

1 DAVID BOIES (PRO HAC VICE)
JONATHAN SCHILLER
2 ROBERT SILVER (PRO HAC VICE)
BOIES, SCHILLER & FLEXNER LLP
3 80 Business Park Drive, Suite 1500
Armonk, NY 10504
4 Telephone: (914) 273-9800
Facsimile: (914) 273-9810

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

9 JOSEPH W. COTCHETT, JR. (CSB No. 36324)
10 CHARLES E. TILLAGE (CSB No. 177983)
COTCHETT, PITRE & SIMON
11 840 Malcolm Road, Suite 200
Burlingame, CA 94010
12 Telephone: (650) 697-6000
Facsimile: (650) 697-0577

13
14 Attorneys for Defendant
NAPSTER, INC.

15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18
19 IN RE NAPSTER, INC. COPYRIGHT
LITIGATION

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

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

20
21
22
23
24 **COMPLIANCE REPORT NUMBER 1**

25 **DATED MARCH 12, 2001**

1 Pursuant to this Court’s Orders entered on March 5, 2001, in A&M Records, Inc. et al. v.
2 Napster Inc., Case No. C 99-05183 MHP, Leiber et al. v. Napster, Inc., Case No. C 00-0074
3 MHP, Casanova Records, et al. v. Napster, Inc., C 00-2638 MHP, Metallica et al. v. Napster, Inc.,
4 Case No. C 00-4068 MHP and Andre Young, et al. v. Napster, Inc., Case No. C 00-3997 MHP,
5 preliminarily enjoining defendant Napster, Inc. (“Napster”) from engaging in, or facilitating
6 others in, copying, downloading, uploading, transmitting, or distributing copyrighted musical
7 compositions or sound recordings pursuant to the procedures set forth in the Court’s Orders (the
8 “Orders”), Napster hereby submits this Consolidated Report of Compliance (“Report”)
9 identifying the steps it has taken to comply with those Orders.

10 **I.**
11 **INTRODUCTION AND SUMMARY**

12 In response to the Court’s Orders, Napster has developed a screening system with
13 sophisticated and creative processes and software to fulfill each procedure and obligation
14 imposed on Napster by the Court. The compliance process started four weeks ago, even before
15 the Court’s Orders were issued on March 5. Napster has to date loaded approximately 6 million
16 file names (including duplicates) and approximately 26,000 artist/title combinations for exclusion
17 from its system.¹ This has been accomplished and is being carried out through the diligent,
18 costly, and constant efforts of Napster’s employees, counsel and consultants. In short, Napster
19 has fully and in good faith complied with this Court’s Orders.

20 Nevertheless, critical disputes have immediately arisen related to this compliance effort,
21 as a result of what Napster believes to be Plaintiffs’ misconstruction of the Orders of this Court
22 and the Ninth Circuit. These disputes at their center result from substantially different
23 interpretations of the Court’s Orders and significant misunderstandings about the architecture of
24 Napster’s file sharing system in several ways discussed below as well as Napster’s capacity to
25 exclude. Plaintiffs’ misconstrue the relative burdens imposed on the parties. Most importantly,
26 they assert that they have no duty to provide notice of any file name(s) containing infringing

27 _____
28 ¹ Declaration of Richard Ault in Support of Compliance Report (“Ault Decl.”) ¶ 36. Those
6 million file names condense to some 115,000 “normalized” file names. *See* note 6 *infra*.

1 works before Napster may be required to search its system for, and attempt to exclude, any and all
2 of the items in their historical catalogues. The Ninth Circuit spoke explicitly about the sequence:
3 the burden is “on Plaintiffs to provide notice to Napster of copyrighted works *and* files containing
4 such works available on the Napster system *before* Napster has the duty to disable access to the
5 offending content.” (emphases added.) 9th Cir. Slip Op. at 49. This Court correspondingly
6 recited in its Orders at ¶ 2(C) that Plaintiffs shall provide Napster with “the name(s) of one or
7 more files available on the Napster system containing such work.”

8 Plaintiffs’ contrary assertion would, if credited, impose on Napster. This assertion would,
9 if credited, impose on Napster overwhelming and unilateral duties. Indeed, the record company
10 Plaintiffs have delivered names of hundreds of thousands of works *without* associated file names
11 in just the last two days. Napster believes Plaintiffs’ constructions to be unfounded, and contrary
12 to the Ninth Circuit opinion and this Court’s Orders and their purported notices non-compliant.
13 Napster will, absent further instruction by this Court, proceed in good faith to exclude files and
14 works identified in compliant notices as explained herein. But in all events, these questions
15 require prompt resolution by the Court, given that Napster’s good standing and ability to comply
16 with the injunction, as well as Plaintiffs’ rights under the injunctions, are at stake.

17 This summary, and the detailed Report below, will provide information on the following
18 issues relating to Napster’s compliance: (A) Napster’s extensive efforts to create a technology
19 that will simultaneously exclude copyrighted works while permitting the substantial non-
20 infringing uses recognized by the Ninth Circuit; (B) Napster’s efforts to disable access to
21 Plaintiffs’ copyrighted works; (C) Plaintiffs’ failure to cooperate in this effort, including their
22 delivery of non-complying notices; and (D) the disputes that have arisen over the meaning of this
23 Court’s Orders.

24 **A. Summary Description of How The Napster File Exclusion System Complies With**
25 **The Court’s Orders**

26 Napster had, by March 5, 2001, created a proprietary two-stage filter to review all file
27 names at the time of user log-in, prior to those files being allowed to be made available in the
28 Napster index. The filters compare incoming files to a “negative database” of file names and

1 artists and titles that are to be excluded from the Napster index. Ault Decl. ¶¶ 12-27.

2 The first stage of the filter, in compliance with paragraph 6 of the Court’s Orders, reviews
3 all file names against a list of the names of artists (or composers) and titles of their works. This
4 filter screens out all file names that contain the same artist and title pairs (“ATPs”) listed in the
5 negative database of prohibited works. *Id.* ¶ 14. Napster has, to date, input some 26,000 artist
6 and title pairs, along with variants in the names of artists and titles. *Id.* ¶ 36. Napster will, within
7 three business days of receipt of Plaintiffs’ first post-injunction notices (delivered at 4:47 p.m. on
8 Friday March 9), block tens of thousands of additional ATPs to the extent complying notices
9 were received.

10 The second stage of the filter, in compliance with paragraph 5 of the Court’s Orders,
11 reviews all file names against a list of specific infringing file names previously reported to or
12 gathered by Napster. The filter screens out all file names matching that list, so that no Napster
13 user can obtain those file names from Napster’s search index. Napster has, to date, inputted over
14 6 million file names into this database of file names to be excluded. *Id.* ¶¶ 12-13, 36. Napster
15 will, within three business days of receipt of Plaintiffs’ first notices under the injunction, add an
16 additional 2 million file names.

17 These two-stage filters will successfully block the vast majority of files containing noticed
18 works upon identification of those works and/or known file names containing them. Ault Decl.
19 ¶ 36. However, because file names only “reasonably or roughly correspond to the material
20 contained in the files”² there will be some leakage as variants of file names are missed. As
21 explained below, accurate determination of variants is critical to the success of any screening
22 system. Accordingly, in compliance with paragraph 3 of the Court’s Orders, which directs that
23 “all parties shall use reasonable measures in identifying variations of the file name(s) or of the
24 spelling of the titles or artists’ [or composers’] names, of the works identified by plaintiffs,”
25 Napster has devised three tools to identify variants.

26 First, Napster has created a Variants Entry Tool to allow personnel to review the existing

27 _____
28 ² *A&M Records, Inc. v. Napster, Inc.*, (9th Cir., February 12, 2001) Slip Op. (“9th Cir. Slip Op.”)
at 6.

1 negative database and manually enter variations in titles and artists' names and has begun this
2 intensely time-consuming process. Although Napster has invited Plaintiffs to supply the variants
3 in titles and artists' names they believe should be used to identify their works, Plaintiffs have yet
4 to supply any variations of titles or artists' names. Plaintiffs instead maintain that this is
5 Napster's sole responsibility. Ault Decl. ¶ 29. The Variants Entry Tool will be at all times
6 available to Plaintiffs.

7 Second, Napster has also developed a "Police BOT processing tool." Upon receipt of
8 complying notices as required under paragraph 2, certifying Plaintiffs' ownership, artist, title, and
9 file names for a work (information that Napster refers to as "OATF" notice), this software
10 program will conduct searches of the Napster index for variant file names to be added to the
11 negative database and excluded from the index. *Id.* ¶ 30. Deployment of this tool satisfies
12 paragraph 4 of the Court's Orders, which imposes on Napster the duty to search its system for
13 files against the lists of copyrighted works Plaintiffs have been ordered to provide under
14 paragraph 2.³

15 Third, Napster has, on March 12, 2001, entered into a relationship with Gracenote, a
16 company that owns a database of millions of artist name and song titles and variations thereof.
17 Napster will incur substantial expense to purchase a database license from Gracenote. Ault Decl.
18 ¶ 95. It will, in return, receive access to Gracenote's list of variants of user-given names. This
19 list includes approximately 400,000 artist names (approximately 140,000 of which are variants)
20 and 12 million artist-title pairs (approximately 3 million of which are variants). *Id.* Napster
21 expects to receive and incorporate the Gracenote data within the next week. *Id.* For example, for
22 popular bands like 'N Sync, Gracenote provides 50 variant names.

23 Moreover, Napster has undertaken to counteract a "pig latin" translator for Napster file

24 _____
25 ³ The Court's Orders imposed this duty on Napster "on the basis of the factual representations by
26 the parties at the March 2, 2001 hearing that it would be difficult for Plaintiffs to identify all
27 infringing files on the Napster system given its transitory operation." Orders at 4. In fact, the
28 transitory nature of the Napster index likewise limits the results of Napster's own searches of its
system to those file names available at any given moment. Moreover, Plaintiffs' representation
(3/2/01 Tr. 31, 44, 52) that they would have to connect to 80 different servers to search Napster's
system was simply false. Ault Decl. ¶ 94. To the extent any question exists as to Plaintiffs' ease
of searching the Napster system Napster is prepared to address it with Plaintiffs. *Id.*

1 names, which Aimster.com had offered to assist users in camouflaging file names from Napster's
2 screening technology. Aimster has informed Napster that it will take down its program. Napster
3 has also implemented a means to block Aimster-encoded file names from being made available
4 on the Napster index. Ault Decl. ¶ 35.

5 **B. The Problem Of Overly Broad Exclusion Mechanisms, and Napster's Solution**

6 These variant identification tools will not immediately identify and locate all variants.
7 Plaintiffs' cooperation in this regard is also necessary. Excluding variants is an iterative and
8 constant process, as is development of the most effective software to do so. As Cary Sherman,
9 General Counsel for the RIAA recently stated:

10 We're not expecting overnight success, but we're expecting some
11 success in the near-term. We don't expect that everything will work
on the first try or the first day.⁴

12 The only alternative to the iterative process of identifying variants would be simply to shut down
13 the system—the only sure way to prevent variant leakage—or to impose filters with parameters
14 so overbroad as to prevent large amounts of legitimate, authorized use of the Napster system.

15 For example, Plaintiffs have argued that Napster should, prior to identification of actual
16 variant file names, exclude files that contain any title (regardless of artist designation) that has
17 been identified as a title of one of Plaintiffs' works. However, as described below, as many as
18 hundreds of different songs composed or recorded by different artists often have the same or
19 similar names. The impact of title-only exclusion would be to exclude vast amounts of works
20 other than those in which Plaintiffs have rights. For example, Plaintiff Frank Music claims
21 ownership of composition rights in one arrangement of "Ave Maria." Ault Decl. ¶ 49. Blocking
22 that song name without more specificity would exclude all of over 200 additional arrangements of
23 the song. *Id.* Plaintiff Sony has requested blocking of Bob Dylan's recording of "I Want You."
24 If implemented by name only, this would exclude many versions of the songs named "I Want
25 You" that Sony does not own, including works authorized by Napster's Featured Artists.
26 Declaration of Eden D. Morrill ("Morrill Decl.") ¶ 12.

27 ⁴ Sue Zeidler, *Record labels Compiling lists for Napster*, Silicon Valley.com, March 7, 2001
28 (www.siliconvalley.com/docs/news/reuters_wire/9342221.htm). See Declaration of Laurence
Pulgram ("Pulgram Decl.") Exh. 15.

1 Similarly, Plaintiffs have suggested that Napster should, without identification of actual
2 variant file names, automatically block file names that contain partial versions, or inexact
3 components, of song titles. Napster already does excludes such variants once identified.

4 But to impose *automated* conventions to this effect would again result in vastly overbroad
5 exclusion. Thus, Plaintiff Sony has identified Bruce Springsteen singing “For You” as a work to
6 be excluded. Were Napster to block all files containing the terms “For You,” or all files
7 containing the word “Bruce,” the overexclusion is obvious. *Id.* at Exh. G

8 Napster understands that the correct approach is not to mechanically apply such an
9 inherently overexclusive convention, but instead to use reasonable measures to exclude the actual
10 and reasonable variations that can be found and verified. As this Court stated in paragraph 3 of
11 the Orders: “if it is reasonable to believe that a file available on the Napster system is a variation
12 of a particular work or file identified by Plaintiffs, *all parties have an obligation to ascertain the*
13 *actual identity (title and artist name) of the work* and to take appropriate action within the context
14 of this Order.” (emphasis added) Napster’s variant identification and exclusion process attempts
15 to implement this approach. Napster has encouraged Plaintiffs to join in the effort, thus far
16 without success.

17 Indeed, Napster’s efforts to comply with the Court’s Orders will, despite reasonable care,
18 exclude works to which Plaintiffs do not have rights as well as works explicitly authorized for
19 distribution on the Napster system. Napster’s experience with Metallica provides a few
20 examples:

- 21 • The Plaintiffs control sound recording rights in studio recordings, but not in live
22 recordings of the same name. Metallica, for instance, has requested Napster to
23 exclude studio recordings, but not live recordings, of its works. The authorized live
24 recordings will nonetheless be excluded, even if they contain the phrase “live” or
25 “concert” or the date of the recording. Ault Decl. ¶ 76.
- 26 • Napster has been asked to block the ATP “Metallica,” (artist) and “Enter Sandman”
27 (title). Searching the Napster index for these two terms, and adding the word “cover”
28 to the search, previously resulted in such diverse file names as: “Pat Boone – Enter
Sandman (Metallica cover)”; “Nirvana cover of Enter Sandman (Metallica)”;
“Motorhead – Enter Sandman (Metallica)”; and “Faith no More – Zombie
(Cranberries cover) Enter Sandman (Metallica Cover).” Under Napster’s solution,
access to all of these file names will be prevented, even though none of them
represents Metallica’s sound recording of “Enter Sandman.” Ault Decl. ¶ 11.

- 1 • The file names Plaintiffs have submitted already include dozens of apparent mistakes. Metallica’s notices, for example, listed numerous works by the bands Rolling Stones, Red Hot Chili Peppers or Creed as owned by Metallica. Ault Decl. ¶ 85, Exh. 44. Because this Court’s Orders, unlike the DMCA, does not provide a means for users to protest such inaccuracies, Napster may be duty bound by the Orders to exclude such files, even if Plaintiffs’ claim to them appears improper.

2
3
4 Napster’s exclusion technology has been extraordinarily difficult to develop. The cost and
5 complexity of its operation has the potential to seriously degrade the operation of the Napster
6 system and to compromise the many authorized and legitimate uses of the system. Ault Decl.
7 ¶¶ 38-42. Napster is committed to excluding Plaintiffs’ works as successfully as possible. It
8 needs the Plaintiffs’ cooperation in this shared burden. It has not received it.

9 **C. Plaintiffs’ Non-Complying Notices**

10 Plaintiffs’ continued delivery of non-complying notices is not only frustrating Napster’s
11 exclusion efforts it threatens to bury Napster under obligations this Court did not impose. As
12 discussed below, these include notices that:

- 13 • Provide mere catalogues of works, including old or obscure works, without any file
14 name(s) to indicate that the work is available through use of Napster’s system;
- 15 • Provide no specification of what rights are claimed in the work;
- 16 • Provide no variations of file names and artists that Plaintiffs desire Napster to block;
- 17 • In the case of compositions, provide no identification of performing artists, by which
18 Napster might be able to identify the work as its users do;
- 19 • Provide data in formats that are not easily computer readable—despite the fact that the
20 RIAA professes to own a computer database of some 2.5 million works. See n. 12,
infra.

21 The Ninth Circuit conditioned Napster’s obligation to disable access to offending content
22 on Plaintiffs’ delivery of “notice to Napster of copyrighted works and files containing such works
23 available on the Napster system.” 9th Cir. Slip Op. at 49. This Court further ordered, in
24 paragraph 2, that Plaintiffs “shall provide notice to Napster . . . by providing for each work . . .
25 [inter alia] the name(s) of one or more files available on the Napster system containing such
26 work.” Orders ¶ 2(A). Nonetheless, Plaintiffs have continued to assert that they have no
27 obligation to provide Napster with any file names, and delivered hundreds of thousands of
28 artist/title pairs for exclusion without associated file names. See Pulgram Decl. Exh. 4, Lavelle

1 Declaration.

2 In particular, at 4:45 p.m. on Friday, March 9, Plaintiffs supplied Napster with the first
3 notices since the entry of the modified injunction—providing Napster with access to several huge
4 databases the RIAA had collected and made available at its IP address. Pulgram Decl. Exhs. 6, 7.
5 The first is a catalogue of tens of thousands of names of titles and artists asserted to be owned by
6 Plaintiff Sony, without any associated file names found on the Napster system. The second is a
7 massive database comprising some 240 megabytes, containing almost 2 million file names.
8 Those millions of file names, however, apparently correlate to only about half of the 91,000 song
9 titles Sony supplied. The remainder of the song titles are unsupported by any file name, reading
10 “NULL” in the file name field. Lavelle Decl. ¶¶ 3, 9-11. Similarly, Plaintiffs delivered to
11 Napster one database listing the 5,600 songs and artists previously presented to Napster (and
12 discussed at the March 2 hearing), along with another database that supplied 228,000 file names.
13 Those file names correlated to only about 3,700 works, however. The remaining works are not
14 supported by any file name, and read “NULL” in the file name field. *Id.*⁵

15 In addition, after the close of business on March 12, Plaintiffs delivered to Napster notice
16 of URLs containing an additional 130,000 song titles and artist names. Pulgram Decl. Exh. 15.
17 These catalogues were delivered unconnected to file names, with demands that Napster exclude
18 the works regardless of their prior availability through the Napster system. *Id.*; Ault Decl. ¶ 98.
19 At the same time, Plaintiffs provided hundreds of thousands or millions of file names, along with
20 artist/title information for those files, which appear to cover *some* of these works, but by no
21 means all. Where a file name is connected to the work in the notice, Napster will exclude them.
22 Where no file name is connected to the work, Napster will not. *Id.* It is simply impossible for
23 Napster, in the three days allowed by the Court’s order, to correlate millions of file names with
24 hundreds of thousands of names of works where Plaintiffs have not done so in their notices. *Id.*

25 In short, Plaintiffs have generally failed to supply Napster with any file names for tens, or
26 even hundreds, of thousands of the works just noticed. Yet the Plaintiffs demand that Napster
27 exclude all of the sound recordings listed, without any indication that they have ever been

28 ⁵ As discussed below, Napster has excluded the 56000 songs already.

1 available through the Napster system. Pulgram Decl. Exh. 4. Plaintiffs’ “notices” puts Napster to
2 the choice of attempting to search for and exclude a huge number of works as to which Plaintiffs
3 have no availability on the Napster system, or risking contempt (under Plaintiffs’ misconstruction
4 of the Court’s Orders), if Napster treats the catalogues as non-compliant because no file names
5 are attached. Moreover, if Plaintiffs were allowed to continue to make available massive
6 catalogues of song titles and artists without corresponding file names, it would exacerbate
7 Napster’s compliance workload to impossible levels and shut down its meaningful efforts to
8 prevent the transfer of allegedly infringing works. Neither of these results is contemplated by this
9 Court’s Orders or the Ninth Circuit’s opinion.

10 **D. The Need For Resolution of These Disputes**

11 If the Plaintiffs’ interest here were merely to screen allegedly infringing files available
12 through the Napster system, one would expect Plaintiffs to target those files by supplying
13 supporting information, rather than seek to impose on Napster additional duties and burdens for
14 works not available on its system.

15 The Court should clarify that Plaintiffs must provide compliant notices, including file
16 name(s), before Napster has a duty to respond; order that non-complying notices may be ignored;
17 and order Plaintiffs to cooperate in the identification of file names and variants that Plaintiffs
18 wish to exclude, as required by paragraphs 2 and 3 of the Orders. Similarly Plaintiffs have taken
19 language in paragraph 6 out of context, asserting that Napster has an absolute duty “to prevent the
20 downloading, uploading, transmitting or distributing of the noticed copyrighted sound
21 recordings”—ignoring the fact that the Ninth Circuit recognized that 100% compliance is simply
22 impossible under the Napster architecture. The Court should clarify that Napster’s duties are to
23 prevent access to the extent reasonably possible “pursuant to the procedures set forth [in the
24 Orders]” (Order ¶ 1). As this report will show, Napster has taken extraordinary efforts to comply
25 with the Court’s procedures, and it intends to continue to do so.

1 **II.**

2 **NAPSTER'S METHODOLOGY**

3
4 Napster believes that it has developed an approach that represents the most efficient and
5 technologically feasible solution for screening allegedly infringing files.

6 **A. The Napster Solution**

7 Napster has created and deployed two proprietary software filters—called negative
8 database filters—to prevent Plaintiffs' noticed copyrighted musical compositions and sound
9 recordings from being shared across its network. Ault Decl. ¶ 13.

10 The first filter is an artist name /song title "term-based" filter. It examines individual
11 words and phrases within a file name and matches them against words and phrases contained in
12 the names of copyrighted works that Plaintiffs have properly noticed. *Id.* ¶ 14.

13 The second filter is a file name-based filter. It matches the entire file name against file
14 names that Plaintiffs, or subsequently Napster, have identified as reasonably corresponding to
15 Plaintiffs' copyrighted works. *Id.* ¶ 15. Both filters store their blocking information in what
16 Napster refers to as the negative database. Napster believes that this two-pronged approach is the
17 most effective and practical mechanism available to prevent Plaintiffs' copyrighted works from
18 being shared on its system.

19 **1. Napster's Term-Based Exclusion Algorithm**

20 The term-based exclusion algorithm is composed of two steps: data loading and
21 subsequent file blocking. *Id.* ¶ 16.

22 **a. The Data Loading Step**

23 During data import, a unique Artist ID is assigned to each noticed artist. The Artist ID
24 refers to all known variants of the artist's name. For example, "Metalica," "Metalica," and
25 "Mettallica" all have the same Artist ID: "Metallica." *Id.* ¶¶ 58-60.

26 When each Napster server starts up, it loads the noticed artist names (and all known
27 variants thereof) and their corresponding Artist IDs from the existing negative database Napster
28 has created. Each noticed artist name (and known variants thereof) is broken into individual

1 words in lowercased letters. The first of three tree data structures is used to store and look up
2 individual words. The words in the artist name are treated as a phrase (sequence of words), which
3 is then stored in an “artist name tree.” *Id.* ¶¶ 17-18.

4 After all noticed artists are loaded in this way, the server loads noticed song titles from the
5 negative database. Each song title in the negative database has a corresponding Artist ID
6 representing the artist that performed the work. *Id.*

7 Noticed song titles are organized in memory in a similar fashion to artists’ names. Each
8 song title (and known variants) is broken into individual words and all letters are lowercased.
9 The words in the song title are treated as a phrase and stored in the “song title tree” along with its
10 associated artist ID. In the current implementation of the exclusion technology, this data is
11 loaded at startup and the negative database is updated with new noticed artists and song titles
12 once every 24 hours. *Id.*

13 **b. The File Blocking Step**

14 After the noticed data has been loaded into the artist name and song title trees, lookups
15 can be used to identify file names associated with specific song titles and performing artists to
16 prevent such file names from being shared. *Id.* ¶ 19.

17 When users login to a Napster server, they upload a list of any file names they would like
18 to share across the network. Under the new procedure developed by Napster, before the files are
19 added to Napster’s index of searchable content, each file must now pass through these exclusion
20 filters.

21 For *each file name* that a user wishes to share with other Napster users, the Napster server
22 breaks the file name and preceding directory into individual words.⁶ Since the artist name can be
23 located anywhere inside the file name, and can contain multiple words, many searches are needed
24 to find all the artist names that are present. *Id.* ¶ 20.

25 _____
26 ⁶ For example, if a user tried to share the file “C:\Program Files\Napster\Music\Metallica\Sad
27 But True.mp3,” the server would take “Metallica\Sad But True.mp3” and break it up into
28 individual words. The letters in these words would all be lowercased and extraneous characters
and punctuation would be removed. The rest of the path name, “C:\Program Files\Napster\
Music,” would be dropped. This process would result in the following words: “metallica,” “sad,”
“but,” and “true.”

1 To take a real world example, consider the file name “Metallica—Sad But True.mp3.”
2 Because the first word in the file name is *metallica*, the algorithm searches for the artist named
3 *metallica*. Because the band name *metallica* exists in Napster’s database, the algorithm finds it
4 and stores its Artist ID. The search then continues for the word *sad* preceded by *metallica*; this
5 looks for artists whose name starts with or is *metallica sad*. When the search for *metallica sad*
6 finds there isn’t an artist whose name starts with or is *metallica sad* in Napster’s negative
7 database, the search is stopped for artists starting with the word *metallica*. However, as the
8 artist’s name could be located anywhere within the file name, the search continues by looking for
9 artists’ names beginning with the word *sad*, because there may be an artist whose name starts
10 with or is *sad*. This search continues until all the words in the sequence have passed through the
11 algorithm and all the artists’ names listed in Napster’s negative database are identified. *Id.* ¶ 21.

12 The process continues by performing the same searches with the song title tree. The
13 searches happen word-by-word in the same order as described above. Again, if no possible song
14 title is discovered, the file passes through this filter. However, if there were some possibilities
15 found, all of the Artist IDs associated with these song titles are retrieved. *Id.* ¶ 22. For example,
16 once “Sad But True” is identified as the name of a song that is on Napster’s list of excluded
17 works, the artist name associated with that noticed work in Napster’s list of excluded works must
18 be compared against all of the artists name(s) that may appear in the file name, to ensure that
19 “Sad But True” performed by the noticed artist is blocked, while other artists’ songs of the same
20 name are not blocked.⁷

21 The Artist ID associated with each *noticed song title* that has been found in the file name
22 is then matched against all of the Artist IDs for each *artist name* that has been found in the file
23 name. Whenever an artist name found in the file corresponds to the artist name associated with
24 one of the song titles in the file name, the file is blocked from being shared on the system. If not,
25 the file passes through the filter successfully. Ault Decl. ¶ 23. Files that pass this filter are next
26 sent through the next filter that blocks exact matches of the file name with the noticed file names

27 _____
28 ⁷ There are at least five different songs with the name “Sad But True” shown in songfile.com
database—only one of which is by Metallica. Ault Decl. Exh. 42.

1 and the file name variations.

2 **2. Napster's File Name -Based Algorithm Exclusion**

3 Like the term-based algorithm, the file name-based algorithm is also composed of two
4 steps: data loading and subsequent file blocking.

5 **a. The Data Loading Step**

6 At startup, each Napster server loads a list of normalized⁸ file names from Napster's
7 negative database into its own embedded database. This allows the server to keep a copy of the
8 blocked file names on the local disk drive. The advantage of using an embedded database in this
9 application is to cut down on loading time and to utilize the database's inherent memory
10 management capabilities to effectively save memory. Frequently used file names are saved in a
11 memory cache. The rest are on disk and can be retrieved as needed. Ault Decl. ¶ 25.

12 **b. The File Blocking Step**

13 After each file that a user wishes to share across the Napster network successfully passes
14 the term-based filter, it is processed by the file name filter. This filter analyzes the user submitted
15 file name, without path or directory information. The file name is normalized in the same fashion
16 as was done for the noticed file names (*see* n. 8) and is then compared to the negative database of
17 excluded file names and variants. If the normalized file name being offered by the user exactly
18 matches one from the negative database, the file is blocked from being shared on the system.
19 Again, file names on disparate users' computers might be identical even though the content is
20 different. Thus, blocking one noticed file name will result in blocking all similar file names of
21 other users.

22 When a user file survives both the name-based exclusion filter and the file name-based
23 exclusion filter, it is added to Napster's searchable index. *Id.* ¶¶ 26-27.

24
25 ⁸ Path names are "normalized" prior to entry into the database to ensure that minor variations are
26 caught as well. There are 5 steps to this normalization process that occur in the following order:
27 (1) removal of the parent directory structure; (2) removal of the trailing suffix (e.g., mp3); (3)
28 translation of all uppercase letters to lowercase letters; (4) stripping of all non-alphanumeric
characters; and (5) stripping all white space characters. For example, the file name "C:\Program
Files\Napster\Music\Metallica\Enter Sandman.mp3" would be normalized and input into the
database as "metallicaentersandman." Ault Decl. ¶ 25, n.2.

1 **Napster’s Good Faith Efforts to Develop Tools to Find And Exclude Variations in**
2 **Names**

3 In addition to creating these screens, Napster engineers have created two pieces of
4 software to facilitate exclusion of artists, title and file name variations.

5 **1. Variants Entry Tool**

6 This tool is designed to allow Napster’s compliance personnel to browse the negative
7 database alphabetically for artist/title pairs and manually enter variants that will be blocked. Each
8 such derived variant is entered into a browser-based form with input fields for artist names and
9 title names. Any number of names may be entered in each field. When the form is submitted the
10 data is added to the artist name and song titles tables in the negative database.

11 The variants entered into this tool are added to the negative database for exclusion from
12 the Napster index across the network of Napster servers. *Id.* ¶ 29.

13 **2. The Police BOT Output Processing Tool**

14 This software tool provides an interface through which Napster’s compliance personnel
15 may discover new file name variants and discern false positive file name variants. The “Police
16 BOT” robot software program patrols the Napster service for file name variations based on artist
17 names and song titles already included in the negative database. When activated by compliance
18 officers, the BOT will conduct searches of the Napster index and report results for reviews, as
19 required in paragraph 4 of the Orders. *Id.* ¶ 30.

20 For example, for the artist/song pair “Metallica\Enter Sandman,” the BOT would provide
21 a compliance officer with all of the associated questionable file names returned by the BOT for
22 such a search, along with a checkbox next to each variation. The compliance officer checks the
23 reasonable file name variations to add them to the negative database. In addition, this interface
24 also includes the functionality of the Variants Entry Tool above, allowing Napster’s compliance
25 personnel to see existing artist and song title variants for the artist/title pair being viewed, and to
26 enter new variants. The officer would leave false positives unchecked. *Id.* ¶ 31.

1 **C. Other Good Faith Efforts by Napster to Reasonably Identify Variations of Infringing**
2 **File names**⁹

3 **1. Napster's Recent License of a Database of Variations from Gracenote**

4 Napster has also entered into a transaction on March 12, 2001 with a company called
5 Gracenote (formally known as CDDDB) to license Gracenote's database of artist name and song
6 title variants. Ault Decl. ¶ 95. Gracenote has represented that its database includes
7 approximately 260,000 "correct" artist names, and approximately 140,000
8 "variations/misspellings" thereof, for a total of approximately 400,000 artist names. In addition,
9 it represents that its database includes approximately 9 million "accurate" artist/title pairs; and
10 approximately 3 million non-accurate phrases, or variations, of names, for a total of
11 approximately 12 million artist and title pairs. *Id.* Through this agreement, Napster will acquire
12 access to a huge list of variations which it will employ to exclude such variations. *Id.*

13 **2. Napster's Self-Notification Tool**

14 In addition to the methods described above for Napster's compliance with the court's
15 order, Napster is developing a proposed external (public) interface through which rights holders
16 may submit notices to Napster by entering "OATF" information (ownership, artist, title and one
17 or more file names) for works that they would like blocked from the Napster index. The interface
18 will consist of a collection of browser-based forms with fields to collect the OATF information.
19 This information is stored in a temporary database. A Napster representative capable of
20 determining the submission's validity would then review the submission. Upon such
21 determination, the data would be added into the negative database. *Id.* ¶ 34.

22 ⁹ Of course Napster: (1) maintains a copyright infringement policy on its website and has
23 adopted a company policy of terminating user accounts when infringement is documented there
24 under, as fully compliant with the Digital Millennium Copyright Act; (2) has joined the Secure
25 Digital Music Initiative ("SDMI"), whose goal is to develop open architecture and specifications
26 for Digital security, and Napster is dedicated to supporting security-compliant formats as they
27 become available; and (3) is committed to supporting encryption formats, such as Windows
28 Media Audio (WMA) whereby files can be distributed over its system, but may only be played
with a "key" from the copyright owner. In addition, Napster has also had discussions with other
format providers such as Liquid Audio, IBM, Universal, and Sony about the possibility of
supporting their file formats to address the problem that the MP3 format, created by the Motion
Picture Expert's Group in the late 1980's, does not contain any encryption or content verification
features.

1 **D. The Efficacy—and Cost—of the Napster Solution**

2 Since February 26, 2001, even prior to receiving any notices from Plaintiffs’ pursuant to
3 the Court’s Orders, Napster has been in the process of loading its negative database with artist
4 and title names, specific file names, and variations of both. Notwithstanding Plaintiffs’ failure to
5 provide proper notice to Napster of the names of one or more files available on the Napster
6 system containing their works (discussed in more detail below), Napster, in a demonstration of its
7 good-faith and its ability and desire to comply with the Court’s Orders, has included
8 approximately 26,000 artist/title pairs and approximately six million file names which, when
9 normalized, is reduced to approximately 115,000 unique file names. *Id.* ¶ 36. These blocked
10 files include 5,600 artist-title pairs (without file names) provided to Napster by the *A&M*
11 Plaintiffs on February 28, 2001, as well as all of the sound recordings identified in the *A&M*
12 Complaint and discovery, Ault Decl. ¶¶ 61, 64-66, 92; Pulgram Decl. Exh. 11, and the *Leiber*
13 Complaint and discovery.

14 The efficacy of Napster’s negative database filter is reflected in “screen shots” showing
15 search results recently conducted on the Napster index for over 25 artist/song title combinations
16 that have been entered into Napster’s negative database. Those screen shots show that no
17 matching files of various popular songs were found. *Id.* ¶ 37.

18 To achieve this level of efficacy, however, Napster has suffered economically in
19 disproportionate terms and Napster is concerned about some of the real and inequitable results of
20 employing its exclusion database technology:

21 **System Performance and Degradation.** Work will need to be done to the process of
22 loading new artist names and song titles into the memory of the Napster server. Currently, the
23 server reloads new data once every 24 hours and the Napster servers are restarted every time new
24 data is introduced into the negative database. Each time the Napster servers are restarted, literally
25 millions of users are disconnected from the system, forcing them to re-login to the servers.

26 **Costs.** Software development is an iterative process. It has taken innumerable steps to
27 produce the exclusion technology that Napster is using today. Many more iterations will be
28 needed in order to optimize the technology for peak performance and make it most effective.

1 Likewise, many more searches for variants will enhance the thoroughness of Napster's process.

2 The cost to Napster in developing and implementing its negative database has been
3 extraordinary. Napster employees have already spent in excess of 2700 hours in building the
4 system, at a cost in salary in excess of \$150,000. The cost of Napster's proposed compliance
5 team, consisting of 12 full-time employees, will be nearly \$1 million. *Id.* ¶¶ 38-41 . These time
6 and manpower efforts, and the associated costs, will represent a significant interruption of
7 Napster's other current development efforts.

8 **E. A Broader, Less Defined Method of File Exclusion Would Indiscriminately Block**
9 **Non-Noticed Works**

10 If Napster's text-based search is framed too broadly – for example, to block any song
11 name, regardless of artist, or to block any file name containing the search term, the result would
12 be vastly overbroad exclusion of non-noticed material. At a minimum, accurate exclusion
13 algorithms require addressing both the title and the artist performing the work. Accordingly, the
14 information provided to Napster must include the title of the work *and* the name of the
15 performing artist and, in order for Plaintiffs to demonstrate that such works are available on the
16 Napster system, at least one or more file names corresponding to such work. Examples of the
17 notices Napster is receiving underscore the importance of these requirements. Ault Decl. ¶¶ 43-
18 44.

19 (1) **The Harry Fox Agency Song Title List**

20 Napster recently conducted a comparison Napster's Featured Artists program and a list of
21 songs expressly authorized by several independent artists against the list of songs provided to
22 Napster by the Harry Fox Agency. *See* Morrill Decl. ¶¶ 3-9. Based on this comparison, Napster
23 discovered that approximately 96% of the song titles on the Featured Artists list and on the list of
24 expressly authorized works by independent artists have the same song title as at least one other
25 song on the Harry Fox Agency list. *Id.* at Exhs. B and D. If Napster were to block HFA songs
26 based simply on song title, these authorized Featured Artist songs would also, and wrongly, be
27 blocked. *See* Morrill Decl. Exh. G.

1 (2) **The Frank Music Song Title List**

2 The list of songs the *Lieber* Plaintiffs contend give adequate notice illustrates (1) the
3 inadequacy of notice and (2) the overbreadth caused by blocking based solely on song title
4 delivered without file name. The first page of Exhibit A to the September 5, 2000, Declaration
5 of Julia Greer in Support of Plan for Ascertaining Plaintiffs' Rights contains the 31 songs at the
6 beginning of an alphabetical listing of the title and author of songs purportedly owned by the
7 Frank Music Company, a named Plaintiff in the *Lieber* case.

8 Plaintiffs supplied this list of songs to Napster without any indication that these songs are
9 available on the Napster system and have requested that Napster nonetheless endeavor to prevent
10 access to them. Pulgram Decl. Exh. 8.

11 This list can be compared against the list of songs maintained by SongFile.com
12 (<http://www.songfile.com>), an Internet service that maintains a searchable database of over 2
13 million songs, and a source upon which the *Lieber* Plaintiffs themselves rely. *See* Tr. 5/15/00 at
14 14-16. The results of this comparison are summarized below in the following table:

15
16 **Comparison Of Exhibit A To Greer Declaration Against SongFile Index**

No.	Frank Music's Song Titles	Number of Different Authors or Composers Listed for Title on SongFile.com
1.	"Caress Me, Possess Me" Perfume	Not Listed
2.	"Til the Big Fat Moon Falls Down"	Not Listed
3.	(All On Account of) A Squirrel On the Ground	Not Listed
4.	"A-Ting-A-Ling"	Not Listed
5.	Abbondanza	1
6.	Abe Lincoln In Illinois, Theme From	Not Listed
7.	About the Blues	1
8.	Absalom, Oh, My Son	Not Listed
9.	Adelaide	3
10.	Adelaide Meets Sarah	1
11.	Adelaide's Lament	1
12.	Adew Sweet Amarillas	Not Listed
13.	After St. Francis	Not Listed
14.	Ah, to be Home Again	Not Listed
15.	Alice In Wonderland	7
16.	All Fly Away	1
17.	All Just Men Rejoice	Not Listed

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

No.	Frank Music's Song Titles	Number of Different Authors or Composers Listed for Title on SongFile.com
18.	All Over Again	9
19.	Almost, But Not Quite	Not Listed
20.	Amorous Flea, The	Not Listed
21.	Angelina	11
22.	Animals Are Funnier Than People	Not Listed
23.	Ann Rutledge	Not Listed
24.	Another Mornin	Not Listed
25.	Anywhere I Wander	1
26.	April Song	1
27.	Aren't You Glad	2
28.	At Last We're Alone	1
29.	At the Red Rose Cotillion	1
30.	Ave Maria	222
31.	B Side, The	13

As can be seen from the above table, of the thirty-one songs on the first page of Exhibit A to the Greer Declaration, fifteen songs—*almost half*—did not show up in the SongFile database. Of the sixteen songs that did show up in the SongFile database, seven of the song titles have been used as the names of compositions by more than one author; the most notable example of which is “Ave Maria,” for which SongFile had a listing of 222 different writers, composers and arrangers, many of which are hundreds of year old, and *none of which includes the composition authored by Harry Robert Wilson, the specific work in which Plaintiffs claim a copyright interest.* Ault Decl. ¶¶ 48-49 and Exh. 31 attached thereto.

Comparing the thirty-one songs that appear on the first page of Exhibit A to the Greer Declaration against the Napster index itself indicates:

Comparison of Exhibit A to Greer Declaration Against Napster Index

No.	Song Title	Number of Matches Returned by Napster	Number of Different Authors or Composers Listed on SongFile
1.	“Caress Me, Possess Me” Perfume	0	0
2.	“Til the Big Fat Moon Falls Down”	0	0
3.	(All On Account of) A Squirrel On the Ground	0	0
4.	“A-Ting-A-Ling”	100	15
5.	Abbondanza	1	1
6.	Abe Lincoln In Illinois, Theme From	0	0
7.	About the Blues	100	50
8.	Absalom, Oh, My Son	0	0
9.	Adelaide	100	50

	No.	Song Title	Number of Matches Returned by Napster	Number of Different Authors or Composers Listed on SongFile
1				
2				
3	10.	Adelaide Meets Sarah	0	0
4	11.	Adelaide's Lament	71	4
5	12.	Adew Sweet Amarillas	0	0
6	13.	After St. Francis	0	0
7	14.	Ah, to be Home Again	0	0
8	15.	Alice In Wonderland	100	12
9	16.	All Fly Away	100	27
10	17.	All Just Men Rejoice	0	0
11	18.	All Over Again	100	20
12	19.	Almost, But Not Quite	0	0
13	20.	Amorous Flea, The	0	0
14	21.	Angelina	100	30
15	22.	Animals Are Funnier Than People	0	0
16	23.	Ann Rutledge	0	0
17	24.	Another Mornin	0	0
18	25.	Anywhere I Wander	12	10
19	26.	April Song	43	7
20	27.	Aren't You Glad	17	7
21	28.	At Last We're Alone	0	0
22	29.	At the Red Rose Cotillion	0	0
23	30.	Ave Maria	100	50
24	31.	B Side, The	100	50

As can be seen from this table, of the thirty-one songs on the first page of Exhibit A to the Greer Declaration, seventeen songs—*more than half*—did not even appear on the Napster index. The *Leiber* Plaintiffs have provided Napster no information suggesting that these songs ever been available on the Napster system. Accordingly, simply being provided with a list of copyrighted song titles and the composers or authors of such works provides Napster with no information that there are “files containing such works” on the Napster system. 9th Cir. Slip. Op. at 49.

Furthermore, of the fourteen song titles that resulted in any file names being returned by the Napster index, thirteen of the search results had more than one performing artist associated with the title. When this is combined with the fact, as demonstrated by the songfile.com index, that any one song title may have multiple authors or composers associated with that song title, it is simply impossible for Napster, or for Plaintiffs for that matter, to reasonably ascertain that any particular user file name represents one of Plaintiffs’ copyrighted works based solely on an examination of the song title and the author. Ault Decl. ¶ 51.

This problem is compounded by the fact that, with the possible exception of unique song

1 titles or otherwise obscure recordings, Napster's users to do not typically name their audio files
2 solely by reference to the song title or by reference to the song title and the composer of the work.
3 Rather, Napster's users typically name their audio files by reference to the performing artist and
4 the song title. (*See e.g.* Ault Decl. ¶ 52.) In short, it is impossible even to determine whether any
5 of the song titles from Plaintiffs' list correspond to a particular Napster file name.

6 Serious overbreadth problems are raised by preventing access to a file simply because a
7 file name may contain the words of a particular song title. For example, when the terms "April
8 Song"(song no. 26 on the Greer Declaration) are used to run a search against the Napster index,
9 43 file names were returned, representing a wide variety of different songs and performing artists,
10 such as: "John Tesh, April Song"; "April Wine – Like a Lover, Like a Song"; "Led Zeppelin –
11 Cleveland April 27, 1977 – The Song Remains the Same"; "Skatos April Fools Song"; and "The
12 Grateful Dead Fillmore East New York April 1971 Bird Song." Plainly, these are not all the
13 "April Song" in which Frank Music Company claims rights. Notably, there is no way to discern
14 whether any one of these works or any of the other 37 file names returned on the Napster Index,
15 represent the composition by Richard Hill, Nevill Coghill and John Hawkins, the composers for
16 whom Frank Music claims rights, as those composers' names did not appear anywhere in the list
17 of file names on the Napster index that were retrieved in response to the search terms "April
18 Song." Ault Decl. ¶ 53.

19 Other such examples abound¹⁰ and make clear that if Napster prevented access to file
20 names based solely on the fact that the file name may contain the words of a song title, or based

21 _____
22 ¹⁰ Another example of the overbreadth of excluding files based on search terms appearing
23 anywhere in a file name is the song "About the Blues" written by Arthur Hamilton (song no. 7 on
24 page 1 of Ex. A to the Greer Declaration). The SongFile index returns only one song title with
25 only one author: Arthur Hamilton. Ault Decl. Exh. 54. Although there is a match between Ex. A
26 to the Greer Declaration and the SongFile index, when the terms "About the Blues" are used to
27 run a search against the Napster index, 100 file names were returned (the maximum number
28 returned by the Napster system), again representing a wide variety of different songs and
performing artists, such as: "About Mr. Brown [Live at The House of Blues 11.17.2000]";
"Blues Van Morrison and Linda Gail Lewis – Lets Talk About Us"; "Boz Scaggs – Ask Me
Nothing But The Blues"; and "Lowest of the Low – Just About The Only Blues." *Id.* Once
again, it is obvious that not all these songs could be the one Mr. Hamilton wrote. Again, there is
no way to discern whether any one of these works, or any of the other 96 file names represent the
composition by Arthur Hamilton, as his name did not appear anywhere in the list of file names on
the Napster index that were retrieved in response to the search terms "About the Blues."

1 on a song title, this would result in the wholesale removal of file names for which Plaintiffs
 2 cannot reasonably contend correspond to one of their particular copyrighted works. Because a
 3 given performing artist rarely records two different compositions of the same title, the name of
 4 the artist and the title of the work is the most effective means to differentiate one composition
 5 from the other, and the best means to locate the specific work on the Napster system.

6 **Napster’s Artist/Title Filter Reduces the Overbreadth of File Exclusion**

7 As demonstrated by the foregoing examples from page one of Plaintiffs’ own lists,
 8 blocking all file names containing the terms of a song title, regardless of the sequence of those
 9 terms or whether those terms appear next to each other or are separated by other terms, would be
 10 tremendously overbroad. As a result, Napster’s term-based algorithm that searches for artist/title
 11 pairs only identifies terms that appear in a particular order. For example, for the known work by
 12 Metallica, “Enter Sandman,” each term will be searched for, but only file names consisting of
 13 “Metallica” followed by “Enter” followed by “Sandman” will be added to Napster’s negative data
 14 base. The various permutations of this term search are presented in the table below:

File Name	Search	Exclude	
Metallica - Enter Sandman	Yes	Yes	
Metallica - Enter the Sandman	Yes	No	intermediate term in title
Metallica - entersandman	No	No	terms are merged
Enter Sandman	No	No	
Metallica -Enter Sandman Live	Yes	Yes	
Metallica – Sandman	No	No	missing title terms
Enter Sandman - Metallica	Yes	Yes	
Metallica - Sandman Enter	Yes	No	title terms aren't in order
Metallica - EnterSandman	Yes	Yes	

22 Napster’s algorithm means that some potential variations will not be caught by the initial,
 23 automated text-based screen. This does not mean, however, that they will not be excluded.
 24 Rather, these variants are addressed at the variants stage, where variations in artist/title pairs
 25 identified by Napster—or by Plaintiffs, or by Gracenote’s database—will be included in
 26 Napster’s negative database. Thus, *all* of the entries in the above table, which represent common
 27 variations of Metallica’s “Enter Sandman” have been added to Napster’s negative database as
 28 variants. Attached, as Exh. 43 to the Ault Declaration, are further examples of the nature and

1 breadth of the kinds of variations of artist and title pairs that been already been added to Napster's
2 negative database.

3 **F. A File Name Dispute Resolution Process Should Be Implemented**

4 As the result of all of Napster's good faith efforts to comply with the Court's Orders, a
5 serious consequence—in addition to the economic consequence—has been produced and
6 deserves immediate redress. That consequence is the illegitimate and excessive overblocking that
7 is the result of several of these methodologies. Napster firmly believes that equity demands that
8 there must—at a minimum—be a challenge procedure that will facilitate the unblocking of access
9 to non-copyright-protected works.

10 One such procedure is set forth in the Digital Millennium Copyright Act, 17 U.S.C.
11 § 512(g), which allows for the replacement of previously removed or disabled material.
12 Thereunder, a counter notification from a user who has been illegitimately blocked permits a
13 service provider to replace the removed work (or cease disabling access to it) within a few days if
14 the alleging copyright holder has not filed a court action against the purported user-infringer.
15 Another remedy for the overblocking inequities triggered by Plaintiffs' notices would be to
16 require Napster to block only those files whose content has been pre-verified as infringing by
17 Plaintiffs, one of its agents, or a neutral industry sponsored organization. Either procedure would
18 more equitably distribute the burden of identifying infringing third party files, would be
19 consistent with the opinion of the Ninth Circuit, and would be more compatible with the spirit of
20 the DMCA.¹¹

21 **III.**

22 **NAPSTER HAS RESPONDED IN A GOOD FAITH EFFORT TO**
23 **EXCLUDE PLAINTIFFS' IDENTIFIED WORKS, EVEN WHEN THE**
24 **NOTICES FROM PLAINTIFFS WERE NON-COMPLYING**
25 **WITH THIS COURT'S ORDERS**

26 The Court's Orders detailed the responsibilities of each of the Plaintiffs in sharing the

27 ¹¹ The DMCA, 17 U.S.C. § 512, which requires a service provider to remove or disable access to
28 material claimed to be infringing, mandates a notification that must include, at a minimum, an
" [i]dentification of the *material* that is claimed to be infringing . . . and *information reasonably*
sufficient to permit the service provider to locate the material." (emphasis added).

1 burden of preventing infringement of their claimed works. Each of the Plaintiffs was ordered:

- 2 (1) To provide notice to Napster of their copyrighted sound recordings by providing
3 for each work: (A) the title of the work; (B) the name of the featured recording
4 artist performing the work ("artist name") or, in the case of musical compositions,
5 the composer's name; (C) the name(s) of one or more files available on the
6 Napster System containing such work; and (D) a certification that Plaintiffs own
7 and control the rights allegedly infringed (Orders ¶ 2);
- 8 (2) To make a substantial effort to identify the infringing files as well as the names of
9 the artist and title of the copyrighted work (Orders ¶ 2);
- 10 (3) To use reasonable measures in identifying variations of the file name(s) or of the
11 spelling of the titles and artists' name of the works Plaintiffs have identified
12 (Orders, ¶ 3); and
- 13 (4) To ascertain the actual identity (title and artist name) of the work associated with
14 such variations where it is reasonable to believe that a file available on the Napster
15 system is a variation of a particular work or file identified by Plaintiffs. (Orders
16 ¶ 3)

17 In addition, for musical compositions, Plaintiffs were required

- 18 (5) To ascertain the actual identity (title and composer's name) of the work associates
19 with such variations where it is reasonable to believe that a file available on the
20 Napster System is a variation of a particular work or file identified by Plaintiffs.
21 (Orders par. 3)

22 Since the date of the injunction, only the A&M Plaintiffs have provided Napster any
23 notices at all, and most of its notices were deficient. None of the other Plaintiffs has provided
24 Napster with any infringing file names, much less made a substantial effort to identify all such
25 file names. And none of the Plaintiffs has provided any artist or title variants.

26 On Napster's part, Napster is on track to comply with all compliant notices that it has
27 received. It will continue to exclude works upon such notice for Plaintiffs in these actions and for
28 non-parties. But in addition, as a show of good faith, even *before* receiving compliant notices,
and even *before* the modified injunction was entered, Napster started to block file names and
artist/title pairs for those works in which Plaintiffs had identified their claims of ownership in this
action.

29 **A. The Extent of Compliance by the A&M Plaintiffs**

30 The A&M Plaintiffs (unlike Metallica, for example) had declined to give Napster notices
31 of the works allegedly infringed prior to the Ninth Circuit's decision, and had refused even to

1 produce in discovery the identity of their copyrighted works. These Plaintiffs had argued that it
2 was Napster's duty to determine Plaintiffs' copyrights *and* to prevent their infringement, and had
3 insisted that generalized knowledge of any infringement was enough to render Napster liable,
4 with no specific notice being required. Although Plaintiffs had provided no notices to Napster
5 (apart from the complaint), they had, in discovery, produced certain documents describing such
6 works they claimed were infringed. Even before the injunction, Napster made substantial efforts
7 to identify those files in which Plaintiffs had claimed rights, and to exclude files associated with
8 such works.

9 **1. Plaintiffs' Notifications Prior To March 5, 2001 To Which Napster Has**
10 **Responded**

11 **a. The Creighton Declaration**

12 Mr. Frank Creighton, Senior Vice President and Director of Anti-Piracy for the RIAA,
13 filed a declaration on behalf of the *A&M* Plaintiffs . He attached approximately 684 computer
14 screen shots of the Napster index which he described as 14,222 file names being offered by 53
15 randomly selected Napster users, as to which he testified that "nearly 90% were sound recordings
16 that appear to be infringing copyrights of RIAA members." Creighton Decl. ¶ 13. Not all RIAA
17 members are Plaintiffs, however. Moreover, Plaintiffs have never identified to Napster which of
18 the 14,222 files contain sound recordings are owned by the eighteen Plaintiffs, or by any RIAA
19 member, and which are not. Thus, there is no basis to tell what songs belong to the named *A&M*
20 Plaintiffs. In addition, many of the file names are truncated in the screenshots. Ault Decl. ¶ 62.

21 On March 6, 2001, Napster's attorneys wrote a letter to counsel for the *A&M* Plaintiffs,
22 requesting clarification of which works the Plaintiffs claim to own. Or, if it would be easier for
23 Plaintiffs, Napster agreed to accept identification of which works Plaintiffs did not claim to own,
24 so that in either case Napster could exclude those that Plaintiffs claim to own from appearing in
25 the Napster index. Pulgram Decl. ¶3, Exh. 2; Ault Decl. ¶ 63, Exh. 2. To date, Napster has
26 received no response. Napster is fully prepared to exclude these file names from its index once
27 Plaintiffs identify which are theirs.

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

b. Creighton’s Supplemental Declaration

On June 10, 2000, the Plaintiffs filed a Supplemental Declaration of Mr. Creighton, (“Creighton Supplemental Declaration”), to which he attached approximately 280 screen shots that allegedly correspond to artist/title pairs listed in Schedules A and B to the A&M Plaintiffs’ complaint. Ault Decl. ¶ 64.

There are 203 artist/title pairs listed in Schedules A and B to the complaint. Attached to the Creighton Supplemental Declaration, however, were 77 screen shots which apparently reference artist/title pairs that are *not* listed on those schedules. For example, a screenshot for the artist/title pair “Pink Floyd—Money,” is attached to the Creighton Supplemental Declaration, but such work does not appear on either of Plaintiffs’ schedules. Hence, Plaintiff’s ownership of that work can not be determined from the documentation provided. Ault Decl. ¶ 65.

In all, there are approximately 280 artist/title pairs and 5,300 file names attached to the Creighton Supplemental Declaration. Notwithstanding the incomplete notification to Napster, as of March 5, 2001, all those artist/title pairs and file names had been manually entered into Napster’s negative database. The entry of this data cost hundreds of man hours, as Napster attempted to provide Plaintiffs protection above and beyond the injunction. Ault Decl. ¶ 66.

c. The Eisenberg Declaration

On July 26, Mark Eisenberg, Vice President of Business Affairs, New Technology and Business Development for Sony Music, filed a declaration listing 50 works owned by Sony Music. Attached as exhibits to his declaration are various lists, including a list of copyright registration information for certain artist/title pairs, a list of Sony’s top-selling digital downloads, top-selling artists for “singles”, a mostly-illegible copy of the Billboard Top 100 List from June 17, 2000, and a list of artist/title pairs approved by Sony for EMD (Electronic Music Distribution). Also attached to his declaration are approximately 50 screenshots containing artist-title searches of the Napster index. Each screenshot contains approximately 30 file names, which purportedly correspond to the works owned by Sony Music. Ault Decl. ¶ 67.

Many of the screenshots attached to the Eisenberg Declaration contain incorrect song titles. For example, there is a screenshot for the ATP “Babyface—When Can I,” when the actual

1 title of the song appears to be “When Can I See You Again.” Also, there is a screenshot for the
2 ATP “Gloria Estefan—Don’t Let This,” when the actual title of the song is “Don’t Let This
3 Moment End.” Additionally, the file names on the screenshots are difficult to read, as the size of
4 the text is very small and the quality of the photocopies is poor. Certain file names are also
5 truncated. Ault Decl. ¶ 68.

6 Once again, notwithstanding the incomplete nature of the works identified in the
7 Eisenberg Declaration, as of March 5, 2001, all the artist/title pairs and file names identified in
8 the Eisenberg Declaration have been excluded from the Napster index. Manual entry of this data
9 took approximately 72 man-hours. Ault Decl. ¶ 69.

10 **d. The Hausman Declaration**

11 On July 26, 2000, Charles Hausman, Anti-Piracy Counsel for the RIAA, filed a
12 declaration with attached electronic copies of two databases: a “Download Database” containing
13 1,150 file names and a “User Database” containing the “hot lists” from each of the 1,150 users
14 sampled by Mr. Hausman, which total over 400,000 file names. No associated artist/title pairs
15 were provided in the Hausman Declaration. Ault Decl. ¶ 70.

16 Mr. Hausman claimed in his Declaration that 834 of the 1,150 file names allegedly
17 contain works owned or administered by one of the Plaintiffs, that 108 files allegedly contain
18 works owned by non-Plaintiff record labels, and that 60 additional files allegedly infringe the
19 copyright in the underlying musical composition. These lists did specify the artist/title for these
20 files. Notwithstanding the non-conforming notification provided by the Hausman declaration, all
21 of the file names in the Download Database were excluded from Napster’s index on March 5,
22 2001. Because this data was provided to Napster in electronic format, Napster was able to add
23 these allegedly infringing files to the database in an efficient manner. Ault Decl. ¶ 71.

24 The User Database contains over 400,000 user file names. However, the file names for
25 which Mr. Hausman identified the copyright holders comprised only about 2,400, or 0.5%
26 scattered through the 400,000 names in User Database. No identification of artist/title pairs was
27 provided with the User Database. However, Plaintiffs apparently have redelivered, in their
28 March 9, 2001 database, a list of just the 2,400 file names, this time correlated to artist/title pairs.

1 These will be blocked by Napster in the time permitted by the Court's Orders. Ault Decl. ¶ 72.

2 **e. Plaintiffs' Notice Dated February 28, 2001**

3 On February 28, 2001, the A&M Plaintiffs jointly served on Napster an "initial list of
4 sound recordings protected by federal or state law that are owned and controlled by Plaintiffs"
5 consisting of 5,600 artist and title pairs. The A&M Plaintiffs failed to provide the names of *any*
6 files on the Napster system containing such works, made no attempt to identify variations of file
7 names, and made no attempt to provide their "initial list" in a computer readable format. *See* Ault
8 Decl. Exh 44. Notwithstanding the non-compliant nature of Plaintiffs' notice, on March 6, 2001,
9 all 5,600 artist/song title pairs were excluded from Napster's index. The manual entry of that data
10 took approximately 20 man-hours. On March 9, 2001, the Plaintiffs subsequently provided their
11 list of 5,600 titles in computable-readable format. Unfortunately, by that time, Napster had
12 already manually added those titles to its negative database. Moreover, as discussed below, even
13 when provided to Napster in computer readable format on March 9, almost 30% of those titles
14 had no corresponding file name or other indication of availability on the Napster system. Ault
15 Decl. ¶ 61.

16 **2. Notifications Received After March 5, 2001**

17 Late in the afternoon of Friday March 9, 2001, the A&M Plaintiffs sent to Napster an
18 Internet address from which Napster could access six files of data. While Napster has had
19 minimal time to digest these files, they appear to contain:

- 20 • A list of the approximately 5600 artists/title pairs corresponding to the list that had
21 been provided in non-computer format on February 28. No file names were
22 included in this list, rendering it non-compliant. Ault Decl. ¶ 76.
- 23 • A list of approximately 5307 artist/title pairs from the same February 28 list,
24 correlated with some 228,000 file names. Declaration of Nora Lavelle ("Lavelle
25 Decl.") ¶ 9. Significantly, however, for some 1574 of those files there was no file
26 name included, and, instead, only a "NULL" recorded in the location for file
27 names in the database. That is, for almost 30% of the list of songs that Plaintiffs
28 made their highest priority to block in this case, Plaintiffs found no file name
available through use of Napster. *Id.* ¶¶ 11-13.
- A list of approximately 65,000 artist/title pairs assertedly provided by Plaintiff
Sony. No file names were included for these files. Ault Decl. ¶ 76.
- A massive database, totaling over 240 megabytes, listing almost two million file
names for what appear to be Sony artist/title pairs overlapping with the other Sony

1 list just described. This database correlated these file names against a total of
2 94,638 unique artist/title pairs. Lavelle Decl. ¶ 9. However, for some 46,037 of
3 the artist/title pairs—almost half—there was no file name included, and, instead,
4 only a “NULL” recorded in the file name field in the database. *Id.* ¶¶ 11-13.

- 5 • Another database included artist/title pairs and file names some of which was
6 produced in discovery in the Hausman Declaration. Although many of these
7 listings appear abbreviated or truncated, Napster was already blocking, or will
8 block, them.
- 9 • Finally, Plaintiffs made available a list of artist/title pairs identified in their
10 complaint (which Napster had already excluded) along with some 21,307 file
11 names correlated to those works (which Napster will exclude). Ault Decl. ¶ 76.

12 In addition, after 6:00 p.m. on March 12, 2001, the A&M Plaintiffs submitted to Napster
13 Internet addresses from which Napster could access additional databases. Although Napster has
14 not had a chance to analyze the lists in detail, they appear to include catalogues of close to
15 130,000 artist/title pairs from various of the major labels, without any file names indicated or
16 attached. While there are also millions of file names provided in a separate databases as large of
17 some 173 megabytes, which may provide file names for some of the artist title pairs, Plaintiffs
18 have demanded that Napster remove their catalogues regardless of the existence of such file
19 names. Pulgram Decl. Exh. 15.

20 Several points from this deluge of data are worth reporting.

21 *First*, with the exception of the massive additional number of works from Sony, Napster
22 had, in its good faith efforts to comply, already anticipated exclusion of most of the works
23 identified, such as those in the A&M Complaint, the February 28 list, and the Hausman
24 Declaration.

25 *Second*, as to both the 5600 artist title/pairs from February 28 song list, and the 95,000
26 Sony artists/title pairs delivered March 9, and probably as to the 135,000 additional artist/title
27 pairs delivered March 12, a very substantial percentage of works had no file names found on
28 Napster. This reconfirms that not everything Plaintiffs ever recorded is available on Napster, and
that Napster must receive notice of actual file names containing infringing works before being put
to the cost of exclusion. Indeed, the Sony database alone would have put Napster to the cost of
searching for and blocking some 45,000 works not known to exist on its system. This would

1 itself impose a major burden. But if allowed to stand as precedent, this could irreparably injure
2 Napster, given that *the RIAA has “a database of 2.5 million label-owned songs”* poised for
3 delivery to Napster according to its General Counsel, Cary Sherman.¹²

4 *Third*, although Napster appreciates receiving access to the notice in computerized form,
5 making such huge amounts of data available at the last moment, and without correlated databases,
6 is inappropriate. This is especially so when the amounts of data involved are too large to be
7 readily manipulated. The 240 megabyte Sony database was entered in confused and frustrating
8 format that imposed added, and unnecessary, expense on Napster to unravel. Lavelle Decl. ¶ 5.
9 Even if accidental, such errors should not be imposed at Napster’s expense.

10 *Fourth*, Napster expects to honor all the valid notices received from Plaintiffs, and to
11 exclude all artist/title pairs delivered with file names to the extent it has not already. However,
12 Napster believes that Plaintiffs’ mixing together of non-compliant works, as to which no file
13 name is provided, with works associated with file names is inappropriate, puts Napster to
14 substantial wasted effort, and should be prohibited. Ault Decl. ¶¶ 77-80.

15 **B. The Extent Of Compliance By the Metallica and Dre Plaintiffs**

16 Attached to the Metallica Complaint is a list of Metallica albums for which the copyrights
17 are owned by E/M Ventures, along with a list of 76 Metallica compositions owned by Creeping
18 Death Music. Also attached to the Metallica Complaint are 6 screenshots of “Metallica” searches
19 on Napster. Each page of screen shots contains approximately 17 file names for multiple works.
20 Ault Decl. ¶ 81.

21 Attached to the Dr. Dre complaint is a list of 34 songs owned by Dr. Dre, as well as 15
22 pages of “Dre” only searches from Napster. Each screenshot contains approximately 17 file
23 names for multiple works. Ault Decl. ¶ 82.

24 As of March 5, 2001, all file names and songs listed in the Metallica and Dr. Dre
25 complaints have been blocked by Napster’s screening system. Ault Decl. ¶ 83.

26 Using NetPD’s search mechanism, Metallica in the spring of 2000 delivered to Napster

27 ¹² Charles C. Mann, *The Day After: Exactly How Will Napster Remove Copyright-Protected*
28 *Songs?*, February 13, 2001, Inside.com (www.inside.com/jcs/Story?article_id=23447), attached
as Pulgram Decl. Exh. 14 (emphasis added).

1 over 4,000,000 file names which allegedly contain one of the 94 works owned by Metallica. All
2 users associated with these file names were blocked by Napster in accordance with the DMCA at
3 that time. *Id.* ¶ 84.

4 As documented in Exhibit 47 to the Ault Declaration, many of the file names that
5 Metallica provided actually did not contain the Metallica works as alleged. Numerous songs by
6 the artists Rolling Stones, Red Hot Chili Peppers and Creed all appeared in the file names
7 provided to us by Metallica. *Id.* Nonetheless, Napster had, as of the entry of the injunction,
8 already excluded all Metallica file names provided by NetPD. Ault Decl. ¶ 85.

9 Also using NetPD's search mechanism, Dr. Dre in 2000 made available to Napster from
10 an Internet site over 1,000,000 file names, in two installments, which allegedly contain one of the
11 34 works owned by Dr. Dre. All users associated with these file names were blocked under the
12 DMCA. In addition, one installment of the file names delivered by Dr. Dre, totaling 71,000 of
13 the NetPD- generated Dr. Dre file names, were blocked by Napster's screening system as of
14 March 5, 2001. The other installment is no longer being made available from the Internet
15 location that previously supplied it, and so Napster does not have access to those names. Ault
16 Decl. ¶ 86. Napster has repeatedly requested that Dr. Dre's counsel provide access to those
17 names so that they could be blocked, including a letter dated March 2, 2001. Pulgram Decl. Exh.
18 7. To date, counsel has not responded.

19 Neither has Dr. Dre or Metallica responded to Napster's request that they assist Napster in
20 identifying file name variants to enhance exclusion of their works. *See* Pulgram Decl. Exh. 3.

21 **C. The Extent of Compliance by the Leiber Plaintiffs**

22 On September 5, 2000, the *Leiber* Plaintiffs provided Napster with a long list of song
23 titles and composers in which they purportedly owned the rights. *See* Exhibits A & B to the
24 Greer Declaration. These included the Frank Music list, as well as a huge catalogue of thousands
25 of songs allegedly owned by Messrs. Leiber and Stoller—contained in a computer database,
26 although produced to Napster in a printed form several inches tall. Neither of these lists included
27 file names from the Napster system. The Frank Music list, and, for the most part, the Leiber and
28 Stoller list, also did not include the names of the performing artists.

1 On March 5, 2001, Frank Music delivered to Napster a computerized list of the same song
2 titles and composers thereof—but, despite the Ninth Circuit’s ruling, still provided no file names
3 available through the Napster system. Leiber and Stoller have still delivered no computerized
4 data to Napster. Ault Decl. ¶ 88.

5 The lengthy lists of compositions thus far supplied do not supply the information Napster
6 needs and that this Court required. The lack of file name(s), or any other indication that the
7 compositions are in fact available on the Napster system is of particular concern because, as
8 stated at the hearing on March 2, and as proven above, Napster has been unable to find most of
9 these songs on Napster. Ault Decl. ¶ 89.

10 Moreover, these Plaintiffs’ failure to identify the performing artists for their recordings
11 will make Napster’s efforts to block files of limited effectiveness. While Napster will seek to
12 block reasonable variations of the file names or title/composer spellings, it is most likely that the
13 file name variations needed to be blocked will contain the names of the performing artist, which
14 Plaintiffs, but not Napster, will generally know. For example, Napster does not know which
15 featured artist recorded Plaintiffs’ versions of “Alice in Wonderland,” “All Over Again,”
16 “Angelina,” “Ave Maria,” or “The B Side”—all of which are titles of multiple compositions of
17 which only one is claimed by Frank Music. *See* Ault Decl. Exh. 49. Napster has requested
18 Plaintiffs (*see* Pulgram Decl. Exh. 10) and hereby requests this Court—to ensure that Plaintiffs
19 provide the names of the featured recording artist performing their works as part of Plaintiffs’
20 duties both to “make a substantial effort to identify the infringing files,” and to enable both parties
21 to “use reasonable measures in identifying variations of the filename(s).” Order ¶ 3.

22 Although the *Leiber* Plaintiffs’ submission of global catalogues of works does not supply
23 Napster with the notice required, Napster nonetheless has gone the extra mile to prevent access to
24 those particular works that the *Leiber* Plaintiffs have, during this litigation, identified as the
25 source of their concern. Napster has entered in its negative database the songs identified in the
26 *Leiber* complaint, as well as dozens of others for which Plaintiffs have provided title and
27 recording artist, or a file name, prior to the March 5 order—even though no complying notice had
28 been previously provided. Pulgram Decl. Exh. 10. Napster also encouraged the *Leiber* Plaintiffs

1 to submit additional variations of these recordings, lists of additional works compliant with the
2 Court's Orders, lists of performing artists for those works to enable effective blocking, and all
3 other information that would be of assistance in screening works that the *Leiber* Plaintiffs seek
4 removed from the index. To date there has been no response. Ault Decl. ¶ 92.

5 **D. The Extent of Compliance by the Casanova Plaintiffs**

6 In Matthew Montfort's Declaration in support of Plaintiff's Motion for Class
7 Certification, his Declaration re Proposed Preliminary Injunctions, and his responses to the First
8 Set of Interrogatories, Montfort identified 66 works and roughly 150 file names which
9 purportedly correspond to such works. Many of the file names were truncated and unreadable.
10 Nevertheless, as of March 5, 2001, all artist/title pairs and file names provided to us by the
11 Casanova Plaintiffs have been blocked by Napster's screening system. Ault Decl. ¶ 93.

12 **IV.**

13 **PLAINTIFFS' DISPUTE OF THE MEANING**
14 **OF THE REQUIREMENTS OF THE NINTH CIRCUIT AND**
15 **THIS COURT'S ORDER REQUIRES PROMPT RESOLUTION**

16 The deficiencies in Plaintiffs' provision of notice of allegedly infringing work, discussed
17 above, coupled with their statements in correspondence,¹³ demonstrate that Plaintiffs have a view
18 of the requirements of this Court's Order that is far different from what this Court stated or what
19 the Ninth Circuit ruled. Several issues need resolution.

20 *First*, Plaintiffs have asserted that, under paragraph 4, they have no obligation to provide
21 file names to Napster prior to Napster's being required both (i) to search its system constantly for
22 the names of any of the millions of works in Plaintiffs' catalogues; and (ii) to remove such works
23 from the Napster index. This reading renders paragraph 2 a nullity, renders paragraph 7
24 irrational, and defies the Ninth Circuit's Opinion, by placing the entire burden of excluding
25 unauthorized works from the Napster index on Napster.

26 As the Ninth Circuit held, the burden is "on Plaintiffs to provide notice to Napster of
27 copyrighted works *and* files containing such works available on the Napster system *before*
28 Napster has the duty to disable access to the offending content." (emphases added.) 9th Cir. Slip

¹³ See Pulgram Decl. Exh. 4.

1 Op. at 49.¹⁴ Indeed, this Court recited in its Orders that the burden is “on Plaintiffs to provide
2 notice to Napster.” Order ¶ 4. That notice “shall provid[e] for each work . . . the name(s) of one
3 or more files available on the Napster system containing such work.” Order at par. 2(c). Only
4 after this mandatory burden is satisfied does it become incumbent upon Napster then to “police[]
5 the system within the limits of the system.” *Id.* ¶ 4; 9th Cir. Slip Op. at 49.

6 As Plaintiffs read paragraph 4, Plaintiffs would never have to provide notices containing
7 all of the information set out in subparts (A) through (D) of paragraph 2. They would never need
8 to provide actual file names, but could simply provide Napster with their entire catalogues,
9 imposing on Napster, under pain of contempt, to constantly search its index for any and all items
10 within those entire catalogues and block the myriad ways in which unauthorized recordings might
11 slip through. Neither this Court, nor the Ninth Circuit, imposed such sweeping obligations.

12 Plaintiffs’ effort to escape their obligations also ignores additional language throughout
13 this Court’s Orders that confirms the necessity of Plaintiffs’ first providing at least one file name
14 in addition to artist and title information. In paragraph 7, for example, this Court addressed the
15 issue of unreleased works—the single circumstance in which Napster must act to deny access,
16 without first being provided with a file name. Napster must do so if “based on a review of that
17 artist’s previous work, including but not limited to popularity and frequency of appearance on the
18 Napster system, there is a substantial likelihood of infringement on the Napster system.” Order
19 ¶ 7. Thus, even in this circumstance, where no file name could possibly be available, the Court
20 required consideration of past experience as a reasonable surrogate to determine the likelihood
21 that a given work would become available on the Napster system. Under Plaintiffs’ view,
22 however, they are entitled to impose on Napster the duty not only to block, but to continuously
23 search for their entire catalogues, regardless of any “substantial likelihood” of their appearing on
24 Napster.¹⁵

25 ¹⁴ See Pulgram Decl. Exh. 4.

26 ¹⁵ Footnote 2 of the Court’s Order merely provides that Plaintiffs are not obligated to provide
27 “each specific infringing file”; it does not state, however, that they need not provide the identity
28 of *any* file names. Likewise, paragraph 4 of this Court’s order states that it may “be difficult for
Plaintiffs to identify *all* infringing files” (emphasis added); again, this does not relieve Plaintiffs
of their obligation to identify at least one infringing file prior to Napster having to search its
system for identified works.

1 Plaintiffs' position relies on the Court's statement that

2 it may be easier for Napster to search the files available on its
3 system at any particular time against lists of copyrighted recordings
4 provided by Plaintiffs. The court deems that the result of such a
5 search provide Napster with 'reasonable knowledge of specific
6 infringing files' as required by the Ninth Circuit. Order ¶ 4.

7 Plaintiffs misread this statement as imposing on Napster a duty to search against some list other
8 than the list, including file names, required by paragraph 2. Plaintiffs imagine some phantom list
9 nowhere else discussed or described in the Order. Napster acknowledges that this Court required
10 it to search for additional file names against a list of *compliant* notices that include at least one
11 file name. Napster's Police BOT software program will do so. But Napster has no duty to search
12 prior to receipt of a compliant notice and list.

13 Indeed, paragraph 8 of the Order states that Napster must make a report to the Court of its
14 compliance within five business days of service of a notice from Plaintiffs under "paragraph 2 or
15 under paragraph 6." It appears that the Court meant to require a report after a notice under
16 paragraph 7 (for pre-release works), rather than paragraph 6, as paragraph 6 does not include any
17 notice provision. The omission of paragraph 4 from this list is telling, for if paragraph 4 allowed
18 Plaintiffs to deliver a "list" other than that required by paragraph 2, then the Court would have
19 included paragraph 4 among other paragraphs listed in paragraph 8, and required a report of
20 search results in response to such list. The Court did not do so.

21 *Second*, the Plaintiffs have seized upon the last clause of paragraph 6 of the order to argue
22 that Napster has an absolute duty, upon receipt of notice of infringing files, "to prevent the
23 downloading, uploading, transmitting or distributing of the noticed copyrighted sound recording,"
24 regardless of the feasibility of doing so. This construction ignores the fact that paragraph 6
25 specifies the means for compliance to accomplish this objective, *i.e.*, that Napster "shall
26 affirmatively search the names of all files being made available by all users at the time those users
27 log on." It ignores the fact that Napster performs exactly such a search through its text based
28 filter. And it ignores the fact that complete exclusion is simply not possible without shutting
down the system, in violation of the Ninth Circuit's directive. As the Ninth Circuit recognized,
this is "not an exact science" and because Napster's obligations are "cabined by the system's

1 current architecture,” Napster’s blocking obligations are not absolute.

2 *Third*, by their conduct and statements, Plaintiffs also read paragraph 3 of this Court’s
3 Order out of context, and in a way that is contrary to the Ninth Circuit Opinion. Paragraph 3
4 orders that “all parties shall use reasonable measures in identifying variations of the file names(s),
5 or of the spelling of the titles or artists’ names, of the works identified by Plaintiffs.” As shown
6 above, Napster has undertaken extensive measures to identify and exclude variations from its
7 index, *inter alia*, by breaking up artists’ names, file names, etc., so that they can more effectively
8 be filtered, and by inputting such variations by hand and by Police Bot. In addition, Napster has
9 undertaken to block “pig latin” translations of the names. By contrast, Plaintiffs’ efforts to
10 comply with paragraph 3 include no identification of variations in artists or title names, nor
11 submissions to Napster of the same. This is true despite the fact that Plaintiffs are well situated to
12 know the nicknames, slang or abbreviations used by their fans. Instead of proactively
13 undertaking their “shared burden,” Plaintiffs have done nothing more than instruct Napster as to
14 how they would like Napster to shoulder Plaintiffs’ burden.

15 *Fourth*, Napster expects a controversy with the holders of musical composition rights, as
16 Napster’s efforts to exclude noticed musical compositions will be of limited effectiveness without
17 receipt of the names of performing artists. This Court has directed Plaintiffs to supply the title of
18 the work, author name, one or more file names, and certification of ownership. It has also
19 directed all parties to “use reasonable measures in identifying variations of the title(s) or
20 composer’s name(s) of the works identified by Plaintiffs.” *Leiber* Order ¶ 3. When Napster
21 receives effective notice for a composition, Napster will comply with the Court’s Orders by
22 blocking the given file name, by blocking the given title/composer information when it appears in
23 files, and by blocking reasonable variations on the same. However, it is most likely that the file
24 name variations needed to be blocked will contain the names of the performing artist, which
25 Plaintiffs, but not Napster, will generally know.

26 In order to make exclusion more effective, Napster requests that, as part of Plaintiffs’ duty
27 to “make a substantial effort to identify the infringing files,” and to enable both parties to “use
28 reasonable measures in identifying variations of the filename(s),” (Order ¶¶ 2, 3) Plaintiffs

1 provide, when known, the names of the featured recording artist performing their works that may
2 appear on the Napster system. Napster believes that, because a given performing artist rarely
3 records two different compositions of the same title, the name of the artist is the most effective
4 means to differentiate one composition from the other, and the best means to locate the specific
5 work on the Napster system. To date, Plaintiffs have refused to provide that information, despite
6 the necessity of Napster receiving it in order to render more effective its exclusion efforts.

7
8 **V.**
CONCLUSION

9 Napster has, in good faith, complied with the letter and spirit of the Court's injunction. It
10 will continue the ongoing process of improving the efficacy of its implementation. And it
11 requests the Court's assistance in effectuating the shared burden and cooperation necessary to
12 achieve the best results in this complicated endeavor.

13 Napster also requests that the Court convene a hearing, to the extent it has questions about
14 the adequacy of Napster's compliance, at which the parties may address their sharp differences in
15 construing this Court's mandate. Plaintiffs' interpretations of the Orders, while erroneous in
16 Napster's view, place Napster at serious risk requiring resolution by the Court.

17 Dated: March __, 2001

Respectfully submitted,

18 BOIES, SCHILLER & FLEXNER LLP

FENWICK & WEST LLP

19
20
21 By: _____
Robert Silver

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

22
23 Attorneys for Defendant
24 NAPSTER, INC.

25 22179/00410/SF/5043972.1

1 **TABLE OF CONTENTS**

2 **Page**

3 I. INTRODUCTION AND SUMMARY 1

4 A. Summary Description of How The Napster File Exclusion System
Complies With The Court’s Orders 2

5 B. The Problem Of Overly Broad Exclusion Mechanisms, and Napster’s
Solution 4

6 C. Plaintiffs’ Non-Complying Notices 7

7 D. The Need For Resolution of These Disputes 8

8 II. NAPSTER’S METHODOLOGY 9

9 A. The Napster Solution..... 9

10 1. Napster’s Term-Based Exclusion Algorithm 10

11 a. The Data Loading Step..... 10

12 b. The File Blocking Step..... 10

13 2. Napster’s File Name-Based Algorithm Exclusion 12

14 a. The Data Loading Step..... 12

15 b. The File Blocking Step..... 12

16 B. Napster’s Good Faith Efforts to Develop Tools to Find And Exclude
Variations in Names 13

17 1. Variants Entry Tool 13

18 2. The Police BOT Output Processing Tool..... 13

19 C. Other Good Faith Efforts by Napster to Reasonably Identify Variations of
Infringing File names 14

20 1. Napster’s Recent License of a Database of Variations from
Gracenote 14

21 2. Napster’s Self-Notification Tool 14

22 D. The Efficacy—and Cost—of the Napster Solution..... 15

23 E. A Broader, Less Defined Method of File Exclusion Would Indiscriminately
Block Non-Noticed Works 16

24 (1) The Harry Fox Agency Song Title List..... 16

25 (2) The Frank Music Song Title List 17

26 F. A File Name Dispute Resolution Process Should Be Implemented 21

27 III. NAPSTER HAS RESPONDED IN A GOOD FAITH EFFORT TO EXCLUDE
PLAINTIFFS’ IDENTIFIED WORKS, EVEN WHEN THE NOTICES FROM
PLAINTIFFS WERE NON-COMPLYING WITH THIS COURT’S ORDERS 22

28 A. The Extent of Compliance by the A&M Plaintiffs 23

1. Plaintiffs’ Notifications Prior To March 5, 2001 To Which Napster
Has Responded 24

a. The Creighton Declaration 24

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

TABLE OF CONTENTS
(continued)

	Page
b. Creighton’s Supplemental Declaration	24
c. The Eisenberg Declaration	25
d. The Hausman Declaration.....	26
e. Plaintiffs’ Notice Dated February 28, 2001	26
2. Notifications Received After March 5, 2001	27
B. The Extent Of Compliance By the Metallica and Dre Plaintiffs.....	29
C. The Extent of Compliance by the Leiber Plaintiffs.....	30
D. The Extent of Compliance by the Casanova Plaintiffs	31
IV. PLAINTIFFS’ DISPUTE OF THE MEANING OF THE REQUIREMENTS OF THE NINTH CIRCUIT AND THIS COURT’S ORDER REQUIRES PROMPT RESOLUTION	31
V. CONCLUSION	35