

1 DAVID BOIES (pro hac vice)  
BOIES, SCHILLER & FLEXNER LLP  
2 80 Business Park Drive, Suite 110  
Armonk, New York 10504  
3 Telephone: (914) 273-9800  
Facsimile: (914) 273-9810

4 LAURENCE F. PULGRAM (CSB No. 115163)  
DAVID L. HAYES (CSB No. 122894)  
5 FENWICK & WEST LLP  
275 Battery Street, Suite 1500  
6 San Francisco, CA 94111  
7 Telephone: (415) 875-2300  
Facsimile: (415) 281-1350

8 DANIEL JOHNSON, JR. (CSB No. 57409)  
DARRYL M. WOO (CSB No. 100513)  
9 MARY E. HEUETT (CSB No. 197389)  
EMILIO G. GONZALEZ (CSB No. 197382)  
10 FENWICK & WEST LLP  
Two Palo Alto Square  
11 Palo Alto, CA 94306  
12 Telephone: (650) 494-0600  
Facsimile: (650) 494-1417

13 Attorneys for Defendant  
14 NAPSTER, INC.

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

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

21 v.

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

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

25 Plaintiffs,

26 v.

27 NAPSTER, INC.,  
28 Defendant.

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

**DECLARATION OF SHAWN  
FANNING IN SUPPORT OF  
DEFENDANT NAPSTER, INC.'S  
OPPOSITION TO PLAINTIFF'S  
JOINT MOTION FOR  
PRELIMINARY INJUNCTION**

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

1 **DECLARATION OF SHAWN FANNING**

2 I, Shawn Fanning, declare as follows:

3 1. I am employed by Napster, Inc. (“Napster”) as a software developer. I have  
4 responsibility for maintaining the Napster client software application and for writing source code  
5 for that application. I am a founder of Napster, and I developed the original Napster client and  
6 server software application. I make the following declaration in support of Napster’s Opposition  
7 to Plaintiffs’ Joint Motion for Preliminary Injunction. Unless otherwise stated on information and  
8 belief, I have personal knowledge of the following facts and, if called to testify, I would and  
9 could testify competently to the matters stated herein.

10 2. I began working on the Napster software application between September 1998 and  
11 early 1999, during my freshman year of college at Northeastern University in Boston,  
12 Massachusetts. “Napster” was my nickname, and I used it for my e-mail address and as my user  
13 name in Internet Relay Chat (IRC) rooms. At that time, I used IRC as a resource for information,  
14 using the programming channels and the Internet security channels. IRC is a network of people  
15 organized into communities, through real time channels on various topics. One of my college  
16 roommates loved listening to MP3s and used Internet sites such as MP3.lycos.com and  
17 Scour.com to find them. My roommate often complained about the unreliability of those sites,  
18 finding that links to sites would not work, and the index would become out of date because the  
19 indexes were updated infrequently. I was interested in computer programming at that time and  
20 began thinking about ways to solve the reliability problems my roommate was experiencing.

21 3. Based on these ideas, I began designing and programming a real-time search  
22 engine for locating files of other users on the Internet. I designed the Napster software to find  
23 those types of files because they were the most compressed files (in consideration of bandwidth)  
24 and they were very popular at the time. The search engine I had in mind was unlike ordinary  
25 search engines at that time. Ordinarily, a search engine scours the Internet periodically, and  
26 updates every hour or more to remove sites that are down or unavailable. Therefore, the indexes  
27 become out of date as sites go up or down. In contrast, my idea was to have a real time index that  
28 reflects all sites that are up and available to others on the network at that moment. Sites that are

1 down would be dropped from our index. Users would connect to a central server, which would  
2 provide a real time index reflecting the files shared by users on the network; anyone who  
3 disconnected from the server would be immediately dropped from our index. This presented a  
4 challenge to the networking infrastructure on our end, to maintain large numbers of server  
5 connections, and required servers and bandwidth.

6 4. I wrote a small design for this real-time search engine, and then began the  
7 implementation. I first wrote the server software. I next worked on writing the client application,  
8 i.e., the user interface. I bought a Windows programming book to learn what I needed and wrote  
9 the client software. I spent many hours and got little sleep working on this project. I became  
10 absorbed with the project because I thought it was a cool idea and because I was interested in  
11 learning Windows programming. I wanted to make this software work, and to prove my concept  
12 for file sharing on the Internet.

13 5. The Napster system combined a real time search engine with chat rooms and  
14 instant messaging (functionality similar to IRC). I also added a “hot list” function that enables  
15 people to see others’ musical preferences by viewing the files they have chosen to share. This  
16 synergy of technologies created a community of users interested in music with different channels  
17 organized by genres of music (similar to IRC), and with a feeling of participation, interaction and  
18 individual involvement by the members’ sharing files together. Napster has a community with  
19 users participating in discussions and sharing music.

20 6. After developing the software prototype, I discussed my ideas with Sean Parker, a  
21 friend I met through IRC who lived in Virginia. Sean joined the project in mid-1999. We  
22 decided to call the software “Napster.” We released an early Beta version of the Napster software  
23 in Summer 1999. A few early adopters provided feedback and helped us track down bugs in the  
24 software. The Napster software was functional in the middle of 1999. The software spread by  
25 word of mouth. Download.com featured Napster in its Download Spotlight in early Fall 1999,  
26 and the number of users of Napster grew significantly.

27 7. Shortly thereafter, my uncle, John Fanning, raised some angel money. In  
28 September 1999 we obtained office space and Sean Parker and I moved to California.

1           8.       Unlike ordinary web-based search engines, Napster cannot index files based on  
2 their content and organize them in a meaningful way for the user. MP3 and Windows Media  
3 Audio (WMA) files are not currently designed for such content-based indexing. Instead, such  
4 files can only be located and organized based on their user-given file names, specific information  
5 in the MPEG header, bandwidth or ping time of the source (such as T1, cable DSL, 35 mili  
6 seconds) or by manually opening each file, listening to the file and then categorizing the file  
7 based on a personal judgment about what the file contains. Napster provides a directory through  
8 which users may find files, by file name, residing on the computers of other Napster users. The  
9 Napster service also provides location information allowing a computer to connect to the other  
10 user and download the file from its location.

11           9.       Napster does not post, host, or serve MP3 files. The Napster software simply  
12 allows users to connect with each other, in order that they may share MP3 files stored on their  
13 individual hard drives. The number of song files available at any given time depends on the  
14 number of song files that active users choose to share from their hard drives. Users need not  
15 share any or all of their files – they can choose which ones to make available to others. MP3 files  
16 do not pass through a centralized server. The transfer is a “computer-to-computer” also known as  
17 “peer-to-peer” process.

18           10.      We have received feedback from record companies that Napster is helping their  
19 business. Attached to this Declaration as Exhibit A is a true and correct copy of a letter from Mr.  
20 Akin Fernandez, Director of Irdial-Discs, to Napster, which we received in the ordinary course of  
21 our business. This letter states that Irdial-Discs, a British record company, “is now using Napster  
22 as one of [its] primary methods of distribution.”

23           11.      We also have received feedback from users telling us that they are using Napster  
24 for sampling purposes that is, to listen to songs and/or artists to decide whether they want to  
25 purchase the CD. Attached to this Declaration as Exhibit B are true and correct copies of a  
26 collection of e-mails received by Napster on this subject. The e-mails were received by Napster  
27 in the ordinary course of our business. (We have removed the e-mail addresses and other  
28 identifying personal information such as phone numbers and addresses.)

1           12.     We have also received feedback that new and emerging artists are using Napster as  
2 a tool to promote their work and attract fans. Attached to this Declaration as Exhibit C are true  
3 and correct copies of a collection of e-mails received by Napster on this subject. The e-mails  
4 were received by Napster in the ordinary course of our business. (We have removed the e-mail  
5 addresses and other identifying personal information such as phone numbers and addresses.)

6           13.     The Napster chat rooms have moderators, volunteers who assist with a variety of  
7 problems. These problems include spam, users flooding the servers, users getting out of control  
8 in their conduct, and similar issues. They are not employed or paid by Napster, Inc. Moderators  
9 can designate other moderators. The moderator system at Napster is very informal. Moderators  
10 have no authority or power with respect to copyright issues.

11           14.     I am a music fan. I have a large CD collection, and currently own about 100 CD's.  
12 Since high school I have played the electric guitar as a hobby. I have some MP3 music files on  
13 my office computer, which were made from CD's I own. They are stored on my office computer  
14 for convenience so that I can listen to them without swapping around CD's.

15           15.     In their brief in support of their motion for a preliminary injunction, Plaintiffs  
16 misrepresented my testimony in relation to Exhibit 192 of my deposition. Although Plaintiffs cite  
17 pages 222-223, the complete testimony is at pages 222-229. Plaintiffs contend that I said "this is  
18 an excellent point," in response to a message posted by an individual using the name "Shane  
19 Courtrille," in which Shane says: "admitting that we know Napster is used for the transfer of  
20 illegal MP3 files might not be the best thing to do . . . I mean . . . obviously people are going to  
21 use it for that purpose . . but . . we . . .might not want to actually say we know that . . ."  
22 (Plaintiffs' Memo. Pts & Auths. on Mot. Prelim. Inj., at 13-14). Plaintiffs assert that I responded  
23 to Shane's statement that this is an "excellent point." That is absolutely false. In fact, my  
24 "excellent point" statement in Exhibit 192 was referring to a statement by Dylan Barwis that  
25 appears between Shane's statements and my statement on the e-mails. Dylan's response to  
26 Shane's posting was:  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

...

Just because he said free music doesn't mean they're illegal. lots of songs are free. <see mp3.com>.

Exhibit 192, NAP001971. At my deposition, page 229, I testified that I believed "Dylan presented an excellent point" in this statement. Plaintiffs' characterization of my testimony about Exhibit 192 is incomplete and untrue.

16. In their brief in support of their motion for a preliminary injunction, Plaintiffs rely upon my deposition testimony and Exhibit 186 to assert that "Napster's business has always been based on music piracy." That is not true now, nor was it true when we began developing Napster. In fact, Exhibit 186 states that Napster wished to "peacefully coexist" with the record companies.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Palo Alto, California this \_\_\_\_\_ day of July, 2000.

\_\_\_\_\_  
Shawn Fanning