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19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

NAPSTER, INC., a corporation, and DOES 1  
through 100,

Defendants.

CASE NO. C-99-5183 MHP

**NOTICE OF JOINT MOTION AND  
JOINT MOTION OF PLAINTIFFS FOR  
PRELIMINARY INJUNCTION;**

**MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: July 26, 2000

Time: 2:00 p.m.

Ctrlm: Hon. Marilyn H. Patel

1 JERRY LEIBER, individually and doing business  
2 as JERRY LEIBER MUSIC, MIKE STOLLER,  
3 individually and doing business as MIKE  
4 STOLLER MUSIC; and FRANK MUSIC CORP.,  
5 on behalf of themselves and all others similarly  
6 situated,

7 Plaintiffs,

8 v.

9 NAPSTER, INC. and EILEEN RICHARDSON,

10 Defendants.

CASE NO. C 00-0074 MHP (ADR)

11 **TO DEFENDANT NAPSTER, INC. AND ITS COUNSEL:**

12 **PLEASE TAKE NOTICE** that, pursuant to this Court's Order, on July 26, 2000,  
13 at 2:00 p.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable  
14 Marilyn H. Patel, Chief Judge of the United States District Court for the Northern District of  
15 California, located at 450 Golden Gate Avenue, San Francisco, California 94102-3483, plaintiffs in  
16 Case No. C-99-5183 MHP, A&M Records, Inc., Geffen Records, Inc., Interscope Records, Sony  
17 Music Entertainment Inc., MCA Records, Inc., Atlantic Recording Corporation, Island Records,  
18 Inc., Motown Record Company L.P., Capitol Records, Inc., La Face Records, BMG Music d/b/a  
19 The RCA Records Label, Universal Records Inc., Elektra Entertainment Group Inc., Arista  
20 Records, Inc., Sire Records Group Inc., PolyGram Records, Inc., Virgin Records America, Inc.,  
21 and Warner Bros. Records Inc. (collectively the "Record Company Plaintiffs"), and plaintiffs in  
22 Case No. C 00-0074 MHP, Jerry Leiber, individually and doing business as Jerry Leiber Music,  
23 Mike Stoller, individually and doing business as Mike Stoller Music, and Frank Music Corp.  
24 (collectively the "Music Publisher Plaintiffs") will and hereby do move for a preliminary  
25 injunction against defendant Napster, Inc. ("Napster"), restraining and enjoining Napster, and its  
26 agents, servants, employees, representatives, subsidiaries, and those acting in concert with them or  
27 at their direction, during the pendency of these actions, from engaging in, or enabling, facilitating  
28 or assisting others in, the copying, downloading, uploading, transmission or distribution of

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1 copyrighted musical works or sound recordings protected by copyright or state law ("Copyrighted  
2 Music"), without the express permission of the rights owner, including without limitation any of  
3 the following:

4 (a) copying, downloading, uploading, transmitting, or distributing Copyrighted  
5 Music;

6 (b) enabling, facilitating, permitting, allowing or assisting users to copy,  
7 download, upload, transmit, or distribute any Copyrighted Music through Napster's service,  
8 including its website (located at <http://www.napster.com>) and servers, other hardware and  
9 software by which users can locate, identify, access, provide access to, or copy, download,  
10 transmit, or upload Copyrighted Music located on one another's computers (collectively,  
11 the "Service"), or any other service owned or controlled by Napster;

12 (c) providing on its Service (by hyperlink or other means) or directing or  
13 referring users of its Service, to an index listing or identifying Copyrighted Music made  
14 available by other users of the Service for copying, downloading, uploading, transmission,  
15 or distribution;

16 (d) enabling, facilitating, permitting, allowing or assisting users of the Service  
17 to locate any Copyrighted Music offered or otherwise made available for copying,  
18 downloading, uploading, transmission, or distribution;

19 (e) enabling, facilitating, permitting, allowing or assisting users of the Service  
20 to make Copyrighted Music available for copying, downloading, uploading, transmission,  
21 or distribution;

22 (f) soliciting or encouraging users of the Service to copy, download, transmit,  
23 upload, or distribute Copyrighted Music; and

24 (g) soliciting or encouraging users of the Service to make available Copyrighted  
25 Music for copying, downloading, uploading, transmission, or distribution.

26 This Motion is and will be made on the grounds that plaintiffs are likely to succeed  
27 on the merits of their claims for contributory and vicarious copyright infringement, and that  
28 Napster is causing plaintiffs serious and irreparable harm by unlawfully making possible.

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1 facilitating, and encouraging the massive, continuing infringements of the sound recording and  
2 musical composition copyrights owned by plaintiffs.

3  
4 This Motion is and will be based upon this Notice of Motion and Motion, the  
5 accompanying Memorandum of Points and Authorities, the Declarations of Mark Eisenberg  
6 ("Eisenberg Decl."), Lawrence Kenswil ("Kenswil Decl."), Kevin Conroy ("Conroy Decl."),  
7 Richard Cottrell (Cottrell Decl."), Paul Vidich ("Vidich Decl."), Mike Stoller ("Stoller Decl."),  
8 Charles J. Sanders ("Sanders Decl."), Robert Kohn ("Kohn Decl."), Michael Robertson  
9 ("Robertson Decl."), Jack Valenti ("Valenti Decl."), Gregory J. Hessinger ("Hessinger Decl."),  
10 Michael Dreese ("Dreese Decl."), Charles Robbins ("Robbins Decl."), Michael Fine ("Fine Rpt."),  
11 Dr. E. Deborah Jay ("Jay Rpt."), Dr. David J. Teece ("Teece Rpt."), Dr. Ingram Olkin ("Olkin  
12 Rpt."), Dennis Drake ("Drake Decl."), Frank Creighton ("Creighton Supp. Decl."), Jason Miller  
13 ("Miller Decl."), Charles Hausman ("Hausman Decl.") and the declarations from independent  
14 labels appended thereto, and Russell J. Frackman ("Frackman Decl."), the Depositions of Eileen  
15 Richardson ("Richardson Depo.") [Ex. A to Frackman Decl.], Shawn Fanning ("Fanning Depo.")  
16 [Ex. B to Frackman Decl.], Sean Parker ("Parker Depo.") [Ex. C to Frackman Decl.], Elizabeth  
17 Brooks ("Brooks Depo.") [Ex. D to Frackman Decl.], and Edward Kessler ("Kessler Depo.")

1 [Ex. E to Frackman Decl.] filed herewith, the Court file, any reply plaintiffs may make, and any  
2 further evidence and argument presented at or prior to the hearing or ruling on this motion.  
3

4 Dated: June 12, 2000

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 This is a joint motion for a preliminary injunction by two sets of plaintiffs. The  
3 Record Company Plaintiffs are record companies that spend substantial time, money, and  
4 resources to create, manufacture, and sell recorded music, and own the copyrights and other rights  
5 in innumerable sound recordings. The Music Publishing Plaintiffs are songwriters and music  
6 publishers who own the copyrights and other rights in popular and successful musical  
7 compositions.<sup>1</sup> Hundreds of thousands of copyrighted works owned by plaintiffs are being  
8 infringed – reproduced and distributed – *every day* by users of defendant Napster's system –  
9 infringements that Napster actively enables and encourages, and from which it directly benefits.

10 There can be no doubt that Napster was designed for the purpose of facilitating  
11 piracy, and that Napster knows full well that its users are using its service overwhelmingly to trade  
12 pirated MP3 files.<sup>2</sup> In a candid, early document written by one Napster founder to another – before  
13 the lawyers and venture capitalists took control – Napster acknowledged that its service would  
14 need to ensure complete user anonymity in order to protect users while they "pirate" plaintiffs'  
15 music. In the words of Napster's co-founder:

16 "Users should be given an incentive to provide information about  
17 their interests. Users will understand that they are improving their  
18 experience by providing information about their tastes *without*  
19 *linking that information to a name or address or other sensitive*  
*data that might endanger them (especially since they are*  
*exchanging pirated music)." Parker Depo. 160:1-162:14, Ex. 254,*  
*at 00100 (emphasis added).*

20 Still, like Captain Renault in the film *Casablanca*, Napster now professes to be "shocked, shocked"  
21 that it is facilitating illegal activities, disavows any knowledge whatsoever of what takes place on  
22 \_\_\_\_\_

23 <sup>1</sup> See Cottrell Decl. ¶¶ 3-5; Conroy Decl. ¶¶ 3-8; Eisenberg Decl. ¶¶ 3-8; Kenswil  
24 Decl. ¶¶ 3-8; Vidich Decl. ¶¶ 3-5; Stoller Decl. ¶¶ 2-8; Sanders Decl. ¶¶ 3-5. For simplicity, the  
25 term "music," as used in this memorandum, refers collectively to the Record Company Plaintiffs'  
sound recordings and the Music Publishing Plaintiffs' musical compositions.

26 <sup>2</sup> MP3 is a compression technology that significantly reduces the file size of a  
27 sound recording and "allows for the fast and efficient conversion of compact disc recordings into  
28 computer files that may be downloaded over the Internet." *A&M Records, Inc. v. Napster, Inc.*,  
54 U.S.P.Q.2d 1746, 1747, n. 1, 2000 WL 573136, \*1 n.1 (N.D. Cal. 2000); see also *UMG*  
*Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000).

1 its system, and claims its purpose is to promote new and unknown artists. These claims are simply  
2 dishonest.

3 Napster has been aware from the moment of its creation that its service offers little  
4 but pirated music, and that rampant infringement of the most commercially popular music in the  
5 world is the very foundation of its system.<sup>3</sup> Napster was *created* to facilitate unlawful copying;  
6 even its search functionality was designed precisely with established artists in mind. Parker Depo.  
7 156:8-159:23, Ex. 253, at 004806 (giving Led Zeppelin as an example of a Napster search request).  
8 Before this litigation, moreover, Napster promoted its system as the place to get popular music and  
9 to *get away from* unknown artists: "With Napster, you'll never come up empty handed when  
10 searching for your favorite music again!"; and Napster virtually guarantees you'll find the music  
11 you want, when you want it" . . . "*you can forget about wading through page after page of*  
12 *unknown artists.*" Brooks Depo., Exs. 110, 111; Parker Depo. 104:16-105:10, Ex. 235. Napster  
13 executives have admitted in documents that "putting up unsigned artists" was being done "to  
14 distract the RIAA..." Parker Depo., Ex. 236.

15 And Napster's own senior executives are no different than Napster's millions of  
16 users; they too use the service to download unlawful copies of their "favorite music" -  
17 predominantly copyrighted works from well-known artists such as the Beatles, Bruce Springsteen,  
18 Madonna, Led Zeppelin, Prince, Van Morrison, and the Temptations, and even including  
19 copyrighted music identified in the Record Company Plaintiffs' complaint in this action.<sup>4</sup>

20  
21 <sup>3</sup> In one of the numerous articles that describes Napster's unauthorized copying and  
22 illegal activities, Napster is aptly described as "wink-wink-nudge-nudgeware. The company  
23 claims it has no clue whether its users are trading copyrighted, commercial music, or the kind of  
24 public-domain music from no-name performers that you find on sites like MP3.com. There's  
25 even a disclaimer. Of course, it's obvious why Napster is so popular: the software makes it  
26 absurdly easy to find the music you really want, which is going to be from top-name,  
27 commercially successful musicians." *Music Lovers Sing For Files Of Freedom* (D. Silverman,  
28 The Houston Chronicle, 1/28/2000), Frackman Decl., Ex. F.

26 <sup>4</sup> Napster's co-founder, Sean Parker, recently acknowledged that new artists are  
27 "not a priority" for Napster (Frackman Decl., Ex G), a sentiment confirmed by Napster's recently  
28 appointed CEO, Hank Barry, when he was asked about the role of unknown artists in Napster's  
current business model. Said Barry: "[T]here are a lot of services around for that now...I don't  
(continued...)

1 Napster claims user base growth at an astounding rate of *five to 35 percent per day*.  
2 Richardson Depo. 147:17-148:17, Ex. 129, at 00141. It anticipates 75 million users by the end of  
3 this year. *Id.* 318:19-319:1, Ex. 166, at 002725. Based on extensive statistical analysis, *every*  
4 *single Napster user sampled was engaged in some copyright infringement while using the*  
5 *Napster service*. Olkin Rpt. pp. 7-8. Further, the overwhelming majority of the songs actually  
6 copied and downloaded on Napster -- over 87% (and likely much more) -- are pirated versions of  
7 copyrighted music. *Id.*; Hausman Decl. ¶¶ 6-8; see also Miller Decl. ¶ 8.

8 Napster is far more pernicious than ordinary "pirate" Internet sites.<sup>5</sup> Napster makes  
9 available for copying millions of popular recordings found on personal computer hard drives that  
10 otherwise would not be available over the Internet. The precise nature of Napster's system  
11 previously has been presented to the Court. A&M Records v. Napster, 54 U.S.P.Q.2d at 1747,  
12 2000 WL 573136, \*1-2. Napster has created a fully integrated system that enables users to "share"  
13 (*i.e.*, illegally download or permit the downloading of) the MP3 music files on their hard drives  
14 and on the hard drives of other Napster users concurrently logged onto Napster's servers. Kessler  
15 Depo. 44:16-45:7, 54:16-56:10, 71:22-23, Ex. 2. As this Court recognized in denying Napster's  
16 motion for summary adjudication, without Napster, none of these downloads could take place.  
17 A&M Records v. Napster, 54 U.S.P.Q. 2d at 1747, 1752, 2000 WL 573136, \*2, \*7.

18 The infringement of plaintiffs' music on Napster's system is not an accident. The  
19 availability of all the most popular music for free is what attracts users and traffic to Napster.  
20 Those millions of users are critical to Napster -- they form the backbone of Napster's business and  
21 translate directly into current economic value. They already have attracted many millions of  
22 dollars in investment to Napster.

23  
24  
25 <sup>4</sup>(...continued)  
think that's our solution." Frackman Decl., Ex. H. See generally Robertson Decl.

26 <sup>5</sup> See, e.g., R. Henriquez, Facing the Music on the Internet: Identifying Divergent  
27 Strategies for Different Segments of the Music Industry in Appraising Digital Distribution, 7  
28 UCLA Ent. L. Rev. 57, 68-69 (1999) (discussing differences between legal and illegal MP3  
sites).

1 The irreparable harm being suffered by plaintiffs from Napster's conduct is  
2 enormous and increasing daily. Each of the Record Company Plaintiffs has engaged in years of  
3 planning and has made huge expenditures to establish a legitimate commercial downloading  
4 market for its copyrighted music. Napster is attempting to usurp plaintiffs' ability to enter this  
5 market by giving away plaintiffs' property.<sup>6</sup> As Congress has recognized, on-line services  
6 permitting users to obtain the music they want on demand poses "the greatest threat to traditional  
7 sales of records and compact discs." Digital Performance Right in Sound Recordings Act of 1995,  
8 Senate Report No. 104-128 at § 27, 2 U.S.C.C.A.N. 356, 363 (104th Cong., 1st Sess. 1995).  
9 Plaintiffs' surveys of Napster users confirm this fact and show that significant numbers of Napster  
10 users report buying fewer CDs as a result of their downloading the music for free on Napster. Jay  
11 Rpt., pp. 3, 15-20. Empirical analyses of music purchasing data show that, while national sales are  
12 increasing, purchases by college students (Napster's core constituency) are *decreasing*. Even more  
13 telling, at stores in the vicinity of colleges where Napster use likely is greatest, music sales actually  
14 are *sharply declining*. Fine Rpt., p. 2.

15 These analyses are alarming, and are corroborated by countless media reports of  
16 consumers eschewing CD purchases in favor of free downloads through Napster, as well as the  
17 personal experiences of music retailers describing a drop in business on account of Napster.<sup>7</sup>  
18 These studies and reports confirm what is self-evident: the millions of illicit downloads that  
19 Napster enables and encourages are eroding the marketability of recorded music. Indeed, on  
20 Napster's own moderated message boards, its users brag about illegally downloading copyrighted  
21

---

22 <sup>6</sup> Napster's early planning documents use this very language. Napster's co-founder  
23 gloated how Napster would "usurp" and "undermine" the record industry. Parker Depo. 167:9-  
24 169:10, Ex. 254, at 00099. Napster's goal is to transport music "unhindered by cumbersome  
copyright schemes." *Id.*, 199:17, Ex. 255, at 004889.

25 <sup>7</sup> See, e.g., Robbins Decl. ¶¶ 3-8; Fanning Depo. Ex. 194, at 00014 - *Potent*  
26 *Software Escalates Music Industry's Jitters* (A. Harmon, New York Times, 3/7/2000) ("When  
27 the local alternative rock station listed the 300 top songs of the millennium in December, Adam  
28 Campbell, a freshman at the University of Oregon, decided it would be nice to own the entire  
collection. [¶] *Two hours later, using the fast Internet connection in his dorm room and a new*  
*online service called Napster, Campbell had retrieved 275 of the tunes - free*") (emphasis  
added); Frackman Decl., Exs. I-K.

1 music from popular artists, and celebrate the imminent destruction of the recording industry.  
2 Frackman Decl., Exs. J-K. When plaintiffs' music is copied on the Napster system, no one  
3 involved in the creation or sale of that music is compensated – not the copyright owners of the  
4 recordings, not the copyright owners of the musical compositions, not the recording artists, not the  
5 producers, not the musicians, not the unions, and not the retailers whose opportunity for sales are  
6 diminished.

7           Plaintiffs are entitled to and need preliminary injunctive relief. First, plaintiffs are  
8 likely to succeed on the merits of their claims. Napster is liable for contributory infringement  
9 because it has knowledge of and contributes to its users' infringing conduct. Fonovisa, Inc. v.  
10 Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996). Napster also is vicariously liable because it has  
11 the ability to control its users' infringing conduct (though it chooses not to) and economically  
12 benefits from such conduct. Id. Second, plaintiffs have been suffering very real and irreparable  
13 harm as a result of Napster's conduct, and that harm will continue – and will increase – as more  
14 users join Napster and current users continue to build their Napster libraries. A reasonable  
15 likelihood of success on the merits in a copyright case raises a *presumption* of irreparable harm.  
16 Apple Computer, Inc. v. Formula International Inc., 725 F.2d 521, 525 (9th Cir. 1984). Here,  
17 plaintiffs also have presented evidence demonstrating ongoing harm to CD sales, harm to the  
18 emerging legitimate market for downloaded music, and – perhaps most important – a devaluing of  
19 music, as Napster teaches a generation of music consumers that artists and copyright owners do not  
20 deserve to be paid for their work, and that creative efforts are free for the taking.

21  
22 **I. THE LEGAL STANDARD.**

23           Injunctive relief is specifically authorized under the Copyright Act. 17 U.S.C.  
24 § 502. In the Ninth Circuit, preliminary injunctive relief is available on a demonstration of either  
25 (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2)  
26 serious questions raised and the balance of hardships tipping in the moving party's favor.  
27 Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 874 (9th Cir. 2000).  
28 These alternative formulations represent two points on a sliding scale in which the required degree

1 of irreparable harm increases as the probability of success decreases. *Id.* Because irreparable harm  
2 is presumed in copyright cases, likelihood of success on the merits is the predominant  
3 consideration in evaluating the propriety of a preliminary injunction in a copyright infringement  
4 action. Micro Star v. Formgen Inc., 154 F.3d 1107, 1109 (9th Cir. 1998).

## 5 6 **II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

7 Napster's conduct happens to occur on the Internet, but the law of contributory and  
8 vicarious infringement is no less applicable to an Internet-based company than any other – such as  
9 the swap meet owner in Fonovisa, the leading Ninth Circuit case on contributory and vicarious  
10 infringement – and plainly applies to Napster's conduct.

11 In Fonovisa, the defendant operated flea markets where individual vendors sold and  
12 offered for sale counterfeit copies of the plaintiffs' copyrighted sound recordings. The owner  
13 controlled access to the flea markets, promoted them, supplied general support services such as  
14 parking and utilities, retained the right to exclude any vendor from the flea markets for any reason,  
15 helped conceal the identities of vendors, and profited from the increased customer traffic resulting  
16 from consumers being attracted to cheap counterfeit recordings. These facts, the Ninth Circuit  
17 ruled, showed that "it would be difficult for the infringing activity to take place in the massive  
18 quantities alleged without the support services provided by the swap meet," and were sufficient to  
19 support both contributory and vicarious copyright infringement. 76 F.3d at 264.

20 Napster essentially is an Internet swap meet – more technologically sophisticated  
21 but in many ways indistinguishable from the swap meet owner in Fonovisa – "and the mere fact  
22 that [infringement is] clothed in the exotic webbing of the Internet does not disguise its illegality."  
23 UMG Recordings, Inc. v. MP3.com, Inc., 2000 WL 710056 (S.D.N.Y. June 1, 2000) (slip opinion,  
24 denying motion to certify for immediate appeal).

25 Contributory infringement consists of two elements: "One who, with knowledge of  
26 the infringing activity, induces, causes or materially contributes to the infringing conduct of  
27 another, may be held liable as a contributory infringer." Fonovisa, 76 F.3d at 264, quoting  
28 Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir.

1 1971) (emphasis added). On the first element, *constructive* knowledge is sufficient. Gershwin,  
2 443 F.2d at 1162; Sega Enterprises, Ltd. v. MAPHIA, 948 F. Supp. 923, 933 (N.D. Cal. 1996)  
3 ("Sega II"); Ez-Tixz, Inc. v. Hit Tix, Inc., 919 F. Supp. 728, 732, 734 (S.D.N.Y. 1996).

4 Vicarious liability also consists of two elements. One is vicariously liable for  
5 copyright infringement if she "has the right and ability to supervise the infringing activity and also  
6 has a direct financial interest in such activities." Fonovisa, 76 F.3d at 262, quoting Gershwin, 443  
7 F.2d at 1162. Unlike contributory infringement, knowledge (actual or constructive) is not an  
8 element. Peer International Corp. v. Luna Records, Inc., 887 F. Supp. 560, 565 (S.D.N.Y. 1995).

9 Although the existence of a direct infringement is a prerequisite to a claim for  
10 contributory or vicarious infringement, the direct infringer need not be a defendant. Danjaq SA v.  
11 MGM/UA Communications Co., 773 F. Supp. 194, 201 (C.D. Cal. 1991). Direct infringement is  
12 indisputable here:

- 13 • Attached to the Record Company Plaintiffs' complaint as Schedules A and B are  
14 over two hundred individual sound recordings (both copyrighted and pre-1972) that  
15 were downloaded using Napster, and remain available on its service. Creighton  
16 Supp. Decl. ¶¶ 2, 3.<sup>8</sup>
- 17 • These recordings were tested and found to be copies of sound recordings  
18 commercially released by the Record Company Plaintiffs. Drake Decl. ¶¶ 4-8.

19  
20  
21  
22 <sup>8</sup> Musical compositions have been protected by federal copyright since 1831. See  
23 17 U.S.C. § 102(a)(2); United States v. Moghadam, 175 F.3d 1269, 1271 (11th Cir.1999). Sound  
24 recordings, *i.e.*, the reproduction of actual sounds, as opposed to musical notation, have been  
25 protected by federal copyright law since February 15, 1972. Persons who reproduce or distribute  
26 musical works without authorization are liable for copyright infringement of both the sound  
27 recordings and the musical compositions embodied therein. 17 U.S.C. § 102(a)(7); Moghadam,  
28 175 F.3d at 1271; United States v. Goldstein, 412 U.S. 546, 551, 93 S. Ct. 2303 (1973). Sound  
recordings fixed prior to February 15, 1972, receive copyright-like protection under state law.  
See, e.g., Cal. Civ. Code § 980(a)(2); see also Goldstein, 412 U.S. at 570; 17 U.S.C. § 301(c).  
Because the state-law protection for these pre-1972 recordings is equivalent to copyright  
protection for post-1972 recordings, for simplicity plaintiffs' use of the term "copyrighted"  
herein includes pre-1972 recordings protected under state law.



- The Record Company Plaintiffs own copyrights in or exclusive rights to each of these recordings. Cottrell Decl. ¶¶ 3-4; Conroy Decl. ¶ 4; Eisenberg Decl. ¶¶ 3-4; Kenswil Decl. ¶¶ 3-4; Vidich Decl. ¶¶ 3-5.
- Those recordings were never authorized for copying and distribution over the Internet in general or Napster in particular. Cottrell Decl. ¶ 5; Conroy Decl. ¶ 4; Eisenberg Decl. ¶ 21; Kenswil Decl. ¶ 15; Vidich Decl. ¶ 4.

Uploading and downloading MP3 versions of copyrighted sound recordings violates both the *reproduction* and *distribution* rights of plaintiffs under 17 U.S.C. subsections 106(1) and 106(3). See, e.g., MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518-19 (9th Cir. 1993) (reproduction right); Sega II, 948 F. Supp. at 931-33 (same); Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (distribution right). The only issue, then, is whether Napster is contributorily or vicariously liable for these infringements. Under the applicable law, the answer is clear that it is.

**A. Napster Is Liable To Plaintiffs For Contributory Infringement.**

Napster is liable for contributory infringement because it has knowledge (actual and constructive) of its users' infringements, and materially contributes to those infringements.

**1. Napster Has Knowledge Of The Pervasive Infringements Enabled By Its Service.**

Anyone who uses Napster, even for a few minutes, knows immediately what Napster and every other Napster user knows: massive copyright violations occur on Napster – not sometimes, but all the time. And not by just some users – by all users. Simply enter the name of any well-known musical artist or song into Napster's search engine and you will find dozens, and most likely hundreds, of unauthorized copies of copyrighted sound recordings and musical compositions. Creighton Supp. Decl. ¶ 5.

Napster users overwhelmingly use Napster to engage in music piracy, and very little else. Napster told this Court it did not know the level of piracy through its system. Frackman Decl., Ex. L. Plaintiffs do. Plaintiffs engaged Professor Ingram Olkin, Professor of Statistics and

1 Education (and past Chair of the Department of Statistics) at Stanford University, to design a  
2 statistical sampling methodology from which he reliably could estimate the level and proportion of  
3 infringements on Napster. Based on actual user download data obtained from Napster and on  
4 independently-gathered data regarding the files being offered for "sharing" by Napster users  
5 (collectively more than 24 million files), Professor Olkin sought to answer two questions: (1) what  
6 percentage of Napster users are engaged in some level of music piracy (by offering at least some  
7 pirated music) while logged onto Napster?; and (2) what percentage of the MP3 music files  
8 actually being downloaded by Napster users are infringing? His findings hardly are surprising:

- 9 • First, every single Napster user sampled was offering at least some pirated music  
10 for others to download. In other words, no one is using Napster exclusively for  
11 non-infringing activities; and
- 12 • Second, over 87% of the files actually selected for downloading by Napster users  
13 have been conclusively confirmed to be infringing, an additional 3.2% of files are  
14 likely (but not yet conclusively verified) to be infringing. Olkin Rpt., pp. 7-8.<sup>9</sup>

15 Of course, these facts are not news to Napster. From its earliest design stage, the  
16 purpose of Napster was to facilitate music piracy. Napster's chief architect and co-founder, Shawn  
17 Fanning, testified that he began work on Napster to put an end to the frustration of his college  
18 roommate in finding and downloading MP3 music files.<sup>10</sup> The essential nature of Napster was  
19 reaffirmed when the three founders were developing their first business plan. Co-founder Sean  
20 Parker, writing to co-founder John Fanning, emphasized the business need to collect user

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21  
22 <sup>9</sup> This does not at all mean that the remaining files are authorized. It simply means  
23 that, to date, plaintiffs have been unable to verify conclusively – with a sworn statement from the  
24 rights holder – that the files are infringing. For example, for about 9.4% of the files, there was  
25 not enough information to form a conclusion one way or the other in the time permitted. For  
26 only 0.26%% of the files -- only 3 of 1,150 files sampled -- have plaintiffs been able to confirm  
27 that the rights holder does not object to the files being traded on Napster. Olkin Rpt., pp. 7-8.  
28 Hausman Decl. ¶¶ 8-11; Miller Decl. ¶¶ 8-10.

<sup>10</sup> Fanning Depo. 31:10-35:1, Ex. 194, at 00015. That frustration was borne out of  
the fact that often the links to MP3 files on pirate MP3 sites would be dead, because the RIAA  
had shut the site down. Declaration of Frank Creighton dated 12/3/99 (previously filed)  
("Creighton 12/3/99 Decl."), ¶¶ 18-19.

1 information (to sell to advertisers and other third parties) while at the same time ensuring complete  
2 user anonymity:

3 "Users will understand that they are improving their experience by providing  
4 information about their tastes without linking that information to a name or  
5 address or other sensitive data that might endanger them (*especially since  
they are exchanging pirated music*)." Parker Depo., 160:1-162:14, Ex. 254,  
at 00100 (emphasis added).<sup>11</sup>

6 In a perverse "fox guarding the hen-house" twist, this plan to conceal user identities was written by  
7 the same Sean Parker who currently purports to be Napster's officially designated "copyright  
8 compliance officer" under the DMCA. Parker Depo 121:24-122:23, Ex. 240. His job is to deal  
9 with copyright infringement notices received by Napster. Adding to the irony, he himself is a  
10 direct infringer of plaintiffs' copyrights, having used Napster to download copyrighted MP3 music  
11 files. Parker Depo. 13:2-14:19, Ex. 230, pp. 3-5.

12 Parker's strategy memo - in a section headed "Problems" - also stressed the need  
13 for Napster to try to convince the music industry that it is more than just a haven for piracy:

14 **"Problems**

15 The main hurdle I was planning to discuss was RIAA harassment,  
16 but that was addressed on the phone. It should be noted however, that many  
17 of the strategies I mentioned above (*harping CD's, recommendation engine,  
etc.*) will put us in a much better bargaining position with the RIAA when  
18 they see that we are not just *making pirated music available* but also  
19 pushing demand." *Id.*, Ex. 254, at 00102 (emphasis added).

20 Indeed, Napster always knew it was building a business based on music piracy - but  
21 it always had a plan, and even to this day the plan really hasn't changed:

22 "the key is to maintain the hook (Napster users know that by connecting to  
23 Napster, they have access to *any music they want, absolutely free*) . . . to  
24 grow our user base, and then use [this] user base coupled with advanced  
25

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26 <sup>11</sup> Napster followed through on the user anonymity feature. As the Court will recall,  
27 in connection with Napster's earlier motion for summary adjudication, plaintiffs presented  
28 evidence, which Napster did not deny, that while Napster collects and stores in a database some  
real world user information, it purposefully disassociates all this information from a user's  
"screen name." Kessler Depo. 255:20-257:22. Of course, there is no business purpose for this -  
in fact it defies logic and all usual principles of data management - except in the context of  
Parker's concern that users would otherwise fear prosecution "since they are exchanging pirated  
music."

1 technology to *leverage the record companies into a deal.*" Fanning Depo.  
148:19-150:19, Ex. 186, at 00115 (emphasis added).<sup>12</sup>

2 Any music you want, absolutely free is exactly the hook Napster has used to grow  
3 its user base:

4 **"Napster is the world's largest MP3 music library.**  
5 Napster ensures the availability of every song online by connecting you live  
6 with millions of songs found in other MP3 listeners' music collections.  
7 With Napster, you'll never come up empty handed when searching for your  
8 favorite music again!" Brooks Depo., Ex. 111.

9 According to Napster, "[w]ith Napster you can locate and download *your favorite music* in MP3  
10 format...and, its 100% FREE!" Richardson Depo., Ex. 136.

11 After the music industry stated its intention to take legal action, and with  
12 professional venture capitalists on board, Napster tried to sanitize its explicit self-promotion as a  
13 community of music pirates. It added lawyerly copyright disclaimers to the website and the  
14 service, and it promptly modified its website to delete essentially all of the language quoted above.  
15 Of course, by that time, Napster didn't need to be so explicit about its purpose. Everyone already  
16 knew.

17 Napster immediately adopted the mantra that it was all about the unknown artist.  
18 Napster's then-new CEO, Eileen Richardson, exclaimed to the press that Napster was about the  
19 unknown artist, "not about known artists like Madonna." Richardson Depo. 238:2-240:1. Yet,  
20 Napster's own promotional materials expose the disingenuousness of that statement and Napster's  
21 continued assertion of it. Before the lawsuit, Napster's key selling point (the "hook" described  
22 above) was that "Napster virtually guarantees you'll find the music you want...*and you can forget*  
23 *wading through page after page of unknown artists.*" Parker Depo. 104:16-105:10, Ex. 235, at  
24 004774; Richardson Depo. 178:21-180:7, Ex. 136. Not surprisingly, Napster deleted that  
25 promotional material when it sanitized its website. Richardson Depo., Ex. 137.

26  
27 <sup>12</sup> One internal Napster memorandum noted as possible "Problems" with this plan –  
28 "revenue insufficient to pay Record Industry," and "Record industry may develop the technology  
themselves." Fanning Depo., Ex. 188, at 00118.

1 But, deleting the words didn't change that Napster was never about the unknown  
2 artist, and still isn't.<sup>13</sup> The music piracy on Napster is such common knowledge that virtually all of  
3 the countless news articles about Napster recount how easy it is to find all the works of world's  
4 leading recording artists.<sup>14</sup> Napster's own message boards, which Napster moderates, are replete  
5 with admissions of infringements. Frackman Decl., Exs. J-K.

6 Moreover, plaintiffs, through the RIAA, notified Napster in writing of the massive  
7 infringing activity taking place on its service, including specific notice of over 12,000 infringing  
8 MP3 files. Creighton 12/3/99 Decl. ¶ 14, Ex. D. See Fonovisa, 76 F.3d at 261, 264 (letters from  
9 sheriff, notifying swap meet organizers of its vendors' continued sale of counterfeit recordings,  
10 constitute evidence of knowledge); Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, 1348 (8th  
11 Cir. 1994) ("in light of [plaintiff's] earlier requests that [defendant] cease copying its copyrighted  
12 photographs, [defendant] had actual notice that its activities infringed on [plaintiff's] copyrights").  
13 Although Napster claims it terminated the individual users identified in the notice, the specific  
14 songs identified in Schedules A and B to the Complaint and in the RIAA's notice are still widely  
15 available through Napster, and Napster users continue to copy and download them. Creighton  
16 Supp. Decl., ¶¶ 3-4.

17  
18  
19 <sup>13</sup> According to the founder and CEO of MP3.com, the leading Internet site for  
20 authorized MP3 downloads of unknown and unsigned artists: "Napster does not contain any of  
21 the features of MP3.com...that are designed to help visitors find new artists, such as categorizing  
22 music by genre or geography, providing lists of new, featured, and most popular music, or  
23 providing information about artists and links to similar artists." Robertson Decl. ¶ 12. This is  
24 not a surprise given the disregard Napster has for the unknown artist. Commenting specifically  
25 on MP3.com, one internal Napster document explains:

26 "According to ZDNet, 'Sampling the charts at MP3.com means  
27 suffering through mediocre music by bands with mediocre names.'  
28 Not exactly the kind of glowing review which will build a world-  
class distribution platform! Napster's unique system, allowing for  
the sharing of users' music portfolios, changes this paradigm."  
Parker Depo., Ex. 251.

29 <sup>14</sup> Napster certainly is aware of these reports. Richardson Depo.209:7-17, Ex. 145;  
30 Fanning Depo. 23:24-24:8, 234:22, 254:5-255:4, Exs. 193, 194.

1 Napster simply cannot claim that it lacks knowledge - Napster's top executives use  
2 Napster and, like every other Napster user, they too use Napster to pirate popular music. The  
3 Court ordered Napster to produce to plaintiffs a listing all MP3 music files that its senior  
4 executives downloaded from or shared on Napster. Most of these files consist of top hits of well-  
5 known artists signed to major record companies.<sup>15</sup> They include recordings specifically identified  
6 in the Complaint as infringing and recordings about which the RIAA had given Napster specific  
7 notice. Ironically, although Napster's former CEO, Richardson, proclaimed Napster is "not about  
8 Madonna," her computer revealed downloads of five Madonna MP3 music files. Richardson  
9 Depo. 239:4-240:23, Ex. 64. In the end, every single Napster executive's downloads contained  
10 blatantly infringing recordings.<sup>16</sup>

11 A January 2000 e-mail exchange between Napster co-founder Shawn Fanning and  
12 one of Napster's chat room moderators, encapsulates the state of affairs regarding Napster's actual  
13 knowledge of the pervasive music piracy it facilitates. After one Napster moderator wrote to a user  
14 that Napster was about "free music," another Napster moderator sent an e-mail questioning  
15 whether that was a wise thing to do, stating the obvious:

16 "admitting that we know Napster is used for the transfer of illegal MP3 files  
17 might not be the best thing to do . . . I mean . . . obviously people are going to

18 <sup>15</sup> For example, Napster executives have downloaded popular music of the Beatles  
19 ("Hey Jude," "Ticket To Ride," "Help"), Madonna ("Borderline," "Like A Prayer," "Crazy For  
20 You"), Led Zeppelin ("Kashmir," "Stairway To Heaven"), Olivia Newton-John ("Hopelessly  
21 Devoted To You"), Bruce Springsteen ("The River," "Secret Garden"), Prince ("1999," "When  
22 Doves Cry," "Purple Rain"), Elton John ("Your Song," "Candle In The Wind," "Goodbye,  
23 Yellow Brick Road"), Bette Midler ("The Rose"), the Rolling Stones ("Paint It, Black,"  
24 "Angie"), Neil Diamond ("Girl, You'll Be A Woman Soon"), the Commodores ("Brick House"),  
25 Cat Stevens ("Father And Son"), Tori Amos ("Cornflake Girl"), the Eagles ("Hotel California"),  
26 Jimi Hendrix ("Little Wing"), Van Morrison ("Brown Eyed Girl"), Third Eye Blind ("Semi-  
27 Charmed Life"), Pink Floyd ("Wish You Were Here"), Eric Clapton ("Layla," "Tears In  
28 Heaven," "Wonderful Tonight"), No Doubt ("Don't Speak"), Puff Daddy ("I'll Be Missing  
You"), U2 ("One"), David Bowie ("Major Tom," "Young Americans"), and the Temptations  
("My Girl"). Brooks Depo. 51:8-24, 54:25-56:11, Ex. 64, pp. 2-4; Richardson Depo. 20:5-22:10,  
25:2-26:1; Parker Depo. 70:14-16, Ex. 230, pp. 3-5; Fanning Depo., Exs. 174-176.

26 <sup>16</sup> Internal Napster documents reveal that even when Napster executives made a  
27 presentation using "screenshots" of the Napster service, those screens do not list unknown artists.  
28 They list top artists such as the Grateful Dead and Pearl Jam. Richardson Depo., Ex. 126, at  
002260, 002263.

1 use it for that purpose . . . but . . . we might not want to actually say we know  
2 that . . . \*shrug\* just semantics I guess . . . but eh . . . being sued can be a bitch .  
3 . . ."

3 Shawn Fanning's response: this is an "excellent point," and moderators should "try to avoid  
4 discussions similar to this...you should all be very aware of what you say...(it appears my  
5 hypocrisy knows no bounds)." Fanning Depo. 222:21-223:8, Ex. 192, at 001971.

6 Of course, although the record of Napster's actual knowledge is irrefutable,  
7 plaintiffs do not need to show actual knowledge; plaintiffs only need to show *constructive*  
8 knowledge to satisfy the knowledge element. Gershwin, 443 F.2d at 1162; Sega II, 948 F. Supp. at  
9 933; Ez-Tix, 919 F. Supp. at 732, 734. Napster boasts 20 million recordings on its service -  
10 every user's "favorite music." With Napster boasting to potential investors that its executives have  
11 "Record label experience" totaling "45+ years in all" (Richardson Depo., Ex. 129, at 00138),  
12 Napster hardly can deny that it knows that the major record companies and other RIAA members  
13 produce and distribute the vast majority, over 90%, of the legitimate music sold in the United  
14 States. Napster also knows that it has been affirmatively authorized to allow distribution of only a  
15 relative handful of unsigned artists. These facts alone prove Napster's knowledge.<sup>17</sup>

16 In Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503 (N.D.  
17 Ohio 1997), the defendant bulletin board operator encouraged users to upload and download any  
18 and all photographs while ignoring the likelihood that plaintiff's copyrighted photos were among  
19 those being uploaded. He argued that he should not be liable because he had no way of  
20 distinguishing between copyrighted and uncopyrighted photographs. The Court rejected this  
21

22  
23 <sup>17</sup> Napster steadfastly protects its own intellectual property, including its  
24 copyrighted software - which users must agree not to infringe before downloading it - and it  
25 plainly understands the nature of copyright law as it applies to music and the illegality of MP3  
26 downloads of popular music. See, e.g., Castle Rock Entertainment v. Carol Publishing Group,  
27 Inc., 955 F. Supp. 260, 267 (S.D.N.Y. 1997) (where defendants were "sophisticated with respect  
28 to [copyright] matters...the record provides clear evidence, at a minimum, of defendants' reckless  
disregard for the possibility that their conduct amounted to copyright infringement"). Indeed,  
when the recording group, The Offspring, began selling merchandise emblazoned with the  
Napster trademark, Napster promptly demanded that they cease and desist. Frackman Decl.,  
Ex. M.

1 argument, finding that defendants had "at least constructive knowledge that infringing activity was  
2 likely to be occurring" on their bulletin board:

3 "Playboy Magazine is one of the most famous and widely distributed  
4 adult publications in the world. It seems disingenuous for  
5 Defendants to assert that they were unaware that copies of  
6 photographs from Playboy Magazine were likely to find their way  
7 onto the BBS." 982 F. Supp. at 514.

8 See RSO Records v. Peri, 596 F. Supp. 849, 858 (S.D.N.Y. 1984) ("knowledge" found where "the  
9 very nature of" the product "would suggest infringement to a rational person."); Universal City  
10 Studios Inc. v. American Invsco Management, Inc., 217 U.S.P.Q. 1076, 1077 (N.D. Ill. 1981) (fact  
11 that motion picture was just released in theaters supports inference of actual or constructive  
12 knowledge that videocassette copy was infringing); Gershwin, 443 F.2d at 1163 (firm responsible  
13 for organizing and supporting community concerts held liable for contributory infringement  
14 despite not knowing which specific songs would be played; general knowledge that "copyrighted  
15 works were being performed at [the concert] and that neither the local association nor the  
16 performing artists would secure a copyright license"); see also Sega Enterprises Ltd. v. MAPHIA,  
17 857 F. Supp. 679, 686-87 (N.D. Cal. 1994) ("Sega I") (element satisfied "[e]ven if Defendants do  
18 not know exactly when games will be uploaded to or downloaded from" its service).

19 This level of knowledge renders any Napster argument about DMCA "safe harbors"  
20 irrelevant. The DMCA is not just a "notice and takedown" statute as Napster repeatedly claims.  
21 Section 512(d) expressly *disqualifies*, from any safe harbor, any defendant that has "actual  
22 knowledge that the material or activity is infringing," 17 U.S.C. § 512(d)(1)(A), or that is "aware  
23 of facts or circumstances from which infringing activity is apparent." 17 U.S.C. § 512(d)(1)(B).  
24 The DMCA's safe harbors protect innocent infringers, not those like Napster, that deliberately  
25 build a business based almost exclusively on piracy.<sup>18</sup>

26 <sup>18</sup> At the same time Napster tries to hide behind Section 512(d)(3)'s "notice and  
27 takedown" provision, Napster forgets that it *failed* to "takedown" after being given specific  
28 notice. Napster has done nothing to disable access to the more than 12,000 infringing music files  
the Record Company Plaintiffs identified to Napster months ago. Creighton 12/3/99 Decl. ¶ 14;  
Creighton Supp. Decl. ¶ 3.



1                   2.     Napster Materially Contributes To Its Users' Direct Infringements.

2                   It cannot be disputed that Napster "materially contributes" to the infringements on  
3 its system. Napster is a "*but for*" cause of its users' infringements, which could not take place  
4 without Napster's involvement. This case is much stronger even than Fonovisa, where the Ninth  
5 Circuit held this element was satisfied where "it would be difficult for the infringing activity to  
6 take place in the massive quantities alleged without the support services provided by the swap  
7 meet." 76 F.3d at 264; see also Gershwin, 443 F.2d at 1162 (concert promoter "caused" the  
8 copyright infringement by its "pervasive participation" in creating an audience for the concert).

9                   Fonovisa held that "providing the site and facilities for known infringing activity is  
10 sufficient to establish contributory liability." 76 F.3d at 264, citing Columbia Pictures Industries,  
11 Inc. v. Aveco, Inc., 800 F.2d 59 (3rd Cir. 1986). It also found that the defendant materially  
12 contributed to infringement where it "protect[ed] infringers' identities" by refusing to "gather and  
13 share basic, identifying information about its vendors." 76 F.3d at 264. Napster does both and  
14 more.

15                  Napster provides the location, environment, and support (including software,  
16 servers, indexing, search functions, moderators, and staff) that enable users to access each others'  
17 computer hard drives so that the infringements can take place. Every user of Napster must  
18 download Napster's proprietary software, must connect to one of Napster's servers to use the  
19 service, must use Napster's search functions in order to locate files to download, and must be  
20 hooked up to Napster to initiate the downloading process. See A&M Records, Inc. v. Napster,  
21 Inc., 54 U.S.P.Q.2d at 1747, 2000 WL 573136, \*1-\*2. Napster's entire integrated service is  
22 predicated on being a "road map" that users can follow to find pirated music. Sega II, 948 F. Supp.  
23 at 933 (defendant who "provided a road map on his BBS for easy identification of Sega games  
24 available for downloading" and "provided the facilities for copying the games by monitoring, and  
25 operating the BBS software, hardware and phone lines necessary for the users to upload and

1 download games" was contributorily liable).<sup>19</sup> For all these reasons, this Court already has found  
2 that, although "the MP3 file is actually transmitted over the Internet...the steps necessary to make  
3 that connection could not take place without the Napster server." A&M Records v. Napster, 54  
4 U.S.P.Q. 2d at 1747, 2000 WL 573136, \*2.

5  
6 **B. Napster Is Liable For Vicarious Infringement.**

7 Napster also is liable for vicarious infringement because it has the right and ability  
8 to supervise its customers, and economically benefits from their use of its services.

9 **1. Napster Has A Direct Financial Interest In Users' Infringing Activities.**

10 The economic benefit Napster receives from the infringement of plaintiffs' music  
11 on the Napster service is both enormous and quantifiable. It already has translated into a cash  
12 infusion of over *\$13 million* from venture capital firm Hummer Winblad (for 20% of the  
13 company), among other substantial investors. Richardson Depo. 80:17-85:16. Napster's current  
14 value (even with this lawsuit pending) has been pegged at figures ranging from *\$60-80 million to*

15  
16 <sup>19</sup> Napster also contributes in numerous other specific ways to its users' activities  
17 including: it takes an inventory of MP3 files in the designated locations on each user's computer  
18 hard drive (Kessler Depo. 154:5-24, 230:18-21, Ex. 4, at 00925); "validates" the indexed MP3  
19 files available on its system to verify they are properly formatted (*id.* 145:2-18, Ex. 2);  
20 continuously updates its directories to reflect the addition or deletion of MP3 files as users log on  
21 or off (*id.* 69:22-71:21); provides its users with specific information about the quality and  
22 download speed of each of the MP3 files available (file size, bit rate, frequency, length, ping  
23 time, the login "name" of the user on whose hard drive the recording resides, and the line speed  
24 of the user's connection) (*id.* 153:16-154:11, Ex. 5, at 00843); enables its users to tailor their  
25 searches by specifying the technical parameters of the search (minimum bit rate, frequency, ping  
26 time, and line speed) (*id.* 137:8-138:9; 140:9-21, Ex. 5, at 00834); obtains and assigns a digital  
27 "fingerprint" (*i.e.*, "checksum") uniquely identifying every MP3 file on its system (*id.* 112:3-13);  
28 determines if a new user is behind a firewall, allows for firewalls to be circumvented, and tailors  
searches to omit responsive files that are inaccessible due to firewalls (*id.* 125:13-127:8, 131:18-  
132:13); provides human "moderators" to facilitate copying and assist users on the Napster  
service (*id.* 57:18-25, 61:21-62:10; 128:9-130:15), and gives the moderators the ability and the  
power to handle problem users (Fanning Depo. 256:15-257:23, Ex. 197, at 00120); monitors  
each user's downloading activity, defers user requests to download MP3 files that cannot be  
accomplished immediately, and "queues" them until they can be downloaded (Kessler Depo.  
80:2-18; 106:1-7); and generally "coordinates file transfers between users" (*id.*, Ex. 2). Napster  
continues to add new features as it rolls out new versions of its software. Fanning Depo. 289:21-  
292:5, Ex. 208.

1 **\$150 million.** Richardson Depo. 132:22-133:11, 277:25-278:5, Ex. 153; see also Teece Rpt.,  
2 pp. 11-12.

3 In the Ninth Circuit and elsewhere, the "financial benefit" element is satisfied where  
4 infringing activities "enhance the attractiveness of the venue to potential customers." Fonovisa, 76  
5 F.3d at 263. In Fonovisa, the Court held that vicarious liability could be found because "the sale of  
6 pirated recordings at the Cherry Auction swap meet is a 'draw' for customers, as was the  
7 performance of pirated music in the dance hall cases and their progeny." 76 F.3d at 263-64; see  
8 also PolyGram International Publishing, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1332 (D.  
9 Mass. 1994) (trade show participants "derived a significant financial benefit from the attention"  
10 that attendees paid to the infringing music being played).

11 Clearly, the availability of millions of copies of plaintiffs' copyrighted music on the  
12 Napster system "enhance[s] the attractiveness" of Napster and is the principal "draw" for its users.  
13 Napster knows and admits that the company's value is based on "the quantity and quality of music  
14 available." Richardson Depo. 112:18-113:2. See also Parker Depo., Ex. 254, at 00099  
15 ("Developing our user base early on *and achieving that 'critical mass' of available songs* will be  
16 important to our success"). In economic terms:

17 "Napster's growth has arisen from what economists call 'network  
18 effects' and 'positive feedback.'...the more users who log on to  
19 Napster and offer their own MP3 music collections for others to  
20 copy, the greater the number of desirable files that are available to  
21 others, and the more Napster becomes attractive to other prospective  
22 users....Napster intends to build a massive user base 'community'  
23 that, once drawn into 'the Napster community' by the attractiveness  
24 of plaintiffs' copyrighted works, can be commercially exploited by  
25 Napster....Thus, Napster's growth has largely if not exclusively been  
26 due to the fact that it facilitates the unauthorized trading of the  
27 valuable intellectual property of plaintiffs and other content holders  
28 on a vast scale." Teece Rpt., pp. 4-5.

29 See Hardenburgh, 982 F. Supp. at 513 ("the quantity of adult files available to customers" on  
30 defendant's bulletin board "increased the attractiveness of the service."); Playboy Enterprises, Inc.  
31 v. Webworld, Inc., 968 F. Supp. 1171, 1177 (N.D. Tex. 1997) ("Webworld I") (element satisfied  
32 where plaintiff's copyrighted photographs "enhanced the attractiveness of the Neptics' website to  
33 potential customers"); Sega I, 857 F. Supp. at 684 (defendants profited by the unlawful activities of

1 their electronic bulletin board because "the existence of the distribution network for Sega video  
2 game programs increases the prestige of the MAPHIA bulletin board"); PolyGram, 855 F. Supp. at  
3 1332; see also Herbert v. Shanley Co., 242 U.S. 591, 595, 37 S. Ct. 232 (1917) (hotel and  
4 restaurant owners permitted infringing performances to attract customers and made a profit from  
5 the sale of food).

6 That Napster has, to date, not earned revenues is immaterial. Napster consciously  
7 has decided initially not to pursue revenues, but instead to focus on its most important metric for  
8 success and value generation: "new user acquisition." Brooks Depo., Ex. 80.<sup>20</sup> Internal Napster  
9 planning documents confirm a deliberate strategy: "early efforts should be directed first toward  
10 generating user base, then toward extending the e-commerce possibilities of the product." Parker  
11 Depo, Ex. 254, at 00099; see also id., Ex. 251 ("Napster will create the largest, fastest growing and  
12 most active user base of digital music enthusiasts - *a population that directly drives revenue*");  
13 Richardson Depo. 106:1-11, Ex. 127, at 00130 (Napster's strategy is to "delay maximizing revenue  
14 while it preserves its first-mover advantage...").

15 However, from the very beginning, Napster has been making plans and devising  
16 strategies to "monetize" its service. See, e.g., Teece Rpt., pp. 7-11. Napster has considered  
17 "many, many models" of revenue generation, including sponsorships, advertising, selling artist and  
18 Napster merchandise, and compact disc sales. Richardson Depo., 114:16-25, 116:23-119:6.  
19 Napster also has considered selling or marketing digital music products "related" to its core service  
20 such as compact disc "rippers" and "burners." Id., Ex. 133, at 002178. Napster is exploring and  
21 negotiating commercial contracts in many of these areas, and, very recently, has entered into a  
22 written agreement with online retailer Amazon.com, Richardson Depo., Ex. 126, pursuant to which  
23 Napster will receive a portion of the revenues Amazon receives from users Napster refers. Id.,

24 \_\_\_\_\_  
25 <sup>20</sup> "In the Internet economy, growth, in the form of 'eyeball' accumulation, is often  
26 seen as more valuable to a business valuation than is current revenues or profits. Napster in fact  
27 has identified 'new user acquisition' as the 'most important metric,' even more important than  
28 revenue. In other words, growth in user base *per se* is seen as building up a valuable economic  
asset, one that has economic value *now* because it can be exploited in the future." Teece Rpt.,  
p. 4 (emphasis in original); 2 M. & D. Nimmer, On Copyright, § 8.21 at n.1 (2000 ed.)  
(describing the "Netscape strategy": "give it away for free in order to make money").

1 Ex. 151. As early as January 2000, Napster was even preparing for a "liquidation event, i.e., IPO  
2 or merger/acquisition..." in order to "cash in" on the size and growth of its user base. Brooks  
3 Depo, Ex. 115, at 002439; Teece Rpt., pp. 5-7.

4 As former CEO Richardson makes clear, Napster was "never a not-for-profit  
5 organization." Richardson Depo. 115:24-116:8. See Major Bob Music v. Stubbs, 851 F. Supp.  
6 475, 480 (S.D. Ga. 1994) (for purposes of vicarious liability, a commercial enterprise "is  
7 considered to be 'profit-making' even if it never actually yields a profit"); see also Herbert, 242  
8 U.S. at 595 ("Whether [music] pays or not, the purpose of employing it is profit, and that is  
9 enough").<sup>21</sup> Napster clearly has "the sort of economic incentives for tolerating unlawful conduct  
10 that the vicarious liability doctrine was meant to eliminate." Universal City Studios, 217 U.S.P.Q.  
11 at 1079.

12 With essentially every Napster user engaged in music piracy while on Napster,  
13 Napster's current value, and future plans for exploiting its user base, are directly – indeed, solely –  
14 attributable to the infringement of plaintiffs' music that it enables and encourages.

15 **2. Napster Has The Right And Ability To Supervise Users' Activities.**

16 In Fonovisa, the Ninth Circuit held that this element was satisfied where the  
17 defendant had the "right to terminate vendors for any reason," "promoted the swap meet," and  
18 "controlled the access of customers to the swap meet area." 76 F.3d at 262. Each of these factors is  
19 present here. Clearly, Napster has "promoted" its music-swapping infringement service. Indeed,  
20 going far beyond the generalized promotional activities of the defendant in Fonovisa, Napster  
21 specifically has touted its service as one where customers will "*never come up empty handed*  
22 when searching for [their] *favorite music* again!" Brooks Depo., Ex. 111. And, just as the  
23 defendant in Fonovisa had the "right to terminate vendors for any reason" and "controlled the  
24 access of customers" to the meet, 76 F.3d at 262, Napster specifically reserves "the right to refuse  
25 service and terminate accounts in their discretion, including, but not limited to, if Napster believes  
26

27  
28 <sup>21</sup> In a related context, the Copyright Act defines the term "financial gain" to include  
"receipt, or *expectation of receipt*, of anything of value..." 17 U.S.C. § 101 (emphasis added).

1 that user conduct violates applicable law or is harmful to the interests of Napster, its affiliates, or  
2 other users, or for any other reason in Napster's sole discretion, with or without cause." Kessler  
3 Depo., Ex. 19. Napster claims, in fact, that it *has* terminated users (Kessler Decl. ¶ 23) and gives  
4 its "moderators" significant authority to discipline users. Fanning Depo, Ex. 197. Clearly, where,  
5 as here, a defendant has "the right to terminate [users of its services] for any reason...through that  
6 right [it has] the ability to control the activities" of the users. 76 F.3d at 262; see also Shapiro,  
7 Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 306-08 (2d Cir. 1963).<sup>22</sup>

8           Moreover, even where (unlike here) a defendant lacks "the formal, contractual  
9 ability to control the direct infringer," its "'pervasive participation in the formation and direction'  
10 of the direct infringers, including promoting them (i.e. creating an audience for them)," puts it "in a  
11 position to police the direct infringers," thus satisfying this element. Fonovisa, 76 F.3d at 263,  
12 quoting Gershwin, 443 F. Supp. at 1163. Napster not only creates the audience for millions of  
13 direct infringers who otherwise would have no contact with each other, it *needs* to – it needs to  
14 bring infringing users together who will "share" their music, so it can use that music to attract still  
15 more users.

16           Importantly, Napster need not actually *exercise* supervision to be deemed capable  
17 of doing so. Where a defendant is "in a position to police the infringing conduct," its "*failure* to  
18 police the conduct" gives rise to vicarious liability. Gershwin, 443 F.2d at 1161-63; see also Chess  
19 Music, Inc. v. Sipe, 442 F. Supp. 1184, 1185 (D. Minn. 1977) ("In an age where much of the music  
20 is copyrighted, Sipe should not profit at the expense of these song composers by instructing  
21 musical groups not to play copyrighted music and by claiming ignorance of their program. He is  
22

23           <sup>22</sup>       Apart from the right to terminate, internal Napster documents acknowledge that  
24 Napster controls its users' environment, and ties Napster's ability to generate revenue directly to  
25 its control: "For the purposes of revenue generation, [the "Napster Experience"] should be  
26 defined as *any time when Napster can control the environment of its users' experience.*"  
27 Brooks Depo., Ex. 80, at 002176 (emphasis in original). Likewise, another Napster document  
28 emphasizes that Napster would exploit its "large base of active users" by using real-time analysis  
of usage patterns, allowing for unprecedented targeting of each user's specific musical tastes."  
Parker Depo., Ex. 254, at 00096. See Playboy Enterprises, Inc. v. Webbworld, Inc., 991 F. Supp.  
543, 554 (N.D. Tex. 1997) ("Webbworld II") (defendant "created and controlled operation of the  
ScanNews software that was the heart of the Webbworld enterprise").

1 deemed to have acquiesced in the musician's performance as he allowed the musicians the  
2 discretion to select the program"); RCA/Ariola Int'l Inc. v. Thomas & Grayston Co., 845 F.2d 773,  
3 777 (8th Cir. 1988); Fonovisa, 76 F.3d at 262 (rejecting characterization of swap meet owner as  
4 mere "absentee landlord" that had "surrendered" its supervisory powers to its tenants); Shapiro,  
5 316 F.2d at 306 (department store vicariously liable for the sale of bootleg recordings by its  
6 concessionaire even though the defendant was "not actively involved in the sale of records," and  
7 did not control and supervise the individual employees).

8           Because Napster "receive[s] a financial benefit directly attributable to the infringing  
9 activity" and "has the right and ability to control such activity" – in other words, because Napster is  
10 a vicarious infringer – it is also disqualified from any potential safe harbor under Section 512(d).  
11 17 U.S.C. § 512(d)(2). The disqualification by virtue of Section 512(d)(2) is independent of and in  
12 addition to the disqualification by virtue of Section 512(d)(1)(A) and (B), discussed above. A  
13 defendant must satisfy *each* of the requirements of 512(d)(1)(A)-(C), 512(d)(2), and 512(d)(3) to  
14 be eligible for safe harbor. The strict eligibility requirements for the 512(d) safe harbor, and  
15 Napster's inability to meet them, explain why Napster pushed so hard (unsuccessfully) to be  
16 considered a mere conduit under Section 512(a).

17           **C. Napster's Defenses Are Meritless.**

18           **1. The 'Staple Article Of Commerce' Doctrine Does Not Shield Napster's**  
19           **Services.**

20           Plaintiffs anticipate Napster will attempt to rely on the "staple article of commerce"  
21 doctrine. First, as a threshold matter, this doctrine, even if applicable, provides a defense only to  
22 *contributory infringement*, not to vicarious infringement. RCA/Ariola, 845 F.2d at 781. Second,  
23 the doctrine does not apply to Napster because its service is used predominantly for copyright  
24 infringement – rather than being "*widely used* for legitimate unobjectionable purposes," as in Sony  
25 Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 442, 104 S. Ct. 774 (1984)  
26 (emphasis added). With essentially every Napster user using its service to engage in piracy, and  
27 over 87% (and likely much more) of the files actually downloaded being infringing (Olkin Rpt.,  
28 pp. 7-8), there simply are no substantial non-infringing uses to invoke the doctrine.

1           Moreover, because it is evident that Napster's founders created its system to allow  
2 its users to "exchang[e] pirated music," Napster may not invoke the doctrine, which does not  
3 extend "to products specifically manufactured for counterfeiting activity, even if such products  
4 have substantial noninfringing uses." A&M Records, Inc. v. General Audio Video Cassettes, Inc.,  
5 948 F. Supp. 1449, 1456 (C.D. Cal. 1996); see also Cable/Home Communication Corp. v. Network  
6 Productions, Inc., 902 F.2d 829, 846 n.30 (11th Cir. 1990) (rejecting "noninfringing use" because  
7 the devices at issue were "utilized and advertised... primarily as infringement aids"). Nor does the  
8 doctrine apply where, as here, the defendant has actual knowledge of the infringing activities or  
9 promotes, advertises, or encourages them. Cable/Home Communication, 902 F.2d at 837, 846;  
10 Elektra Records Co. v. Gem Electronic Distributors, Inc., 360 F. Supp. 821, 823 n.5 (E.D.N.Y.  
11 1973); Pomeroy, Promoting The Progress Of Science And The Useful Arts In The Domain:  
12 Copyright, Computer Bulletin Boards, And Liability For Others, 45 Emory L.J. 1035, 1066 (1996).  
13 Napster is not a staple article of commerce by any stretch of the imagination - it is a knowing and  
14 intended haven for music piracy.<sup>23</sup>

15           Third, in any event, the doctrine plainly does not apply where, as here, the  
16 defendant's contribution to the infringement is more than solely manufacturing a product. A&M  
17 Records v. General Audio Video, 948 F. Supp. at 1456-57; RCA Records v. All-Fast Systems,  
18 Inc., 594 F. Supp. 335, 339 (S.D.N.Y. 1984). In Sony, the defendant was not liable for  
19 contributory infringement by home users of its VCRs because, among other things, the defendant  
20 merely *manufactured* the VCRs. Its involvement in the allegedly infringing activity ended at the  
21 moment the device was sold, and the defendant had no further connection to the product or the  
22 consumers who used it. By contrast, Napster is the operator of a fully-integrated online *service*,  
23

24           <sup>23</sup> The decision in Sony turned in large part on a finding that substantial numbers of  
25 copyright holders who broadcast their works over free television either had authorized or would  
26 not object to having their work "time shifted" by private viewers. 464 U.S. at 443, 446. Here,  
27 plaintiffs represent the overwhelming majority of music copyright holders in the United States  
28 who specifically have *not* authorized Napster to make their content available on its service, and  
plaintiffs have obtained declarations from dozens of "independent" record labels confirming that  
they also have not authorized Napster to make their recordings available. Hausman Decl., ¶ 8  
and exhibits thereto.



1 and maintains operational control over every aspect of the service, and an ongoing relationship  
2 with its users. See RCA Records, 594 F. Supp. at 339 ("The Sony Corp. decision extends  
3 protection only to the manufacturer of the infringing machine, not to its operator"); RCA/Ariola,  
4 845 F.2d at 781 (manufacturer of "staple article of commerce" was nonetheless liable "because it  
5 retained title to the [device used to accomplish infringement]...exercised control over the retailers'  
6 use of the machines...and because it profited from that use"); Sony, 464 U.S. at 437 (liability for  
7 contributory infringement may be appropriate where there exists "an ongoing relationship between  
8 the direct infringer and the contributory infringer at the time the infringing conduct occur[s]").

9 **2. Napster Is Not Eligible For Any 'Safe Harbor' Under The DMCA.**

10 Plaintiffs have demonstrated above why Napster's conduct disqualifies it for safe  
11 harbor protection based on the particular requirements of Section 512(d). On a broader level, this  
12 Court should find that Napster does not qualify for protection under *any* DMCA safe harbor.  
13 Napster is not in compliance with section 512(i), which requires that the party seeking the benefit  
14 of any DMCA safe harbor "has adopted and *reasonably implemented*, and informs subscribers and  
15 account holders of the service provider's system or network of, a policy" to terminate repeat  
16 infringers (emphasis added). This provision is to ensure that "those who repeatedly or flagrantly  
17 abuse their access to the Internet through disrespect for the intellectual property rights of others  
18 should know that there is a realistic threat of losing that access." H.R. Rep. No. 551(II), at 61,  
19 1998 WL 414916, at \*154. See A&M Records v. Napster, 54 U.S.P.Q.2d at 1753, 2000 WL  
20 573136, \*10 (plaintiffs "have produced evidence that Napster's copyright compliance policy is  
21 neither timely nor reasonable within the meaning of subparagraph 512(i)(A)").

22 In order to maintain the strict anonymity and confidentiality that its users require to  
23 pirate plaintiffs' music without fear, Napster specifically designed its system so that it cannot  
24 comply with 512(i). Napster co-founder, Shawn Fanning, concedes that copyrighted music is  
25 being traded on Napster, that he was "a bit concerned" about this when he created Napster, but that  
26 Napster has done nothing to prevent it other than "establis[h] a system for removing users sharing,  
27 allegedly infringing, material." Fanning Depo. 105:10-108:20. This "system" was put in place  
28 only after this lawsuit was filed. Kessler Depo. 189:17-192:16, Ex. 8, at 00931, and former CFO

1 Richardson admits that it doesn't work. "It's proved impossible" to stop copyrighted music from  
2 being distributed on Napster: "[W]hat's been tried is ... someone should try to let us know if they  
3 think there's stuff on [Napster] that intentionally infringes a copyright, and so Metallica is one  
4 band that's tried to do that, unsuccessfully." Richardson Depo. 145:4-17.<sup>24</sup>

5 Napster refuses to know the real names and physical addresses of its users, and  
6 refuses to block the IP addresses of known infringers (although it does block the IP address of  
7 anyone who interferes with Napster's business by running "bots" on its server). Kessler Depo.  
8 60:24-61:10, 205:4-7, 255:20-257:22. Napster cannot conceal the identities of its users - to avoid  
9 "endanger[ing] them (especially since they are exchanging 'pirated music')" - and then ask this  
10 Court to give it the benefit of a DMCA safe harbor designed for innocent service providers who do  
11 *not* have knowledge of any infringements, who do *not* profit from infringements, and who *have*  
12 taken meaningful steps to terminate repeat infringers.

13  
14 **III. ABSENT AN INJUNCTION, PLAINTIFFS WILL SUFFER SUBSTANTIAL AND**  
15 **IRREPARABLE HARM.**

16 In copyright cases, irreparable harm is *presumed* upon a showing of a reasonable  
17 likelihood of success on the merits. Formula International, 725 F.2d at 525; Micro Star, 154 F.3d  
18 at 1109 (plaintiff "need only show a likelihood of success on the merits to get the preliminary  
19 injunction it seeks"); Carol Cable Co., Inc. v. Grand Auto, Inc., 4 U.S.P.Q.2d 1056, 1062 (N.D.  
20 Cal. 1987) (Patel, J.) ("irreparable injury is presumed upon a *prima facie* showing of copyright  
21 infringement").

22 Having demonstrated a reasonable likelihood of success on the merits, and  
23 submitted proof of the expenditure of significant time, effort and money directed to the production  
24 of copyrighted music at issue (Cottrell Decl. ¶ 5; Conroy ¶ 5; Eisenberg ¶ 5; Kenswil ¶ 5; Vidich

25  
26 <sup>24</sup> Richardson also testified that, after Napster received a letter from the Recording  
27 Industry Association of America ("RIAA") notifying Napster that users were downloading  
28 copyrighted recordings on the system, Napster did nothing to investigate because "[t]here's not  
any way to do that." Richardson Depo. 56:20-57:7.

1 ¶ 3), plaintiffs are entitled to the requested preliminary injunction. Apple Computer, Inc. v.  
2 Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983) ("the public interest underlying the  
3 copyright law requires a presumption of irreparable harm, as long as there is, as here, adequate  
4 evidence of the expenditure of significant time, effort and money directed to the production of the  
5 copyrighted material. Otherwise, the rationale for protecting copyright, that of encouraging  
6 creativity, would be undermined"). Nevertheless, plaintiffs need not rest on the presumption.

7 Over 10 million Napster users currently are "sharing" tens of millions of copies of  
8 copyrighted music – and, according to Napster, the number of users is growing at the almost  
9 unthinkable rate of "5% to 35% *per day*." And Napster is still in "Beta." The irreparable harm  
10 being inflicted upon plaintiffs is self-evident. Napster is harming sales of CDs. It is undermining  
11 the emerging commercial market for downloaded music. It is teaching a generation of music  
12 consumers that music has little intrinsic value. These injuries are happening now and are  
13 irreparable. This harm also was foreseen and intended by Napster. As an internal Napster business  
14 plan concludes: "the key is to coexist with the record industry, *at least temporarily* [and]  
15 ultimately *bypass the record industry entirely....*" Fanning Depo. 148:19-150:19, Ex. 186, at  
16 00117; see also Parker Depo., Ex. 254, at 00099 (Napster's goal of "usurping" and "undermining"  
17 the record industry).

18 As for Napster's impact on CD purchases, an internal Napster strategy document  
19 effectively puts an end to any suggestion that Napster is intended somehow to promote legitimate  
20 sales. Under the heading "Goals," Napster executives wrote:

21 "Napster brings about *death of the CD*  
22 Record industry may be unwilling to support this transition (*gut their bottom line*)  
Record stores (Tower records) *obsoleted*."

23 Fanning Depo, Ex. 188 (emphasis added).

24 Napster's internal prognostications are being borne out in the market, even after just  
25 a few months of operation. The evidence demonstrates that Napster users report that they are  
26 buying significantly fewer CDs as a result of their Napster use; empirical sales data analyses  
27 confirm a decrease in purchases among Napster's core constituency; and retail record stores near  
28

1 college campuses fear that Napster is putting them out of business. This evidence is summarized  
2 below:

3 **Survey of Napster Users.** Plaintiffs commissioned Dr. Deborah Jay of Field  
4 Research to survey Napster users. In response to open-ended questions asking why they use  
5 Napster and how it has had an impact on their purchases of CDs, Napster users (answering in their  
6 own words and unprompted) report as follows:

- 7 • **They are buying few CDs because of Napster.** A full 22% expressly said that,  
8 because of Napster, they don't buy CDs anymore or buy fewer CDs. Jay Rpt.,  
9 pp. 3, 18-20. Additionally, a full 41% of Napster users responded with answers  
10 that, while not explicit, certainly indicate they are buying fewer CDs or using  
11 Napster downloads as a substitute for purchasing CDs, including words to the effect  
12 that they use Napster "to get free music" or "to get music I don't have" or "it's  
13 easier or better than CDs." *Id.*
- 14 • **The more people download from Napster, the more they report buying fewer**  
15 **CDs.** More than 30% of heavy Napster users (those who have downloaded more  
16 than 75 songs) expressly said that, because of Napster, they don't buy CDs anymore  
17 or buy fewer CDs. And, 56% gave an answer that fairly suggests they are buying  
18 fewer CDs. *Id.*, pp. 4, 18-20.
- 19 • **The longer people use Napster, the more they download.** Of those who had used  
20 Napster for more than four months, a majority (51%) had downloaded more than 75  
21 songs. Napster users who have downloaded 25 songs or fewer overwhelmingly  
22 (65.1%) had been using Napster for less than three months. *Id.*, pp. 4, 20-21.<sup>25</sup>

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25 <sup>25</sup> These findings are consistent with the results of surveys conducted by plaintiff  
26 UMG for its own business purposes, not for this litigation. UMG's survey of Internet users (not  
27 limited to Napster users) found that users who had downloaded 100+ free songs showed a much  
28 greater tendency to decrease subsequent purchases of music. Kenswil Decl. ¶ 16. A document  
produced by Napster shows that Napster users (at least when sampled by Napster) made  
available, on average, over 100 music files each. Fanning Depo., Ex. 212.

1 Corroborating these findings, Dr. Jay's research also found that most Napster users  
2 don't already own - and do not subsequently purchase - the music they download. Almost half  
3 (48.6%) owned less than 10% of the music they were downloading, and almost half (46.6%)  
4 subsequently purchased less than 10% of the downloaded music they did not previously own. Jay  
5 Rpt., pp. 4, 21-22.

6 **Sales Data Analyses.** These survey findings are corroborated further by empirical  
7 analyses of SoundScan data on CD purchases. SoundScan collects actual point of sale purchasing  
8 data from retail stores, and even Napster agrees SoundScan is the accepted industry standard for  
9 this data. Brooks Depo. 40:5-15. The report of Michael Fine, CEO and President of SoundScan,  
10 analyzes music purchasing data from the first quarters of 1997, 1998, 1999, and 2000. He  
11 compared four data sets: national sales, general college sales (that is, sales at stores within a one  
12 mile radius of college campuses), and sales at two different sets of colleges where Napster use  
13 reasonably could be predicted to be high (again, measured by sales at stores within a one mile  
14 radius of the targeted schools). The two groups of colleges are "Napster Banned Colleges" (those  
15 colleges known to have attempted to ban Napster because use by students was overloading the  
16 schools network) and "Top 40 Wired Colleges" (those colleges identified by a major Internet  
17 publication as being the most Internet connected). The analysis tracked increases and decreases in  
18 unit purchases as a percentage of 1997 sales. Fine Rpt., pp. 2-5.

19 Despite a growth in overall nationwide purchases in music from the first quarter of  
20 1997 until the first quarter of 2000, purchases at colleges generally - Napster's key demographic -  
21 have steadily declined since 1998. Moreover, at the Napster Banned Colleges and the Top 40  
22 Wired Colleges *purchases have sharply declined* in that same period. For example, while a  
23 comparison of national first quarter sales from 1997 to 2000 shows an 18% increase, sales at  
24 colleges generally in 2000 remained at the same levels as 1997, and sales at the Napster Banned  
25 Colleges in 2000 were down significantly, being only 88% of the 1997 level. That reflects a gap of  
26 30% from national sales (an 18% gain nationally compared to a 12% drop at Napster Banned  
27 Colleges). The results were similar at the Top 40 Wired Colleges - national sales up (18%); 2000  
28

1 college sales at 1997 levels; and sales at the Wired Colleges at only 87% of 1997 levels. Fine Rpt.,  
2 p. 2.

3 And, while certainly the analysis reflects that pirate MP3 downloading was having  
4 an impact even before Napster, a comparison of the 1998-1999 decrease in purchases (before  
5 Napster) to the 1999-2000 decrease (after Napster) shows a marked worsening of the decrease. For  
6 example, the 1998-1999 decrease at college stores generally was 4.65%; at the Napster Banned  
7 Colleges it was 5.46% – reflecting about a 17.4% difference. The post-Napster, 1999-2000,  
8 decrease at college stores generally was 2.64%; but at the Napster Banned Colleges, the decrease  
9 in sales was 8.15% – *more than three times the decrease at colleges generally*. Fine Rpt., Data  
10 Analysis of College Store Sales. During this same period, national sales *increased* by 6.7%. *Id.*

11 **Retailer Testimony.** In addition to the surveys and sales data analyses, plaintiffs  
12 have presented evidence from the owners of retail music stores. One, Charles Robbins, owns an  
13 independent record store (Oliver's) just outside the gate of Syracuse University. He has been in  
14 the retail record business since 1976, and has owned Oliver's since 1992. Robbins Decl. ¶¶ 1-2.  
15 Since Napster swept the Syracuse campus in the Fall of 1999, he doesn't know if he can continue  
16 in business. December is traditionally his busiest month, with historic sales averaging between  
17 \$18,000 and \$30,000. This past December, his sales were \$4,000. Robbins Decl. ¶¶ 4, 9. He  
18 describes a troubling trend: "students listen to an album here and write down their favorite tracks  
19 so they don't have to waste time downloading songs from Napster that they may not want."  
20 Robbins Decl. ¶ 7. This is, of course, consistent with the countless news stories interviewing kids  
21 who say they'll never buy a CD again, and user postings on Napster's message boards. Frackman  
22 Decl., Exs. I-K.<sup>26</sup>

23  
24  
25 <sup>26</sup> Michael Dreese, the CEO of Newbury Comics, a retail chain with 21 stores  
26 throughout New England, reports a startling increase in sales of blank recordable CDs (or CDRs)  
27 coinciding precisely with the explosive growth of Napster. Blank CDR sales are up almost  
28 1000% from May 1999 to May 2000, and increased over 25% just from April to May of this  
year. His customers confirm that "consumers who used to buy pre-recorded CDs are now,  
instead, downloading the recordings for free from Napster and burning them on to CDRs, which  
the consumer can buy for less than a dollar each." Dreese Decl. ¶ 4.

1 Napster is hurting sales of CDs, particularly among the core college student  
2 constituency – and that harm is significant. See generally Teece Rpt., pp. 16-18.

3 Napster also is undermining plaintiffs' efforts to develop a legitimate commercial  
4 market for digitally downloaded music. Napster itself recognizes this market as critical to the  
5 future of the recording industry. Fanning Depo., Ex. 188. Here again, Napster both foresaw and  
6 intended the harm it is causing plaintiffs. That same internal strategy document identified above  
7 lists as the number one "goal" to "[a]ggregate users (*seize control of digital distribution*)."  
8 *Id.* (emphasis added).

9 Each of the plaintiff record companies has spent years researching and developing  
10 its plans to enter this market; each has spent thousands of personnel hours and millions of dollars  
11 in preparation; and each either has already entered the digital download market, or is written just a  
12 few weeks or months of launching its download plans. Eisenberg Decl. ¶¶ 9-22; Kenswil Decl.  
13 ¶¶ 9-17; Cottrell Decl. ¶¶ 6-17; Conroy Decl. ¶¶ 9-18; Vidich Decl. ¶¶ 6-10. Dr. David J. Teece,  
14 the Mitsubishi Bank Professor in the Haas School of Business and Director of the Institute of  
15 Management, Innovation and Organization at the University of California at Berkeley, has studied  
16 the emerging market, plaintiffs' plans to enter it, and Napster's impact. In his studied opinion,  
17 plaintiffs are suffering immediate harm, and will continue to suffer harm, in their efforts to enter  
18 and sustain their presence in the emerging digital download market as a result of the millions of  
19 free downloads available on Napster.

20 In their simplest form, Dr. Teece's conclusions say what is intuitively obvious:  
21 plaintiffs' *sale* of downloads of popular music essentially compete head-to-head with Napster's  
22 *free* downloads of the same music, and, as Dr. Teece puts it, "[i]t should not be surprising if  
23 Napster's presence undercuts the willingness of consumers to pay for music." Teece Rpt., p. 14.  
24 "The obvious economic difference between plaintiffs and Napster, of course, is that Napster need  
25 not worry about the costs of doing business that are borne by plaintiffs." *Id.* Napster does "not  
26 invest in developing content, and it does not pay royalties"; Napster "neither funds nor takes risks  
27 inherent in the creation of new content" and it does "not need to worry about security or pricing" or

28

1 "funding advertising and promotion." *Id.* "Napster benefits from those expenditures made by the  
2 plaintiffs. In economic terms, Napster is 'free riding' on the efforts of the plaintiffs." *Id.*

3 But, Napster does more than just free ride and unfairly compete with plaintiffs.  
4 Napster is undermining plaintiffs' efforts to establish a legitimate market at what Dr. Teece  
5 describes as "a critical juncture" in the development of that market. *Id.* at 16. Dr. Teece describes  
6 the inherent difficulties plaintiffs face in trying to penetrate a new market – especially since  
7 downloaded music represents both a new music *format* (digital downloads) via a new *distribution*  
8 *system* – and how these difficulties are compounded by the pervasive piracy enabled by Napster.  
9 Plaintiffs will have to "devise additional ways to 'add value' in order to attract the same purchasers  
10 of their product." *Id.* at 15. Because the legitimate commercial market is in its infancy, Dr. Teece  
11 concludes that "Napster's current activities will likely have a significant effect on the way that  
12 [the] market will evolve in the future." *Id.* at 16.

13 Finally, Dr. Teece from an economic perspective, and several other witnesses from  
14 their own varied perspectives, all testify to another consequence of the massive music give-away  
15 that is the essence of the Napster service. And again, the point is intuitive. Unlimited and  
16 unrestricted free music downloads teach consumers that the musical content itself has little value  
17 apart from the physical container in which it is packaged. Indeed: "The greatest danger posed by  
18 Napster ... is that consumers are beginning to consider free music to be an entitlement. This  
19 concept, of course, ignores and completely devalues both the work done by the artists themselves  
20 to create the music and the funds invested by the record companies and retailers to bring that music  
21 to the consumers." Dreese Decl. ¶ 6; see also Valenti Decl. ¶ 7; Frackman Decl., Ex. K. As Dr.  
22 Teece explains the problem:

23 "Once consumers become accustomed to obtaining something for  
24 free, they resist paying for it. From an economic perspective, such  
25 an attitude makes it extremely difficult for firms in the industry to  
26 charge for their content in a manner that fairly compensates them for  
27 fostering the creation and dissemination of those works in the first  
28 instance, or to receive compensation for their efforts to establish a  
commercial digital download market. *If the perception of music as  
a 'free good' becomes pervasive, it may be difficult to reverse.*"  
Teece Rpt., p. 16.



1 **IV. A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST.**

2 In copyright cases, "the issue of public policy rarely is a genuine issue if the  
3 copyright owner has established a likelihood of success," Concrete Machinery Company, Inc. v.  
4 Classic Lawn Ornaments, Inc., 843 F.2d 600, 612 (1st Cir. 1988), because "the public interest is  
5 the interest in upholding copyright protections." Autoskill Inc. v. National Educational Support  
6 Systems, Inc., 994 F.2d 1476, 1499 (10th Cir. 1993). "[I]t is virtually axiomatic that the public  
7 interest can only be served by upholding copyright protections and, correspondingly, preventing  
8 the misappropriation of the skills, creative energies, and resources which are invested in the  
9 protected work." Apple Computer v. Franklin Computer, 714 F.2d at 1255; see Jackson v. Axton,  
10 25 F.3d 884, 890 (9th Cir. 1994); Mazer v. Stein, 347 U.S. 201, 219.

11 The foregoing observations could not be more pertinent here. In addition, plaintiffs  
12 have submitted the declarations of individuals and organizations - from both the online and offline  
13 communities - whose interests are being compromised by Napster's disregard for the copyright  
14 laws. For example:

- 15 • The American Federation of Television and Radio Artists (AFTRA) - which  
16 represents approximately 15,000 vocalists on sound recordings, 11,000 of whom are  
17 background singers - describes how "[f]or the majority of Artists who do not have  
18 lucrative recording contracts, but rather, struggle to make a living at their craft,  
19 [Napster] represents nothing less than a brazen assault upon the already shaky  
20 economic foundation on which their professional careers are built." Hessinger Decl.  
21 ¶ 7; see also Stoller Decl. ¶¶ 13-14.
- 22 • The Internet site with the largest collection of authorized MP3's available for free  
23 download (MP3.com) and the site that is the largest source of authorized MP3  
24 downloads for sale (EMusic.com) both have testified that they have not authorized  
25 their MP3 files - over 500,000 MP3 files in total - to be distributed over Napster.  
26 Robertson Decl. ¶¶ 2, 11; Kohn Decl. ¶¶ 7-8. They also explain how Napster  
27 injures their businesses: "Napster is gaining an unfair competitive advantage over  
28 EMusic.com. Every time a Napster user illegally copies a recording that is

1 available in MP3 format from EMusic.com...that is one more person who does not  
2 need to visit the EMusic.com site to purchase the recording legally. Each such copy  
3 thus potentially deprives EMusic.com of both a visitor to our site and a sale of that  
4 recording, our two sources of revenue." Kohn Decl. ¶ 11; see also Robertson Decl.  
5 ¶ 2 (even though MP3.com offers free MP3 downloads, "[m]any of the benefits that  
6 MP3.com provides to its artists – as well as our own revenues – depend on  
7 attracting as many people as possible to the [MP3.com] Website").

- 8 • The Chairperson of *The Copyright Assembly* – whose members represent every  
9 significant intellectual property industry in the country (including the software  
10 industry, the sports industry, film producers, television programmers, broadcast and  
11 cable stations and networks, photography, magazine and book publishers, and the  
12 creative guilds) – cautions that "any intellectual property that can be digitized is  
13 vulnerable to the wholesale piracy enabled by Napster. The owners and creators of  
14 copyrighted material will of course be hesitant to offer their works over the Internet  
15 if they cannot be protected from this type of unauthorized duplication and  
16 dissemination." Valenti Decl. ¶ 6.

17 Although it undoubtedly will try, Napster cannot invoke the innovation of the  
18 Internet or unmet consumer demand to justify its actions. Copyright "is not designed to afford  
19 consumer protection or convenience but, rather, to protect the copyright holders' property  
20 interests." UMG Recordings, 92 F. Supp. 2d at 352. In the end, "[c]reative works do not spring  
21 from a void. The seed bed of this creativity lies within the imagination, artistry and ingenuity of a  
22 community of artists and craftspeople who provide Americans with most of what they read, hear  
23 and watch....But if we cannot protect what we invest in, create and own, then we really don't own  
24 anything." Valenti Decl. ¶ 8.

1 **CONCLUSION**

2 For all of the foregoing reasons, plaintiffs respectfully request that the Court enter  
3 the requested preliminary injunction.

4 Dated: June 12, 2000

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