

Appeal Nos. 00-16401 and 00-16403
UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

NAPSTER, INC., a corporation,

Defendant-Appellant,

v.

A & M RECORDS, INC., a corporation,

(For Full Caption See Following Pages)

Plaintiffs-Appellees.

NAPSTER, INC., a corporation,

Defendant-Appellant,

v.

JERRY LEIBER, individually and dba JERRY LEIBER MUSIC,

(For Full Caption See Following Pages)

Plaintiffs-Appellees.

Appeal from the U. S. District Court Northern District of California
Civil Nos. C 99-5183 MHP (A&M Records) &
C 00-0074 MHP (Leiber) Judge Marilyn Hall Patel

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Appeal No. 00-16401

NAPSTER, INC., a corporation,

Defendant-Appellant,

v.

A & M RECORDS, INC., a corporation, GEFLEN RECORDS, INC., a corporation, INTERSCOPE RECORDS, a general partnership, SONY MUSIC ENTERTAINMENT INC., a corporation, MCA RECORDS, INC., a corporation, ATLANTIC RECORDING CORPORATION, a corporation, ISLAND RECORDS, INC., a corporation, MOTOWN RECORD COMPANY L.P., a limited partnership, CAPITOL RECORDS, INC., a corporation, LA FACE RECORDS, a joint venture, BMG MUSIC d/b/a THE RCA RECORDS LABEL, a general partnership, UNIVERSAL RECORDS INC., a corporation, ELEKTRA ENTERTAINMENT GROUP INC., a corporation, ARISTA RECORDS, INC., a corporation, SIRE RECORDS GROUP INC., a corporation, POLYGRAM RECORDS, INC., a corporation, VIRGIN RECORDS AMERICA, INC., a corporation, WARNER BROS. RECORDS INC., a corporation,

Plaintiffs-Appellees.

Appeal No. 00-16403

NAPSTER, INC., a corporation,

Defendant-Appellant,

v.

JERRY LEIBER, individually and dba JERRY LEIBER MUSIC, MIKE STOLLER, individually and dba MIKE STOLLER MUSIC, and FRANK MUSIC CORP., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees.

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PRELIMINARY STATEMENT

Serious errors pervade Appellees' Responding Brief ("ARB"). For example:

- It argues from disputed facts and stresses the "fact-intensive" nature of the proceeding below (ARB42), but does not even try to defend the District Court's misallocation of the burden of proof (and barely mentions the court's denial of an evidentiary hearing, which compounded the burden of proof error);
- It repeatedly asserts as fact, propositions that the District Court did not find (and for which there is no support in the record);¹
- It ignores key language from the Audio Home Recording Act of 1992 ("AHRA"), and thereby creates results so absurd that no Congress should be assumed to have intended them;
- It minimizes the *Sony* doctrine to the point of transforming it into an effective nullity that would come into play only in the most extreme and implausible circumstances, and that ignores demonstrated capability for substantial future (as well as present) noninfringing uses;

¹ It also uses *ellipses* to make judicial quotes appear helpful to Plaintiffs' case when in fact they are not. ARB71 (deceptively quoting *Playboy Enters. v. Hardenburgh*, 982 F.Supp. 503, 510-11 (N.D. Ohio 1997)); see n.31, *infra*.

- It dismantles the framework created by Congress in the Digital Millennium Copyright Act (“DMCA”), which insures that Internet companies can continue to function in the face of claims about the actions of their users; and
- It does not even try to defend a broad array of the District Court’s errors identified in Appellant’s Opening Brief (“AOB”) – errors relating to virtually every statute and common law doctrine at issue in this case (and to factual findings that Plaintiffs’ own expert contradicted).

Although they claim to follow Congress’ literal and exact words, Plaintiffs (and their *amici*) in fact do not. For example:

- When Congress says “No action may be brought” based on certain consumer conduct (17 U.S.C. §1008)², Plaintiffs’ *amici* say “some actions” may be brought based on that same consumer conduct (DOJ Brief 19-20);
- When Congress and this Court (*RIAA v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1079 (9th Cir. 1999)) say “all noncommercial

² All section cites are to Title 17. All emphases are added unless noted.

copying” is protected, Plaintiffs say “some” noncommercial copying is protected (ARB29-30).

Contrary to the claims of Plaintiffs and their *amici*:

- “no” does not mean “some”;
- “all” does not mean “some.”

This case is not about any diminution in the value of Plaintiffs’ copyrights; none has occurred or is reasonably foreseeable as the result of Napster. This case is about whether Plaintiffs can use their control over music copyrights to achieve control over Napster’s decentralized technology and prevent it from transforming the Internet in ways that might undermine their present chokehold on music promotion and distribution.

Plaintiffs have refused a reasonable license, and oppose a compulsory license remedy. Conclusory protestations notwithstanding, Plaintiffs seek not fair compensation for what they own, but to kill or control a technology that is not theirs.

I. PLAINTIFFS SERIOUSLY MISCONSTRUE THE AHRA, WHICH IN FACT IMMUNIZES NAPSTER’S USERS.

Plaintiffs (by their silence) and Plaintiffs’ *amici* from the Copyright Office and the Department of Justice (expressly) recognize that the basis asserted by the District Court for its holding that §1008 of the AHRA does not protect the activities of Napster users was clear error. Plaintiffs (in 5 pages) and their *amici*

(in 30) offer a variety of alternative arguments why this Court should, without further proceedings below, nevertheless hold §1008 inapplicable to the noncommercial sharing of music at issue here. Most of those arguments require little response.

Plaintiffs assert (ARB29-30) that “noncommercial” is limited to “home taping” and small-scale sharing. However, the language of §1008 as written by Congress, which contains no scale criteria and does not use the phrase “home taping,” is inconsistent with that argument – a discussion Plaintiffs and their *amici* wholly ignore. Moreover, the original text of the AHRA, instead of barring suit against those who made noncommercial use, barred suit generally but contained an exception for those who make copies “for direct or indirect commercial advantage.” S. Rep. 102-294 at 4 (1992). It then defined “not for direct or indirect commercial advantage” as being copying “by a consumer for private, noncommercial use.” *Id.* The final text eliminated the “private” qualification and required only “noncommercial” use.

Plaintiffs also argue (ARB29-30) that §506(a) somehow indicates that “noncommercial” in §1008 does not mean “noncommercial,” even though §506(a) – unlike §109(b)(1)(A)³ – does not even use the term. Plaintiffs also suggest that

³ Our Opening Brief pointed out that §109(b)(1)(A) was another example of Congress striking a commercial/noncommercial balance without regard to scale.

(footnote continued)

§506(a) might apply to Napster users. However, the language of §506(a) (which Plaintiffs never quote) makes clear that the section has nothing to do with whether an activity is an infringement, but only what the penalty is for one “who infringes a copyright willfully.”

Plaintiffs (ARB29) and their *amici* (DOJ Brief 17-19) also argue that §1008 does not affect an action for illegal *distribution* as opposed to illegal *copying*. Plaintiffs’ central premise, that merely making a work available “distributes” it, ignores the language of the Copyright Act which requires a “sale or other transfer of ownership.”⁴ Two points independently demonstrate the error of that argument. First, §1008 bars *any* action under Title 17 (which includes distribution rights) based on noncommercial use by a consumer of a device or medium for making musical recordings. *See* 2 M.&D. Nimmer, *Nimmer on Copyright* §8B.07[C] at 8B-87-88 (2000). Second, the distribution right granted is only the right to – distribute “to the public by sale or other transfer of ownership, or by rental, lease, or lending.” §106(3). Even Plaintiffs’ *amici* emphasize that the distribution must

(footnote continued)

Plaintiffs’ only response is to dismiss (ARB30 n.14) the section as “many years earlier” than the 1992 AHRA, without mentioning that the section was adopted in 1984 and amended (to add software) in 1990.

⁴ For support, they cite *Hotaling v. Church of Jesus Christ of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1997), a case about whether a court should presume distribution when the copyright owner has not kept accurate records. *Hotaling* also

(footnote continued)

be to the public, and there is no evidence in the record regarding the extent to which any individual file of any individual user is shared – a necessary but not sufficient predicate to convert Napster users’ one-to-one sharing to public distribution.⁵ Even more important, Napster users do not sell, rent, lease, lend, or transfer their ownership. If the distribution right were given the scope Plaintiffs’ *amici* argue, there would have been no need for §109(b)(1)(A).⁶

Plaintiffs’ *amici* also argue (DOJ Brief 20) that even if §1008 protects Napster users, it does not protect Napster “because the terms of Section 1008 address only whether consumers can be *sued* for infringement” (emphasis in original). However, as Plaintiffs’ *amici* concede, the claim against Napster (for vicarious/contributory infringement) is necessarily based on the conduct of Napster users, and §1008 makes clear that “no action may be brought” (not no action against a consumer, or no action against a direct infringer, but *no* action) based on the covered noncommercial conduct by consumers.⁷

(footnote continued)

recognizes the right of an owner of a lawfully held copy to make that work available. *Id.*

⁵ No evidence supports Plaintiffs’ repeated assertions that individual files are shared with “millions” of strangers.

⁶ Whatever the limits on appropriate advocacy by a private litigant, this Court has a right to expect more from the Department of Justice when it appears as an asserted *amicus*.

⁷ *Amici*’s argument that the immunity for manufacturers in §1008 would be surplusage if the immunity for consumers were sufficient to preclude

(footnote continued)

Plaintiffs' *amici* also argue that even for purposes of §1008 Napster users are not making “digital musical recordings.” To support this counterintuitive assertion, *amici* refer to the definition of that term in §1001(5), asserting that because computer hard drives store data and computer programs as well as music, they are not “musical recordings.” Among the problems with this position is that it is true for tapes and disks as well – they too are used for data and computer programs. The issue is not whether an object can be (or is elsewhere) used for data or programs, but whether the recording at issue includes more than music. Tapes, disks, or computer hard drives are not themselves musical recordings; but the fact that they may be (and commonly are) used for data other than music does not mean that when they are used for music, the music recorded is not a “musical recording” under §1008.

The exemption for computers was added to the AHRA after the initial compromise between the digital device industry and the recording industry. ER00829, ER00886. The entire purpose of choosing the phrase “digital musical recording” over “phonorecord” was to avoid implying that the AHRA extended

(footnote continued)

contributory/vicarious liability is erroneous. Immunity for manufacture of devices is still necessary to preclude liability for *direct* infringement on the part of manufacturers of copying devices, and to preclude contributory/vicarious liability in cases where the use of the devices is not by consumers (or, if by consumers, is commercial).

beyond works that were primarily musical audio works, and to ensure that the incidental use of music in talking books and computer programs would not bring them within the scope of the AHRA. ER00845. In a declaration submitted in *Diamond*, Cary Sherman of the RIAA testified that the exclusion of computer programs and “talking books” was the only purpose of the changes in the statutory definitions. ER01262-ER01267. There is no suggestion in the legislative history that the intent was to include only some primarily musical audio recordings within §1008 protection and to exclude other primarily musical audio works.

The only serious argument made by Plaintiffs and their *amici* deals with whether §1008 applies to the use by consumers of computer hard drives, a device or medium as to which (under *Diamond*) no royalty is paid and no serial copying restriction imposed. Plaintiffs’ argument assumes, without analysis or citation, (a) that the statutory reference in §1008 to “such a device or medium” is limited to the specific devices and media earlier identified in the section, and (b) that for purposes of §1008, the devices and media specifically identified are not intended to cover all ways in which consumers may copy music.

Plaintiffs are correct, as we have stated (AOB20), that this Court in *Diamond* held that computer hard drives are not subject to the SCMS/royalty requirements because they are not within the §1001 definition of a “digital audio recording device.” However, both *Diamond* and principles of statutory

construction dictate that the §1001 definition of “digital audio recording device” should be read to limit *only* the scope of the SCMS/royalty requirements, and *not* the scope of immunity of the AHRA. In *Diamond*, this Court construed the immunity provisions of the AHRA as all-encompassing, and not limited to any particular type of medium on which a digital musical recording might be stored. Professor Nimmer is in accord that this Court read the immunity provisions of the AHRA as *not* being limited by its own construction of the definitions of the technical terms that it held to limit the scope of the SCMS/royalty requirements. *Nimmer* §8B.07[C][4] at 8B-94. This reading is consistent with the fact, discussed above, that references to computers were *only* to ensure that computer programs and “talking books” would not be subject to the SCMS/royalty requirements, and not to reduce the scope of immunity. ER00829, ER00845, ER00886, ER01262-ER01267.

Plaintiffs’ *amici*’s reliance on the *quid pro quo* they say the AHRA represents is refuted by their own analysis. *Amici* recognize that there is no royalty or serial copying linkage with the §1008 exemption for copying using analog media or devices. They explain that lack of linkage on the basis that analog copies are less than perfect copies whereas certain digital copies can be. However, *Amici* ignore totally the finding of the District Court, and the undisputed fact, that MP3 copies ripped to a hard drive also lack CD fidelity (which, the evidence below

showed, was an important reason why Napster users purchased CDs of music they had already downloaded).

If Congress had intended to limit the protection of §1008 to specific devices and media, it could have identified them in the second clause; it could have referenced “those devices” or “the above devices” or “the foregoing devices”; it could even have (perhaps ambiguously) referred to “such devices.” Congress did not. Instead it referred to “such a device.” (Whatever ambiguity might have resulted from the use of “such devices” is removed by the addition of an indefinite article.)

Moreover, permitting unlimited copying by consumers using undefined analog devices (as to which no royalty is paid) or defined digital devices (as to which a royalty is paid unrelated to the number of copies made) but *no* copying by consumers using computer hard drives leads to an absurd result not lightly to be inferred as Congress’ intent.

Plaintiffs’ argument leads to the further absurd construction that every time a consumer copies the music of her own CD onto her own hard drive (or off again) the §1008 immunity is inapplicable. Such an interpretation is inconsistent with the statutory language, with commonly accepted (and encouraged) practice, with the RIAA’s own previous interpretation of the statute, and with this Court’s analysis in *Diamond*. Plaintiffs’ present argument would mean that §1008 gives no protection

to consumers using the Rio (or Sony's Vaio, ER02480) to copy music – a result flatly inconsistent with *Diamond*. Even Plaintiffs appear to recognize elsewhere this fact when they accept that, at least where the copying is on a small scale, Congress intended to permit consumer copying of music using a computer.

Constructions of statutory language that lead to absurd results clearly contrary to legislative intent must be rejected. *See, e.g., United Steel Workers v. Weber*, 443 U.S. 193, 204 (1979); *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1, 7 (1975).

II. PLAINTIFFS' HAVE FAILED TO DISTINGUISH SONY.

When Plaintiffs finally (ARB42) address the *Sony* decision, 464 U.S. 417 (1984), they do so in the mechanical context of whether the Napster system is a “staple article of commerce.” Entirely missing is any recognition of *Sony*'s essential holding: new technologies should not be judicially banned (or re-engineered) unless the only substantial use of which they are capable is unlawful.

Sony does not limit a copyright holder's right to pursue direct infringers. It addresses whether the judicially developed doctrine of contributory/vicarious infringement should be applied to technologies that are capable of multiple uses. In this respect, it wisely leaves to Congress the balancing of interests where new technology may be used for both lawful and unlawful purposes.

While Plaintiffs mistakenly assert that the *Sony* Court “hinged” its analysis on the primary use of the Betamax (AOB42), they never address the District Court’s fundamental legal error in holding that Napster’s service should be banned if its initial “chief” or “primary” or “predominant” use was unlawful. AOB25-26, 29. Instead, they argue that Napster has *no* substantial fair use and that authorized sharing is “*de minimis* and severable.”

A. Plaintiffs’ Conjunctive Test Requiring Current “Wide Use” for Noninfringing Purposes Is Unsupportable.

Instead of defending the District Court’s reliance on the supposed or inferred primary use of Napster, Plaintiffs now suggest that *Sony* imposes a conjunctive test requiring a technology to be *both* currently “widely used for legitimate, unobjectionable purposes” *and* “capable of substantial commercially significant noninfringing uses.” ARB49. But the *Sony* Court made clear that the technology need “*merely*” meet the latter standard. 464 U.S. at 442.

While Napster’s evidence of present wide use is certainly *more* than sufficient, the mere capability of such use suffices.⁸ None of the cases cited by Plaintiffs (ARB50) purports to require widespread *present* use where a realistic capacity for such use is shown. None involves facts in which there was *any*

⁸ Plaintiffs mischaracterize *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1998), as involving a product “commonly used” for noninfringing uses, (footnote continued)

material noninfringing capacity or use, let alone the multiple actual and potential uses presented here.

Napster does not contend that purely *theoretical* potential for authorized transfer is automatically sufficient under *Sony*. ARB50. Rather, both Napster’s present uses and its *demonstrated*, and dramatic, capability of fair and authorized uses satisfy *Sony*. Even Plaintiffs’ own declarants admit that Napster’s technology can be “highly effective” for developing new artists. ER02469.

Indeed, Plaintiffs’ data likely understate the magnitude of the potential noninfringing uses of Napster. Plaintiffs’ claim that 87% of Napster uses are unauthorized is based on survey data collected May 2000, less than two months after the formal launch of the New Artists Program.⁹ A survey represents – as the District Court termed it (ER04229) – only a “snapshot” of Napster’s usage. This snapshot neither accurately reflects Napster’s current usage by new artists nor determines Napster’s future *capability* for such use.

B. The Use of Napster for Authorized Sharing Is Substantial and Growing.

Plaintiffs seek to leverage their current control of “the vast majority of the relevant market of copyrighted materials” (ARB43) to deny all other artists a

(footnote continued)

when that court actually did not find it necessary to assess the extent of such uses after finding that the product *could* be used for a non-infringing purpose.

⁹ As the District Court noted, planning for the program had begun in October 1999. ER0422, ER01741¶6, ER02164¶5.

revolutionary alternative platform for distributing music. However, in the absence of evidence that they speak “for virtually all copyright holders with an interest in the outcome” (*Sony*, 464 U.S. at 446), Plaintiffs are not entitled to stifle distribution of content over which they have no rights.

Plaintiffs’ claim to represent virtually all music copyright holders (ARB6, 43) is baseless. Plaintiffs’ own reports indicate that they *do not represent 98% of musicians*, and the District Court did not disagree.¹⁰ Plaintiffs offer no contrary evidence. ARB6 n.4. It was legal error to write off 98% of artists, tens of thousands of whom already use Napster to share their music (AOB20-28), as *de minimis*.

Moreover, Plaintiffs dismiss in a footnote the undisputed evidence (AOB27) that hundreds of established recording artists – not just a “few” (ARB65 n.32) – have authorized the sharing of their live performances. Plaintiffs present only supposition that these artists object to peer-to-peer sharing, whereas the evidence reflects that prominent bands, including Metallica and The Offspring, have authorized such trading on Napster. AOB14, ER01724¶8, ER01703-01704.

¹⁰ Warner Music’s strategic plan states that the “record labels” are “gatekeepers” that “sign ~2% of artists,” leaving over 100,000 recording artists “hoping to record professionally” unrepresented by the major labels. ER03026.

One cannot distinguish authorized live recordings from studio releases based on file names. ER01814, ER02001. Accordingly bands who have authorized the use of Napster (*e.g.*, The Offspring, ER01724), bands that permit the trading of recordings of their live performances (*e.g.*, the Grateful Dead and the Dave Matthews Band, ER01310) and bands that have released free music files over the Internet (*e.g.*, the Beastie Boys, ER01473¶¶8-9, ER01703-ER01704) are improperly *included* in the list of artists whose songs constitute the 87% of uses Plaintiffs allege to be *unauthorized*. ER03818-ER03837. The 87% figure is inaccurate because it relied on assumptions from file names made without listening to the music. ER01385¶¶6d, ER01387¶¶8d. But even if accurate, this figure suggests that use of the other 13% – some 1.8 to 4.5 million files copied per day – is *authorized*. Noninfringing use of this magnitude cannot be written off as *de minimis*. ARB65.¹¹

C. Space-Shifting Is Both a Fair and Substantial Use.

Plaintiffs fail to refute the conclusion this Court has already reached:

transferring works a user *already owns* into a different, more convenient format

¹¹ Plaintiffs assert in a footnote that “the vast majority [of the 13%] also *likely* is infringing.” ARB5 n.3. This assertion contradicts the District Court’s finding that 87% of files shared through Napster are *copyrighted, not unauthorized*. ER04228. The issues discussed in this section are precisely the sort of factual issues on which the court’s denial of an evidentiary hearing was critical. The Court should not
(*footnote continued*)

(“space-shifting”) is “paradigmatic noncommercial personal use.” *Diamond*, 180 F.3d at 1079.¹² They also fail to defend the District Court’s insupportable conclusion that space-shifting in which millions engage is *de minimis*. ER04230.

Plaintiffs define space-shifting as neither Napster nor this Court has, that is, as the accumulation of a library of works through unauthorized copying from one location to another. ARB54-55. Only through this artifice can Plaintiffs assert, notwithstanding *Diamond*, that Napster space-shifters engage in commercial use because they stand “to profit from the exploitation of the copyrighted material without paying the customary price.” ARB54, 58. Because space-shifters already own the work they are using Napster to transfer, they have already paid “the customary price.” Moreover, a use that enhances enjoyment of a product already purchased is a fair one. *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 984 F.2d 965, 971 (9th Cir. 1992).

(footnote continued)

decide the *Sony* issue based merely on what is alleged to be “likely,” without any evidence.

¹² Plaintiffs attempt to distinguish Napster from the Rio player in *Diamond* by noting that the Rio could not make duplicates of MP3 files that were downloaded to it. *Diamond* did not so limit its analysis. Instead, it relied on the fact that the “Rio merely makes copies in order to render portable or ‘space-shift,’ those files that already reside on a user’s hard drive.” *Diamond*, 180 F.3d at 1079. Moreover, whereas Plaintiffs seek to distinguish space-shifting from the time-shifting addressed in *Sony* (ARB53-54), this Court analogized the two in *Diamond*. See 180 F.3d at 1079. The fact that time-shifting *is* fair use in no way establishes that

(footnote continued)

Plaintiffs also fail to rebut Napster’s argument that the District Court erred by failing to conduct an independent analysis of the third fair use factor. AOB33. They continue to cite *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983), for the proposition that copying of an entire work precludes fair use. This Court has specifically stated both that *Marcus* was overruled by *Sony* and that the proposition is incorrect. *United States v. Hustler Magazine, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986).

Plaintiffs argue that consumers may in the future be willing to pay to shift their music collections to MP3 format, potentially creating a market that could be harmed by space-shifting. *No* evidence in the record – and no finding of the District Court – supports this new hypothesis, which Plaintiffs advance as “axiomatic.” ARB60. Nor can anyone credibly claim that users should *have* to pay to convert their CDs to MP3 format, as Plaintiffs’ executives and declarants acknowledge. The Executive Vice-President of Warner Bros. testified that a consumer who owns a CD is freely permitted to convert it into an MP3 file. ER02938:5-17. Another of Plaintiffs’ declarants, the President of MP3.com, testified that he had downloaded MP3 files but did not believe it to be infringement because he already owned those works. ER02800:10-28. The argument that

(footnote continued)

space-shifting is *not*, and nothing in the Nimmer treatise, miscited by Plaintiffs on this point (ARB54), suggests otherwise.

space-shifting harms any markets is also contradicted by Plaintiffs' acquiescence in "freely available ripping software." ARB60; AOB58.¹³

Plaintiffs (but not the District Court) assert that someone who transfers music to someone who uses the work to space-shift is not engaged in fair use, but cannot explain why. ARB55. Unlike peer-to-peer sharing, the two cases cited by Plaintiffs both involved commercial distribution, where existing markets for the fair use were likely to be harmed.

Finally, Plaintiffs do not even try to defend the District Court's finding that space-shifting on Napster is *de minimis*, the basis for its conclusion that space-shifting was not a substantial noninfringing use. This finding contradicts the court's own recognition that "there may be a lot of space-shifting going on" (ER04203), as well as the relevant evidence: *both* parties' experts testified that millions use Napster to space-shift. AOB30-31, 33. The conclusion that this use is "*de minimis*" was erroneous.

D. Sampling Is Both a Fair and Substantial Use.

Neither Plaintiffs nor the District Court denies that sampling is a substantial use of Napster. Indeed, according to Plaintiffs' expert, *the single largest impact on*

¹³ Plaintiffs' argument that Napster appropriates the "value" that consumers see in downloading compared to ripping (ARB60) fails to account for *Sony*, in which Sony, not television or movie producers, reaped the benefits of whatever "value" *(footnote continued)*

music purchases fell into the sampling category. ER03418.¹⁴ The only question is whether sampling is fair use.¹⁵

Plaintiffs make no effort to rehabilitate the District Court's discredited finding that "it is likely that survey respondents who sample are primarily direct infringers." ER04245; AOB37-39. Indeed, Plaintiffs confirm this error by pointing out that only 14% of samplers claimed they decreased music purchases.¹⁶ They also do not address Napster's argument (AOB36) that the District Court committed reversible error in assessing the market impact of *downloading* generally rather than *sampling* in particular.

(footnote continued)

the Betamax's users ascribed to time-shifting. Plaintiffs also presented no evidence that they plan to appropriate this "value."

¹⁴ Plaintiffs object to Napster's supposed "recoding" (recategorizing) responses to Plaintiffs' survey, claiming that Napster's coding is "wildly inaccurate." ARB64 n.31. However, Plaintiffs fail to identify a single inaccuracy. The data yield the conclusion that sampling is a significant use (approximately 20% (Napster) v. 21.8% (Plaintiffs' Napster expert)), that many Napster users increase music purchases (8% v. 8.4%), and that Napster exposes users to new artists (4% v. 6.4%). Compare AOB37-38 n.13 with ER03418. The District Court committed reversible error by failing to *analyze* the data that it touted as the central virtue of Dr. Jay's report. ER04202, 04280. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1352 (11th Cir. 1999) (a "district court abuses its discretion" when it "ignores or misunderstands the relevant evidence").

¹⁵ Plaintiffs fail to respond to Napster's discussion (AOB42 n.18) of their previous erroneous assertion that increased CD sales resulting from sampling are irrelevant to fair use analysis, instead citing the same inapposite authority for the same inaccurate proposition. ARB64 n.31.

¹⁶ The discrepancy Plaintiffs identify between samplers who say they increased and decreased purchases is within the survey's margin of error. ER00480.

Plaintiffs argue that sampling injures them in the digital download market but offer no evidence of any demand for non-free sampling, a necessary prerequisite for such injury. ARB64.¹⁷ Moreover, Plaintiffs' economist, Professor Teece, analyzing downloading generally speculated that "there appears to have developed an attitude among many individuals that digitally downloaded music 'ought' to be free" and that "If the perception of music as a 'free good' becomes pervasive, it *may* be difficult to reverse." ER00608. As Napster's economist explained, basic economic concepts vitiate the supposition that "the period of free circulation of music owned by the plaintiffs will prevent the plaintiffs from building a profitable download business *once they implement the appropriate protection technology.*" ER01884-ER01890. Had the *Sony* court applied Teece-like predictions to the movie industry (ARB23 n.5), neither the public nor that industry would have enjoyed the convenience and profit that the video rental industry has provided.¹⁸

¹⁷ Although Plaintiffs also argue that sampling undermines licensing revenues they receive from Web sites that offer *free* samples of their work (*id.*), their lone citation to the record on this point does not even address sampling, let alone payment of licensing fees. ER00606. There is no evidence in the record that sampling has affected or threatens to affect Plaintiffs' licensing revenues. AOB38.

¹⁸ Teece also failed to weigh the fact that Napster also *helps* Plaintiffs overcome the two challenges (acclimating consumers to the MP3 format and distribution of music over the Internet) to building the digital download market that Teece identified. ER00606, ER04355-ER04356. Teece also failed to weigh this
(footnote continued)

E. Severing Infringing from Noninfringing File Sharing Is Infeasible.

Plaintiffs' assertions that Napster could segregate uses and comply with the injunction without shutting down its file transfer system (ARB65-66) are unfounded.

First, because the District Court made no such findings; its injunction cannot be sustained on that ground. It indicated that it viewed a shutdown as possible, if not inevitable, but made no attempt to determine whether Napster could comply with the injunction otherwise. ER04251, ER04257, ER04261, ER04263, ER04212-ER04213.¹⁹

Second, Plaintiffs concede that without redesigning its technology, Napster cannot even theoretically segregate uses. ARB19. The law does not require redesign (AOB66-67), a point to which Plaintiffs have no response, and on which the District Court's conclusions are erroneous.

Third, even Plaintiffs' suggestion that Napster could redesign its system relies on a single conclusory reply declaration, submitted six weeks after witness

(footnote continued)

benefit against any lost sales pending trial in what Plaintiffs acknowledge is currently a miniscule market. ER01878-ER01883, ER01888.

¹⁹ Plaintiffs' suggestion (ARB65-66) that the District Court found Napster's noninfringing file transfers "severable" is false. The court noted that it had not been asked to shut down "satellite programs" and was not ordering Napster to do so, but never determined that any noninfringing file transfers could continue. ER04249.

designations were due and therefore immune (by the Court's order) from live hearing. Although Napster's Opening Brief dismantled Mr. Farmer's proposals (AOB66 n.27), Plaintiffs make no attempt to rehabilitate them.

Fourth, even if Mr. Farmer's preauthorized database approach were practicable – and it is not (AOB12-14; ER02001, ER01821¶¶29-31, ER1826)²⁰ – it would destroy the advantages of peer-to-peer technology. As Professor Tygar testified, “the effect of requiring authorizations would change the utility from a decentralized, ground up information base to a centrally controlled top down distribution device,” undermining both the breadth and real-time availability of file sharing. ER02002. No peer-to-peer directory service could possibly collect, much less verify (*id.* at 34), authorizations of hundreds of thousands of files authorized by people around the globe. *Id.* As Dr. Tygar attested, requiring ISPs to obtain pre-authorization “would change the underlying technical model of how the [World Wide Web] works. The performance model of the Internet would change, almost certainly for the worse, and probably with severe technical difficulties.” ER02003.

²⁰ It is not correct that users' computers “provide Napster's servers with song title [and] artist” of each file. ARB9. Napster receives only whatever name for the file the user might assign on her hard drive. Whereas Napster can validate that each file is actually in MP3 format, it is incapable of determining the expressive audio content of the file itself. ER01821¶¶30-31.

Fifth, Plaintiffs misleadingly suggest that file sharing by new artists could continue under the injunction. ARB66. New artists share their music through the Napster system like anyone else, and shutting down the system would terminate their use. ER01742-ER01743. In any event, the New Artists Program constitutes only one of numerous authorized and/or fair Napster uses, including millions of exchanges of established artist promotions, live recordings, music freely offered over the Internet, and secure files. Plaintiffs make no showing how it is possible to sever such uses from arguably infringing ones.

F. Whatever “Ongoing Relationship” Exists Between Napster and Its Users Does Not Negate the *Sony* Doctrine.

The relevant issue under *Sony* is not whether a defendant has any ongoing relationship with consumers, but whether a defendant has direct involvement such that it can distinguish between infringing and noninfringing uses. *See* Eighteen Copyright Professors’ Amicus Brief 7-9. An ongoing relationship is relevant only to the extent it enables the provider “to exercise complete control over the use of” the technology. *RCA Records v. All-Fast Sys., Inc.*, 594 F.Supp. 335, 339 (S.D.N.Y. 1984). Plaintiffs’ cases each involved the personal participation of the defendant in the operation of a particular machine or supervision over a confined

physical space where the defendant could completely control the machine, its operator, or the area.²¹

G. Plaintiffs Seek To Inject Irrelevant Intent Evidence Into the Sony Analysis.

Plaintiffs and their *amici* wrongly argue that Napster's knowledge of unauthorized sharing of copyrighted music undermines its *Sony* defense.²²

²¹ One cannot equate Napster's inability to control 20 million users sharing files whose names do not reveal their content or copyright status with the facts of Plaintiffs' cases. See AOB44 n.20; *A&M Records, Inc. v. General Audio Video Cassettes*, 948 F.Supp. 1449 (C.D. Cal. 1996) (seller of blank cassettes timed to the length of copyrighted recordings also a contact with known counterfeiters).

²² Plaintiffs' brief misquotes Shawn Fanning on the issue of knowledge, suggesting that he hypocritically agreed with a moderator's suggestion that Napster not talk about music being available for "free" through Napster, since that would be "illegal." ARB13-14. Fanning agreed that an "excellent point" was made *not* by the moderator, but in an intervening e-mail, which *rejected* the moderator's position that "free" meant "illegal." ER03285, ER1355. Fanning also self-deprecatingly joked that his "hypocrisy knows no bounds" as he urged moderators to communicate clearly with the public, stating that he had been picked on for being unclear himself, so "When I explain to them about ambiguous comments, I figure they would call me a hypocrite." ER03283.

This is far from Plaintiffs' only distortion of the record. While Plaintiffs congratulate themselves for finding Madonna songs on the hard drive of Napster's former president, Plaintiffs do not tell the court that she already owned the CD of every such song; *see also* ER02163-02165 explaining mischaracterizations in Plaintiffs' briefs). Plaintiffs' *amici* join in. See BSA's Amicus Brief 5,8,9 (asserting that Napster had professed to "push demand" for pirated works). Napster actually has expressed intent to dispel the RIAA's assumption of pirating, and to show that it has pushed demand for *purchases from Plaintiffs*). SER1643; ER02163¶3.

Plaintiffs' attack on intentions is not only misleading, but irrelevant.²³ Nothing in *Sony* allows the public to be deprived of beneficial technology based on an assessment of its inventors' motivations. *See* DiMA Amicus Brief at 14; CEA Brief at 9.

III. THE DISTRICT COURT APPLIED THE INCORRECT LEGAL STANDARDS FOR CONTRIBUTORY AND VICARIOUS LIABILITY AND THE DMCA.

Plaintiffs (and the District Court, ER04251) acknowledge that Napster cannot distinguish between authorized and unauthorized uses, but conclude nonetheless that it can be held liable based on generalized knowledge and the purported ability to supervise its users.

A. Vicarious Infringement.

Plaintiffs do not explain, and submit no authority to support, the radical extension of a doctrine based on *respondeat superior* to cover an ISP's relationship with consumers. AOB48-49. *See* Yen (cited AOB46) at 1886 (existing case law "appears headed away from the imposition of vicarious copyright liability against

²³ Most amazing was the court's finding that Napster "possessed enough sophistication about intellectual property laws to sue a rock band that copied its logo." ER04252. This immaterial finding rested on admittedly double hearsay (and false) news reporting. ER04267n.23; SER1865. Despite having previously ruled this irrelevant (ER00246-ER00249), the court's Opinion admitted the hearsay, claiming that Napster's second objection, to relevancy, "indicates that it admits such a lawsuit was filed." ER04267n.23.

ISPs, and this development is consistent with limitations on the general application of enterprise liability”).

Instead, Plaintiffs argue it was “legally sufficient” to impose vicarious liability because Napster can “supervise” by blocking access to consumers identified as infringing. ARB39, ER04254. Plaintiffs ignore the paradox this would create, as the DMCA itself requires that ISPs implement termination policies to qualify for protection. AOB55-56. Plaintiffs’ argument conflates the ability to exclude a user and the ability effectively to determine and control infringing activities. If the former were sufficient, all ISPs would have “control” and thus face liability for infringement committed by their users. That is not the law. The DMCA provides a safe harbor against vicarious liability unless the ISP has both “the right and ability to control *such activity*.” §512(d)(2). The statute thus forecloses liability based on mere supervision absent control, or the mere “right” to control absent the realistic ability to do so.

Plaintiffs’ theory reduces to the claim that Napster has “control” because it *could* redesign its system – a notion inconsistent with *Sony* (§512(m)), and the record. ER01826 ¶39; *see* part II.D. The District Court made no finding that Napster could effectively be reconfigured. Instead, it erred as a matter of law by holding Napster vicariously liable even when it is “infeasible to distinguish legal and illegal conduct.” ER02454.

B. Contributory Infringement.

Plaintiffs weakly attempt to distinguish *Religious Technology Cntr. v. Netcom Online Communication Services Corp.*, 907 F.Supp. 1361, 1374-75 (N.D.Cal. 1995), which holds that ISPs cannot be deemed to have knowledge – even after written notice that specific material at a particular location was allegedly infringing – unless provided facts sufficient to substantiate infringement. 907 F.Supp. at 1374-75. Plaintiffs err in claiming that any questions of fact in *Netcom* undermine the standard. Nor does the DMCA undermine the specific knowledge requirement. By its own terms, the statute only adds to the protections that previously existed for ISPs. §512(l).

Every case cited by Plaintiffs found knowledge only upon proof that the defendant personally observed or had other specific knowledge of the content alleged to be infringing. *See Hardenburgh*, 982 F.Supp. at 506 (defendant viewed all files before moving them into subscriber area); *Sega Enters., Ltd. v. MAPHIA*, 857 F.Supp. 679, 686-87 (N.D. Cal. 1994) (defendant specifically solicited the uploading of plaintiffs' particular works); n.21, *supra*.²⁴

²⁴ *Fonovisa* did not hold that generalized knowledge of potential infringement was sufficient – indeed, the knowledge element was not before the court. *See Fonovisa v. Cherry Auction, Inc.*, 76 F.3d 259, 261, 264 (9th Cir. 1996).

C. The DMCA.

In their Brief, Plaintiffs:

- abandon the contention that the DMCA provides no protection for vicarious or contributory infringement;
- abandon any challenge to Napster's compliance with §512(i) (ARB36);
- concede that §512(d)(1)(C) required the District Court to extend safe harbor protection if, after obtaining sufficient "knowledge" or "awareness," Napster acted expeditiously to block access to the infringing materials (ARB33);²⁵ and
- do not dispute that Napster blocks any user specifically identified as a location of infringing materials. ER04250.

Plaintiffs' theory thus reduces to the claim that Napster must, because it has actual (albeit generalized) knowledge that infringing material may be available at unknown locations, seek out and locate *all* infringing activity and block it at *all* locations. The DMCA, however, clearly protects an ISP absent actual knowledge or "red flags" showing a *particular location* at which infringing material is located, and upon such notice, requires the ISP only to block that *particular location*.

²⁵ Plaintiffs' contention that the District Court "recognized" (ARB33) that it need not conduct the §512(d)(1)(C) inquiry is mistaken. ER04247.

Section 512(d) immunizes information location tools when “referring or linking users to *an online location* containing infringing material or infringing activity.” The statute then limits the knowledge inquiry to that particular online location. Thus, §512(d)(1)(A) defeats immunity only if the service provider has “actual knowledge that *the material or activity* at that location is infringing.”²⁶

Moreover, to provide effective notice, copyright holders must deliver to ISPs an “identification of the reference or link to material or activity claimed to be infringing that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.” §512(d)(3). Notices lacking the infringing location require no action by ISPs. §512(c)(3)(A)(iii); §512(c)(3)(B)(ii). Plaintiffs point to §512(c)(3)(A)(ii), which allows a notice to include merely “a representative list” of copyrighted works. Plaintiffs omit that this provision applies only “if multiple copyrighted works *at a single site*” are at issue and the location of that site has been specified. *Id.*; S. Rep. 105-190 at 46 (1998) (object of statute is to ensure information necessary to find location of infringement). Indeed, were it not sufficient to disable only the particular location known to hold allegedly infringing

²⁶ The statute’s reference to infringing “activity” online is not inconsistent with the requirement that the ISP know of the specific location. The term “activity” “refers to wrongful activity that is occurring *at the site on the provider’s system or network at which the material resides.*” H.R. Rep. 105-551 at 53 (1998).

information, every ISP, once notified of any allegedly infringing work, would be required to monitor the Internet continuously thereafter to find, and disable access to, that work at any location. The District Court erred in holding that, having blocked every user identified as a *location* of infringing works, Napster then had to search for and block every *work* at any other location. ER04250.

Plaintiffs correctly acknowledge that an ISP satisfies the awareness requirements of §512(d)(1)(B) only when it meets the “red flag” test, but misconstrue the definition of a red flag.²⁷ An ISP “need not monitor its service or affirmatively seek facts indicating infringing activity . . . in order to claim this limitation on liability.” S. Rep. 105-190 at 44. Red flags are signals making infringement apparent from “even a brief and casual viewing” of the information (*id.*), typified by locations that are “obviously infringing because they typically use words such as ‘pirate,’ ‘bootleg,’ or slang terms in their [URL] and header information to make their illegal purpose obvious.” *Id.* at 48; *see also* Irina Dmitrieva, “I Know It When I See It: Should Internet Providers Recognize Copyright Violation When They See It?” 16 Santa Clara Computer High Tech L.J. 233, 255, 260 (2000) (red flags must leave “no reasonable doubt as to the illegal

²⁷ Plaintiffs incorrectly assert (ARB33) that Napster did not assert the heightened “red flag” standard below. ER00770.

activities”); Congress charged copyright owners with principal duty to detect infringement on the web); Copyright Coalition Amicus Brief at 16-21.

Plaintiffs have not alleged, and have presented no evidence, that any location or user indexed by Napster includes such red flags. Because there was no evidence, and no finding below that Napster failed to act after encountering red flags or obtaining actual knowledge, the court’s broad injunction violates the DMCA. §§512(d), 512(j).²⁸

IV. THE MISALLOCATION OF THE BURDEN OF PROOF WAS REVERSIBLE ERROR.

The District Court erred in placing the burden on Napster to establish a likelihood of success for its affirmative defenses – an error the court compounded by refusing to hold an evidentiary hearing.²⁹ *See* ACLU Amicus Brief at 23-28. Although Plaintiffs emphasize the “fact-intensive” nature of the court’s rulings

²⁸ Plaintiffs mischaracterize Napster’s position as requiring that Plaintiffs identify works file-by-file. Rather, in keeping with the DMCA, when Napster learns of any infringing file it blocks all files at that location, and has done so for hundreds of thousands of users to date. Moreover, Plaintiffs can avoid individualized notification by activating watermarking, a “standard technical measure” that Congress contemplated (§512(i)(1)(B)) and that Napster respects. Further, Plaintiffs falsely claim that the District Court relied on an e-mail attributed to John Fanning, filed without authentication (SER2207-09; *see* 2234), to conclude that Napster’s notice policy was “cynical.” ARB21. The court stated no such conclusion, and in fact never referred to this document. Instead, the court held that Plaintiffs’ unauthenticated documents were inadmissible. ER04265.

(ARB42), they ignore the misplacement of the evidentiary burden. The importance of this issue is underscored by the many times Plaintiffs (like the court) assert that, in the absence of conclusive evidence, an issue must be resolved against Napster. *See Carvalho v. Raybestos-Manhattan, Inc.*, 794 F.2d 454, 455 (9th Cir. 1986) (“[P]lacing the burden of proof on the wrong party in a civil action generally constitutes reversible error.”)

Plaintiffs do this, for example, with respect to the effect of sampling on the market for CDs, the amount of space-shifting (ER00472, ER00489); and the percentage of authorized music swapped. *See* part II.B, *supra*. A reasonable fact-finder could certainly have found for Napster on these issues – and would have been significantly more likely to do so had Plaintiffs been assigned their proper burden of overcoming Napster’s evidence. *See White v. Washington Pub. Power Supply Sys.*, 692 F.2d 1286, 1289 (9th Cir. 1982) (reversing based on a misallocation of burden even though some evidence supported court’s finding).

The District Court similarly erred by rejecting Napster’s waiver argument because the court was “unconvinced” by the “limited evidence” Napster

(footnote continued)

²⁹ Napster does not claim that the absence of an evidentiary hearing demands a *de novo* review, but that the standard for finding clear error is lessened on a paper record.

presented – even as it rejected as “irrelevant” Napster’s requests for discovery on this issue.³⁰

V. THE DISTRICT COURT’S INJUNCTION IS OVERBROAD AND THEREFORE UNCONSTITUTIONAL.

Plaintiffs’ argument that the First Amendment does not shelter copyright violations fails to respond to the substance of Napster’s constitutional claim.

Napster has explained that the District Court’s order will:

- shut Napster down entirely and thereby bar Napster and its users from stating certain facts (most significantly the location of music over which Plaintiffs do not hold copyrights) that are protected by the First Amendment and unreachable by the Copyright Act;
- bar users from engaging in legitimate expressive activities, such as sharing unprotected musical recordings; and

³⁰ Plaintiffs’ claim that Napster’s evidence is insufficient is remarkable given that the District Court denied Napster both discovery and an evidentiary hearing to support those defenses. ER04151-ER04166. In any event, Plaintiffs point to no evidence that contradicts their encouragement of MP3 technology and Internet music sharing, or the benefit they derived from that encouragement. AOB58-59.

Plaintiffs’ claim that the RIAA (not a party here) fights a “constant battle” is belied by their statements specific to the waiver here – that of the right to prohibit the creation and sharing of MP3s. AOB58-59.

Plaintiffs similarly do not deny their attempts to control the online distribution of works that they do not control (including the more than 17,000 members of the New Artists Program, ER01729-ER01733). Instead, they continuously shift the focus to an issue never raised – their attempt to “destroy MP3 technology.” ARB68.

- suppress new music, as unsigned artists will be denied an important channel for distributing their work.

Where copyright and free speech are in such “acute conflict,” at a minimum, “courts should weigh cautiously whether a prior restraint in the form of an injunction is the appropriate remedy.” *New Era Pubs. v. Henry Holt*, 695 F.Supp. 1943, at 1527-28 (1988). Plaintiffs address none of these considerations.

Plaintiffs’ assertion that requiring Napster to shut down is necessary to protect their copyrights distorts the basic goal of Congress in passing §512(j) of the DMCA.³¹ That statute mandates that courts balance the technical feasibility of the

³¹ The cases Plaintiffs cite in support of this assertion (ARB71) are readily distinguishable, and Plaintiffs’ citation to *Hardenburgh* is deceptive. Plaintiffs quote language purporting to be a pronouncement of the court but omit the crucial words “Plaintiffs argue,” which make clear that the court was merely restating a claim made by one of the litigants. *See* 982 F.Supp. at 510-11. The *Hardenburgh* court did not even address this argument, and there is no excuse for such a misrepresentation.

In *Dr. Seuss Enters. v. Penguin Books USA*, 109 F.3d 1394, 1406 (9th Cir. 1997), a direct infringement action, the defendant created the “all-or-nothing predicament” only *after* an infringement action had been initiated. Here, the disentanglement problem predates any litigation, and is not traceable to a conscious decision made by Napster, but rather inheres in the decentralized file-sharing technology itself. The court in *Orth-O-Vision v. Home Box Office*, 474 F.Supp. 672 (S.D.N.Y. 1979), did not even consider a First Amendment challenge to its injunction.

injunction against the constitutional requirement that only offending speech be blocked.³²

The First Amendment concerns are heightened here. Because indirect copyright liability is premised on the defendant's knowledge of the infringement, an injunction that is not hinged on some degree of knowledge is inherently suspect. *See Netcom*, 907 F.Supp. at 1377-78 (requiring Usenet servers to screen the information passing between users "could have a serious chilling effect on what some say may turn out to be the best public forum for free speech yet devised"). Because the injunction fails to calibrate for Napster's knowledge or control, it compels Napster to stifle noninfringing speech, overextends copyright protections, improperly restrains legitimate uses and users, and thereby threatens core First Amendment values.³³ *Cf. Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp.2d 1290, 1295 (D. Utah 1999) (limiting, on First Amendment

³² As set forth above, Napster *does* qualify under §512(d), but even if it did not, §512(j) provides a model of how a court should craft injunctions affecting the Internet, and a strong policy statement in favor of restraint. The statute reflects a clear congressional intent to preserve the Internet's special role as a facilitator of free expression. Requiring ISPs to engage in the massive affirmative information filtering required by the District Court's injunction starkly opposes this goal.

³³ The District Court might have fashioned an injunction that properly balanced First Amendment concerns had it, for example, required Plaintiffs to provide a list of file names containing precisely the song titles and artists' names of each copyrighted work, and ordered Napster to block any matching MP3 file name.

(footnote continued)

grounds, an injunction against an Internet portal charged with indirect infringement).

VI. A COMPULSORY ROYALTY IS AN APPROPRIATE REMEDY.

A compulsory royalty would provide Plaintiffs with the “*quid pro quo*” that they and their *amici* contend the AHRA should afford them. A compulsory royalty would also preserve the public’s access to new technology (which Plaintiffs say they do not wish to block). Plaintiffs nevertheless maintain that, if liability is found, this Court may not compensate them through a compulsory royalty, and that such a royalty would be inappropriate even if nominally permissible. ARB75-76.

Plaintiffs are incorrect. Nimmer states that even:

“Assuming contributory infringement is found, the conventional remedy of an injunction against the sale of recording equipment and tapes is itself undesirable. Society should not lose the benefit of recording technology. Legislation providing for a compulsory license would appear to be the most acceptable solution. But absent such legislation, it would appear to be open to the courts to order a royalty payment to be made in lieu of an injunction.” 3 M. *Nimmer* §14.06[B], at 14-55-14-56.2.

Accord Abend v. MCA, Inc., 863 F.2d 1465, 1479 (9th Cir. 1988) (where ““great public injury would be worked by an injunction,”” the court could ““award damages or a continuing royalty instead of an injunction in such special circumstances””) (citations omitted); *cf. Woods v. Bourne Co.*, 60 F.3d 978, 983-

(footnote continued)

Anything broader (such as blocking only a song title or a part thereof) would be impermissibly broad, for reasons described previously. AOB12-17.

84 (2d Cir. 1995) (discussing blanket ASCAP royalties similar to type of royalty appropriate here). Here copyright owners are trying to enforce their rights in a way that allows them not merely to receive compensation, but to hold a technology hostage and block public access to the benefits of important innovations.³⁴

CONCLUSION

For the foregoing reasons, Napster respectfully requests that this Court vacate the injunction.

Dated: September 12, 2000

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Respectfully submitted,

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NAPSTER, INC., a corporation**

³⁴ Professor Peter Jaszi, discussing the *Napster* and *MP3.com* cases, states: “As these cases and others like them get sorted out we will learn to what extent copyright law is being interpreted to give the owners of content an indirect monopoly over the development of useful consumer information technologies.” Amy Harmon, “Copyright and Copying Wrongs: A Web Rebalancing Act,” N.Y. Times, Sept. 10, 2000, at D4.

**“FORM 8” CERTIFICATION OF COMPLIANCE TO
FED. R. APP. P.32(a)(7)(C) AND CIRCUIT RULES 32-1 AND 32-2
FOR CASE NOS. 00-16401 and 00-16403**

I certify, pursuant to Fed R. App. P.32(a)(7)(C) and Circuit Rules 32-1 and 32-2, that the attached Reply Brief of Appellant Napster, Inc. is proportionately spaced, has a typeface of 14 points or more, and contains _____ words (based on the word processing system used to prepare the brief).

Dated: September __, 2000

FENWICK & WEST LLP

By: _____
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