

Appeal No. 01-_____

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

IN RE NAPSTER COPYRIGHT LITIGATION, including

NAPSTER, INC.

Defendant - Appellant.

v.

A&M RECORDS, INC., et al.

Plaintiffs – Appellees

(For Full Captions See Following Pages)

Appeal from the United States District Court for the Northern District of California,
MDL No. CV-00-1369-MHP, The Honorable Marilyn Hall Patel
and Coordinated Cases

**APPELLANT NAPSTER, INC.'S EMERGENCY MOTION FOR STAY
PURSUANT TO RULE 27-3 AND MOTION TO EXPEDITE APPEAL OF
ORDER MODIFYING PRELIMINARY INJUNCTION ISSUED BY
THE HONORABLE MARILYN HALL PATEL ON JULY 11, 2001**

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Plaintiffs – Appellees,

v.

NAPSTER, INC., a corporation,

Defendant – Appellant

(U.S. District Court Northern District of California No. C 99-05183 MHP)

JERRY LEIBER, individually and dba JERRY LEIBER MUSIC, MIKE STOLLER, individually and dba MIKE STOLLER MUSIC, and FRANK MUSIC CORP., on behalf of themselves and all others similarly situated,

Plaintiffs – Appellees,

v.

NAPSTER, INC., a corporation,

Defendant – Appellant.

(U.S. District Court Northern District of California No. C 00-0074 MHP)

**METALLICA, a California general partnership; E/M VENTURES, a New York joint venture, and CREEPING DEATH MUSIC, a California general partnership,
(U.S. District Court Northern District of California No. C-00-4068 MHP)**

Plaintiffs – Appellees,

v.

NAPSTER, INC., a corporation,

Defendant –Appellant.

(U.S. District Court Northern District of California No. C 00-1369 MHP)

**ANDRE YOUNG, p/k/a Dr. Dre, a California resident; and AFTERMATH ENTERTAINMENT, a California joint venture;
(U.S. District Court Northern District of California No. C-00-3997 MHP)**

Plaintiffs – Appellees,

v.

NAPSTER, INC., a corporation,

Defendant –Appellant.

(U.S. District Court Northern District of California No. C 00-1369 MHP)

**CASANOVA RECORDS, a Virginia Limited Liability Corporation, NICOLA BATTISTA, an individual, KUTMUSIC, and ECL3CTIC, sole proprietorships,
(U.S. District Court Northern District of California No. C-00-2638 MHP)**

Plaintiffs – Appellees,

v.

NAPSTER, INC., a corporation,

Defendant –Appellant.

(U.S. District Court Northern District of California No. C 00-1369 MHP)

CORPORATE DISCLOSURE STATEMENT

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

Petitioner/Appellant, Napster, Inc., has no parent corporation, subsidiaries or affiliates that have issued shares to the public.

CIRCUIT RULE 27-3 CERTIFICATE

Laurence Pulgram, counsel for Petitioner/Appellant, hereby certifies:

1. I am a member of the bar of this Court, and of Fenwick & West LLP, counsel for Petitioner/Appellant Napster, Inc. (“Napster”). I make this Certificate in support of Napster Inc.’s Emergency Motion for Stay pending appeal and for an expedited appeal pursuant to Circuit Rule 27-3.

2. The office addresses and telephone numbers of the attorneys for the parties are as follows:

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3. Petitioner/Appellant Napster is located in San Mateo County, California, and is an Internet company engaged in the business of providing software that allows “peer-to-peer” file sharing of MP3 music files between and among its users. Following this Court’s decision on February 12, 2001, in *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), the district court, on March 5, 2001, entered modified preliminary injunctions setting forth certain procedures by which Plaintiffs as well as Napster must abide. The district court’s March 5th orders are the subject of separate appeals, Ninth Circuit Nos. 01-15998, 01-16003 and 01-16011, which have been consolidated.

4. On July 11, 2001, the district court radically modified its March 5th orders by imposing a new “zero tolerance” standard without regard to Napster’s existing architecture, the feasibility of implementing a perfect filtering technology, or Napster’s voluntary and extraordinary efforts in reducing the incidence of copyrighted works being shared on the Napster system. Since the district court’s March 5th orders were already on appeal, the district court lacked jurisdiction to further modify its preliminary injunctions. By imposing a new “zero-tolerance” standard without regard to the limitations of Napster’s architecture and existing commercial technologies, the district court also grossly exceeded the remedial limitations imposed by this Court in its February 12th opinion, which recognized that Napster’s duty to police extended only to the “limits of its

system” and that its duties were “cabined by its current architecture.” *A&M Records, Inc.*, 239 F.3d at 1024, 1027. The district court also took advantage of the fact that Napster had voluntarily disabled its file sharing function for several days in early July so as to improve its new filtering technologies, when it ordered Napster to remain shut down until it could satisfy the court-appointed technical expert that it had done everything “humanly possible” to prevent infringing works from being shared over Napster’ system.

5. This draconian relief is particularly unjust in light of the fact that Napster’s newly implemented filtering technologies have an error rate of less than one percent. Finally, the district court abdicated its Article III responsibilities by delegating to the court-appointed technical expert the responsibility of determining, in the first instance, whether Napster has complied with the district court’s preliminary injunctions.

6. For the reasons set forth below, Napster hereby moves for an emergency stay pending appeal. Unless the district court’s modified preliminary injunction of July 11th is stayed pending appeal, Napster, a privately owned business, will have its core business shut down indefinitely and will be unable stay in business or remain competitive. Napster will also suffer irreparable injury to its business reputation and customer goodwill, and will lose a customer base that it has invested large amounts of time, money and hard work in building.

7. To avoid irreparable harm to Napster in this case, relief from this Court is requested by the end of Friday, July 13, 2001.

8. Napster’s request for a stay pending appeal was submitted to the District Court in open court. The District Court summarily denied Napster’s request for a stay

pending appeal to this Court.

9. Napster also requests an expedited briefing and hearing schedule.

Appellant proposes the following schedule:

Appellant's opening brief due July 27, 2001,

Respondent's opposition brief due, August 12, 2001

Appellant reply brief due on August 19, 2001.

10. Appellant has requested that a copy of the transcript be completed on an expedited basis, which has already been completed and is submitted herewith.

11. Respondents' counsel have been notified of this motion.

12. The following Memorandum of Points and Authorities, and a separately bound appendix containing the relevant portion of the record, are submitted in support of this motion.

INTRODUCTION

Appellant Napster, Inc. respectfully moves this Court for an emergency stay of the district court's order, issued July 11, 2001, that forbids Napster from operating its file sharing system – the central, distinctive and defining feature of the Napster service – until such time as there are *zero* infringing works on its system. As we explain below, the trial court's decision flies in the face of this Court's February 12, 2001 decision, in which the Court affirmed in part, reversed in part, and substantially narrowed a July 26, 2000, injunction that had the identical effect of barring Napster entirely from operating its core service. In addition, the district court lacked jurisdiction to enter its July 11, 2001 modification of the March 5, 2001 preliminary injunction it had been entered on remand, as the earlier injunction is currently on appeal before this Court. What is more, the impossible standard set by the district court for Napster to resume service was set on the very day that Napster presented undisputed testing data revealing that it now effectively excludes over 99% of Plaintiffs' noticed works. Plaintiffs thus face minimal risk of injury from any stay. By contrast, the district court's July 11 order inflicts clear and irreparable injury on Napster by threatening, in very real terms, complete destruction of its business. This Court did not hesitate to enter an emergency stay last summer, when Napster – although providing far less protection against infringement – sought relief from a similar order terminating its file transfer system. This Court should have no hesitation to enter the necessary emergency relief again.

STATEMENT OF THE CASE

On July 26, 2000, the district court entered a broad preliminary injunction barring Napster from allowing any infringing transfers of files by users of the Napster system.

The district court also set a deadline of midnight, July 28, 2000, by which all such transfers must cease. With that deadline looming, Napster on July 27, 2000, sought an emergency stay in this Court, arguing that the district court's order effectively required Napster to shut down its file sharing system – the distinctive and defining feature of the Napster system. On July 28, 2000, this Court granted Napster's emergency motion and stayed the district court's order "pending further order of this court." Order of July 28, 2000, at 2. In issuing that stay, this Court necessarily determined that the prospect of a shut down threatened Napster with irreparable injury or, at the very least, would inflict hardships on the company that far outweighed any burden on the Plaintiffs. The Court also relied on the fact that Napster's appeal raised "substantial questions" relating not only to "the merits" but also to "the form of the injunction" entered by the district court.

Id.

On February 12, 2001, this Court affirmed in part and reversed in part the preliminary injunction entered by the district court. *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). In doing so, this Court recognized Napster's right to exist and to supply the public with peer-to-peer file sharing capabilities. Rejecting the district court's conclusion "that Napster failed to demonstrate that its system is capable of commercially significant non-infringing uses," this Court ruled that the preliminary injunction was "overbroad because it places on Napster the *entire* burden of ensuring that

no ‘copying, downloading, uploading, transmitting, or distributing’ of plaintiffs’ works occur on the system.” *Id.* at 1021, 1027 (emphasis added). That burden, this Court explained, must be shared by the parties: Plaintiffs are required to provide notice to Napster of copyrighted works; Napster, in turn, has an obligation to police its system, but that the “‘right and ability’ to police is cabined by the system’s current architecture.” *Id.* at 1024.

On remand, the district court entered a modified preliminary injunction on March 5, 2001 (the “March 2001 PI”).¹ The district court stated its intention that the burden of preventing infringing uses by Napster users be “shared between the parties,” and limited Napster’s duties to “‘policing the system within the limits of the system,’” quoting this Court. EMR0147. Consistent with the March 2001 PI, Napster sought to exclude noticed works by imposing text-based filters or “screens” that blocked files named with the artist and title of Plaintiffs’ noticed works, thereby preventing such files from being downloaded. This approach complied with this Court’s direction that Napster can do “‘a text search of the file names’” (239 F.3d 1012 (quoting district court)), and that Napster’s architecture was limited in that it “does not ‘read’ the content of indexed files, other than to check that they are in the proper MP3 format.” *Id.* at 1024.

¹ The Court ordered entry of modified preliminary injunctions in five actions: *A&M Records, Inc. v. Napster, Inc.*; *Leiber v. Napster, Inc.*; *Metallica v. Napster, Inc.*; *Young v. Napster, Inc.*; and *Casanova Records v. Napster, Inc.* The modified preliminary injunctions entered by this Court on March 5 are identical except that the modified preliminary injunction in *Leiber v. Napster, Inc.*, filed by composition copyright holders, provides in addition that “[f]or compositions for which there might be a number of compositions of the same name, the burden will rest with plaintiffs to identify those compositions to which they own or control copyright.” EMR0153.

Thereafter, Napster launched a costly effort to comply fully with the March 2001 PI. Virtually all files corresponding to the precise notices provided by Plaintiffs were blocked. As a result, the total number of files available for sharing by Napster users dropped a staggering 92% by early June 2001. EMR0520.

Napster's compliance efforts proved problematic, however, in two limited respects: (1) Napster users purposely devised variants of file names that proved nearly impossible in many instances to detect; and (2) Napster's efforts to block particular words that users might choose as surrogates for song titles resulted in substantial overblocking of songs that had *not* been noticed by Plaintiffs. *See* 239 F.3d at 1019 (noting that Plaintiffs "did not seek to enjoin [authorized] or any other non-infringing uses of the Napster system").

The inability of Napster's existing architecture to exclude *all* infringing works clearly frustrated the district court, which had made no secret of its distaste for this Court's February 12 decision. At a hearing held on April 10, 2001, for example, the district court invoked the same reasoning this Court had previously disapproved, stating: "I still think I was right." The Court called Napster's efforts a "disgrace" because it was unable to exclude file name *variants* – even though Napster had blocked all accurate titles supplied by Plaintiffs. EMR0264; EMR0271; EMR0281.

At the same hearing, the district court appointed Dr. A. J. Nichols "to serve as a technical expert to assist the court in connection with the dispute." EMR0148-EMR0149. In response to the district court's intense pressure to exclude infringing works more thoroughly than its text-based architecture would allow, Napster stated that it had

considered whether it had no choice but to consider a fundamental change to its architecture by seeking to implement a brand-new emerging acoustic waveform recognition and fingerprinting technology known as “audio fingerprinting.” EMR40358. Even though Dr. Nichols correctly noted that such technology “may, in fact, not exactly correspond with the [March 2001 PI]” (EMR0357), the district court directed him to investigate “what else was out there that could possibly be integrated into or used that would achieve the objectives of the order.” *Id.*

On May 3, 2001, the district court ordered Napster to jettison its text-based filtering system altogether and employ the emerging acoustic waveform recognition and fingerprinting technology, which had never been tried before (let alone implemented successfully) on such a large scale. Subsequently, at a hearing on June 6, 2001, the district court ordered Napster to complete deployment of this system, which it had dubbed “fileID,” by June 27, 2001. The district court rebuffed Napster’s claim that the court lacked legal authority to compel Napster to replace one architecture with another.

After a Herculean company-wide effort, Napster met this deadline. On June 27, the Napster system was converted to the new architecture and Napster required all users to utilize the new fileID software in order to engage in file-sharing. EMR0894.

Although the architecture performed as designed, its launch revealed a flaw related to the database of noticed works, caused by human error, which gave rise to a concern that noticed works were being transferred. On July 1, 2001, shortly after discovering this flaw, Napster decided to suspend the transfer of all files until it diagnosed and fixed the

database problem. Additional problems were identified and corrected on July 5, 2001.
EMR0897-EMR0898.

Even though Napster solved each identified problem relatively quickly, it nonetheless decided to continue to temporarily suspend file transfers. Napster made this decision principally because it wanted to further test and debug the new system. Declaration of Hank Barry (“Barry Decl.”), ¶ 3. In addition, Napster wanted to demonstrate to the trial court that it was acting cautiously and responsibly to guard against any possible leakage of copyrighted works. EMR0895. Despite suspending file transfers, Napster nonetheless had the ability in the interim to employ a variety of tests to determine whether noticed works would have been available for transfer had transfers been allowed.² One set of six tests (*e.g.*, for noticed works on the Billboard Top 100) showed a 100% success rate from July 2 to July 9. EMR0896. Another set of two tests, in which Napster sampled logs of file transfer attempts made by users, showed that, since July 5, less than 1% of the works that would have been available for transfer (had downloads been allowed), were noticed works. EMR0897. In his July 6 report to the court, Dr. Nichols stated that the primary cause of even this limited appearance of noticed works related to either erroneous data about the artists and titles of works that Plaintiffs

² Such testing was still possible because thousands of individuals (although only a small percentage of Napster’s total previous users) continued to utilize the Napster system for purposes other than file-transfer. When they did so, their individual files were uploaded to the Napster index and run through the fileID technology, generating substantial test data. EMR0895.

put in their notices to Napster or erroneous metadata³ that Napster received from third parties. EMR0899. Significantly, he did not in any way measure the *size* of this problem or seek to put it in context given the tremendously positive data that Napster's testing revealed.

On July 11, 2001, at a previously scheduled status conference, Napster offered its evidence that the new fileID architecture was now more than 99% effective. Plaintiffs did not challenge this evidence. Indeed, Plaintiffs' own evidence corroborated Napster's testing results.⁴ Napster also stated that it believed that its system was fully compliant with the district court's March 2001 PI and with this Court's February 12 decision, and thus was prepared to remove the barriers to file-sharing by users that Napster had put in place voluntarily on July 1. Without issuing a written opinion, the district court ordered:

³ "Metadata" is simply identifying information – song title, artist name, album title – that describes the contents of an MP3 file. EMR0892.

⁴ From June 27, 2001, the date of the implementation of the fileID system, until the July 11 hearing, Plaintiffs had two weeks to test Napster's system and to determine for themselves whether noticed works were available. It is clear from the declarations that Plaintiffs submitted on July 10 that the Plaintiffs devoted substantial manpower and resources to their detection efforts. The only actual evidence proffered by the Plaintiffs, however, demonstrates the fundamental efficacy of fileID system. In total, the Plaintiffs claim that they were able to locate approximately 350 noticed works on the system since fileID was launched. This number represents significantly less than one-tenth of one percent (0.04 %) of the 950,000 works for which they have given Napster notices. Furthermore, approximately two-thirds of the 350 noticed works identified by Plaintiffs were found during a three hour period on July 5 when blocking had been accidentally disabled – an aberrant problem that was promptly identified and corrected and did not result in the actual transfer of any works because file transfers were suspended during that time. The bulk of the remaining works were detected during the time that Napster had not yet corrected its initial database problem. Declaration of Richard Joseph Carey ("Carey Decl."), ¶ 18.

(i) that Napster must disable file-sharing until it has achieved “zero tolerance” of noticed works on the system, EMR0976; and (ii) that, before it would permit Napster to allow its users to resume file-sharing on its service, the court would rely *solely* on the judgment of its court-appointed expert, Dr. Nichols, to certify that Napster had done everything that the *expert* thought necessary to block noticed copyrighted works in a manner consistent with the March 2001 PI (collectively, the “July 11 Order”) EMR0978. The district court denied Napster’s request to stay its decision. This appeal followed.

ARGUMENT

To obtain a stay of a preliminary injunction order, the moving party must show: (1) a combination of probable success on the merits of its appeal and the possibility of irreparable injury should the stay be denied; or (2) that the order raises serious legal or factual questions and the balance of hardships tips sharply in favor of the moving party. *See, e.g., Lopez v. Heckler*, 713 F.2d 1432, 1435-36 (9th Cir. 1983) (also noting that the public interest may be a factor to be strongly considered), *stay granted*, 463 U.S. 1328 (1983). Napster satisfies these requirements.

To begin with, there is a high likelihood that Napster will succeed on the merits of the important but narrow legal issues raised in this particular appeal, or at least has raised substantial questions of law. First, because the March 2001 PI is currently on appeal before this Court, the district court lacked jurisdiction to modify its March 2001 PI by ordering Napster effectively to stay shut down indefinitely. Second, the district court’s decision that Napster must be 100% perfect in blocking noticed copyright works from its file-sharing system is flatly inconsistent with this Court’s February 2001 decision that

reversed nearly the same ruling a year ago, as well as with the district court's own March 2001 PI. Third, the district court clearly acted without authority in delegating to Dr. Nichols the authority to certify whether Napster is acting in compliance with its order.

Napster also submits that there is not just a possibility, but a certainty that it will be irreparably harmed by an indefinite shutdown. In fact, this Court necessarily recognized the severe harm Napster would suffer in the event of a shut down when it issued its prior stay. The equities also overwhelmingly tip in Napster's favor because Napster's system is operating at more than 99% effectiveness and because any miniscule leakage in noticed works can be remedied, if appropriate, via a future damages assessment.

I. THE DISTRICT COURT LACKED JURISDICTION TO MODIFY ITS MARCH 2001 PI

The filing of a notice of appeal ordinarily “divests the district court of jurisdiction over those aspects of the case involved in the appeal.” *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir. 1997) (quoting *Marrese v. American Academy of Ortho. Surgeons*, 470 U.S. 373, 379 (1985)). The purpose of this rule is to “avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time.” *Id.* This Court has consistently held that once an order granting a preliminary injunction has been appealed, the district court loses the power to modify the preliminary injunction except as necessary to preserve the status quo while the case is pending in the Court of Appeals. *See, e.g., Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d

867, 880 (9th Cir. 2000) (“district court lacks jurisdiction to modify an injunction once it has been appealed except to maintain the status quo among the parties”); *Flynt Distributing Co. Inc. v. Harvey*, 734 F.2d 1389, 1392 n.1 (9th Cir. 1984).⁵

The July 11 Order – precisely like the July 26, 2000 order previously found overbroad by this Court – mandates a total shutdown of the Napster service until Napster can affirmatively prove that its system is not allowing *any* uploading or downloading of infringing material by its users. This represents a drastic modification of the March 2001 PI, not merely an attempt to clarify its scope or to preserve the status quo among the parties during the pendency of the appeals. The district court fundamentally changed the status quo by depriving Napster of its essential right as a business to allow its users to resume file sharing at a time that it believed the fileID system was working effectively (and in compliance with the March 2001 PI).

There are, of course, critical differences between Napster’s temporary suspension of service between July 1 and July 11 and what Judge Patel has now ordered. First, Napster now lacks the ability to restart its business, and in fact may be essentially out of business for an indefinite, undefined period of time. Barry Decl., ¶ 5. Second, the standard for resuming service has now been raised to a level that is entirely new – 100% success. *Id.*

⁵ While the language of Rule 62(c) would appear to allow the district court, in its discretion, to modify an order granting a preliminary injunction pending an appeal of the order, this Court has consistently interpreted the Rule 62(c) power as *limited to actions necessary to preserve the status quo*. *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734-735 (9th Cir. 1982); Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 2d § 3921.2 (emphasis added).

As this Court has recognized, an order that substantially alters the terms and force of a preliminary injunction, or that changes the legal relationship among the parties, constitutes a modification, not a mere clarification, of the preliminary injunction. For that reason, it is separately appealable. *See, e.g., Hook v. Arizona Dept. of Corrections*, 1997 U.S. App. LEXIS 8042, *7-8 (9th Cir. 1997); *Stone v. City and County of San Francisco*, 968 F.2d 850, 859 (9th Cir. 1992).

II. NAPSTER WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY AND THE BALANCE OF HARDSHIPS TIPS STRONGLY IN ITS FAVOR

To obtain a stay, Napster must demonstrate the “possibility” of irreparable injury should the stay be denied. *See, e.g., Lopez*, 713 F.2d at 1435. Irreparable harm is not only possible in this case, but certain in the absence of a stay because of the devastating impact the shutdown order will have on existing business partners, potential business partners, and Napster users. This Court’s prior grant of a stay necessarily was based on a determination that a shut down threatened Napster with irreparable injury or would inflict hardships on the company outweighing any burden on the Plaintiffs. At the time of the July 11 order, Napster had demonstrated that, for nearly seven days, it had achieved more than 99% success in blocking noticed works with the fileID system. EMR0897. With these successful results in hand, Napster was poised to reactivate file sharing. *Id.* The district court’s order not only prevents Napster from doing so, but prevents it indefinitely and publicly, until certification by Dr. Nichols that Napster’s technology allows “zero”

noticed works to be shared. EMR0978. Because the public now knows that Napster must live up to an absolute – and quite probably impossible – standard before it can resume its business, the district court’s order will inflict immediate, drastic harm on Napster.⁶ Barry Decl., ¶ 4. This fact was recognized by the press within hours of the District Court’s ruling. *Id.* & Exhs. A & B.

The district court’s order cuts Napster off from users seeking to engage in file transfers of music. Barry Decl., ¶ 6. These users will move to other sites that provide audio file sharing, few of which have been subjected to the attacks and restrictions to which Napster has been subjected. *Id.* It will be inordinately difficult for Napster to regain lost users in this environment, particularly with Napster now being held to an absolute standard that *no* other service must fulfill, and that few people will expect to be attainable. *Id.* This harm is likely irreparable in its own right. *Id.*

The loss of users also will cause irreparable harm in that such loss will make it difficult or impossible to demonstrate Napster’s ongoing viability to actual and potential partners and investors. Barry Decl., ¶ 7. To maintain the viability of the launch of a new subscription service later this year, as Napster has repeatedly said it will do, Napster must be able to operate its business now, as this Court permitted it to do in February. *Id.* Existing and potential business partners have required, and will require, that Napster demonstrate that its new technology is effective in real-time, full-scale application. *Id.*, ¶ 8. The district court’s order prevents this from occurring. Meanwhile, other on-line

⁶ As noted above in, there are critical differences between Napster’s temporary suspension of service between July 1 and July 11 and what Judge Patel has now ordered.

music services – including ones planned by the Plaintiffs in this case – will be permitted to press full steam ahead. *Id.* In this environment, Napster will be immediately and irreparably harmed as long as it is forced to remain shut down. *Id.*

Finally, the district court's order will also cause irreparable injury to Napster's business reputation and customer goodwill, and will cause a loss to its customer base for Napster services that it has invested large amounts of time, money and hard work in building. Barry Decl., ¶ 9. Similarly, Napster will be forced to consider workforce reductions, and will likely face loss of crucial employees, within days or weeks if the district court's order is not stayed. *Id.*

In addition to demonstrating the possibility of irreparable injury, Napster can show that the balance of hardships, as well as the public interest, weighs in favor of the grant of a stay. *Lopez*, 713 F.2d at 1435-1436. Napster meets this requirement, too. The hardship imposed by the district court's order on Napster is, as discussed above, extreme and nearly absolute: the order effectively and immediately deprives Napster of the ability to conduct business, and creates a cloud of uncertainty as to whether it will *ever* be able to do business again.

By contrast, the hardship that the grant of a stay would cause to Plaintiffs is miniscule. Plaintiffs' own tests, which were conducted with every incentive to find as high an error rate as possible, revealed only 0.04% of the noticed copyrighted works over a five-day period at the beginning of this month. EMR0898. In the short term, the March 2001 PI provides a simple, effective mechanism for promptly addressing the remaining

See Barry Decl., ¶ 5.

less than 1%, the large bulk of which continue to appear as a consequence of errors in data supplied by Plaintiffs or independent third parties. EMR0894. When Plaintiffs detect such slippage, all they need to do is supply supplemental notices pertaining to the missed work(s) so that Napster can immediately block them. *Id.* Plaintiffs also retain potential damages remedies for such ongoing infringement, if demonstrated to be within Napster's control and/or knowledge. Under these circumstances, the grant of stay would create minimal hardship for Plaintiffs.

For similar reasons, a stay would overwhelmingly be in the public interest. As this Court has recognized: "To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use." *A&M Records*, 239 F.3d at 1021. The district court's order at issue here, like the preliminary injunction found infirm by this Court in February, does precisely that: shuts off *all* actual and potential uses of the Napster system in the name of eradicating infringing use, without limitation. Because such uses almost certainly include no infringing uses, such a broad order is contrary to the public interest. Because only the Plaintiffs' private interest in a tiny number of works that may evade Napster's filters (largely as a result of data errors, often in Plaintiffs' own notices) would be served by denial of a stay, granting the requested stay is clearly in the public interest.

III. NAPSTER HAS A HIGH PROBABILITY OF SUCCESS ON THE MERITS IN THIS APPEAL AND IS RAISING SUBSTANTIAL AND IMPORTANT QUESTIONS

A. The District Court's July 11 Order Directly Violates This Court's February 12 Decision

The district court's order that Napster's technology may not operate until it is 100% effective in excluding noticed works directly defies this Court's February 12 decision. This Court held that the reach of any preliminary injunction against Napster "is cabined by the system's current architecture." 239 F.3d at 1024. Likewise, the Court found that the "boundaries of the premises that Napster 'controls and patrols' are limited" (*id.* at 1023), that Napster "bears the burden of policing the system within the limits of the system," and that, in the context where "files are user-named," policing "is not an exact science." *Id.*⁷ These holding presumed and expressly tolerated an architecture providing a less than perfect ability to block infringing works. *See id.* at 1024.

Contrary to this Court's ruling, the district court has now imposed a "zero tolerance" standard on Napster. The court did so even though Napster literally was inches from an outstanding achievement – successfully deploying the world's first, large-scale acoustic fingerprinting technology. Even though Napster walked into court on July 11 with evidence of an Ivory Soap level of purity (99.4%), and even though

Plaintiffs' own data confirmed that level of blocking, the district court found that was not good enough. Such a decision simply flies in the face of this Court's February 12 decision. In reaching the judgment that Napster must be held to a standard of "zero tolerance" – which Plaintiffs' lead counsel has already loudly trumpeted in the media⁸ – the district court appeared to rely on nothing more than Dr. Nichols' assessment in his July 6 report to the trial court that there was *one* remaining problem with fileID, namely, the inconsistency that has sometimes existed between the metadata contained in Plaintiffs' notices⁹ and the metadata Napster had acquired from third parties and referenced to its catalogue of known fingerprints. EMR0909-EMR0914. While Napster does not dispute the existence of this problem, the fundamental error in the district court's extremely limited explanation for her decision is that neither the judge nor the

⁷ Consistent with these notions, the district court's own March 2001 PI requires that Napster "police the system *within the limits of the system*," (EMR0147) (emphasis added), and contemplate file name blocking as the available means of policing. *See* EMR0148 (Napster must prevent "specific infringing files" from being included in index "thereby preventing access to the files corresponding to such *names* through the Napster system"); *id.* (Napster must "search the *names* of files . . . (prior to the *names* of files being included in the Napster index)" to prevent downloading of noticed works).

⁸ Several hours after the July 11 Order, the Associated Press quoted Russell Frackman, the lead outside counsel for the recording industry in these lawsuits, as saying: "Judge Patel made it clear that there should be zero tolerance and that the goal should be no infringement." Barry Decl. ¶3, Exh. A.

⁹ It is undisputed that some of Plaintiffs' notices lack an artist or song title or both; others misidentify the work; invert the song name and artist; or are ambiguous in various ways. EMR0899-EMR0900. Dr. Nichols opined that "Napster's ability to block noticed works would be significantly enhanced if [Plaintiffs'] notices could be improved. Adding fingerprints [to Plaintiffs' notices] would be of great value." EMR0905-EMR0908. Plaintiffs have declined to cooperate in any way to help solve this problem. EMR0899.

expert made any effort to quantify the *size* of this problem. Instead, the mere existence of a single problem was sufficient, in the trial judge's mind, to order an indefinite shutdown. That skimpy reasoning does not withstand scrutiny. *New York Times Co., Inc. v. Tasini*, 69 U.S.L.W. 4567 (U.S. June 25, 2001) (in holding that major newspapers, magazines, and electronic databases violated the copyrights of freelance writers, no requirement on remand that lower courts order the defendants immediately to purge 100% of the infringing works).

Apart from issues surrounding the new 100% success requirement, the district court went well beyond the purview of this Court's February 12 decision (and its own March 2001 PI) when it ordered Napster, under pain of contempt, to change its architecture entirely by jettisoning text-based filtering and adopting fileID. It is undisputed that no one known to the parties or Dr. Nichols has ever successfully implemented fileID in a wide-scale file sharing environment. *See* EMR0475-EMR0476 (Dr. Nichols describes technology is "in its infancy"). Under the Ninth Circuit's decision (as well as under *Sony Corp. v. Universal Studios*, 464 U.S. 417 (1984)), which refuses to countenance the prohibition of products capable of lawful as well as unlawful uses, until a technical means of distinguishing the two are developed), Napster cannot be liable for failing to employ, with 100% accuracy, a technology that *no one* has yet deployed in this fashion, and that is clearly outside the architecture of the Napster system.

Were the law otherwise, Napster (and all other companies operating in a fast-changing technological environment) could find themselves under the threat of legal sanction for failing to research, develop, and integrate as quickly as possible the next

technology over the horizon, no matter what the cost, the vagaries of research and development, and the ultimate effectiveness of the technology.¹⁰ Compliance with court orders would become partially a function of the quality of the technology that is developed (often, as here, by third parties) and partially a function of how quickly such technology evolves. Neither component is under the total control of a company such as Napster.

For these reasons, it cannot be the case that the overhaul of Napster's system architecture to deploy fileID could have been *required* in order for Napster to be found in compliance with preexisting orders. This is all the more true when the imperfection is by no means intentional recalcitrance, and when the new technology is, even in its imperfect condition, operating at an error rate far superior to the original architecture Napster was entitled to retain. As Napster's obligations were "cabined by the system's current architecture," (*A&M Records v. Napster, Inc.*, 239 F.3d at 1024) the district court clearly erred in commanding Napster to implement fileID by a date certain, and in shutting the company down when that system was operating at less than perfection in the time allowed.

¹⁰ In situations where a number of different technologies are potentially available, courts would also find themselves in the position of deciding which new technology might work best. In such cases, courts would effectively perform the very unusual function of overseeing complicated business and engineering processes that, by all accounts, are nearly always subject to fits, starts, stops, delays, recalculations, and an uncertain chance of success.

B. The District Court Erred When it Delegated to the Court-Appointed Expert the Authority to Determine When Napster Has Achieved Compliance

Dr. Nichols was originally appointed as a technical expert, with the consent of the parties, to assist the district court in resolving technical issues regarding Napster's ability to comply with the court's modified preliminary injunction. As discussed above, at the July 11 hearing, the district court brushed aside Napster's evidence that its testing revealed a better than 99% success rate with its new fileID system, insisting that Napster must do even more. When Napster sought guidance on what it must do before recommencing operations, other than achieve an impossible standard of "zero tolerance," the court simply stated that Napster would have to "satisfy" Dr. Nichols. As the district court stated:

[T]his system is not to go back up in such a manner as to permit copying and downloading other than to test that for the purposes of determining the error rate until you've satisfied Dr. Nichols. And then, he can notify me.

EMR0976.

Napster immediately objected that "we still don't know from the court what the standard is other than satisfying Dr. Nichols. And I would suggest to the Court that we are now in a world in which we are essentially operating in a receivership." EMR0977.

The district court responded:

Dr. Nichols knows what is expected. I expect you to get down to zero, as close thereto as possible. . . as humanly possible. He has already indicated some things that can be done, and apparently that you recognize can be done to get closer. And that is what is going to have to be accomplished. And work with him. And he will tell me when he thinks you've got to that point.

EMR0978-EMR0979.

When Napster continued to object that this was no standard at all, the district court responded merely by offering Napster some undefined right to come back to the court so that the trial judge could "take it up." EMR0976.

The outright delegation to the court-appointed technical expert on the critical issue of when Napster has achieved compliance with the modified preliminary injunction and may resume operations clearly violates Napster's Article III rights. In *United States v. Microsoft*, 147 F.3d 935 (D.C. Cir. 1998), the trial judge made a similar error, referring the government's request for a permanent injunction to a special master, under the court's apparent authority under Fed.R.Civ.P. 53(b). In reversing, the Court of Appeal explained that while a special master's findings are always advisory, it was apparent that the district court was ready to grant substantial deference to the findings of its special master, thereby depriving the parties of their right to determination of the issues by an Article III judge. The Court of Appeals rejected the government's argument that the district court's implicit reservation of *de novo* review of the special master's report saved the reference. *See also LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) (district judge's reference to special master to avoid burdensome litigation "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation"), *reh'g denied*, 352 U.S. 249 (1957); *In Re Bituminous Coal*

Operators' Ass'n., 949 F.2d 1165 (D.C. Cir. 1991) (a district judge has no discretion to impose on parties against their will a 'surrogate judge'), *petition granted*, 1991 U.S. App. LEXIS 28963 (D.C. Cir. 1991).

Here, the district court's delegation of its judicial authority to its technical expert to determine, in the first instance, when Napster has "done enough" to achieve compliance with the court's modified preliminary injunction is plainly outside the permissible confines of Fed.R.Civ.P. 53(b). Indeed, Dr. Nichols was never intended to act as a special master and he operates under none of the restrictions and requirements set forth in Rule 53(b). Nor is Dr. Nichols now serving as a testifying expert under Fed.R.Evid. 706. Rather, as the parties understood and agreed, Dr. Nichols was simply to "assist" the Court in helping it to resolve issues concerning Napster's compliance with the court's injunction. Now, however, the district court has delegated to Dr. Nichols the essential authority to determine when Napster has achieved compliance with the Court's modified preliminary injunction and thus resume full operations. The district court's extraordinary order must be reversed.

To make matters worse, Dr. Nichols has repeatedly rebuffed Napster's requests over the past several weeks to provide Napster with objective benchmarks for success. *See* Carey Decl., Exh. D. Until the district court yesterday announced its "zero tolerance" policy, Napster also had no clear direction from the district court regarding the fileID project other than a directive "that something needs to be done." EMR0988. But apart from the 100% success criteria that Napster first learned about yesterday, Napster still has no idea of what it is required to do in the ongoing process with Dr. Nichols. Indeed, no

fair reading the transcript of the July 11 proceedings could possibly discern what Napster is exactly required to do. For that reason, the court's standard is impermissibly vague, *see Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996), *reh'g en banc denied*, 89 F.3d 857 (11th Cir. 1996) and violates Fed.R.Civ.P. 65(d), *see Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 771 (3rd Cir. 1994) ("broad, non-specific language that merely enjoins a party to obey the law or comply with an agreement . . . does not give the restrained party fair notice of what conduct will risk contempt."). Simply put, a restrained party cannot properly be required to speculate about what it must do to avoid contempt. If the order is not clear and specific enough to provide plain direction, then it is invalid. *See Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995); *Union Pacific R.R. v. Mower*, 219 F.3d 1069, 1077 (9th Cir. 2000).

CONCLUSION

For the foregoing reasons, Napster respectfully submits that (i) the Court should enter a stay pending appeal of that portion of the district court's July 11 Order in which the court directed Napster to remain shut down; and (ii) the Court should enter an order directing the district court, in the interim, to provide the parties with a specific and detailed description of what both sides are obligated to do as part of the ongoing technical expert process, provided that the district court first give the parties an opportunity to

submit proposed orders on this subject; and (iii) the Court should enter an order setting an expedited schedule for briefing and oral argument.

Dated: July __, 2001

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