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12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

14
15
16 A&M RECORDS, INC., et al.

17 Plaintiffs,

18 v.

19 NAPSTER, INC., et al.

20 Defendants.

CASE NO. C-99-5183 MHP (ADR)

**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
JOINT MOTION OF PLAINTIFFS FOR
PRELIMINARY INJUNCTION**

Date: July 26, 2000

Time: 2:00 p.m.

Ctrm: Hon. Marilyn H. Patel

21 JERRY LEIBER, et al.,

22 Plaintiffs,

23 v.

24 NAPSTER, INC., et al.

25 Defendants.

CASE NO. C 00-0074 MHP (ADR)

1 INTRODUCTION

2 Napster’s opposition represents the latest in a long line of Napster’s attempts to reinvent
3 itself and its legal position. Napster devotes far less attention to responding to the key issues before
4 this Court ~ contributory and vicarious infringement ~ than it does to arguing patently baseless
5 defenses:

6 . The Audio Home Recording Act (“AHRA”) does not immunize Napster’s users for
7 reproducing and distributing millions of copies of copyrighted music files to countless third party
8 strangers, and RIAA v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999), nowhere
9 implies, let alone says, it does. Indeed, even today, Napster’s website acknowledges precisely the
10 contrary, telling its users:

11 “Unauthorized copying, distribution, modification, public display, or
12 public performance of copyrighted works is an infringement of the
copyright holders’ rights.”

13 . Because Napster is operating an ongoing service, not merely selling a product like a
14 VCR, the “staple article of commerce” doctrine, as a matter of law, simply does not apply to
15 Napster. Even if it did, the doctrine would not provide a defense here because Napster
16 overwhelmingly is used for infringement (regardless of how many incidental or severable uses it tries
17 to concoct).

18 . Courts routinely have held that the “fair use” doctrine does not protect the
19 wholesale, nontransformative copying and distribution of the entirety of plaintiffs’ creative works.

20 . Napster’s other defenses, including copyright misuse and waiver, are meritless,
21 mirroring those that the Court in UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349
22 (S.D.N.Y. 2000), recently dismissed as “essentially frivolous.”

23 In the end, Napster’s opposition uses euphemisms like “sharing” to avoid the real issue:
24 Napster is a business that already claims a value in the billions, based overwhelmingly on the piracy
25 of millions of plaintiffs’ copyrighted works. The truth is, the making and distributing of
26 unauthorized copies of copyrighted works by Napster users is not “sharing,” any more than stealing
27 apples from your neighbor’s tree is “gardening.”

1 **I. NAPSTER ENABLES COPYRIGHT INFRINGEMENT THAT IS NOT PROTECTED**
2 **EITHER BY THE AHRA OR AS FAIR USE.**

3 Napster's defense essentially has been reduced to the proposition that Napster's users are not
4 engaged in infringement when, on a daily basis, they copy and distribute *millions* of copies of every
5 popular recording. But, Napster's users are not engaged in private, home copying for personal use.
6 Napster admits it turns every user into a public server ~ a worldwide distributor of the music on her
7 hard drive. Kessler Decl., ¶¶ 7-8. Courts that have examined the issue have all held that the
8 operator of an Internet site offering copyrighted works for download (*i.e.*, distribution and copying)
9 is liable for copyright infringement ~ and in almost all of those cases, the activity ostensibly was
10 "noncommercial." *E.g.*, Sega Enterprises, Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994)
11 ("Sega I") & 948 F. Supp. 923 (N.D. Cal. 1996) ("Sega II"); Playboy Enterprises, Inc. v. Russ
12 Hardenburgh, Inc., 982 F. Supp. 503 (N.D. Ohio 1997); Playboy Enterprises, Inc. v. Frena, 839 F.
13 Supp. 1552 (M.D. Fla. 1993); Playboy Enterprises, Inc. v. Webbworld, Inc., 968 F. Supp. 1171
14 (N.D. Tex. 1997) & 991 F. Supp. 543 (N.D. Tex. 1997); Playboy Enterprises, Inc. v. Chuckleberry
15 Publishing System, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996); Sega Enterprises, Ltd. v. Sabella, 1996
16 WL 780560, at *7 (N.D. Cal. 1996); Creative Labs, Inc. v. Cyrix Corp., 42 U.S.P.Q. 2d 1872 (N.D.
17 Cal. 1997). Napster users whose hard drives are made accessible over the Internet via Napster are
18 no different, in this respect, than the operators of such pirate sites, and each download of a
19 copyrighted recording is an infringement of both the reproduction and distribution rights. Further,
20 merely making a copyrighted recording available through Napster violates the distribution right.
21 Hotaling v. Church of Jesus Christ of Latter Day Saints, 118 F.3d 199, 203 (4th Cir. 1997)
22 (distribution occurs "when a public library adds a work to its collection, lists the work in its index or
23 catalog system, and makes the work available to the borrowing or browsing public").

24 **A. The AHRA Has No Relevance To The Napster Service.**

25 The current centerpiece of Napster's defense is its newly minted contention that the AHRA
26 exempts the copying and distribution of MP3 files to millions of unknown users. The AHRA does
27 no such thing. The AHRA balances the interests of manufacturers, consumers, and copyright
28 owners by "plac[ing] restrictions only upon a specific type of recording device," defined in the
statute, and requiring such devices to be equipped with copy protections and that royalty payments

1 be made based on their sale. Diamond, 180 F.3d at 1075; see also AHRA, 17 U.S.C. § 1002
2 (“Incorporation of copying controls”) and § 1003 (“Obligation to make royalty payments”). As part
3 of this balance, Section 1008 exempts consumers from copyright infringement lawsuits for private
4 uses of AHRA- covered devices.

5 Tellingly, nowhere does Napster quote the relevant language of Section 1008 (relegating to a
6 footnote a truncated version, with the critical language replaced with an ellipsis). Opp. at 5 n.3.

7 The full text of Section 1008 reveals the speciousness of Napster’s argument:

8 “No action may be brought under this title alleging infringement of
9 copyright based on the manufacture, importation, or distribution of a
10 **digital audio recording device**, a digital audio recording medium, an
11 analog recording device, or an analog recording medium, or based on
the noncommercial use by a consumer of such a device or medium for
making **digital musical recordings** or analog musical recordings.”
(Emphasis added.)

12 First and foremost, a general-purpose computer is not a “digital audio recording device” and,
13 therefore, is not within the scope of Section 1008. In Diamond, the Ninth Circuit addressed this
14 very issue in considering whether a portable device (the “Rio”) ~ to which consumers transferred
15 MP3 files from their own computer hard drives for playback, but from which no further copying or
16 distribution could be made ~ was a “digital audio recording device” or “medium” within the AHRA.
17 180 F.3d at 1074-75. The Court ruled: “Under the plain meaning of the [AHRA’s] definition of
18 digital audio recording devices, computers (and their hard drives) are not digital audio recording
19 devices...” Id. The Court also concluded that the legislative history was “consistent with the
20 [AHRA’s] plain language ~ computers are not digital audio recording devices.” Id.¹ Simply stated,
21 because Napster’s users who transfer MP3 music files from and to each others’ computers are not
22 engaged in the use of a “digital audio recording device,” this alone ends any debate about the
23 applicability of Section 1008 to their conduct. See also 2 Nimmer, Nimmer On Copyright

24
25 ¹ Diamond also held that the MP3 files contained on computer hard drives are not
26 “digital musical recordings.” 180 F.3d at 1076. The Court concluded: “There are simply no
27 grounds in either the plain language of the definition or in the legislative history for interpreting
28 the term ‘digital musical recording’ to include songs fixed on computer hard drives.” 180 F.3d at
1077. Thus, a copy made by one Napster user of an MP3 file residing on another Napster user’s
computer hard drive is not a copy of a “digital musical recording,” and is not immunized by
Section 1008. 17 U.S.C. § 1001(4)(A). 3

1 § 8B.02[A][1][a] at 8B-29 (hereinafter “*Nimmer*”) (“[T]he AHRA’s structure, whereby computers are
2 excluded from its thrust, places the Internet essentially outside the statute’s purview”).

3 Second, even if computers somehow were covered by the AHRA (and thus bound by its copy
4 control and royalty requirements), the exempt “noncommercial use” contemplated by Section 1008
5 does not apply to the wholesale distribution of music files among millions of anonymous strangers.
6 Section 1008 deals only with private copying (“*making*” digital musical recordings) ~ not
7 *distribution*. But, this case is not about the lawfulness of a consumer making MP3 copies of her
8 own compact discs for her own use. This case is about copying and widespread distribution to
9 millions of Napster users ~ an activity that always has been considered an infringement of copyright,
10 and which never was raised or discussed in Diamond. The AHRA’s legislative history fully supports
11 this conclusion. Congress did *not* give consumers a license to distribute copies of copyrighted music
12 over the Internet to millions of persons ~ any more than Congress gave consumers a license to make
13 home copies of copyrighted music and distribute them from a street corner to all comers. That is
14 why the congressional statements quoted by Napster all use the terms “personal” or “private” to
15 describe the limited “noncommercial” AHRA exemption. Even the Court in Diamond, when
16 quoting this legislative history, *emphasized* the words “private, noncommercial use” ~ yet when
17 Napster quotes Diamond on this point, it *omits* the Court’s emphasis. Opp. at 5.

18 Further, although Napster again neglects to mention it, the very section of the OTA report
19 on which Napster so heavily relies specifically states that distributing copies of music *to the public* is
20 *not* “personal use”:

21 “Thus, home copies are used privately within the household
22 (including personal vehicles) and are not used for implicit or explicit
23 commercial purposes. Admission is not charged and users *are a*
24 *household and its normal circle of friends, rather than the public*.
25 Homemade copies that were subsequently used for commercial
26 purposes or public performances would not be considered home
27 copies.” U.S. Congress, OTA, Copyright and Home Copying:
Technology Challenges the Law, OTA-CIT-422, at 5 (U.S. GPO, Oct.
1989) (emphasis added).

28 This statement confirms common sense ~ the copying and widespread public
distribution of copies of music is not an exempt use.²

² Napster’s argument also is directly at odds with Congress’ most recent
pronouncement on the subject. In 1997, Congress enacted the No Electronic Theft (NET) Act to
impose criminal penalties for copyright infringement over the Internet, even when not done for

1 **B. Napster's Users Are Not Engaged In Fair Use.**

2 The purpose of the fair use doctrine is “to avoid rigid application of the copyright statute
3 when, on occasion, it would stifle the very creativity which that law is designed to foster.” Campbell
4 v. Acuff-Rose Music, Inc., 510 U.S. 569, 577, 114 S. Ct. 1164 (1994). Examining the four fair use
5 factors, 17 U.S.C. § 107, confirms the obvious: downloading complete copies of plaintiffs’ music
6 does not enhance or encourage creativity.

7 Napster essentially concedes that two of the four factors favor plaintiffs: “Plaintiffs’ works are
8 undoubtedly creative in nature” (Opp. at 11);³ and Napster users copy the entirety of the works.
9 The latter point should alone be dispositive, because the Ninth Circuit “has long maintained the
10 view that wholesale copying of copyrighted material *precludes application of the fair use doctrine.*”
11 Marcus v. Rowley, 695 F.2d 1171, 1176 (9th Cir. 1983) (emphasis added); see also MP3.com, 92 F.
12 Supp. 2d at 352 (defendant used “the entirety of the copyrighted works here in issue, thus again
13 negating any claim of fair use”).

14 Napster focuses its argument on the remaining two factors: purpose and character of the use
15 and the effect on the potential market. Napster claims the purpose of its users’ copying is
16 “noncommercial.” However, the backscratching arrangement among Napster users has a
17 commercial purpose. See Section I(A) supra. Further, making a copy to avoid paying for a work is
18 commercial use. American Geophysical Union v. Texaco Inc., 60 F.3d 913, 924 (2d Cir. 1995) (use
19 commercial because defendant circulated photocopies of journals to avoid having to purchase
20 multiple copies); 2 Nimmer, § 8B.01 [D][2] at 8B-20 (“The individual who engages in audio home
21 recording may not be seeking a commercial advantage by selling the recordings, but for fair use

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23 traditional commercial purposes. 17 U.S.C. § 506(a). In addition, explicitly to address the case of
24 U.S. v. LaMacchia, 871 F. Supp. 535 (D. Mass 1994) ~ in which the infringer was acquitted of
25 criminal copyright infringement charges because, instead of charging a fee for providing the
26 unauthorized works (pirated software), he asked those downloading to provide him with
27 additional copyrighted works in exchange ~ the NET Act defined the term “financial gain” to
28 include the “receipt, or expectation of receipt, of anything of value, *including the receipt of other*
copyrighted works.” 17 U.S.C. § 101 (emphasis added). Of course, the mutual “receipt of other
copyrighted works” is the very premise on which Napster is founded. If Congress had intended to
immunize this activity from civil liability, it would not subsequently have subjected the same
conduct to possible criminal penalties.

³ Creative works such as songs are ⁵at the core of copyright’s intended protection.

Campbell, 510 U.S. at 586; see also Micro Star v. Formgen, 154 F.3d 1107, 1113 (9th Cir. 1998).

1 purposes his motivation is nevertheless commercial. By engaging in audio home recording, he
2 avoids the cost of purchasing records and prerecorded tapes”).

3 Consideration of the “purpose and character of the use” factor “also involves inquiring into
4 whether the new use essentially repeats the old or whether, instead, it ‘transforms’ it by infusing it
5 with new meaning, new understandings, or the like.” MP3.com, 92 F. Supp. 2d at 351; Los Angeles
6 News Service v. Reuters Television Int’l, Ltd., 149 F.3d 987, 993 (9th Cir. 1998) (copying of news
7 footage not transformative where defendant “does not explain the footage, edit the content of the
8 footage, or include editorial comment”). Napster’s claim that the mere act of copying an MP3 file
9 from one computer to another is “transformative” is unsupported. Even converting a recording
10 from one medium to another (e.g., CD to MP3) would be “an insufficient basis for any legitimate
11 claim of transformation...” MP3.com, 92 F. Supp. 2d at 351; Micro Star, 154 F.3d at 1113 n.6
12 (compact disc copy of levels of video game was “anything but” transformative).

13 Napster also incorrectly claims its users’ conduct does not affect the market for plaintiffs’
14 works. “[T]o negate fair use one need only show that if the challenged use ‘should become
15 widespread, it would adversely affect the potential market for the copyrighted work.’” Harper &
16 Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 568, 105 S. Ct. 2218 (1985); Campbell,
17 510 U.S. at 590. The Record Company Plaintiffs have expended millions of dollars to enter, and to
18 expand their presence in, digital downloading of music -- selling the exact same audio files that
19 Napster makes available for free in the exact same electronic medium. See initial Memorandum at
20 30. It is self-evident that free copying via Napster would impact the sale of the same product by
21 plaintiffs. See 2 Nimmer, § 8B.01[D][2] (“the creation of a permanent recording [by a consumer]
22 must inevitably have a harmful impact upon the potential market for the sale of those sound
23 recordings”); see also Teece Rpt. pp. 16-18; Jay Rpt. pp. 3-4, 18-21; Fine Rpt. pp. 2-5. Further, the
24 activities of Napster’s users “on their face invade plaintiffs’ statutory right to license their
25 copyrighted sound recordings to others for reproduction.” MP3.com, 92 F. Supp. 2d at 352; see
26 also Texaco, 60 F.3d at 923.

27 Napster’s unsupported argument that its users’ acts are fair use because they might enhance
28 plaintiffs’ CD sales, or help develop the demand for digital downloaded music, has been routinely
rejected. Reingold v. Black Entertainment Television, Inc., 126 F.3d 70, 81 n.16 (2d Cir. 1997)

1 (unauthorized use is not fair even if it “might increase poster sales”); DC Comics Inc. v. Reel
2 Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982) (“even a speculated increase in DC’s comic book sales
3 as a consequence of RFI’s infringement would not call the fair use defense into play as a matter of
4 law”); MP3.com, 92 F. Supp. 2d at 352 (“Any allegedly positive impact of defendant’s activities on
5 plaintiffs’ prior market in no way frees defendant to usurp a further market that directly derives
6 from reproduction of the plaintiffs’ copyrighted works....This would be so even if the
7 copyright holder had not yet entered the new market in issue”).

8 Napster asserts that some of its users may delete some music files after “sampling” for
9 possible purchase. Even if this doubtful proposition were true,⁴ this would not be a fair use. A
10 consumer does not need to make a complete copy of music to “sample” it. Making a complete,
11 potentially permanent copy of music is not sampling -- it is infringement, and no court has ever held
12 to the contrary. Opportunities abound on the Internet for consumers to sample plaintiffs’ music
13 before buying. Indeed, online CD retail stores typically allow consumers to listen to clips of
14 plaintiffs’ music before buying. Importantly for any fair use analysis, plaintiffs are *compensated* for
15 *licensing* the rights to sample their music in that way. See Declaration of David Lambert, ¶¶ 2-3.
16 Thus, even this claimed use, which usurps plaintiffs’ licensing opportunities, is not fair.⁵

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26 ⁴ A user might delete an MP3 file for numerous reasons -- to make room for new,
more desired songs, or because the user has recorded it onto a CD or some other storage device.

27 ⁵ That Napster’s purported sampling of complete copies of plaintiffs’ music is not
28 fair use also is directly supported by the Copyright Act. If the purported sampling were fair use
(on the theory that the recordings ultimately are deleted), then it clearly also would be fair use for
Internet services to use streaming technology (in which a song is digitally performed, but no copy
ordinarily is made) to permit consumers to sample music. But the Copyright Act prohibits such
unrestricted streaming without a license. 17 U.S.C. § 114(d) *et seq.*

1 Napster also claims that some of its users may sometimes engage in “space shifting” by using
2 Napster to obtain an MP3 copy of music they already own on a CD. Again, even if true, no court
3 ever has held that “space shifting” is fair use. See 2 Nimmer, § 8B.01[D][2] (“space shifting” of a
4 song is different than “time shifting” of a television show because “audio taping is almost always
5 done for ‘librarying’ purposes, and almost never for time-shifting purposes”).⁶ Moreover, even if the
6 person receiving the MP3 file is permitted to make a reproduction as a fair use, that does not excuse
7 the violation of the distribution right by the third party sending the file. It is established that any
8 fair use defense is a personal defense and does not excuse infringement by another person. E.g.,
9 Los Angeles News Service v. Tullo, 973 F.2d 791, 797 (9th Cir. 1992); Micro Star, 154 F.3d at
10 1113. Thus, even if a CD owner has the right to make an MP3 copy of her own CD for private,
11 personal use, it does not follow that the user can copy an MP3 file from a stranger over Napster.
12 Finally, even assuming space shifting were a fair use, a consumer who uses Napster to download an
13 MP3 file of music she already owns on a CD, does so because she views copying that file from
14 Napster as easier or more convenient than making the MP3 from the CD she owns. To the extent a
15 demand exists for this service, it is plaintiffs’ exclusive right, not Napster’s, to determine whether,
16 when, on what terms, and with what protections, to provide it. Plaintiffs also are entitled to receive
17 any benefit from it, including increased Internet site traffic. Harper & Row, 471 U.S. at 559; Castle
18 Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132, 145-46 (2d Cir. 1998);
19 MP3.com, 92 F. Supp. 2d at 352.

20 **II. NAPSTER CANNOT CLAIM PROTECTION AS A “STAPLE ARTICLE OF**
21 **COMMERCE.”**

22 Napster operates an ongoing *service* that is widely and overwhelmingly used for
23 infringement -- it does not merely manufacture a product like a VCR. Napster specifically was
24 created, advertised, and promoted for music piracy. The de minimis and severable alternative uses
25 posited by Napster, after-the-fact, to justify its continued infringement cannot turn its service into a
26 product that is a “staple article of commerce.”

27 **A. Napster Does Not Sell A Staple Article Of Commerce.**

28 ⁶ The dicta in Diamond merely suggested that private space shifting did not offend
the AHRA’s purpose because it permitted copying to the Rio player, which -- in contrast to
Napster -- did *not* allow further copies to be made. The Court did not consider any issues related
to fair use; indeed, the Diamond case did not involve allegations of copyright infringement at all.

1 The “staple article of commerce” doctrine, as a matter of law, does not apply to the
2 operation of an ongoing service like Napster’s. The doctrine literally applies to “articles of
3 commerce” ~ *i.e.*, products like VCRs ~ and no court ever has applied it to an operation like
4 Napster, which does far more than make and distribute a product. Without Napster’s ongoing
5 participation, the service essentially would be useless. Napster is no more subject to the “staple
6 article of commerce” doctrine than would be a defendant whose business consisted of providing
7 customers with VCRs, copyrighted movies, and a room in which to duplicate them. See Columbia
8 Pictures Indus., Inc. v. Avenco, Inc., 800 F.2d 59, 62 (3rd Cir. 1986) (business which encouraged
9 public to rent and make use of its private rooms to view plaintiffs’ copyrighted videocassettes that
10 defendant provided was a contributory infringer).

11 In Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774
12 (1984), the defendant was not liable for contributory infringement because, among other things, it
13 merely *manufactured* VCRs. Its involvement with the product ended the moment the device was
14 sold by it, and the defendant had no further connection or relationship with the product or the
15 consumers who used it. Id. at 440 (“when a charge of contributory infringement is predicated
16 entirely on the *sale of an article* of commerce that is used by the purchaser to infringe a patent, the
17 public interest in access to that article of commerce is necessarily implicated”) (emphasis added).

18 By contrast, the Sony Court recognized that, where there exists “an ongoing
19 relationship between the direct infringer and the contributory infringer at the time the infringing
20 conduct occur[s],” the doctrine does not apply. Id. at 437. Indeed, the only cases that have
21 addressed this issue rejected the expansion of the doctrine beyond mere manufacturers. In RCA
22 Records v. All-Fast Systems, Inc., 594 F. Supp. 335 (S.D.N.Y. 1984), the defendant operated a
23 “Rezound” machine that enabled customers to make copies of pre-recorded tapes onto specially
24 designed blank cassettes sold by the defendant. Id. at 336-37. The Court found the defendant
25 liable for contributory infringement, specifically rejecting the staple article of commerce defense,
26 and holding that “[t]he Sony Corp. decision extends protection only to the *manufacturer* of the
27 infringing machine, not to its operator”:

28 “[T]he [Supreme] Court recognized that contributory infringer status
had traditionally been given to those who were ‘in a position to
control the use of copyrighted works by others and had authorized the

1 use without permission from the copyright owner.’ It did not purport
2 to alter this long-standing rule. *The manufacturer of the machine*
3 *does not fit this definition since it has no such control once the*
4 *machine is sold. Defendant, in contrast, is in a position to exercise*
5 *complete control over the use of the Rezound machine.”* *Id.* at 339
6 (emphasis added).

7 Accord RCA/Ariola International, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 777, 781 (8th
8 Cir. 1988) (manufacturer of “staple article of commerce” nonetheless was liable “because it retained
9 title to the [device used to accomplish infringement]...exercised control over the retailers’ use of the
10 machines [and] profited from that use”); A&M Records, Inc. v. General Audio Video Cassettes,
11 Inc., 948 F. Supp. 1449, 1456-57 (C.D. Cal. 1996) (“the evidence in this case indicated that
12 [defendant’s] actions went far beyond merely selling blank, time-loaded tapes....Therefore, even if
13 Sony were to exonerate [defendant] for his selling of blank, time-loaded cassettes, this Court would
14 conclude that [defendant] knowingly and materially contributed to the underlying counterfeiting
15 activity”). See also, Dobbins, Computer Bulletin Board Operator Liability for Users’ Infringing
16 Acts, 94 Mich. L. Rev. 217, 234-35 (1995); Tickle, The Vicarious Liability Of Electronic Bulletin
17 Board Operators For The Copyright Infringement Occurring On Their Bulletin Boards, 80 Iowa L.
18 Rev. 391, 395-96, 410 (1995).⁷

19 **B. The Overwhelming Use Of The Napster Service Is Infringement.**

20 Even if the operator of a service were eligible for consideration as a “staple article of
21 commerce,” Napster could not escape liability merely by postulating minimal or incidental uses -
22 particularly where those purported lawful uses are severable from the primary infringing use for
23 which the product is widely used and could continue unaffected by an injunction against the
24 infringing uses.
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27 ⁷ If the Napster service could be a “staple article of commerce,” then so could a flea
28 market, which clearly has substantial non-infringing uses and which may provide various products
and services that are capable of substantial non-infringing uses such as vendor booths, parking
lots, concession stands, and public restrooms. Indeed, the flea market in Fonovisa, Inc. v. Cherry
Auction, Inc., 76 F.3d 259 (9th Cir. 1996), had all of these characteristics, but no court seriously
would have entertained the argument that it was a “staple article of commerce.”

1 Sony held that the staple article of commerce doctrine applied where the product at issue “is
2 *widely used* for legitimate unobjectionable purposes,” 464 U.S. at 442 (emphasis added). Its result
3 was predicated on the conclusion that the “*primary use* of the machine for most owners” was
4 noninfringing. Id. at 423 (emphasis added). Here, Napster has not even attempted to dispute that
5 nearly 90% of its use (and probably a lot more) clearly is for copying and distributing copyrighted
6 music and that 100% of the Napster users sampled were engaged in some music piracy while on
7 Napster. The remaining uses on which Napster relies -- its new artist program and authorized
8 downloads from a few independent artists -- simply are not commercially significant in light of the
9 massive piracy on which Napster is built (and the relief requested does not reach these activities).⁸

10 Courts understandably refuse to clothe defendants in the protection of the staple article of
11 commerce doctrine merely because a small proportion of users may use their products lawfully. See
12 General Audio Video, 948 F. Supp. at 1456 (“Sony requires that the product being sold have a
13 ‘substantial,’ noninfringing use, and although time-loaded cassettes can be used for legitimate
14 purposes, these purposes are insubstantial given the number of [defendant]’s customers that were
15 using them for counterfeiting purposes”); Sega I, 857 F. Supp. at 685 (rejecting defendant’s reliance
16 on “incidental capabilities” that “have not been shown to be the primary use” of defendant’s
17 computer game copiers); Atari, Inc. v. JS&A Group, Inc., 597 F. Supp. 5, 8 (N.D. Ill. 1983)
18 (rejecting de minimis use that did not make economic sense); Cable/Home Communication Corp.
19 v. Network Productions, 902 F.2d 829, 846 & n.30 (11th Cir. 1990) (rejecting defense where
20 products were “utilized and advertised...primarily as infringement aids”).

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27 ⁸ Napster claims 17,000 new artists, each with an average of 1 to 3 recordings
28 (Krause Depo. 71:11-14), compared to the tens of millions of unauthorized recordings made
available and downloaded daily. No one can seriously contend that Napster has acquired a user
base of several million in a few short months because it is used to search for unknown artists.
Indeed, a statistical analysis reveals that only about 1.2% of Napster download traffic involves any
of these allegedly new artists. See Olkin Reply Decl.; Hausman Reply Decl.

1 Moreover, Napster has not established, as it must, that any of the “other” uses on
2 which it relies would have to be discontinued if its infringing uses were enjoined. This principle is
3 recognized even in one of the cases on which Napster relies. Vault Corp. v. Quaid Software Ltd.,
4 847 F.2d 255, 263-64 & n.16 (5th Cir. 1998) (issue is whether separate objectionable feature had
5 substantial noninfringing uses); see also Compaq Computer Corp. v. Procom Tech., Inc., 908 F.
6 Supp. 1409, 1424 (S.D. Tex. 1995) (same). Thus, Napster’s “New Artist Program” -- which it
7 admitted was designed to “distract the RIAA” (Parker Depo., Ex. 234) and which it did not begin to
8 implement until late April (Krause Depo. 7:11-2, 21:13-22:4, 23:1-10), long after it promoted itself
9 as a way to avoid “wading through page after page of unknown artists” -- need not be affected by an
10 injunction and is irrelevant to any staple article of commerce analysis. In its new artist program,
11 Napster claims to obtain specific authorization to offer these artists’ music. Krause Decl. ¶ 10(c) &
12 Ex. D (Napster makes no such effort with respect to music owned by plaintiffs.) Napster then
13 indexes the new artists and makes available their recordings. Krause Depo. 124:9-25. Napster also
14 claims to provide other information on its new artists and includes, at times, links to their websites.
15 Krause Decl., ¶ 10(b) & Ex. C. Of course, all this (as well as Napster’s chat rooms and instant
16 messaging) is severable from Napster’s infringing service and could continue independently of it.
17 Farmer Decl., ¶¶ 3-4; Krause Depo. 142:8-12, 143:23-144:7.⁹

18 **III. NAPSTER IS LIABLE FOR CONTRIBUTORY INFRINGEMENT.**

19 **A. Napster Has The Requisite Knowledge Of Infringements.**

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27 ⁹ The same is true for the few established artists who own the rights in their music
28 and who wish to be a part of Napster, see Farmer Decl., ¶¶ 3-4; Creighton Decl. (previously filed)
¶ 2 (90% of copyrights in commercially released recordings owned by RIAA members); Olin Decl.
¶ 12 (record companies generally retain ownership to copyrights in master recordings created by
artists), as well as those few artists who can and do permit copying of live performances, which
otherwise is unlawful. See 18 U.S.C. § 2319A.

1 In the face of overwhelming evidence (including that its own executives have engaged in
2 such conduct, and that the vast majority of the material available on Napster is unauthorized),
3 Napster now admits that it has knowledge that copyrighted material is distributed and copied on its
4 system. Still, Napster claims it is not liable because it does not know about each specific act of
5 infringement as it is occurring. Even assuming that to be the case, that is not the standard. The
6 knowledge Napster has clearly is sufficient. Hardenburgh, 982 F. Supp. at 514 (defendants had “at
7 least constructive knowledge that infringing activity was likely to be occurring” on their adult
8 bulletin board because “Playboy Magazine is one of the most famous and widely distributed adult
9 publications in the world. It seems disingenuous for Defendants to assert that they were unaware
10 that copies of photographs from Playboy Magazine were likely to find their way onto the BBS”);
11 MAPHIA, 857 F. Supp. at 686-87 (element satisfied “[e]ven if Defendants do not know exactly when
12 games will be uploaded to or downloaded from” its service); RSO Records v. Peri, 596 F. Supp. 849,
13 858 (S.D.N.Y. 1984) (element satisfied where “the very nature of” the product “would suggest
14 infringement to a rational person”); Gershwin Publishing Corp. v. Columbia Artists Management,
15 Inc., 443 F.2d 1159, 1163 (2d Cir. 1971). In none of these cases was a defendant’s contributory
16 liability limited to those particular infringements it specifically observed.¹⁰

17 The knowledge Napster admittedly possesses is consistent with the general standard of
18 knowledge for contributory infringement. Id at 1162 (constructive knowledge sufficient), with the
19 case law generally, Fonovisa, 76 F.3d at 261, 264 (“no question” that element satisfied by what was
20 generalized knowledge), and with the DMCA, 17 U.S.C. § 512(d)(1)(A) (knowledge that “material
21 *or activity*” is infringing). A contributory infringer cannot escape liability when it knows that
22 virtually every one of its users is engaged in infringing conduct and the overwhelming activity it
23 facilitates is infringement, just because it constructs a system where it does not or chooses not to
24 know of *specific* infringements. See Hotaling, 118 F.3d at 204 (“no one can expect a copyright

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26 ¹⁰ The *only* two cases Napster cites to support its contention that “particularized
27 knowledge” is required did not address the issue at all, and one was not even a copyright case.
28 They involved Internet Service Providers, one whose sole role was to provide users with “access to
the Internet,” Religious Technology Center v. Netcom On-Line Communication Services, Inc.,
907 F. Supp. 1361, 1373-75 (N.D. Cal. 1995), and the other that was sued for a defamatory
message posted by a subscriber, Lunney v. Prodigy Services Co., 723 N.E.2d 539, 542 (N.Y. 1999).

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

3 **B. Napster Materially Contributes To Its Users’ Infringements.**

4 It is disingenuous for Napster to argue that it does not “materially contribute” to its
5 users’ infringements.¹¹ That its users could not connect to one another and copy each other’s MP3
6 music files without Napster’s continued involvement conclusively ends this inquiry. Napster’s
7 contention that there are “other search engines, sites and methods to find the same MP3 files on the
8 Internet” (Opp. at 19) is factually incorrect ~ Napster’s users’ MP3 files reside on their individual
9 computer hard drives, not on any Internet site accessible other than through Napster. See A&M
10 Records, 54 U.S.P.Q.2d at 1747. It also is irrelevant ~ that others may also contribute to music
11 piracy on the Internet in no way absolves Napster of responsibility. See Sony Computer
12 Entertainment America, Inc. v. Gamemasters, 87 F. Supp. 2d 976, 989 (N.D. Cal. 1999).¹²

13 **IV. NAPSTER IS VICARIOUSLY LIABLE.**

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18 ¹¹ Preliminarily, Napster relies on an outdated legal standard. Plaintiffs need only
19 show that Napster “induces, causes or materially contributes” to infringing conduct. After
20 Fonovisa, “substantial participation” no longer is required. 76 F.3d at 1374; see also Sega II, 948
21 F. Supp. at 933; Gross, Intellectual Property, 13 Berkeley Tech. L. J. 101, 105 (1998) (Fonovisa
22 “relaxed” the test for material contribution from “substantial participation” to a more lenient
23 “participation” standard); Weiskopf, The Risks of Copyright Infringement on the Internet: A
Practitioner’s Guide, 33 U.S.F. L. Rev. 1, 30-32 (1998) (in Fonovisa, “the Ninth Circuit expanded
the definition of ‘material’ participation or contribution to the infringing activity...Other courts
have found the reach of Fonovisa sufficient to hold the provision of Internet facilities enabling
infringing activity enough to constitute contributory infringement as a matter of law”).

24 ¹² Napster’s argument that “providing a link to a location” is insufficient to create
25 contributory infringement is similarly irrelevant ~ Napster does far more than this, see initial
26 Memorandum at 17 n. 19 ~ and is directly refuted by one of the two cases Napster cites.
27 Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, 75 F. Supp. 2d 1290, 1295 (D. Ut. 1999)
28 (preliminary injunction *granted* against defendants who contributed to infringement merely by
listing on their website the URL’s of other sites containing the infringing material); Bernstein v.
J.C. Penney Inc., 50 U.S.P.Q.2d 1063 (C.D. Cal. 1998) (merely rejecting with no analysis a
dubious claim that J.C. Penney was liable for infringement where its web site was hyperlinked to
an unrelated site which in turn was hyperlinked to a third unrelated site that contained two
infringing photographs).

1 Essentially conceding the financial benefit element, Napster argues it lacks the requisite
2 ability to supervise. However, the legal standard for this element is simple; it is satisfied where
3 Napster “has the right and ability to *supervise* the infringing activity.” Fonovisa, 76 F.3d at 262
4 (emphasis added), quoting Gershwin, 443 F.2d at 1162. Napster admittedly has the “contractual
5 right to terminate users for infringing conduct.” Opp. at 20. It has exercised or claims to have
6 exercised this power in various contexts. Kessler Decl., ¶¶ 20-24. It is able to police its new artist
7 program and delete (or never accept) certain new artist profiles. Krause Depo. 42:10-45:10, 48:15-
8 49:3, 50:10-19, 51:9-52:17. Its system cannot operate without its direct participation. Initial
9 Memorandum, ¶II(A)(2). Its business and value are derived from controlling its users’ environment.
10 Brooks Depo., Ex. 80 at 2176. Its moderators have the power to oversee users and punish them for
11 misconduct. Fanning Depo., Ex. 197. Napster clearly is “*in a position to* police the infringing
12 conduct” of its users, and its “*failure* to police the conduct” gives rise to vicarious liability.
13 Gershwin, 443 F.2d at 1161-63 (emphasis added); Fonovisa, 76 F.3d at 262-63.

14 Napster tries to confuse the issue by introducing inapposite principles borrowed from
15 unrelated doctrines. Napster’s arguments that it “can never know the use to which a shared file is
16 put, and thus cannot control whether a use is fair or not” and that “[d]etermining the intricate
17 combination of copyrights in sound recordings and musical compositions is tricky, detailed, and
18 individualized” and would be too time-consuming and expensive (Opp. at 20-21) try to introduce
19 elements of *knowledge* and *burden* into a legal standard that involves neither. Knowledge is not an
20 element of vicarious infringement. Peer International Corp. v. Luna Records, Inc., 887 F. Supp.
21 560, 565 (S.D.N.Y. 1995). And, it is Napster’s burden, not plaintiffs’, to ensure its own compliance
22 with copyright law. See Section VII infra.¹³

23 V. NAPSTER’S REMAINING DEFENSES ARE BASELESS.

24 A. Plaintiffs Have Not Misused Their Copyrights Or Waived Their Rights.

25 These same arguments recently were made by the defendant in MP3.com and were rejected
26 on summary judgment as “essentially frivolous.” 92 F. Supp. 2d at 352. As demonstrated by every
27 case cited by Napster, the copyright misuse doctrine applies only where a copyright owner attempts

28 _____
¹³ Contrary to Napster’s assertion, any SDMI watermark implemented in the future
by plaintiffs (even if somehow relevant to this motion) would not prevent copying. Farmer Decl. ¶
5; Tygar Rpt. at 45-46.

1 to impose terms in a *license agreement* to restrain competition beyond the protection of the
2 copyright itself, or otherwise engages in fraud to obtain copyright protection over materials it did
3 not create. Opp. at 23-24. Here, plaintiffs simply have sought to enforce their copyrights.
4 MP3.com, 92 F. Supp. 2d at 352 (defense rejected where “plaintiffs have reasonably exercised their
5 right to determine which infringers to pursue, and in which order to pursue them”); see also
6 Gamemasters, 87 F. Supp. 2d at 988-89.

7 Napster’s waiver argument is equally meritless. The Ninth Circuit in Diamond recognized
8 that “[v]arious pirate websites offer free downloads of copyrighted material,” and that the “RIAA
9 fights a well-nigh constant battle against Internet piracy, monitoring the Internet daily, and routinely
10 shutting down pirate websites by sending cease-and-desist letters and bringing lawsuits.” 180 F.3d at
11 1074. There is no evidence that plaintiffs, by making available certain of their own MP3 files for
12 promotional and other purposes, intentionally waived or abandoned their property rights as to those
13 works, let alone others, or impliedly licensed the unlimited copying of all of their works.

14 **B. Plaintiffs’ Motion Does Not Implicate The First Amendment.**

15 The First Amendment “is not a license to trammel on legally recognized rights in intellectual
16 property,” Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th
17 Cir. 1979), and “it no longer is open to doubt that the First Amendment does not shield copyright
18 infringement.” Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 223 (S.D.N.Y. 2000).

19 Courts “have repeatedly rejected First Amendment challenges to injunctions from copyright
20 infringement on the ground that First Amendment concerns are protected by and coextensive with
21 the fair use doctrine.” Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc., 166 F.3d 65, 74
22 (2d Cir. 1999); see also Religious Technology Center v. Netcom On-Line Communication Services,
23 Inc., 923 F. Supp. 1231, 1258 (N.D. Cal. 1995) (“the Copyright Act itself embodies a balance
24 between the rights of copyright holders, and the protections of the First Amendment”); Harper &
25 Row, 471 U.S. at 555-60.

26 **VI. IRREPARABLE HARM IS PRESUMED, AND IS MANIFEST.**

27 As discussed in plaintiffs’ initial Memorandum, having demonstrated a likelihood of success
28 on the merits, plaintiffs are entitled to a *presumption* of irreparable harm to the unique intellectual
property they created, paid for, and own. See cases¹⁶ cited in initial Memorandum at 25-26; Country

1 Kids ‘n City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1288 (10th Cir. 1996) (reason for presumption is
2 that “the financial impact of copyright infringement is hard to measure and often involves
3 intangible qualities such as customer goodwill”). Here, the likelihood of such harm is self-evident
4 given Napster’s continuing exponential growth and its projections of over **70 million users** by the
5 end of this year who will be distributing and copying billions of music files if an injunction does not
6 issue. See also, e.g., Frackman Decl., Exhibit P. Only in rare cases have courts held the
7 presumption rebutted, and plaintiffs have not located a single published case in which the
8 presumption was rebutted in the face of evidence of actual harm.

9 Notwithstanding that plaintiffs need not show that actual harm already has occurred, the
10 infringement facilitated by Napster is so massive that, even in Napster’s infancy, there is significant
11 evidence of actual harm:

12 (1) Napster offers **no** credible rebuttal to the evidence of harm to plaintiffs’ digital
13 distribution of their music, or the huge effort and investment by plaintiffs to prepare for and
14 commence the digital downloading of their music. See initial Memorandum at 30-31, Teece Rpt.
15 14-18. Its only argument is that Napster’s massive infringement helps build an “infrastructure” that
16 ultimately will inure to plaintiffs’ benefit - ignoring that Napster already is giving away for free the
17 same music that the Record Company Plaintiffs are trying to sell, and licensing third parties to sell,
18 over the Internet.¹⁴

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25 ¹⁴ Napster’s expert, Hall, supports plaintiffs’ view. Hall Rpt., ¶ 31 (Napster, in part,
26 can reduce value and cause lost sales by “permitting established fans to obtain music for free that
27 they would have otherwise purchased from the plaintiffs”); Hall Depo. 165:5-16 (Napster “may
28 result in some loss of sales because some of the people getting it for free would have otherwise
bought it”), 216:23-217:11 (despite Hall’s belief that sales are generally promoted, “the availability
of the same song for free at Napster is, on that account, a negative with respect to the sale of the
positive price [sic]”). See also Objections to Expert Report. Plaintiffs have concurrently filed
extensive objections to Napster’s expert reports to address their significant and myriad
deficiencies.

1 (2) Of all the consumer studies brought to the Court's attention, only one -- that
2 conducted by plaintiffs' expert, Dr. Jay -- explicitly asks users whether and how Napster downloads
3 are affecting their purchases of CDs. The result of that survey makes absolutely clear that far more
4 of the Napster users surveyed buy fewer compact discs than buy more.¹⁵

5 (3) Finally, Napster says nothing about the devaluing of music that inevitably results as
6 consumers continue to obtain millions of recordings on demand, for free. There can be no doubt
7 that the growing view that digitally distributed music has no value, and is and ought to be free, will
8 have an immeasurable negative effect on plaintiffs' businesses for years to come. See initial
9 Memorandum at 31; Teece Rpt. at 16.

10 VII. THE BALANCE OF HARDSHIPS TIPS IN PLAINTIFFS' FAVOR.

11 Plaintiffs have presented substantial evidence of Napster's liability and of irreparable harm.
12 Under these circumstances, a "balance of hardships" analysis is not permitted, because once a
13 copyright infringement plaintiff has established a strong likelihood of success,

14 "any harm to the defendant that results from the defendant being
15 preliminarily enjoined from continuing to infringe is legally
16 irrelevant. See Triad Sys. Corp. v. Southeastern Exp. Co., 64 F.3d
17 1330, 1338 (9th Cir. 1995) (defendant 'cannot complain of the harm
18 that will befall it when properly forced to desist from its infringing
19 activities.'). The Ninth Circuit has held it to be reversible error for a
20 district court to even consider "the fact that an injunction would be
21 devastating to [defendant's] business" once the plaintiff has made a
22 strong showing of likely success on the merits of a copyright
23 infringement claim. Cadence Design Sys., Inc. v. Avant! Corp., 125
24 F.3d 824, 830 (9th Cir. 1997)."

20 eBay, Inc. v. Bidder's Edge, Inc., 54 U.S.P.Q.2d 1798, 1806 (N.D. Cal. 2000) (Whyte, J.); see also
21 Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1198 (9th Cir. 1999) ("the balance of
22 hardships issue cannot be accorded significant weight in determining whether a court
23 should enter a preliminary injunction to prevent the use of infringing material in cases where ... the
24 plaintiff has made a strong showing of likely success on the merits"), quoting Cadence, 125 F.3d at

26 ¹⁵ Napster's witness Fader, who attempted to undermine Dr. Jay, did so by relying on
27 numerous irrelevant third party studies. Fader, moreover, was not even familiar with their
28 methodology and refused to testify that any of them were valid. Fader Depo. 143:16-19. Indeed,
he is unfamiliar with the well-known standards federal courts use to assess the trustworthiness of
surveys and never before conducted, or was retained as an expert to criticize, a consumer survey to
meet the requirements of evidentiary admissibility. Id. 20:8-20, 35:14-21; See also Objections to
Expert Report.

1 830; Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1255 (3d Cir.1983)
2 (reversing denial of preliminary injunction; “nor can we accept the district court’s explanation which
3 stressed the ‘devastating effect’ of a preliminary injunction on [defendant’s] business. If that were
4 the correct standard, then a knowing infringer would be permitted to construct its business around
5 its infringement, a result we cannot condone”).

6 Regardless, the balance cuts sharply in plaintiffs’ favor. Napster argues that any preliminary
7 injunction that meaningfully protects copyrighted music necessarily will drive Napster out of
8 business. But as discussed earlier, Napster, like the many existing legitimate MP3 sites, could
9 continue to operate the other components of its “community” -- its new artist program, its chat
10 rooms, its message boards, and its instant messaging services -- and could use its system for
11 authorized file sharing (including the “Human Genome Project”) if it were enjoined from infringing
12 copyrights. Farmer Decl., ¶¶ 3-4. Defendant has no further basis to complain. “Where the only
13 hardship that the defendant will suffer is lost profits from an activity which has been shown likely to
14 be infringing, such an argument in defense ‘merits little equitable consideration.’” Concrete
15 Machinery Company, Inc. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 612 (1st Cir. 1988); see
16 also Triad Systems, 64 F.3d at 1338 (same) Cadence, 125 F.3d at 829 (same); Atari, Inc. v. North
17 American Philips Consumer Electronics Corp., 672 F.2d 607, 620 (7th Cir. 1982) (same).

18 “[S]uch considerations apply even to a business which is exclusively
19 based on an infringing activity and which would be virtually destroyed
20 by a preliminary injunction. ***It would be incongruous to hold that***
21 ***the more an enterprise relies on copyright infringement for survival,***
22 ***the more likely it will be able to defeat the copyright owner’s efforts***
23 ***to have that activity immediately halted.*** We see little reason why an
24 entity should be allowed to establish and continue an enterprise based
25 solely on what is in all likelihood copyright infringement, simply
26 because that is its only business.” Concrete Machinery, 843 F.2d at
27 612 (emphasis added).

28 Thus, even if Napster’s claim that it no longer could operate if enjoined from infringing
copyrighted music were accepted, modifying its business so that it can operate without committing
infringement is Napster’s burden. Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d
1394, 1406 (9th Cir. 1997) (where defendants “created the all-or-nothing predicament in which they
currently find themselves,” product would be preliminarily enjoined). Napster’s claim that it cannot
do so, or cannot do so economically, even if true,⁹ is unavailing. “[W]hen, as here, it is

1 technologically impossible to separate out the infringing material, the copyright owner ought not go
2 unprotected.” Orth-O-Vision Inc. v. Home Box Office, 474 F. Supp. 672, 686 n.14 (S.D.N.Y.
3 1979); see also Hardenburgh, 982 F. Supp. at 510-11 (“It is more reasonable to place the cost of
4 protecting against copyright infringement on the parties who provide the system which facilitates
5 infringement, rather than the innocent owner of the copyright....If Defendants cannot divine an
6 efficient way to operate a computer BBS free of copyrighted material...then Defendants have the
7 option of leaving the industry”). Indeed, “[i]f a business cannot be operated within the bounds of
8 the Copyright Act, then perhaps the question of its legitimate existence needs to be addressed.”
9 Webbworld, 968 F. Supp. at 1175.¹⁶ This burden is most appropriate in connection with a
10 technology company like Napster. If Napster has a viable business without infringing copyrighted
11 music, it is difficult to believe any claimed technology challenges will stand in its way.

12 **VIII. PLAINTIFFS ARE ENTITLED TO THE INJUNCTIVE RELIEF SOUGHT.**

13 In cases of widespread infringement, courts will issue an injunction prohibiting infringement
14 of *all* copyrighted works. See, e.g., Sega I, 857 F. Supp. at 686; Walt Disney Co. v. Powell, 897 F.2d
15 565, 568 (D.C. Cir. 1990); Picker International Corp. v. Imaging Equipment Services, Inc., 931
16 F. Supp. 18, 45 (D. Mass. 1995); Encyclopaedia Britannica Educational Corp. v. Crooks, 542
17 F. Supp. 1156, 1187 (W.D.N.Y. 1982). It may and should also cover works to be created in the
18 future. See, e.g., Pacific and Southern Company, Inc. v. Duncan, 744 F.2d 1490, 1499 (11th Cir.
19 1984); Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, 1349 (8th Cir. 1994).. As the law
20 recognizes, absent that relief, plaintiffs would have to file multiple, identical actions to obtain
21 complete relief. Moreover, such an injunction is absolutely necessary here. From the outset,
22 Napster has had a strategy of attempting to circumvent any effective relief by insisting that plaintiffs
23 identify individual infringing files ~ a remedy Napster knows would be completely ineffective. As co-
24 founder John Fanning stated in an e-mail to a potential investor (recently produced by that third
25 party, but never by Napster):

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¹⁶ Napster’s claim that the appropriate remedy is some undefined “compulsory
license” is baseless. Congress has legislated compulsory licenses for music in only limited
situations, see 17 U.S.C. §§ 114(f), 115, and not in this one.

1 “If the RIAA decides the best way to react to Napster is to request that
2 we remove links...that would be good new [sic] for napster [sic]. *We*
3 *can easily remove any listed links, and doing so would have little to*
4 *no effect on us. The burden the RIAA will have documenting each*
5 *case for each user before the link would be removed could also*
6 *amount to a seriously onerous task.* Frankly, this seems to be the
7 ideal way to frame the issue from our perspective.” Frackman Decl.,
8 Ex. P (emphasis added).¹⁷

6 **IX. A NOMINAL BOND IS SUFFICIENT.**

7 Courts have wide discretion in setting a bond. Fed. R. Civ. P. 65(c). Where there is a strong
8 likelihood of success on the merits and an important public interest is involved, courts tend to
9 require only a modest bond. Moltan Co. v. Eagle-Picher Indus., Inc., 55 F.3d 1171, 1176 (6th Cir.
10 1995); see Ellison Educ. Equip. v. Tekservices, Inc., 903 F. Supp. 1350, 1360 (D. Neb. 1995) (\$1000
11 bond because copyright infringement plaintiff demonstrated strong likelihood of success on merits);
12 Northwest Bell Tel. Co. v. Bedco of Minn., Inc., 501 F. Supp. 299, 304 (D. Minn. 1980).

13 **CONCLUSION**

14 For all of the foregoing reasons and those set forth in plaintiffs’ initial Memorandum,
15 plaintiffs respectfully request that the Court enter the requested preliminary injunction.

16 Dated: July 13, 2000

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¹⁷ Napster now tries to claim, incorrectly, that the DMCA limits the scope of
injunctive relief available against it to just such an injunction. Napster is ineligible for any DMCA
safe harbor because of its liability for both contributory and vicarious infringement. 17 U.S.C. §
512(d)(1)-(2). The limitations on injunctions outlined in DMCA § 512(j) apply *only* to service
providers that qualify for safe harbor. See initial Mem. at 15, 22.

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