

Appeal No. 00-16401

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

NAPSTER, INC., a corporation,
Petitioner/Appellant,
v.
A & M RECORDS, INC., a corporation,
(For Continuation of Caption See Next Page)

NAPSTER, INC., a corporation,
Petitioner/Appellant,
v.
JERRY LEIBER, individually and doing business as JERRY LEIBER MUSIC;
(For Continuation of Caption See Next Page)

Appeal from the United States District Court
for the Northern District of California,
San Francisco Division Jointly Heard In
Civil Nos. C 99-5183 MHP (ADR) (A&M Records, et al.) and
C 00-0074 MHP (ADR) (Leiber, et al.)
Judge Marilyn Hall Patel

**APPELLEES' OPPOSITION TO APPELLANT NAPSTER INC.'S EMERGENCY
MOTION FOR STAY PURSUANT TO RULE 27-3 AND MOTION TO EXPEDITE
APPEAL**

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WARNER BROS. RECORDS INC., a corporation,

Respondents/Appellees.

MIKE STOLLER, individually and doing business as MIKE STOLLER MUSIC; and FRANK
MUSIC CORP., on behalf of themselves and all others similarly situated

Respondents/Appellees.

CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1.

Respondent POLYGRAM RECORDS, INC. has been renamed UMG RECORDINGS, INC.

Respondents A&M RECORDS, INC., GEFLEN RECORDS, INC., ISLAND RECORDS, INC., MCA RECORDS, INC., and UNIVERSAL RECORDS, INC., were merged into UMG RECORDINGS, INC. on November 30, 1999. They have no subsidiaries that have issued shares to the public. Their parent corporations are Universal Studios, Inc., the Seagram Company, Ltd., a publicly traded corporation, and Matsushita Electric Industrial Co., Ltd., also a publicly traded company.

Respondent SONY MUSIC ENTERTAINMENT INC.'s parent companies are Sony Music Holding Inc., Sony Software Corp., Sony Corporation of America, Sony America Holding Inc., and Sony Corporation (Tokyo), a publicly held company.

Respondent ATLANTIC RECORDING CORPORATION's parent companies are Warner Bros. Records Inc., Warner Communications Inc., Time Warner Cos. Inc., and Time Warner Inc., a publicly traded company. (Time Warner Inc. has announced plans to merge with America Online, Inc. This transaction, which is subject to regulatory approval, has not yet been consummated.)

Respondent CAPITOL RECORDS, INC.'s parent corporations are EMI Group North America Holdings Inc. and EMI Group plc, a publicly traded company.

Respondent ELEKTRA ENTERTAINMENT GROUP, INC.'s parent corporations are Warner Communications Inc., Time Warner Cos. Inc., and Time Warner Inc., a publicly traded company.

Respondent ARISTA RECORDS, INC.'s parent corporations are Bertelsmann Music Group, Inc., Bertelsmann, Inc., and Bertelsmann AG.

Respondent SIRE RECORDS GROUP, INC. has been renamed LONDON-SIRE RECORDS INC. Its parent corporations are Warner Music Group Inc., Warner Communications Inc., Time Warner Cos. Inc., and Time Warner Inc., a publicly traded company.

Respondent VIRGIN RECORDS AMERICA, INC.'s parent corporations are EMI Group North America Holdings Inc., and EMI Group plc, a publicly traded company.

Respondent WARNER BROS. RECORDS INC.'s parent corporations are Warner Communications Inc., Time Warner Cos. Inc., and Time Warner Inc., a publicly traded company.

Respondent FRANK MUSIC CORP. is wholly owned by MPL Communications, Inc.

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I. INTRODUCTION

The District Court found that plaintiffs demonstrated a "strong" and "substantial" likelihood of success on every element of contributory and vicarious infringement and each of Napster's defenses. The District Court enjoined Napster from infringing plaintiffs' copyrighted works after finding that Napster was actively trying to accomplish the goals laid out in its own early planning documents -- to "usurp" and "undermine" the record industry, "unhindered by cumbersome copyright schemes." Its declared goals also included the following: "[S]eize control of digital distribution. . . . Napster brings about death of the CD . . . Record stores (Tower Records) obsoleted." To that end, Napster expressly designed a system to make available to millions of users unlimited copies of what Napster itself accurately labeled "pirated music."

Napster's present attempt to delay this matter fits its pattern in this litigation. Its motion rests on mischaracterizations of both the evidentiary record and the District Court's ruling, and on the fundamental fallacy that the injunction will cause Napster irreparable injury. Napster's claim that the injunction would put it out of business is both untrue and legally irrelevant. The law does not permit a company deliberately built on copyright infringement to complain that its business will be devastated if it is forced to stop trafficking in pirated music.

II. THE STANDARD OF REVIEW

Napster has the burden of demonstrating that the District Court abused its discretion in issuing the preliminary injunction. Religious Technology Center, Church of Scientology Int'l, Inc. v. Scott, 869 F.2d 1306, 1309 (9th Cir. 1989). This Court applies the same standard employed by district courts when considering a motion for a preliminary injunction. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). The Court may employ two interrelated legal tests: the party seeking the stay must show both a probability of success on its appeal and

the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in its favor. *Id.* The District Court's factual findings underlying its decision must be upheld unless "clearly erroneous." Fed. R. Civ. P. 52(a).

III. AN ORDER STAYING THE PRELIMINARY INJUNCTION WOULD SEVERELY HARM PLAINTIFFS

Napster is facilitating copyright infringement on a massive scale, causing an entire industry of music copyright owners -- artists, songwriters, record companies, and music publishers -- extensive harm. Given Napster's explosive, unprecedented growth, that harm will increase dramatically if the District Court's Order is stayed.

· Every *minute*, 14,000 recordings are downloaded using the Napster system (see generally Olkin Rpt., p.6); every day, using Napster's own numbers, between 12 million and 30 million downloaded copies of recordings are made on the Napster system.

· When this action was commenced in December 1999, there were only some 200,000 Napster users. By now, the number of Napster users has grown, by its estimate, to 20,000,000; by the end of this year, unless enjoined, Napster estimates that it will have 75,000,000 users.¹ Richardson Depo. 318:19-319:1, Ex. 166 at 2725.

¹ Napster's allusion to delays in bringing this motion (a point it did not argue below) is, at best, disingenuous. When plaintiffs filed this action they concurrently sought expedited discovery for the expressly stated purpose of seeking preliminary injunctive relief. The District Court set a hearing on plaintiffs' request for expedited discovery for January 31, 2000. After the

· Napster estimates that every second, 100 users attempt to log on, making available 10,000 files (100 per user). 7/3/00 Kessler Decl. ¶¶ 16, 29.

· ***Virtually every*** recording copied using Napster is subject to federal copyright protection (recordings fixed after February 15, 1972) or state law protection. See 17 U.S.C. §§ 102(a), 301(c). See also, e.g., Cal. Civ. Code § 980. Contrary to Napster's assertions, so too are live concert recordings. 17 U.S.C. § 1101. Plaintiffs' statistical analysis demonstrated that at least 87% of recordings actually downloaded by Napster users are not authorized by their owners. (That number likely is far greater, as only 1.2% of recordings downloaded belonged to Napster's "new artist" program for which it obtained express authorization from the owners.) Olkin Reply Decl.; Hausman Reply Decl.

· All copies are made by anonymous Napster users whose identities are protected by Napster, of innumerable works that Napster cannot (by design) identify. Copyright owners can never get back what they will have lost.

· The copyright proprietors are paid nothing for the use of their works by Napster. They receive no return on their investment in creative activity, while Napster spends nothing to obtain and permit appropriation of plaintiffs' copyrighted works.

· Additionally, plaintiffs' exclusive recording artists, as well as songwriters, music publishers, musicians, and unions integrally involved in creating music receive no

delay caused by Napster's request to file a motion for summary adjudication, which was denied, plaintiffs sought the fastest schedule for the hearing on the preliminary injunction motion. As the Court advised Napster's counsel, "none of this [the preliminary injunction] should come as a surprise to anyone." Tr. 92:3-4.

compensation from Napster or its users.

- Other users of copyrighted music, who compensate the owners for the use of their music, must try to compete with Napster's unfair advantage.

- The copyright owners lose the crucial right to control their copyrighted works -- the planning, marketing, scheduling, and timing of the release of their works, the method of their exploitation -- and the ability to maximize their long-term value.

Napster's motion makes only the barest reference to the District Court's express finding that plaintiffs will suffer irreparable harm without an injunction, or to the extensive supporting evidence. The District Court first held that, having established a strong likelihood of success on the merits in a copyright infringement action, plaintiffs were entitled to a presumption of irreparable harm. Tr. 71,84 (R139, R152). E.g., Micro Star v. Formgen Inc., 154 F.3d 1107, 1109 (9th Cir. 1998), Apple Computer, Inc. v. Formula International Inc., 725 F.2d 521, 525 (9th Cir. 1984). In addition, plaintiffs provided evidence, on which the District Court relied, that the massive copyright infringement facilitated by Napster already has begun to cause plaintiffs serious and growing harm on multiple levels. Thus, the Court expressly found that plaintiffs are likely to be injured by "reduced CD sales and impediments into entry to the digital download market." Tr. 83:21-23 (R151).

(1) The unchallenged evidence clearly showed that the record company plaintiffs have spent vast sums and years of effort preparing to develop legitimate commercial acceptance by consumers to pay for digital downloads of music. Some plaintiffs already have entered this new but extremely important distribution medium; some are about to. Napster is competing directly with plaintiffs in this arena at this crucial time by providing to the same consumers, by means of the same electronic medium, precisely the same recordings -- for free.

(2) The evidence credited by the Court also established the intuitively obvious: plaintiffs are losing sales of CDs because Napster users obtain the same music for free. Given the number of recordings downloaded and Napster's projected growth, this harm is increasing on a daily basis. Plaintiffs' consumer survey, which the District Court found of "far greater use and more probative to the Court" than Napster's survey, established, *inter alia*, that more than four times as many Napster users indicated that such downloading caused them to buy fewer CDs than indicated that downloading on Napster caused them to buy more, Jay Rpt., 3, 18-20 (R407; R424-25); the longer people used Napster, the more songs they downloaded *Id.*, 4, 20-21 (R408; R424-25); and the more they downloaded, the more likely they were to buy fewer CDs *Id.*, 4, 18-20 (R408; R422-24).

(3) Napster is causing a vast number of consumers to believe that free music on the Internet is an entitlement. Teece Rpt., p. 16 (R544); Dreece Decl., ¶ 6; Valenti Decl., ¶ 7; Frackman Decl., Ex. F. Napster encourages literally millions of Napster users, who never would consider taking a CD from a record store without paying, to commit infringement by downloading music from the computer hard drives of strangers without paying. Thus, as one Napster user posted on the Napster website: "We all know it's illegal. We just don't think it's wrong." Frackman Decl., Ex. K, at p. 8. This view subverts the very purpose of copyright law, to the long term detriment of the public. See Jackson v. Axton, 25 F.3d 884, 890 (9th Cir. 1994).

IV. NAPSTER HAS NOT SHOWN A PROBABILITY OF SUCCESS ON THE MERITS, OR EVEN THAT SERIOUS LEGAL QUESTIONS ARE RAISED.

The District Court provided a detailed ruling that will soon be memorialized in a written opinion. The Court ruled in plaintiffs' favor on every legal issue presented, finding "that plaintiffs have shown not just a reasonable likelihood of success but a *strong* likelihood of success

on the merits,” Tr. at 70:10-12 (R138), emphasis added. The District Court also rejected Napster’s defenses for several independent reasons.

The standard for contributory and vicarious infringement -- set forth in Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996) -- is undisputable. Concluding it had been easily met here, the District Court made numerous specific *factual findings* based upon overwhelming evidence in a massive record gleaned from dozens of depositions, thousands of documents, and expert reports, including surveys and statistical analyses.

A. The District Court Correctly Found That Plaintiffs Have A “Substantial” Likelihood Of Success On Their Claims For Contributory Infringement.

“One who [1] with knowledge of the infringing activity, [2] induces, causes or materially contributes to [3] the infringing conduct of another, may be held liable as a contributory infringer.” Fonovisa, 76 F.3d at 264. The District Court made the following factual findings in support of its determination that plaintiffs were likely to prevail on this claim:

· *Napster users are engaged in massive direct copyright infringement.* “[T]he evidence establishes that a majority of Napster users use the service to download and upload copyrighted music.” Tr. 70:16-21 (R138). Indeed, plaintiffs presented essentially irrefutable statistical evidence that at least 87 percent of the music (and probably more) on Napster is unauthorized. Tr. 71:6-10 (R139); Olkin Rpt. pp. 7-8; Hausman Decl., ¶¶ 6-8; Miller Decl., ¶8; Cottrell Decl. ¶¶ 3-5; Conroy Decl. ¶ 4; Eisenberg Decl. ¶¶ 3-4, 21; Kenswil Decl. ¶¶ 3-4, 15; Vidich Decl. ¶¶ 3-5). This is clear infringement. See, e.g., MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518-19 (9th Cir. 1993).

· *The evidence “overwhelmingly establishes that [Napster] had actual or at the very least constructive knowledge...that third parties were engaging and continue to engage in*

direct copyright infringement by downloading/uploading MP3 files using the Napster system. This evidence includes internal documents authored by Napster executives stating that Napster was making pirated music available and stressing the need to remain ignorant of Napster users' identities since they are exchanging pirated music, notice from the Recording Industry Association of America, that identified 12,000 infringing files on Napster, the fact that Napster executives had recording industry experience and at least some knowledge of copyright laws, and the fact that Napster executives downloaded copyrighted music to their own computers using the service.” Tr. 79:16-80:8 (emphasis added) (R147). See, e.g., Parker Depo. 160:1-162:14, Ex. 254, at 00100 (Napster’s co-founder writes: “Users will understand that they are improving their experience by providing information about their tastes without linking that information to a name or address or other sensitive data that might endanger them (*especially since they are exchanging pirated music*)” (emphasis added); Brooks Depo., Exs. 110, 111; Parker Depo. 104:16-105:10, Ex. 235 (“With Napster, you’ll never come up empty handed when searching for your favorite music again!”; and “you can forget about wading through page after page of unknown artists”); Creighton 12/3/99 Decl. ¶ 14, Ex. D (RIAA notice of 12,000 infringing files); Brooks Depo., 51:8-24; 54:25-56:11, Ex. 64, pp. 2-4; Richardson Depo. 20:5-22:0; 25:2-26:1; Parker Depo. 70:14-16, Ex. 230, pp. 3-5; Fanning Depo. Exs. 174-76).

Napster disputes none of this evidence. It merely claims that the evidence the District Court found “overwhelmingly establishes that [Napster] had actual or at the very least constructive knowledge” is legally insufficient to establish the knowledge element, claiming “[n]o prior case has ever held that generalized knowledge alone is enough.” Napster is wrong, as it logically must be, especially where it has actual knowledge of massive infringement but intentionally avoided knowledge of the specific works being infringed. See Fonovisa, 76 F.3d at

261, 264 (“no question” that what was generalized knowledge satisfied that element); Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 514 (N.D. Ohio 1997) (defendants had “at least constructive knowledge that infringing activity was likely to be occurring” on their adult bulletin board because “Playboy Magazine is one of the most famous and widely distributed adult publications in the world. It seems disingenuous for Defendants to assert that they were unaware that copies of photographs from Playboy Magazine were likely to find their way onto the BBS”); Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679, 686-87 (N.D. Cal. 1994) (element satisfied “[e]ven if Defendants do not know exactly when games will be uploaded to or downloaded from” its service); RSO Records v. Peri, 596 F. Supp. 849, 858 (S.D.N.Y. 1984) (element satisfied where “the very nature of” the product “would suggest infringement to a rational person”). See also 17 U.S.C. § 512(d)(1)(A) (under DMCA, knowledge that “material *or activity*” is infringing is sufficient).

· *Napster materially contributes to its users’ infringements.* “[T]he evidence shows that, among other activities, defendant supplies the proprietary software, search engine, the means of establishing a connection between Napster users’ computers, and without those services Napster users could not find and download the music they want, at least not via Napster. In fact, that was the whole reason for Napster’s existence, if you look at their early business plans and what they purported to do and what they told their consumers or users they were doing.” Tr. 80:18-81:1 (R148-R149). See A&M Records, Inc. v. Napster, Inc., 54 U.S.P.Q.2d 1746, 1747 (N.D. Cal. 2000); evidence cited in plaintiffs’ Motion for Preliminary Injunction, p. 17, n.19 (R383).

**B. The District Court Correctly Found That Plaintiffs Have a Strong Likelihood
Of Success On Their Claims For Vicarious Infringement.**

The District Court found that plaintiffs established a strong likelihood of success on a second, independent basis -- vicarious liability. Tr. 83:15-18 (R149). One is vicariously liable for copyright infringement if he “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” Fonovisa, 76 F.3d at 262. The Court found that both elements were satisfied here. Tr. 81:14-83:9 (R149-151). In its motion, *Napster* ***does not even attempt to dispute these findings.***

C. **The District Court Correctly Rejected Napster’s Affirmative Defenses.**

The District Court properly dismissed Napster’s affirmative defenses, including the Audio Home Recording Act, fair use, and the staple article of commerce.²

1. **The Audio Home Recording Act Is Irrelevant And Inapplicable.**

The centerpiece of Napster’s defense was its claim that Section 1008 of the Audio Home Recording Act (“AHRA”) rendered legal its users’ copying and distribution of plaintiffs’ copyrighted works, because the AHRA supposedly authorizes all noncommercial copying by consumers. This argument flatly contradicts the AHRA’s plain language, this Court’s precedent, and the warning on Napster’s own website to this day: “Unauthorized copying, distribution, modification, public display, or public performance of copyrighted works is an infringement of the copyright holders’ rights.”

As the District Court recognized, the AHRA “*is irrelevant in fact to this action.*” Tr. 76:21-22 (emphasis added) (R144). The AHRA balances the interests of manufacturers, consumers, and copyright owners by “plac[ing] restrictions only upon a specific type of recording device,” specifically defined in the statute, requiring such devices to be equipped with copy protections and that royalty payments be made based on their sale, and exempting consumers from copyright infringement lawsuits for private uses of *AHRA-covered devices*:

“No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium,

² See also Plaintiffs’ Reply Memorandum of Points and Authorities in Support of Joint Motion of Plaintiffs for Preliminary Injunction, filed herewith, at 2-12, for a fuller discussion of these issues.

an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of ***such*** a device or medium for making digital musical recordings or analog musical recordings.” 17 U.S.C. § 1008 (emphasis added)

In RIAA v. Diamond Multimedia Systems, Inc., 180 F.3d 1072, 1074-1075 (9th Cir. 1999), this Court squarely held that “[u]nder the plain meaning of the [AHRA’s] definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices...” Diamond also held that MP3 files contained on computer hard drives are not “digital musical recordings.” 180 F.3d at 1076-77. Thus, under Diamond, a computer is not a covered device, and a copy made by one Napster user of an MP3 file residing on another Napster user’s computer hard drive is not a copy of a “digital musical recording,” and is not covered by Section 1008. 17 U.S.C. § 1001(4)(A).

Moreover, even if it applied, Section 1008 exempts only “noncommercial use” by consumers, *i.e.*, private copying -- not the wholesale ***distribution*** of music files among millions of anonymous strangers. Contrary to Napster’s contention, the AHRA’s legislative history fully supports this conclusion, providing that “home copies are used privately within the household (including personal vehicles) and are not used for implicit or explicit commercial purposes. Admission is not charged and users ***are a household and its normal circle of friends, rather than the public.***”³ U.S. Congress, OTA, Copyright and Home Copying: Technology Challenges the Law, OTA-CIT-422, at 5 (U.S. GPO, Oct. 1989) (emphasis added). The District Court properly found that the backscratching arrangement among Napster users -- each of whom becomes a public server -- is a “commercial,” not a “noncommercial,” activity. Tr. 73:4-5, 73:21-

³ Napster currently has over 20 million users. At any one time, each user is connected to several thousand other users, with hundreds of thousands of songs available for copying. This is hardly the type of “one-on-one” copying that Napster posits is protected.

74:3 (R141-142). See also 17 U.S.C. § 101 (defining “financial gain” for purposes of criminal No Electronic Theft Act to include the “receipt, or expectation of receipt, of anything of value, *including the receipt of other copyrighted works*”) (emphasis added).

2. The Conduct Of Napster’s Users Is Not Fair Use.

The District Court found that all four fair use factors, 17 U.S.C. § 107, militated against a finding of fair use:

· **Nature of the copyrighted work.** “The copyrighted musical compositions and recordings certainly are the paradigmatic kinds of things for which copyrights are obtained. They’re creative in nature.” Tr. 72:20-25 (R140). See also *Micro Star v. Formgen*, 154 F.3d 1107, 1113 (9th Cir. 1998). Napster does not dispute this finding.

· **Amount and substantiality of the portion of the copyrighted work used.** The songs available on Napster “are, in fact, uploaded or downloaded, or at least can be and generally are, in their entirety. Certainly they’re generally made available in their entirety.” Tr. 72:23-73:1 (R140-141). Napster does not dispute this finding. This Court “has long maintained the view that wholesale copying of copyrighted material *precludes application of the fair use doctrine.*” Marcus v. Rowley, 695 F.2d 1171, 1176 (9th Cir. 1983) (emphasis added).

· **Purpose and character of the use.** Napster conceded that its uses were not transformative. (Tr. 24:17-25) (R93) Its only argument on this element is its continued insistence that its users’ distribution and copying is “noncommercial.” Properly disposing of this argument, the District Court found that the conduct of Napster users is not “typical of the personal use that is in the traditional sense....[A]t the very least a host user sending a file cannot be said to engage merely in the typical personal use when distributing the file to, in this case, many anonymous requesters. Moreover, the fact that Napster users get for free something they ordinarily would

have to pay for suggests that they reap, the users reap, an economic advantage from Napster use.”

Tr. 73:4-5, 73:21-74:3 (R141-R142). This finding (based on undisputed evidence about the way Napster operates) comports with established law. American Geophysical Union v. Texaco Inc., 60 F.3d 913, 924 (2d Cir. 1995) (use commercial because defendant circulated photocopies of journals to avoid having to purchase multiple copies); Nimmer, *Nimmer On Copyright* § 8B.01 [D][2] at 8B-20 (hereinafter “Nimmer”) (“The individual who engages in audio home recording may not be seeking a commercial advantage by selling the recordings, but for fair use purposes his motivation is nevertheless commercial. By engaging in audio home recording, he avoids the cost of purchasing records and prerecorded tapes”).⁴

Effect of the use upon the potential market for or value of the copyrighted work. “Plaintiffs have produced evidence that Napster use harms the market for the copyrighted work in at least two ways...” Tr. 74:4-6 (R142). First, the Court credited a survey by plaintiffs’ expert that found that among college students, “a segment that Napster itself has said it has targeted,” CD sales were detrimentally affected by Napster use. (Jay Rpt. p. 3, 18-20) (R407; R422-424); Tr. 74:10-17 (R142). Second, the Court found “harm [to plaintiffs] by reason of

⁴ Because the Court found that the use was commercial, it properly placed the burden on Napster to demonstrate the absence of harm. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984); Campbell v. Acuff-Rose, 510 U.S. 569, 590, 591, 594 (1994). In any event, even if the burden were on plaintiffs, the Court concluded that they met it, finding that “plaintiffs have produced evidence that Napster use harms the market for the copyrighted work in at least two ways”: (1) interfering with plaintiffs’ entry into the market for digital downloads of music; and (2) decreasing CD sales among college students.

raising barriers to plaintiffs' entry into the market for digital downloading of music." Tr. 75:8-11 (R143); Eisenberg Decl. ¶¶ 9-22; Kenswil Decl ¶¶ 9-17; Cottrell Decl. ¶¶ 6-17; Conroy Decl. ¶¶ 9-18; Vidich Decl. ¶¶ 6-10; Teece Report at 14-18 (R542-546). Either type of harm, standing alone, is sufficient to defeat this element of Napster's fair use defense.

Napster's claim that "the predominant use of Napster is to make temporary copies of a work to sample the work to decide whether to buy it," is unsupported and irrelevant. The Court specifically rejected Napster's arguments that some "sampling" of music by its users to decide whether to buy a CD or some "space-shifting" of music they already own on CD were fair uses that might enhance plaintiffs' CD sales, finding Napster's evidence unreliable. First, "[s]ampling does not constitute a noncommercial personal use in the traditional sense because it involves the distribution of music among millions of users. Plaintiffs have shown a meaningful likelihood that if sampling became widespread, it would reduce the market for copyrighted works. The defendants argue, and I think unpersuasively, that the use of Napster for sampling stimulates CD sales. *I don't think in fact the reliable evidence in this case supports that.*" Tr. 75:17-76:1 (R143-144) (emphasis added). Moreover, "[e]ven if sampling did increase CD sales, it would still infringe plaintiffs' right to licensing fees, to control their work to derivative markets, and so forth. And if users can sample songs for free on Napster, they're unlikely to purchase individual songs from the online sites affiliated with plaintiffs." Tr. 76:2-7 (R144).⁵ See, e.g., UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000). Dispositively, contrary to

⁵ Indeed, the Copyright Act prohibits unrestricted "sampling" using streaming technology (in which a song is digitally performed, but no copy ordinarily is made) without a license. 17 U.S.C. § 114(d) *et seq.*

Napster's assertion, a present market exists in which plaintiffs are compensated for licensing the right to sample their music. See Declaration of David Lambert, ¶¶ 2-3.

The Court likewise dismissed Napster's "space-shifting" arguments, finding that Napster "fails to show that space shifting constitutes a commercially-significant use of Napster." Tr. 77:6-7 (R145). Recognizing the obvious, the Court noted that "the most credible explanation for the exponential growth of traffic on Napster is the vast array of files offered by other users, not the ability of each individual to space shift music that he or she already owns." Tr. 77:8-11 (R145). Further, contrary to Napster's claim, no Court has ever held that "space-shifting" is a fair use. The dicta in Diamond on which Napster relies merely suggested that private space shifting using the Rio player did not offend *the purpose of the AHRA* because the music was not obtained from an unauthorized third party distributor (in contrast to Napster) and because the Rio player (in contrast to Napster) did *not* allow further copies to be made and distributed. The Diamond case did not involve any issues of fair use or of copyright infringement at all.

3. The District Court Correctly Found That the Napster Service Is Not A "Staple Article Of Commerce".

In Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), unlike here, Sony manufactured video tape recorders, the primary use of which (conceded by both sides) was to tape, entirely within the home, television shows made available for free and which were then erased. Unlike here, the plaintiffs owned well below 10% of the copyrights involved (and large numbers of copyright holders did not object to the home copying for time shifting). The Court specifically noted that there was "[n]o issue concerning the transfer of tapes to other persons." Id. at 425. The District Court correctly rejected Napster's "staple article of commerce" defense, for several independent reasons:

The Court found (and the evidence is undisputed) that Napster “is not merely a manufacturer/seller whose contact with consumers ceases when the product is sold, rather, [Napster] exercises a substantial and ongoing control over its service.” Tr. 77:14-19 (R145); Kessler Decl. ¶¶ 20-24; Krause Depo. 42:10-45:10; 48:15-49:3; 50:10-19; 51:9-52:17; Brooks Depo. Ex. 80 at 2176; Fanning Depo, Ex. 197. As a result, Napster cannot qualify for protection as a “staple article of commerce” under Sony, in which the defendant merely *manufactured* VCRs, and its involvement with the product ended the moment it sold it. Sony, 464 U.S. at 440. No case has ever held that an ongoing service with supervisory control could be a “staple article of commerce” immune from liability for contributory or vicarious copyright infringement. The law is directly opposite. See, e.g., RCA Records v. All-Fast Systems, Inc., 594 F. Supp. 335 (S.D.N.Y. 1984) (“[t]he Sony Corp. decision extends protection only to the *manufacturer* of the infringing machine, not to its operator”) (emphasis added); RCA/Ariola International, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 777, 781 (8th Cir. 1988) (manufacturer of “staple article of commerce” nonetheless was liable “because it retained title to the [device used to accomplish infringement]...exercised control over the retailers’ use of the machines [and] profited from that use”).

The Court found Napster had no current “substantial non-infringing use.” Rather, the several purported “non-infringing uses” trumpeted by Napster -- all of which essentially boiled down to the same claim, that musical artists other than those whose copyrights plaintiffs own use Napster to promote their music -- were minimal, commercially insignificant, and pretextual. (Olkin Reply Decl.; Hausman Reply Decl.) Napster’s argument that the District Court addressed just one of these alleged uses and “ignore[d] all” the others is false. It ruled that “[a]ny of the potential noninfringing uses of the Napster service are minimal. Some of them seem to be thought

of afterward and after this litigation started; but the *substantial or commercially significant use of the service was and continues to be copying popular music, most of which is copyrighted and for which no authorization has been obtained.*” Tr. 71:25-72:6 (emphasis added) (R139-R140). Olkin Rept. pp. 7-8; Hausman Decl. ¶¶ 6-8; Miller Decl., ¶ 8. The Sony result rested on the conclusion that the “*primary use* of the machine for most owners” was noninfringing. Sony, 464 U.S. at 423 (emphasis added). Here, Napster has not even attempted to dispute that nearly 90% of its use (and probably more) is for copying and distributing copyrighted music without authorization, that 100% of the Napster users sampled were engaged in some music piracy while on Napster (Olkin Rept. pp. 7-8), and that only 1.2% were authorized new artist works. Reply Declaration of Dr. Ingram Olkin and Reply Declaration of Charles Hausman. See General Audio Video, 948 F. Supp. at 1449, 1456 (C.D. Cal. 1996) (“Sony requires that the product being sold have a ‘substantial,’ noninfringing use, and although time-loaded cassettes can be used for legitimate purposes, these purposes are insubstantial given the number of [defendant’s] customers that were using them for counterfeiting purposes”); Sega, 857 F. Supp. at 685 (rejecting defendant’s reliance on “incidental capabilities” that “have not been shown to be the primary use” of defendant’s computer game copiers). Moreover, those purported non-infringing uses asserted by Napster are severable from the infringing uses and, therefore, cannot insulate them. See Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 263-64 & n.16 (5th Cir. 1998) (issue is whether separate objectionable feature had substantial noninfringing uses).

· The Court also found that the infringing uses were precisely what Napster “was promoted for and what it continues to be used for.” Tr. 72:9-10. (R140) Before this litigation, Napster touted its system as the place to get popular music and to *get away from* new and unknown artists: “With Napster, you’ll never come up empty handed when searching for your

favorite music again!"; and "Napster virtually guarantees you'll find the music you want, when you want it" . . . "*you can forget about wading through page after page of unknown artists.*" (Brooks Depo., Exs. 110, 111; Parker Depo. 104:16-105:10, Ex. 235). See Cable/Home Communication Corp. v. Network Productions, 902 F.2d 829, 846 & n.30 (11th Cir. 1990) (rejecting staple article defense where products were "utilized and advertised...primarily as infringement aids"). Napster's newfound support for "new artists" was manufactured after-the-fact to justify the massive infringement that is the heart of Napster's business -- indeed, its executives have admitted that "putting up unsigned artists" was "to distract the RIAA..." (Parker Depo., Ex. 236; see Tr. 78:12-15) (R146).

The Court further found that Napster, as presently designed, is not even "*capable of* substantial noninfringing uses." Tr. 78:24-25 (R146) (emphasis added), nor did Napster even posit any credible, future noninfringing uses.

V. AS THE DISTRICT COURT FOUND, THE "BALANCE OF HARDSHIPS" TIPS IN FAVOR OF PLAINTIFFS, AND AGAINST NAPSTER.

The preliminary injunction does not require Napster to go out of business by any stretch. It simply requires Napster to stop infringing plaintiffs' copyrighted music.⁶ There is no dispute that Napster could continue its chat rooms, instant messaging, new artist program, and website. These are some of the very noninfringing uses Napster cited to the District Court. Moreover, it

⁶ Napster tries to confuse the requirement of registration with the available scope of injunctive relief. The law is clear that in cases of widespread infringement such as this one, an injunction may and should prohibit infringement not only of the specific copyrighted works identified in the complaint, but of *all* copyrighted works owned by plaintiffs. See, e.g., Walt Disney Co. v. Powell, 897 F.2d 565, 568 (D.C. Cir. 1990); Sega, 857 F. Supp. at 686. As the District Court recognized, such an injunction is absolutely necessary here in light of the "wholesale magnitude" of Napster's infringement.

could continue to enable the copying and distribution of music for which it has received appropriate authorization, using its current peer-to-peer architecture. This is not a matter of technology; the technological implementation is modest. Rather, as the District Court found, “the evidence shows that there is no desire [on Napster’s part] to do that.” Tr. 82:5-6 (R150).

If Napster decides to close down part or all of its other operations, that will be because Napster has made a business decision that, without unfettered access to infringing copies of plaintiffs’ copyrighted music -- the most popular music in the world -- people will find the Napster service less attractive. However, the law is clear that Napster “cannot complain of the harm that will befall it when properly forced to desist from its infringing activities.” Triad Sys. Corp. v. Southeastern Exp. Co., 64 F.3d 1330, 1338 (9th Cir. 1995); Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1406 (9th Cir. 1997) (where defendants “created the all-or-nothing predicament in which they currently find themselves,” product would be preliminarily enjoined).

After considering an extensive factual record, the District Court found that the balance of hardships tips in favor of plaintiffs: “to hold otherwise would essentially allow wholesale infringing, as has been going on in this case, without the ability of plaintiffs to stop the hemorrhaging of that.” Tr. 84:14-17 (R152). “I can’t just let it go on. A strong case has been made.” Tr. 88:18-19 (R156). Whether or not Napster’s business may be adversely affected is legally irrelevant.

A. There Is No Technological Impediment To Compliance With The District Court’s Order.

For decades, thousands of other media companies -- from radio stations to print magazines to motion picture studios -- have obtained the permission of copyright holders before

disseminating their creative works. Napster suggests that, for technological reasons, it cannot do what others have had to do. According to the newest declaration of Edward Kessler, echoing testimony submitted in two other declarations to the District Court, “it is not technically feasible to comply with the District Court’s order without shutting down all of Napster’s file sharing capabilities.” Declaration of Edward Kessler In Support of Request for Emergency Stay (“Kessler Decl.”).

But this argument that Napster cannot “filter out” only those recordings and musical works owned by plaintiffs, and thus cannot comply with the preliminary injunction without shutting down, is a red herring. Napster can comply with the injunction and the copyright laws by enabling copying and distribution only of music that the copyright holder has authorized for such copying and distribution. In response to Kessler’s original declaration presented to the District Court, Daniel Farmer, a technology expert for plaintiffs, explained how Napster can operate a peer-to-peer service lawfully:

From a technological perspective, Napster could continue to operate its service in a manner in which only MP3 music files that first have been authorized for transmission and copying on the Napster service by the copyright owners of those music files would be available to Napster users. For example, Napster could compile a database of song titles and artist names that have been authorized by the copyright owners of those songs to be made available on the Napster service. . . . Napster could then write a simple software program that would read the file names of MP3 files on a user’s hard drive when the user logged into the Napster service, compare those file names with the database of authorized song titles and artists, and then permit only the file names of the user’s MP3 files that match the entries in this database of authorized songs to be uploaded to the Napster index of available songs. MP3 files that were not authorized would thus be unavailable for copying over the Napster service because they would never come up as a result of a search request. 7/13/00 Farmer Decl. ¶ 3.

In short, “Napster could continue in operation as a file sharing service for the songs of new artists

and other copyright owners who have authorized Napster to make their song files available for distributing and copying on the Napster service”. Id. ¶ 4. Indeed, Napster already engages in such a process of obtaining authorizations: it creates a database of “new artists” that, as a condition of the artist’s admission into the directory, requires them expressly to permit distribution and copying of their music using the Napster system. Krause Decl., ¶ 10(c) & Ex. D (R1046, R1063). There is simply no reason -- technological or otherwise -- why Napster cannot show the same respect for the music of established artists.

Napster did not challenge any of this evidence in the District Court; nor does it do so here. The record is undisputed that there is no meaningful technological impediment to Napster’s continuing its file distribution function with only authorized files. Napster fails to explain why it should be exempt from the rules followed by so many other companies. Remarkably, Napster itself (as well as plaintiffs) submitted ample evidence of companies that distribute protected music only after obtaining the owner’s permission. See Declaration of Emilio Gonzalez (attaching multiple examples of such websites) (R782, 789-95, 893-898). See also Declarations of M. Robertson and R. Kohn.

In short, the dichotomy Napster attempts to portray -- that it is either lawless or it cannot exist -- is simply wrong.

B. Napster Would Not Be Injured Even If The Injunction Were Ultimately Reversed.

Napster offers no reason to believe that, in the extraordinarily unlikely event that Napster prevailed on appeal, it would be in any worse position when the injunction were lifted. Napster presumably would occupy precisely the same position it does now: its “proprietary” software could be used immediately by the millions of users who have installed it to trade the

millions of music files currently on their computer hard drives.

VI CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully submit that Napster has not carried its burden and a stay should not issue.

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The undersigned hereby declares:

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I declare under penalty of perjury, under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on July 28, 2000.



Susan Maupia