISSION, DECIDED ON AN ALLOCATION OF THE ARGUMENT BETWEEN US; AND, OF COURSE, DEPENDING ON WHAT THE COURT'S QUESTIONS MAY BE, BUT I WOULD LIKE TO LEAD OFF IF I MAY.

THE COURT: IS THAT AGREEABLE WITH YOU?

MR. RAMOS: ABSOLUTELY.

MR. FRACKMAN: IT BETTER BE.

THE COURT: DID YOU DRAW STRAWS OR WHATEVER?

(LAUGHTER)

THE COURT: WELL, IF THERE ARE TWO OF YOU, I'M STILL GOING TO GIVE YOU 20 MINUTES.

MR. FRACKMAN: RIGHT.

THE COURT: AND THEN WE'LL SEE WHERE WE GO FROM THERE BECAUSE I DON'T THINK IT'S FAIR TO THE OTHER SIDE SINCE THE ARGUMENTS FOR EACH -- WELL, THE ARGUMENTS THAT YOU HAVE ARE PRETTY MUCH THE SAME ALBEIT THAT YOU MAY HAVE DIVIDED UP OR ALLOCATED SOME OF THE RESPONSIBILITIES.

MR. FRACKMAN: YES. I MAY TAKE UP MOST OF THAT.

THE COURT: ALL RIGHT. THEN YOU MAY PROCEED.

MR. FRACKMAN: THANK YOU, YOUR HONOR.

WHILE YOUR HONOR IS QUITE CORRECT AND WE'VE PROVIDED

THE COURT WITH WHAT I WOULD EUPHEMISTICALLY CALL A WEALTH OF PAPERS, I BELIEVE AND WE BELIEVE THAT THE LEGAL ISSUES INVOLVED HERE, THE NARROW LEGAL ISSUES INVOLVED IN THIS CASE ARE STRAIGHTFORWARD AND WE BELIEVE THAT ON THE MERITS WE HAVE SHOWN AN OVERWHELMING LIKELIHOOD OF SUCCESS ON THE MERITS.

AND WHAT I WOULD LIKE TO DEVOTE SOME OF MY TIME TO, YOUR HONOR, IS THE ISSUE OF IRREPARABLE HARM AND THE NEED, THE CURRENT OVERWHELMING NEED FOR AN INJUNCTION TODAY.

I WOULD LIKE TO START OFF, YOUR HONOR, ILLUSTRATING THAT NEED BY THE FOLLOWING: SINCE THE COURT WALKED IN SEVERAL MINUTES AGO AND COURT STARTED THIS AFTERNOON, 30, 40, MAYBE 50,000 RECORDINGS HAVE BEEN DOWNLOADED USING THE NAPSTER SYSTEM; 14,000 RECORDINGS ARE DOWNLOADED A MINUTE USING THE NAPSTER SYSTEM.

IF WE ARE HERE FOR, LET'S SAY, THREE HOURS, 2,520,000 RECORDINGS WILL HAVE BEEN DOWNLOADED. THAT'S 20 MILLION A DAY. THOSE ARE NOT ONLY OUR FIGURES, YOUR HONOR. THOSE ARE NAPSTER'S FIGURES. THEY SAY BETWEEN 12 AND 30 MILLION A DAY.

AND IF WE TAKE THE SIX MONTHS THAT NAPSTER HAS POSITED IT WILL TAKE TO GET TO TRIAL, THERE WILL BE 3,600,000,000 SEPARATE RECORDINGS DOWNLOADED USING THE NAPSTER SYSTEM AND 90 PERCENT OF THOSE, YOUR HONOR, ARE COPYRIGHTED RECORDINGS. THEY DON'T SERIOUSLY CHALLENGE ANY OF THOSE FIGURES.

THE COURT: ARE YOU GETTING THOSE FROM THE OLKIN (PHONETIC) FIGURES FROM '87 PERCENT?

MR. FRACKMAN: MR. OLIN.

THE COURT: OLIN, EXCUSE ME.

MR. FRACKMAN: YES, I'M GETTING BOTH THE PER MINUTE AND THE APPROXIMATELY 90 PERCENT. INDEED, AS YOUR HONOR KNOWS, WE BELIEVE IT'S MORE THAN THAT FROM MR. OLIN'S MATERIALS.

MR. KESSLER IN THE MATERIALS THAT WERE PRESENTED TO THE COURT BRAGS THAT THERE ARE 100 USERS PER SECOND ATTEMPTING TO LOG ON TO NAPSTER AND MAKING AVAILABLE 10,000 MUSIC FILES PER SECOND. THAT, WE THINK, YOUR HONOR, SPEAKS MOST ELOQUENTLY OF THE NEED, BUT THAT IS NOT ALL, YOUR HONOR.

WHEN WE STARTED THIS ACTION SEVERAL MONTHS AGO, NAPSTER PROBABLY HAD ABOUT 200,000 USERS. TODAY IT HAS, THEY SAY -- IT SAYS 20 MILLION USERS. NAPSTER ESTIMATES -- AND I APOLOGIZE TO THE COURT, BUT WE DO HAVE A CHART....

(PAUSE IN PROCEEDINGS.)

MR. FRACKMAN: NAPSTER ESTIMATES BY THE END OF THE YEAR, BEFORE THE SIX-MONTH PERIOD THAT THEY SAY IT WILL TAKE TO GET TO TRIAL, THEY WILL HAVE 75 MILLION USERS.

AND THE NUMBERS I GAVE TO THE COURT A MOMENT AGO DID NOT EVEN TAKE INTO ACCOUNT THIS EXPONENTIAL GROWTH. THESE ARE COPIES OF PROTECTED WORKS THAT ARE MADE AND DISTRIBUTED THROUGH THE NAPSTER SYSTEM BY PEOPLE WHOSE ANONYMITY IS PROTECTED BY NAPSTER; AND EXCEPT, AS YOUR HONOR KNOWS THROUGH THE COURT

ORDER, THE WORKS THEMSELVES CAN'T EVEN BE IDENTIFIED.

NO ROYALTIES ARE PAID TO ANYONE. THE ARTIST WHOSE WORK GOES INTO THIS, THE MUSIC PUBLISHERS AND WRITERS, MUSICIANS, LABOR UNIONS, THE RETAILERS, OTHER ONLINE DISTRIBUTORS, MY CLIENTS, OUR CLIENTS, THE RECORD COMPANIES GET -- NOT ONLY GET NO RETURN ON THEIR INVESTMENT, BUT THE NAPSTER SERVICE AND SYSTEM IS PIGGYBACKING ON OUR CLIENTS' INVESTMENT IN THE MANUFACTURE AND CREATION OF THOSE RECORDINGS, THE PROMOTIONAL COSTS, THE ADVERTISING, ALL OF WHICH GO INTO MAKING A NAPSTER USER WANT TO DOWNLOAD OUR RECORDINGS.

AND THE LONGER THIS GOES ON, YOUR HONOR, THE MORE IMPOSSIBLE IT WILL BE FOR US, AND WE BELIEVE FOR THE COURT, TO DO ANYTHING REALISTIC.

NAPSTER HAS ATTEMPTED TO BUILD, AND THIS IS IN THEIR PAPERS, A USER BASE SO THAT THEY CAN CONTROL DIGITAL DISTRIBUTION. THAT WAS, AMONG OTHER THINGS, THEIR PLAN FROM THE VERY BEGINNING AND IT IS REFLECTED, YOUR HONOR, IN ONE OF THE DOCUMENTS WE GAVE TO THE COURT, ONE OF THE EXHIBITS. IT'S EXHIBIT 254. IT WAS ATTACHED TO MY DECLARATION FROM MR. FANNING'S FILE, AND I'M QUOTING ONE SENTENCE:

> "ULTIMATELY NAPSTER COULD EVOLVE INTO A FULL-FLEDGED MUSIC DISTRIBUTION PLATFORM USURPING THE RECORD INDUSTRY AS WE KNOW IT TODAY."

AND, YOUR HONOR --

THE COURT: SO THE MICROSOFT OF THE INDUSTRY; IS THAT IT?

MR. FRACKMAN: WELL, I CONFESS, YOUR HONOR, FOR SOME PERIOD OF TIME I'VE BEEN TRYING TO THINK OF AN APT ANALOGY BUT I REALLY DON'T SEE ONE. THIS IS A UNIQUE SITUATION, YOUR HONOR. IT'S A UNIQUE CASE. IT IS THE MOST EGREGIOUS CASE OF MASSIVE COPYRIGHT INFRINGEMENT THAT HAS EVER EXISTED AND THERE CAN BE LITTLE DOUBT ABOUT THAT.

AND NOT ONLY, YOUR HONOR, WILL THESE USERS CONTINUE TO DOWNLOAD BUT THE MORE THEY DOWNLOAD, YOUR HONOR, THE GREATER THE DISPLACEMENT OF SALES. THAT IS WHAT OUR EXPERT DEBORAH JAY INDICATED.

ONE MORE.

(PAUSE IN PROCEEDINGS.)

MR. FRACKMAN: AND WHAT THIS CHART ILLUSTRATES, YOUR HONOR, IS FROM DEBORAH JAY'S SURVEY THE MORE USERS DOWNLOAD, THE LESS OR THE GREATER THE DECREASE IN PURCHASING OF CD'S, WHICH IS INTUITIVELY OBVIOUS.

IF YOU HAVE A SOURCE OF 50 OR 75 OR BY THEIR OWN FIGURES NOW THE AVERAGE PERSON ON NAPSTER 100 DIFFERENT AUDIO FILES, YOU'RE GOING TO USE YOUR COMPUTER TO LISTEN TO THOSE. IT'S GOING TO BE A MAIN SOURCE IF NOT THE MAIN SOURCE OF YOUR LISTENING TO MUSIC, AND THAT IS GOING TO CONTINUE TO GROW AT AN ENORMOUS RATE FROM TODAY UNTIL THE TIME THAT WE CAN HAVE A TRIAL IN THIS CASE.

THE COURT: WHAT ABOUT THE EVIDENCE THAT -- I'M SORRY, I AM INTERRUPTING YOU IN YOUR MINUTES AND I DON'T HAVE A CLOCK UP HERE TO INDICATE HOW MUCH OF YOUR TIME I'VE TAKEN, BUT --

MR. FRACKMAN: I'LL LET YOU KNOW, YOUR HONOR.

THE COURT: -- WHAT ABOUT THE EVIDENCE -- YOU HAVE NO CHOICE; RIGHT?

(LAUGHTER)

THE COURT: WHAT ABOUT THE EVIDENCE THAT THERE IS SOME SHOWING OF ENHANCEMENT OF SALES BY, IN OTHER WORDS, YOU SAMPLE SOMETHING, YOU LISTEN TO IT, YOU DECIDE YOU WANT TO GO OUT AND BUY IT?

MR. FRACKMAN: I THINK -- FIRST OF ALL, YOUR HONOR, I THINK THAT EVIDENCE IS WEAK; BUT I ALSO THINK, YOUR HONOR, THAT IT IS COMPLETELY IRRELEVANT TO THE ISSUE BEFORE THE COURT.

YOU CANNOT TAKE COPYRIGHTED MATERIAL AND EXCUSE THE INFRINGEMENT BY AN ARGUMENT THAT SOME OF THE PEOPLE SOME OF THE TIME MAY USE THAT COPYRIGHTED MATERIAL TO THE BENEFIT OF THE COPYRIGHT OWNER.

THERE IS NO, AS FAR AS I CAN TELL, YOUR HONOR -- FIRST OF ALL, WE'VE INTRODUCED EVIDENCE TO THE CONTRARY. SECOND OF ALL, YOUR HONOR, AND AGAIN I WILL READ FROM NAPSTER'S OWN DOCUMENT, EXHIBIT 188:

"GOALS. WHAT ARE NAPSTER'S GOALS? NAPSTER BRINGS ABOUT THE DEATH OF THE CD."

THEY'RE NOT GOING TO DO THAT BY INCREASING SALES OF CD'S.

"RECORD STORES, TOWER RECORDS, OBSOLETED."

THAT'S FROM THEIR OWN PLAN, YOUR HONOR. AND TO NOW, AFTER THE FACT, CLAIM THAT IN SOME FASHION A FEW OR SOME USERS -- AND I THINK THE EVIDENCE IS CERTAINLY MORE THAN IN DISPUTE, I THINK WE'VE PRESENTED EVIDENCE DIRECTLY TO THE CONTRARY -- SOME USERS MAY USE THE SYSTEM TO IN SOME FASHION SAMPLE IS COMPLETELY BESIDE THE POINT, IRRELEVANT AND NOT PROBATIVE.

AND I THINK MORE IMPORTANT, YOUR HONOR, IF I CAN JUMP OFF WHAT YOU SAID IN TERMS OF THE IRREPARABLE HARM AND THE PLACE THAT THERE IS ABSOLUTELY NO ANSWER IS THE ISSUE OF ONLINE DISTRIBUTION OF MUSIC. AND WE HAVE PLACED BEFORE THE COURT REALLY UNDISPUTED EVIDENCE BY EACH OF THE RECORD COMPANIES OF THEIR CURRENT ONGOING SUBSTANTIAL PLANS TO ENTER THAT ONLINE DISTRIBUTION MARKET. AND INDEED, AS WE STAND HERE TODAY, TWO OF THEM ALREADY ARE IN THAT MARKET.

THEY HAVE SPENT, AND YOUR HONOR KNOWS FROM OUR PAPERS, TENS OF MILLIONS OF DOLLARS TO ENTER THAT MARKET, YEARS OF PLANNING, THOUSANDS OF PERSON HOURS, TO ENTER INTO THE MEDIUM THAT NAPSTER ITSELF CLAIMS IS THE FUTURE OF THE RECORD INDUSTRY, THE DIGITAL ONLINE DISTRIBUTION OF MUSIC.

IT IS, IN FACT, THE VERY MEDIUM, AS I READ TO THE COURT, I BELIEVE, THAT NAPSTER PLANS OR PLANNED TO USURP. AND

IN THIS DISTRIBUTION SYSTEM, IN THIS MEDIUM, THERE IS PRESENT DIRECT, ONGOING AND IT WILL BE INCREASING COMPETITION HEAD TO HEAD BETWEEN THE RECORD COMPANIES WHO OWN THE COPYRIGHTS AND NAPSTER WHICH DOESN'T OWN THE COPYRIGHTS AND GIVES THEM AWAY FOR FREE.

WE ARE TALKING ABOUT THE SAME CONSUMERS, THE PEOPLE SITTING AT HOME BY THEIR PERSONAL -- THE SAME CONSUMERS, THE PEOPLE SITTING AT HOME BY THEIR PERSONAL COMPUTERS DOWNLOADING MUSIC. WE'RE TALKING ABOUT THE SAME RECORDINGS.

WE'VE TOLD THE COURT AND WE'VE SHOWN THE COURT THAT SONY, WHICH WAS THE FIRST OF THE RECORD COMPANIES TO DISTRIBUTE DIRECTLY ONLINE, MADE AVAILABLE INITIALLY 49 OF ITS COPYRIGHTED RECORDINGS; AND EACH AND EVERY ONE OF THEM, EACH AND EVERY ONE OF THEM IS AVAILABLE ON NAPSTER FOR FREE. IT'S THE SAME ELECTRONIC MEDIUM.

AND THIS IS JUST THE BEGINNING, YOUR HONOR, AND YOUR HONOR HAS THE OPPORTUNITY ON THAT MOST IMPORTANT AREA OF IRREPARABLE HARM TO NIP THIS IN THE BUD AND NOT TO WAIT UNTIL THERE ARE 75 MILLION USERS WHO ARE DOING THIS AND WHO ARE DOWNLOADING BILLIONS OF RECORDINGS WITHOUT PAYMENT TO OUR CLIENTS, MR. RAMOS' CLIENTS, THE ARTISTS OR ANYONE ELSE.

AND WHAT I THINK, YOUR HONOR, THAT BRINGS ME TO IS THAT AT BOTTOM, AND ANOTHER REASON FOR THIS COURT, AN INDEPENDENT REASON FOR THIS COURT TO EXERCISE YOUR EQUITY JURISDICTION HERE, IS THAT THE NAPSTER SYSTEM IS SIMPLY

ANTICOPYRIGHT.

THERE ARE PROBABLY, OUT OF THAT 20 MILLION, A VAST MAJORITY OF USERS WHO WOULDN'T THINK OF GOING INTO A RECORD STORE AND TAKING A CD AND PUTTING IT IN THEIR POCKET AND WALKING OUT WITHOUT PAYING; BUT THOSE VERY SAME PEOPLE ARE CONDITIONED TO BELIEVE THAT IT'S OKAY TO DOWNLOAD THE SAME MUSIC, THAT THE COPYRIGHT IN THAT CONTEXT, IN THIS NEW EMERGING MARKET, IS MEANINGLESS.

AND I CAME ACROSS, YOUR HONOR, IN ONE OF THE DOCUMENTS WE GAVE TO THE COURT WHAT I THINK IS A PRECISE ILLUSTRATION OF THAT; AND THAT -- AS YOUR HONOR KNOWS, WE PROVIDED THE COURT WITH SOME OF THE EXCERPTS FROM NAPSTER'S MESSAGE BOARD OR CHAT ROOM FROM THEIR VARIOUS USERS, AND HERE'S WHAT THIS USER SAID:

"WE ALL KNOW IT'S ILLEGAL. WE JUST DON'T THINK IT'S WRONG."

WELL, THAT'S THE PROBLEM, YOUR HONOR. IT IS WRONG BECAUSE IT IS ILLEGAL, AND IT IS WRONG BECAUSE IT DEPRIVES THE PROPRIETOR, THE CREATOR OF THE COPYRIGHT IN WHAT THE COPYRIGHT CLAUSE AND THE COPYRIGHT ACT WAS DESIGNED TO DO, AND THAT IS TO PROTECT THIS ALL-IMPORTANT CREATIVE SYSTEM IN THE UNITED STATES BY PROVIDING TO THE COPYRIGHT PROPRIETOR FOR LIMITED TIMES THE RIGHT TO DO WHAT HE OR SHE CHOOSES TO DO AND THE RIGHT -- WITH HIS OR HER COPYRIGHTED MATERIAL AND THE RIGHT TO BE COMPENSATED FOR IT, THE RIGHT TO SAMPLE IF THEY WANT TO SAMPLE, THE RIGHT

TO WITHHOLD IF THEY DON'T WANT TO DISTRIBUTE, THE RIGHT TO DISTRIBUTE ONLINE, THE RIGHT TO DISTRIBUTE FREE CD'S, AND THE RIGHT TO CHARGE FOR THEIR CREATIVE WORKS.

AND WITH ALL THIS, YOUR HONOR, WE ARE CREATING AND WILL BE CREATING A SYSTEM WHERE THAT RIGHT, AT LEAST WITH RESPECT TO MUSIC, HAS NO VALUE. THAT'S, YOUR HONOR, I SUBMIT, WHAT NAPSTER SET OUT TO DO FOR THEIR OWN PROFIT AND THEIR OWN PURPOSES. THEY SET OUT TO MONETIZE THIS SYSTEM FROM THE VERY BEGINNING, AS THE COURT KNOWS. AND THEY HARDLY RAISE AN ARGUMENT THAT THEY ARE NOT A COMMERCIAL VENTURE OR NOT IN IT FOR FINANCIAL PROFIT AS I THINK IT WOULD BE DIFFICULT FOR THEM TO DO.

AND AS THE COURT KNOWS -- AND I THINK THIS IS MY LAST CHART, AND I THINK MAYBE IT WILL END MY 20 MINUTES, IF I'VE COUNTED CORRECTLY -- RECENTLY IN DISCOVERY WE OBTAINED, VERY RECENTLY IN DISCOVERY IN FACT, WE OBTAINED A DOCUMENT, I BELIEVE INITIALLY FROM A THIRD PARTY, THAT MR. PARKER, ONE OF THE CO-FOUNDERS OF NAPSTER, PREPARED NEAR THE VERY BEGINNING OF NAPSTER.

> "USERS WILL UNDERSTAND THAT THEY ARE IMPROVING THEIR EXPERIENCE BY PROVIDING INFORMATION ABOUT THEIR TASTES WITHOUT LINKING THAT INFORMATION TO A NAME OR ADDRESS OR OTHER SENSITIVE DATA THAT MIGHT ENDANGER THEM, ESPECIALLY SINCE THEY ARE EXCHANGING PIRATED

MUSIC."

AND MR. PARKER, AS INDEED HE MUST, AT HIS DEPOSITION ACKNOWLEDGED THAT HE KNEW WHAT "PIRATED MUSIC" WAS.

AND, YOUR HONOR, THIS IS A COURT OF EQUITY AND WE'RE HERE IN THIS COURT ASKING THAT EQUITY BE DONE AGAINST SOMEBODY OR A GROUP OF PEOPLE, A BUSINESS, THAT WAS FORMED FROM THE VERY BEGINNING TO EXCHANGE PIRATED MUSIC, AND THAT IS PRECISELY WHAT THEY ARE DOING ON A MASSIVE SCALE AND WHAT WILL CONTINUE TO BE DONE ON AN EXPONENTIALLY GROWING SCALE.

IF THIS COURT DOESN'T ACT NOW, IT WILL AFFECT, AS IT MUST, CERTAINLY TRADITIONAL CD SALES AND IT WILL CERTAINLY HAVE A SUBSTANTIAL IMPACT ON THIS BRAND NEW MARKET OF ONLINE DISTRIBUTION; AND AS WE SUBMIT TO THE COURT AND AS I'VE ARGUED, IT WILL HAVE A TREMENDOUS IMPACT ON THE COPYRIGHT SYSTEM IN THIS COUNTRY.

AND I THINK THAT'S PROBABLY MY 20 MINUTES, YOUR HONOR.

THE COURT: THANK YOU.

MR. RAMOS: YOUR HONOR, BY MY CALCULATION, WE HAVE ABOUT THREE MINUTES LEFT.

THE COURT: OKAY.

MR. RAMOS: YOUR HONOR, I INTEND --

THE COURT: I'LL GIVE -- DO YOU WANT -- YOU WANT REBUTTAL TIME OR DO YOU WANT -- I'LL GIVE YOU 10 MINUTES, HOW'S THAT?

MR. RAMOS: I MAY NOT EVEN NEED THAT.

THE COURT: OKAY.

MR. RAMOS: YOU MEAN FOR REBUTTAL OR TO GO NOW?

THE COURT: NO, RIGHT NOW. RIGHT NOW.

MR. RAMOS: THANK YOU, YOUR HONOR.

THE COURT: I WON'T BE THAT CHARITABLE, OKAY.

(LAUGHTER)

MR. RAMOS: YOUR HONOR, MR. FRACKMAN HAS ADDRESSED THE STRENGTH OF THE CLAIM THAT WE HAVE PUT ON AND THE IRREPARABLE HARM THAT WOULD BE DONE TO HIS CLIENTS AND MINE IN THE EVENT THAT THIS INFRINGEMENT IS ALLOWED TO CONTINUE.

WHAT I WOULD LIKE TO ADDRESS BRIEFLY, YOUR HONOR, IS THE NATURE AND THE SCOPE OF THE RELIEF THAT WE'RE REQUESTING HERE BECAUSE I THINK IT'S IMPORTANT TO CLARIFY THAT AND FOR PURPOSES OF THIS HEARING.

THERE HAVE BEEN STATEMENTS MADE TO THE PRESS, THERE ARE STATEMENTS MADE IN THE PAPERS FILED BY THE DEFENDANT WHICH SUGGEST THAT WE ARE ASKING THE COURT TO BAN A NEW TECHNOLOGY OR TO SHUT DOWN NAPSTER. THAT IS NOT CORRECT.

WE NO MORE SEEK TO BAN A NEW TECHNOLOGY THAN LAWS REGULATING AIRPLANE TRAFFIC BAN THE AIRPLANE. WE NO MORE SEEK TO BAN A NEW TECHNOLOGY THAN LAWS ESTABLISHING RULES OF THE ROAD REQUIRING THAT DRIVERS DRIVE ON THE RIGHT-HAND SIDE OF THE ROAD, THAT THEY OBSERVE SPEED LIMITS AND THAT THEY OBSERVE TRAFFIC SIGNALS WOULD BAN THE AUTOMOBILE.

ALL WE REQUEST IS THAT NAPSTER BE REQUIRED TO COMPLY WITH THE LAW, TO FOLLOW THE SAME RULES OF THE ROAD THAT OTHER MEDIA BUSINESSES HAVE FOLLOWED FOR YEARS BY OBTAINING PERMISSION BEFORE ENABLING THE COPYING OF COPYRIGHTED MUSICAL RECORDINGS USING ITS SERVICE. THAT IS WHAT OTHER MEDIA BUSINESSES DO AND HAVE DONE FOR YEARS. THEY GET CLEARANCES. INDEED, MANY BUSINESSES OFTEN HAVE ENTIRE DEPARTMENTS DEVOTED TO OBTAINING CLEARANCES.

IN THE PRINT PUBLISHING INDUSTRY THE PUBLISHER OF BOOKS AND MAGAZINES WOULD NEVER THINK TO PUBLISH A COPYRIGHTED WORK WITHOUT FIRST GETTING CLEARANCE FROM THE COPYRIGHT PROPRIETOR.

YOUR HONOR ASKED ABOUT SOME STUDIES THAT DEFENDANTS SUGGEST SHOW THAT THERE MAY BE SOME ENHANCED SALES OF CD'S AS A RESULT OF ITS SERVICE. IN EFFECT WHAT THEY'RE ARGUING IS THAT THEIR SERVICE PROMOTES THE SALE OF CD'S.

WELL, YOUR HONOR, I WOULD ASK, THEN, IF AN INTERNET BUSINESS WERE TO PUBLISH LENGTHY EXCERPTS OF THE LATEST HARRY POTTER BOOK ON AN INTERNET SITE AND THEN WHEN SUED FOR INFRINGEMENT BY THE COPYRIGHT OWNER CONTEND THAT THE PUBLICATION OF THOSE EXCERPTS ON THE INTERNET SITE HAD IN FACT ENHANCED SALES OF THE BOOK POINTING TO THE FACT THAT IT HAD GONE IMMEDIATELY TO NUMBER ONE ON THE BEST SELLER LIST, I THINK THAT A COURT WOULD HAVE LITTLE TIME IN DISPOSING OF THAT DEFENSE.

I WOULD SUGGEST, YOUR HONOR, THAT IT IS PREPOSTEROUS TO SUGGEST THAT THEY HAVE THE RIGHT TO USE OUR COPYRIGHTED MATERIAL TO MAKE DECISIONS AS TO WHAT CONSTITUTES PROMOTION OF OUR WORKS, HOW MUCH PROMOTION IS APPROPRIATE.

WE HAVE MARKETING PEOPLE WHO MAKE THOSE DECISIONS, AND THOSE ARE DECISIONS THAT WE ARE ENTITLED TO MAKE UNDER THE COPYRIGHT LAW QUITE PROPERLY.

AS I WAS SAYING, YOUR HONOR, IN ADDITION TO THE PRINT PUBLISHING INDUSTRY, RADIO, TELEVISION, CABLE TELEVISION, ALL THESE BUSINESSES GET CLEARANCES BEFORE THEY USE COPYRIGHTED MATERIAL. THEY GET LICENSES. THEY HAVE DONE SO FOR YEARS AND, IN FACT, YOUR HONOR, INTERNET COMPANIES DO THE SAME THING.

IN THE RECORD THERE IS EVIDENCE THAT E-MUSIC AND MP3 DOT-COM CLEAR THEIR MUSIC BEFORE THEY OFFER IT ON THEIR SERVICES. THEY OBTAIN PERMISSION BEFORE THEY OFFER COPYRIGHTED MUSIC ON THEIR SERVICES BEFORE ENABLING DOWNLOADS TO CONSUMERS.

WELL, YOUR HONOR, NAPSTER DOESN'T WANT TO HAVE TO DO THAT. IT DOESN'T WANT TO HAVE TO ENGAGE IN CLEARANCES. IT DOESN'T WANT TO HAVE TO HIRE PEOPLE TO DETERMINE WHETHER THEY NEED TO GET CLEARANCES AND TO SEEK PERMISSION. IT'S TOO MUCH EFFORT. IT REQUIRES THEM TO WORK BEFORE THEY BECOME INTERNET BILLIONAIRES.

IN SUBSTANCE, NAPSTER WANTS SPECIAL PRIVILEGES, NOT TO BE BOUND BY THE RULES OF THE ROAD. THEY WANT TO BE ABLE TO FIGURATIVELY DRIVE OVER THE SPEED LIMIT, IGNORE TRAFFIC

SIGNALS, DRIVE IN THE COMMUTER LANE WITH ONLY ONE PASSENGER IN THE CAR IF THAT SUITS THEM, IF THAT GETS THEM RICH QUICK.

NAPSTER SAYS, "OH, WE CAN'T DO CLEARANCES. WE CAN'T GET PERMISSION. IT WOULD CHANGE THE WHOLE NATURE OF OUR BUSINESS." THAT'S THE CONTENTION IN MR. KESSLER'S, THEIR TECHNOLOGY OFFICER'S, DECLARATION. THAT'S HIS RESPONSE TO THE RELIEF THAT WE REQUEST.

AND YET, YOUR HONOR, THAT IS PRECISELY WHAT NAPSTER DOES. NAPSTER, YOUR HONOR, HAS A NEW ARTIST PROGRAM, INDEED IT'S BRAGGED ABOUT THIS NEW ARTIST PROGRAM AND HAS PROMOTED ITSELF AS BEING THAT IS HELPING THE LITTLE GUY, THE NEW ARTIST, BREAK INTO THE MUSIC BUSINESS.

AND ON ITS WEBSITE, AND THIS IS IN THE RECORD, IT'S AN EXHIBIT TO MR. PULGRAM'S SECOND DECLARATION, EXHIBIT G, IT'S ALSO AN EXHIBIT TO MS. RICHARDSON'S DEPOSITION, EXHIBIT 146, THERE IS A COPY OR A PRINTOUT OF THE PAGES FROM NAPSTER'S NEW ARTISTS PROGRAM. AND WHAT THEY REQUIRE A NEW ARTIST THAT WANTS TO PARTICIPATE IN THE PROGRAM TO DO IS TO FILL OUT A PROFILE ABOUT THEMSELVES WITH CONTACT INFORMATION, INFORMATION ABOUT THEIR MUSIC. AND THEN AT THE END OF THE PROFILE, THEY ARE REQUIRED TO AGREE TO FOLLOW CERTAIN HOUSE RULES. AND THE LAST OF THOSE RULES, AND THERE IS A BOX TO CHECK, SAYS:

"YES, I AGREE TO LET NAPSTER USERS DOWNLOAD AND SHARE MY MUSIC."

AND, IN FACT, AS SCOTT KRAUSE TESTIFIED IN HIS

DEPOSITION, PAGE 52, IF THE APPLICANT FOR THE PROGRAM DOES NOT CHECK THAT BOX, DOES NOT GRANT PERMISSION FOR THE USE OF -- FOR THE TRADING OF THEIR MUSIC, THEY GET A MESSAGE BACK SAYING THAT THEIR APPLICATION CANNOT BE ACCEPTED. THAT'S SCOTT KRAUSE'S DECLARATION EXHIBIT D, A MESSAGE COMES UP SAYING THAT.

AND WHEN ASKED IN HIS DEPOSITION, MR. KRAUSE TESTIFIED:

"IS THAT A CHECK BEFORE IT BECOMES AVAILABLE TO THE USER VIEWERS?"

HE ANSWERS:

"YES. THE SOFTWARE DOESN'T ALLOW THE INFORMATION TO BE ENTERED INTO THE DATABASE."

IN OTHER WORDS, YOU CAN'T PARTICIPATE IN THE PROGRAM UNLESS YOU GIVE THAT PERMISSION.

WELL, YOUR HONOR, WHAT WE ASK IS THAT NAPSTER GIVES THE SAME COURTESY TO OUR CLIENTS, TO ESTABLISHED SONGWRITERS, PERFORMING ARTISTS AND RECORD COMPANIES THAT THEY GIVE TO NEW ARTISTS WHO WANT TO PARTICIPATE IN THEIR PROGRAM, THAT THEY GET PERMISSION FIRST BEFORE ALLOWING USERS OF THEIR SERVICE TO DOWNLOAD OUR MUSIC. THAT IS ALL THAT WE REQUEST.

IT SEEMS TO ME A FAIR REQUEST COMING FROM MY CLIENTS, COMING FROM MIKE STOLLER AND JERRY LEIBER, WHO'VE WRITTEN ROCK AND ROLL HITS FOR 50 YEARS. AS EXPLAINED IN MR. STOLLER'S DEPOSITION, HE STARTED WHEN HE WAS 17 YEARS OLD HE SOLD HIS FIRST SONG AND HE HAD THE GOOD FORTUNE THAT SOME OF

THOSE EARLY SONGS WERE RECORDED BY ELVIS PRESLEY AND MANY AFTERWARDS CAME TO BE RECORDED BY SOME OF THE MOST FAMOUS RECORDING ARTISTS IN THE LAST HALF CENTURY. THEY WANT THAT COURTESY.

I THINK, YOUR HONOR, THAT THEY -- GIVEN WHAT THEY HAVE CONTRIBUTED TO AMERICAN MUSIC AND WHAT THE RECORD COMPANIES AND THE ARTISTS WHO THEY REPRESENT HAVE CONTRIBUTED TO AMERICAN MUSIC, THAT THEY'RE ENTITLED TO THAT COURTESY FROM NAPSTER. THAT IS ALL WE SEEK, YOUR HONOR.

THE COURT: AND WHAT YOU'RE SEEKING IS THE ENJOINING OF INFRINGEMENT OR DISTRIBUTION, COPYING, ET CETERA, OF ALL MUSIC OR MUSICAL COMPOSITIONS, SONGS, HOWEVER YOU WANT TO CHARACTERIZE IT, MATERIAL, ON WHICH THE PLAINTIFFS IN YOUR CASE AND IN THE A&M CASE HAVE OR HOLD COPYRIGHTS; IS THAT CORRECT?

MR. RAMOS: THAT IS CORRECT, YOUR HONOR, WITH --

THE COURT: YOU'RE NOT SEEKING TO GO BEYOND THAT TO OTHERS BECAUSE THIS ISN'T A CLASS ACTION.

MR. RAMOS: THAT IS CORRECT, YOUR HONOR, WITHOUT THEIR EXPRESS PERMISSION.

THE COURT: RIGHT.

MR. RAMOS: THAT'S CORRECT.

THE COURT: RIGHT. OKAY. THANK YOU.

WHO'S ARGUING ON BEHALF OF DEFENDANTS?

MR. JOHNSON: WE'RE GOING TO SPLIT THE ARGUMENT, YOUR HONOR.

MR. BOISE: YOUR HONOR --

THE COURT: ABOUT 15, MAYBE I GUESS A LITTLE BIT MORE THAN THAT, EACH?

MR. JOHNSON: YES, YOUR HONOR.

THE COURT: OKAY.

MR. BOISE: YOUR HONOR, MY NAME IS DAVID BOISE. I'M ONE OF THE COUNSEL FOR NAPSTER.

WITH THE COURT'S PERMISSION, I'D LIKE TO HAND UP A BINDER THAT JUST HAS SOME SMALL VERSIONS OF CHARTS THAT I WILL BE REFERRING TO.

THE COURT: DOES OPPOSING COUNSEL HAVE A COPY OF THAT BINDER? I GUESS THEY DO NOW. OKAY.

MR. BOISE: YOUR HONOR, I WANT TO BEGIN WITH A SUBJECT THAT WAS CONSPICUOUSLY ABSENT FROM THE PLAINTIFFS' PRESENTATION, AND THAT IS WHETHER OR NOT THEY HAVE ANY REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS.

AND AS I THINK THE COURT IS FAMILIAR FROM OUR PAPERS, WE HAVE A NUMBER OF REASONS WHY WE THINK THERE IS NO REASONABLE LIKELIHOOD THAT THE PLAINTIFFS CAN SUCCEED ON THE MERITS AND CERTAINLY NO BASIS FOR ENTERING A PRELIMINARY INJUNCTION AT THIS STAGE.

FIRST, AND WE HAVE AT TAB NUMBER 2 OF THE BOOK THAT THE COURT HAS A REFERENCE TO A WHOLE SERIES OF SUBSTANTIAL NONINFRINGING USES TO WHICH NAPSTER IS CAPABLE.

AND AS THE COURT IS AWARE --

THE COURT: WHAT DOES THAT MEAN "IS CAPABLE"? AS OPPOSED TO IS IN FACT OR HAS IN FACT BEEN PERFORMING?

MR. BOISE: YOUR HONOR, I THINK THAT THE REASON THAT WE USE THE "CAPABLE" LANGUAGE IS BECAUSE IT COMES FROM THE SONY COURT'S DECISION. AND AS THE COURT IS AWARE, IN THE SONY DECISION, WHAT THE COURT SAID IS THAT IF A PRODUCT OR SERVICE IS CAPABLE OF SUBSTANTIAL NONINFRINGING USES, THAT IS SUFFICIENT TO PREVENT THE IMPOSITION OF VICARIOUS LIABILITY AGAINST THE DEFENDANT.

NOW, IN THIS PARTICULAR INSTANCE ALL OF THE USES THAT ARE LISTED THERE ON THE CHART THAT'S ON NUMBER 2 ARE USES TO WHICH NAPSTER NOT ONLY IS NOW CAPABLE BUT THEY ARE USES TO WHICH NAPSTER IS NOW BEING PUT.

THE COURT: WELL, THEN WHY HAVE DEFENDANTS BEEN MAINTAINING THROUGHOUT THIS THAT IF THE COURT SHOULD ENJOIN WHAT PLAINTIFFS SEEK, IT'S GOING TO PUT THEM OUT OF BUSINESS?

MR. BOISE: BECAUSE --

THE COURT: ISN'T THAT INCONSISTENT WITH THE FACT THAT IT'S CAPABLE OF DOING ALL THESE OTHER THINGS?

MR. BOISE: NO, YOUR HONOR, BECAUSE AS THE COURT IN THE NEWTON CASE OR THE NET-COM CASE -- AND IF THE COURT WOULD TURN THERE TO I THINK IT IS TAB 14 -- TAB 16 IN THE COURT'S BOOK, YOU'LL SEE A DESCRIPTION AND QUOTATION FROM THE DECISION IN THE NET-COM CASE IN WHICH THE COURT EXAMINED THERE WHAT WOULD HAPPEN IF YOU HAD A SERVICE, THEIR SO-CALLED BULLETIN

BOARD SERVICE, THAT WAS CAPABLE OF SUBSTANTIAL NONINFRINGING USES BUT YOU HAD AN INJUNCTION THAT IN EFFECT TRIED TO STOP SOME OF THOSE USES AND NOT OTHERS.

AND ONE OF THE THINGS THAT THE COURT FOCUSES ON THERE IS THE FACT THAT THERE IS NO PRACTICAL WAY TO SEPARATE OUT THE INFRINGING AND THE NONINFRINGING USES.

FOR EXAMPLE, AND LET ME GIVE THE COURT THREE EXAMPLES HERE, FIRST, THE MERE FACT THAT A SONG THAT IS BEING DOWNLOADED IS COPYRIGHTED AND THERE'S NOT BEEN ANY EXPRESS PERMISSION DOES NOT, AS THE CASES MAKE ABSOLUTELY CLEAR, MEAN THAT THERE IS INFRINGEMENT. IT MAY BE FAIR USE. IT MAY BE SUBJECT TO THE PROTECTIONS OF THE AMERICAN HOME RECORDING ACT. THERE ARE A VARIETY OF REASONS WHY. THE MERE FACT THAT IT IS COPYRIGHTED AND THERE'S NOT SOMEBODY WHO HAS SIGNED AUTHORIZED EXPRESS PERMISSION DOES NOT MEAN THAT THAT IS A COPYRIGHT INFRINGEMENT.

THE SECOND POINT IS THAT THE NAPSTER SERVICE IS BASED ON PROVIDING AN INDEX OF INFORMATION. THE USERS PROVIDE TO NAPSTER AN INDEX OF THEIR FILES, TO THE EXTENT THEY'RE PREPARED TO SHARE THOSE FILES WITH OTHER PEOPLE. NAPSTER IN EFFECT CORRELATES THAT INFORMATION AND PRESENTS IT TO OTHER NAPSTER USERS IN THE EXACT SAME FORM THAT NAPSTER GOT IT.

THERE'S NO PRACTICAL WAY THAT NAPSTER CAN GO IN AND VERIFY OR REFORMAT OR FORMALIZE OR STANDARDIZE THOSE FILE NAMES. SO THAT IF YOU TRIED TO HAVE, SAY, AN INJUNCTION THAT

SAID, "ELIMINATE EVERY TITLE THAT HAS IN IT ONE OF THE NAMES OF THE PLAINTIFFS," FIRST YOU WOULD BE ELIMINATING CERTAIN SONGS, FOR EXAMPLE, RECORDED AT A CONCERT WHERE THERE IS NOT ANY PROHIBITION ON DISTRIBUTION.

SECOND, UNLESS THE NAME WAS VERY SPECIFICALLY IDENTIFIED, THERE IS A RISK THAT YOU ELIMINATE OTHER SONGS, OTHER MUSIC BY OTHER ARTISTS OR WITH OTHER TITLES THAT ARE SIMILAR TO THOSE NAMES.

AND IF YOU DON'T DO THAT, AS A PRACTICAL MATTER, YOU'RE NOT GOING TO ACCOMPLISH WHAT THEY WANT TO ACCOMPLISH ANYWAY.

THE COURT: IS THAT GOING TO THE RELIEF ARGUMENTS IN THIS CASE OR IS THAT GOING TO FAIR USE?

MR. BOISE: IT GOES, I THINK -- I THINK IT GOES TO RELIEF. IT ALSO GOES TO THE ISSUE OF CONTRIBUTORY INFRINGEMENT.

THE COURT: DOESN'T IT ALSO CUT AGAINST YOU ON THE FAIR USE THEORY? I MEAN, ESSENTIALLY WHAT IS -- I WOULD GATHER, THEN, YOU'RE NOT TAKING ISSUE WITH THE FACT THAT NOTHING IS DONE TO THIS MATERIAL THAT IN ANY WAY IMPRESSES ANY KIND OF CREATIVE TRANSFORMATIVE WORK TO IT. IT'S ESSENTIALLY EXACT DUPLICATION OF WHATEVER WAS THERE TO BEGIN WITH; RIGHT?

MR. BOISE: IT IS NOT CREATIVE IN THE SENSE -- IT IS NOT CREATIVE IN THE SENSE THAT A NEW OR DERIVATIVE WORK IS BEING CREATED, THE COURT IS EXACTLY RIGHT.

THE COURT: AND ALSO WITH RESPECT TO THE VERY NATURE OF THIS COPYRIGHTED WORK, IF WE'RE GOING TO LOOK AT FAIR USE, IT IS SORT OF PARADIGMATIC, ISN'T IT, OF WHAT IS USUALLY COPYRIGHTED?

MR. BOISE: WELL, YOUR HONOR, IF THE COURT WOULD TURN TO TAB NUMBER 7 IN THE BOOK, THE COURT WILL SEE THAT THE SONY COURT ADDRESSED THAT VERY ISSUE.

THE COURT: BY THE WAY, TAB 14, THAT'S PRETTY MUCH DICTA AND IT'S ANOTHER DISTRICT COURT; RIGHT?

MR. BOISE: IT IS, YOUR HONOR, AND IF THE COURT FINDS THAT REASONING --

THE COURT: I LIKE MY DICTA BUT I DON'T NECESSARILY HAVE TO FOLLOW SOMEONE ELSE'S.

(LAUGHTER)

MR. BOISE: RIGHT. AND IF THE COURT FINDS THE CENTRAL DISTRICT OF CALIFORNIA'S OPINION NOT WELL REASONED, OBVIOUSLY THE COURT'S REASONING IS GOING TO CONTROL HERE.

BUT WE THINK THAT IT IS NOT ONLY PRECEDENT THAT THE COURT MIGHT WANT TO CONSIDER, BUT WE THINK THE REASONING OF THE COURT IN THE CENTRAL DISTRICT OF CALIFORNIA DECISION IN THE NET-COM CASE IS REASONING THAT WE WOULD AT LEAST ASK THE COURT TO CONSIDER WHETHER THE COURT AGREES WITH IT OR NOT. BECAUSE WHAT THE COURT DOES THERE IS REALLY BUILD OFF OF THE SUPREME COURT'S DECISION. BECAUSE, OF COURSE, IN THE SUPREME COURT DECISION IN THE SONY CASE, WHAT THE COURT THERE HELD WAS THAT

AS LONG AS SOMETHING WAS CAPABLE OF SUBSTANTIAL NONINFRINGING USES, YOU COULD NOT HAVE CONTRIBUTORY INFRINGEMENT OR VICARIOUS INFRINGEMENT.

YOU HAVE IN THIS PARTICULAR CASE NO CONTENTION THAT NAPSTER IS ENGAGED IN DIRECT INFRINGEMENT. IF NAPSTER HAS ANY LIABILITY, IT IS BECAUSE OF VICARIOUS OR CONTRIBUTORY INFRINGEMENT.

SO THAT WHEN YOU LOOK AT WHAT THE SUPREME COURT SAYS IN SONY AND WHAT THE NET-COM AND OTHER COURTS HAVE HELD, WHERE YOU HAVE CASES LIKE A BULLETIN BOARD OR A NAPSTER SERVICE THAT IS CAPABLE OF A VARIETY OF USES, THAT SERVICE IS NOT GUILTY OF CONTRIBUTORY INFRINGEMENT EVEN IF CERTAIN PEOPLE WERE TO USE IT IN A WAY THAT ENGAGE IN COPYRIGHT INFRINGEMENT.

AND I NOW WANT TO TURN TO THE ISSUE --

THE COURT: WELL, ISN'T THAT THE GUTS OF WHAT NAPSTER WAS ALL ABOUT? IF YOU LOOK AT SOME OF THE EXHIBITS THAT ARE BEFORE THE COURT ABOUT WHAT NAPSTER CONTEMPLATED, WHAT ITS BUSINESS PLAN WAS, WHAT IT PURPORTED TO DO, WHAT IN FACT PEOPLE WHO ARE ACCESSING NAPSTER FOR NOW AND RECOGNIZE IT FOR, ISN'T THAT THE GUTS OF NAPSTER, THAT IT WAS ESSENTIALLY A PROGRAM OR SYSTEM CREATED TO FACILITATE THE DOWNLOADING OF MUSIC AND THE UPLOADING OF MUSIC MUCH OF WHICH WAS COPYRIGHTED BUT PIRATING BE DAMNED I THINK WAS PRETTY MUCH THE SENSE ONE GETS IN READING SOME OF THE EXHIBITS FROM SOME OF THESE EARLY MEETINGS OR MEMOS, ET CETERA? I MEAN, PIRACY WAS UPPERMOST IN

THEIR MIND; RIGHT? FREE MUSIC FOR THE PEOPLE; RIGHT?

MR. BOISE: FREE MUSIC FOR THE PEOPLE. AND I WOULD SAY, THOUGH, THAT WHAT IS PIRACY OR IS NOT PIRACY, WHAT IS LEGAL OR WHAT IS ILLEGAL IS OBVIOUSLY SOMETHING FOR THE COURT TO DECIDE NOT BASED ON WHAT SOME 19-YEAR-OLD, HOWEVER TALENTED THEY MAY BE IN TERMS OF TECHNOLOGY, WROTE.

I THINK THAT THE ISSUE OF WHETHER OR NOT WHAT NAPSTER IS DOING IS SOMETHING THAT HAS TO BE DECIDED ON THE ACTUAL FACTS THAT ARE PRESENTED TO THE COURT.

AND LET ME TURN TO THE QUESTION AS TO WHETHER THE NAPSTER USERS ARE ENGAGED IN ANY KIND OF UNLAWFUL ACTIVITY BECAUSE, AS THE COURT QUITE PROPERLY I THINK POINTS OUT, THAT IS A NECESSARY PREDICATE TO THE ARGUMENT THAT THE PLAINTIFFS MAKE HERE. BECAUSE IF THE NAPSTER USERS ARE NOT BREAKING THE LAW, THEN NAPSTER CANNOT HAVE ANY CONTRIBUTORY OR VICARIOUS LIABILITY.

AND THE FIRST POINT IN TERMS OF WHETHER THE NAPSTER USERS ARE BREAKING THE LAW OR NOT IS THE AMERICAN HOME RECORDING ACT, AND --

THE COURT: NOW, WHAT ABOUT THAT MAKES THAT APPLY TO THIS CASE? WHERE IS THE DIGITAL RECORDING DEVICE IN THIS CASE?

MR. BOISE: YOUR HONOR, IF YOU LOOK AT THE LEGISLATIVE HISTORY OF THAT CASE AND YOU LOOK AT THE TERM "DIGITAL RECORDING DEVICE" -- "DIGITAL AUDIO RECORDING DEVICE," I THINK THAT WHAT IS ABSOLUTELY CLEAR IS THAT CONGRESS, BY USE

OF THE TWO TERMS, "ANALOG AUDIO RECORDING DEVICE" AND "DIGITAL AUDIO RECORDING DEVICE," INTENDED TO ENCOMPASS ALL RECORDING.

AND I'M NOW GOING TO GET INTO DICTA AGAIN, YOUR HONOR, BUT THIS TIME IT'S DICTA FROM THE NINTH CIRCUIT COURT OF APPEALS IN THE RIAA VERSUS DIAMOND MULTIMEDIA CASE THAT WAS DECIDED LAST YEAR. AND WHAT THE COURT SAYS THERE, AND IF YOU'LL TURN TO TAB 3 OF THE BINDER THAT I HAVE IN FRONT OF YOU, YOU WILL SEE NOT ONLY SECTION 1008 OF THE AMERICAN HOME RECORDING ACT BUT ALSO THE LANGUAGE OF THE DIAMOND MULTIMEDIA SERVICES CASE INTERPRETING IT. AND WHAT THE COURT SAYS THERE IS THAT SECTION 1008 WAS INTENDED TO PERMIT ALL NONCOMMERCIAL CONSUMER COPYING OF MUSIC.

THE PLAINTIFFS SAY THAT'S DICTA. IT IS PROBABLY DICTA. I THINK YOU CAN SEE WAYS IN WHICH IT CONTRIBUTED TO THE COURT'S ANALYSIS, BUT IT CERTAINLY IS CONSIDERED RECENT DICTA.

THE COURT: HOW FAR IS THAT LANGUAGE FROM THE LANGUAGE THAT STARTS OUT THAT:

"THE ACT DOES NOT BROADLY PROHIBIT DIGITAL SERIAL COPYING OF COPYRIGHT-PROTECTED AUDIO RECORDINGS. INSTEAD THE ACT PLACES RESTRICTIONS ONLY UPON A SPECIFIC TYPE OF RECORDING DEVICE"?

MR. BOISE: RIGHT.

THE COURT: AND THEN IT GOES ON TO LOOK AT THE STATUTORY DEFINITION.

MR. BOISE: RIGHT. AND WHAT THE COURT THERE, OF

COURSE, HOLDS IS THAT A COMPUTER HARD DRIVE DOES NOT COME WITHIN THE SERIAL COPYING PROVISIONS OR THE ROYALTY PROVISIONS OF THE AMERICAN HOME RECORDING ACT.

AND WHAT THE PLAINTIFFS ARGUE IS THAT IF IT DOESN'T COME WITHIN THE DEFINITION OF "DIGITAL AUDIO RECORDING DEVICE" FOR PURPOSES OF THE SERIAL COPYING AND ROYALTY PROVISIONS, IT SHOULD NOT BE SUCH A DEVICE FOR PURPOSES OF SECTION 1008.

I THINK THERE ARE TWO THINGS THAT THE COURT HAS TO KEEP IN MIND THERE. THE FIRST IS THAT AFTER THAT DISCUSSION, THE COURT IN THE PARAGRAPH THAT WE REFER TO GOES ON TO SAY THAT IN TERMS OF THE COPYING THAT IS IMMUNIZED, THAT IS COPYING OF ALL NONCOMMERCIAL CONSUMER COPYING. THAT'S AT I THINK TAB 3, YOUR HONOR.

THE SECOND POINT IS THAT THROUGHOUT THE NINTH CIRCUIT'S OPINION, IT REPEATEDLY TALKS ABOUT HOW THE AMERICAN HOME RECORDING ACT HAS IMMUNIZED HARD DRIVE COPYING. IN FACT, THERE'S ONE PORTION WHERE THE COURT SAYS IT MAY BE ANOMALOUS TO THINK THAT YOU CAN LAUNDER A COPYRIGHTED WORK BY SIMPLY PASSING IT THROUGH A COMPUTER HARD DRIVE, BUT THAT SEEMS TO HAVE BEEN WHAT CONGRESS INTENDED.

AND THEY TALK ABOUT HOW IF YOU HAVE DONE THAT, THE CONSUMER THEN CAN MAKE AN UNLIMITED NUMBER OF COPIES. SO THAT I WOULD RESPECTFULLY SUGGEST TO THE COURT THAT YOU CAN'T READ THE NINTH CIRCUIT'S OPINION IN THAT DECISION JUST LAST YEAR WITHOUT UNDERSTANDING THAT AT LEAST THE NINTH CIRCUIT AT THAT

TIME WAS OF THE VIEW THAT ALL CONSUMER COPYING, WHETHER BY COMPUTER HARD DRIVE OR NOT, BY CONSUMERS THAT WAS NONCOMMERCIAL WAS PROTECTED BY SECTION 1008.

NOW, IF THAT'S SO, YOUR HONOR, THERE IS NO DISPUTE THAT THE NAPSTER USERS HERE ARE ENGAGED IN NONCOMMERCIAL ACTIVITY. THEY DON'T EVEN HAVE TO PUT UP ANY FILES OF THEIR OWN TO ACCESS THE FILES THAT ARE UP. THEY CERTAINLY DON'T PAY ANY MONEY. THEY DON'T GIVE ANYTHING. THEY DON'T BARTER ANYTHING. ALL THEY DO IS SIGN ON AND THEY GET ACCESS, AND THE PERSON WHO'S MAKING THEIR FILES AVAILABLE DOESN'T GET ANYTHING IN RETURN.

SO THIS IS CLEARLY NONCOMMERCIAL COPYING AND THAT IS RELEVANT, I THINK, NOT ONLY TO THE DIAMOND MULTIMEDIA DECISION OF THE NINTH CIRCUIT LAST YEAR, IT'S ALSO RELEVANT TO THE SONY DECISION AS TO WHAT WOULD HAVE CONSTITUTED FAIR USE EVEN IN THE ABSENCE OF THE AMERICAN HOME RECORDING ACT.

THE AMERICAN HOME RECORDING ACT IS A SPECIAL, OBVIOUSLY, EXEMPTION FOR SOUND RECORDINGS BUT THE SUPREME COURT ADDRESSED THE BROADER ISSUE OF WHAT CONSTITUTED FAIR USE UNDER THE COPYRIGHT ACT IN SONY.

AND ONE OF THE THINGS THAT THE COURT IN SONY HELD -- AND IF THE COURT WOULD TURN TO TAB 7 OF THE MATERIALS THAT ARE IN FRONT OF THE COURT, YOU'LL SEE A QUOTATION FROM THE SONY COURT --

THE COURT: WELL, I HAVE THE CASES HERE SO I'D JUST

AS SOON LOOK AT THOSE --

MR. BOISE: SURE. ABSOLUTELY.

THE COURT: -- RATHER THAN SELECTED EXCERPTS.

MR. BOISE: THE CITATION, I GIVE IT TO YOU ONLY FOR PURPOSES OF THE CITATION. YOU'LL SEE IT'S QUITE A LENGTHY QUOTE AND --

THE COURT: BUT GOING BACK FOR A MOMENT, BECAUSE I SHOULD HAVE INTERRUPTED YOU EARLIER, BUT GOING BACK FOR A MOMENT TO, YOU KNOW, TO THE DIAMOND MULTIMEDIA CASE, THAT WAS TALKING ABOUT THE KIND OF -- FIRST OF ALL, FACILITATION OF PERSONAL USE BUT IT WAS TALKING ABOUT THE KIND OF EQUIPMENT THAT ALLOWS FOR SPACE SHIFTING ESSENTIALLY OF WHAT ONE ALREADY HAS AS MUSIC AND SHIFTING THAT TO SOME OTHER MEANS OF CARRYING IT AROUND OR HAVING IT IN ANOTHER LOCATION; CORRECT? I MEAN, THAT'S WHAT THE RIAA PLAYER DOES, IT ALLOWS YOU TO RUN AROUND WITH ALL THAT STUFF INSTEAD OF JUST LISTENING TO IT IN YOUR HOME; RIGHT?

MR. BOISE: EXACTLY, YOUR HONOR. AND, FOR EXAMPLE, ONE OF THE USES OF NAPSTER THAT WE POINT OUT THAT IS A SUBSTANTIAL NONINFRINGING USE IS THAT SAME SPACE SHIFTING AND, AS --

THE COURT: WHY WOULD YOU NEED NAPSTER TO SPACE SHIFT? WHO WOULD BOTHER TO GO ON TO NAPSTER AND DO ALL OF THAT JUST TO SPACE SHIFT? I MEAN, YOU COULD SPACE SHIFT WITHOUT NAPSTER; RIGHT?

MR. BOISE: NOT VERY EASILY, YOUR HONOR. IN FACT, IF THE COURT WOULD LOOK AT -- I DON'T MEAN TO KEEP REFERRING YOU TO THIS, BUT --

THE COURT: HOW MANY PEOPLE ACTUALLY GO ON TO SPACE SHIFT AS OPPOSED TO DOWNLOAD?

MR. BOISE: IF YOU'LL TURN TO TAB 4 --

THE COURT: YES.

MR. BOISE: -- IN THIS BOOK, YOU'LL SEE THAT WE'VE ADDRESSED THAT ISSUE.

THE COURT: YES.

MR. BOISE: AND, FIRST, WE ADDRESS AT TAB 4 THE CONTENTION BY THE PLAINTIFFS THAT NOBODY HAS EVER HELD SPACE SHIFTING TO BE A FAIR USE, WHICH IS AT THEIR REPLY BRIEF AT PAGE 8. AS THE COURT HAS ALREADY POINTED OUT, OBVIOUSLY THE RIAA CASE DID SO HOLD.

IN THE FADER REPORT, 70 PERCENT OF NAPSTER USERS USE THE NAPSTER DIRECTORY SERVICE TO SPACE SHIFT. IN THE JAY REPORT, WHICH WAS THEIR EXPERT, 49 PERCENT OF NAPSTER USERS SPACE SHIFT FROM BETWEEN 10 PERCENT TO A HUNDRED PERCENT OF THE TIME. SO THIS IS CLEARLY SUBSTANTIAL SPACE SHIFTING THAT'S GOING ON USING THE NAPSTER SERVICE.

THE COURT: IS THAT THE SOLE PURPOSE FOR WHICH THEY'RE USING NAPSTER IS TO SPACE SHIFT OR THAT ALONG WITH EVERYTHING ELSE?

MR. BOISE: NO, IT DOESN'T SAY THAT THAT'S THE SOLE

PURPOSE, BUT IT'S OBVIOUSLY A VERY WIDELY-USED PURPOSE. AND AS THE COURT IS AWARE, UNDER ALL OF THE AUTHORITY IN TERMS OF SUBSTANTIAL NONINFRINGING USES, YOU DON'T HAVE -- IT DOESN'T HAVE TO BE THE ONLY USE. IT DOESN'T HAVE TO EVEN BE THE PRIMARY USE. INDEED, IN THE SONY CASE, 80 TO 90 PERCENT OF WHAT WAS BEING COPIED WAS COPYRIGHTED MATERIAL.

I MEAN, THE COURT SAID 7.3 PERCENT ARE SPORTS AND GAME SHOWS AND "MR. ROGERS" AND THINGS LIKE THAT, THAT ARE NOT PROTECTED OR THAT THE PEOPLE HAVE AUTHORIZED; BUT THE VAST MAJORITY OF WHAT WAS BEING COPIED IN SONY WAS ALSO COPYRIGHTED MATERIAL AS TO WHICH THERE WAS NO AUTHORIZATION.

WHAT --

THE COURT: THEY WEREN'T SHARING IT WITH THE WORLD.

MR. BOISE: NO, YOUR HONOR, BUT THESE PEOPLE AREN'T SHARING IT WITH THE WORLD EITHER. AND ONE OF THE THINGS ABOUT THE AMERICAN HOME RECORDING ACT AND THE DOCTRINE OF FAIR USE IS THAT IT FOCUSES ON WHAT IS COMMERCIAL NOT ON HOW MANY COPIES ARE BEING SHARED OR HOW WIDE THE CIRCLE IS.

THERE ARE PROVISIONS OF THE COPYRIGHT ACT THAT DO FOCUS ON THOSE VERY THINGS. FOR EXAMPLE, WHEN THE COPYRIGHT ACT TALKS ABOUT DOING SOMETHING PUBLICLY, THAT DIRECTLY IMPLICATES EXACTLY THE QUESTION THAT THE COURT HAS. BUT NEITHER SECTION 1008 NOR THE COMMERCIAL/NONCOMMERCIAL DISTINCTION IN TERMS OF FAIR USE TALKS ABOUT HOW MANY PEOPLE ARE BEING AFFECTED OR INCLUDED. IT DOES TALK ABOUT THE

POTENTIAL HARM; AND IT IS FAIR, I THINK, TO SAY THAT IN A LOT OF CASES THE WIDER THE USE, IF THERE IS HARM, THE WIDER THE HARM.

BUT ONE OF THE THINGS THAT THE SONY COURT SAYS, AND I WON'T DIRECT YOU TO THE TAB, BUT IT'S AT 451 OF THE U.S. REPORT IF THE COURT WANTS TO LOOK AT THE CASE, IS TO SAY THAT ALTHOUGH EVERY COMMERCIAL USE OF COPYRIGHTED MATERIAL IS PRESUMPTIVELY UNFAIR USE, NONCOMMERCIAL USES ARE A DIFFERENT MATTER. AND WHERE THERE'S A CHALLENGE TO A NONCOMMERCIAL USE, EITHER THE PARTICULAR USE MUST BE PROVEN TO BE HARMFUL OR IF IT SHOULD BECOME WIDESPREAD, IT WOULD ADVERSELY AFFECT THE POTENTIAL MARKET FOR THE COPYRIGHTED WORK.

AND IT GOES ON TO SAY THAT IN THAT CASE THE PLAINTIFFS DID NOT MAKE THEIR BURDEN, DID NOT CARRY THEIR BURDEN. AND I RESPECTFULLY SUGGEST, YOUR HONOR, THAT THE HYPOTHESES THAT YOU'VE HEARD IN TERMS OF ARGUMENT DOESN'T CARRY THAT BURDEN EITHER.

INITIALLY, AS THE COURT IS AWARE, THE PLAINTIFFS CAME IN AND THEY SAID TO THE COURT, "THIS IS CAUSING A DECLINE IN CD SALES." AND WHAT THEY DID IS THEY DID A SURVEY OF COLLEGE STORES WITHOUT BOTHERING TO INCLUDE SALES TO COLLEGE STUDENTS ON AN ONLINE BASIS. AND THE SALES DECLINE IN THE COLLEGE RECORD STORES BEGAN BEFORE NAPSTER CAME, HAD NOTHING TO DO WITH NAPSTER.

AND THE EVIDENCE, THE OVERWHELMING EVIDENCE THAT HAS

BEEN PRESENTED NOT ONLY FROM OUR EXPERT BUT FROM A NUMBER OF INDEPENDENT STUDIES, IS THAT NAPSTER HAS NOT HAD, DOES NOT INDICATE THAT IT WILL AT ANY TIME IN THE NEAR FUTURE HAVE ANY SUBSTANTIAL ADVERSE EFFECT ON EITHER THE MARKET FOR THE COPYRIGHTED WORK, WHICH IS THE SONY TEST, OR TO CREATE ANY HARM.

AND JUST AS A --

THE COURT: WHO HAS THE BURDEN ON THAT?

MR. BOISE: WELL, THE SONY CASE SAYS IT BELONGS ON THE PLAINTIFFS.

THE COURT: BUT DOESN'T DEFENDANT HAVE THE BURDEN? FAIR USE IS AN AFFIRMATIVE DEFENSE. THE DEFENDANT HAS THE BURDEN ON FAIR USE; RIGHT?

MR. BOISE: AND WHAT THE SUPREME COURT --

THE COURT: SO HOW DO YOU ALL OF A SUDDEN PUNT IT TO THEM?

MR. BOISE: BECAUSE I THINK THE WAY THE SUPREME COURT PUTS IT HERE ON PAGE 451 -- AND, REMEMBER, THE RESPONDENTS THERE WERE THE PLAINTIFFS -- AND IT SAYS:

"RESPONDENTS FAILED TO CARRY THEIR BURDEN WITH REGARD TO HOME TIME SHIFTING WITH RESPECT TO PROVING THAT THE NONCOMMERCIAL USE IS HARMFUL."

AND THE COURT SAYS VERY DIRECTLY, YOUR HONOR:

"ACTUAL PRESENT HARM NEED NOT BE SHOWN.

SUCH A REQUIREMENT WOULD LEAVE THE COPYRIGHT HOLDER WITH NO DEFENSE AGAINST PREDICTABLE DAMAGE NOR IS IT NECESSARY TO SHOW WITH CERTAINTY THAT FUTURE HARM WILL RESULT. WHAT IS NECESSARY IS A SHOWING OF A PREPONDERANCE OF THE EVIDENCE THAT SOME MEANINGFUL LIKELIHOOD OF FUTURE HARM EXISTS."

AND OBVIOUSLY THE PREPONDERANCE OF THE EVIDENCE IS THE PLAINTIFF'S BURDEN THERE.

"IF THE INTENDED USE IS FOR COMMERCIAL GAIN, THAT LIKELIHOOD MAY BE PRESUMED; BUT IF IT IS FOR NONCOMMERCIAL PURPOSE, THE LIKELIHOOD MUST BE DEMONSTRATED. IN THIS CASE RESPONDENTS FAILED TO CARRY THEIR BURDEN WITH RESPECT TO HOME TIME SHIFTING."

AND I THINK WHAT THE SUPREME COURT IS QUITE CLEARLY SAYING IS THAT WHERE THE DEFENDANT COMES FORWARD AND MEETS ITS BURDEN BY SHOWING THAT THE USE IS NONCOMMERCIAL, THEN IT BECOMES THE PLAINTIFF'S BURDEN TO SHOW THAT THAT USE EVEN THOUGH NONCOMMERCIAL MAY HAVE THIS KIND OF HARM.

THE COURT: HOW DOES THAT SQUARE WITH CAMPBELL V. ACUFF ROSE?

MR. BOISE: YOUR HONOR, I'M NOT SURE.

THE COURT: IT WOULD BE HELPFUL TO KNOW BECAUSE --

MR. BOISE: TELL ME THAT CASE AGAIN.

THE COURT: MAYBE I'M MISPRONOUNCING IT. ACUFF ROSE MUSIC, SUPREME COURT DECISION 1994 AFTER SONY.

MR. BOISE: RIGHT. I DON'T THINK IT'S -- I DON'T THINK IT'S INCONSISTENT WITH THAT. IS THERE A PARTICULAR PORTION THAT THE COURT HAS IN MIND?

THE COURT: WELL, YES. I'LL JUST HAND IT DOWN TO YOU AND YOU CAN READ MY WHOLE CASE INSTEAD OF JUST A TAB. ARE YOU JUST --

MR. BOISE: ALL I'M TRYING TO DO --

THE COURT: WE'RE PROBABLY AT THE END OF YOUR TIME AND WE HAVE TO GET TO YOUR CO-COUNSEL.

MR. BOISE: I WANTED TO RESPOND TO THE PARTICULAR POINT THE COURT RAISED. I DIDN'T SEE ANYTHING INCONSISTENT THERE.

THE COURT: OKAY. THANK YOU.

MR. BOISE: THANK YOU, YOUR HONOR.

THE COURT: MR. JOHNSON, ARE YOU NEXT?

MR. JOHNSON: YES, YOUR HONOR.

THE COURT: YES.

MR. JOHNSON: YES. I'D LIKE TO FOCUS ON THE ISSUES OF HARM AND --

THE COURT: IN WHAT CONTEXT? IN THE CONTEXT OF THE IRREPARABLE INJURY OR IN THE CONTEXT OF FAIR USE?

MR. JOHNSON: THE BALANCE OF HARM TO THE PLAINTIFFS AND TO THE DEFENDANTS SHOULD AN INJUNCTION ISSUE.

THE COURT: OKAY.

MR. JOHNSON: AND I ALSO WANT TO ADDRESS THE SAFE HARBOR PROVISIONS OF 512(D) AS WELL AS THE SCOPE OF THE INJUNCTION.

WHY DON'T WE START FIRST WITH THE QUESTION OF THE BALANCE OF HARM.

THE COURT: WELL, WHAT KIND OF SHOWING HAS BEEN MADE ON 512(D)? I'M A LITTLE MYSTIFIED.

MR. JOHNSON: YES. THE COURT IN ITS RULING EARLIER IN THIS CASE STATED --

THE COURT: I'M FAMILIAR WITH THAT.

(LAUGHTER)

MR. JOHNSON: -- THAT THERE WAS A QUESTION OF FACT --

THE COURT: 512(A) BUT ARE WE AT 512(D)?

MR. JOHNSON: YES, WE ARE AT 512(D).

THE COURT: WHAT KIND OF SHOWING HAS BEEN MADE AT 512(D)?

MR. JOHNSON: AT 512(D) YOU SAID THERE WAS A QUESTION OF FACT AS TO WHETHER OR NOT WE HAD AN EFFECTIVE TAKE-DOWN POLICY.

THE COURT: WELL, WHAT I WANTED TO KNOW -- WELL, THERE WERE SOME OTHER ISSUES THERE AS WELL. YOU KNOW, WHAT HAVE YOU ESTABLISHED ON THIS ROUND OF BRIEFING WITH RESPECT TO 512(D)? WHAT DO YOU THINK YOU'VE ESTABLISHED?

MR. JOHNSON: WE'VE ESTABLISHED IN THE DECLARATION OF MR. KESSLER THE FOLLOWING: THAT THE TAKE-DOWN PROCEDURE WE HAD IN PLACE BEFORE, WHICH SIMPLY ADDRESSED THE USER NAME, HAS BEEN CHANGED DRAMATICALLY.

NOW, AS WE POINTED OUT TO YOU EARLIER, AND WE STILL BELIEVE THAT HAVING A NAME ALONE WILL NOT SUFFICE GIVEN THE INABILITY TO SEARCH A DATABASE, THAT WHAT WE NOW DO IS TAG THE HARD DRIVES OF ANYONE WHO HAS BEEN FOUND TO HAVE HAD INFRINGING MATERIAL.

THE RESULT IS THAT THAT PERSON CAN NO LONGER GET ON NAPSTER SIMPLY BY CHANGING THE NAME. THEY HAVE TO EITHER GET A NEW COMPUTER OR DO ALL SORTS OF THINGS WHICH WOULD OTHERWISE BE CONSIDERED UNREASONABLE. AND, IN FACT, IN OUR EXPERT OPINION, DR. TYGAR SAYS THAT THE APPROACH NAPSTER HAS ADOPTED IS CONSISTENT WITH THE APPROACH TAKEN BY OTHER INTERNET PROVIDERS.

AND WHY IS THAT IMPORTANT? IT'S IMPORTANT BECAUSE 730,000 PEOPLE WHO WERE APPROPRIATELY IDENTIFIED AS HAVING INFRINGING MATERIAL WERE SUBJECTED TO OUR TAKE-DOWN PROCEDURE; AND CONTRARY TO THE ASSERTION YOU JUST HEARD OR THAT'S INTIMATED IN THIS MEMO THAT WAS DICTATED IN SEPTEMBER 1999 BUT DOES NOT REFLECT THE REALITY OF NAPSTER, IF A USER IS IDENTIFIED AS HAVING INFRINGING MATERIAL, THAT USER'S HARD DRIVE IS BLOCKED.

YOU WILL NOTE IN THE REVIEW OF THE PAPERS THAT PLAINTIFFS NEVER OFFERED ANY EVIDENCE TO SAY THAT THAT WAS NOT

REASONABLE.

NOW, THAT'S IMPORTANT BECAUSE THE COURT RULED IN MARCH THAT THESE CONSUMERS DON'T SEND ANYTHING THROUGH NAPSTER, NAPSTER DOESN'T ROUTE ANYTHING, AND THEREFORE THE ACTIVITY THAT IS THE CREATION OF THE MP3 FILE AND THE SENDING IT TO ANOTHER CONSUMER IS STRICTLY DONE PEER TO PEER.

SINCE IT'S DONE PEER TO PEER AND SINCE IT'S DONE IN THE INTERNET, NAPSTER CANNOT HAVE CONTROL OVER OR THE ABILITY TO SUPERVISE. SINCE THAT'S THE CASE AND SINCE WE HAVE AN EFFECTIVE TAKE-DOWN POLICY, WE'RE ENTITLED TO RELY UNDER THE PROVISION OF 512.

NOW, WHAT DID THE PLAINTIFFS DO? IN THE HEARING IN MAY YOU TOLD THE PLAINTIFFS THAT IF THEY WERE GOING TO ADDRESS THE ISSUE OF CONTROL, THEY NEEDED TO IDENTIFY SOMEONE AND THEY NEEDED TO DO IT SO THAT PERSON COULD BE DEPOSED BY MAY 30. MAY 30 CAME AND WENT. THE ONLY REPORT WE RECEIVED WAS IN THEIR REPLY, WHICH WAS FILED JUST THE OTHER DAY, BY MR. FARMER.

NOW, IN OUR POSITION, MR. FARMER, NEEDLESS TO SAY, COULD NOT BE DEPOSED BECAUSE WE HAD BEEN SANDBAGGED EFFECTIVELY, BUT MR. FARMER NEVER ADDRESSED THE ISSUE OF DISABLING THE HARD DRIVE; AND THE REASON HE DIDN'T, I SUGGEST TO THE COURT, IS BECAUSE HE COULDN'T BECAUSE THAT IS AN EFFECTIVE WAY TO DO IT.

WHAT DID MR. FARMER DO? MR. FARMER PROPOSED TO REINVENT NAPSTER BY TURNING NAPSTER INTO A SERVER-BASE SYSTEM

BY CREATING THIS HUGE DATABASE OF NAMES.

AS WE TOLD THE COURT, YOU CANNOT SORT BY WORD IN NAPSTER. AND A GOOD EXAMPLE IS THE TRYING TO FIND METALLICA SONG "SAD BUT TRUE." AND I BELIEVE IT'S AT 37 OF OUR OUTLINE, YOUR HONOR. ACTUALLY, IT'S -- IF YOU GO TO 38.

THE COURT: WHAT, IF ANYTHING, HAS NAPSTER DONE OR ATTEMPTED TO DO TO IDENTIFY COPYRIGHTED MUSIC THAT'S BEING EXCHANGED?

MR. JOHNSON: NAPSTER HAS COMPLIED WITH THE DMCA. IF IT RECEIVES NOTICE OF THE EXISTENCE OF INFRINGING MATERIAL, IT PURSUES THE APPROPRIATE COURSE OF CONDUCT, WHICH IS TO IDENTIFY ONCE A PERSON IS ONLINE.

BECAUSE REMEMBER NOW, THIS IS NOT A STATIC SITUATION. IF A PERSON IS NOT ONLINE, NAPSTER CAN DO NOTHING. BUT IF A PERSON IS ONLINE AND IT IS DETERMINED THAT THAT PERSON, AFTER HAVING RECEIVED NOTICE, HAS IN FACT BEEN -- DOES, IN FACT, HAVE THE COPYRIGHTED MATERIAL, THAT PERSON'S HARD DRIVE IS DISABLED. THAT'S WHAT WE DID.

NOW, WHAT DO THE PLAINTIFFS SAY? THE PLAINTIFFS SAY, "OH, NO, YOU HAVE TO GO OUT AND FIND AND GET AUTHORIZATION FROM EVERYONE IN THE WORLD WHO HAS COPYRIGHTED MATERIAL." THAT'S NOT REQUIRED BY THE DMCA. OUR OBLIGATION IS LIMITED TO HAVING AN EFFECTIVE TAKE-DOWN PROCEDURE.

NOW, WE'VE PROVIDED NOTICE ON OUR SITE AT THE WORST CASE SINCE FEBRUARY OF 1999. THE COURT HAS ALREADY NOTED THAT.

AND WE HAVE IMPROVED OUR TAKE-DOWN PROCEDURE, AND THERE IS NO EVIDENCE THAT THAT TAKE-DOWN PROCEDURE IS NOT EFFECTIVE. AGAINST THAT BACKGROUND, WE'RE ENTITLED TO RELY ON THE DMCA.

I WOULD LIKE TO -- THE COURT -- I WANTED TO ADDRESS A POINT MADE BY MR. BOISE BECAUSE IT GOES DIRECTLY TO WHAT MR. FARMER, THE LATE PURPORTED EXPERT, CLAIMED THAT WE CAN EASILY SORT BY NAME.

IF YOU LOOK AT TAB 38, THESE ARE A COUPLE -- THIS IS JUST A SCREEN SHOT OF ALBUMS WITH THE SONG "SAD BUT TRUE." "SAD BUT TRUE" WAS RECORDED BY METALLICA IN 1994, I THINK. IF YOU'LL LOOK DOWN THE LEFT SIDE, YOU'LL SEE THE NAMES, AND DOWN THE RIGHT SIDE AS WELL, OF VARIOUS RECORDINGS OF "SAD BUT TRUE" BY DIFFERENT ARTISTS, SOME OF WHOM WROTE THEIR OWN "SAD BUT TRUE."

IF WE WERE TO TRY TO IMPLEMENT THE TYPE OF SYSTEM THAT MR. FARMER PROPOSED -- AND, BY THE WAY, HE PROPOSED IT WITHOUT EVER HAVING LOOKED AT NAPSTER'S SOFTWARE, WITHOUT EVER HAVING DONE ANY TECHNICAL FEASIBILITY AS IT WOULD RELATE TO PEER-TO-PEER SHARING, HE JUST SIMPLY POSITED THIS GREAT ASSUMPTION WITHOUT BOTHERING TO PERMIT HIMSELF TO BE DEPOSED AND WITHOUT HAVING BOTHERED TO COMPLY WITH THE COURT'S ORDER -- WE WOULD END UP DISABLING NUMEROUS SONGS WITH THE SAME TITLE, SOME OF WHICH MAY BE PERFECTLY AUTHORIZED. AND THE RESULT WOULD BE THAT WE WOULD BE SUBJECT TO SANCTION BY USERS UNDER THE DMCA. THAT IS THE REALITY.

NOW, YOU HEARD FROM MR. FRACKMAN THAT 75 MILLION, I THINK THAT'S THE CHART, 75 MILLION DOWNLOADS WILL OCCUR IN THE NEXT SIX MONTHS. WHAT MR. FRACKMAN DIDN'T TELL YOU IS THAT THERE ARE ALREADY, AS WE SIT HERE TODAY, MILLIONS IF NOT BILLIONS OF CD'S THAT ARE ALREADY IN MP3 FILES.

NAPSTER DOES NOT CREATE MP3 FILES. THERE IS NOTHING THAT YOU CAN DO TODAY THAT WILL ELIMINATE THE EXISTENCE OF MP3 FILES. THE PIETY OF SAYING, "OH, THESE MP3 FILES ARE SO HORRIBLE, THESE PEOPLE ARE DOING BAD THINGS," IGNORES THE FACT THAT THE ONLY WAY MP3 FILES CAN BE CREATED IS BY USING RIPPING SOFTWARE, BY USING PLAYER SOFTWARE. AND THAT RIPPING SOFTWARE AND THAT PLAYING SOFTWARE IS NOT MANUFACTURED BY NAPSTER. IT'S MANUFACTURED BY SONY.

WE HAVE PUT INTO THE RECORD EVIDENCE THAT THEY DID THIS DELIBERATELY BEGINNING IN 1996 FOR THE PURPOSE OF CREATING A MARKET. WELL, THEY SUCCEEDED. THEY NOW HAVE MILLIONS AND BILLIONS OF MP3 FILES THAT WILL NOT GO AWAY REGARDLESS OF ANYTHING YOU DO; AND AS A CONSEQUENCE, TO IMPLY THAT SOMEHOW IT IS NAPSTER IS WRONG.

AND , IN FACT, IT'S WRONG FOR ANOTHER REASON. AS WE POINT OUT IN OUR DECLARATION, AND THIS IS -- THIS POINT I THINK REALLY BEARS EMPHASIS, ONCE THE MUSIC INDUSTRY CONCLUDED THAT IT NEEDED TO PROTECT ITS MUSIC, IT IMPLEMENTED A POLICY UNDER IT'S WHAT'S KNOWN AS SDMI. SDMI IS AN ENCRYPTION SCHEME THAT WORKS WITH WATERMARKING.

AND WHAT DOES THAT MEAN? THAT MEANS THAT IN THE FUTURE, AND WE'RE TALKING NOW AND GOING FORWARD, ALL MUSIC IS GOING TO BE WATERMARKED. WHEN YOU WATERMARK YOUR MUSIC AND YOU PLAY IT BACK IN WHAT'S KNOWN AS AN SDMI-COMPLIANT DEVICE, IT WILL ENABLE YOU TO PLAY BECAUSE IT WILL DETERMINE THAT YOU'VE GOT THE RIGHT TO DO SO.

HOWEVER, IF YOU RIP A WATERMARKED DEVICE -- EXCUSE ME, CD, AND YOU TRY TO PLAY IT IN AN UNAUTHORIZED WAY, IT WILL NOT PERMIT YOU TO DO IT. AND HOW DO WE KNOW? YOU REMEMBER THE LAST TIME I WAS HERE AND I ASKED YOU IF I COULD TAKE THE DEPOSITION OF MR. AL SMITH, AND AFTER MUCH RAVING AND RANTING I WAS GIVEN AT LEAST A HALF A DAY? MR. SMITH TESTIFIED TO THAT AND THAT IS EXACTLY WHAT'S GOING ON AND IT WILL BE DONE BY THE END OF THE YEAR.

SO WHEN WE TALK ABOUT IRREPARABLE HARM AND GRIEVOUS INJURY TO THE MUSIC INDUSTRY, UNDERSTAND THAT THEY'VE IMPLEMENTED THEIR OWN TECHNOLOGY TO SOLVE THIS PROBLEM. AND UNDERSTAND SOMETHING ELSE --

THE COURT: BUT THEY ARE THE OWNERS OF THE COPYRIGHTS, AT LEAST AS TO THE MUSIC THAT THEY ARE SUING OVER; RIGHT?

MR. JOHNSON: THAT'S CORRECT, BUT THE DIFFERENCE --

THE COURT: ARE YOU SUGGESTING THAT SOMEHOW THEY FORFEIT THEIR RIGHT TO GO AFTER INFRINGERS?

MR. JOHNSON: NO. WHAT I AM SUGGESTING IS TWO

THINGS. ONE, THAT CREATING AN ENVIRONMENT, MORE THAN CREATING AN ENVIRONMENT, ENABLING THE WORLD TO GENERATE MP3 FILES, WHICH THEY DID, AND KNOWING YOU HAD A NEED TO ENCRYPT YOUR MUSIC IN ORDER TO AVOID A PROBLEM GOES TO THE ISSUE OF DID THEY WAIVE THEIR RIGHTS. IT ALSO GOES TO AN ISSUE OF COPYRIGHT MISUSE, WHICH WE HAVE DETAILED FOR THE COURT IN OUR BRIEF.

IT IS NOT ENOUGH TO SAY THAT, "I DON'T HAVE TO PROTECT MY COPYRIGHT IN A SITUATION WHEN I CREATED THE PROBLEM IN THE FIRST PLACE." IN MR. KENSWIL'S DEPOSITION HE WAS ASKED -- AND REMEMBER IF WE GO BACK TO THE AUDIO HOME RECORDING DEVICE, UNDER THAT STATUTE AND UNDER THE SUBSEQUENT DMCA STATUTE THERE WAS A FLAT ROYALTY IMPOSED ON CERTAIN TYPES OF DEVICES THAT ALLOWED YOU TO RECORD DIGITALLY, A FLAT ROYALTY -- HE WAS ASKED:

> "IN 1995, WHEN YOU FIRST BECAME AWARE THAT CD RIPPING TECHNOLOGY WAS ON THE MARKET, WHY DIDN'T YOU ASK FOR A FLAT ROYALTY AS YOU HAD DONE FOR DIGITAL AUDIO TAPE DEVICES?"

THE ANSWER WAS TELLING:

> "WE DIDN'T WANT THAT BUSINESS MODEL."

SO THEY ALLOWED IT TO GO ON AND NOW THEY'RE COMING TO YOU AND IMPLYING THAT IT'S NAPSTER'S FAULT. THE REALITY IS WHETHER NAPSTER IS HERE TODAY OR NOT, YOU WILL STILL HAVE BILLIONS OF MP3 FILES. WHETHER NAPSTER IS HERE TODAY OR NOT, YOU WILL STILL BE ABLE TO GO TO HUNDREDS OF SITES ON THE

INTERNET TO HEAR MP3 FILES. EVERY MAJOR MANUFACTURER TODAY IS MAKING MP3 FILE DEVICES THAT CAN BE PLAYED BACK.

AND WHAT THE MUSIC INDUSTRY HAS DONE --

THE COURT: AND FOR MOST OF THESE THERE'S SOME SORT OF A SUBSCRIPTION OR PRICE OR --

MR. JOHNSON: NO. NO. LET ME -- I'M SORRY, YOUR HONOR, AND THIS IS MY FAULT BECAUSE --

THE COURT: THAT'S WHAT IT LOOKS LIKE FROM THE EVIDENCE I SAW.

MR. JOHNSON: NO, NO. LET ME EXPLAIN TO YOU HOW THIS WORKS.

I WANT YOU TO ASSUME THIS IS A CD (INDICATING), THIS CD -- AND CD'S HAVE BEEN AROUND SINCE THE LATE '70'S. THIS CD IS CAPABLE OF BEING INSERTED INTO YOUR -- INTO A HARD DRIVE AND USING SOFTWARE MANUFACTURED BY MICROSOFT AND OTHERS CONVERTED AND PLACED ON YOUR HARD DRIVE.

NOW, WHEN YOU PLACE IT ON YOUR HARD DRIVE, IF IT IS NOT ENCRYPTED, THAT IS TO SAY IF THERE'S NO PROTECTION THERE, THAT IS JUST LIKE ANY OTHER PIECE OF DIGITAL INFORMATION. IT CAN BE TRANSMITTED FROM YOUR HARD DRIVE ANYWHERE IN THE INTERNET. THAT IS THE PROBLEM AND THAT PROBLEM OCCURRED NOT BECAUSE OF ANYTHING NAPSTER DID BUT BECAUSE OF THE EXISTENCE OF THIS RIPPING SOFTWARE.

NOW, IN ADDITION --

THE COURT: WELL, HOW MANY PEOPLE -- WELL, AND

THAT'S BECAUSE OF THE ENCRYPTION; RIGHT?

MR. JOHNSON: RIGHT.

THE COURT: OR THE LACK OF ENCRYPTION. HOW MANY PEOPLE ULTIMATELY WOULD SAY -- I OR SOMEONE ELSE IN THIS COURTROOM WHO WANTED TO SHARE IT WITH OTHER PEOPLE, HOW MANY PEOPLE WOULD I BE ABLE TO COMMUNICATE THAT WITH WITHOUT THE ASSISTANCE OF NAPSTER?

MR. JOHNSON: ALL. OH, EASILY. I COULD RIP A PIECE OF YOUR FAVORITE MUSIC TODAY AND E-MAIL IT TO YOU.

THE COURT: NO, BUT I'M SAYING HOW MANY -- UNLESS YOU HAD NOTHING ELSE TO DO ALL DAY LONG, ALL NIGHT LONG, HOW MANY PEOPLE COULD YOU ACTUALLY SHARE THAT WITH WITHOUT THE BENEFIT OF NAPSTER?

MR. JOHNSON: EASILY. EASILY. YOU CAN GO TO AOL, GO TO ONE OF THEIR CHAT ROOMS, TALK ABOUT MUSIC, SWAP FILES. YOU CAN GO TO --

THE COURT: BUT HOW MANY PEOPLE ARE YOU SHARING IT WITH AT THAT POINT?

MR. FRACKMAN: WELL, THE ISSUE IS -- HOW MANY PEOPLE ARE YOU SHARING WITH? IT'S ALWAYS ONE-TO-ONE. NOW, BUT IT GOES UP EXPONENTIALLY BUT THAT'S BECAUSE OF THE INTERNET.

BUT THE POINT IS, THE POINT IS THAT SHARING IS GOING ON AND WILL CONTINUE AND THAT -- AND TO SAY THAT THERE MAY BE 75 MILLION PEOPLE WHO ARE DOING IT VIA NAPSTER MISSES THE POINT. THE POINT IS HAVING CREATED THE MP3 FILES IN THE FIRST

PLACE, THERE IS SHARING GOING ON ALL OVER THE NET IN SIGNIFICANT VOLUMES.

AND THE POINT TO BE MADE IS: THIS CD (INDICATING) IS A LEGACY. BY THAT I MEAN YOU CANNOT GO BACK AND PUT THE GENIE BACK IN THE BOTTLE VIS-A-VIS THOSE CD'S. THEY ARE HERE. THEY ARE GOING TO BE HERE. THE ONLY THING YOU CAN DO TO SOLVE THIS PROBLEM, IF YOU'RE THE RECORD INDUSTRY, IS GO TO SDMI-COMPLIANT DEVICES, WHICH THEY HAVE DONE.

AND FOR THEM TO SAY THAT IT IS NAPSTER'S FAULT IS FUNDAMENTALLY WRONG. AND IF YOU GO TO ANY WEBSITE, AND YOU CAN LIST -- I'VE GOT A LIST OF AT LEAST EIGHT RIGHT NOW YOU CAN GO TO, YOU CAN DOWNLOAD FREE MP3 FILES ALL DAY LONG ANYWHERE, AND THEY'VE KNOWN THAT FOR YEARS.

THE COURT: AND FOR SOME OF THEM YOU CAN PAY ALSO; RIGHT?

MR. JOHNSON: NO. THE ONLY ONES YOU PAY FOR -- SO WE'RE CLEAR, WE'RE NOT TALKING ABOUT MP3 FILES. MP3 FILES ARE FREE. YOU'RE GOING TO PAY FOR TO STREAM IF YOU GO TO CERTAIN SITES, BUT --

THE COURT: HOW ABOUT NUTELLA (PHONETIC), DO YOU HAVE TO PAY?

MR. JOHNSON: NO. NOT ONLY DO YOU NOT HAVE TO PAY, OR FREENET YOU DON'T HAVE TO PAY, YOU DON'T HAVE TO PAY IF YOU GO TO YAHOO. YOU DON'T HAVE TO PAY IF YOU GO TO AOL. THE ONLY PLACE YOU PAY IS IF YOU GO TO ONE OF THEIR SITES OR ONE OF

THEIR AUTHORIZED SITES LIKE LISTEN DOT-COM.

WHAT HAPPENS HERE IS THEY ARE CREATING A MARKET, THEY SAY, FOR THE PAYMENT OF DOWNLOADABLE MUSIC AND THERE'S NOTHING WRONG WITH THAT. THEY CAN ENCRYPT THE DOWNLOADABLE MUSIC. THEY ARE ENCRYPTING IT. BUT THOSE OTHER MP3 FILES THAT HAVE BEEN OUT THERE SINCE THE MP3 WAS CREATED IN 1987, SINCE THE STAND WAS CREATED IN 1987 AND CERTAINLY HAVE PROLIFERATED, AS WE POINT OUT IN OUR REPORT, SINCE THE MID-'90'S, THEY WERE THEN AND THEY WILL ALWAYS BE FREE.

THE COURT: DOES THAT MEAN THEY'RE POWERLESS AGAINST ANY INFRINGER AT THIS POINT?

MR. JOHNSON: NO, BUT I THINK THEIR ONLY, THEIR ONLY REAL OPPORTUNITY TO CORRECT THIS SITUATION, ONE, IS TO DEVELOP THE SDMI-COMPLIANT; AND, TWO, TO GO AFTER COMMERCIAL TRANSACTIONS WHERE, FOR EXAMPLE, PEOPLE ARE CHARGING FOR THESE DOWNLOADS. AND THAT'S WHY THEY STRUGGLED SO MIGHTILY IN THIS CASE BECAUSE --

THE COURT: I THOUGHT YOU JUST TOLD ME THERE WAS NO ONE CHARGING FOR THIS.

MR. JOHNSON: NO, NO. I MEAN, FOR EXAMPLE, I AM GOING ONLINE AND PREPARING A MIXTURE OF MUSIC, OKAY? AND THEN I DECIDE I'M GOING TO BURN THAT INTO A CD. SO I GO -- I DOWNLOAD IT TO MY COMPUTER. I THEN USE CD-R SOFTWARE, CREATE MY OWN CD AND THEN I COME TO YOU AND I SAY, "I'VE GOT THESE GREAT CD'S. I WANT YOU TO PAY ME 10 BUCKS FOR IT." THAT'S A

COMMERCIAL TRANSACTION. THAT'S WHAT I'M TALKING ABOUT. THAT'S NOT WHAT THEY'RE TALKING ABOUT AND THAT'S NOT WHAT NAPSTER IS DOING. THEY HAVE CREATED THEIR OWN MONSTER AND THE MONSTER IS THE MP3.

NOW, IF YOU WILL, IF YOU GO OVER TO TAB 53 WITH ME, I CAN ASSURE YOU WE DON'T CITE ANY CASES, AT LEAST FOR THE MOMENT NOW --

THE COURT: I DON'T MIND IF YOU CITE THEM. IT'S JUST --

MR. JOHNSON: ALL RIGHT. ALL RIGHT.

THE COURT: IT'S THE EXCERPTED -- SELECTIVE EXCERPTION OF THEM.

MR. JOHNSON: YOUR HONOR, I LIVE FOR SELECTIVE EXCERPTIONS.

THE COURT: I KNOW, MOST LAWYERS DO. MOST LAWYERS DO.

(LAUGHTER)

THE COURT: YES.

MR. JOHNSON: I ALSO LIVE TO OBJECT TO SOMEONE ELSE'S ABILITY TO SELECTIVELY EXCERPT.

BUT HERE'S WHAT I WANT -- HERE'S WHAT I HAVE SELECTIVELY EXCERPTED. YOU HAVE HEARD MR. RAMOS TELL YOU ABOUT THEIR NARROW LITTLE CLAIM FOR INJUNCTION AND MR. FRACKMAN SAYING, "WE DON'T WANT MUCH." TAKE A LOOK AT THE PROPOSED ORDER IN THIS CASE. THEY SAY:

"DEFENDANTS ARE EACH ENJOINED DURING THE PENDENCY OF THESE ACTIONS FROM ENGAGING IN OR ENABLING, FACILITATING OR ASSISTING OTHERS IN THE COPYING, DOWNLOADING, UPLOADING, TRANSMISSION OR DISTRIBUTION OF COPYRIGHTED MUSICAL WORKS OR SOUND RECORDINGS PROTECTED BY COPYRIGHT OR STATE LAW WITHOUT THE EXPRESS PERMISSION OF THE RIGHTS OWNER."

WELL, THAT'S NOT THE LAW. IT HAS NEVER BEEN THE LAW. THE ISSUE OF A TECHNOLOGY AS OPPOSED TO AN INDIVIDUAL BUSINESS WAS RESOLVED IN SONY, AND IN SONY THE SUPREME COURT SIDED WITH THE TECHNOLOGY. IF IT HAD BEEN OTHERWISE --

THE COURT: THIS IS A DIFFERENT TECHNOLOGY; RIGHT?

MR. JOHNSON: WELL, BUT YOU KNOW WHAT? THE ONLY DIFFERENCE, YOUR HONOR, IS THE FACT THAT WE NOW HAVE THE INTERNET. THAT'S THE ONLY DIFFERENCE.

LOOK AT BETA MAX. ONE --

THE COURT: IS THAT -- THAT'S -- YOU MAKE THAT SOUND AS IF THAT'S SORT OF AN INCONSEQUENTIAL FACTOR.

MR. JOHNSON: NO, I DON'T.

THE COURT: I THOUGHT THAT WAS THE WHOLE POINT OF ALL OF THIS, IS THE INTERNET HAS REVOLUTIONIZED EVERYTHING AND HERE WE ARE WITH A WHOLE NEW TECHNOLOGY THAT NOBODY QUITE HAS A HANDLE ON IN TERMS OF CONTROL.

MR. JOHNSON: AND WHAT'S GREAT ABOUT YOUR LAST

COMMENT IS YOU'RE ABSOLUTELY RIGHT AND THAT'S WHY THE NINTH CIRCUIT SAID IN DEALING WITH THE INTERNET, THE COURT SHOULD GO SLOW AND HAVE CONGRESS ADDRESS IT. AND HERE'S WHY --

THE COURT: WELL, BUT YOU JUST COMPLAINED THAT THEY WERE GOING TOO SLOWLY. THEY WAITED -- THE PLAINTIFFS WENT TOO SLOWLY.

MR. JOHNSON: OH, THEY DID BUT THEY DIDN'T GO TOO SLOWLY IN TERMS OF SEEKING LEGISLATIVE ASSISTANCE. THEY COULD HAVE SOUGHT LEGISLATIVE ASSISTANCE. THEY ELECTED NOT TO DO SO. MR. KENSWIL SAID IT BEST, "WE DIDN'T WANT TO GO BACK TO CONGRESS AND GET A FLAT ROYALTY, WHICH WE COULD HAVE."

THE COURT: I'M TALKING ABOUT THE MP3, THOUGH.

MR. JOHNSON: THAT'S THE WHOLE POINT. IF THEY HAD GOTTEN A ROYALTY ON THE ABILITY AGAINST THE SOFTWARE MANUFACTURERS WHO MADE THE RIPPING SOFTWARE AND THE PLAYER SOFTWARE, THEY WOULDN'T BE SITTING HERE TODAY AND CLAIMING THEY WEREN'T GETTING ANY MONEY BECAUSE THAT'S THE PROBLEM.

THE COURT: WOULDN'T THAT HAVE REALLY BROUGHT THEM WITHIN SONY MUCH MORE THAN WHAT WE HAVE HERE?

MR. JOHNSON: NO -- YES, AND HERE'S THE REASON WHY: BECAUSE IN THEIR SITUATION THEY COULD SAY -- OKAY, JUST AS THEY DID AFTER SONY, AFTER SONY THEY WENT TO CONGRESS AND THEY SAID, "CONGRESS, WE WANT YOU TO FORCE THE MANUFACTURERS TO GIVE US A COPY, WHAT WAS CALLED A COPY CODE." THIS WAS IN 1988. IT'S IN OUR PAPERS.

AND CONGRESS SAID, "WAIT A SECOND. IF YOU WANT US TO ENFORCE -- YOU WANT US TO IMPOSE THIS ON YOUR MANUFACTURERS, ONE, IT'S NOT TECHNICALLY FEASIBLE; TWO, IT MIGHT NEGATIVELY IMPACT THE OPERATION OF THE DEVICE. WE'RE NOT GOING TO DO IT." SO THEY WENT AWAY.

SO NOW WHAT THEY'VE DONE IS CREATED THEIR OWN SYSTEM 20 YEARS LATER, OR SINCE 1988. MY MATH IS OFF. MAKE THAT 12 YEARS LATER.

THE COURT: TRY 12, YES.

MR. JOHNSON: ALL RIGHT. SO THE RESULT IS THE SAME. THEY HAD THE ABILITY TO GO TO CONGRESS BUT THEY KNEW THEY WEREN'T GOING TO GO BACK AFTER HAVING BEEN REBUFFED IN 1988. SO NOW THEY COME TO YOU AND SAY, "WE'VE GOT MILLIONS." IT'S NOT MY FAULT. IT'S NOT NAPSTER'S FAULT. IT'S THEIR FAULT.

NOW, I WANT -- LOOKING AT THEIR PROPOSED ORDER, BECAUSE I THINK IT'S IMPORTANT --

THE COURT: TALKING ABOUT FAULT FOR JUST A MINUTE, I JUST WANT TO BACK UP BECAUSE I THOUGHT THAT, YOU KNOW, THE 512 AND THE DIGITAL MILLENNIUM COPYRIGHT ACT SORT OF SEEMED TO BE AN AFTERTHOUGHT IN THE PAPERS.

BUT AS I UNDERSTAND 512(D), YOU ONLY GET THE EXEMPTION IF YOU -- WELL, YOU DON'T GET THE EXEMPTION IF YOU HAVE ACTUAL KNOWLEDGE OF THE INFRINGEMENT; RIGHT?

MR. JOHNSON: RIGHT, AND IT'S GOT TO BE OF THE INFRINGING ACTIVITY, THE SPECIFIC INFRINGEMENT. THAT MEANS I

HAVE TO HAVE ACTUAL KNOWLEDGE EACH TIME AN INDIVIDUAL CONSUMER SENDS INFRINGING MATERIAL TO ANOTHER INFRINGING CONSUMER NOT, AS COUNSEL SUGGESTS, I'VE GOT A 19-YEAR-OLD TESTOSTERONE-FILLED KID SAYING, "HEY, THEY'RE DOING PIRACY OUT THERE." THAT DOESN'T GET IT. THAT IS NOT THE TEST AND IT CAN'T BE THE TEST BECAUSE OTHERWISE HOW COULD THE INTERNET EXIST?

THE COURT: I DON'T THINK THIS SYSTEM IS JUST INVESTED IN BY AND SUPPORTED BY A SINGLE 19-YEAR-OLD, NUMBER ONE, IF THAT'S EVEN RELEVANT, OR HOW SMART THE KID IS.

THE QUESTION IS, IF YOU HAVE IN FACT -- OR IT SEEMS TO ME THE ISSUE IS IF YOU HAVE IN FACT DESIGNED A PRODUCT, A SYSTEM THAT IS IN FACT DESIGNED TO DO JUST WHAT IT'S BEEN DOING, ENABLING INFRINGING, ENABLING PIRACY, YOU CAN HARDLY STAND BACK AND SAY, "GEE, I DIDN'T KNOW THAT ALL THAT STUFF ON THERE WAS PIRATED OR ALL OF THAT STUFF WAS COPYRIGHTED AND WE'RE INFRINGING."

MR. JOHNSON: YOUR HONOR, THAT IS A GREAT ARTICULATION OF A SCENARIO, BUT THAT'S NOT WHAT PEER-TO-PEER DOES. PEER-TO-PEER SHARING -- AND LET ME SHOW YOU THIS CHART, AND I'M NOT TRYING TO RUN OVER.

THE COURT: REMEMBER, I WENT ON TO NAPSTER TO CHECK AND SEE WHAT IN FACT YOU FIND.

MR. JOHNSON: SO DID I. AND WHEN I WENT ON TO NAPSTER, I WENT ON TO NAPSTER BECAUSE I'M OLD --

THE COURT: JUST ABOUT EVERYTHING I SAW I COULD

IDENTIFY ALMOST IMMEDIATELY EVERYTHING WAS COPYRIGHTED.

MR. JOHNSON: NOW THAT'S A GOOD POINT. THAT'S A GOOD POINT. YOU SAY THAT.

THE COURT: IT WASN'T HARD.

MR. JOHNSON: NOW YOU UNDERSTAND THAT LIVE CONCERTS WHICH ARE REGULARLY, ARE REGULARLY -- CONSUMERS ARE REGULARLY PERMITTED TO TAPE THESE LIVE CONCERTS SO LIVE MUSIC, IT'S NOT UNAUTHORIZED. SO METALLICA HAS A LIVE CONCERT AND YOU'RE THERE AND YOU TAPE IT, IT'S ON NAPSTER'S SITE.

THE COURT: WHAT PERCENTAGE OF THE MUSIC THAT IS IN FACT ACCESSIBLE AT ANY ONE TIME ON NAPSTER IS, IN FACT, LIVE CONCERT MUSIC, INDEPENDENT ARTISTS WHO HAVE AUTHORIZED THEIR PERMISSION, AS COMPARED TO CD'S THAT HAVE COPYRIGHT NOTICE ON THEM AND THAT EVERYBODY KNOWS IS COPYRIGHTED? TELL ME WHAT --

MR. JOHNSON: THE ANSWER IS NOBODY KNOWS.

THE COURT: NOBODY KNOWS.

MR. JOHNSON: AND YOU KNOW WHY?

THE COURT: AND YOU KNOW WHO COULD DETERMINE THAT?

MR. JOHNSON: NO. CAN I FINISH? THE POINT IS THE REASON YOU CAN'T DETERMINE IT IS BECAUSE YOU HAVE TO LISTEN TO THE RECORDING TO KNOW AND THE --

THE COURT: BUT YOU CREATE THE SOFTWARE THAT CREATES THE PROBLEM IN THE FIRST PLACE. IT'S SORT OF LIKE -- AND A GOOD EXAMPLE WAS USED WHEN MY LAW CLERK AND I WERE TALKING ABOUT IT. IF YOU BUILD A CAR THAT WILL ONLY GO 150 MILES AN

HOUR, SURE, IT MAY HAVE SOME OTHER USES BUT YOU CAN'T USE IT ON THE HIGHWAY BECAUSE IT WON'T GO AT THE SPEED LIMIT BECAUSE IT WILL ONLY REV UP AND GO 150 MILES AN HOUR. TOO BAD, YOU DON'T GET TO USE IT THEN.

MR. JOHNSON: OKAY. AND LET'S TAKE --

THE COURT: REGULATIONS SAY YOU'VE GOT TO DRIVE 55 OR 60 OR 80, WHATEVER IT MAY BE, TOUGH LUCK.

MR. JOHNSON: AND LET'S TAKE YOUR EXAMPLE. HERE'S THE NAPSTER PEER-TO-PEER ARCHITECTURE (INDICATING). THIS USER NUMBER "C" (INDICATING) WANTS TO SEND A CURRENTLY SDMI-COMPLIANT SONG TO "B."

THE COURT: YES.

MR. JOHNSON: HE SENDS IT TO "B." IF "B" HAS GOT A COMPLIANT PLAYER, HE CAN HEAR IT. IF HE DOESN'T, HE CAN'T.

"C" DECIDES TO SEND A COPY OF A LIVE RECORDING TO "E." PERFECTLY PERMITTED. HE CAN DO IT.

YOU CANNOT CLAIM THAT BECAUSE THIS TECHNOLOGY CAN BE USED TO SHARE MP3 FILES AND, OH, BY THE WAY, ANYTHING ELSE THAT CAN FIT IN A PDF OR PTP FORMAT, THAT THAT MAKES IT BAD, AND THAT'S THE ARGUMENT. THAT WAS THE ARGUMENT THEY MADE IN SONY. SONY WAS BAD BECAUSE YOU COULD PLAY AND RECORD COPYRIGHTED MATERIAL.

IN FACT, IN SONY THEY EXPRESSLY TOLD PEOPLE, "THIS IS GREAT. YOU NOW CAN GO OUT AND RECORD ALL OF THESE FILMS ON YOUR OWN AND YOU DON'T HAVE TO LEAVE HOME AND YOU CAN SHARE

THEM WITH YOUR FRIENDS."

AND THE SUPREME COURT SAID --

THE COURT: ALL 79 MILLION OF THEM; RIGHT?

MR. JOHNSON: HEY, 79 MILLION OR 7. IF THE TEST IS GOING TO BE THAT YOU CAN'T USE --

THE COURT: BUT DOESN'T THAT TAKE IT BEYOND PERSONAL USE --

MR. JOHNSON: WELL, YOU KNOW WHAT'S INTERESTING --

THE COURT: -- WHICH IS WHAT SONY WAS REALLY TALKING ABOUT?

MR. JOHNSON: WHAT'S INTERESTING IS, IF IT DOES, THEN HOW CAN YOU RECONCILE THE RESULT IN DIAMOND/RIAA? BECAUSE IN DIAMOND/RIAA --

THE COURT: EASY. IT DOESN'T APPLY HERE AND I WILL EXPLAIN TO YOU WHY WHEN I RENDER MY DECISION. BUT IT DOESN'T APPLY.

MR. JOHNSON: IN DIAMOND/RIAA ONCE THE CD IS IN A HARD DRIVE, WHAT HAPPENS TO IT?

THE COURT: THERE'S NO DIGITAL RECORDING DEVICE EVEN BY --

MR. JOHNSON: YOU'RE NOT LISTENING. LET ME TRY ONE MORE TIME. ONCE IT'S ON THE HARD DRIVE --

THE COURT: YOU'RE FINISHED. YOU MAY HAVE A SEAT.

MR. JOHNSON: OKAY.

THE COURT: THANK YOU.

WE'LL TAKE A BRIEF -- WELL, DO YOU HAVE FIVE MINUTES YOU WANT TO REBUT?

MR. FRACKMAN: I DON'T KNOW HOW I CAN DO IT IN FIVE MINUTES, YOUR HONOR. I EITHER DON'T NEED ANY TIME AT ALL IF THE COURT DOESN'T HAVE ANY QUESTIONS OR I MIGHT NEED A LITTLE MORE THAN THAT.

THE COURT: WELL, DO YOU WANT TO RESPOND TO ANY OF THE ARGUMENTS THAT HAVE JUST BEEN MADE EITHER ABOUT THE 512(D) ISSUE OR THE IRREPARABLE HARM?

MR. FRACKMAN: I COULD DO THAT BRIEFLY, YOUR HONOR, I THINK, A COUPLE OF THINGS.

512(D) DOESN'T APPLY FOR EXACTLY THE REASON THE COURT SAID. IF THERE'S LIABILITY FOR CONTRIBUTORY OR VICARIOUS INFRINGEMENT, THEY'RE NOT COVERED UNDER 512(D).

AND, IN FACT, 512(D) IS NOT LIMITED TO ACTUAL KNOWLEDGE. IT IS -- AS THE COMMON LAW, IT ENCOMPASSES ACTUAL AND CONSTRUCTIVE KNOWLEDGE BECAUSE 512(D)(1)(A) REFERS TO ACTUAL KNOWLEDGE AND 512(D)(1)(B) SAYS, "IN THE ABSENCE OF SUCH ACTUAL KNOWLEDGE IS NOT AWARE OF FACTS OR CIRCUMSTANCES FROM WHICH INFRINGING ACTIVITY IS APPARENT." SO I THINK, YOUR HONOR, THAT EFFECTIVELY TAKES CARE OF 512(D).

THE COURT: AND HOW ABOUT WAIVER OF MISUSE? IN OTHER WORDS, YOU ALL CREATED THIS PROBLEM.

MR. FRACKMAN: WELL, YOUR HONOR, IT'S SORT OF LIKE ALICE IN WONDERLAND. WE CREATED A PROBLEM AND NOW THEY'RE

FIXING IT FOR US, AND SO I'M NOT REALLY SURE WHY WE'RE HERE. AND IF YOU HEAR MR. BOISE TALK, NO ONE IS GETTING ANYTHING OUT OF IT. ONE USER DOESN'T GET ANYTHING AND THE OTHER USER DOESN'T GET ANYTHING, SO I'M A LITTLE CONFUSED.

WE DIDN'T CREATE A PROBLEM. WHAT THEY WANT US TO DO IS TO ARRANGE A SYSTEM WHEREBY THEY CAN'T OR MAY NOT BE ABLE TO INFRINGE.

IF I HAVE A CAR PARKED OUTSIDE OF MY HOUSE AND I DON'T HAVE A BURGLAR ALARM IN IT AND SOMEBODY STEALS IT, THAT'S THEFT. IF I PUT A BURGLAR ALARM IN IT, THEY MAY NOT STEAL IT BUT THAT DOESN'T MEAN THAT I'VE WAIVED MY RIGHT IF I DON'T PUT A BURGLAR ALARM IN IT. IN FACT, IF I LEAVE THE CAR PARKED OUTSIDE OF MY HOUSE WITH THE KEY IN IT, NOBODY CAN TAKE IT.

AND WE DIDN'T DO THAT HERE, YOUR HONOR. WE'VE -- TAKING THEIR ARGUMENT TO THE EXTREME, IF WE DON'T CREATE ANY MUSIC AT ALL, THERE ISN'T GOING TO BE A NAPSTER, BUT THAT'S NOT OUR PROBLEM AND THAT'S NOT WHAT THE COPYRIGHT LAW PROVIDES.

THE COURT: BUT THERE ARE RIGHTS THAT YOU HOLD IN COPYRIGHT THAT CAN BE WAIVED BY EITHER YOUR OWN -- BY YOUR OWN CONDUCT OVER SOME, YOU KNOW, SIGNIFICANT PERIOD OF TIME OR BY FAILING TO ENFORCE THE COPYRIGHT OVER A SIGNIFICANT PERIOD OF TIME.

MR. FRACKMAN: WELL --

THE COURT: AND I GATHER IT'S THE FORMER THAT THEY'RE REALLY GETTING AT.

MR. FRACKMAN: I DON'T KNOW OF ANY CASE AT ALL, YOUR HONOR, AND WE'VE LOOKED, WHERE THERE'S A WAIVER IN A SITUATION THAT IS ANYWHERE ANALOGOUS TO THIS.

WE'VE NEVER -- WE'VE ENFORCED THOSE RIGHTS. DIAMOND/RIAA CASE SAYS WE'VE ENFORCED THOSE RIGHTS. THERE IS A MASSIVE ANTIPIRACY EFFORT THAT GOES ON BY THE RECORDING INDUSTRY TO ENFORCE THOSE RIGHTS AGAINST ONLINE PIRATE SITES AS WELL AS AGAINST THOSE WHO MAKE UNLAWFUL CD'S OR OTHER RECORDINGS.

I'VE BEEN DOING THIS FOR 30 YEARS, YOUR HONOR. I STARTED OUT ENFORCING THESE AGAINST PEOPLE WHO MADE EIGHT-TRACK TAPES IN GARAGES. THAT'S HOW LONG -- AND PEOPLE DID IT BEFORE I DID IT. THAT'S HOW LONG THIS EFFORT HAS BEEN GOING ON.

WE'RE NOT SITTING ON OUR HANDS. WE'RE HERE LITIGATING AND THE COPYRIGHT LAW, THAT'S OUR ENFORCEMENT MECHANISM, IT'S THE COPYRIGHT LAW. AND THE DMCA HAS ALREADY MADE THE ACCOMMODATION THAT COUNSEL ARGUES FOR UNDER 512(A), AND THEY DON'T FALL UNDER 512(A). THEY TRIED THAT ONE ALREADY AND THEY LOST.

IF THE COURT HAS ANYTHING FURTHER, I'D BE HAPPY TO RESPOND. I DON'T KNOW WHAT YOUR HONOR'S TIMING IS.

THE COURT: WELL, LET ME JUST SEE IF THERE'S ANYTHING ELSE THAT I DIDN'T GET AN ANSWER TO THROUGH THIS WHOLE PROCESS.

THERE WERE ISSUES, AND I WILL JUST RULE ON THOSE

WITH RESPECT TO SOME OF THESE REPORTS AND THE ADMISSIBILITY OF THEM.

ONE THING I COULDN'T DETERMINE, I DON'T KNOW WHETHER YOU CAN ANSWER THIS OR DEFENDANTS ARE IN A BETTER POSITION TO ANSWER WITH RESPECT TO THE FADER REPORT, MAYBE I MISSED IT SOMEWHERE BUT THERE WAS A LAST PAGE OF WHAT'S CALLED EXHIBIT 7 TO THE REPORT, IT'S THE LAST ONE ANYWAY, IT'S THE LAST -- IT'S THE LAST EXHIBIT TO THE REPORT THAT HAD SOME BREAKDOWN OF WHAT THE DATA MEANT THAT WAS INCLUDED IN HIS REPORT.

BUT WHAT I WAS LOOKING FOR AND I DIDN'T FIND, MAYBE IT'S SOMEWHERE, IS REALLY AN ANALYSIS OF THE, FOR EXAMPLE, THE ANSWERS TO THE QUESTIONS OF THE SURVEY, THE GREENFIELD SURVEY THAT WENT OUT. YOU KNOW, WE SAW THE GREENFIELD SURVEY BUT I DIDN'T SEE A COMPILATION OF THE ANSWERS AS I DID IN THE JAY REPORT, OR AN ANALYSIS OF THOSE, OTHER THAN THAT ONE PAGE.

SO, FOR EXAMPLE, I COULD NOT TELL HOW MANY PEOPLE -- THAT LOOKS LIKE THE PAGE. I CAN SEE IT FROM HERE.

BUT I COULDN'T TELL HOW MANY PEOPLE WHO USE NAPSTER THERE WERE IN THAT, YOU KNOW, ULTIMATELY IN THAT ANALYSIS THAT HE HAD DONE.

HE ASKED ABOUT, YOU KNOW, PEOPLE USING MP3 FILES, HE ASKED ABOUT USING OTHER SERVICES AND SO FORTH. THEN HE ASKED ABOUT NAPSTER AND HOW MANY PEOPLE USE NAPSTER AND WHAT THEY USED IT FOR; BUT IT DOESN'T BREAK DOWN INTO, FROM WHAT I COULD SEE, INTO HOW MANY PEOPLE THAT, QUOTE, "UNIVERSE" WAS.

MR. JOHNSON: THE UNIVERSE WAS 1600.

THE COURT: OF PEOPLE WHO USE NAPSTER?

MR. JOHNSON: YES.

THE COURT: OKAY. WELL, THAT ANSWERS ONE OF MY QUESTIONS THEN. BUT IS THERE SOMETHING OTHER THAN THAT LAST PAGE THAT DOES A LITTLE MORE ANALYSIS OTHER THAN SORT OF A VERBAL DESCRIPTION OF IT?

MR. JOHNSON: NO. I THINK, YOUR HONOR, THE DESCRIPTION --

THE COURT: THAT'S IT?

MR. JOHNSON: -- IN THE REPORT IS WHAT HE'S DONE.

THE COURT: OKAY. SO THAT'S THE ONLY BREAKDOWN OF THE FIGURES, IS THAT LAST PAGE?

MR. JOHNSON: ALL OF THE OTHER TABLES, TO THE EXTENT THAT THEY WERE RELEVANT, WERE PRODUCED DURING DISCOVERY, YOUR HONOR.

MR. BOISE: THERE ARE SOME OTHER TABLES THAT PRECEDE IT, BUT I THINK --

THE COURT: RIGHT, BUT THOSE HAD TO DO WITH JAY'S REPORT AND THE BREAKDOWN.

MR. BOISE: YES.

THE COURT: BUT I'M TALKING ABOUT FROM HIS REPORT. IS THERE ANYTHING ELSE BESIDES THAT LAST TABLE?

MR. BOISE: NOT THAT LAST TABLE. THAT TABLE AND THE REFERENCE TO THE ANALYSIS THAT ARE CONTAINED IN THE REPORT

ITSELF, THE TEXTUAL REPORT.

THE COURT: ALSO, DO WE HAVE SOME SENSE OF THE MUSIC THAT'S OUT THERE THAT IS IN A FORMAT CAPABLE OF BEING USED OVER NAPSTER, WHAT PERCENTAGE OF THAT MUSIC IS, IN FACT, COPYRIGHTED?

MR. JOHNSON: NO.

THE COURT: IS THERE ANY WAY OF DETERMINING THAT?

MR. FRACKMAN: YES, YOUR HONOR.

THE COURT: HAS ANYBODY TRIED TO MAKE THAT DETERMINATION?

MR. FRACKMAN: IT'S VERY SIMPLE. IT'S A MATTER OF LAW. EVERY SOUND RECORDING THAT WAS MADE AFTER THE SOUND RECORDING AMENDMENT IN 1971 IS STILL IN COPYRIGHT. SO THAT MEANS EVERY SOUND RECORDING AFTER THEN IS IN COPYRIGHT. EVERY SOUND RECORDING MADE PRIOR TO 1971 IS STILL PROTECTED UNDER STATE LAW.

SO THE SIMPLE ANSWER, YOUR HONOR, IT SO HAPPENS WITH RESPECT TO MY CLIENTS EVERYTHING IS PROTECTED EITHER UNDER STATE OR FEDERAL LAW.

THE COURT: OKAY, BUT I'M NOT TALKING JUST WITH RESPECT TO YOUR CLIENTS OR WITH RESPECT -- I'M TALKING ABOUT MUSIC THAT'S OUT THERE THAT IS NOT, YOU KNOW -- THAT IS NOT COPYRIGHTED, THAT MAY IN FACT FIND ITS WAY ONTO SYSTEMS LIKE NAPSTER. AND YOU'RE SAYING IT ALL IS COPYRIGHTED IF IT WAS ONLY PERFORMED AND SOME KIND OF A RECORDING WAS MADE.

MR. FRACKMAN: BECAUSE IT'S FIXED IN A TANGIBLE MEDIUM BY DEFINITION ONCE IT GETS ON NAPSTER OR BEFORE IT GETS ON NAPSTER. SO IT IS, AND THAT'S THE TEST FOR COPYRIGHT, IS FIXATION IN A TANGIBLE MEDIUM.

THE COURT: DO YOU AGREE WITH THAT?

MR. BOISE: NO, YOUR HONOR. FOR EXAMPLE, THERE ARE CLEARLY PEOPLE WHO HAVE AUTHORIZED THE USE OF THEIR WORKS AND THE SHARING OF THEIR WORKS ON NAPSTER. THERE IS A WAY --

THE COURT: WHAT HE'S SAYING IS THAT HAS THE PROTECTION OF COPYRIGHT, IT'S JUST THAT THEY'VE AUTHORIZED THE USE. DO YOU AGREE WITH THAT?

MR. BOISE: NO. WE ALSO THINK THAT THERE ARE THINGS THAT ARE ON THERE THAT ARE NOT COPYRIGHTED AT ALL.

AND TO ANSWER THE COURT'S QUESTION AS TO HOW YOU COULD DETERMINE THIS, WHAT YOU COULD DO IS WHAT WE WILL DO AS THE CASE GOES ON IN THE COURSE OF DISCOVERY, IS THERE WILL BE A SCIENTIFIC SAMPLE DONE IN WHICH YOU WILL HAVE TO ACTUALLY LISTEN TO THE MUSIC. THAT WASN'T DONE BY THE PLAINTIFFS' EXPERT. THEY DIDN'T LISTEN TO THE MUSIC.

AND IT'S A LABORIOUS PROCESS. IT'S A VERY LONG AND TIME-CONSUMING PROCESS, BUT WHAT HAS TO BE -- WHAT HAS TO HAPPEN IS YOU HAVE TO TAKE A RANDOM SAMPLE. YOU HAVE TO TAKE A STATISTICALLY-RELEVANT SAMPLE AND THEN YOU ACTUALLY HAVE TO GO TO THE MUSIC AND FIND OUT WHAT THE SONG IS AND WHAT THE MUSIC IS AND THEN TRACE BACK: IS IT COPYRIGHTED? AND THEN AFTER THE

QUESTION OF WHETHER IT'S COPYRIGHTED, THE SECOND QUESTION IS: IS THE SHARING AUTHORIZED?

THE ONLY THING ELSE I WOULD ASK THE COURT TO CONSIDER IN THIS PARTICULAR CONTEXT IS THE COURT ASKED, "CAN YOU SEND OUT TO 79 MILLION PEOPLE?" ONE THING THAT THERE IS NO EVIDENCE IN THE RECORD HERE IS HOW MANY PEOPLE EVEN ON AVERAGE SHARE THE MUSIC FILES OF ANY PARTICULAR PERSON.

IT IS TRUE THAT THE INTERNET IS SOMETHING OF ENORMOUS SCALE AND IT IS TRUE THAT THE CREATION OF THE INTERNET AND THE SCALE OF THE INTERNET HAS CREATED A LOT OF THIS PROBLEM; BUT ONE OF THE THINGS THAT WE DO NOT YET HAVE IN THE RECORD IS THE EXTENT TO WHICH ANY PARTICULAR INDIVIDUAL IS SHARING HIS OR HER FILES WITH A LARGE NUMBER OF PEOPLE.

THERE ARE A LARGE NUMBER OF USERS. WE'VE GOT 20 MILLION USERS AND THEY EACH SHARE ONE-TO-ONE, THEY'RE SHARING ONE-TO-ONE. THEY'RE NOT SHARING, YOU KNOW, WITH 79 OR, AS MR. JOHNSON SAYS, EVEN 7 PEOPLE; AND THAT'S ANOTHER ONE OF THE ELEMENTS THAT THERE IS SIMPLY NO EVIDENCE IN THE RECORD ON RIGHT NOW.

THE COURT: WHAT THEY DO SHARE, HOWEVER, AND IS DOWNLOADED THEN CAN BE SHARED BY THAT PERSON WHO HAS -- USER WHO HAS DOWNLOADED IT WITH, YOU KNOW, THE NEXT GROUP OF PEOPLE WHO SIGN ON TO NAPSTER WHEN THAT PERSON IS ON; RIGHT?

MR. BOISE: IT COULD BE.

THE COURT: SO IT HAS AN EXPONENTIAL EFFECT.

MR. BOISE: WELL, IT COULD BE; BUT, AGAIN, THERE'S NO EVIDENCE OF THE EXTENT THAT THAT IS USED. AND IF YOU'RE TALKING ABOUT NAPSTER USERS, THEN THE NEW FILE THAT IS CREATED WILL BE A DUPLICATE OF THE OLD FILE THAT IS CREATED. NOW THERE ARE TWO PEOPLE FROM WHICH SOMEBODY COULD GET THE SAME FILE.

IF YOU WERE TALKING ABOUT SHARING IT OTHER THAN THROUGH NAPSTER, OBVIOUSLY THE ORIGINAL PERSON COULD HAVE SHARED THAT FILE IN A NON-NAPSTER WAY. THAT WAS ONE OF THE POINTS MR. JOHNSON WAS MAKING THROUGH THE INTERNET AND THE LIKE. BUT THE COURT IS EXACTLY RIGHT, THAT THERE ARE A VARIETY OF WAYS THESE THINGS CAN BE SHARED.

WHAT WE DON'T HAVE IN THE RECORD IS ANY EVIDENCE TO SUPPORT THE ASSERTIONS THAT ARE GOING ON AS TO HOW MANY PEOPLE ARE ACTUALLY SHARING A PARTICULAR FILE.

MR. FRACKMAN: OF COURSE WE DO, YOUR HONOR, IF I MAY RESPOND.

THE COURT: YES.

MR. FRACKMAN: MR. KESSLER HIMSELF SAYS A HUNDRED PEOPLE A SECOND WITH 10,000 FILES A SECOND. THAT'S A HUNDRED PER PERSON. AS SOON AS THEY DO THAT, THEY'RE SHARING. THAT'S THE HOTALING CASE. THEY'RE MAKING IT AVAILABLE FOR DISTRIBUTION. SO THAT'S POINT NUMBER ONE, YOUR HONOR.

NUMBER TWO, THE DEFAULT ON THE NAPSTER SYSTEM IS ONCE YOU DOWNLOAD IT, YOU AUTOMATICALLY MAKE IT AVAILABLE FOR EVERYBODY ELSE. AND YOU'RE NOT NECESSARILY MAKING A DUPLICATE

BECAUSE THEY HAVE 60 OR 80 SERVERS. SO YOU'RE MAKING IT MORE LIKELY THAT THE SHARED FILE, THE COPIED FILE, IS GOING TO BE AVAILABLE FOR SHARING.

AND, YOUR HONOR, WE DO HAVE EVIDENCE. OUR EVIDENCE IS 87 PERCENT OF OUR SAMPLE THAT WE WERE ABLE TO DETERMINE IN THE PERIOD OF TIME THAT WE HAVE WAS COPYRIGHTED MATERIAL, NOT ONLY COPYRIGHTED MATERIAL BUT COPYRIGHTED MATERIAL FOR WHICH THE COPYRIGHT PROPRIETOR DID NOT AUTHORIZE.

AND WE HAVE MR. DRAKE'S DECLARATION. HE DID THE AB TESTING ON SOME OF THOSE MATERIALS THAT WERE ORIGINALLY ON THE RIAA NOTICE TO NAPSTER WHICH, BY THE WAY, EVERY ONE OF THOSE RECORDINGS IS STILL AVAILABLE ON NAPSTER. AND HE TESTED IT AND NAPSTER COULDN'T WORK, NAPSTER COULDN'T WORK IF MOST THE OVERWHELMING NUMBER OF PEOPLE DIDN'T CORRECTLY IDENTIFY THEIR RECORDINGS BECAUSE YOU HAVE TO SEARCH BY THE NAME OF THE ARTIST OR BY THE NAME OF THE RECORDING.

OH, AND I HAVE ONE OTHER POINT THAT I FORGOT TO MAKE TO THE COURT.

THERE IS NOTHING IN THE RECORD, BECAUSE INDEED IT WAS NOT THE CASE, THE RECORD INDUSTRY DID NOT CREATE MP3 FILES. THAT WAS CREATED OUTSIDE THE PURVIEW OF THE RECORD INDUSTRY AND CERTAINLY THEY'RE USED BY THE RECORD INDUSTRY, BUT WE DIDN'T LAUNCH THIS INTO THE WORLD AND WE'VE DONE EVERYTHING WE POSSIBLY CAN, INCLUDING NUMEROUS LAWSUITS, TO STOP THE UNAUTHORIZED USE OF MP3 MUSIC FILES.

THANK YOU, YOUR HONOR.

THE COURT: OKAY. WE'LL TAKE A BRIEF RECESS. I THINK ABOUT 10, 15 -- HOW MUCH TIME DO YOU NEED?

THE REPORTER: THAT'S FINE, YOUR HONOR.

THE COURT: 10? 10 MINUTES.

MR. BOISE: THANK YOU, YOUR HONOR.

(RECESS TAKEN AT 3:45 P.M.)

(PROCEEDINGS RESUMED AT 4:12 P.M.)

THE COURT: WELL, COUNSEL, A LOT OF PAPER HAS BEEN FILED IN THIS CASE AND I SUPPOSE WE COULD HEAR A LOT MORE ARGUMENT AND WE COULD TAKE A LOT MORE TIME WITH THIS, AND ULTIMATELY I WILL REDUCE THE COURT'S DECISION TO WRITING; BUT I THINK IT'S TIME FOR THERE TO BE A DECISION ON THE PRELIMINARY INJUNCTION MOTION BECAUSE YOU HAVE BEEN WAITING FOR THIS AND YOU HAVE BEEN THROUGH A ROUND OF MOTIONS EARLIER UNDER THE DIGITAL MILLENNIUM COPYRIGHT ACT. I THINK THAT PLENTY OF TIME HAS BEEN EXPENDED IN PREPARING FOR THE MOTION, CERTAINLY PLENTY OF PAPER HAS BEEN EXPENDED AS WELL, THAT THE COURT IS ABLE TO RENDER A DECISION ON THE MOTION FOR PRELIMINARY INJUNCTION.

TO PREVAIL ON A MOTION FOR PRELIMINARY INJUNCTION, AND THIS IS GOING TO TAKE A WHILE BECAUSE I'M GOING TO GO THROUGH THE ELEMENTS AND THE CLAIMS AND DEFENSES, BUT TO PREVAIL ON A MOTION FOR A PRELIMINARY INJUNCTION, PLAINTIFFS MUST DEMONSTRATE A COMBINATION OF PROBABLE SUCCESS ON THE MERITS AND POSSIBILITY OF IRREPARABLE HARM OR ON THE CONTINUUM

SCALE OF SERIOUS LEGAL QUESTIONS THAT ARE RAISED AND A BALANCE OF HARDSHIPS TIPPING IN THE PLAINTIFFS' FAVOR. I THINK IT'S SAFER TO STAY WITH THE FIRST OF THOSE; IN OTHER WORDS, THE HIGHER END OF THE CONTINUUM.

IN COPYRIGHT CASES THE REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS DOES CREATE A PRESUMPTION OF IRREPARABLE HARM. AND DON'T EVERYBODY GO BOLTING FOR THE DOOR, BUT I WILL TELL YOU RIGHT NOW WHAT MY CONCLUSION IS ON THAT AND THEN GO THROUGH THE REASONS FOR IT.

I FIND THAT PLAINTIFFS HAVE SHOWN NOT JUST A REASONABLE LIKELIHOOD OF SUCCESS BUT A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS, FIRST OF ALL, WITH RESPECT TO DIRECT INFRINGEMENT, BECAUSE IN ORDER TO ESTABLISH EITHER CONTRIBUTORY OR VICARIOUS LIABILITY, THEY MUST ESTABLISH DIRECT INFRINGEMENT BY A THIRD PARTY, IN THIS CASE THE USERS OF NAPSTER.

AND HERE THE EVIDENCE ESTABLISHES THAT A MAJORITY OF NAPSTER USERS USE THE SERVICE TO DOWNLOAD AND UPLOAD COPYRIGHTED MUSIC. THIS, IN FACT, SHOULD COME AS NO SURPRISE TO NAPSTER SINCE THAT REALLY, IT'S CLEAR FROM THE EVIDENCE IN THIS CASE AND THE EARLY RECORDS THAT WERE DIVULGED IN DISCOVERY, WAS THE PURPOSE OF IT.

AND BY DOING THAT, IT CONSTITUTES -- THE USES CONSTITUTE DIRECT INFRINGEMENT OF PLAINTIFFS' MUSICAL COMPOSITIONS, RECORDINGS, THAT ARE COPYRIGHTED. AND IT IS PRETTY MUCH ACKNOWLEDGED ALSO BY NAPSTER THAT THIS IS

INFRINGEMENT UNLESS THEY CAN FALL BACK ON AN AFFIRMATIVE DEFENSE BECAUSE OF THE WARNINGS THAT ARE GIVEN TO THE USERS OF THE SYSTEM THAT THEY MAY BE INFRINGING AND BY STATEMENTS MADE IN THEIR OWN DOCUMENTS WHEN THIS BUSINESS WAS GETTING OFF THE GROUND.

ALSO, ACCORDING TO THE EVIDENCE BEFORE THE COURT, AS MUCH AS 87 PERCENT OF THE MUSIC, AND I THINK THAT'S A FAIRLY REASONABLE FIGURE AND FAIRLY WELL SUPPORTED IN THE EVIDENCE, 87 PERCENT OF THE MUSIC AVAILABLE ON NAPSTER MAY BE COPYRIGHTED, CERTAINLY A SUBSTANTIAL AMOUNT OF IT IS.

NOW, DEFENDANTS HAVE RAISED THE FAIR USE DEFENSE. THAT IS AN AFFIRMATIVE DEFENSE. DEFENDANTS HAVE THE BURDEN ON THAT DEFENSE AND TO REBUT ALLEGATIONS OF INFRINGEMENT, THEY HAVE RAISED THIS BASED UPON SONY AND ITS PROGENY, BUT PARTICULARLY SONY, WHERE THE SUPREME COURT STATED THAT ANY INDIVIDUAL MAY REPRODUCE A COPYRIGHTED WORK FOR A FAIR USE.

SONY ALSO STANDS FOR THE RULE THAT A MANUFACTURER IS NOT LIABLE FOR SELLING A STAPLE ARTICLE OF COMMERCE, AND THAT'S IN QUOTES FROM THE CASE, THAT IS, QUOTE, "CAPABLE OF COMMERCIALLY SIGNIFICANT NONINFRINGING USES."

FAIR USE AND SUBSTANTIAL NONINFRINGING USE ARGUMENTS ARE IN FACT AFFIRMATIVE DEFENSES AND DEFENDANT, AS I SAID, HAS THE BURDEN OF SHOWING THAT A GIVEN USE CONSTITUTES A FAIR USE.

THE COURT FINDS THAT, AND THEN I'LL GO THROUGH THE ELEMENTS OF THIS, BUT THE FINDING IS THAT ANY OF THE POTENTIAL

NONINFRINGING USES OF THE NAPSTER SERVICE ARE MINIMAL. SOME OF THEM SEEM TO BE THOUGHT OF AFTERWARD AND AFTER THIS LITIGATION STARTED; BUT THE SUBSTANTIAL OR COMMERCIALLY SIGNIFICANT USE OF THE SERVICE WAS AND CONTINUES TO BE COPYING POPULAR MUSIC, MOST OF WHICH IS COPYRIGHTED AND FOR WHICH NO AUTHORIZATION HAS BEEN OBTAINED.

WHILE IT MAY BE CAPABLE OF SOME OF THESE OTHER THINGS, THAT SEEMS TO -- THOSE USES SEEM TO PALE BY COMPARISON TO WHAT NAPSTER IS USED FOR, WHAT IT WAS PROMOTED FOR AND WHAT IT CONTINUES TO BE USED FOR.

NOW, WHAT THE COURT MUST CONSIDER AND THE FACTORS THE COURT MUST CONSIDER, AMONG OTHERS, IS, THE FOUR THAT ARE SPECIFICALLY ENUMERATED IN SONY, ARE: THE PURPOSE AND CHARACTER OF THE USE, INCLUDING WHETHER IT'S OF A COMMERCIAL NATURE; THE NATURE OF THE COPYRIGHTED WORK; THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED IN RELATION TO THE COPYRIGHTED WORK AS A WHOLE; AND THE EFFECT OF THE USE UPON THE POTENTIAL MARKET FOR VALUE OF THE COPYRIGHTED WORK.

I THINK THERE'S MUCH DISPUTE WITH RESPECT TO THE SECOND AND THIRD FACTORS. THE COPYRIGHTED MUSICAL COMPOSITIONS AND RECORDINGS CERTAINLY ARE THE PARADIGMATIC KINDS OF THINGS FOR WHICH COPYRIGHTS ARE OBTAINED. THEY'RE CREATIVE IN NATURE. THEY CONSTITUTE ENTERTAINMENT AND ALSO THE THIRD FACTOR, THEY ARE, IN FACT, UPLOADED OR DOWNLOADED, OR AT LEAST CAN BE AND GENERALLY ARE, IN THEIR ENTIRETY. CERTAINLY THEY'RE GENERALLY

MADE AVAILABLE IN THEIR ENTIRETY.

AS TO THE FIRST FACTOR, THE COURT FINDS THAT ALTHOUGH DOWNLOADING AND UPLOADING MP3 MUSIC IS NOT A PARADIGMATIC COMMERCIAL ACTIVITY, IT IS NOT ALSO TYPICAL OF THE PERSONAL USE THAT IS IN THE TRADITIONAL SENSE. IT MAY BE WHAT MAKES THIS CASE DIFFICULT OR ANY OF THE CASES INVOLVING NEW TECHNOLOGY IS THAT IT IS HARD SOMETIMES TO MAKE A NEAT FIT.

THE MERE FACT THAT THAT FIT IS NOT AN EASY ONE DOES NOT MEAN THAT PLAINTIFFS HAVE TO FOREGO ENFORCING THEIR RIGHTS UNDER THE COPYRIGHT LAWS.

PLAINTIFFS HAVE NOT SHOWN THAT THE MAJORITY OF NAPSTER USERS DOWNLOAD THE MUSIC FOR SALE OR FOR PROFIT, AND IT WOULD APPEAR THAT THEY PROBABLY DO NOT. HOWEVER, THERE IS EVIDENCE THAT NAPSTER ANTICIPATES PROUDLY THAT MORE THAN 70 MILLION USERS BY THE END OF THE YEAR 2000 WILL BE ON NAPSTER IN SOME FASHION OR ANOTHER.

GIVEN THE VAST SCALE WHICH NAPSTER AND THE INTERNET CAN IN FACT ACCESS NUMBERS AND NUMBERS OF USERS AND THAT THE USES AMONG ANONYMOUS INDIVIDUALS, NOT JUST A SHARING AMONG FRIENDS AND TYPICAL OF THE MORE PRIVATE USE, THAT CASES HAVE SEEN AT THE VERY LEAST A HOST USER SENDING A FILE CANNOT BE SAID TO ENGAGE MERELY IN THE TYPICAL PERSONAL USE WHEN DISTRIBUTING THE FILE TO, IN THIS CASE, MANY ANONYMOUS REQUESTERS.

MOREOVER, THE FACT THAT NAPSTER USERS GET FOR FREE

SOMETHING THEY ORDINARILY WOULD HAVE TO PAY FOR SUGGESTS THAT THEY REAP, THE USERS REAP AN ECONOMIC ADVANTAGE FROM NAPSTER USE.

AS TO THE FOURTH FACTOR, PLAINTIFFS HAVE PRODUCED EVIDENCE THAT NAPSTER USE HARMS THE MARKET FOR THE COPYRIGHTED WORK IN AT LEAST TWO WAYS, AND WE'VE HAD A NUMBER OF STUDIES AND I WILL SPELL OUT IN THE ORDER THE PROBLEMS WITH SOME OF THOSE STUDIES. I DON'T THINK ANY OF THEM ARE, YOU KNOW, WHAT YOU WOULD CALL WITHOUT FLAW.

BUT SELECTING OUT COLLEGE STUDENTS I DON'T THINK WAS INAPPROPRIATE AND, THEREFORE, DOES NOT NEGATE THE ENTIRE STUDY. WHAT IT MAKES CLEAR TO THE COURT, HOWEVER, IS THAT IT IS ONLY LOOKING AT COLLEGE STUDENTS AND, THEREFORE, WE KNOW THAT IT'S ONLY LOOKING AT A SEGMENT OF THE MARKET. NONETHELESS, A SEGMENT THAT NAPSTER ITSELF HAS SAID IT HAS TARGETED. AND IT GIVES US A SNAPSHOT, PARTICULARLY FOR PRELIMINARY INJUNCTION PURPOSES, OF WHAT IS HAPPENING IN A PARTICULAR MARKET.

I FIND THAT THE FADER REPORT IS FAR LESS PERSUASIVE. FIRST OF ALL, HE RELIES UPON A NUMBER OF STUDIES THAT WERE PRINTED IN THE WALL STREET JOURNAL AND WIRED AND NEW YORK TIMES, AND SO FORTH, WHICH MAY BE FINE FOR MARKETING PURPOSES AND STRATEGIZING, BUT IT DOESN'T DO VERY MUCH FOR A RELIABLE SURVEY FOR COURT PURPOSES. I COMMEND TO YOU JUDGE SCHWARZER'S BOOK IN THAT RESPECT.

BUT, IN ANY EVENT, EVEN AS TO THE EVALUATION OF THE

GREENFIELD SURVEY, I THINK THERE ARE A NUMBER OF PROBLEMS WITH THE GREENFIELD SURVEY, BUT WE DON'T REALLY HAVE A BREAKDOWN OTHER THAN THAT ONE SHEET AT THE END AND IT DOESN'T TELL US VERY MUCH AT ALL ABOUT WHAT THE ANSWERS REALLY WERE. AT LEAST IN THE JAY REPORT WE HAVE THE ANSWERS THAT WERE GIVEN TO THE QUESTIONS IN THE QUESTIONNAIRE. SO IT'S FAR GREATER USE AND MORE PROBATIVE TO THE COURT THAN THE FADER REPORT.

THE OTHER ELEMENT OR FACTOR WITH RESPECT TO THIS FOURTH ELEMENT IS THE HARM BY REASON OF RAISING BARRIERS TO PLAINTIFFS' ENTRY INTO THE MARKET FOR DIGITAL DOWNLOADING OF MUSIC. THE POTENTIAL FAIR USES OF NAPSTER THAT HAVE BEEN PROFFERED BY DEFENDANT ARE, FOR EXAMPLE, SAMPLING, SPACE SHIFTING AND THE AUTHORIZED DISTRIBUTION OF THE WORK OF NEW ARTISTS. FOR THE FOLLOWING REASON I DON'T FIND THAT THESE CONSTITUTE THE KIND OF FAIR USES THAT ARE SUBSTANTIAL AND NONINFRINGING WITHIN THE MEANING OF SONY:

FIRST OF ALL, WITH RESPECT TO SAMPLING, SAMPLING DOES NOT CONSTITUTE A NONCOMMERCIAL PERSONAL USE IN THE TRADITIONAL SENSE BECAUSE IT INVOLVES THE DISTRIBUTION OF MUSIC AMONG MILLIONS OF USERS.

PLAINTIFFS HAVE SHOWN A MEANINGFUL LIKELIHOOD THAT IF SAMPLING BECAME WIDESPREAD, IT WOULD REDUCE THE MARKET FOR COPYRIGHTED WORKS. THE DEFENDANTS ARGUE, AND I THINK UNPERSUASIVELY, THAT THE USE OF NAPSTER FOR SAMPLING STIMULATES CD SALES. I DON'T THINK IN FACT THE RELIABLE EVIDENCE IN THIS

CASE SUPPORTS THAT.

EVEN IF SAMPLING DID INCREASE CD SALES, IT WOULD STILL INFRINGE PLAINTIFFS' RIGHT TO LICENSING FEES, TO CONTROL THEIR WORK TO DERIVATIVE MARKETS, AND SO FORTH. AND IF USERS CAN SAMPLE SONGS FOR FREE ON NAPSTER, THEY'RE UNLIKELY TO PURCHASE INDIVIDUAL SONGS FROM THE ONLINE SITES AFFILIATED WITH PLAINTIFFS. AND PARTICULARLY IF THEY CANNOT ONLY SAMPLE THEM BUT COPY THEM, THERE IS CERTAINLY LESS INCENTIVE TO DO WHAT YOU CAN DO ON SOME SITES, AND THAT IS JUST TO SAMPLE THE MUSIC BUT NOT BE ABLE TO COPY IT.

THE OTHER USE THAT DEFENDANTS PROFFER IS SPACE SHIFTING. NOW, THERE MAY BE A LOT OF SPACE SHIFTING GOING ON BUT I THINK THE EVIDENCE SHOWS THAT THAT SPACE SHIFTING IS GOING ON NOT INDEPENDENT OF BUT IN FACT IN CONJUNCTION WITH THE COPYING OF OR DOWNLOADING OF MUSIC THAT IS BEING OBTAINED IN A WAY THAT I JUST INDICATED IS INFRINGING. I DON'T FIND THAT THE SUBSTANTIAL NONINFRINGING USE WITHIN THE MEANING OF SONY.

ALSO, THE COURT REJECTS THE APPLICATION OF THE AUDIO HOME RECORDING ACT TO THE FACTS OF THIS CASE. IT DOES NOT IMMUNIZE THE NONCOMMERCIAL USE OF NAPSTER IN THE SPACE SHIFTING AREA AS THEY HAVE SUGGESTED. THAT ACT IS IRRELEVANT IN FACT TO THIS ACTION BECAUSE PLAINTIFFS HAVE NOT BROUGHT ANY CLAIMS UNDER IT, AND ALSO UNDER NINTH CIRCUIT LAW NEITHER COMPUTERS NOR HARD DRIVES ARE AUDIO HOME RECORDING DEVICES NOR IS THERE ANYTHING ELSE IN THIS CASE THAT INVOLVES NAPSTER THAT IS AN

AUDIO HOME RECORDING DEVICE WITHIN THE MEANING OF THE STATUTE.

I THINK THE LIE IS GIVEN TO THAT BY THE FACT THE DEFENDANTS ARGUE LEGISLATIVE HISTORY, BUT THERE'S NOTHING IN THE ACT THAT IS SO UNCLEAR THAT REQUIRES THAT THE COURT GO TO THE LEGISLATIVE HISTORY TO TRY TO INTERPRET THE STATUTE.

SECOND, DEFENDANT FAILS TO SHOW THAT SPACE SHIFTING CONSTITUTES A COMMERCIALLY-SIGNIFICANT USE OF NAPSTER. INDEED, THE MOST CREDIBLE EXPLANATION FOR THE EXPONENTIAL GROWTH OF TRAFFIC ON NAPSTER IS THE VAST ARRAY OF FILES OFFERED BY OTHER USERS, NOT THE ABILITY OF EACH INDIVIDUAL TO SPACE SHIFT MUSIC THAT HE OR SHE ALREADY OWNS.

FINALLY, THE COURT DECLINES TO APPLY THE STAPLE ARTICLE OF COMMERCE DOCTRINE TO NAPSTER ON THE BASIS OF SPACE SHIFTING BECAUSE DEFENDANT IS NOT MERELY A MANUFACTURER/SELLER WHOSE CONTACT WITH CONSUMERS CEASES WHEN THE PRODUCT IS SOLD, RATHER, AS I WILL GO INTO ON THE CONTRIBUTORY AND VICARIOUS INFRINGEMENT, DEFENDANT, DESPITE HIS CONTENTION TO THE CONTRARY, EXERCISES A SUBSTANTIAL AND ONGOING CONTROL OVER ITS SERVICE.

DEFENDANTS HAVE ALSO MADE MUCH OF THE PROMOTION OF NEW ARTISTS WHO AUTHORIZE DISTRIBUTION OF THEIR WORK. I THINK THIS IS SOMETHING THAT'S SORT OF COME LATELY TO THE TABLE. I DON'T FIND THAT THAT CONSTITUTES A SUBSTANTIAL NONINFRINGING USE OF NAPSTER.

INDEED, THE COURT WOULD CERTAINLY NOT ENJOIN THAT

KIND OF A USE NOR WOULD IT HAVE THE AUTHORITY TO DO SO; AND IF, IN FACT, THAT IS A USE THAT IS A SUBSTANTIAL USE OF NAPSTER, THEN I DON'T SEE HOW THEY ARE PUT OUT OF BUSINESS, WHAT COULD BE A CRITICAL ASPECT OF THEIR BUSINESS, BY BEING ENJOINED FROM ALLOWING THE COPYING OF COPYRIGHTED MATERIAL FOR WHICH THERE IS NO AUTHORIZATION.

THE EVIDENCE SHOWS THAT, IN FACT, PROMOTING THE NEW ARTIST WAS NOT THE CHIEF STRATEGY IN NAPSTER'S BUSINESS PLAN. RATHER, DEFENDANT PROMOTED THE AVAILABILITY OF SONGS BY MAJOR STARS AS, AND I QUOTE FROM SOME OF THEIR PAPERS, "OPPOSED TO HAVING TO GO THROUGH PAGE AFTER PAGE OF UNKNOWN ARTISTS."

SUDDENLY THEY FOUND THOSE UNKNOWN ARTISTS AND WOULD SEEK TO USE THEM AS A BASIS FOR PROTECTION AGAINST INFRINGEMENT OF THE WELL-KNOWN ARTIST WHOSE MUSIC THEY WERE MAKING AVAILABLE OR PROVIDING ACCESS TO.

NAPSTER'S PURPORTED MISSION OF DISTRIBUTING MUSIC BY ARTISTS UNABLE TO OBTAIN RECORD LABEL REPRESENTATION, AS I SAID, APPEARS TO HAVE BEEN DEVELOPED LATER IN THE GAME AND AFTER THE BEGINNING OF THIS LITIGATION.

SO WITH RESPECT TO THE AFFIRMATIVE DEFENSE OF FAIR USE, I DO NOT FIND THAT DEFENDANTS HAVE ESTABLISHED OR MET THEIR BURDEN OF PROVING THAT THEY'RE ENTITLED TO THE AFFIRMATIVE DEFENSE OF FAIR USE OR SUBSTANTIAL NONINFRINGING USES ARE IN FACT IN PLACE OR THAT THEY'RE CAPABLE OF SUBSTANTIAL NONINFRINGING USES.

NOW, WITH RESPECT TO THE INFRINGEMENT ITSELF, I SAID, FIRST OF ALL, IN ORDER TO ESTABLISH EITHER CONTRIBUTORY OR VICARIOUS INFRINGEMENT THERE MUST BE DIRECT INFRINGEMENT BY THE USERS, AND WE'VE GONE OVER THAT.

WITH RESPECT TO CONTRIBUTORY INFRINGEMENT, TO USE THE WORDS OF THE STATUTE:

> "A CONTRIBUTORY INFRINGER IS ONE WHO WITH KNOWLEDGE OF THE INFRINGING ACTIVITY INDUCES, CAUSES OR MATERIALLY CONTRIBUTES TO THE INFRINGING CONDUCT OF ANOTHER. THE REQUIREMENTS ARE ACTUAL OR CONSTRUCTIVE KNOWLEDGE AND MATERIAL CONTRIBUTION TO DIRECT INFRINGEMENT."

I FIND THAT PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THEIR CONTRIBUTORY COPYRIGHT INFRINGEMENT CLAIMS.

THE EVIDENCE BEFORE THE COURT OVERWHELMINGLY ESTABLISHES THAT DEFENDANT HAD ACTUAL OR AT THE VERY LEAST CONSTRUCTIVE KNOWLEDGE, AND THIS APPLIES AS WELL TO THE DIGITAL MILLENNIUM RECORDING ACT ASPECT OF THIS UNDER SUBSECTION (D) THAT DEFENDANT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE THAT THIRD PARTIES WERE ENGAGING AND CONTINUE TO ENGAGE IN DIRECT COPYRIGHT INFRINGEMENT BY DOWNLOADING/UPLOADING MP3 FILES USING THE NAPSTER SERVICE.

THIS EVIDENCE INCLUDES INTERNAL DOCUMENTS AUTHORED BY NAPSTER EXECUTIVES STATING THAT NAPSTER WAS MAKING PIRATED

MUSIC AVAILABLE STRESSING THE NEED TO REMAIN IGNORANT OF NAPSTER USERS' IDENTITIES AND IP ADDRESSES SINCE THEY ARE EXCHANGING PIRATED MUSIC, NOTICE FROM THE RECORDING INDUSTRY ASSOCIATION OF AMERICA THAT IT IDENTIFIED 12,000 INFRINGING FILES ON NAPSTER, THE FACT THAT NAPSTER EXECUTIVES HAD RECORDING INDUSTRY EXPERIENCE AND AT LEAST SOME KNOWLEDGE OF COPYRIGHT LAWS, AND THE FACT THAT NAPSTER EXECUTIVES DOWNLOADED COPYRIGHTED MUSIC TO THEIR OWN COMPUTERS USING THE SERVICE.

SO, THEREFORE, I FIND THAT PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS, IN FACT A STRONG LIKELIHOOD OF SUCCESS, ON THE KNOWLEDGE OR ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THIS COMPONENT AS WELL AS FOR THE SAFE HARBOR PROVISIONS UNDER THE DMCA.

THE NEXT ELEMENT, THE SECOND ELEMENT AFTER -- I SHOULD SAY THIRD BECAUSE WE'VE TALKED ABOUT DIRECT INFRINGEMENT AND KNOWLEDGE, IS THAT DEFENDANT TERRIBLY CONTRIBUTED TO COPYRIGHT INFRINGEMENT BY PARTIES UNDER NINTH CIRCUIT LAW.

THE EVIDENCE SHOWS THAT, AMONG OTHER ACTIVITIES, DEFENDANT SUPPLIES THE PROPRIETARY SOFTWARE, SEARCH ENGINE, THE MEANS OF ESTABLISHING A CONNECTION BETWEEN NAPSTER USERS' COMPUTERS, AND WITHOUT THOSE SERVICES NAPSTER USERS COULD NOT FIND AND DOWNLOAD THE MUSIC THEY WANT, AT LEAST NOT VIA NAPSTER. IN FACT, THAT WAS THE WHOLE REASON FOR NAPSTER'S EXISTENCE, IF YOU LOOK AT THEIR EARLY BUSINESS PLANS AND WHAT THEY PURPORTED TO DO AND WHAT THEY TOLD THEIR CONSUMERS OR

USERS THEY WERE DOING.

WITH RESPECT TO VICARIOUS COPYRIGHT INFRINGEMENT, NOT ONLY MUST DIRECT INFRINGEMENT BE SHOWN, AND WE'VE GONE OVER THAT, BUT THERE ALSO MUST BE THE RIGHT AND ABILITY TO SUPERVISE THE INFRINGING ACTIVITY AND A DIRECT FINANCIAL INTEREST IN SUCH ACTIVITY.

AGAIN, THE COURT FINDS THAT PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS ON VICARIOUS LIABILITY. ALTHOUGH I COULD LEAVE IT AT CONTRIBUTORY INFRINGEMENT, I'M GOING TO MOVE TO THAT ONE AS WELL. THAT WAY WHEN YOU TAKE ME UP IF I'M WRONG ON ONE, MAYBE I'M RIGHT ON THE OTHER, WHATEVER ELSE, OR I'M WRONG ON BOTH.

(LAUGHTER)

THE COURT: BUT PLAINTIFFS HAVE ARGUED, AND I THINK PERSUASIVELY, THAT DEFENDANT IS CAPABLE OF EXERCISING SUPERVISORY POWERS OVER ITS SERVICE. AND I HAVE TO ADD HERE THAT THOUGH IT MAY BE TECHNOLOGICALLY DIFFICULT, WHEN YOU CREATE A PROGRAM THAT HAD THE VERY PURPOSE THAT NAPSTER ESPOUSES THAT IT HAD AND THEN YOU -- YOU KNOW, IT'S SORT OF LIKE, YOU KNOW, BECOMING AN ORPHAN BECAUSE -- BY YOUR OWN HAND AND THEN THROWING YOURSELF ON THE MERCY OF THE COURT BECAUSE YOU'RE AN ORPHAN. IT'S RATHER HARD TO HEAR THAT SOUND OF THROWING THEMSELVES ON THE MERCY OF THE COURT BECAUSE THIS TECHNOLOGY JUST ISN'T GOING TO ALLOW THEM TO DO OR CONTROL THE INFRINGEMENT.

IN FACT, I'M SURE THAT ANYONE AS CLEVER AS THE PEOPLE ARE WHO WROTE THE SOFTWARE IN THIS CASE ARE CLEVER ENOUGH, AS THERE ARE PLENTY OF THOSE MINDS IN SILICON VALLEY TO DO IT, CAN COME UP WITH A PROGRAM THAT WILL HELP TO IDENTIFY INFRINGING ITEMS AS WELL. I THINK THE EVIDENCE SHOWS THAT THERE'S NO DESIRE TO DO THAT.

ALTHOUGH DEFENDANT, AS I SAID, CONTENDS THAT IT IS TECHNOLOGICALLY DIFFICULT TO DISTINGUISH COPYRIGHTED AND AUTHORIZED FROM NOT COPYRIGHTED OR COPYRIGHTED AND UNAUTHORIZED, DEFENDANT HAS TAKEN PAINS TO INFORM THE COURT ABOUT METHODS IT USES FOR BLOCKING USERS ABOUT WHOM RIGHTS HOLDERS COMPLAIN. THE DEFENDANT CAN IN FACT POLICE, AND WILL HAVE TO GIVEN THE NATURE OF ITS PROGRAM AND THE VERY PURPOSES OF IT, POLICE ITS SERVICE. AND THE COURT FINDS THAT, IN FACT, THE DEFENDANT DOES HAVE THE RIGHT AND ABILITY TO SUPERVISE.

WITH REGARD TO THE FINANCIAL INTEREST, IT IS TRUE THAT DEFENDANT IS NOT CHARGING A FEE, RECEIVING ANY MONEY IN EXCHANGE FOR THIS SERVICE. HOWEVER, IT IS CLEAR ALSO FROM THE RECORD THAT THERE HAVE BEEN SUBSTANTIAL INVESTMENTS IN THE SERVICE AND THAT PART OF THE BUSINESS PLAN OR DISCUSSIONS AMONG THE PERSONS WHO OPERATE AND DIRECT AND CONTROL NAPSTER INCLUDE TALKS OR PLANS ABOUT MONETIZING ITS USER BASE THROUGH ONE OF SEVERAL REVENUE-GENERATING MODELS.

THE AVAILABILITY OF A MYRIAD OF POPULAR MUSIC FILES, MOST OF WHICH ARE COPYRIGHTED, CERTAINLY ATTRACTS PEOPLE TO THE

USER BASE AND THE COURT REJECTS DEFENDANT'S ARGUMENT THAT ITS NONINFRINGING USE LURES CUSTOMERS TO ITS SERVICE. I DON'T THINK THAT'S WHAT LURES THEM. WHAT LURES THEM IS THE INFRINGING USE.

AND THEY HAVE, IN FACT, DISCUSSED AMONG THEMSELVES WAYS TO MONETIZE THAT, THAT THEY INTEND SOMETIME TO MAKE A PROFIT. I RECALL READING I THINK IN RICHARDSON'S DEPOSITION THAT, IN FACT, IT WAS NOT A NOT-FOR-PROFIT ORGANIZATION. THEY INTEND SOMEDAY TO MAKE A PROFIT.

EVEN IF THAT WERE NOT THE CASE, THERE CERTAINLY IS, WHEN ONE GETS TO IRREPARABLE INJURY, A PRESUMPTION AS WELL THAT IS INVOKED BY REASON OF HAVING FOUND A LIKELIHOOD OF SUCCESS ON THE MERITS OF IRREPARABLE HARM, AND THAT DOVETAILS WITH THIS AREA THAT I'M JUST TALKING ABOUT.

BECAUSE PLAINTIFFS HAVE SHOWN A LIKELIHOOD OF SUCCESS, AND I THINK A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS, ON BOTH CONTRIBUTORY AND VICARIOUS COPYRIGHT CLAIMS, INFRINGEMENT CLAIMS, THEY'RE ENTITLED TO A PRESUMPTION OF IRREPARABLE HARM AND I REJECT THE DEFENDANT'S CONTENTION THAT IT'S DE MINIMIS.

PLAINTIFFS PRESENTED EVIDENCE THAT THEY'RE LIKELY TO BE INJURED BY REDUCED CD SALES AND IMPEDIMENTS INTO ENTRY INTO THE DIGITAL DOWNLOADING MARKET. I CAN'T GIVE MUCH WEIGHT TO THE FACT THAT DEFENDANTS CONTEND THIS WILL PUT THEM OUT OF BUSINESS. THEY HAVE CONTENDED THAT THERE ARE OTHER USES THAT

NAPSTER CAN BE PUT TO AND IS CAPABLE OF; AND IF THAT IS IN FACT THE CASE, THEY'RE NOT DEPRIVED OF DOING THAT NOR ARE THEY DEPRIVED OF ASSISTING THE NEW ARTISTS OR PUBLISHING THE MUSIC -- OR ASSISTING, RATHER, IN THE PUBLISHING OF THE MUSIC OR COPYING OF MUSIC OF PERSONS WHO AUTHORIZE THEM TO DO SO OR TO PRESENT NEW ARTISTS WITH AN OPPORTUNITY TO BE HEARD OVER THE INTERNET, AND SO FORTH.

THE COURT HAS TO, OF COURSE, TAILOR AN INJUNCTION THAT IS NARROW ENOUGH TO MEET ONLY THE NEEDS THAT ARE INVOKED BY PLAINTIFFS' COPYRIGHTS. AT THE SAME TIME WHILE IT MAY IN FACT HAVE A SIGNIFICANT -- IS LIKELY TO HAVE A SIGNIFICANT NEGATIVE IMPACT UPON DEFENDANTS, I DON'T THINK THAT THE BURDEN SHIFTS OR, RATHER, THE BALANCE OF HARDSHIPS SHIFTS IN THEIR FAVOR BECAUSE TO HOLD OTHERWISE WOULD ESSENTIALLY ALLOW WHOLESALE INFRINGING, AS HAS BEEN GOING ON IN THIS CASE, WITHOUT THE ABILITY OF PLAINTIFFS TO STOP THE HEMORRHAGING OF THAT.

SO THE QUESTION IS: WHAT SHOULD THAT INJUNCTION LOOK LIKE? AND I THINK, GIVEN THE LANGUAGE IN THE DISNEY V. -- IS IT DISNEY V. POWELL? I'LL PULL IT UP HERE IN A MINUTE -- CASE AND A NUMBER OF OTHER CASES HAVE TALKED ABOUT THE PROBLEM OF WHETHER ALL OF THE COPYRIGHTED MATERIAL HAS BEEN IDENTIFIED, THAT THE COURT CAN, IN FACT, ENJOIN NOT ONLY THAT WHICH IS IN SUIT, SUCH AS WHAT WAS ENUMERATED IN THE COMPLAINT OR THE APPENDIX TO THE COMPLAINT IN THIS CASE, BUT ALSO ALL OTHER

COPYRIGHTED WORKS OWNED BY THE PLAINTIFF FOR WHICH AUTHORIZATION FOR USE HAS NOT BEEN PERMITTED.

AND THE REASON THAT I BELIEVE THAT THE COURT CAN FASHION AN INJUNCTION OF THAT NATURE AND OF THAT BREADTH, BUT IT DOES NOT GO BEYOND PLAINTIFFS, IT DOES NOT GO TO OTHER COPYRIGHTED WORKS OF PARTIES WHO ARE NOT -- PERSONS WHO ARE NOT PARTIES TO THIS LITIGATION, THE REASON I BELIEVE I CAN DO THAT IS BECAUSE WHERE THE BUSINESS ITSELF, THE NATURE OF THE INFRINGING IS THE WHOLESALE MAGNITUDE WHAT IS INVOLVED HERE AND WHERE DEFENDANTS HAVE ACKNOWLEDGED THAT IT'S VERY DIFFICULT TO IDENTIFY WHAT IS INFRINGING AND WHAT ISN'T, I CANNOT ESSENTIALLY SIT BY ON THAT AND PLAINTIFFS ARE ENTITLED TO ENFORCE THEIR COPYRIGHT RIGHTS AND NOT HAVE THEM INFRINGED JUST BECAUSE THE NATURE OF THE TECHNOLOGY IS SUCH THAT IT'S TOO HARD TO IDENTIFY.

NOW, HOW ONE ULTIMATELY DOES IDENTIFY, I SUPPOSE SOMETHING CAN BE DONE BETWEEN NOW AND THE PERMANENT INJUNCTION TIME, AND I WILL INVITE YOU TO SUBMIT A PROPOSED INJUNCTION. BUT FOR THE TIME BEING, NAPSTER IS ENJOINED FROM CAUSING OR ASSISTING OR ENABLING OR FACILITATING OR CONTRIBUTING TO THE COPYING, DUPLICATING OR OTHERWISE OTHER INFRINGEMENT UPON ALL COPYRIGHTED SONGS, MUSICAL COMPOSITIONS OR MATERIAL IN WHICH PLAINTIFFS HOLD A COPYRIGHT OR WITH RESPECT TO PLAINTIFFS' PRE-1972 RECORDINGS IN WHICH THEY HOLD THE RIGHTS.

AND YOU CAN EXPLAIN TO ME WHY THAT INJUNCTION EITHER

IS NOT BROAD ENOUGH OR IS NOT NARROW ENOUGH GIVEN WHAT I HAVE SAID BUT -- AND I DON'T KNOW HOW YOU'RE GOING TO IDENTIFY ALL OF THOSE ITEMS, BUT YOU DON'T GET THE BENEFIT OF THE DMCA ESSENTIALLY OF REQUIRING THAT THEY PROVIDE NOTICE TO YOU OF EACH AND EVERY COPYRIGHT. BUT FOR NOW NAPSTER IS ENJOINED FROM DOING THE ACTS THAT I JUST DESCRIBED.

MR. FRACKMAN, IS THERE ANYTHING ELSE THAT SHOULD BE INCLUDED IN THAT INJUNCTION AT THIS POINT?

MR. FRACKMAN: I DON'T THINK SO, YOUR HONOR. THANK YOU.

THE COURT: IS THERE ANY WAY IT CAN BE NARROWED AND STILL --

MR. FRACKMAN: I DON'T SEE HOW, YOUR HONOR.

THE COURT: -- PROTECT YOUR RIGHTS?

MR. FRACKMAN: I DON'T SEE HOW, YOUR HONOR.

THE COURT: MR. BOISE, MR. JOHNSON?

MR. BOISE: I DON'T SEE HOW THAT IS, WITH RESPECT, YOUR HONOR, SUSCEPTIBLE OF BEING FAIRLY IMPLEMENTED. WE DON'T EVEN HAVE A LIST OF WHAT IS CLAIMED TO BE COPYRIGHTED UNDER THE COURT'S ORDER.

EVEN LEAVING ASIDE THE ISSUES THAT THE COURT HAS BEFORE IT IN THE RECORD AS TO HOW YOU WOULD IMPLEMENT THAT, I FRANKLY DON'T THINK THAT THE INJUNCTION IS SOMETHING THAT GIVES US ANY FAIR ABILITY TO COMPLY WITH IT AND STILL OPERATE SIMPLY BECAUSE OF THE WAY, AS WE'VE TRIED TO EXPLAIN TO THE COURT,

PEER-TO-PEER SYSTEM WORKS.

NOW, AS I HEAR THE COURT --

THE COURT: THAT'S THE SYSTEM THAT HAS BEEN CREATED.

MR. BOISE: EXACTLY. AND AS I HEAR THE COURT --

THE COURT: AND I THINK YOU'RE STUCK WITH THE CONSEQUENCES OF THAT.

MR. BOISE: RIGHT. AND AS I HEAR THE COURT, THE COURT IS SAYING THE COURT UNDERSTANDS WHAT THE COURT HAS DONE, BUT BELIEVES THAT THAT IS THE APPROPRIATE THING TO DO AND --

THE COURT: THAT'S RIGHT.

MR. BOISE: AND I --

THE COURT: AND I THINK IT'S -- NAPSTER WROTE THE SOFTWARE. IT'S UP TO THEM TO TRY TO WRITE SOFTWARE THAT WILL REMOVE FROM THAT, YOU KNOW, FROM THE USERS THE ABILITY TO COPY COPYRIGHTED MATERIAL. AND THAT'S THEIR PROBLEM I THINK. THEY'VE CREATED THE, QUOTE, "MONSTER," FOR WANT OF A BETTER TERM, AND I GUESS, YOU KNOW, THAT'S THE CONSEQUENCE THEY FACE.

MR. BOISE: JUST TO --

THE COURT: I MEAN, THEY CAN HAVE THEIR CHAT ROOMS AND THEY CAN SOLICIT ALL THOSE NEW ARTISTS.

MR. BOISE: YOUR HONOR, WITHOUT TRYING TO REARGUE, BECAUSE I KNOW THE COURT HAS MADE UP ITS MIND AND I ACCEPT THAT THE COURT HAS MADE UP ITS MIND HOWEVER ERRONEOUS I MAY THINK IT IS, BUT THE ONLY THING I WANT THE COURT TO FOCUS ON IS THAT WHEN THE COURT SAYS THAT NAPSTER WROTE THE SOFTWARE, WHAT

NAPSTER DID WAS TO TAKE FILE TRANSFER SOFTWARE AND SIMPLY ADAPT IT TO EXCHANGING MP3 FILES.

THE COURT: WHATEVER IT DID, IT'S GOING TO HAVE TO FIGURE OUT HOW TO UNDO IT OR HOW TO OPERATE IN A WAY SO THAT IT IS NOT FACILITATING THE COPYING OF COPYRIGHTED MATERIAL PERIOD, COPYRIGHTED MATERIAL OF PLAINTIFFS ADMITTEDLY, AND THAT'S UP TO THEM TO FIGURE OUT.

AND I SAY THAT BECAUSE IT IS SUCH A WHOLESALE COPYING EFFORT THAT IT'S NOT AS IF THERE WERE JUST A HANDFUL OF THINGS THAT WERE BEING -- YOU KNOW, ITEMS OR SONGS THAT WERE BEING INFRINGED UPON.

I REALLY AM NOT WILLING TO PUT THE BURDEN ON PLAINTIFF. I CERTAINLY BELIEVE THAT THEY SHOULD WORK WITH DEFENDANT DURING THE PERIOD OF TIME BETWEEN NOW AND THE NEXT PROCEEDING TO SEE WHAT CAN BE DONE TO MAKE SURE THAT THEY'RE ONLY REMOVING -- YOU'RE ONLY REMOVING THEIR COPYRIGHTED WORK; BUT IN THE MEANTIME, OR ACCESS TO THEIR COPYRIGHTED WORK. IN THE EVEN MEANTIME WE CAN'T -- YOU KNOW, I CAN'T JUST LET IT GO ON. A STRONG CASE HAS BEEN MADE.

MR. BOISE: DOES THE COURT UNDERSTAND THAT THERE ARE TWO SEPARATE ISSUES THAT WE'RE TALKING ABOUT HERE IN TERMS OF THE SCOPE? ONE ISSUE IS HOW WOULD YOU GO ABOUT CHANGING A PEER-TO-PEER FILE TRANSFER PROGRAM TO ACCOMPLISH WHAT THE COURT WANTS TO DO EVEN IF YOU KNEW WHAT SONGS WERE CLAIMED TO BE COPYRIGHTED. THAT'S ONE ISSUE. THE SECOND ISSUE IS WE DON'T

EVEN HAVE A LIST OF THE SONGS THAT ARE CLAIMED TO BE COPYRIGHTED. DO YOU UNDERSTAND THAT THERE ARE BOTH OF THOSE PLACES?

THE COURT: I UNDERSTAND THAT, BUT YOU'RE -- BUT WHAT YOUR CLIENT IS DOING IS FACILITATING SOMETHING THAT INVOLVES THE INFRINGING UPON PLAINTIFFS' COPYRIGHTED WORKS AND THEY'RE GOING TO HAVE TO FIGURE OUT. SINCE THEY'RE DOING IT ON SUCH A WHOLESALE BASIS, THEY'RE GOING TO HAVE TO FIGURE OUT A WAY TO MAKE SURE THEY DON'T ASSIST OR FACILITATE IN THAT ANY LONGER.

NOW, IF THE USERS WANT TO SHARE FILES IN SOME OTHER WAY, THAT'S BETWEEN THEM AND IT'S UP TO THE PLAINTIFFS TO TRY TO ENFORCE THEIR RIGHTS AS AGAINST THEM, YOU KNOW, IF THERE IS A SYSTEM THAT COMES INTO BEING. AND I GUESS THERE ARE SOME OTHERS THAT ARE IN BEING THAT ALLOW PEOPLE TO DO PRETTY MUCH THE SAME THING. THAT'S UP TO THEM TO ENFORCE THOSE RIGHTS.

THAT DOESN'T MEAN THAT I CAN'T RESTRAIN NAPSTER, BECAUSE THEY'RE THE ONLY ONES BEFORE THE COURT RIGHT NOW, FROM DOING WHAT THEY'RE DOING.

MR. BOISE: COULD I RAISE ONE OTHER QUESTION THAT DOESN'T GO TO THIS ISSUE?

THE COURT: YES.

MR. BOISE: AND THAT IS THE ISSUE OF THE TIMING WHEN THIS GOES INTO EFFECT, AND THERE ARE REALLY TWO ASPECTS OF THAT.

ONE IS WHETHER THE COURT IS PREPARED TO GRANT A STAY PENDING AN APPLICATION TO THE COURT OF APPEALS FOR A STAY; AND, SECOND, IF THE COURT IS NOT PREPARED TO DO THAT, HOW LONG THE COURT PLANS TO GIVE US TO IMPLEMENT THE COURT'S INJUNCTION.

THE COURT: WHY DON'T YOU ANSWER THE FIRST QUESTION.

MR. FRACKMAN: HOW LONG?

THE COURT: I MEAN THE SECOND QUESTION FIRST. HOW LONG SHOULD THEY BE GIVEN TO --

MR. FRACKMAN: RIGHT NOW.

THE COURT: AND YOU'RE LOOKING AT THE CLOCK.

MR. FRACKMAN: YES, I AM, YOUR HONOR.

THE COURT: NOT THE CALENDAR.

MR. FRACKMAN: THAT'S RIGHT.

(LAUGHTER)

MR. FRACKMAN: INTENTIONALLY.

YOUR HONOR, WE FILED THIS LAWSUIT ON DECEMBER 7TH. WE TOLD THEM AT THE TIME WE FILED THE LAWSUIT WE WOULD BE SEEKING A PRELIMINARY INJUNCTION. THIS MOTION HAS BEEN PENDING FOR TWO MONTHS. THEY'VE KNOWN SINCE THAT TIME AT LEAST THAT TODAY WOULD VERY WELL BE THE DAY OF RECKONING.

IF THIS INJUNCTION DOES NOT GO INTO EFFECT IMMEDIATELY, I THINK YOUR HONOR KNOWS AND I THINK WE KNOW WHAT'S GOING TO HAPPEN WITH THOSE 20 MILLION USERS UNTIL IT DOES GO INTO EFFECT, AND THAT'S GOING TO BE A RUSH TO THE COMPUTER AND ENORMOUS AMOUNTS OF DOWNLOADING.

AND IT'S NOT UNFAIR, YOUR HONOR. THEY'VE HAD EIGHT MONTHS OF NOTICE AND SO I WOULD SAY IMMEDIATELY WOULD BE MY REQUEST.

MR. BOISE: THERE IS OBVIOUSLY NO WAY THAT WE COULD FAIRLY IMPLEMENT IT IMMEDIATELY. THE ONLY WAY YOU COULD DO IT IMMEDIATELY IS TO STOP THE SERVICE; AND IF THE COURT IS GOING TO ORDER THAT, I MEAN -- THE COURT WILL OBVIOUSLY ORDER WHAT THE COURT WILL ORDER. BUT I WOULD RESPECTFULLY SUGGEST TO THE COURT THAT TO SAY TO NAPSTER, "YOU'VE GOT TO FIGURE OUT A WAY OF PREVENTING THE COPYING OF COPYRIGHTED WORKS THAT ARE NOT EVEN IDENTIFIED AND YOU MUST DO SO IMMEDIATELY," IS SIMPLY SAYING, "YOU MUST SHUT YOUR BUSINESS DOWN."

AND IF THE COURT BELIEVES THAT THAT IS THE APPROPRIATE THING TO DO, THE COURT WILL ORDER THAT, BUT I WOULD SIMPLY URGE THE COURT THAT THAT GOES FAR BEYOND WHAT EVEN THE COURT HAS FOUND

THE COURT: I'M NOT ORDERING THEM TO SHUT THEIR BUSINESS DOWN. I WANT TO MAKE THAT CLEAR. WHAT ABOUT ALL THOSE SUBSTANTIAL NONINFRINGING USES YOU WERE TRYING TO CONVINCE ME OF EARLIER?

MR. BOISE: RIGHT. WELL, BUT THE PROBLEM IS, YOUR HONOR, IS THAT THOSE SUBSTANTIAL -- IT'S A PROBLEM OF SEPARATING OUT THE NONINFRINGING USES FROM WHAT THE COURT FINDS TO BE INFRINGING USES. AND WHAT I'M SAYING TO THE COURT AND WHAT I THINK THE PAPERS QUITE CLEARLY DEMONSTRATE IS THAT THAT

IS NOT POSSIBLE TO DO TODAY. IT'S NOT POSSIBLE TO DO. I'M NOT SURE --

THE COURT: NONE OF THIS SHOULD COME AS A SURPRISE TO ANYONE REALLY.

MR. BOISE: WELL, YOUR HONOR, ALL I CAN --

THE COURT: I MEAN, THIS LITIGATION HAS BEEN GOING ON FOR SOME TIME NOW AND IT SHOULD NOT COME AS A SURPRISE.

MIDNIGHT TOMORROW NIGHT, OKAY?

MR. BOISE: WILL THE COURT --

THE COURT: TODAY IS AUGUST THE 26TH --

MR. FRACKMAN: JULY, YOUR HONOR.

THE COURT: I REALLY WANT TO BE IN AUGUST. I'M SORRY.

JULY THE 26TH, IS THAT RIGHT, OR 25TH? 26TH.

MR. BOISE: 26TH I THINK, YOUR HONOR.

THE COURT: UNTIL FRIDAY MIDNIGHT, JULY THE 28TH MIDNIGHT.

NO, I WILL NOT GRANT A STAY. IF YOU WANT A STAY, YOU CAN GO TO THE NINTH CIRCUIT. OKAY?

MR. BOISE: AND IS THE COURT GOING TO GRANT A BOND?

THE COURT: WHY NOT? AND IF SO, HOW MUCH?

MR. RAMOS: YOUR HONOR, IF I MAY ADDRESS THAT.

THE COURT: MAYBE YOU SHOULD SAY FIRST. HOW MUCH? YOU ANSWER THAT QUESTION.

MR. BOISE: YOUR HONOR, WE THINK A MINIMUM -- WE

SAID IN OUR PAPERS WE THOUGHT THAT THE VALUE OF THE BUSINESS IS BETWEEN 800 MILLION AND A BILLION AND A HALF DOLLARS, AND WE THINK IT SHOULD BE A MINIMUM OF $800 MILLION.

THESE ARE SUBSTANTIAL COMPANIES BUT THEY'RE NOT THAT SUBSTANTIAL WITHOUT THE POSTING OF THE BOND; AND WE THINK THE LAW ABSOLUTELY REQUIRES IT. THIS IS NOT A MATTER WE THINK IS COMMITTED TO THE COURT'S DISCRETION IN TERMS OF POSTING AN ADEQUATE BOND. AND I THINK THAT PARTICULARLY GIVEN THE BREADTH OF THE INJUNCTION THAT THE COURT IS ISSUING, AND THE TIMEFRAME THAT THE COURT IS REQUIRING AT THE PLAINTIFFS' INSTANCE THIS BE DONE AT, THE COURT IS OBLIGATED TO IMPOSE THAT BOND.

THE COURT: YES?

MR. BOISE: THERE IS NO EVIDENCE IN THE RECORD TO THE CONTRARY IN TERMS OF THE AMOUNT OF THE BOND FROM THE PLAINTIFFS. WE DO NOT HAVE ANYTHING FROM THE PLAINTIFFS THAT CONTRADICTS THE NEED FOR THAT AMOUNT OF BOND.

MR. RAMOS: YOUR HONOR, THAT'S NOT CORRECT.

THE COURT: YES?

MR. RAMOS: I BEGIN BY REFERENCE TO YOUR HONOR'S ANALOGY ABOUT THE ORPHAN ASKING FOR THE MERCY OF THE COURT. THIS IS THE ORPHAN NOT ONLY ASKING FOR THE MERCY OF THE COURT BUT ASKING THE COURT FOR COMPENSATION FOR THE LOSS OF THE PARENTS THE ORPHAN KILLED. I THINK IT TURNS THE CASE ON ITS HEAD.

YOUR HONOR INDICATED THAT THE COURT HAD FOUND A VERY

STRONG LIKELIHOOD OF SUCCESS ON THE MERITS AND, FRANKLY, I THINK TO REQUIRE US TO PUT UP A BOND OF ANYTHING LIKE THE AMOUNT THAT'S BEEN REQUESTED WOULD BE ADDING INSULT TO INJURY.

THE VALUE OF THIS COMPANY, IF THERE IS ANY VALUE IN THIS COMPANY, IS THE VALUE OF THE COPYRIGHTED MUSIC OF MY CLIENT AND MR. FRACKMAN'S CLIENT, AND TO ASK US TO PAY AGAIN FOR THE CREATIVE EFFORTS OF OUR CLIENTS BY POSTING A BOND OF THAT SIZE I THINK IS COMPLETELY INAPPROPRIATE.

THE COURT: WHAT ARE YOU PROPOSING?

MR. RAMOS: HAVING SAID THAT, YOUR HONOR, AND, FRANKLY, UNDER THE CIRCUMSTANCES GENUINELY BELIEVING THAT NO BOND HERE IS REQUIRED, I BELIEVE THAT THERE ARE CASES IN THE NINTH CIRCUIT THAT SUPPORT THAT CONCLUSION, IF YOUR HONOR SO DECIDES, I BELIEVE THE MAXIMUM, AND THIS IS IN THE RECORD, THE MAXIMUM SHOULD BE THE AMOUNT THAT WAS INVESTED IN THIS COMPANY PRIOR TO THE FILING OF THIS LAWSUIT, WHICH I BELIEVE WAS NO MORE THAN $2 MILLION.

I BELIEVE THAT ANY MONEY INVESTED AFTER THE LAWSUIT WAS FILED WAS INVESTED AT THE PERIL OF INVESTORS AND THAT THEY WERE ON AMPLE NOTICE THAT THERE COULD BE A FINDING OF COPYRIGHT LIABILITY AS THERE AT LEAST ON A PRELIMINARY BASIS HAS BEEN IN THE COURT.

I'M SPEAKING FOR, I BELIEVE, FOR BOTH SETS OF PLAINTIFFS IN THAT REGARD, YOUR HONOR.

THE COURT: WELL, I WILL SET A BOND AT $5 MILLION.

CAN THAT BE POSTED BY MIDNIGHT -- WELL, 4:00 O'CLOCK ON FRIDAY?

MR. FRACKMAN: MOST DEFINITELY, YOUR HONOR.

THE COURT: OKAY. THANK YOU. AND YOU'RE EXCUSED.

MR. FRACKMAN: THANK YOU, YOUR HONOR.

(WHEREUPON PROCEEDINGS ADJOURNED AT 4:53 P.M.)

CERTIFICATE OF REPORTER

I, JO ANN BRYCE, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C 99-5183 MHP & C 00-0074 MHP, A&M RECORDS, ET AL. VS. NAPSTER, INC., WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

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JO ANN BRYCE, CSR 3321, RPR, RMR, CRR, FCRR

THURSDAY, JULY 27, 2000