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14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA

17
18 IN RE NAPSTER, INC. COPYRIGHT
LITIGATION

Case No. C-MDL-00-1369 (MHP)

19 **NAPSTER'S SECOND CONSOLIDATED**
20 **REPORT OF COMPLIANCE WITH THE**
21 **MODIFIED PRELIMINARY**
22 **INJUNCTIONS ENTERED IN CASE**
NOS. C99-05183 MHP, C00-0074 MHP, C00-
2638 MHP, C00-3997 MHP, AND C00-
4068 MHP

23 **COMPLIANCE REPORT NUMBER 2**

24 **DATED MARCH 20, 2001**

1 Napster, Inc. (“Napster”) hereby submits its Second Consolidated Report of Compliance
2 (“Second Report”) identifying the steps taken to comply with this Court’s Orders entered on
3 March 5, 2001, in *A&M Records, Inc. et al. v. Napster Inc.*, Case No. C 99-05183 MHP, *Leiber et*
4 *al. v. Napster, Inc.*, Case No. C 00-0074 MHP, *Casanova Records, et al. v. Napster, Inc.*, C 00-
5 2638 MHP, *Metallica et al. v. Napster, Inc.*, Case No. C 00-4068 MHP and *Andre Young, et al. v.*
6 *Napster, Inc.*, Case No. C 00-3997 MHP, and with the Court’s ruling at the telephonic hearing on
7 March 15, 2001, for the period March 9 through March 15, 2001.

8 **I.**

9 **INTRODUCTION**

10 This Second Report outlines Napster’s response to Plaintiffs’ submission of notices that
11 became available as of March 9, 2001 through March 15, 2001 at 5:00 p.m.¹ During that six-day
12 period, the A&M Plaintiffs (Case No. 99-05183 MHP) delivered to Napster, by electronic mail,
13 catalogues containing hundreds of thousands of works they claim to own, allegedly sorted by
14 artist name, song title, and album name. During that time, Napster loaded into its negative
15 database and excluded from its system over 200,000 unique artist/title pairs and almost
16 1.2 million normalized file names. Napster entered an agreement with Gracenote to add millions
17 of variant spellings to its lists of excluded works. Napster has complied with the time tables set
18 by this Court for responding to Plaintiffs’ notices.

19 During this time period, Plaintiffs have continued to maintain that “[they] *are not required*
20 *to provide any individual file names, or any information other than lists of copyrighted*
21 *recordings that they own or control.*” See Declaration of Laurence Pulgram in Support of
22 Napster’s Consolidated Report of Compliance (“Pulgram Decl.”), Ex. 4 (emphasis added).
23 Consequently, the A&M Plaintiffs have been inundating Napster with catalogues of artist/title
24 pairs without corresponding file names:

25
26 ¹ This Second Report does not address an additional submission made by the A&M Plaintiffs to
27 Napster on Friday, March 16, at 4:30 p.m. because Napster’s engineers were unable to open
28 Plaintiffs’ electronic file. Upon determining over the weekend that the file was corrupted,
Napster immediately requested that Plaintiffs resend this data, which will be processed by
Napster on Monday, March 19, 2001.

- 1 • On March 12, 2001, Sony provided a catalogue of 65,536 artist/title pairs without
2 any associated file names.
- 3 • On March 13, 2001, EMI provided a catalogue of 102,698 artist/title pairs without
4 any associated file names; and Sony provided a catalogue of 5,663 artist/title pairs
5 without any associated file names.
- 6 • On March 14, 2001, EMI provided a catalogue of 39,377 artist/title pairs without
7 any associated file names.
- 8 • On March 15, 2001, BMG provided a catalogue of 82,721 artist/title pairs without
9 any associated file names; and WMG provided a catalogue of 8,483 artist/title
10 pairs without any corresponding file names. *See* Exh. 1 hereto.

11 The A&M Plaintiffs assert that they have “made substantial efforts” (*id.*) to identify file
12 names available on the Napster system that allegedly correlate to *parts* of their catalogues of
13 claimed works. They have delivered to Napster millions of file names allegedly corresponding to
14 artist/title pairs provided in lists of allegedly protected works separate from the catalogues
15 described above. Plaintiffs’ file name notices, however:

- 16 • Include hundreds of thousands of inaccurate file names that do not correlate to the
17 artist and title to which they are purportedly linked;
- 18 • Reflect no attempt to ascertain the actual identity of the work, and **no human**
19 **review of the data**, despite Plaintiffs’ obligation, under paragraph 3, to ascertain
20 the actual identity of the work associated with any given file name; and
- 21 • Combine non-conforming notices with other notices.

22 None of the remaining Plaintiffs in Case Nos. C00-0074 MHP (*Leiber*), C00-2638 MHP
23 (*Casanova*), C00-3997 MHP, (*Metallica*) and C00-4068 MHP (*Dr. Dre*) has made any
24 submissions to Napster during this reporting period. Moreover, none of the Plaintiffs, including
25 the A&M Plaintiffs, has specified to Napster any variations of the spelling of the performing artist
26 and song titles of their protected works, as would be required for Napster effectively to compile
27 and search for such variations as described in Napster’s first Compliance Report, filed March 13,
28 2001 (“First Compliance Report”).

1 The aggregate impact of Plaintiffs' misinterpretation of the Court's injunctions and
2 inattention to the accuracy of their compliance efforts has placed a serious and inappropriate
3 economic and physical burden on Napster, resulted in significant overexclusion of legitimate user
4 files on the Napster indices, and produced an environment that will wrongly cause significant user
5 frustration with the Napster system.

6 II.

7 NAPSTER'S EXCLUSION OF NOTICED WORKS AND FILE NAMES

8 During the second reporting period, Napster has entered into its negative database and
9 timely excluded from its index approximately 202,000 unique artist/song title pairs and over
10 1,186,000 normalized file names purportedly corresponding to those artist/title pairs. In total,
11 Napster has now excluded from its index approximately 228,569 artist/song title pairs and
12 approximately 1,301,104 normalized file names pursuant to the methodology described in
13 Napster's First Compliance Report.

14 As explained in the First Compliance Report, to facilitate Napster's ability to locate file
15 name variations pursuant to Paragraph 3 of the Court's Orders, Napster has incurred substantial
16 expense by contracting with Gracenote, thereby obtaining access to Gracenote's extensive
17 database containing millions of spelling variations of artist names and song titles. As a result of
18 that agreement, Napster has completed its engineering specification with Gracenote. Gracenote's
19 database of approximately 140,000 variations and misspellings of artist names and approximately
20 3 million variations and misspellings of file names will be available to Napster within the week
21 for Napster to access variants for the works noticed by Plaintiffs. Moreover, Napster has
22 generated and added to its negative database approximately 3,977 variations in the spelling of
23 artists' names and song titles by searching its database.²

24 Napster has also successfully prevented the use of "Pig Latin" as a means for users to
25 avoid Napster's negative database filters. When Napster learned of an application that was being
26 distributed by the website operated by Aimster (www.aimster.com) called the "Pig Encoder

27 ² Napster's effort is illustrated by the variety of variations it generated for Janet Jackson's song
28 "ALL 4 U." All of the following have been incorporated into Napster's negative database: "All 4
U," "All 4 You," "All Four You," "All Four U," "All For You," and "All For U."

1 Software,” it notified Aimster of its objection to the program, which was being used to encode
2 file names into “Pig Latin,” thereby masking them from the Napster screens. At Napster’s
3 request, Aimster removed the software from its website on or about March 13, 2000. Napster has
4 also implemented another form of file exclusion based on the suffix of the file name created
5 through the Pig Latin encoding software. Through these efforts, Napster has successfully blocked
6 the file names created with this software.

7 Napster has also added the artist and song titles of certain pre-release recordings not yet
8 appearing on the Napster index, including recordings for artist Jon B, for which Plaintiffs have
9 provided notice of artist, song name, and release date to Napster, as required by paragraph 7 of
10 the Court’s Orders.

11 All of these exclusions have resulted in a substantial reduction of files listed on the
12 Napster index. The number of songs shared by Napster’s users on the index since Napster first
13 implemented its negative database has fallen approximately 50%. Whereas the average Napster
14 user once had 220 songs available for sharing on the Napster index, now the number is
15 approximately 110 files.

16 Attached hereto as Exhibit 1 is a spreadsheet summarizing the A&M Plaintiffs’
17 submissions and Napster’s responses during the second reporting period.³

18 III.

19 **PLAINTIFFS CONTINUE TO DISREGARD AND FAIL TO COMPLY** 20 **WITH THE ORDERS OF THE NINTH CIRCUIT AND THIS COURT**

21 1. The A&M Plaintiffs’ Failure to Ascertain the Accuracy of Their Submissions.

22 Napster has learned that many of the file names that the A&M Plaintiffs have provided to
23 Napster, and which Napster has entered into its negative database, do not correspond to the A&M
24 Plaintiffs’ protected works. *See generally* Declaration of Rajeev Motwani in Support of

25 _____
26 ³ Exhibit 1 summarizes Plaintiffs’ notices and Napster’s responses thereto for the period
27 March 12 through March 15, 2001. Since Plaintiffs’ electronic files sent on March 9, 2001 at
28 4:47 p.m. were not able to be opened until after 5:00 p.m. on that date, that data is being reported
as received on March 12, 2001. In all events, those notices were addressed by Napster by
March 14, within the time frame that would have been applicable even assuming timely notice
had been conveyed on March 9.

1 Napster’s Second Consolidated Compliance Report (“Motwani Decl.”). Upon receiving
2 Plaintiffs’ submissions, Napster is unable to inspect and verify the accuracy of the millions of file
3 names before they are added to Napster’s negative database within the limited 72-hour time
4 period. Plaintiffs, however, operate under no such time constraint. Napster had assumed that
5 Plaintiffs had made a good faith effort in evaluating file names to ensure that they accurately
6 corresponded to the lists of Plaintiffs’ protected works. Unfortunately, Plaintiffs’ submissions
7 demonstrate that such reliance was misplaced.

8 After Plaintiffs’ submissions had been loaded into Napster’s negative database, a random
9 spot-check revealed that the data was riddled with errors. Plaintiffs’ data appears to have been
10 generated by an automated term-based search on the Napster index using Napster’s search engine.
11 However, as Plaintiffs are well aware, Napster’s ordinary search engine often generates file
12 names having nothing to do with a particular work being sought. Napster’s ordinary search
13 algorithm is far broader than its screening algorithms. To investigate these errors further, Napster
14 retained as a consultant Professor Rajeev Motwani of Stanford University to conduct a more
15 thorough analysis of Plaintiffs’ data—an analysis that, in fairness, Plaintiffs themselves should
16 have conducted in the first instance.⁴

17 Motwani’s analysis has revealed that as many as 700,000 of the file names designated by
18 Plaintiffs do not correspond to the particular noticed work.⁵ Motwani Decl. ¶8. In other words,
19 where Plaintiffs have provided artist and song title pairs they claim to own with associated file
20 names purportedly containing those works, in thousands of instances those file names do not
21 correspond to and often have no connection to the works Plaintiffs claim. The average error rate
22 is over 10%. *Id.* ¶8. In some instances, nearly 50% of the file names in a given electronic file do
23 not accurately correspond to the noticed works. *Id.* ¶8. The addition of thousands of erroneous
24 file names to Napster’s negative database has resulted in excessive overexclusion of users’ file

25 ⁴ Professor Motwani supervised a staff at Gigabeat, Inc., a company with which he is affiliated
26 in this analysis. Napster has separately entered into an agreement whereby it may in the future
acquire certain assets of Gigabeat.

27 ⁵ If printed out on 8½ x 11 inch paper, the vast amount of erroneous data provided by Plaintiffs
28 in this submission alone would consist of over 25,000 pages. Plaintiffs’ total submissions to date
would total a quarter million pages.

1 names that would otherwise be available for sharing, as well as needless degradation of the
2 Napster system.

3 For example, Plaintiffs' notices contained the following errors:

- 4 • Plaintiff EMI incorrectly associated the Classic rock group The Band's song
5 "Saved" with the Napster file name "1:\\1\\saved\\Dave Matthews Band – new
6 studio single – I did it.mp3"⁶
- 7 • Plaintiff BMG incorrectly associated the R&B group For Real's song "For All of
8 My Life" with the Napster file name "10:\\10\\Cock Rock\\Diesel Boy - Cock
9 Rock - 13 - Real Life in the Big City.mp3"⁷
- 10 • The hymn "Wonderous Type and Vision Fair, O" from the various artists
11 compilation "Hymns Triumphant II" was incorrectly associated with the Napster
12 file name 1:\\1\\Various\\Widespread Panic - Hampton 99 -Encore
13 Coconuts.mp3"⁸
- 14 • Plaintiff UMB incorrectly associated the song "Get on the Ball" from the various
15 artists compilation "Scandal Ska" with the Napster file name "1:\\1\\My Files\\The
16 Electrics - Get to Heaven - Various Artists – Gas Collection 6 - 7 - Ball
17 Sampler.mp3"⁹
- 18 • The song "People" appearing on the soundtrack to "Funny Girl" was incorrectly
19 matched with the Napster file name "9:\\9\\Short Music For Short People\\Various
20 Artists - D.O.A. - I hate Punk Rock.mp3."¹⁰

21 See Motwani Decl. ¶¶ 14-19; Exhs. 2-7.

22 _____
23 ⁶ From notice received by Napster on March 12, 2001 in a .TXT file entitled "FileNames1-
EMI1".

24 ⁷ From notice received by Napster on March 15, 2001 in a .TXT file entitled "FileNames1-
BMG1".

25 ⁸ From notice received by Napster on March 14, 2001 in a .TXT file entitled "FileNames1-
EMI3".

26 ⁹ From notice received by Napster on March 13, 2001 in a .TXT file entitled "FileNames2-
UMG1".

27 ¹⁰ From notice received by Napster on March 12, 2001 in a .TXT file entitled "FileNames-
28 Sony".

1 Significantly, The Dave Matthews Band song “I Did It,” incorrectly excluded by
2 Plaintiffs based on their claimed ownership of The Band’s song “Saved,” was released on the
3 Napster System as part of Napster’s Featured Artists Program with the express authorization of
4 The Dave Matthews Band and RCA Records. Similarly, Widespread Panic’s song, “Coconuts,”
5 for which Plaintiffs incorrectly excluded a file name supposedly embodying For Real’s song “For
6 All of My Life,” was also released with authorization on the Napster System as part of the
7 Featured Artists Program. These examples represent just a small sample of the thousands of
8 incorrectly associated and excluded file names noticed by Plaintiffs. Such misassociations
9 regularly occur where the name of a song or artist contains common words such as “The Band” or
10 “People” or “Love” (*see id.* ¶10), or songs that derive from “various artists” compilations.
11 *Id.* ¶10. Other misassociations appear to be the result of Plaintiffs’ search on the Napster system
12 for a particular artist’s name without also searching for a particular song title. For example,
13 Plaintiffs claimed ownership in the song “From Me to You” by Bobby McFerrin, but several of
14 the purportedly corresponding Napster file names contained no reference to the song “From Me
15 to You.” *Id.* ¶10. The volume of misassociated file names strongly suggests that Plaintiffs have
16 failed to check for accuracy the notices submitted to Napster.

17 These are only a few examples of the inaccuracies to be found throughout Plaintiffs’
18 submissions. Purporting to own a recording of “God Rest Ye Merry Gentlemen,” Plaintiffs Sony
19 sent a list of some 96 different file names by scores of artists, none of which corresponded to
20 Plaintiffs’ claimed work. *See* Exh. 2, attached hereto, which is a true and correct copy of a
21 portion of Sony’s files submitted to Napster for the work “God Rest Ye Merry Gentlemen.”
22 Purporting to own a recording of Vivaldi’s The Four Season, “Presto,” Plaintiffs Sony sent a list
23 of some 74 different file names containing Presto movements by Mozart, Rachmaninoff, Bach
24 and dozens of others, none of which apparently corresponded to Plaintiffs’ claimed works. *See*
25 Exh. 3, attached hereto, which is a true and correct copy of a portion of Sony’s files submitted to
26 Napster for the work “Presto.” And, purporting to own recordings of “Scarlet Fever” and
27 “Ashes,” each from the “Little Women” soundtrack, Plaintiffs Sony submitted a list of some 162
28 different file names by numerous other artists, few of which correspond to Plaintiffs’ claimed

1 works. *See* Exh. 4, attached hereto, which is a true and correct copy of a portion of Plaintiffs’
2 files submitted to Napster for the works “Scarlet Fever” and “Ashes.”

3 These obviously erroneous submissions have required Napster to expend additional
4 resources to check the accuracy of Plaintiffs’ submissions, an intolerable and unwarranted
5 burden. Indeed, Plaintiffs’ submission of erroneous file names represents a clear violation of
6 paragraph 3 of the Court’s Orders, which requires Plaintiffs to ascertain the actual identity of file
7 names before submitting them to Napster for incorporation into Napster’s negative database.
8 Napster requests that this Court order Plaintiffs to compensate Napster for the actual time and
9 expense it has incurred in adding, validating, and removing these erroneous file names from its
10 negative database. More importantly, Napster requests that this Court order Plaintiffs to
11 comprehensively review and verify their data before delivery to Napster.

12 2. Other Errors in Plaintiffs’ Submissions

13 The A&M Plaintiffs also have submitted to Napster: (1) over 150,000 unique artist/title
14 pairs with no corresponding file names; (2) over 50,000 distinct (non-duplicative) file names and
15 artist-song title pairs that contain the word “*null*” where the artist or song title should appear;
16 (3) over 30,000 lines where the artist and/or song title field is completely missing. In one
17 instance, Plaintiffs provided two hundred entries for the artist “Blondie” where the song title was
18 denoted simply as “-”. In other submissions, Plaintiffs listed only “various” as artist for over
19 20,000 artist/song-title pairs and “soundtrack” for another 41,000 file names without identifying
20 the artist. Interspersed with other compliant notices, these erroneous identifiers make it nearly
21 impossible for Napster to parse through Plaintiffs’ data and separate valid notices within the
22 three-day period. As the Motwani analysis reveals, Plaintiffs’ haste and delivery of erroneous
23 submissions inevitably results in overblocking.¹¹

24 3. Plaintiffs’ Submission of Data in Mixed Formats

25 In several of Plaintiffs’ submissions, the electronic files contain column headings
26 indicating the formatting used by the Plaintiffs, such as “Artist,” “Album,” “Title” and

27 ¹¹ A number of Plaintiffs’ erroneous submissions were reported in Napster’s First Compliance
28 Report. The exact number of such submissions continues to be refined as Napster further
analyzes the data Plaintiffs have submitted in the short time available.

1 “Filename.” In most instances, the files actually contain the columns in the correct order.
2 However, there are hundreds of instances where the “Artist” and “Title” columns are transposed -
3 - that is, the song name is listed where the artist should be listed, and vice versa. Examples are
4 “Let it Be” by the Beatles, where “Let it Be” is listed as the Artist; “Purple Haze” by Jimi
5 Hendrix, where “Purple Haze” is listed as the Artist; and “Trucking” by the Grateful Dead, where
6 “Trucking” is listed as the Artist. These formatting mistakes make it impossible to use
7 computerized scripts to evaluate Plaintiffs’ submissions. An automated script cannot determine
8 whether an entry is an artist, an album, or a track; rather, it can determine only whether or not
9 something is in the field. It is incredibly burdensome for Napster to go through these large
10 electronic files of file names and verify that each artist name, song title, and file name is listed in
11 the correct column.

12 On Friday, March 16, 2001, Napster discovered that a substantial portion of the electronic
13 data that had been submitted by Plaintiffs up to that date had been extracted by Napster’s
14 engineers by album name instead of song name. This happened since Plaintiffs’ files had several
15 different formats of tab-delimited entries, such as “artist-title-album-filename,” “artist-song-
16 filename” and “artist-album-track-filename.” In Napster’s rush to comply with Plaintiffs’ notices,
17 Napster’s engineers did not notice that certain files had the song title after the artist and that
18 others had song title after the album name after the artist name. The erroneous entry of this data
19 required Napster’s engineers to write brand new scripts that re-extracted the data from the correct
20 columns and to reload all of this data into Napster’s negative database. This entire process took
21 Napster’s engineers approximately 12 hours and was not completed until 3:00 a.m. on March 17,
22 2001.

23 4. Plaintiffs’ Erroneous “Double Blocking”

24 Plaintiffs have effectively excluded entire words and phrases, and file names containing
25 the same, from the Napster service by listing the same word in their notices twice, both as artist
26 and song title. For example, in the USERDatabase, Plaintiffs submitted the following artist, title,
27 file name line entry:
28

1 "163496 Madonna Madonna C:\\Sounds\\Net\\Like a Prayer –
2 Madonna.mp3."

3 Exh. 5. Although the file name appears to represent the song "Like a Prayer" by the artist
4 Madonna, Plaintiffs erroneously described the *song title* as Madonna. This results in Napster's
5 text-based filter finding both matching artist name, and (erroneously) a matching song title in the
6 negative database. Thus, based on the word "Madonna" appearing in any file name—whether or
7 not it describes the artist or a song title—that file name must be excluded. *See* Exh. 7, attached
8 hereto, which is true and correct copy of a screen shot of the Napster index for searches for the
9 word "Madonna" showing no results. As there are some 37 song names containing the word
10 "Madonna" listed in Songfile.com alone—none of them attributable to the artist Madonna—this
11 results in substantial overblocking. *See* Exh. 8, attached hereto, which is a true and correct copy
12 of the results generated by SongFile for a search of the term "Madonna."

13 This type of "double blocking" has occurred approximately 122 times to date, sometimes
14 by Plaintiffs' erroneous notices, and sometimes due to the inherent overbreadth of any file name
15 based exclusion system. To date, pending correction of these errors, files containing any one of
16 the following words or phrases, among others, have been excluded: "madness"; "dead on";
17 "move your body"; "train"; "origin"; "peace of mind"; "butterfly"; or "show me love." A true
18 and correct copy of a list generated by Napster of double blocks for identical artists and song
19 titles is attached hereto as Exhibit 8.

20 5. Plaintiffs' Failure to Submit Variations

21 None of the Plaintiffs,¹² including the A&M Plaintiffs, has identified any variations in the
22 artist name, or song titles, of their protected works. In contrast, the National Academy of
23 Recording Arts and Sciences ("NARAS") has provided Napster with numerous variations of the
24 spelling of the artist name and/or song titles of their protected works. *See* Exh. 9, attached hereto,
25 which is a series of emails from NARAS' counsel to Napster and Napster's counsel. NARAS'

26 _____
27 ¹² The A&M Plaintiffs submitted by letter several *file name* variations for Janet Jackson, and
28 have submitted multiple file names for other artists, but have not submitted variations to be used
in term-based exclusions of variations of artist names and by song titles, as specified in
paragraph 3.

1 submissions demonstrate that the means of identifying such variations are available to all other
2 Plaintiffs.

3 6. The A&M Plaintiffs' Failure to Abide by the Court's Order Regarding Pre-
4 Released Works

5 On March 13, 2001, counsel for the A&M Plaintiffs sent Napster two letters purporting to
6 provide Napster with notice of 42 unreleased sound recordings performed by the artists Tupac
7 and Stevie Nicks, along with an assertion that file names containing such sound recordings had
8 *already appeared* on the Napster system. Since these works allegedly are already available
9 through use of the Napster system, Plaintiffs are required, under paragraph 2 of the Court's
10 Orders, to provide Napster with the names of one or more files available on the Napster system
11 containing such works. No such information, however, was provided. (In addition, Plaintiffs
12 failed to provide the release date of such sound recordings, as would also be required by
13 paragraph 7 of the Court's Orders.) *See* Exh. 10 attached hereto, which consists of true and
14 correct copies of March 13, 2001, correspondence from counsel for the A&M Plaintiffs, and
15 Napster's response to same.¹³ Plaintiffs subsequently submitted release dates, but have still
16 insisted that, although they claim these works are already available on Napster, they have no
17 obligation to provide file names for them. In addition, the sloppy or uncoordinated effort by
18 Plaintiffs in providing pre-release notices has resulted in the delivery of duplicate notices to
19 Napster for some pre-release works by the artist Run DMC. After noticing these works on
20 February 28, and having them excluded by March 5, Plaintiffs sent another notice on March 19.
21 These errors multiply the manhours Napster spends reviewing and parsing the data, increase the

22
23 ¹³ Plaintiffs have demonstrated that they have the capability of providing file names for pre-
24 release works when they choose to do so. For example, on March 12, 2001, the A&M Plaintiffs
25 provided Napster with six file names allegedly corresponding to Janet Jackson's unreleased song
26 entitled "All 4 You," and enclosed illegible screen shots showing the results of a search for that
27 work. In response to Napster's written request for legible copies of the screen shots, on March
28 13, 2001 counsel for the A&M Plaintiffs sent Napster another letter enclosing additional screen
shots purportedly corresponding to that work. As another example of the carelessness with which
they designate file names, Plaintiffs included file names for "My Love 4 U" which presumably is
a separate and distinct work of Janet Jackson. *See* Exh. 11, attached hereto, which consists of true
and correct copies of the correspondence between the parties concerning Janet Jackson's work
"All 4 U."

1 costs Napster will incur for examination of the data, and exacerbate the inequity Napster has
2 suffered as a result of Plaintiffs' misinterpretation of the Court's Orders.

3 7. The *Leiber* Plaintiffs' Continued Failure to Provide Adequate Notice

4 On March 8, 2001, Napster's attorneys notified counsel for the *Leiber* Plaintiffs that a
5 computerized list of song titles and composers, unaccompanied by any file names available on
6 Napster, and to which Frank Music asserts publishing rights, did not constitute adequate notice
7 under the Court's Order. Napster thus requested from the *Leiber* Plaintiffs the file names
8 corresponding to the identified works. *See* Pulgram Decl., Exh. 10. Because most Napster users
9 identify their MP3 files not by composer and song title, but by performing artist and song title,
10 Napster also requested from the *Leiber* Plaintiffs the name of the performing artists. To date, the
11 *Leiber* Plaintiffs have not responded to Napster's requests and have failed to submit any
12 additional notices.

13 8. The 14,222 Orphan File Names

14 As explained in greater detail in Napster's First Compliance Report, Napster's attorneys
15 sought clarification from the *A&M* Plaintiffs' counsel on March 6, 2001 as to which of the 14,222
16 file names reflected in various screen shots attached to Frank Creighton's declaration contain
17 sound recordings owned by one of the *A&M* Plaintiffs (or by any RIAA member) so that Napster
18 could begin blocking the appropriate files. *See* Pulgram Decl., Exh. 2. To date, the *A&M*
19 Plaintiffs have not responded to that request. Accordingly, Napster still does not have notice of
20 which "90%" of the 14,222 file names Plaintiffs claim should be excluded.

21 **IV.**

22 **ADDITIONAL ISSUES**

23 1. The Overinclusiveness of Napster's Filters

24 In its First Compliance Report, Napster alerted the Court of the likelihood that its negative
25 database filters necessarily would be overbroad. *See* Declaration of Richard Ault in Support of
26 Napster's (First) Consolidated Report of Compliance with Modified Preliminary Injunction
27 ("Ault Decl."), ¶¶ 10-11. That overbreadth is demonstrated by the following actual examples.

1 a. Madonna's "Music"

2 Napster has excluded Madonna's song entitled "Music" pursuant to a notice received from
3 the A&M Plaintiffs prior to entry of the Court's Orders. However, the word "music" also appears
4 as the name of many users' directory of shared music files, because the Napster software
5 automatically provides that as the name of the default directory. As a result, every file name
6 containing the word "Madonna" in such a directory has now been excluded from Napster's index.
7 As demonstrated above, this excludes at least 37 song titles containing the word "Madonna" not
8 performed by the artist of the same name.

9 b. Peter Sallet

10 In several cases, Plaintiffs' notices have resulted in Napster blocking several of its
11 "featured artists" who have expressly authorized the distribution of their work on the Napster
12 service. These include several works by the featured artist Peter Sallet, whose songs "Heart of
13 Mine" and "The Way Things Used to Be" were among the file names excluded from Napster's
14 index by Plaintiffs' notices. *See* Motwani Decl., ¶10. Wrongful exclusion of works of authors
15 who have signed on with Napster injures Napster's goodwill with those artists and Napster users.

16 2. Napster's Service Outage

17 On the evening of March 14, 2001, Napster was required to shut down its service for
18 several hours in order to update its negative database. This interruption in Napster's service was
19 unplanned, severely disrupted Napster's service, and was a direct result of Napster's efforts to
20 comply with the injunction.

21 3. Plaintiffs' Encouragement of Third Parties to Submit Non-Compliant Notices

22 Napster has received notices from various third parties consisting of copies of their entire
23 catalogues without any corresponding file names indicating the availability of their works on the
24 Napster system. Some of these parties have explicitly represented to Napster that they had been
25 advised to send such (non-compliant) notices to Napster by one or more of Plaintiffs' counsel.

26 Thus, the burden created by Plaintiffs' own noncompliance with the requirement to
27 provide notice of "files containing copyrighted works on the Napster system" (*A&M Records v.*
28

1 *Napster, Inc.*, (9th Cir. Feb. 12, 2001) Slip. Op. at 49) is further exacerbated by disseminating
2 their misinterpretation of the notice provisions to third parties.

3 4. The A&M Plaintiffs' Claims of Confidentiality

4 On March 15, 2001, Napster received a letter from the A&M Plaintiffs' attorneys
5 purporting to designate "all lists of recordings previously or subsequently provided to Napster in
6 connection with the injunction" as confidential under the Protective Order entered by the Court
7 on January 30, 2001. As the Court is aware, that Protective Order offers protection only for
8 materials that a party believes "comprise or reflect proprietary information used by it in . . . its
9 business which is not generally known and which the party would normally not reveal to third
10 parties or would cause third parties to maintain in confidence." Protective Order, ¶ 2. It
11 specifically does not apply to any information that (a) is lawfully and generally available to the
12 public, or (b) is already lawfully known to the receiving party at the time of disclosure.
13 Protective Order, ¶ 13. This Court has also made clear that these proceedings are public in
14 nature, and that it does not intend to shield from public inspection the functions of this Court.

15 Plaintiffs' purported assertion of confidentiality is entirely inappropriate under the Court's
16 Protective Order, because all of the requisite information¹⁴ in the lists Plaintiffs have provided
17 Napster is lawfully and generally available to the public and not proprietary to Plaintiffs:

- 18 • Under no stretch of the imagination are file names proprietary to the Plaintiffs for they
19 belong to *Napster users*. They were neither developed nor maintained by Plaintiffs
20 and they have already been displayed to the public at large. Nor are they used by
21 Plaintiffs in their business. Moreover, the public users and other artists have a
22 legitimate right to know which files have been identified for exclusion from Napster,
23 in order to facilitate the unblocking of access to files that have been blocked in error.
24 *See* First Compliance Report at 23 (request for a dispute resolution remedy for
25 substantial overblocking).
- 26 • Both artist name and song titles are lawfully available to the public. Copyright by its
27 very nature requires disclosure of the name, title, and owner of the copyrighted work
28 with the Copyright Office. 17 U.S.C. §§ 401, 402. Whether noticed upon production
of the work or officially registered with the U.S. Copyright Office, this information is
in the public domain and, therefore, generally available to the public. Moreover, all
transfers of ownership in copyrights are only valid if the instrument of conveyance is

14 Under the Court's modified preliminary injunction of March 5, 2001, at paragraph 2,
Plaintiffs are required to provide Napster: (A) the title of the work; (B) the name of the featured
recording artist performing the work ("artist name"); (C) the name(s) of one or more files
available on the Napster system containing such work; and (D) a certification that Plaintiffs own
or control the rights allegedly infringed.

1 in writing (*see* 17 U.S.C. § 204) and registration must occur prior to the
2 commencement of an infringement action. *See* 17 U.S.C. § 411(a).

- 3 • Requisite artist name and song title information, in practice, is widely disseminated
4 and is generally available to the public. For example, as Plaintiffs have frequently
5 repeated, public databases and websites, such as songfile.com and allmusic.com, post
6 such information over the Internet. In fact, Plaintiffs have maintained to the Ninth
7 Circuit that Napster executives already have this information in their possession or
8 could easily obtain this information without Plaintiffs providing it. *A&M Records,*
9 *Inc. v. Napster, Inc.*, Brief of Appellees, dated Sept. 8, 2000, at 11 (9th Cir., No. 00-
10 16401 and 00-16403).
- 11 • Finally, even to the extent that any confidentiality could be claimed, paragraphs 6(a)
12 and (c) of the Protective Order require that such designation be made at the time of
13 production by placing the appropriate confidentiality legend on each page of a
14 document for which the protection is claimed. Plaintiffs' wholesale confidentiality
15 claim for "all lists of recordings previously or subsequently provided" is ineffective,
16 since no complying notice was provided to Napster that the lists warranted
17 confidential treatment. Moreover, the Protective Order mandates the designation of
18 *particular* documents and the placement of a *legend* on each page of any document
19 subject to the assertion of confidentiality. No such designations have been made by
20 Plaintiffs.¹⁵ To the contrary, Plaintiffs delivered certain lists to Napster without
21 claiming confidentiality as early as February 28, and provided them in open court on
22 March 2, likewise without verification.

23 Despite Plaintiffs' seemingly frivolous assertion of confidentiality for materials they have
24 provided, Napster nevertheless has made a good faith offer not to disclose Plaintiffs' lists in their
25 substantial entirety without prior notice. Napster has also given Plaintiffs assurance that it has no
26 intention of providing the lists to the public to facilitate evasion of Napster's exclusion
27 mechanism. Instead, Napster will allow the press to review, but not substantially duplicate, the
28 lists of works sent by Plaintiffs, thereby ensuring both free and open inspection of the materials,
without the risk of publication of a catalogue of file names. Plaintiffs to date have ignored this
offer. Attached hereto as Exhibit 12 are true and correct copies of correspondence between
counsel for the parties on these issues.

29 CONCLUSION

30 Napster continues to comply with the letter and spirit of the Court's injunction.
31 Unfortunately, it has relied on Plaintiffs' submissions at its peril. Plaintiffs' meager effort to

32 ¹⁵ In all events, a designation of confidentiality on those documents would render them
33 attorneys-eyes only under the Protective Order, unless the parties stipulate otherwise. Plaintiffs,
34 however, have intentionally delivered those documents directly to non-attorney staff at Napster
35 for their use, while purporting thereafter to unilaterally "stipulate" away their waiver of
36 confidentiality to have it apply retroactively.

1 correlate the file names with the protected works submitted to Napster compounds the problems
2 caused by their express position that they are under no obligation to provide Napster with any
3 information other than their catalogues of copyrighted sound recordings.

4 Plaintiffs' submission of erroneous information to Napster must stop. To ensure that it
5 does, Napster requests this Court to require: (1) that Plaintiffs be instructed to review and
6 validate their data before it is submitted to Napster; and (2) a modification of the 72-hour period
7 in which Napster must respond to Plaintiffs' submissions, so that Napster may also validate
8 Plaintiffs' data before it is added to Napster's negative database; and (3) an Order requiring
9 Plaintiffs to compensate Napster for the actual time and expense it has incurred in first adding
10 these erroneous file names to its negative database, the costs it incurred in validating Plaintiffs'
11 submissions, and the additional costs its will incur in removing these erroneous file names from
12 its negative database.

13 Dated: March __, 2001

Respectfully submitted,

14 BOIES, SCHILLER & FLEXNER LLP

FENWICK & WEST LLP

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16
17 By: _____
Robert Silver

By: _____
Laurence F. Pulgram
(CSB No.115163)

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19 Attorneys for Defendant
20 NAPSTER, INC.

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VERIFICATION

I, RICHARD AULT , hereby declare:

I am an officer of Napster, Inc., defendant in this action, and am authorized to make this verification on its behalf:

I am the officer in charge of implementing and overseeing the staff dedicated to compliance with this Court's Modified Preliminary Injunctions.

I have read the foregoing SECOND CONSOLIDATED REPORT OF COMPLIANCE WITH THE MODIFIED PRELIMINARY INJUNCTIONS ENTERED IN CASE NOS. C 99-0518 MHP, C00-0074 MHP, C00-2638 MHP, C00-3997 MHP, and C00-4068 MHP submitted by defendant Napster, Inc. and know the contents thereof. I know or am informed and believe from those I supervise that the factual matters stated therein are true and on that ground certify and declare under penalty of perjury that the same are true and correct.

Executed on this _____ day of March, 2001, at _____, California.

RICHARD AULT

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