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17 UNITED STATES DISTRICT COURT  
18 NORTHERN DISTRICT OF CALIFORNIA

19 IN RE NAPSTER, INC., COPYRIGHT  
20 LITIGATION.

CASE NO. MDL 00 1369 MHP

21 \_\_\_\_\_  
22 This Document Relates to:

23 *A&M Records, et al. v. Napster, Inc.*,  
24 No. C 99-5183 MHP, and *Leiber, et al. v.*  
*Napster, Inc.*, No. C 00-0074 MHP.

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR SUMMARY  
JUDGMENT ON LIABILITY AND  
WILLFULNESS; AND MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Date: October 1, 2001  
Time: 2:00 p.m.  
Ctrm: Hon. Marilyn Hall Patel

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**TO ALL PARTIES AND THEIR COUNSEL:**

**PLEASE TAKE NOTICE** that on October 1, 2001, at 2:00 p.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Marilyn H. Patel, Chief Judge of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102-3483, plaintiffs in Case No. C-99-5183 MHP, A&M Records, Inc., Geffen Records, Inc., Interscope Records, Sony Music Entertainment Inc., MCA Records, Inc., Atlantic Recording Corporation, Island Records, Inc., Motown Record Company L.P., Capitol Records, Inc., La Face Records, BMG Music d/b/a The RCA Records Label, Universal Records Inc., Elektra Entertainment Group Inc., Arista Records, Inc., Sire Records Group Inc., PolyGram Records, Inc., Virgin Records America, Inc., and Warner Bros. Records Inc. (collectively the “Record Company Plaintiffs”), and plaintiffs in Case No. C 00-0074 MHP, Jerry Leiber, individually and doing business as Jerry Leiber Music, Mike Stoller, individually and doing business as Mike Stoller Music, and Frank Music Corp. (collectively the “Music Publisher Plaintiffs”), will and hereby do move pursuant to Federal Rule of Civil Procedure 56 for summary judgment against defendant Napster, Inc. (“Napster”) on the issues of (1) Napster’s liability to the Record Company Plaintiffs and Music Publisher Plaintiffs for copyright infringement, and (2) the willfulness of such infringement.

This Motion is and will be made on the grounds that as to the foregoing issues, there is no genuine issue as to any material fact and the Record Company Plaintiffs and Music Publisher Plaintiffs are entitled to a judgment on these issues as a matter of law.

This Motion is and will be based upon:

- this Notice of Motion and Motion;
- the accompanying Memorandum of Points and Authorities;
- the following Declarations (some of which have previously been filed and copies of which are filed herewith except where indicated):

- 1 Mark Eisenberg (“Eisenberg Decl.”)
- 2 Lawrence Kenswil (“Kenswil Decl.”)
- 3 Kevin Conroy (“Conroy Decl.”)
- 4 Richard Cottrell (“Cottrell Decl.”)
- 5 Paul Vidich dated 6/12/00 (“6/12/00 Vidich Decl.”)
- 6 Paul Vidich dated 8/1/01 (“8/1/01 Vidich Decl.”)
- 7 William Stafford (“Stafford Decl.”)
- 8 Alasdair McMullan (“McMullan Decl.”)
- 9 Jennifer L. Pariser (“Pariser Decl.”)
- 10 JoAn H. Cho (“Cho Decl.”)
- 11 Dr. David J. Teece (“Teece Rep.”)
- 12 Dr. Ingram Olkin (Olkin Rep.”)
- 13 Frank Creighton dated 12/6/99 (“12/6/99 Creighton Decl.”)
- 14 Frank Creighton dated 6/10/00 (“6/10/00 Creighton Decl.”)
- 15 Jason Miller (“Miller Decl.”)
- 16 Mike Stoller (“Stoller Decl.”)
- 17 Charles Hausman (“Hausman Decl.”)
- 18 Daniel Farmer dated 3/1/00 (“3/1/00 Farmer Decl.”)
- 19 Daniel Farmer dated 7/13/00 (“7/13/00 Farmer Decl.”)
- 20 Daniel Farmer dated 3/26/01 (“3/26/01 Farmer Decl.”)
- 21 Stanley Pierre-Louis dated 3/27/01 (“3/27/01 Pierre-Louis Decl.”)
- 22 Stanley Pierre-Louis dated 6/6/01 (“6/6/01 Pierre-Louis Decl.”)
- 23 Stanley Pierre-Louis dated 7/9/01 (“7/9/01 Pierre-Louis Decl.”)
- 24 Stanley Pierre-Louis dated 8/7/01 (“8/7/01 Pierre-Louis Decl.”)
- 25 Mark McDevitt dated 3/17/01 (“3/17/01 McDevitt Decl.”)
- 26 Mark McDevitt dated 4/10/01 (“4/10/01 McDevitt Decl.”)
- 27 Mark McDevitt dated 6/5/01 (“6/5/01 McDevitt Decl.”)
- 28 Nancy Schafer dated 6/5/01 (“6/5/01 Schafer Decl.”)

1 Nancy Schafer dated 7/9/01 (“7/9/01 Schafer Decl.”)  
2 Dennis Drake (“Drake Decl.”)  
3 David Lambert (“Lambert Decl.”)  
4 Russell J. Frackman (“Frackman Decl.”)  
5 Keith Evans-Orville (“Evans-Orville Decl.”)  
6 Julia D. Greer (“Greer Decl.”)  
7 Michael Keats dated 3/26/01 (“3/26/01 Keats Decl.”)  
8 Michael Keats dated 8/6/01 (“8/6/01 Keats Decl.”)  
9 Edward Kessler dated 7/3/00 (“Kessler Decl.”) (filed by Napster, in court  
10 file)  
11 Milton Olin dated 7/2/00 (“Olin Decl.”) (filed by Napster, in court file)  
12 Richard Ault dated 3/13/01 (“Ault Decl.”) (filed by Napster, in court file)  
13 Richard Joseph Carey dated 7/10/01 (“Carey Decl.”) (filed by Napster, in  
14 court file);  
15 • the Plan for Ascertaining Plaintiffs’ Rights, filed September 5, 2000 (in  
16 court file);  
17 • the transcripts of court hearings in this action on April 10, 2001 (“4/10/01  
18 Tr.”), May 3, 2001 (“5/3/01 Tr.”), and June 6, 2001 (“6/6/01 Tr.”) (attached to the Greer Decl.);  
19 • the Depositions of Eileen Richardson (“Richardson Depo.”), Shawn Fanning  
20 (“Fanning Depo.”), Sean Parker (“Parker Depo.”), Elizabeth Brooks (“Brooks Depo.”), and  
21 Edward Kessler (“Kessler Depo.”), and certain exhibits thereto, all attached as Ex. E to the  
22 Frackman Decl.;  
23 • Napster’s Response to Interrogatories 37, 38, 41, 42, and 45 and Requests  
24 for Admissions 13-18, 21, and 22;  
25 • Plaintiffs’ Non-Compliance Report filed on March 27, 2001 (in the court  
26 file);  
27 • Napster’s Compliance Reports filed on March 13, 2001 and April 3, 2001  
28 (in the court file);

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- the Court file;
- all matters of which this Court may take judicial notice;
- any reply plaintiffs may make; and
- any further evidence and argument presented at or prior to the hearing or

ruling on this Motion.

Dated: August 7, 2001

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1 **Preliminary Statement**

2 Plaintiffs seek summary judgment on an issue that nearly two years of litigation have made  
3 plain: Napster, Inc. (“Napster”) is liable for contributory and vicarious copyright infringement,<sup>1</sup>  
4 and Napster’s infringing conduct was willful.<sup>2</sup> No case could be more appropriate for summary  
5 judgment on both liability and on willfulness. Napster set out to build, and was enormously  
6 successful in building, a business based on the intentional, massive infringement of plaintiffs’  
7 copyrighted music. The evidence of Napster’s knowledge of direct infringement, its material  
8 contribution to that infringement, its ability to supervise its users’ conduct, its financial benefit,  
9 and its willful infringement through the creation and operation of a system designed to infringe  
10 music copyrights on an unprecedented scale is drawn largely from Napster’s internal documents,  
11 its conduct, and its admissions. The material facts are established, undisputed, and overwhelming,  
12 the Ninth Circuit has conclusively decided most of the salient legal issues, and summary judgment  
13 is appropriate.

14 **Argument**

15 **I. THE APPLICABLE LEGAL STANDARDS.**

16 **A. The Summary Judgment Standard.**

17 A party seeking summary judgment has the initial burden of “informing the district court of  
18 the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to  
19 interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes  
20 demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S.  
21 317, 323 (1986). Once the moving party has met its burden under Rule 56, “its opponent must do  
22 more than simply show that there is some metaphysical doubt as to the material facts [in  
23 question].” Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

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25 <sup>1</sup> Plaintiffs move for summary judgment with respect to the sound recordings  
26 identified in the Record Company Plaintiffs’ complaint and the musical compositions identified  
by the Music Publisher Plaintiffs in the 8/6/01 Keats Decl.

27 <sup>2</sup> The form of permanent injunctive relief and the amount of damages are not at  
28 issue in this motion. After a finding of liability, Napster will be subject to a permanent  
injunction, 17 U.S.C. § 502, as well as damages for all works infringed.

1 “The mere existence of a scintilla of evidence in support of the [opposing party’s] position will be  
2 insufficient . . .” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

3 **B. The Binding Effect Of The Ninth Circuit’s Opinion.**

4 The Ninth Circuit’s legal conclusions in A&M Records, Inc. v. Napster, Inc., 239 F.3d  
5 1004 (9th Cir. 2001), are binding on this Motion. “The [previously] published decisions [in the  
6 same case] are both the controlling law of the circuit and the law of [the] case.” Hilao v. Estate of  
7 Ferdinand Marcos, 103 F.3d 767, 772 (9th Cir. 1996). “The law of the case doctrine precludes  
8 relitigation of the legal issues presented in successive stages of a single case once those issues have  
9 been decided.” Cohen v. Brown Univ., 101 F.3d 155, 167 (1st Cir. 1996); see also Royal Ins. Co.  
10 of Am. v. Quinn-L Capital Corp., 3 F.3d 877, 881 (5th Cir. 1993).

11 **II. PLAINTIFFS OWN THE COPYRIGHTS TO THE WORKS AT ISSUE.**

12 Musical compositions have been protected by copyright since 1831. 17 U.S.C. § 102(a)(2);  
13 United States v. Moghadam, 175 F.3d 1269, 1271 (11th Cir. 1999). Sound recordings – the  
14 reproduction of sounds as opposed to musical notation – have been protected by copyright since  
15 1972. Id. at 1271. Sound recordings “fixed” before 1972 are protected under state law. 17 U.S.C.  
16 §301(c); see, e.g., Cal. Civ. Code § 980(a)(2); United States v. Goldstein, 412 U.S. 546, 571  
17 (1973); A&M Records, Inc. v. Heilman, 75 Cal. App. 3d 554, 560 n.6, 564 (1977) (copying of  
18 sound recordings constitutes unfair competition).

19 The Record Company Plaintiffs own the copyrights in the works listed in Schedule A to  
20 their Complaint. Cottrell Decl. ¶ 3; Conroy Decl. ¶ 4; Eisenberg Decl. ¶ 3; Kenswil Decl. ¶ 3;  
21 6/12/00 Vidich Decl. ¶ 4; Stafford Decl. ¶ 1, Ex. 1; McMullan Decl. ¶ 3, Ex. 1; Pariser Decl. ¶ 4,  
22 Ex. 1; Cho Decl. ¶ 3, Ex. 1; 8/1/01 Vidich Decl. ¶ 3, Ex. 1. The Music Publisher Plaintiffs own the  
23 copyrights in the works listed in Exhibits 1-46 to the 8/6/01 Keats Decl. Plaintiffs’ copyright  
24 certificates constitute *prima facie* evidence of the validity of the copyrights and of the facts stated  
25 in the certificates, such as ownership. 17 U.S.C. § 410(c); Transgo, Inc. v. Ajac Transmission  
26 Parts Corp., 768 F.2d 1001, 1019 (9th Cir. 1985). The Record Company Plaintiffs also own the  
27 “pre-1972” recordings listed in Schedule B to their Complaint. See Cottrell Decl. ¶ 4; Conroy  
28 Decl. ¶ 4; Eisenberg Decl. ¶ 4; Kenswil Decl. ¶ 4; 6/12/00 Vidich Decl. ¶ 5; Stafford Decl. ¶ 11,

1 Exs. 4-5; McMullan Decl. ¶ 10, Ex. 5; Pariser Decl. ¶ 10, Ex. 6; Cho Decl. ¶ 5, Ex. 2; 8/1/01  
2 Vidich Decl. ¶ 7-8, Exs. 3-5.<sup>3</sup>

3 **III. NAPSTER IS LIABLE FOR CONTRIBUTORY INFRINGEMENT.**

4 Summary judgment for contributory copyright infringement is common. See, e.g.,  
5 Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162-63 (2d  
6 Cir. 1971); Cable/Home Communication Corp. v. Network Prod., Inc., 902 F.2d 829, 845-47 (11th  
7 Cir. 1990); Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59, 62 (3d Cir. 1986);  
8 Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154, 160-61 (3d Cir. 1984); Educational  
9 Testing Serv. v. Simon, 95 F. Supp. 2d 1081, 1089 (C.D. Cal. 1999).

10 Contributory infringement consists of two elements: “[O]ne who, with knowledge of the  
11 infringing activity, induces, causes or materially contributes to the infringing conduct of another,  
12 may be held liable as a ‘contributory’ infringer.” A&M Records, 239 F.3d at 1019; accord,  
13 Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996). Constructive knowledge  
14 is sufficient. A&M Records, 239 F.3d at 1020 (“Contributory liability requires that the secondary  
15 infringer ‘know or have reason to know’ of direct infringement.”), citing Cable/Home  
16 Communication Corp., 902 F.2d at 845, 846 n.29; see also, e.g., Sega Enters., Ltd. v. MAPHIA,  
17 948 F. Supp. 923, 933 (N.D. Cal. 1996) (“Sega II”).

18 **A. Napster Has Materially Contributed To Direct Infringement.**

19 Napster users are direct infringers: “Napster users infringe at least two of the copyright  
20 holders’ exclusive rights: the rights of reproduction (§ 106(1)) and distribution, (§ 106(3)).  
21 Napster users who upload file names to the search index for others to copy violate plaintiffs’  
22 distribution rights. Napster users who download music containing copyrighted music  
23 violate plaintiffs’ reproduction rights.” A&M Records, 239 F.3d at 1014; see, e.g., Sega Enters.,  
24

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25 <sup>3</sup> The doctrines of contributory and vicarious infringement are based upon the  
26 common-law principles of enterprise liability and *respondeat superior*, respectively.  
27 Demetriades v. Kaufmann, 690 F. Supp. 289, 292 & n.5 (S.D.N.Y. 1988). Thus, the same  
28 analysis applicable to plaintiffs’ copyright claims applies to their state law claims. For  
convenience, plaintiffs’ recordings, whether protected under state or federal law, are referred to  
as “copyrighted.”

1 Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994) (“Sega I”); Drake Decl. ¶¶ 4-8.

2 “[P]roviding the site and facilities for known infringing activity is sufficient to establish  
3 contributory liability.” Fonovisa, 76 F.3d at 264, citing Columbia Pictures Indus., Inc. v. Aveco,  
4 Inc., 800 F.2d 59 (3rd Cir. 1986); accord, A&M Records, 239 F.3d at 1022 (“We agree that  
5 Napster provides ‘the site and facilities’ for direct infringement.”). Napster plainly satisfies this  
6 standard: it provides the location, environment, and support (including software, servers, indexing,  
7 search functions, firewall circumvention, moderators, and staff) that enable its users to access each  
8 others’ computer hard drives, and locate and transfer music files so that infringement can take  
9 place. 3/1/01 Farmer Decl. ¶¶ 13-27; Kessler Decl. ¶¶ 6-13. As this Court found, Napster is not  
10 just a “material” contributor; it is a “but-for” cause of users’ infringements: although “[t]he MP3  
11 file is actually transmitted over the Internet . . . the steps necessary to make that connection could  
12 not take place without the Napster server.” A&M Records, Inc. v. Napster, Inc., 54 U.S.P.Q.2d  
13 1746, 1747 (N.D. Cal. 2000).<sup>4</sup> Napster’s entire integrated service is predicated on being a “road  
14 map” to find and transfer pirated music. See, e.g., Sega II, 948 F. Supp. at 933 (defendant who

15  
16  
17 <sup>4</sup> Napster also contributes in other ways to its users’ activities including by: taking  
18 an inventory of MP3 files on each user’s computer hard drive (Kessler Depo. 154:5-24, 230:18-  
19 21, Ex. 4, at 00925); “validating” the indexed MP3 files available on its system to verify they are  
20 properly formatted (id. 145:2-18, Ex. 2); continuously updating its directories to reflect the  
21 addition or deletion of MP3 files as users log on or off (id. 69:22-71:21); providing its users with  
22 specific information about the quality and download speed of each of the MP3 files available  
23 (file size, bit rate, frequency, length, ping time, the login “name” of the user on whose hard drive  
24 the recording resides, and the line speed of the user’s connection) (id. 153:16-154:11, Ex. 5, at  
25 00843); enabling its users to tailor their searches by specifying the technical parameters of the  
26 search (minimum bit rate, frequency, ping time, and line speed) (id. 137:8-138:9; 140:9-21, Ex.  
27 5, at 00834); obtaining and assigning a digital “checksum” uniquely identifying every MP3 file  
28 on its system (id. 112:3-13); determining if a new user is behind a firewall, allowing for firewalls  
to be circumvented, and tailoring searches to omit responsive files that are inaccessible due to  
firewalls (id. 125:13-127:8, 131:18-132:13); providing human “moderators” to facilitate copying  
and assist users on the Napster service (id. 57:18-25, 61:21-62:10; 128:9-130:15), and giving the  
moderators the ability and the power to handle problem users (Fanning Depo. 256:15-257:23, Ex.  
197, at 00120); monitoring each user’s downloading activity, deferring user requests to download  
MP3 files that cannot be accomplished immediately, and “queueing” them until they can be  
downloaded (Kessler Depo. 80:2-18; 106:1-7); and generally “coordinat[ing] file transfers  
between users” (id., Ex. 2). See generally A&M Records, 239 F.3d at 1011-13; A&M Records,  
54 U.S.P.Q.2d at 1747-48, 1751-52 (describing Napster system).

1 “provided the facilities for copying the games by providing, monitoring, and operating the BBS  
2 software, hardware, and phone lines necessary for the users to upload and download games” and  
3 “provided a road map on his BBS for easy identification of Sega games available for downloading”  
4 was contributorily liable). Napster further materially contributes to infringement because it  
5 “protect[s] infringers’ identities” by refusing to “gather and share basic, identifying information”  
6 about its users. Kessler Depo. 60:24-61:10, 255:20-257:22; 3/1/00 Farmer Decl. ¶ 30; see also  
7 Fonovisa, 76 F.3d at 264.

8 **B. Napster Has Knowledge Of Direct Infringement.**

9 The evidence of Napster’s actual knowledge of its users’ infringements is overwhelming:

- 10 • Napster co-founder Sean Parker described Napster’s business plan as follows:

11 “Users will understand that they are improving their experience by providing information about  
12 their tastes without linking that information to a name or address or other sensitive data that might  
13 endanger them (*especially since they are exchanging pirated music*).” Parker Depo. 160:1-  
14 162:14, Ex. 254, at 00100 (emphasis added); Fanning Depo. 148:19-150:19, Ex. 186 at 01115;  
15 Brooks Depo. Ex. 111.

16 • The same memorandum acknowledged that Napster anticipated “harassment” by the  
17 Recording Industry Association of America because Napster was “making *pirated music* available  
18 . . .” Id. at 00102 (emphasis added).

19 • Napster co-founder Shawn Fanning described Napster’s purpose to “bypass the  
20 record industry entirely,” make record stores obsolete, and “brin[g] about the death of the CD . . .”  
21 Exs. 186 and 188; Napster’s Response to Interrogatories 37, 38, 41, 42, 45 & Response to  
22 Requests for Admissions 13-18, 21, 22. See United States v. Manning, 56 F.3d 1188, 1199 (9th  
23 Cir. 1995) (admission of preparation of letter sufficient authentication); United States v. Lawrence,  
24 934 F.2d 868, 871 (7th Cir. 1991) (production of records in response to subpoena implicit  
25 representation of authenticity). In another memorandum, Napster’s other co-founder, Parker,  
26 described its goals as “usurping the record industry as we know it today,” “wooing the [record]  
27 industry before we try to undermine it,” and transporting music “unhindered by cumbersome  
28 copyright schemes.” Parker Depo. 160:1-162:14, Ex. 254, at SF00099; 199:17, Ex. 255, at 004889

1 (attached to Greer Decl.).

2 • Fanning admitted to knowledge (or belief) that many of the files transferred on  
3 Napster are copyrighted: “Q: Do you believe that any of those millions of MP3 music files [on the  
4 Napster system] are protected by copyright? A. Yes, I believe so.” Fanning Depo. 105:10-108:2.

5 • Fanning engaged in e-mail discussions with Napster moderators, in which the  
6 participants acknowledged knowing that Napster facilitated piracy (“admitting we know Napster is  
7 used for the *transfer of illegal MP3 files* might not be the best thing to do . . I mean . . obviously  
8 people are going to use it for that purpose . . but . . we might not want to actually say we know  
9 that”). Fanning Depo. 222:21-223:8, Ex. 192, at 001971 (emphasis added).

10 • Napster’s website advertised the piratical nature of the system by bragging that,  
11 “With Napster, you’ll never come up empty handed when searching for your favorite music  
12 again!” and “Napster virtually guarantees you’ll find the music you want, when you want it . . .  
13 you can forget about wading through page after page of unknown artists.” Brooks Depo., Exs.  
14 110, 111; Parker Depo. 104:16-105:10, Ex. 235.

15 • Napster’s bulletin boards, which Napster ran, controlled, and monitored, were full  
16 of users bragging that they were infringing copyrights using the Napster system. E.g., Frackman  
17 Decl. Exs. J, K (“i freely admit to breaking over 2000 copyrights myself”; “FACT: I’m never  
18 paying for music again. Why should I when it is fast and easy because of Napster[?]”; “I’m 100%  
19 for Napster and 100% for pirating music.”; “I certainly won’t do the Tower Records thing. I don’t  
20 buy CDs anymore, nope!”). Newspaper and other articles, some of which were in Napster’s files,  
21 reported infringing conduct over the Napster system. See, e.g., Fanning Depo. Ex. 194 at 00014.

22 • Before filing suit, plaintiffs notified Napster in writing of the massive infringing  
23 activity taking place on its system, including specific notice of over 12,000 infringing files.  
24 12/6/99 Creighton Decl. ¶ 14, Ex. D; A&M Records, 239 F.3d at 1020 n.5; see Fonovisa, 76 F.3d  
25 at 261, 264 (letters from sheriff, notifying swap meet organizers of vendors’ continued sale of  
26 counterfeit recordings); Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, 1348 (8th Cir. 1994) (“in  
27 light of [plaintiff’s] earlier requests that [defendant] cease copying its copyrighted photographs,  
28 [defendant] had actual notice that its activities infringed on [plaintiff’s] copyrights”).

1 • Thereafter, plaintiffs notified Napster on repeated occasions that the works listed in  
2 their Complaints, among hundreds of thousands of other works, were being infringed on the  
3 Napster system.<sup>5</sup> Yet, despite these notices, works listed in the Complaints remained available on  
4 the Napster system. The Record Company Plaintiffs have made Napster aware of these ongoing  
5 infringements no less than seven times in the past twenty months – December 6, 1999 (Complaint,  
6 Schedules A and B); June 12, 2000 (6/10/00 Creighton Decl.); March 9, 2001 (3/27/01 Pierre-  
7 Louis Decl., attaching correspondence); March 27, 2001 (3/17/01 McDevitt Decl.); April 10, 2001  
8 (4/10/01 McDevitt Decl.); June 5, 2001(6/5/01 McDevitt Decl., 6/5/01 Schafer Decl.); and July 9,  
9 2001 (7/9/01 Pierre-Louis Decl., 7/9/01 Schafer Decl.).<sup>6</sup> Recordings identified in the Complaint  
10 were infringed no less than **50,000** times (and undoubtedly multiple times more). 8/7/01 Pierre-  
11 Louis Decl., ¶ 4, Ex. 1.<sup>7</sup> They remained available on the Napster system until Napster suspended  
12 file transfers. *Id.* ¶ 10, Ex. 8. Likewise, the two songs specifically named in the Music Publisher  
13 Plaintiffs’ Complaint – “Unchained Melody” and “Jailhouse Rock” – remained available on  
14 Napster long after plaintiffs had given notice. *See* Evans-Orville Decl., ¶¶ 2, 4, Exs. A, D. As a  
15 senior Napster executive then put it: “Works that should have been filtered out were being shown  
16 on the index.” 7/9/01 Pierre-Louis Decl. ¶ 5, Ex. 4.

17 • Almost 90% (and likely more) of the recordings available on Napster were

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19 <sup>5</sup> Between March 5 (the date of entry of this Court’s Modified Preliminary  
20 Injunction) and June 4, 2001, the Record Company Plaintiffs created and delivered to Napster:  
21 (1) lists containing 716,147 copyrighted works they own or control (arranged by artist name,  
22 album title, and song title); and (2) lists of 8,022,516 infringing file names. 6/6/01 Pierre-Louis  
23 Decl. ¶ 4. The Music Publisher Plaintiffs created and provided to Napster lists of over 2,185  
24 songs. 3/26/01 Keats Decl. ¶ 2. Napster has also been provided with a database of over 90,000  
25 files of songs owned or controlled by the music publisher class members. 8/6/01 Keats Decl., ¶  
26 51, Ex. 49.

27 <sup>6</sup> With the exception of the Complaint, each such notification was accompanied by  
28 corresponding file names from the Napster system.

<sup>7</sup> This number clearly is but a minute portion of the infringements. Plaintiffs were  
only able to locate the infringing works that were available at the time plaintiffs searched for  
such material, from the (relatively) small number of users logged on at that time. Nor could  
plaintiffs determine what had been available on Napster historically, because of Napster’s refusal  
to keep these basic records.

1 infringing. Olkin Rep. pp. 7-8; Hausman Decl. ¶¶ 6-8; Miller Decl. ¶ 8; see 239 F.3d at 1013.  
2 Every Napster user sampled was engaged in some infringement while using the Napster system.  
3 Olkin Rep. pp. 7-8. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 902-03 (N.D. Cal.  
4 2000) (“The evidence shows that virtually all Napster users download or upload copyrighted files  
5 and that the vast majority of the music available on Napster is copyrighted.”).

6 Substantial, undisputed evidence of constructive knowledge also is present:

7 • Napster’s entire business was built on infringement. “The ability to download  
8 myriad popular music files without payment seems to constitute the glittering object that attracts  
9 Napster's financially-valuable user base.” A&M Records, 114 F. Supp. 2d at 922.

10 • Napster executives are sophisticated in intellectual property matters and have  
11 extensive recording industry experience. Richardson Depo., Ex. 129 at ER00138 (“45+ years in  
12 all”). Napster’s CEO (until about a week ago) and board member, Hank Barry, was an intellectual  
13 property attorney; its COO, Milton Olin, was a veteran record industry lawyer; and its Vice  
14 President for Corporate and Policy Development, Manus Cooney, was counsel to the Senate  
15 Judiciary Committee, including on intellectual property matters. Frackman Decl., Ex. H; Olin  
16 Decl. ¶¶ 2-4; 8/7/01 Pierre-Louis Decl. ¶ 5.

17 • Napster executives repeatedly downloaded popular, infringing music, including  
18 copyrighted recordings identified in the Record Company Complaint, to their own computers using  
19 the Napster system. Brooks Depo. 51:8-24, 54:25-56:11, Exs. 64 at 2-4, Ex. 126 at 002260,  
20 002263; Richardson Depo. 20:5-22:10, 25:2-26:1; Parker Depo. 70:14-16, Ex. 230, ¶¶ 3-5;  
21 Fanning Depo., Exs. 174-76.

22 • Napster promoted its service with screen shots showing infringing files.  
23 Richardson Depo., Ex. 126, at 002260, 002263.

24 • Napster vigorously sought to protect its own intellectual property. It posted  
25 copyright notices for its own content on its web site, required users to agree to a license agreement  
26 in order to use Napster client software, filed for patents, and threatened to sue for trademark  
27 infringement of its logo. Kessler Depo., Ex. 5 (patent application); 8/7/01 Pierre-Louis Decl., ¶ 13,  
28 Ex. 11; Frackman Decl., Ex. M.

1 Although the Court need not reach the issue in light of Napster’s actual knowledge, these  
2 facts demonstrate Napster’s constructive knowledge. See, e.g., Playboy Enters., Inc. v. Russ  
3 Hardenburgh, Inc., 982 F. Supp. 503, 514 (N.D. Ohio 1997) (“Playboy Magazine is one of the  
4 most famous and widely distributed adult publications in the world. It seems disingenuous for  
5 Defendants to assert that they were unaware that copies of photographs from Playboy Magazine  
6 were likely to find their way onto the BBS.”); RSO Records, Inc. v. Peri, 596 F. Supp. 849, 858  
7 (S.D.N.Y. 1984) (“knowledge” where “the very nature of” the product “would suggest  
8 infringement to a rational person.”); Universal City Studios Inc. v. American Invsco Management,  
9 Inc., 217 U.S.P.Q. 1076, 1077 (N.D. Ill. 1981) (fact that motion picture was just released in  
10 theaters supports inference of actual or constructive knowledge that videocassette copy was  
11 infringing);<sup>8</sup> Gershwin, 443 F.2d at 1163 (general knowledge that “copyrighted works were being  
12 performed at [the concert] and that neither the local association nor the performing artists would  
13 secure a copyright license.”).

#### 14 **IV. NAPSTER IS LIABLE FOR VICARIOUS INFRINGEMENT.**

15 Summary judgment for vicarious copyright infringement is common. See, e.g., Playboy  
16 Enters., Inc. v. Webworld, Inc., 968 F. Supp. 1171, 1176 (N.D. Tex. 1997) (“Webworld I”)  
17 (“Whether a defendant has the required supervisory authority and financial interest are issue [sic]  
18 of law to be decided by the court.”); Pinkham v. Sara Lee Corp., 983 F.2d 824, 834 (8th Cir.  
19 1992); RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 778 (8th Cir. 1988);  
20 Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass’n, Inc., 554 F.2d 1213,  
21 1214-15 (1st Cir. 1977); Educational Testing Serv., 95 F. Supp. 2d at 1089; Microsoft Corp. v.  
22 Grey Computer, 910 F. Supp. 1077, 1090-91 (D. Md. 1995); Peer Int’l Corp. v. Luna Records,  
23 Inc., 887 F. Supp. 560, 565 (S.D.N.Y. 1995).

24 A defendant is vicariously liable if it “has the right and ability to supervise the infringing  
25 activity and also has a direct financial interest in such activities.” A&M Records, 239 F.3d at  
26 1022; Fonovisa, 76 F.3d at 262.

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27  
28 <sup>8</sup> Of course, Napster users infringe newly released, and even not yet released,  
recordings. E.g., 6/5/01 Schafer Decl. ¶ 6.

1           **A.     Napster Has The Right And Ability To Supervise Users’ Conduct.**

2           Every one of the recognized indicia of the “right and ability to supervise” is present here.

3           **First**, “[t]he ability to block infringers’ access to a particular environment for any reason  
4 whatsoever is evidence of the right and ability to supervise.” A&M Records, 239 F.3d at 1023; see  
5 Fonovisa, 76 F.3d at 262 (defendant “had the right to terminate vendors for any reason” and  
6 “controlled the access of customers to the swap meet area.”); Shapiro, Bernstein & Co. v. H.L.  
7 Green Co., 316 F.2d 304, 306-08 (2d Cir. 1963). Napster specifically reserves “the right to refuse  
8 service and terminate accounts in their discretion, including, but not limited to, if Napster believes  
9 that user conduct violates applicable law or is harmful to the interests of Napster, its affiliates, or  
10 other users, or for any other reason in Napster’s sole discretion, with or without cause.” Kessler  
11 Depo., Ex. 19; see A&M Records, 239 F.3d at 1023-24. Napster *has* exercised its right to  
12 terminate users, Kessler Decl. ¶ 23, gave its “moderators” significant authority to discipline users,  
13 Fanning Depo., Ex. 197, and blocks the IP addresses of those who use “bots” on the Napster  
14 servers, 8/7/01 Pierre-Louis Decl., ¶ 13, Ex. 11. (Napster has now graphically illustrated its  
15 absolute control by prohibiting transfers of music files by its users. Id., ¶ 10, Ex. 8.)

16           **Second**, Napster controls the “environment of its users’ experience.” Brooks Depo., Ex. 80  
17 at 002176. Napster controls *what* is copied – only those specific files indexed, selected, and  
18 provided by Napster in response to a search request can be copied; and it controls *when* and *from*  
19 *whom* copies can be made – only *when* Napster users are logged onto the Napster system, and only  
20 *from* other Napster users accessed through the Napster system.

21           **Third**, Napster has the ability to supervise its users’ conduct by implementing filtering  
22 systems to block infringing works. Napster refused to implement *any* filtering system until forced  
23 to do so. Then, Napster refused to fully police infringement, including refusing to block by artist  
24 or song title; block by album titles (which plaintiffs had provided from the beginning); block  
25 reverse names (e.g., “Presley Elvis” or “Rock Jailhouse”), which Napster did only after plaintiffs’  
26 expert wrote and provided the very simple program necessary to do so; block so-called “generic”  
27 names of artists or song titles (e.g., “The Eagles” or “Butterfly”); use MD5 hash marks (which  
28 Napster had collected from its inception); and make its blocking algorithm as broad as its search

1 algorithm. Each of these methods had been proposed by plaintiffs many times. See, e.g., 3/2/01  
2 Tr. 45:3-9; 3/26/01 Farmer Decl. ¶¶ 4-20; Plaintiffs’ 3/27/01 Non-Compliance Report at 1, 15.  
3 Napster either refused, or long delayed, in implementing any of these procedures. As late as June  
4 6, 2001, Napster **admitted** that it could, but would not, do more to prevent infringement of noticed  
5 works. When discussing its failure to prevent infringement, Napster’s counsel admitted that even  
6 Napster’s primitive, ineffective text-based filtering could block more infringing works: “We do  
7 have to make a value judgment, we do have to make a subjective value judgment [on what to  
8 block] . . .” 6/6/01 Tr. at 14. Napster also admitted that it could avoid its purported concern of  
9 “overfiltering” generic names by filtering back any noninfringing works. 6/16/01 Tr. at 31-32; see  
10 also, e.g., 3/26/01 Farmer Decl. ¶ 13.

11 **Fourth**, Napster had the ability to supervise users’ conduct by employing procedures to  
12 block infringing works. Most important, Napster could have chosen to run its business like every  
13 other media company by adopting a “filter-in” system instead of its infringement-prone approach.  
14 7/13/00 Farmer Decl. ¶¶ 3-4; 3/26/01 Farmer Decl. ¶ 4; Plan For Ascertaining Plaintiffs’ Rights,  
15 filed 9/5/00, at 5-7. Under such a “filter-in” approach (a form of which it implemented long ago  
16 for its New Artists Program), Napster would permit only those works for which it first received  
17 authorization to be copied and distributed on its system (as do all other legitimate users of  
18 copyrighted works). Had Napster done so, there would have been virtually no – or none at all –  
19 infringement. Such a “filter-in” system is within the “boundaries” of the Napster system, as such a  
20 system is based on the Napster search index. See 239 F.3d at 1024 (search index within the  
21 boundaries of Napster’s system). But Napster refused to implement a “filter-in” system – not  
22 because it could not be done, but because Napster claimed “it involved logistically and practically  
23 a fair amount of difficulty.” 6/6/01 Tr. at 22.

24 **Fifth**, until ordered to do so, Napster refused to log and collect data of all music offered for  
25 sharing and listed on its index – which it could easily have done, and which would have been  
26 invaluable in policing its system. Kessler Depo. 219:1-4; 5/3/01 Tr. at 48-52. Similarly, Napster  
27 could have collected user identification and other information (which it refused to do) to help  
28 identify infringing users. 5/3/01 Tr. at 47; 3/1/00 Farmer Decl. ¶ 30 (physical address of users).

1 *Sixth*, the “supervisory” element also is satisfied by evidence that the defendant  
2 “promoted” the site where infringement occurred: “[P]ervasive participation in the formation and  
3 direction’ of the direct infringers, including promoting them (*i.e.*, creating an audience for them),”  
4 puts the defendant “in a position to police the direct infringers,” thus satisfying this element.  
5 Fonovisa, 76 F.3d at 263, quoting Gershwin, 443 F.2d at 1163. It is undisputed that Napster has  
6 gone far beyond the generalized promotional activities in Fonovisa by, for example, specifically  
7 advertising and promoting its service as one where users will “*never come up empty handed* when  
8 searching for [their] *favorite music* again!” Brooks Depo., Ex. 111 (emphasis added).

9 Where a defendant is “in a position to police the infringing conduct,” its “failure to police  
10 the conduct” gives rise to vicarious liability. Gershwin, 443 F.2d at 1162-63. The Ninth Circuit  
11 put it even more emphatically: “To escape imposition of vicarious liability, the reserved right to  
12 police *must be exercised to its fullest extent*. Turning a blind eye to detectable acts of  
13 infringement for the sake of profit gives rise to liability.” A&M Records, 239 F.3d at 1023  
14 (emphasis added); see Chess Music, Inc. v. Sipe, 442 F. Supp. 1184, 1185 (D. Minn. 1977);  
15 RCA/Ariola, 845 F.2d at 777-78; Shapiro, Bernstein, 316 F.2d at 306-07. Napster, of course,  
16 never exercised its right to police to the “fullest extent.” A&M Records, 239 F.3d at 1023. The  
17 recordings subject to this motion were still available long after Napster was served with notice, and  
18 as late as July 1, 2001. 7/9/01 Pierre-Louis Decl. ¶¶ 7-10; 7/9/01 Schafer Decl. ¶¶ 2-4.

19 **B. Napster Financially Benefits From Its Users’ Infringing Activity.**

20 The “financial benefit” element is satisfied where infringing activity “acts as a ‘draw’ for  
21 customers.” A&M Records, 239 F.3d at 1023, quoting Fonovisa, 76 F.3d at 263-64 (infringing  
22 activities “enhance the attractiveness of the venue to potential customers.”); see PolyGram Int’l  
23 Publishing, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1333 (D. Mass. 1994) (trade show  
24 participants “derived a significant financial benefit from the attention” attendees paid to the  
25 infringing music being played). Napster admits that its value is based on “the quantity and quality  
26 of music available.” Richardson Depo. 112:18-113:2; see Parker Depo., Ex. 254, at 00099  
27 (“Developing our user base early on and achieving that ‘critical mass’ of available songs will be  
28 important to our success”); Teece Rep., pp. 4-5; see also Hardenburgh, 982 F. Supp. at 513 (“the

1 quantity of adult files available to customers [on defendant’s bulletin board] increased the  
2 attractiveness of the service.”); Webbworld I, 968 F. Supp. at 1177 (copyrighted photographs  
3 “enhanced the attractiveness of the Netpics website to potential customers”); Sega I, 857 F. Supp.  
4 at 684 (defendants profited by the unlawful activities of their electronic bulletin board because “the  
5 existence of this distribution network for Sega video game programs increases the prestige of the  
6 MAPHIA bulletin board”).

7 Napster always has been a for-profit, commercial entity. Richardson Depo. 114:16-25;  
8 115:24-116:13 (intended to make a profit); 106:1-11 & Ex. 127 (Executive Summary re company  
9 plans); Ex. 129 (venture capital presentation); 277:25-278:5 & Ex. 153 (e-mails re value of  
10 company); Ex. 254 (marketing and development plans, including advertising and merchandise  
11 sales); Teece Rep. pp. 4-12. In fact, Napster is now advertising a paid subscription service to be  
12 launched in late summer. 7/9/01 Pierre-Louis Decl. ¶ 4 & Ex. 3 (Napster home page seeking  
13 testers for new subscription service); 8/7/01 Pierre-Louis Decl., ¶ 12, Ex. 10 (press release). The  
14 use of plaintiffs’ music to build an enormous user base ultimately resulted in Napster’s ability to  
15 attract investment based on a valuation of the company at \$60-\$150 million. 8/7/01 Pierre-Louis  
16 Decl., ¶ 11, Ex. 9 (70 million users); Richardson Depo. 80:17-85:16 (Napster received a cash  
17 infusion of over \$13 million from Hummer Winblad for a portion of the company, among other  
18 investors), 132:22-133:11 (Napster’s value in early 2000, even with this lawsuit pending, pegged at  
19 \$60 million to \$150 million).

20 **V. NAPSTER’S INFRINGING CONDUCT IS WILLFUL AS A MATTER OF LAW.**

21 There can be no question that Napster’s infringement was willful: Napster specifically  
22 designed its system to facilitate the copying and distribution of copyrighted music in order to  
23 “undermine” the music industry; it knew its users were “exchanging pirated music”; it built its  
24 business by advertising the availability of copyrighted music; its own experienced executives  
25 downloaded copyrighted works using the Napster system; and it continued to delay and operate in  
26 defiance of copyright law after repeated notice of infringement, and after the modified preliminary  
27 injunction was entered by this Court. A determination of willfulness is appropriate on summary  
28 judgment when there is no genuine dispute of material fact or when the defendant is unable to

1 show that it had a good faith, reasonable belief that its conduct was not infringing. See, e.g., Peer  
2 Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1335-1336 (9th Cir. 1990); Sega II, 948 F. Supp.  
3 at 936.<sup>9</sup>

4 The facts underlying Napster's willful conduct are not in dispute; and Napster will not be  
5 able to show that it had a good faith, reasonable belief that its conduct was innocent. See Pausa,  
6 909 F.2d at 1336 ("To refute evidence of willful infringement, [defendant] must not only establish  
7 its **good faith** belief in the innocence of its conduct, it must also show that it was **reasonable** in  
8 holding such a belief.") (emphasis added); see also Playboy Enters., Inc. v. Sanfilippo, 46  
9 U.S.P.Q.2d 1350, 1356 n.9 (S.D. Cal. 1998). A determination of willfulness is amply supported by  
10 Napster's deliberate conduct designed to facilitate the infringement of plaintiffs' music on a  
11 previously unprecedented scale, and to build Napster's business on that wholesale infringement.

12 Willfulness means that a defendant knew or had reason to know that its conduct constituted  
13 infringement, or that it acted in reckless disregard of a copyright holder's rights. Fitzgerald  
14 Publishing Co., Inc. v. Baylor Publishing Co., 807 F.2d 1110, 1115 (2d Cir. 1986); Spectravest,  
15 Inc. v. Fleet Street, Ltd., 13 U.S.P.Q.2d 1457, 1461 (N.D. Cal. 1989). Thus, Napster's business  
16 plan essentially is the very definition of willfulness. Frequently, there will be little or no direct  
17 evidence of willfulness; such conduct is proven by inference from the surrounding circumstances.  
18 N.A.S. Import Corp. v. Chenson Enters., Inc., 968 F.2d 250, 252 (2d Cir. 1992). Here, although  
19 unequivocal inferences certainly can be drawn to further seal the conclusion that Napster's  
20 infringement was willful, the starting point is the overwhelming direct evidence that Napster knew  
21 and had reason to know that its system, which it designed for the purpose of widescale  
22 infringement, had the intended result.

23 Napster knew that its conduct was facilitating the "exchanging of [millions of copies of]  
24 pirated music." See supra at section III(B). Napster acted in blatant disregard of plaintiffs' rights,  
25 boasting that it would "undermine" and "usurp" the record industry and traditional music outlets.  
26 See supra at 5. Where a defendant conducts business with an "infringe-now, negotiate-later"

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28 <sup>9</sup> Willful infringement allows recovery of enhanced statutory damages. 17 U.S.C.  
§ 504(c)(2).

1 approach, that conduct is willful. See, e.g., Wildlife Express Corp. v. Carol Wright Sales, 18 F.3d  
2 502, 514 (7th Cir. 1994) (willfulness supported by fact that defendant was willing to risk possible  
3 infringement suits as a “cost of doing business”); Chi-Boy Music v. Charlie Club, Inc., 930 F.2d  
4 1224, 1228 (7th Cir. 1991). “Increased statutory damages may be necessary in a particular case to  
5 prove that it ‘costs less to obey the copyright laws than to violate them.’” Wildlife Express, 18  
6 F.3d at 514.

7 Napster is fully cognizant of copyright law and the protection of intellectual property  
8 rights. See supra at 8; Pausa, 909 F.2d at 1336 (defendant, “a corporation engaged in the business  
9 of manufacturing and distributing copyrighted works,” adjudicated a willful infringer); Fitzgerald  
10 Publishing, 807 F.2d at 1115; N.A.S. Import, 968 F.2d at 253; see also Castle Rock Entertainment  
11 v. Carol Publishing Group, 955 F. Supp. 260, 267 (S.D.N.Y. 1997) (where defendants were  
12 “sophisticated with respect to [copyright] matters . . . the record provides clear evidence, at a  
13 minimum, of defendants’ reckless disregard for the possibility that their conduct amounted to  
14 copyright infringement”).

15 Napster continued to engage in its infringing conduct after notice that the system it  
16 designed was enabling the massive, viral infringement of plaintiffs’ copyrights. See supra at 10-  
17 11. “[E]vidence that notice has been accorded to the defendants before the specific facts found to  
18 have constituted infringement occurred is perhaps the most persuasive evidence of willfulness.”  
19 Superior Form Builders v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 496 (4th Cir. 1996),  
20 citing Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1021 (7th Cir. 1991) (“one who  
21 undertakes a course of infringing conduct may neither sneer in the face of the copyright owner nor  
22 hide its head in the sand like an ostrich”). Indeed, immediately after the Ninth Circuit confirmed  
23 that the uploading of an MP3 file name to Napster’s search index was an infringing distribution,  
24 Napster defiantly encouraged its users to “[s]tay connected to the Napster Community by running  
25 the Napster application even when you’re not actively searching for MP3s . . .” 8/7/01 Pierre-  
26 Louis Decl., ¶ 9, Ex. 7. Of course, “running the Napster application” resulted in precisely the  
27 infringing distribution condemned by the Ninth Circuit.

28 Even after entry of the modified preliminary injunction, Napster made a business decision

1 to avoid or delay its obligation to prevent users from infringing plaintiffs’ copyrights while it  
2 attempted to transition to a paid service. Its refusal to employ the most obviously effective means  
3 of preventing infringement is perhaps the strongest evidence of Napster’s “reckless disregard” of  
4 copyright holders’ rights. See supra at 10-11. See, e.g., Playboy Enters., Inc. v. Webbworld, Inc.,  
5 991 F. Supp. 543, 553-554 (N.D. Tex. 1997) (“Webbworld II”) (after TRO, defendant did not  
6 implement a system that would reliably delete even obvious infringements). Even after being  
7 ordered to immediately cease all infringement of noticed works by this Court and the Ninth  
8 Circuit, Napster chose the most ineffectual way to filter, ignored plaintiffs’ numerous suggestions,  
9 falsely represented full compliance, provided and then missed deadlines, and made changes only  
10 after plaintiffs, each time, proved that Napster was not adequately policing its system. At the same  
11 time that Napster was purporting to filter infringing music, it permitted its bulletin boards to be  
12 used to disseminate to its users alternative file-naming conventions to *bypass* these same filters.  
13 3/27/01 Pierre-Louis Decl. ¶ 17 & Ex. 22. Plaintiffs advised Napster of that fact, but to no avail.  
14 Id., Ex. 1. Napster also provided its users with a road map to rename their files. 4/10/01 McDevitt  
15 Decl. ¶ 4 & Ex. 3.

16 Initially, Napster justified its incomplete, text-based filtering by claiming that any other  
17 method of filtering was not feasible. Ault Decl. ¶ 9 (“Napster can only locate infringing material  
18 listed on its search indices by reference to file names created by Napster’s users. Napster’s  
19 solution (or variations thereof) [*i.e.*, text-based filtering] is the only technologically feasible  
20 solution that exists . . .”); see also Napster 4/3/01 Compliance Report at 17-19 (fingerprinting  
21 technology “remains, at the present day, more a theoretical solution than a commercially  
22 practicable one.”). At the same time, Napster *knew* that text-based filtering would not work since  
23 Napster permits users to name and re-name their files. Id. at ¶¶ 6, 43. Soon thereafter, Napster  
24 excused its failure to block infringing works on the pretext that it was (belatedly) working on  
25 exactly the fingerprinting system plaintiffs had long ago suggested, and that Napster had just  
26 claimed was not feasible.

27 Similarly, starting with its very first March 13, 2001 “Compliance” Report, Napster falsely  
28 asserted that “Napster has *fully* and in good faith complied with this Court’s Orders.” Napster

1 3/13/01 Compliance Report at 37:9 (emphasis added). As plaintiffs then demonstrated, *every one*  
2 of the recordings listed in the Record Company Plaintiffs' Complaint (plus others) still were  
3 available on the Napster system (and most could be found simply by searching artist name or song  
4 title). *Id.* ¶¶ 3-13. In its following April 3 "Compliance" Report, Napster again falsely represented  
5 that "zero" of the works from the complaint could be found by searching by artist and title, and that  
6 for the other noticed works, "no results" were returned "in the majority of instances." Napster  
7 4/3/01 Compliance Report at 5. Yet plaintiffs again found available *all* of the works from the  
8 Record Company Plaintiffs' Complaint, among thousands of others. 4/10/01 McDevitt Decl. The  
9 Music Publisher Plaintiffs located massive infringements of the two songs in their Complaint –  
10 "Unchained Melody" and "Jailhouse Rock." 3/26/01 Keats Decl. This prompted the Court to  
11 admonish Napster that its compliance efforts were "disgraceful." 4/10/01 Tr. at 113.

12 Later, at the May 3, 2001, hearing, Napster, while still permitting infringement, stated it  
13 "might implement" blocking works by the album titles that had been provided by plaintiffs since  
14 early March. 5/3/01 Tr. at 16:9-12. It also was severely limiting its blocking (only recently  
15 instituted) by MD-5 hash or checksum – which it had been collecting for *all* music on its search  
16 index since its inception (3/26/01 Farmer Decl. ¶ 14-17; Napster 6/3/01 Compliance Report at 17-  
17 18) and otherwise clearly was not blocking infringement "to the fullest extent." 5/3/01 Tr. at 10:5-  
18 11:22. The situation still was not remedied by the next hearing on June 6, 2001 – *at least 75%* of  
19 the Record Company recordings listed in their Complaint were available (as well as *95%* of the  
20 "pre-release" music on the "Billboard Hot 100" list of popular recordings for which plaintiffs had  
21 given Napster notice.) 6/5/01 McDevitt Decl. ¶¶ 3-6; 6/5/01 Schafer Decl. ¶¶ 3-5. Remarkably, at  
22 the June 6 hearing, *Napster admitted it was not blocking all the copyrighted works that it could –*  
23 *but that it was making a "subjective value judgment" on what to filter.* 6/6/01 Tr. at 14.

24 On June 27, Napster installed its new, long-promised filtering system. Plaintiffs provided  
25 this Court with evidence that, among other things, over half of the works identified in the Record  
26 Company Plaintiffs' Complaint continued to be listed on the Napster index within the week  
27 following June 27. 7/9/01 Pierre-Louis Decl. ¶¶ 7-10. Soon after, Napster voluntarily disabled file  
28 transfers because it could not prevent infringement (Carey Decl. ¶ 26), essentially *conceding* that it

1 had not previously prevented infringement of plaintiffs’ works. That concession was echoed just a  
2 few days ago by Napster’s new CEO: “*The next step* is to complete the task of transforming this  
3 phenomenon [Napster] into a business that *respects copyrights . . .*” 8/7/01 Pierre-Louis Decl. ¶ 6,  
4 Ex. 3 (emphasis added). Napster’s disrespect and disregard for copyright laws was calculated,  
5 intentional, and willful as a matter of law.

6 **VI. NAPSTER’S DEFENSES ARE MERITLESS AS A MATTER OF LAW.**

7 With respect to affirmative defenses, “the moving party has no burden to negate or disprove  
8 matters on which the non-moving party will have the burden of proof at trial. The moving party  
9 need only point out to the court that there is an absence of evidence to support the non-moving  
10 party’s case.” Casey by & through Casey v. Old Line Life Ins. Co. of Am., 996 F. Supp. 939, 943  
11 (N.D. Cal. 1998), citing Celotex Corp., 477 U.S. at 325. Regardless of where the burden is placed,  
12 Napster’s defenses are meritless as a matter of law. See A&M Records, 239 F.3d at 1015 n.3.<sup>10</sup>

13 **A. Napster’s Sony Defense Is Meritless As A Matter Of Law.**

14 The Ninth Circuit held that Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417  
15 (1984), was inapplicable because where, as here, “a computer system operator learns of specific  
16 infringing material available on his system and fails to purge such material from the system, the  
17 operator knows of and contributes to direct infringement. . . . [S]ufficient knowledge exists to  
18 impose contributory liability when linked to demonstrated infringing use of the Napster  
19 system. . . . The record supports the district court’s finding that Napster has actual knowledge that  
20 specific infringing material is available using its system, that it could block access to the system by  
21 suppliers of the infringing material, and that it failed to remove the material.” A&M Records, 239  
22

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23 <sup>10</sup> This Memorandum addresses Napster’s Sony, DMCA, and fair use defenses.  
24 Napster’s other defenses – First Amendment, waiver, implied license, copyright misuse, and the  
25 Audio Home Recording Act – also are without merit. See A&M Records, 239 F.3d at 1024-25  
26 (AHRA); accord, Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d  
27 1072, 1077 (9th Cir. 1999); A&M Records, 239 F.3d at 1026-27 (waiver, implied license,  
28 copyright misuse). Summary judgment on these defenses is appropriate. See UMG Recordings,  
Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 353 (S.D.N.Y. 2000) (waiver); Worldwide Church of  
God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1114-15 (9th Cir. 2000) (implied  
license); Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400,  
1408 (9th Cir. 1986) (misuse).

1 F.3d at 1021-2; see also, e.g., Cable/Home Communication, 902 F.2d at 837, 846. Of course, in  
2 light of plaintiffs’ myriad notices of infringement, the evidence of Napster’s knowledge that  
3 specific infringing material is available on its system is even more overwhelming now than when  
4 the Ninth Circuit ruled.

5         The Ninth Circuit’s conclusion illustrates several of the fundamental differences between  
6 Napster and the defendant in Sony: Napster is unlike a mere manufacturer, and therefore does not  
7 qualify as a “staple article of commerce.” Napster is the operator of a fully-integrated **system**,  
8 maintains operational control over every aspect of its system, and has an ongoing relationship with  
9 its users while they are copying **and distributing** copyrighted music. By contrast, in Sony, the  
10 defendant merely manufactured VCRs, its involvement with the product ended the moment the  
11 device was sold, and it had no further connection, relationship with, or control over, the product or  
12 the consumers who used it to copy. 464 U.S. at 440. The Court recognized that, where there exists  
13 “an ongoing relationship between the direct infringer and the contributory infringer at the time the  
14 infringing conduct occur[s],” the doctrine does not apply. Id. at 437. Rather, the doctrine applies  
15 only to the sale of products that may be used for copying over which the manufacturer is not “in a  
16 position to control the use of copyrighted works by” the products’ users. Id. at 437-38; see RCA  
17 Records v. All-Fast Systems, Inc., 594 F. Supp. 335, 339 (S.D.N.Y. 1984) (“The Sony Corp.  
18 decision extends protection only to the manufacturer of the infringing machine, not to its  
19 operator”); A&M Records, Inc. v. General Audio Video Cassettes, 948 F. Supp. 1449, 1456-57  
20 (C.D. Cal. 1996); A&M Records, 114 F. Supp. 2d at 916-17 (“Courts have distinguished the  
21 protection Sony offers to the manufacture and sale of a device from scenarios in which the  
22 defendant continues to exercise control over the device’s use.”). Thus, the Sony doctrine does not  
23 apply to Napster’s conduct in facilitating its users’ **distribution** of copyrighted music. Sony, 464  
24 U.S. at 425 (“No issue concerning the transfer of tapes to other persons” was raised). Moreover,  
25 the Sony defense never has been applied, and is inapplicable, to vicarious infringement. A&M  
26 Records, 239 F.3d at 1022-23.

27         In addition, the Napster system has no “substantial” non-infringing use. In Sony, the  
28 “staple article of commerce” doctrine applied because the VCR was “**widely used** for legitimate

1 unobjectionable purposes” (464 U.S. at 442, emphasis added) and the “*primary use* of the machine  
2 for most owners” was noninfringing. *Id.* at 423 (emphasis added). Here, on the other hand, almost  
3 90% (and likely more) of the music available on Napster was infringing – and *every* Napster user  
4 sampled by plaintiffs was engaged in some infringement while using the Napster system. *See*  
5 *supra* at 7-8; *General Audio Video*, 948 F. Supp. at 1456 (“although time-loaded cassettes can be  
6 used for legitimate purposes, these purposes are insubstantial given the number of [defendant’s]  
7 customers that were using them for counterfeiting purposes”); *Sega I*, 857 F. Supp. at 685  
8 (rejecting defendant’s reliance on “incidental capabilities” that “have not been shown to be the  
9 primary use” of defendant’s computer game copiers); *Atari, Inc. v. JS&A Group, Inc.*, 597 F. Supp.  
10 5, 8 (N.D. Ill. 1983).<sup>11</sup>

11 **B. Napster Cannot Establish Eligibility For DMCA Limitation On Liability.**

12 The DMCA is an affirmative defense. DMCA House Report 105-551 (105th Cong. 2d  
13 Sess.) at 26 (“a defendant asserting [a DMCA limitation on liability] as an affirmative defense...  
14 bears the burden of establishing its entitlement.”). The DMCA is designed to provide copyright  
15 owners with “reasonable assurance that they will be protected against massive piracy.” DMCA  
16 Senate Report 105-190 (105th Cong. 2d Sess.) at 8. It is intended “to exclude sophisticated pirate  
17 directories – which refer Internet users to other selected Internet sites where pirate software, books,  
18 movies, and music can be downloaded or transmitted – from the safe harbor.” *Id.* at 48. Thus, the  
19 DMCA limits the liability only of *innocent* infringers; that limitation “is not presumptive, but  
20 granted only to ‘innocent’ service providers *who can prove* they do not have actual or constructive  
21 knowledge of the infringement . . .” *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619,  
22 625 (4th Cir. 2001). “The DMCA’s protection of an innocent service provider disappears at the

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24 <sup>11</sup> The Ninth Circuit held that this “substantial non-infringing use” inquiry required  
25 analysis of the system’s “current *and future* noninfringing use.” 239 F.3d at 1021 (emphasis  
26 added). However, none of the claimed “non-infringing” uses of Napster’s system has ever come  
27 to fruition in any significant way. Indeed, when Napster was forced to begin filtering out  
28 infringing files, even in the half-hearted way it went about it, the average number of files shared  
per Napster user purportedly declined almost immediately from 200 to 17 (6/16/01 Tr. 5:21-23),  
effectively illustrating that its use overwhelmingly was infringing. (And, as plaintiffs’ non-  
compliance reports demonstrated, even these remaining available files were replete with  
infringing material.)

1 moment the service provider loses its innocence, *i.e.*, at the moment it becomes aware that a third  
2 party is using its system to infringe.” Id.

3 Napster cannot meet its burden of proving the DMCA applies to its conduct for numerous  
4 independent reasons.

5 **First**, Napster’s actual knowledge of direct infringement from numerous sources (see supra  
6 at section III(B)) renders this defense unavailable. Section 512(d) expressly **disqualifies** a  
7 defendant with “actual knowledge that the material or activity is infringing,” 17 U.S.C.  
8 § 512(d)(1)(A), or that is “aware of facts or circumstances from which infringing activity is  
9 apparent.” 17 U.S.C. § 512(d)(1)(B). Napster’s actual (let alone constructive) knowledge clearly  
10 satisfies either standard.

11 **Second**, section 512(d) is unavailable because Napster cannot prove that it “does not  
12 receive a financial benefit directly attributable to the infringing activity, in a case in which [it] has  
13 the right and ability to control such activity.” Congress intended this standard to **codify** the  
14 established law of vicarious infringement. DMCA House Report 105-551 (105th Cong., 2d Sess.)  
15 at 25-26 (“The financial benefit standard in subparagraph (B) is intended to codify and clarify the  
16 direct financial benefit element of vicarious liability . . . The ‘right and ability to control’ language  
17 in Subparagraph (B) codifies the second element of vicarious liability.”).<sup>12</sup>

18 **Third**, Napster is not an “information location tool” under section 512(d). The section  
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20 <sup>12</sup> The Ninth Circuit’s statement, at the preliminary injunction stage, that **potential**  
21 liability for contributory and vicarious infringement does not render the DMCA inapplicable *per*  
22 *se* (239 F.3d at 1025) does not apply where plaintiffs have demonstrated that Napster **is** liable for  
23 contributory and vicarious infringement. Moreover, whether or not DMCA protection is  
24 inapplicable *per se*, the DMCA’s plain language makes clear it is inapplicable here because of  
25 Napster’s actual knowledge of infringement (see supra at section III), as well as its awareness of  
26 facts and circumstances from which obvious and conspicuous infringing activity is apparent. See  
27 S. Rep. 105-190, 105th Cong., 2nd Sess. 1998, at 49 (other than actual knowledge, “awareness”  
28 of infringement is imputed “with respect to pirate sites or in similarly obvious and conspicuous  
circumstances”). Similarly, examining “all relevant aspects of the relationship” between Napster  
and its users, Napster’s demonstrated level of control satisfies any standard required to remove  
DMCA protection from vicarious infringement. See H. R. Rep. 105-551(I), 105th Cong., 2nd  
Sess. 1998, at 26 (“The ‘right and ability to control’ language . . . is intended to **preserve existing**  
**case law** that examines all relevant aspects of the relationship between the primary and secondary  
infringer.”) (emphasis added).

1 512(d) limitation on liability applies only to a defendant engaged in “referring or linking users to  
2 **an online location** containing infringing material or infringing activity” (emphasis added).  
3 Napster does not search for or link to Internet websites; it locates individual infringing files in the  
4 computer hard drives of Napster users. Thus, Napster connects users to Napster’s own network of  
5 servers in order to link them to each others’ home computers, not to “online locations.”

6 **Fourth**, Napster cannot establish that it qualifies as a “service provider” within the  
7 meaning of section 512(d). A “service provider” is “a provider of online services or network  
8 access, or the operator of facilities therefor . . .” 17 U.S.C § 512(k). These terms are not defined in  
9 the statute or legislative history, but it cannot be enough for any commercial entity doing business  
10 involving the Internet to claim to be an ISP. Napster does not provide “online services” or  
11 “network access”; on the contrary, access to the Napster system requires a third party “provider of  
12 online services” and “network access.”

13 **Fifth**, Napster has not been in compliance with section 512(i), which requires that the party  
14 seeking the benefit of any DMCA safe harbor “has **adopted** and **reasonably implemented**, and  
15 informs subscribers and account holders of the service provider’s system or network of, a policy”  
16 to terminate repeat infringers (emphasis added). This provision is to ensure that “those who  
17 repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual  
18 property rights of others should know that there is a realistic threat of losing that access.” H.R.  
19 Rep. No. 551(II), at 61, 1998 WL 414916, at \*154. See A&M Records, 54 U.S.P.Q.2d at 1753  
20 (plaintiffs “have produced evidence that Napster’s copyright compliance policy is neither timely  
21 nor reasonable within the meaning of subparagraph 512(i)(A)”). In order to maintain the strict  
22 anonymity and confidentiality that its users require to pirate plaintiffs’ music, Napster specifically  
23 designed its system so that it could not comply with 512(i). 3/1/00 Farmer Decl. ¶¶ 25-30. To this  
24 day, Napster conceals the identities of its users – to avoid “endanger[ing] them (especially since  
25 they are exchanging ‘pirated music’).” Parker Depo. 160:1-162:14, Ex. 254, at 00100.

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1           **C.     Napster Users’ Copying And Distribution Of The Entirety Of The Same**  
2                           **Copyrighted Works Plaintiffs Are Attempting To Sell Is Not ‘Fair Use.’**

3           The Ninth Circuit recognized the obvious: “Napster users are not fair users.” A&M  
4 Records, Inc., 239 F.3d at 1014-15. Fair use routinely is determined on summary judgment.  
5 Worldwide Church of God, 227 F.3d at 1115; Los Angeles News Serv. v. Reuters TV Int’l, 149  
6 F.3d 987, 993-95 (9th Cir. 1998); Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1986); Supermarket  
7 of Homes, Inc., 786 F.2d at 1408; Los Angeles News Serv. v. Tullo, 973 F.2d 791, 796 (9th Cir.  
8 1992); UMG Recordings, 92 F. Supp. 2d at 350-52.

9           In evaluating fair use, the Court considers four nonexclusive factors (17 U.S.C. § 107),  
10 which are to be weighed together, in light of the purposes of copyright. Campbell v. Acuff-Rose  
11 Music, Inc., 510 U.S. 569, 577-78 (1994); Harper & Row, Publishers, Inc. v. Nation Enters., 471  
12 U.S. 539, 549 (1985); Reuters, 149 F.3d at 993-95 (in evaluating whether to grant summary  
13 judgment, this Court “must balance the nonexclusive factors set out in 17 U.S.C. § 107” and where  
14 only one of four factors weighed in defendant’s favor, summary judgment was proper). None of  
15 the four factors favors Napster:

16           **1. Nature of the copyrighted work.** Plaintiffs’ musical works are creative renderings, the  
17 result of substantial time, effort, and money. Cottrell Decl. ¶ 5; Conroy Decl. ¶ 5; Eisenberg Decl.  
18 ¶¶ 5-8; Kenswil Decl. ¶¶ 5-7; 6/12/00 Vidich Decl. ¶ 3. Music is at “the core of intended copyright  
19 protection.” Campbell, 510 U.S. at 586; A&M Records, 239 F.3d at 1016.

20           **2. Amount and substantiality of the copied material.** Napster users copy the entirety of  
21 plaintiffs’ music. A&M Records, 239 F.3d at 1016. “[C]opying an entire work ‘militates against a  
22 finding of fair use.’” Worldwide Church of God, 227 F.3d at 1118, quoting Hustler Magazine, Inc.  
23 v. Moral Majority, Inc., 796 F.2d 1148, 1155 (9th Cir. 1986).

24           **3. Purpose and character of the use.** “This factor focuses on whether the new work  
25 merely replaces the object of the original creation or instead adds a further purpose or a different  
26 character. In other words, this factor asks ‘whether and to what extent the new work is  
27 “transformative.”” A&M Records, 239 F.3d at 1015, quoting Campbell, 510 U.S. at 579. Napster  
28 users “transform” nothing; they engage in “simple copying.” Id. at 590 n.21. Converting music

1 from a plastic disk (a CD) to a metal disk (a hard drive) is not “transformation.” UMG  
2 Recordings, 92 F. Supp. 2d at 351; see American Geophysical Union v. Texaco, Inc., 60 F.3d 913,  
3 923 (2d Cir. 1994) (photocopying not transformative); Reuters, 149 F.3d at 993; Infinity Broadcast  
4 Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998).

5 Also relevant is whether the use is “of a commercial nature or is for nonprofit educational  
6 purposes. . .” 17 U.S.C. § 107(1); Los Angeles Times v. Free Republic, 54 U.S.P.Q.2d 1453, 1465  
7 (C.D. Cal. 2000). Napster is a for-profit, commercial entity and its users’ bartering of recordings  
8 has no relation to any “nonprofit educational” purpose. The “crux” of this consideration is  
9 “whether the user stands to profit from the exploitation of the copyrighted material without paying  
10 the customary price.” Harper & Row, 471 U.S. at 562. “Direct economic benefit” is not required:  
11 “commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies  
12 of copyrighted works were made to save the expense of purchasing authorized copies.” A&M  
13 Records, 239 F.3d at 1015. Because “Napster users get for free something they would ordinarily  
14 have to buy,” their use is commercial. Id.; accord, Worldwide Church of God, 227 F.3d at 1118;  
15 American Geophysical Union, 60 F.3d at 924; Sega I, 857 F. Supp. at 687; 2 Nimmer & Nimmer,  
16 Nimmer On Copyright (2001) § 8B.01[D][2] at 8B-20 (“The individual who engages in audio  
17 home recording may not be seeking a commercial advantage by selling the recordings, but for fair  
18 use purposes his motivation is nevertheless commercial” because “he avoids the cost of purchasing  
19 records or prerecorded tapes”).

20 **4. Effect of the use on the potential market for the copyrighted work.** Napster’s use  
21 undermines commercial opportunities for plaintiffs in, at the very least, the digital download  
22 market. See UMG Recordings, 92 F. Supp. 2d at 352. Plaintiffs have prepared to and are  
23 attempting to sell the exact same digital copies of the exact same music owned by plaintiffs, to the  
24 exact same consumers to whom Napster provides that music for free. See generally Cottrell Decl.,  
25 Conroy Decl., Eisenberg Decl., Kenswil Decl., 6/12/00 Vidich Decl., Stoller Decl., 8/7/01 Pierre-  
26 Louis Decl. ¶¶ 15-17, Exs. 13-15; It is axiomatic that “[h]aving digital downloads available for  
27 free on the Napster system necessarily harms the copyright holders’ attempts to charge for the  
28 same downloads.” A&M Records, 239 F.3d at 1017. The focus is not on any single user, but the



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