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13 Attorneys for Defendant
14 NAPSTER, INC.

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

19 A&M RECORDS, INC., a corporation, et al.
20 Plaintiffs,

21 v.

22 NAPSTER, INC., a corporation, and DOES 1
through 100,
23 Defendant.

24 JERRY LEIBER, individually and doing business
as JERRY LEIBER MUSIC, et al.

25 Plaintiffs,

26 v.

27 NAPSTER, INC.,
28 Defendant.

Case Nos. C 99-5183 MHP (ADR)
C 00-0074 MHP (ADR)

**OPPOSITION OF DEFENDANT
NAPSTER, INC. TO PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Date: July 26, 2000
Time: 2:00 p.m.
Courtroom: 15
Hon. Marilyn H. Patel

1 **I. INTRODUCTION¹**

2 Plaintiffs ask this Court to do what no court has ever done: to hold that private non-
3 commercial sharing of music by consumers is unlawful; to hold that an Internet directory service
4 is liable for uses made by its users; and to extend judicially copyright protection to stifle a new
5 technology. Plaintiffs ask this Court to take this action in the face of substantial First Amendment
6 issues, without a trial or evidentiary hearing (which Napster respectfully requests on this motion),
7 and without any convincing evidence of interim harm pending trial.

8 Napster’s one-to-one file sharing and Internet directory service has ignited a revolution.
9 By enabling individual Internet users to access and share data, Napster empowers individuals
10 rather than centralized institutions to distribute information. As Andy Grove, former Chairman of
11 Intel, recently stated, “The whole Internet could be re-architected by Napster-like technology.”
12 Barry Decl., Exh. B at 128.

13 The primary present use of the Napster Internet directory service is to provide users with a
14 list of other users who are prepared to share, on a one-to-one noncommercial basis, certain music
15 files. Noncommercial sharing of music among individuals is common, legal, and accepted. Even
16 the President of the Recording Industry Association of America (“RIAA”) has said: “it’s cool to
17 make tapes, it’s cool to trade them with your friends. It’s good to share music.” 2d Pulgram
18 Decl., Exh. J. Moreover, the Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010
19 (“AHRA”), expressly immunizes any such “noncommercial use by a consumer.” 17 U.S.C.
20 § 1008. As the Court of Appeals stated in *RIAA v. Diamond Multimedia Sys., Inc.*, 180 F.3d
21 1072, 1079 (9th Cir. 1999), the AHRA’s “main purpose” was to “protect all noncommercial
22 copying by consumers of digital and analog musical recordings.”

23 There is nothing in the language of the AHRA, or any precedent under it, suggesting that
24 consumers’ noncommercial copying is permissible only if a few consumers do it. To the
25 contrary, as discussed below, Congress expressly intended to shield all noncommercial music
26 copying resulting from any technology that might later develop. The courts have repeatedly
27 refused to extend copyright prohibitions in response to new technologies, leaving to Congress any

28 ¹ All deposition cites are attached to the Pulgram Decls.; all expert reports are attached to
the Lisi Decl.; and RFJN refers to Request for Judicial Notice.

1 change or extension of the law. *Sony Corp. of Am. v. Universal Studios* (“*Sony US*”), 464 U.S.
2 417, 433 (1984); *see also*, *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974); *Fortnightly*
3 *Corp. v. UA TV, Inc.*, 392 U.S. 390 (1968).

4 As the following discussion will show, there are numerous reasons why no preliminary
5 injunction can issue in this case:

- 6 • Under the *Diamond* decision and the AHRA, consumers have an absolute right to
7 create and transfer digital music for noncommercial purposes; since its users are not
8 directly infringing, Napster cannot be liable for contributory infringement.
- 9 • Napster’s directory service is capable of numerous and substantial non-infringing uses
10 and thus under the Supreme Court’s decision in *Sony*, Napster has no liability.
- 11 • Because Napster users use Napster in a variety of ways that constitute “fair use,” such
12 as space shifting and sampling, no injunction can issue.
- 13 • Plaintiffs have engaged in copyright misuse, which precludes enforcement of their
14 copyrights against Napster.
- 15 • No injunction can issue because it would violate the First Amendment rights to free
16 speech of Napster and its users.
- 17 • Finally, no injunction can issue because to do so would irrevocably alter the status
18 quo, result in permanent injury to Napster, and ultimately not benefit Plaintiffs.

19 **II. THE APPLICABLE LEGAL STANDARD**

20 The Court may not exercise its discretion to grant a preliminary injunction unless
21 Plaintiffs establish (1) a likelihood of success on the merits of both their case in chief and against
22 Napster’s affirmative defenses, and a showing of irreparable injury *or* (2) serious questions going
23 to the merits where the balance of hardships tip sharply in Plaintiffs’ favor. *Sony v. Connectix*
24 (“*Connectix*”), 53 U.S.P.Q.2d 1705, 1709 (9th Cir. 2000). “Public policy does not advocate the
25 liberal issuance of preliminary injunctions in copyright infringement actions.” *Nintendo of Am. v.*
26 *Lewis Galoob Toys*, 16 F.3d 1032, 1038 (9th Cir. 1994).

27 Although Plaintiffs rely heavily on the presumption of irreparable harm, that presumption
28 can be rebutted where “the plaintiff has not been harmed, [or] where any harm is *de minimis*.”
Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 829 (9th Cir. 1997). Here, the
overwhelming weight of the evidence—including data from Plaintiffs’ own experts—proves that,
both today and during the eight months or so until a merits trial is held, Napster’s presence will

1 significantly *increase* Plaintiffs’ sales and their ability to enter the digital download market.

2 To the extent there has been harm resulting from consumers’ noncommercial creation and
3 sharing of their MP3 files with one another, which conduct has been condoned if not encouraged
4 by Plaintiffs, that alleged harm could not be stopped without shutting down a myriad of Internet
5 services such as AOL, altavista.com, or Excite.com, or indeed—because of other free-standing
6 file sharing technologies such as Gnutella—the Internet itself.

7 In any event, Plaintiffs’ alleged harm is irrelevant because, as shown below, there is no
8 likelihood of success on the merits. Napster does not itself directly infringe any copyright, its
9 users are engaged in noninfringing uses, and there can be no liability for contributory or vicarious
10 infringement absent direct infringement. *Sony US*, 464 U.S. at 434.

11 **III. THE TECHNOLOGY AT ISSUE**

12 To appreciate fully Napster’s argument, it is important to have a basic understanding of
13 how music files are created and exchanged on the Internet and how the Napster Internet directory
14 service works.

15 **A. The Creation Of MP3 Files.**

16 The digital audio files on music CDs are large—on the order of 40-50 megabytes of data
17 per song. 2d Pulgram Decl., Exh. X. Copied to a computer’s disk drive, files this large would be
18 difficult to store, to process and to transmit. *Id.* In 1987, the Moving Picture Experts Group
19 promulgated a standard for reducing the size of these files. *Id.* This standard, the MP3 file
20 format, compresses digital audio files by a factor of about 12:1, creating files that are
21 approximately 3 megabytes per song. *Id.* Because the MP3 formatted file is smaller, requiring
22 less disk drive space, less memory and less network transmission time, it has become the *de facto*
23 standard for Internet applications. Kessler Decl. ¶ 4. To create an MP3 file, a consumer copies
24 the original CD audio file to his or her disk drive, then compresses that file into the MP3 format
25 using software provided by numerous vendors. Tygar Rep. at 14; Kessler Decl. ¶ 4. The process
26 of copying to the hard drive and compressing into the MP3 format is collectively and colloquially
27 called “ripping.” Kessler Decl. ¶ 32. This practice is so commonplace and accepted that some
28 Plaintiffs estimate that every song on every CD issued to date—or at least their catalogue of

1 music, and there have been 15 billion CDs—has been converted to an MP3 file and is potentially
2 available to be sent over the Internet using email or any other file transfer protocol. *See*
3 *e.g.*, Smith Dep. 29:20-30:9. As detailed below, the Plaintiffs have not only tolerated this form of
4 copying CDs onto computers in MP3 format, they have encouraged consumers to do so.

5 In addition to CDs, consumers can also obtain MP3-formatted audio files directly from
6 web-based search engines such as altavista.com or through literally hundreds of other websites.
7 Gonzalez Decl. ¶ 2. Once the MP3 file has been received and stored on the user’s disk drive,
8 player software (also freely available) is used to decompress the MP3 file so that the file recipient
9 can hear the music. Tygar Rep. at 21-22.

10 **B. The Napster Technology.**

11 Among its other functions, the Napster directory service makes software available that
12 allows users to (1) search a directory that lists the names of files available to be shared by other
13 users who are then online, and (2) choose whether or not to create a folder on their disk drive
14 where files they wish to share are available to others. Each of those files is listed, and that list
15 becomes part of the Napster directory. Kessler Decl. ¶ 7. Napster’s application does not copy
16 digital audio files or create MP3-formatted versions of those files. *See* Kessler Decl. ¶ 7. Napster
17 does not have any MP3 files on its servers. Kessler Decl. ¶ 12. This Internet directory service
18 helps users navigate the available files and search for and locate files of interest. Kessler Decl.
19 ¶ 7. The software also allows users to participate in a community of users by browsing favorite
20 user lists, chatting online and exchanging instant messages with other users. Kessler Decl. ¶ 8.

21 The greatest innovation in the Napster architecture is its decentralization of the
22 information sharing and indexing process. Barry Decl. ¶ 5; Kessler Decl. ¶ 3. The Napster
23 directory system allows ordinary individuals to contribute to a collective directory, in which
24 everyone connected to the Internet can both supply and access information, and where the
25 information available is indexed in real time. Fanning Decl. ¶¶ 3, 8. This is in stark contrast to
26 the current predominant Internet architecture of large centralized file storage servers whose
27 contents are catalogued by software “robots.” Tygar Rep. at 25. In the Napster directory system
28 the files are distributed all over the Internet on millions of PCs, and the users voluntarily send

1 lists of file names to Napster, thereby building their own navigation directory. Kessler Decl.
2 ¶¶ 7, 8. This decentralized structure multiplies the power of the Internet and may “turn the
3 Internet inside out.” Barry Decl. ¶ 5; *see also* Lessig Rep. ¶ 42, 48; 2d Pulgram Decl., Exh. Z. In
4 the case of music, an artist may now share and promote his or her works to millions worldwide at
5 minimal cost, without needing technical knowledge or equipment. Chuck D. Decl. ¶¶ 10-13.

6 **IV. AS A MATTER OF LAW THE CREATION OF AN MP3 FILE AND SHARING IT**
7 **IN A NONCOMMERCIAL WAY DOES NOT CONSTITUTE COPYRIGHT**
8 **INFRINGEMENT.**

9 To obtain injunctive relief, Plaintiffs must show that they are likely to succeed on the
10 merits of their claim. *Connectix*, 53 U.S.P.Q.2d at 1709. To do this, Plaintiffs must show that
11 users of Napster, by creating and sharing MP3 files, have engaged in acts of direct infringement.
12 *Sony US*, 464 U.S. at 434. Plaintiffs must also show that Napster’s service constitutes
13 contributory or vicarious infringement. *Id.* The Ninth Circuit held under the AHRA that the
14 primary purpose of the AHRA was to facilitate personal use. *Diamond*, 180 F.3d at 1079.

15 In declaring that the Rio was not subject to the AHRA’s Serial Copy Management System
16 (“SCMS”) and royalty provisions,² the Ninth Circuit, interpreting § 1008 of the AHRA³, held that
17 a consumer has the right to create personal MP3 files:

18 In fact, the Rio’s operation is entirely consistent with *the Act’s main*
19 *purpose—the facilitation of personal use.* As the Senate Report explains,
20 “[t]he purpose of [the] Act is to ensure the right of consumers to make
21 analog or digital audio recordings of copyrighted music for their private,
22 noncommercial use.” The Act does so through its home taping exemption,
23 see 17 U.S.C. § 1008, which “protects all noncommercial copying by
24 consumers of digital and analog musical recordings.” The Rio merely
25 makes copies in order to render portable, or “space-shift,” those files that
26 *already reside on a user’s hard drive.*

27 *Diamond*, 180 F.3d at 1079 (citations omitted; emphasis added).

28 In deciding that the Rio was exempt under the AHRA, the Ninth Circuit made it clear that
not only was personal use authorized under the AHRA but that copying a music file from one’s

² 17 U.S.C. §§ 1002-1007. The SCMS allows unlimited first generation copies of an original, but prohibits second generation copies (copies of a copy). 2 M. B. Nimmer & D. Nimmer, *Nimmer on Copyright* §§ 8B.02 & 8B.03 (2000).

³ Section 1008 provides: “No action may be brought . . . based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.” 17 U.S.C. § 1008 (emphasis added). The immunity applies with respect to copyrights in both the sound recording and any musical compositions embodied therein. *Nimmer* § 8B.07[C][2], at 8B-90.

1 hard drive to a portable device was also appropriate. If a consumer can copy an MP3 file from
2 his or her hard drive without violating the copyright laws, it is self evident that Napster’s Internet
3 directory service does not violate the copyright laws either.

4 The legislative history of the AHRA supports not only the *Diamond* decision, but also
5 Napster’s users’ activity. S. Rep. 102-294 (1992) at 51, RFJN Exh. 1 (“A central purpose of the
6 [AHRA] is conclusively to resolve [the] debate” over the “copyright implications of private audio
7 recording for noncommercial use.”); H. Rep. 102-873(I) (1992) at 24, RFJN Exh. 2 (“In the case
8 of home taping, the exemption protects *all noncommercial copying by consumers* of digital and
9 analog musical recordings.”) (emphasis added). Contemporaneous comments by the former head
10 of the RIAA acknowledged that the immunity provisions of the AHRA were intended to have the
11 broadest scope.⁴ Further comments by members of Congress influential in passing the AHRA are
12 consistent. As Senator DeConcini noted, the AHRA

13 makes clear the private, non-commercial taping, of both analog and digital
14 material, is permissible under the copyright law. *As new and improved*
15 *technologies become available, such clarification in the law becomes more*
important.

16 137 Cong. Rec. S11845 (1992), RFJN Exh. 3 (emphasis added).

17 Congress fully understood that consumers would share music with family, friends and
18 others. In enacting the AHRA, Congress relied upon a report by the Office of Technology
19 Assessment (OTA) on home taping, which deemed taping CDs or records borrowed from friends,
20 and giving copies of one’s own CDs or records to friends, to be synonymous with “personal use,”
21 “private copying,” “home use,” and “private use.” U.S. Congress, OTA, *Copyright and Home*
22 *Copying: Technology Challenges the Law*, OTA-CIT-422, at 5, 156 (U.S. GPO, Oct. 1989),
23 RFJN Exh. 6. The OTA report noted that, even by 1989, copying for personal use was
24 widespread: 37% of the home tapers surveyed copied music they borrowed from a friend or other
25 family members; 26% gave away the last copy they made to others outside their household or to
26 family members; and 41% had within the last year borrowed a friend’s music to copy so they

27 ⁴ “The [AHRA] will eliminate the legal uncertainty about home audio taping that has
28 clouded the marketplace. The bill will bar copyright infringement lawsuits for both analog and
digital home audio recording by consumers” H.R. 4567, Serial No. 102-139 (March 1992)
(Jason Berman, former head of the RIAA); RFJN Exh. 5.

1 would not have to buy it themselves. *Id.* at Tables 6-10, 6-12 at 270 & Table 7-4 at 274.
2 Congress knowingly legislated a very broad form of immunity for all of this conduct. The only
3 difference between the activity noted in the OTA report and that done through Napster is that
4 today sharing is done on the Internet.

5 The Ninth Circuit's holding that the Rio was exempt from the AHRA's SCMS/royalty
6 requirements does not, as Plaintiffs may attempt to argue, limit the scope of the Act's immunity
7 provisions.⁵ The previously quoted passage from *Diamond* makes clear the Ninth Circuit read the
8 immunity provisions as not being limited by the definitions of the technical terms that limit the
9 scope of the SMCS/royalty requirements. Prof. Nimmer is in accord.⁶ Indeed, the Court found
10 space-shifting using the Rio to be "paradigmatic noncommercial personal use entirely consistent
11 with the purposes of the Act['s]" immunity provisions. *Diamond*, 180 F.3d at 1079.

12 To read the immunity provisions as excluding digital musical recordings stored on
13 computer hard drives would defy the clearly expressed Congressional intent that the immunity
14 apply to *all* noncommercial copying by consumers, without distinction as to medium.⁷ Congress
15 expressly indicated that immunity was not conditioned upon the use of a device that was SCMS
16 compliant or for which royalties had been paid. S. Rep. No. 102-294 at 52, RFJN Exh. ____.
17 Congress intended to avoid "having to revisit this issue almost annually in order to keep pace
18
19
20

21 ⁵ Plaintiffs will argue that, because § 1008 immunizes "the noncommercial use by a
22 consumer of *such a device* [i.e., a digital audio recording device] ... for making digital musical
23 recordings" (emphasis added), and *Diamond* held that copies on a hard drive are not "digital
24 musical recordings," § 1008 does not immunize MP3 files stored on a computer hard drive.

25 ⁶ "Based on the legislative history's characterization of 'all noncommercial copying by
26 consumers of digital and analog musical recordings' as falling under the protection of the home
27 taping exemption, the court appears ready to apply that provision beyond its precise wording."
28 *Nimmer* § 8B.07[C][4], at 8B-94.

⁷ The original version of the AHRA did not include definitions that would restrict
computers and their hard drives from the provisions of the Act. After the computer industry
voiced concern about falling within its scope, Congress introduced the new term "digital musical
recording" to exclude computer programs and "talking books" from the AHRA. H. Rep. 102-
873(I) at 17. Cary Sherman, Sr. Exec. VP and General Counsel of the RIAA, acknowledged that
the exclusion of computer programs and "talking books" was the only purpose of the changes in
the statutory definitions of the AHRA. Sherman Decl. ¶¶ 10-16.

1 with the rapidly changing technological world.” *Id.* at 36.⁸ Plaintiffs, now fearing the ease with
2 which home copying can occur over the Internet, seek to renege on the bargain struck in the
3 AHRA. But there is nothing in the language of the AHRA, or any precedent under it, suggesting
4 that consumers’ noncommercial copying is permissible if only a few consumers do it. Plaintiffs’
5 desire to narrow the statutory immunity due to technological change must be addressed to
6 Congress, not to this Court.

7 **V. UNDER THE SONY DECISION, NAPSTER’S SYSTEM, AS A MATTER OF**
8 **LAW, DOES NOT INFRINGE PLAINTIFFS’ COPYRIGHTS.**

9 In addition to the complete defense provided by the AHRA, the *Sony* doctrine provides
10 Napster with an absolute defense against Plaintiffs’ claims of contributory and vicarious
11 infringement. Under the seminal *Sony* case, as long as a technology is “capable of substantial
12 non-infringing uses,” a provider making a technology available cannot be liable for copyright
13 infringement, even where it may have encouraged infringing uses and the technology may in fact
14 have been used for infringing activity. *Sony* addressed the sale of a video cassette recording
15 device (“VCR”), known as the Betamax, which was capable of authorized and unauthorized
16 recording of copyrighted material. *Sony*’s offering of the Betamax did not constitute
17 infringement because “the product is widely used for legitimate, unobjectionable purposes.
18 Indeed, it need merely be *capable* of substantial noninfringing uses.” *Id.* emphasis added. The
19 Supreme Court recognized that “[s]ound policy, as well as history, supports our deference to
20 Congress when major technological innovations alter the market for copyrighted materials.” *Sony*
21 *US*, 464 U.S. at 431. Over protests by the entertainment industry that the Betamax would destroy
22 its markets,⁹ the *Sony* Court refused to enjoin its distribution. *See generally, Sony US*, 464 U.S.

23 ⁸ A narrow application of § 1008 would also lead to the absurd construction that a
24 manufacturer of a device whose primary purpose is copying a CD (which is clearly a digital
25 musical recording) onto a hard drive would be immune, yet when a consumer used that very same
26 device to copy her musical recording from the hard drive back onto a CD or onto a Rio for her
27 own or a friend’s personal use, she would not have immunity. Such an absurd construction would
28 reintroduce uncertainty Congress was seeking to avoid. 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 Public Interest Research Group*,
426 U.S. 1, 7 (1975); *Ozawa v. United States*, 260 U.S. 178, 194 (1922).

⁹ At the time, Jack Valenti stated that the VCR was to the movie industry “as the Boston
Strangler is to a woman alone.” Lessig Rep. ¶ 32. Valenti now proclaims the “grave risks” to all
intellectual property if “Napster and services like it” are allowed to survive. Valenti Decl. ¶ 7.

1 417. As a result of the Court’s decision, consumers have enjoyed the convenience of the VCR,
2 and the movie industry now reaps more than half of its profits from that technology. 2 Nimmer,
3 §8B.01[B].

4 Under the *Sony* doctrine, it is enough to show a single potential non-infringing use of
5 social or commercial importance. *Vault v. Quaid*, 847 F.2d 255, 266-67 (6th Cir. 1988) (because
6 technology which enabled unfettered copying of copy-protected software *could* be used to make
7 archival copies of the software, the product was non-infringing; relative *proportion* of the single
8 lawful use to unlawful copying not even considered); *RCA/Ariola Int’l, Inc. v. Thomas &*
9 *Grayston Co.*, 845 F.2d 773, 776-77 (8th Cir. 1988) (court did not disturb a finding that a
10 machine for duplicating cassette tapes, using tapes specially timed to replicate specific
11 copyrighted materials, was capable of substantial non-infringing uses—even though the only
12 evidence of non-infringing uses was that the machine was advertised as suitable for duplicating
13 spoken word recordings).

14 **A. Personal Use In Compliance With The AHRA Is A Non-Infringing Use.**

15 Because personal use under the AHRA is non-infringing, even if it could be argued that
16 such use was not a total bar to a copyright infringement claim, such use would still be sufficient
17 to bar a claim for contributory or vicarious infringement against Napster.

18 **B. Napster Facilitates A Variety Of Authorized Transfers Of Music Files.**

19 In addition, a multitude of artists authorize the sharing of their music on Napster, Kraus
20 Decl. ¶ 9, and Napster is widely used for two fair uses—space shifting and sampling. The
21 declarations submitted by Napster conclusively establish that not only is there one substantial
22 non-infringing use, but there are several substantial non-infringing uses.¹⁰ Thus, as a matter of
23 law, Plaintiffs’ request for injunction must be denied.

24 The following are some of the myriad authorized uses of Napster which singly or
25 collectively require that this motion be denied:

26 ¹⁰ In addition to allowing each computer to serve as a music distribution platform, the
27 technology can also be used to build collaborative workgroups in business, educational, and
28 research settings. Tygar Rep. at 25-26; Lessig Rep. ¶¶ 53-61. In fact, the Human Genome
Project, a group of hydro engineers, and a group of filmmakers have all expressed an interest in
using the technology. Brooks Dep. 202:18-203:02.

- 1 • Independent managers and record labels are using Napster to promote and
2 distribute their products worldwide. For example, the bands “Of a Revolution”
3 and “Pancho’s Lament” have successfully promoted themselves through Napster.
4 Issacs Decl. ¶ 17; Xeatlot Decl. ¶¶ 1-8; Gilbert Decl. ¶ 12; Nichols Decl. ¶¶ 6-8;
5 Chuck D. Decl. ¶¶ 6, 11; Sivers Decl. ¶¶ 6-11; Gantry Decl. ¶¶ 4-7.
- 6 • Major stars like The Offspring and Chuck D have recognized the value of Napster
7 as a mechanism to reach fans directly, without having to rely on the whim and be
8 bound by the “standard” financial terms of the major labels. Chuck D. Decl. ¶¶
9 6-13; Guerinot Decl. ¶¶ 7-9.
- 10 • Thousands of artists post MP3s on the Internet, over 3,000 artists are using
11 Napster to circulate their music for free, while also listing themselves at the
12 MP3.com website, where they can sell CDs and charge for downloads. Gonzalez
13 Decl. ¶¶ 2-4; Kraus Decl. ¶ 16, Exh. 1.¹¹
- 14 • Napster’s new artist program has already enlisted over 17,000 artists who
15 expressly approve of sharing their music through Napster; by contrast, the major
16 labels released a total of only 2,600 albums last year, and only 150 of those songs
17 were played on the radio on a regular basis. Kraus Decl. ¶ 16; Vidich Dep. 94:2-
18 96:8 & Exh. 277 at T0009.
- 19 • Napster permits the transfer of secure file formats, subject to the conditions
20 governing access to the file, thereby facilitating viral distribution, which Plaintiffs
21 recognize as maximizing product penetration at little cost.¹² Kenswil Dep. 44:20-
22 46:16; Chuck D. Decl. ¶ 8.
- 23 • Hundreds of artists allow the digital taping of their live performances and the
24 trading of these recordings among their fans. Barlow Decl. ¶¶ 8-9; Gonzalez Decl.
25 ¶¶ 2, 8, Exh. J. For example, Metallica itself has authorized trading of hundreds
26 of concert recordings on Napster, and Courtney Love, The Offspring, the Beastie
27 Boys, and Motley Crüe have made their concert recordings available in MP3
28 format. Gonzalez Decl. ¶ 9.

Exposure is the key to an artist’s success in the music industry. Chuck D. Decl., ¶ 8.
Over 98 % of recording artists seeking recording contracts are rejected. Napster provides them an
unprecedented opportunity to market themselves to music fans. Vidich Dep. 94:13-96:3;
Chuck D. Decl. ¶¶ 10-11. By encouraging distribution of their works among a wide audience,
artists are obtaining unprecedented exposure at a minimal cost. Chuck D. Decl. ¶¶ 6, 10; *see also*
Diamond, 180 F.3d at 1074. As one of Plaintiffs’ own declarants has stated, a service like

¹¹ MP3.com’s president Michael Robertson declared that MP3.com had not authorized any
of its artists’ music to be shared on Napster. Robertson Decl. ¶ 11. However, he has since
admitted that MP3.com has only *non-exclusive* licenses with its artists, and they may freely make
their music available on Napster. Robertson Dep. at 18:14-19:11, 47:4-48:9 (acknowledging that
Robertson was unfamiliar with the operation of Napster’s new artist program criticized in his
declaration.)

¹² Napster is a member of, and compliant with, SDMI, and will honor any security placed on
any files. Kessler Decl. ¶ 37. The transfer of these secured files will only expand the non-
infringing uses of the Napster System as Plaintiffs bring such formats to market.

1 Napster “could be highly effective” for developing talent. Dreese Dep. at 175:4-22. In a short
2 time, Napster has generated tremendous hope and enthusiasm among new artists. Heuett Decl.,
3 Exh. A. All of these authorized uses—and hundreds more (see Heuett Declaration)—are
4 substantial non-infringing uses.

5 In an action for contributory infringement against the seller of copying
6 equipment, the copyright holder may not prevail unless the relief he seeks
7 affects only his programs, or unless he speaks for virtually all copyright
8 holders with an interest in the outcome.

8 *Sony US*, 464 U.S. at 446. Plaintiffs do not have the right to exclude the other 98 % of artists
9 from using Napster to exercise their First Amendment rights. Even if they think such artists are
10 “ill-advised” in permitting file sharing on Napster, it does “not change the fact that they have
11 created a substantial market for a paradigmatic noninfringing use of [Napster’s] product.” *Id.*, at
12 446 n.28.

13 **C. Napster’s Users Engage Predominantly In Fair Uses.**

14 Besides authorized uses, Napster cannot be liable if the use by consumers constitutes fair
15 use. There can be no third-party liability where, as here, the *alleged direct infringers* are engaged
16 in fair use. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 576 (1994).

17 In determining whether the use made of a work in any particular case is a
18 fair use the factors to be considered shall include—
19 (1) the purpose and character of the use, including whether such use is
20 of a commercial nature or is for nonprofit educational purpose;
21 (2) the nature of the copyrighted work;
22 (3) the amount and substantiality of the portion used in relation to the
23 copyrighted work as a whole; and
24 (4) the effect of the use upon the potential market for or value of the
25 copyrighted work.

22 17 U.S.C. § 107. These factors are “to be explored, and the results weighed together, in light of
23 the purposes of copyright.” *Acuff-Rose*, 510 U.S. at 578.

24 Under the first factor, the noncommercial nature of Napster’s users’ activities weighs
25 strongly in favor of a finding their use is fair. *Id.* at 584; *Sony*, 464 U.S. at 449-50. Under the
26 second and third factors, although Plaintiffs’ works are undoubtedly creative in nature, the extent
27 of permissible copying varies with the purpose and character of the use, and the amount of the
28

1 work copied by Napster’s users is certainly reasonable in relation to the purposes of space-
2 shifting and sampling. *Id.* at 450 (for home taping, copying of the whole “does not have its
3 ordinary effect of militating against a finding of fair use”).

4 The fourth factor looks at the market harm caused by the use. *Acuff-Rose*, 510 U.S. at
5 590. When, as in the case of Napster users, the conduct is noncommercial, the burden shifts to
6 the copyright holder to prove some meaningful likelihood that “the *particular use* is harmful, or
7 that if it should become widespread, it would adversely affect the potential market for the
8 copyrighted work.” *Sony*, 464 U.S. at 451 (emphasis added). “[A] use that has no demonstrable
9 effect upon the potential market for, or the value of, the copyrighted work need not be prohibited
10 in order to protect the author’s incentive to create.” *Id.* at 450. Any such fair use is noninfringing
11 and, if substantial, precludes a finding of Napster’s liability. As discussed below, Plaintiffs have
12 failed to carry their burden of establishing that *every* substantial use of Napster will harm their
13 markets.

14 1. Space Shifting Of Previously Owned Works Is Fair Use.

15 The Ninth Circuit has ruled that “space shifting” of works already owned constitutes a fair
16 use, calling it “paradigmatic noncommercial personal use.” *Diamond*, 180 F.3d at 1079.
17 Historically, those who wanted a portable copy of their CD could fairly make a cassette copy;
18 Napster allows them to transfer an MP3 copy instead. MP3 files, while of lesser musical quality,
19 are easier to store and move than CDs, less affected by motion in playback than CDs, and capable
20 of being easily ordered into customized playlists. Hall Rep. ¶ 32; Tygar Rep. at 13. Similarly,
21 having decoded her CD into an MP3 on her home computer, a consumer can now access that file
22 from her office as well.¹³

23 Plaintiffs have submitted no evidence to meet their burden to show such uses actually
24 displace purchases. Warner’s studies showed that the increase in copying to MP3s merely
25 displaced copying to cassettes. Vidich Dep. 108:19-114:19; Exh. 277. In fact, surveys show
26 those who space shift with Napster buy as much or more music than before. Fader Rep. ¶¶ 62-63.

27 ¹³ Space-shifting is also transformative, an additional factor weighing in favor of a finding of
28 fair use, because the additional copy is created for use in a setting to which the original
embodiment is not suited. *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 929
(2d Cir. 1994).

1 The noncommercial nature of space-shifting, the benefit from a transformative change of format,
2 the absence of market harm, and, as discussed above, the law authorizing home copying, all
3 compel a finding of fair use. Both sides' experts conclude that a large percentage of Napster
4 users engage in space shifting, a substantial non-infringing use. Fader Rep. ¶ 77 (70%
5 always/frequently/sometimes space shift); Jay Rep. Table 7 (49% of users space shift from 10%
6 to 100% of the time).

7 **2. Sampling Music Before Buying Is Also Fair Use.**

8 The use of Napster to sample a song before buying it is also a fair use because the purpose
9 is not archival and does not displace a purchase. This use is analogous to visiting a listening
10 station or borrowing a CD from a friend, to decide whether to purchase.

11 Over 84% of Napster users report downloading music files to see if they want to buy the
12 work. Fader Rep. ¶ 74. Even Plaintiffs' expert's data showed sampling to be the predominant
13 use of Napster. Jay Rep., Table 4 (largest response regarding impact pertained to the use of
14 Napster as a tool for selecting purchases); Fader Rep. ¶¶ 71-74. The clear evidence is that
15 sampling on Napster increases, rather than decreases, the market for the work. Plaintiffs' expert
16 concedes that nearly half of all Napster users purchase from 10% to 100% of all music they
17 download. Jay Rep., Table 8. Over 91 % of Napster users buy as much or more music than
18 before they used Napster, with 28 % purchasing *more*. Fader Rep. ¶ 43. As much as 90 % of
19 files are deleted, rather than retained, after sampling. *Id.*

20 Moreover, there is no market for sampling. In the traditional marketplace the public
21 samples at no charge, through radio, television, retail stores, friends, MTV and other avenues. In
22 fact, the recording labels pay for prominent placement of their works at such venues, not the other
23 way around. Cottrell Dep. 23:6-25:7; Olin Decl. ¶ 7. Finally, Plaintiffs' simplistic notion that
24 every copy made is a lost sale is simply false. Fader Decl. ¶¶ 62-63; *Diamond*, 180 F.3d at 1074
25 n.1. Obviously, some people who sample a work for free would simply go without the work if
26 they were required to purchase it merely to sample it. *Id.* In addition, many consumers decide to
27 purchase music after having had the opportunity to sample, and the evidence shows that the
28 availability of sampling is helping drive Plaintiffs' CD sales. Fader Rep. ¶ 69.

1 In *Sony*, 82% of Betamax users watched the same amount of television, and 83%
2 maintained their movie-going frequency, despite the new technology. See *Universal City Studios,*
3 *Inc. v. Sony Corp. of Am.* (“*Sony DC*”), 480 F. Supp. 429, 438 (C.D. Cal. 1979). Similarly, in
4 this case over 91% of Napster users buy at least as much music, and some 28% buy *more* music
5 than they did before using Napster. Fader Rep. ¶ 43. The impact of Napster has proven positive,
6 not negative, on Plaintiffs’ CD sales, which are up 8 % this year over last year. Fader
7 Rep. ¶ 20.¹⁴

8 In view of all these facts, Napster is plainly capable of substantial non-infringing uses.

9 **D. Plaintiffs’ Attempts To Distinguish *Sony* Are To No Avail.**

10 Plaintiffs’ attempts to distinguish *Sony* based upon the assertions of a statistician that
11 87 % of the materials found on Napster are copyrighted and exchanged without authorization by
12 the copyright owner are to no avail. First, Plaintiffs make no effort to determine the percentage of
13 users who are engaged in the substantial fair uses described above. Second, Plaintiffs’ report
14 reached this percentage based on flawed methodology, relying merely on the file name without
15 even listening to the MP3s to confirm their content. Goldberg Decl. ¶ 6. Third, even Plaintiffs’
16 report acknowledges that some 13 % of the files being shared cannot be proven to be
17 unauthorized. Given the millions of files shared through Napster, this figure is substantial in and
18 of itself.

19 Further, Plaintiffs’ characterization of 100 % of Napster users as “infringers” merely
20 because they may have files of copyrighted works on their hard drive ignores the significant
21 number of Napster users who choose *not* to share any files—each of whom would reduce that
22 percentage, because by definition, they make no infringing files available. Kessler Decl. ¶ 7.
23 Moreover, Plaintiffs’ methodology counts these users “against” Napster even if every other file
24 the user shared was expressly authorized for sharing.

25 Plaintiffs also distort the law in alleging that because they believe Napster knew of and
26 encouraged copying of copyrighted material, Napster would be ineligible for *Sony* immunity.

27 ¹⁴ As explained by Professor Hall, Napster is not obstructing Plaintiffs’ entry into the
28 download business, but rather paving the way, by building the infrastructure of demand,
equipment, and familiarity that Teece claims Plaintiffs *lack* in that market. Hall Rep. ¶¶ 45-49.

1 That is not the law. In *Sony*, defendant’s national advertisements had “exhort[ed] the public to
2 ‘record favorite shows’ or ‘build a library’ . . . [and] suggested recording ‘novels for television’
3 and ‘classic movies.’” *Sony DC*, 480 F. Supp. at 436. The Supreme Court expressly rejected
4 claims by plaintiffs in that case that “supplying the means to accomplish an infringing activity
5 and encouraging that activity through advertising are sufficient to establish copyright liability.”
6 *Sony US*, 464 U.S. at 436.¹⁵ Under *Sony*, knowledge of, or even intent to profit from, infringing
7 uses does *not* justify foreclosing a new technology that has legitimate uses.

8 Finally, Plaintiffs argue that *Sony* applies only to contributory infringement and not to
9 vicarious liability. But the *Sony* decision speaks in broader terms, discussing throughout all
10 theories of “vicarious liability” and immunizing all “third-party conduct” liability, not merely
11 based on a theory of contributory infringement. 464 U.S. at 435 n.17, 437 & n.18, 439 & n.19.
12 The Court expressly recognized the overlap of the theories and caselaw, stating that “reasoned
13 analysis” of the issues required consideration under various theories of liability. *Id.* at 435 n.17.
14 Indeed, if the “substantial non-infringing use” doctrine did not apply to all third-party liability
15 theories, a single use by a third party of any new technology could subject the manufacturer to
16 liability, and the new technology to injunction, regardless of non-infringing uses.¹⁶

17 Plaintiffs urge that Napster can “control” its users by excluding them from the Napster
18 service. Pla’s. Mot. For Prel. Inj. (“MPA”) at 21. By this logic, the Betamax would have been
19 enjoined, since Sony could certainly have “controlled” infringement by keeping its product off

20 ¹⁵ Even in the cases cited by Plaintiffs, the courts do not focus on intent in creating a good or
21 service but rather find liability based on the defendant’s direct participation in the infringing act
22 or control over another. *See Cable/Home Communication Corp. v. Network Prods., Inc.*,
23 902 F.2d 829, 837, 846 (11th Cir. 1990) (defendant participated by ordering and funding the
24 creation of a directly infringing work); *RCA/Ariola*, 845 F.2d at 777-78 (defendants selected the
25 correct length of tape to copy works marked as copyrighted and started the recorder); *RCA*
26 *Records v. All-Fast Sys.*, 594 F. Supp. 335, 337 (S.D.N.Y. 1984) (same); *A&M Records, Inc. v.*
27 *General Audio Video Cassettes, Inc.*, 948 F. Supp. 1449, 1457 (C.D. Cal. 1996) (holding
28 defendant liable on the basis of personal participation in the form of loans to set up counterfeiting
operations, selecting the proper tape length to create specific counterfeits, and directing customers
to sources for counterfeiting tools). Plaintiffs do not allege such direct participation, much less
establish a likelihood of proving it. Moreover, unlike *Sony*, 480 F. Supp. at 436, Napster warns
its users that making unauthorized copies of copyrighted material may violate the law and it is the
user’s obligation to comply. Kessler Decl. ¶ 17; Parker Decl. ¶ 8, Exh. D.

¹⁶ The case cited by Plaintiffs does not in fact find the manufacturer vicariously liable for
providing an article of commerce but rather vicariously liable for the conduct of the retailers to
which it had licensed the machines and had trained in its uses. *RCA/Ariola*, 845 F.2d at 782.

1 the market, or by allowing a recording to be replayable only once—thereby limiting use only to
2 time-shifting. *Sony DC*, 480 F. Supp. at 462 (rejecting such a theory). See Lessig Rep. ¶ 56. The
3 *Sony* doctrine is not so limited; it fully insulates Napster from an injunction in this action.¹⁷

4 **VI. PLAINTIFFS CANNOT PROVE THIRD-PARTY LIABILITY.**

5 There are two classes of third-party liability asserted by Plaintiffs, contributory
6 infringement and vicarious liability. Plaintiffs can prove neither.

7 **A. Contributory Infringement.**

8 The touchstones of contributory infringement are knowledge and participation. See
9 *Religious Tech. Center v. Netcom On-Line (“RTC”)*, 907 F. Supp. 1361, 1373-75 (N.D. Cal.
10 1995). Plaintiffs have shown neither in any sense applicable to the Internet.

11 **1. Napster Has No Knowledge Of Specific Direct Infringements.**

12 The law is clear that merely providing a one-to-one file sharing technology with a real-
13 time searchable index does not constitute third-party infringement. If this were infringement,
14 then an ISP could be found liable simply for permitting users to search for and transfer files,
15 where the ISP was shown to have only a *generalized* knowledge that many of those works may be
16 copyrighted. Plaintiffs have cited no case to support this proposition because none exists. The
17 search engine and index portion of the Napster directory service is the electronic equivalent of a
18 card catalog, and cannot, without particularized knowledge or control of items searched, establish
19 liability.

20 Plaintiffs rely heavily on *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir.
21 1996), a case involving a motion to dismiss, seeking to apply the rules for commercial flea
22 markets to free searching and file exchange over the Internet. The shoe simply does not fit. The
23 market operator in *Fonovisa* entered commercial contracts with a limited number of known

24 ¹⁷ Plaintiffs’ argument that the doctrine does not protect “services” makes the same
25 distortion of the case law. In each case cited, the deciding factor was the presence of direct
26 participation in the infringement or direct control over the infringers, not whether the
27 instrumentality supplied by the defendant was a “service” or a “product.” See *RCA/Ariola*,
28 845 F.2d at 781 (defendant controlled its licensees’ usage of the machine); *All-Fast*, 594 F. Supp.
at 339.(defendant controlled the uses of the machine because users presented the work to be
copied when purchasing a tape onto which to copy the work); *accord Sony US*, 464 U.S. at 446
(no liability for providing an article of commerce without direct involvement in the infringing
act). Furthermore, the product/service distinction is meaningless for software. See Tygar Rep.
at 22 n.4.

1 vendors; it depended on its vendors' sales of counterfeit goods to pay for daily booth rentals; it
2 monitored and patrolled the confined grounds of the market; it controlled access into and out of
3 the premises; and when notified of its vendors' rampant commercial sale of counterfeit goods, it
4 agreed to provide the names of individual vendors to the Sheriff but then later reneged. *Id.*
5 at 261-262. Upon these facts, the Court ruled only that a claim was stated. *Id.* at 264.

6 By contrast, Napster offers access to all comers, without meeting them and without
7 distinction, including millions who may visit from any computer anywhere in the world. Kessler
8 Decl. ¶ 6. No rents are paid by, nor are products sold on Napster by any Napster user. Kessler
9 Decl. ¶¶ 14-15. Napster does not, and cannot, patrol any confines. Napster allows free file
10 sharing, among an ever-changing public, with ever-changing files, and Napster has nothing
11 approaching the knowledge or control of the operator of a commercial flea market. *Fonovisa* at
12 most establishes what is necessary for Plaintiffs to state a claim. It did not and does not stand for
13 the proposition that Plaintiffs can rewrite the copyright laws to cover Internet sharing of MP3
14 files. Commercial vendors who buy space at a swap meet are not anything like the individuals
15 who use Napster.

16 Napster does not dispute that copyrighted materials may be indexed, linked to, and
17 exchanged using Napster's technology. Such is the case with any other ISP. As almost every
18 expression created since 1976 is potentially subject to copyright protection, all ISPs have
19 generalized knowledge that they may provide links to infringing materials. Tygar Rep. at 23-26.
20 If this were sufficient, there could be no Internet.¹⁸ *See, e.g., Lunney v. Prodigy Servs. Co.*,
21 723 N.E.2d 539, 542 (N.Y. 1999) ("The public would not be well served by compelling an ISP to
22 examine and screen millions of e-mail communications"); *RTC*, 907 F. Supp. at 1372-74

23 ¹⁸ Plaintiffs' brief misquotes Shawn Fanning on the issue of knowledge, suggesting that he
24 hypocritically agreed with a moderator's suggestion that Napster not talk about music being
25 available for "free," through Napster, since that would be "illegal." MPA at 13-14. Fanning Dep.
26 at 222:21-229, Exh. 192. Fanning agreed that an "excellent point" was made *not* by the
27 moderator, but by Dylan in an intervening e-mail which *rejected* the moderator's position that
28 "free" meant "illegal." *Id.* 229:8-9; Fanning Decl. ¶ 15. 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." *Id.* at 227. This is far from
Plaintiffs' only distortion of the record. *See also* Parker Decl. ¶¶ 3-4, 7 (citing deposition
testimony and explaining mischaracterized documents); Richard Dep., pp. 145:4-147:11
(explaining near impossibility of identifying copyrighted works by file name).

1 (setting the threshold for knowledge too low would result in countless liability for those whose
2 only role is to provide a service through which communications can flow); *see also* Tygar Rep.
3 at 35-36.

4 The law requires knowledge that an exchange of *particular* material is infringing. *See*
5 *RTC*, 907 F. Supp. at 1373-75; see A. Berschadsky, “RIAA v. Napster: A Window Onto the
6 Future of Copyright Law in the Internet Agr.” 18 J. Comp. & Info. L.101,119 (2000)(“knowledge
7 of infringing activity cannot be presumed where a legitimate use for a device or system exists”).
8 In fact, in a case in which the ISP, unlike Napster, *did* receive a commercial payment for
9 providing services, Judge Whyte stated the proper legal standard for knowledge:

10 Where a BBS operator cannot reasonably verify a claim of infringement,
11 either because of a possible fair use defense, the lack of copyright notices
12 on the copies, or the copyright holder’s failure to provide the necessary
13 documentation to show that there is a likely infringement, the operator’s
14 lack of knowledge will be found reasonable and there will be no liability
15 for contributory infringement for allowing the continued distribution of the
16 works on its system.

17 *RTC*. 907 F. Supp. at 1374. Indeed in every case cited by Plaintiffs, knowledge was found only
18 upon proof that the defendant made a personal observation or had other actual specific knowledge
19 that the copying was infringing.¹⁹

20 Absent actual notice to which it responds, Napster has no specific knowledge that any
21 particular use of a file through its system is unauthorized. Napster cannot know, any more than a
22 photocopier or video recorder manufacturer, which uses of its system are fair or not. But even
23 apart from fair use, Napster cannot know the copyright status of users’ files. Neither CD audio
24 files nor the resultant MP3 files carry any copyright notice or watermark. Tygar Rep. at 37-47.²⁰
25 MP3 file names are created by users, contain errors, and are variable and undependable. Fanning
26 Decl. ¶ 18. Song titles cannot be used to distinguish authorized files from others because many

27 ¹⁹ *See, e.g., GershwinPub’g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159,
28 1161 (2d Cir. 1971) (defendants were provided a list of the works to be performed for inclusion in
the concert program); *Playboy Enter., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513
(N.D. Ohio 1997) (defendants, in a case finding liability for *direct* infringement, viewed all files
before moving them into the subscriber area); *Sega Enter. Ltd. v. MAPHIA*, 857 F. Supp. 679,
686-87 (N.D. Cal. 1994) (defendant specifically solicited the uploading of plaintiff’s particular
works).

²⁰ Although each MP3 file has an “MD5 hash,” that hash is not an adequate identifier of a
song, and varies for different recordings and other reasons. Tygar Rep. at 30-32.

1 song titles are used by multiple artists or, as in the case of Metallica songs, there may be multiple
2 recordings of the same work—some of which are authorized to be shared and others not. Tygar
3 Rep. at 29; Ulrich Dep. at 36:16-37:2, Exh. 376; Sanders Dep. 24:23-29:13. Relying on file
4 names alone resulted in Metallica claiming infringement of thousands of authorized files. Kessler
5 Decl. ¶ 25. Plaintiffs do not have control of all the music (sound recordings and musical
6 compositions) of all their signed artists; nor is it even clear that they have rights to control digital
7 distribution of some or all of the works by those artists. Olin Decl. ¶ 14; Sanders Dep. at 43:24-
8 44:8, 45:10-49:11, 139:2-140:7, Exh. 395. Indeed, Plaintiffs claim to have no master list of songs
9 to which they control the rights. How can Napster determine which works are protected if
10 Plaintiffs themselves can only guess?

11 **2. Napster Does Not Substantially Participate In Infringing Activity.**

12 Contributory infringement also requires “substantial participation” in a specific direct
13 infringement. *See RTC*, 907 F. Supp. at 1375 (citing *Apple Computer, Inc. v. Microsoft Corp.*,
14 821 F. Supp. 616, 625 (N.D. Cal. 1993), *aff’d*, 35 F.3d 1435 (9th Cir. 1994)). Plaintiffs’ sole
15 basis for claiming substantial participation is that “but for” Napster’s searching and indexing
16 functions, the file sharing would not be as easy. Plaintiffs ignore the existence of a myriad of
17 other search engines, sites and methods to find the same MP3 files on the Internet. Kessler Decl.
18 ¶ 4. Providing a link to a location, even one with known infringing material, is not enough to
19 render the provider of the link contributorily liable for the content at the linked location. *See*
20 *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry*, 75 F. Supp. 2d 1290, 1293 (C.D. Utah
21 1999); *Bernstein v. J.C. Penny, Inc.*, 50 U.S.P.Q.2d 1063 (C.D. Cal. 1998). Substantial
22 participation might exist if Napster were given actual notice and failed to take remedial action.
23 *See Fonovisa*, 76 F.3d at 264 (defendants failed to comply with a sheriff’s investigation of the
24 conduct); *RTC*, 907 F. Supp. at 1375 (proof of failure to take simple steps to block the infringing
25 reproduction might constitute substantial participation). But every time Napster has received
26 actual notice of infringement at a specified location, Napster has blocked the conduct by
27 terminating the user account. Kessler Decl. ¶ 22.

28

1 **B. Plaintiffs Cannot Establish the Elements Of Vicarious Liability.**

2 Vicarious liability requires (1) the *right* and *ability* to control the infringing activity, and
3 (2) a direct financial interest in the infringing activities. *Fonovisa*, 76 F.3d at 264. Consistent
4 with agency principles of respondeat superior, proof is required of control or supervision over the
5 individuals directly responsible for the infringement. *Demitriades v. Kaufmann*, 690 F. Supp.
6 289, 292 (S.D.N.Y. 1988).

7 It is undisputed that Napster could pull the plug, shut down its system, and thereby
8 eliminate any claimed infringement. Sony could have stopped selling the Betamax; Vault could
9 have stopped selling its software. That is not, however, the legal standard for control. *Sony DC* ,
10 480 F. Supp. at 462. Similarly, it is undisputed that Napster has a contractual right to terminate
11 its users for infringing conduct. If this alone were sufficient, every landlord (or ISP) would be
12 deemed to have control and supervision; that is also not the legal standard. Rather, a right to
13 terminate must be combined with an *ability* to police the conduct. Contracts routinely permit
14 termination for copyright infringement; indeed such terms are required by the Digital Millennium
15 Copyright Act (“DMCA”). *See* 17 U.S.C. § 512(i). Plaintiffs would turn Congress’ effort to
16 create safe harbors into a Catch 22—in which compliance alone satisfied the legal standard for
17 vicarious infringement.

18 The control issue turns on whether Napster can identify and prevent particular instances of
19 infringement in its service. The answer is clearly no. As an initial matter, Napster can never
20 know the use to which a shared file is put, and thus cannot control whether a use is fair or not.
21 On this basis alone, Napster cannot control and distinguish between legal or illegal user conduct.

22 Moreover, an ISP has no affirmative duty to police its users, and cannot be expected to
23 monitor individual users until put on notice by the copyright holder of particular alleged
24 infringing materials. 17 U.S.C. § 512(m). For example, AOL’s chat rooms provide exchange of
25 MP3s, including entire albums by hit artists. *See* 1st Pulgram Decl., Exh. W. AOL’s response:
26 “AOL doesn’t monitor its chat rooms but *responds to legitimate outside complaints.*” *Id.*

27 In requesting that Napster “supervise” and exclude every copyrighted file other than those
28 for which it has express authorization, Plaintiffs demand the impossible. Napster cannot identify

1 all the copyrighted music in the universe. *See* Kessler Decl. ¶¶ 30-31; *see also* Tygar Rep. 29,
2 37-47. Indeed, Plaintiffs cannot even identify the works in which *they* claim rights, and have
3 refused, despite repeated requests, to give Napster a list of those recordings. As Mr. Frackman
4 told the Court:

5 “We’re talking more than hundreds of thousands—probably millions, going
6 back 40, 50 years. At best, these companies have disparate catalogues, . . .
7 most of the files listed on Napster . . . are by individual single recording. And
8 an album may contain ten or fifteen different ones. So you’re talking about a
9 multiple of ten of that, so maybe ten million [recordings].”

10 Hearing of 5/15/00 at 14:23-15:9. Plaintiffs point to a website that lists 2.5 *million* recorded
11 songs. Yet, even using that site, Plaintiffs needed two teams of over 50 people and thousands of
12 hours just to determine the status of 1150 works they selected at random from Napster. Goldberg
13 Decl. ¶ 6, Exh. A, and ¶ 8, Exh. C. And, even then, Plaintiffs admittedly failed to reach closure
14 on over 10 % of those songs, and made errors as to others. *Id.* Determining the intricate
15 combination of copyrights in sound recordings and musical compositions is tricky, detailed, and
16 individualized. Olin Decl. ¶¶ 13-15. Importantly, and there are millions of MP3 files—not
17 1150—shared on Napster.

18 In sum, were Napster or any other ISP required affirmatively to identify and exclude all
19 copyrighted materials, there could be no file sharing, and indeed, no World Wide Web. Tygar
20 Rep. at 35-36. An ISP like Napster, which provides a directory service through which users
21 choose which of millions of messages and files to exchange, cannot control each user’s use. *Id.*
22 There is nothing that resembles an agency relationship giving Napster the ability to supervise its
23 users’ conduct.

24 Nor does Napster receive a direct financial benefit from any alleged infringing activity.
25 Plaintiffs argue that the infringing activities enhance the attractiveness of Napster, but ignore the
26 “draw” of Napster’s many patently non-infringing uses. Generalized financial benefit not tied to
27 directly to infringing acts does not give rise to vicarious liability. *RTC*, 907 F. Supp. at 1379.

28 **VII. EQUITABLE DEFENSES BAR PLAINTIFFS FROM OBTAINING INJUNCTIVE RELIEF.**

In addition to failing to prove their claims of contributory infringement, Plaintiffs’

1 conduct over a period of years bars them from obtaining any relief under a variety of equitable
2 defenses.

3 **A. Plaintiffs' Misuse Of Copyright Bars Their Claim Against Napster.**

4 **1. The Facts Supporting Misuse.**

5 Plaintiffs and the RIAA have known of the existence of software for creating MP3 files
6 for years, and have known that making MP3s from CDs was the most prevalent means by which
7 sound recordings became available for transfer over the Internet in the first place, yet Plaintiffs
8 have failed to take any actions to stop or even slow its widespread proliferation. Conroy
9 Dep. 13:16-14:4; Creighton Dep. 19:4-20:1; Eisenberg Dep. 74:11-74:13; Kenswil Dep. 18:25-
10 19:14; Vidich Dep. 39:10-39:14; Creighton Dep. 63:22-64:9.

11 Plaintiffs' stance on MP3 encoding software has extended beyond mere acquiescence to
12 active formation of partnerships with and investment in companies that direct consumers to MP3
13 encoding software that will enable them to transfer music files over the Internet.²¹ Sony
14 Corporation of America, which owns Plaintiff Sony Music Entertainment, markets a portable
15 listening device called the VAIO Music Clip that plays MP3 files, regardless of whether the files
16 were made with the authorization of the copyright holders.²² Eisenberg Dep. 44:5-7. Indeed,
17 Sony's advertising encourages its customers to "Log-on and download ATRAC3, MP3 or WAV
18 files from your favorite music web sites." Eisenberg Dep. 27:8-10; 40:25-41:6, Exh. 220. While
19 Sony Music now claims that Napster is harming its bottom line, Sony Electronics is seeking to
20 profit from the vast number of MP3s currently available on the Internet.

21 Plaintiffs had ample reason to permit and encourage proliferation of encoding software
22 and MP3 files on the Internet. Primarily, Plaintiffs did not believe that MP3s hurt their sales. A
23 study conducted by Warner in 1998 concluded that the availability of MP3s on the Internet had
24 "no impact on sales," that copying of music onto cassettes had dropped 18% among the 18 to 24

25 ²¹ Each Plaintiff has an investment in Listen.com, and several have partnerships with music
26 websites. 1st Pulgram Decl., Ex. L; Conroy Dep. 41:10-42:12; Eisenberg Dep. 135:2-24.
27 Listen.com, like several other online partners of Plaintiffs, provides links to applications designed
28 *solely* for ripping sound recordings from CDs to MP3s. Conroy Dep. 49:22-51:7, Exh. 295.

²² The VAIO Music Clip is designed to play songs in either MP3 format or Sony's
proprietary compaction technology format called ATRAC3. Sony has released only 50 songs in
the U.S. in the ATRAC3 format and obviously relies upon the existence of free MP3 files on the
Internet to promote sales of the \$400 device. Eisenberg Dep. 44:2-46:5.

1 age group, and that “MP3 is shift in copying [sic] among group that has traditionally copied
2 music.” Vidich Dep. 103:20-104:20, Exh. 278 at T3086. Another Warner study in 1999,
3 following the release of a Tom Petty track in MP3 format on the Internet prior to the album’s
4 street release, concluded that “it is clear that the first week sales (of the new album) were
5 considerably higher than the first week for Petty’s previous album, *She’s The One*. Moreover,
6 consumers were favorable about their downloading experiences and reported positive intent to
7 purchase the album.” Vidich Dep. 132:24-133:9, Exh. 279 at T 3122-23. The report
8 recommended future free online releases of tracks before an album release. *Id.* Similarly, a
9 UMG survey of people who download MP3 files found that 93 % of the respondents indicated
10 they purchased *more* CDs as a result of downloading MP3 files. Kenswil Dep. 110:22-111:15.²³

11 2. The Legal Standard For Copyright Misuse.

12 The Ninth Circuit has held that attempts such as Plaintiffs’ to use the limited monopoly
13 rights bestowed on a copyright holder to control competition in an area outside the scope of the
14 copyright constitutes copyright misuse—an affirmative defense that bars the copyright holder
15 from enforcing its copyright unless and until its misuse is “cured.” *Practice Management Info.*
16 *Corp. v. American Medical Ass’n.*, 121 F.3d 516, 521 (9th Cir. 1997), *as amended* 133 F.3d 1140
17 (9th Cir. 1998); *see also Alcatel USA v. DGI Tech.*, 166 F.3d 772 (5th Cir. 1999); *QAD, Inc. v.*
18 *ALN Assocs., Inc.*, 770 F. Supp. 1261, 1266-1270 (N.D.Ill. 1991) (copyright misuse may be found
19 based on attempts to use legal proceedings to extend a copyright improperly), *aff’d*, 974 F.2d 834
20 (7th Cir. 1992). The Ninth Circuit takes a broad view of misuse under which copyrights may not
21 be enforced if they are being used in any manner that impedes the “copyright system’s goal of
22 promoting the arts and sciences by granting temporary monopolies to copyright holders.”
23 *Practice Management*, 121 F.3d at 518, 521. *Practice Management* found it a misuse to attempt
24 to extend the copyright monopoly in a copyrighted code system for medical terminology by
25 licensing it to a third-party under the condition that the third-party would not use competitors’

26 ²³ The zenith of hypocrisy is the position taken by Metallica, which piously claims now that
27 its money is being stolen by Napster’s users. Not only did the band members themselves copy
28 music rampantly in days before they were wealthy, but in August of 1997, when specifically
advised that Metallica songs were being encoded into MP3 files and transferred via the web, they
stated succinctly, “We don’t give a f ***.” Ulrich Dep. 39:24-42:25, Exh. 373.

1 products. *See also Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978-79 (4th Cir. 1990)
2 (exclusive licensing provision was copyright misuse because it extended copyright holder’s
3 control beyond scope of copyrights by discouraging licensees from developing their own
4 competing products).

5 **3. The Conduct Which Gives Rise To The Misuse.**

6 Like the copyright holders in *Practice Management* and *Lasercomb*, Plaintiffs’ legal
7 maneuvering against Napster is less for enforcing intellectual property rights than to control
8 (1) the flow of competing unsigned artists’ music into the electronic marketplace, and (2) the
9 means of and business model for distributing music over the Internet.

10 On the first point, Plaintiffs admit that only 2% of all recording artists are signed to the
11 “major” labels. Vidich Dep. 94:13-96:3. Their strategy is to focus the collective ear of the
12 American public on a small segment of recording artists. Indeed, Paul Vidich acknowledged that
13 by opening mass distribution paths to unsigned artists, the Internet will make the major label’s job
14 of differentiating their own catalog more difficult and more expensive:

15 I see no benefit to the record companies from the Internet in lowering costs
16 in that category [marketing and A&R]. Payments to artists, which have
17 been rising steadily for 30, 40 years aren’t being affected in any way by the
18 Internet other than *increased competition because of lower barriers of*
19 *entry. . . . I see it being not easier but harder to differentiate artists in an*
environment where you said 50,000 artists have the ability to post their
music and get them to consumers. Not only are you now differentiating all
the artists signed but all the artists unsigned.

20 2d Pulgram Decl., Exh. P (emphasis added); Kenswil Dep. [MP3.com] 179:4-180:1. Plaintiffs’
21 documents reflect fear of entities like Napster who are “downstream players . . . positioning
22 themselves to dominate the contact with the customer”—especially because Plaintiffs know that,
23 with the growth of the Internet, the “majors’ share of the music market is likely to decline.” 1st
24 Pulgram Decl., Exh. T, at E0830-E0848. Plaintiffs’ efforts to use their copyright monopolies to
25 shut down Napster and thereby stifle competition from unsigned artists is clear copyright misuse
26 as the doctrine is recognized by the Ninth Circuit.

27 On the second point, Plaintiffs have recognized belatedly that Napster’s innovative file
28 sharing technology represents an effective system for electronic music distribution. Having

1 recognized that, they now seek to extend the copyright monopoly in order to eliminate or control
2 that form of distribution for themselves. Indeed, UMG had its own plans for “viral” distribution
3 of its music, i.e., passing music files between consumers, which increases the market reach of the
4 product without significant additional marketing costs. Kenswil Dep. 44:20-46:4, Exh. 257. In
5 an internal document less than two months old, UMG’s Global E group stated that UMG’s
6 “[g]oal is not just to equal Napster et al, but to surpass them.” Kenswil Dep. 59:15-60:3; Exh. 258
7 at U0840. Explaining this statement, Lawrence Kenswil, President of UMG’s Global E group,
8 stated that UMG wants to “move more files than Napster is now moving.” Kenswil Dep. 78:6-7.
9 UMG’s documents also suggest a plan to make Napster an affiliate *after* this litigation concludes.
10 Kenswil Dep. 75:4-11, Exh. 258 at U0801. Kenswil explained that Napster, under UMG’s
11 control, would “provide the consumers with a front end for purchasing our content.” Kenswil
12 Dep. 75:9-11, Exh. 259.

13 In a candid admission, Kenswil, testifying on behalf of UMG, explained that UMG had no
14 interest in pursuing a model where the sound recording copyright holders would receive a royalty
15 for the sale of each unit of ripping software, because “royalties would be totally inadequate to
16 compensate us for our losses being caused by the actions and therefore we did not want to agree
17 to a system that would allow unfettered home digital copying in return for the royalty.” Kenswil
18 Dep. 33:7-33:19. The reason the industry does not want a royalty-based model is due to the way
19 in which the industry pays the artists. If a CD is sold, the record industry pays a royalty of
20 approximately 12-18 percent to the artist. Olin Decl. ¶ 10. However, for uses such as licensing,
21 the industry pays 50% of the licensing fee to the artist. *Id.* Thus, the fundamental purpose of the
22 Plaintiffs’ attempt to use its copyright monopolies to eliminate the file sharing model for
23 distribution is simple: If they can control the method of distribution, they can control the business
24 model for that distribution. Their business model has one powerful purpose: to reduce the
25 amounts otherwise payable to artists for those types of users. Olin Decl. ¶ 10.

26 In sum, Plaintiffs’ use of anticompetitive litigation against new technologies and emerging
27 artists, cloaked as an effort to preserve copyrights, attempts to restrain the breadth of useful arts
28 by limiting the distribution of artistic works that Plaintiffs do not control. As such, the defense of

1 copyright misuse (or unclean hands) precludes Plaintiffs from using their limited copyright
2 monopolies to shut down Napster’s availability to the 98 % of artists it does not control, which is
3 “violative of the public policy embodied in the grant of a copyright.” *Practice Management*,
4 121 F.3d at 521, citing *Lasercomb*, 911 F.2d at 977.

5 **B. Plaintiffs Have Waived Any Right To Claim Direct Infringement**

6 The right of Napster users to share files also exists by implication or by waiver. An
7 implied license, for which no additional fee need be paid, can arise for any use that follows from
8 a grant of permission to use a work combined with a failure to object to subsequent uses, *see*
9 *Jacob Maxwell, Inc. v. Veek*, 110 F.3d 749, 752 (11th Cir. 1997), or from any use that naturally
10 follows from a rights holder’s encouragement to use the work in a particular manner, *Herbert v.*
11 *United States*, 36 Fed. Cl. 299, 310 (Fed. Cl. 1996); *see also Effects Assoc., Inc. v. Cohen*,
12 908 F.2d 555 (9th Cir. 1990) (a nonexclusive license may be implied from conduct). Waiver of
13 the rights of a copyright holder may occur through statements or conduct by the copyright holder
14 that are inconsistent with these rights. “Waiver is the intentional relinquishment of a known right
15 with knowledge of its existence and the intent to relinquish it.” *United States v. King Features*
16 *Entertainment*, 843 F.2d 394, 399 (9th Cir. 1988). Waiver may be established through evidence
17 of statements or conduct inconsistent with the right being waived. *Id.*; *Zimmerman v. Jenkins*,
18 165 F.3d 1026, 1029 (5th Cir. 1999).

19 As discussed above, Plaintiffs have encouraged Internet users to download MP3 files from
20 their affiliated websites; to encode Plaintiffs’ works to MP3 format using encoding software; and
21 to obtain MP3s from the Internet for use in digital players. Vidich Dep. [MP3.com] 47:10-14;
22 Kenswil Dep. 54:8-56:19; Vidich Dep., Exh. 227; Eisenberg Dep., 44:5-48:10, Exh. 227; Conroy
23 Dep., Exh. 295, Cottrell Dep. 141: 24, 180:7-181:10. Plaintiffs have expressed to the public that
24 individuals will not be sued for obtaining MP3 copies of Plaintiffs’ works from online sites.
25 Creighton Dep. 81:22-84:22, Exh. 283. By encouraging the creation and copying of MP3 files
26 and by making such public statements, Plaintiffs have impliedly licensed such conduct, and have
27 waived the right to sue for it. *Sony*, 464 U.S. at 433 (1984) (anyone authorized to use a work in a
28 particular way is not an infringer with respect to such use).

1 **VIII. AN INJUNCTION AGAINST NAPSTER’S DIRECTORY WOULD VIOLATE**
2 **THE FIRST AMENDMENT.**

3 Napster’s directory provides users with information about the files that Napster users have
4 made available for sharing at any given moment. The injunction that Plaintiffs seek would
5 effectively require Napster to take down its directory. The law is clear that such directories are
6 entitled to First Amendment protection. *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977);
7 *Princeton Community Phone Book v. Bate*, 582 F.2d 706, 710-11 (3d Cir. 1978) (“a listing placed
8 in a book or directory . . . is entitled to the same protection as an advertisement placed in a
9 newspaper.”). The fact that the Napster directory is electronic and resides on the Internet does
10 not change the analysis. *RTC*, 907 F. Supp. at 1383.

11 Among other things, Plaintiffs seek an injunction that would prohibit users of Napster
12 from “providing on its Service (by hyperlink or other means) or directing or referring users of its
13 Service, to an index listing or identifying Copyrighted Music made available by other users of the
14 Service for copying, downloading, uploading, transmission or distribution.” MPA at iii.
15 Plaintiffs thus do not simply ask this Court to enjoin the further dissemination that allegedly
16 infringes Plaintiffs’ copyrights but request an outright prohibition on the operation and
17 publication of the Napster directory, which itself contains no copyrighted material.

18 This request would prevent the listing of the name and location of virtually any MP3 file
19 and would silence the entire Napster community, violating not only Napster’s free speech rights,
20 but those of its users as well. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of*
21 *Boston*, 515 U.S. 557, 569-70 (1995) (“First Amendment [protection does not] require a speaker
22 to generate as original matter, each item featured in the communication.”); *RTC*, 907 F. Supp.
23 at 1383 (on-line bulletin board service “play[s] a vital role in the speech of [its] users”); *see also*
24 *Lessig Rep.* ¶¶ 39-40. Plaintiffs have virtually no likelihood of success on this claim because the
25 relief they seek is forbidden by the U.S. Constitution.

26 Plaintiffs do not have the right to exclude the 98 % of artists who are unsigned from using
27 Napster to exercise their First Amendment rights. Even if Plaintiffs think such artists are “ill-
28 advised” in permitting file sharing on Napster, it does “not change the fact that they have created

1 a substantial market for a paradigmatic noninfringing use of [Napster's] product.” *Sony US*, 464
2 U.S. at 446 n. 28.

3 Moreover, the relief that Plaintiffs seek is particularly egregious because it would silence
4 the Napster community in advance of any ruling by the Court confirming that Napster's directory
5 is protected by the First Amendment.²⁴ Courts have uniformly viewed any injunction that could
6 act as a prior restraint on free speech as presumptively invalid. *See, e.g., Lowe v. SEC*, 472 U.S.
7 181, 234 (1985) (Justice White concurring), *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994)
8 (Justice Blackmun as Circuit Justice) (staying preliminary injunction), *RTC*, 907 F. Supp. at 1383
9 (denying preliminary injunction and finding that requiring bulletin board operators to prescreen
10 postings for possible copyright infringement “would chill their users’ speech.”).

11 **IX. PLAINTIFFS HAVE FAILED TO SHOW IRREPARABLE HARM.**

12 The law is clear that if Napster can show that Plaintiffs have either suffered no injury or
13 that the injury is de minimis, no injunction can issue. *Cadence*, 125 F.3d at 829. Despite
14 Plaintiffs’ claims, the greater weight of the evidence is that the recording industry has suffered no
15 harm and in fact has benefited from Napster’s presence.

16 **A. Sales Of CDs Are Rising, Not Falling, Since Napster’s Appearance.**

17 Far from falling due to Napster, sales of CDs are at record levels, up 8% through May
18 2000 compared to the same quarter last year, when Napster was not operating. *Fader Rep.* ¶ 20.
19 The only contrarian is Mr. Fine, who, at the request of the RIAA, has penned up a theory of
20 decreased sales at supposed “college record stores” from Q1 1997 through Q1 2000. *Fine Rep.* 1-
21 2. Fine’s selection of stores makes no sense, *Fader Rep.* ¶ 32, but even among his odd sample,
22 sales fell the most from Q1 1998 to Q1 1999—before Napster even existed, and certainly for
23 reasons other than Napster. The report fails to analyze actual causation of the reduction in sales
24 at record stores—a fatal defect under *McGlinchey v. Shell*, 845 F.2d 802 (9th Cir. 1988), and
25 ignores the dramatic increase in online record sales to students and the impact of new stores being
26 opened. *See Fader Rep.* ¶¶ 29-35. The Fine Report is clearly inadmissible and deserves no

27 ²⁴ “The special vice of prior restraint is that communication will be suppressed, either
28 directly or by inducing excessive caution in the speaker, before an adequate determination that it
is unprotected by the First Amendment.” *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human
Relations*, 413 U.S. 376, 390 (1973).

1 weight. Moreover, at deposition Fine admitted that he had no facts to support his claim that
2 Napster causes injury to Plaintiffs. Fine Dep. 68:16-21.

3 **B. Independent Studies Have All Confirmed Napster’s Direct And Substantial**
4 **Positive Effect On Music Purchases.**

5 Five independent studies have all confirmed Napster’s direct and substantial positive
6 effect on music purchases and a sixth finds no significant reduction in CD purchases. Fader Rep.
7 ¶¶ 36-45. That broad body of consensus is powerful market proof that Napster’s only present
8 effect on Plaintiffs has been strongly positive as users sample music and buy more. *Id.*

9 **C. Despite Dr. Jay’s Conclusions To The Contrary, The Data In Dr. Jay’s**
10 **Report Fall Into Line With The Independent Studies And Dr. Fader’s Study.**

11 Seeking to find users who spent less on music because of Napster, Dr. Jay targeted only
12 college students for her study, and was forced to acknowledge that her study is not “projectable”
13 to Napster users as a whole, Jay Dep. at 23:5-25:9, some 75% of whom are outside her sample.
14 Fader Rep. ¶¶ 48-51. Given Dr. Jay’s concession that she could not project her sampling to the
15 general population at issue, no factfinder could reasonably make such a projection, as a matter of
16 law. *Winning Ways v. Holloway Sportswear, Inc.*, 913 F. Supp. 1447, 1467 (D. Kans. 1996)
17 (“college only” sample inadmissible under *Daubert*).

18 Regardless, even Dr. Jay’s data, fairly interpreted, provide compelling evidence that use
19 of Napster has increased purchases of music. Fader Rep. ¶ 64. Dr. Jay asked respondents why
20 they used Napster, and then whether it affected their music purchasing. Jay Rep. 2-3. She
21 concluded that any respondent who mentioned “free music”—even if referring to free sampling,
22 or free format shifting—was a lost sale for Plaintiffs. Fader Rep. 58. Jay so tortured her
23 categorizations that, even as to users who affirmatively answered that Napster *increased* their
24 purchases of music, she counted them as *displaced* sales. Jay Dep. at 59:1-4. In fact, if Jay’s data
25 are fairly sorted, it leads to the same conclusion found in the other studies, which conclude that
26 Napster has increased sales. Fader Rep. ¶ 64.

1 **D. The Evidence Demonstrates That In The Months Before A Merits Trial**
2 **Napster Will Have A Beneficial Effect On Plaintiffs’ Anticipated Entry Into**
3 **The Digital Download Market.**

4 Far from blocking Plaintiffs’ entry into the digital download market, Napster’s presence is
5 paving the way. See Hall Report at ¶¶ 36-49. Napster is building consumer awareness and
6 acceptance of downloading music, building demand, and providing an inventory of music that is
7 playable by the new SDMI-compliant players like the Rio and Sony Vaio, which play both MP3
8 and other files in secured formats. *Id.* at 45-49. This inventory is necessary to generate consumer
9 desire to purchase these players, and consumers must, in turn, own such players to play (and buy)
10 digital downloads. *Id.* at 47-48. The real data show that freely available music is seeding the
11 market. Moreover, since, pending trial, the market for CDs (\$14 billion in the United States)
12 dwarfs the market for digital downloads, 1st Pulgram Decl., Exh. T at E0832, E0834; Cottrell
13 Dep. 120:12-121:8, Exh. 31, even a minimal uptick in CD buying due to sampling would offset
14 any loss of download revenues.

15 While Plaintiffs rely on Dr. Teece’s report to forecast harm, Dr. Teece relies on literally
16 nothing. Dr. Teece had not seen any of Plaintiffs internal documents of Plaintiffs regarding plans
17 for the digital download market and was unaware of specifics regarding Plaintiffs’ plans for
18 pricing proposals, encryption, standards-setting, download changes, or profiling. Teece Dep.
19 at 70:5-10; 78:15-19; 79:4-13; 80:24-81:6; 92:13-16; 85:12-17; 88:18-21; 89:21-15. Teece
20 reviewed no data other than Plaintiffs’ papers as to the actual use, or impact, of Napster in the
21 marketplace. Teece Dep. at 16:18-22. Teece simply speculates that “it should not be surprising if
22 Napster’s presence undercuts the willingness of consumers to pay for music.” Teece Decl. at 14.
23 As Dr. Hall points out, that speculation by Dr. Teece runs counter to well-established economic
24 theory and to well-documented historical examples. Hall at ¶¶ 38-44, 50-54. The two
25 “problems” Teece identified in his report as exacerbated by Napster—the difficulties of adjusting
26 consumers to a new format and new method of distribution, Teece Decl. at 14—are precisely
27 what the Napster service is facilitating at no cost for Plaintiffs, Hall Rep. ¶ 49.

28 **X. THE BALANCE OF HARDSHIPS TIPS SHARPLY AGAINST AN INJUNCTION.**

 The law is clear that a preliminary injunction must be denied if the balance of hardship on

1 the defendant is too great. *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1979), *aff'd sub*
2 *nom*, *Stewart v. Abend*, 495 U.S. 207 (1990). Without an injunction, Plaintiffs will suffer no
3 harm. An injunction against Napster could not significantly protect Plaintiffs' intellectual
4 property, as other file sharing programs, such as Scour Exchange, CuteMX, I-Mesh and Gnutella,
5 would expand to take Napster's place. Hall Decl. at ¶¶ 15-19; Barry Decl. ¶ 13. Further, an
6 injunction would do nothing to eliminate the millions of CDs available on the Internet.

7 By contrast, the requested injunction would effectively put Napster out of business. Its
8 irreversible effects on Napster are palpable and certain: closing its service and severing important
9 relationships with investors, its own employees, and users who would rapidly transition to other
10 file-sharing and directory services. Barry Decl. at ¶ 13; Hall Decl. at ¶ 83.

11 Napster's service does not injure Plaintiffs for another reason. By the end of the year, all
12 of Plaintiffs' new music releases—in CD and download—will be SDMI-compliant. Cottrell Dep.
13 99:24-101:4, 114:13-19; Smith Dep. at 54:19-55:14; Vidich Dep. 59:8-62:6; Kenswil 57:21-
14 58:18. Therefore, as to new music produced by Plaintiffs, Napster users will not be able to listen
15 to SDMI-compliant files without permission and thus new music can only be "shared" if payment
16 is made to the Plaintiffs. *Id.*; Kessler Decl. ¶ 36. Finally, the evidence is clear that Napster helps,
17 not hurts, the music industry because it creates a demand for new artists, for new music, and most
18 importantly, has created a demand for "downloadable music," which is exactly what the industry
19 wanted in 1997 when it began encouraging consumers to create MP3 files.

20 **XI. AN INJUNCTION WOULD HARM THE PUBLIC INTEREST.**

21 In every instance in which new technologies have been perceived to threaten the
22 entrenched interests of copyright holders, the law has sided with the technology, and both the
23 public and the copyright holders have benefited. *See supra* at 1-2; Lessig Rep. ¶¶ 26-28. The
24 importance of Napster's technology has been demonstrated by the overwhelming public demand
25 for it, and by the public's use of Napster as a music-finding and community-building tool. Barry
26 Decl. ¶ 6. The public desires convenience, access, immediacy, and an interactive community for
27 music, and there is no need to deprive it of these benefits, especially with no corresponding
28 benefit to the Plaintiffs.

1 Plaintiffs' err in relying on the assertion that copyright is designed to protect the holders'
2 property interest. In truth:

3 "the monopoly privileges that Congress may authorize [under the copyright
4 clause] are neither unlimited or designed to provide a special private
5 benefit. . . . [American copyright law] is not based upon any natural right
6 that the author has in his writings, but upon the ground that the welfare of
the public will be served and progress of science and useful arts will be
promoted by securing to authors for limited periods the exclusive rights to
their writings."

7 *Sony*, 464 U.S. at 429 & n.10.

8 Even if Napster were found liable, the only appropriate ultimate relief in a case seeking to
9 restrict a new technology with noninfringing uses would be a compulsory royalty, not an
10 injunction. *Universal City Studios v. Sony Corp. of Am.*, 659 F.2d 963, 976 (9th Cir. 1981)
11 (stating that a compulsory license might be the appropriate remedy presuming a finding of
12 infringement in *Betamax* case); *see also RIAA v. Diamond Multimedia, Inc.*, 29 F. Supp. 2d 624,
13 633 (C.D. Cal. 1998) (even if Rio player had been infringing, no preliminary injunction could
14 issue where it can be used to record "legitimate music" and is a device with substantial beneficial
15 uses). Because injunctive relief would not be appropriate ultimately, it is entirely improper as an
16 interim remedy.

17 **XII. THE DMCA SHIELDS NAPSTER FROM A BROAD INJUNCTION.**

18 Even if the Court were to find for Plaintiffs, because Napster satisfies the conditions for
19 eligibility under the DMCA safe harbor 17 U.S.C. § 512(d), only a narrow injunction requiring
20 Napster to disable one or more specific users could be issued. 17 U.S.C. § 512(j); Order of
21 May 5, 2000 at 9:14-16 (finding the challenged functions of Napster should be analyzed under
22 § 512(d)).²⁵

23 Napster has satisfied the elements of § 512(d). As discussed above, Napster is not
24 vicariously liable, and thus § 512(d)(2) is satisfied. With respect to knowledge, generalized
25 awareness of users' possible infringing conduct is not sufficient to remove an ISP from the

26 ²⁵ Plaintiffs' contention that the safe harbors do not apply to contributory or vicarious
27 liability is nonsensical. The only possible basis of liability for offering links is contributory or
28 vicarious infringement. *See Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 U.S. Dist. LEXIS
4553, at *6 (C.D. Cal. March 27, 2000). The safe harbor applies when an ISP is liable by means
of referring or linking users to infringing material. *See* 17 U.S.C. § 512(d).

1 statute's safe harbor.²⁶ Upon receipt of a complying notice, Napster has acted expeditiously to
2 block access to the location of the allegedly infringing activity by terminating the applicable user.
3 *See* 17 U.S.C. § 512(d)(3); Kessler Decl. ¶¶ 22-24. Congress made the judgment that no more is
4 required, and indeed legislated that the safe harbors do *not* depend upon an ISP "monitoring its
5 service or affirmatively seeking facts indicating infringing activity." 17 U.S.C. § 512(m); *see*
6 *also* S. Rep. 105-190 (1998) at 55.

7 The Court previously found an issue of fact precluding summary adjudication as to
8 Napster's compliance with § 512(i). Napster respectfully submits that the facts now support a
9 finding for present purposes that Napster complies with § 512(i). Section 512(i) requires that to
10 be eligible for DMCA protection, a service provider must adopt, reasonably implement, and
11 inform account holders of a policy to terminate the accounts of repeat infringers. 17 U.S.C.
12 § 512(i).

13 Napster complies. It has publicly posted its policy on its website. Parker Decl. ¶ 8,
14 Exh. D; Kessler Decl., ¶ 17; Barry Decl., ¶ 10. The fact that Napster reduced its policy to writing
15 in February, 2000, and expanded its description to the public of its policy at that time, even if it
16 arguably raises an issue as to immunity from damages before that date, nonetheless satisfies
17 DMCA requirements and precludes an injunction at this time. Moreover, the documents confirm
18 that Napster had a policy to terminate alleged infringers since at least August of 1999. Parker
19 Decl. ¶ 7, Exh. C.²⁷ Napster terminates a user upon any proper notice of alleged infringement and
20 makes no inquiry as to the validity of the claim.²⁸ Moreover, Napster has, since February,
21 strengthened its method of terminating user accounts, now disabling the user name and password
22 and placing a code on the user's computer to prevent anyone from using that computer to access

23 ²⁶ "Awareness of facts and circumstances" may be enough, but does not occur merely by
24 virtue of the *content* being shared, but only where the ISP observes "red flags," such as
25 descriptive terms indicating that works at a specific location are infringing, and nevertheless links
26 to or indexes the material. *See* S. Rep. No. 105-190 (1998), at 48. Plaintiffs allege no such facts.

27 ²⁷ Plaintiffs have taken Kessler's testimony out of context to claim that no policy existed.
28 The full text of his testimony shows the existence of such a policy. Kessler Dep. at 189:17-194:4.
29 Plaintiffs previously cited Kessler's testimony to assert that no policy was communicated to
30 users. That testimony, however, stated that Napster's detailed *internal* policy had not been
31 communicated, not that no policy had been communicated. Kessler Dep. at 191:1-192:16.

32 ²⁸ Plaintiffs misstate the record in stating that no action was taken as to 12,000 file names
33 provided to Napster. To the contrary, every user hosting any of those files of which Napster
34 received a complying notice was terminated. Kessler Decl. ¶ 22.

1 Napster under *any* account name. Kessler Decl. ¶¶ 23-24. This method of blocking is more
2 technologically effective than blocking by IP address, and cannot be readily circumvented. Tygar
3 Rep. at 51-52, 55; *see also* Berschadsky, *supra* at 128.²⁹ The safe harbors require only that a
4 policy be adopted, reasonably implemented, and communicated to users. Napster has done so,
5 and has terminated 700,000 users for whom it received notices under the DMCA. Kessler Decl.
6 ¶ 20. This conduct is fulfills the Congressional intent of informing users of “a realistic threat of
7 losing [their] access” if they engage in infringing conduct. S. Rep. 105-190 (1998) at 52.

8 **XIII. NO INJUNCTION CAN ISSUE BECAUSE PLAINTIFFS FAILED TO PROVIDE** 9 **PROOF OF REGISTRATION OF THE COPYRIGHTS.**

10 Under 17 U.S.C. § 411(a), “no action for infringement of the copyright in any work shall
11 be instituted until registration of the copyright claim has been made.” “Copyright registration is
12 not a prerequisite to a valid copyright, but it is a prerequisite to a suit based on copyright.”
13 *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1211 (9th Cir. 1998) (citation omitted). There
14 are exceptions to § 411(a)’s proof of registration requirement, but as none of them apply, it would
15 undermine the mandate of § 411(a) if, by merely providing the proof of registration of a few
16 selected works, Plaintiffs were able to obtain relief for millions they cannot identify. Insofar as
17 Plaintiffs seek relief for multiple works without both specifying the works with particularity and
18 providing proof of their registrations, their claim is fatally defective. *Cole v. Allen*, 3 F.R.D. 326,
19 237 (S.D.N.Y. 1942).

20 **XIV. NO INJUNCTION MAY ISSUE WITHOUT AN APPROPRIATE BOND.**

21 A prerequisite for any injunction is a bond sufficient to compensate Napster for all
22 damages it may suffer if the injunction were later reversed or vacated. Fed. R. Civ. P. 65(c).
23 As Napster’s recovery would be limited to the amount of the bond, the bond must be set to an
24 amount adequate to cover all potential injury pending trial. *Lewis Galoob Toys*, 16 F.3d at 1036.
25 Plaintiffs’ own expert has recognized that Napster has value in the tens of millions of dollars,

26 ²⁹ Accepting actual names and addresses of users would not enhance Napster’s ability to
27 block repeat infringers. Users can, and do, readily give false information to all manner of ISPs.
28 Tygar Rep. at 52-53. Moreover, such information, even if true, would not assist Napster in
blocking access. *Id.* The DMCA recognizes the sensitivity and privacy of user information even
though the conduct of that user may constitute an infringement. 17 U.S.C. § 512(m) (ISPs not
required to monitor their service); *see also* 17 U.S.C. § 1201(i)(D).

1 placing that value at somewhere between \$60 and \$80 million. Teece Exp. Rep. at 11-12. In
2 reality, Napster's value is substantially more than the \$63 million set by the marketplace in its last
3 round of venture funding. Hall Report at ¶¶ 78-87; *see also* Barry Decl. ¶ 7. When comparing
4 Napster to Internet companies with comparable numbers of active users, Napster's market value
5 is between \$1.5 and \$2 billion. Barry Decl. ¶¶ 7-8. Given the serious probability that a
6 preliminary injunction would destroy Napster's business, the appropriate bond amount would be
7 at least \$500 million and possibly as much as \$1.5 billion.

8 **XV. CONCLUSION**

9 For all the foregoing reasons, the preliminary injunction should be denied.

10
11 July ____, 2000

Respectfully submitted

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