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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 IN RE NAPSTER, INC., COPYRIGHT
14 LITIGATION.

CASE NO. MDL 00 1369 MHP

**PLAINTIFFS' REPORT ON
NAPSTER'S NON-COMPLIANCE
WITH MODIFIED PRELIMINARY
INJUNCTIONS**

15 _____
16 This Document Relates to:

17 *A&M Records, et al. v. Napster, Inc.*,
18 No. C 99 5183 MHP
and
19 *Jerry Leiber, et al. v. Napster, Inc.*
No. C 00 0074 MHP
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21
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23
24
25
26
27
28

TABLE OF CONTENTS

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

Page

INTRODUCTION.....1

I. PLAINTIFFS HAVE FULLY COMPLIED WITH THE UNPRECEDENTED REQUIREMENT TO PROVIDE LENGTHY LISTS OF COPYRIGHTED WORKS TO NAPSTER.4

II. BY USING AN INEFFECTIVE METHOD TO FILTER, NAPSTER IS NOT FULFILLING ITS OBLIGATION TO BLOCK ACCESS TO PLAINTIFFS’ WORKS.8

 A. Napster’s Defective Textual Filter.....9

 1. Virtually All of Plaintiffs’ Works Remain Available on Napster.....9

 2. The Gaping Hole In Napster’s Filter-- Only Filtering Files Named with *Both* Artist and Song.10

 3. Napster’s Search Functionality Returns More Than Its Filter Blocks.....11

 4. Napster is Not Filtering Obvious Variations.12

 5. Napster is Facilitating Its Users' Avoidance of the Filter.13

 B. The Checksum or MD5 Hash.....13

 C. Fingerprinting.....15

 D. Gracenote’s Digital Object Identifier.....15

 E. Filtering In.....16

 F. The Burden on Napster is Minimal17

III. PLAINTIFFS ARE NOT *REQUIRED* TO PROVIDE A FILENAME PRIOR TO OBTAINING PRELIMINARY RELIEF.....19

IV. NAPSTER’S “DEFENSE” OF OVER-FILTERING IS A RED HERRING.....23

V. CONFIDENTIALITY OF THE LISTS IS CRUCIAL TO ENSURE EFFECTIVENESS OF THE

CONCLUSION.....26

TABLE OF AUTHORITIES

CASES

	<u>Page(s)</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

<u>Basic Books, Inc. v. Kinko's Graphics Corp.,</u> 758 F. Supp. 1522 (S.D.N.Y. 1991)	20
<u>Broadcast Music, Inc. v. Niro's Palace, Inc.,</u> 619 F. Supp. 958 (N.D. Ill. 1985)	6
<u>Diamontiney v. Borg,</u> 918 F.2d 793 (9th Cir. 1990)	22
<u>Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.,</u> 109 F.3d 1394 (9th Cir. 1997)	24
<u>Hulex Music v. Santy,</u> 698 F. Supp. 1024 (D.H.H. 1988).....	6
<u>Marvin Music Co. v. BHC Ltd Partnership,</u> 830 F. Supp. 651 (D. Mass. 1993).....	23
<u>Orth-O-Vision v. Home Box Office,</u> 474 F. Supp. 672 (S.D.N.Y. 1979)	24
<u>RCA/Ariola International, Inc. v. Thomas & Grayston Co.,</u> 845 F.2d 773 (8th Cir. 1988)	20
<u>Sega Enterp. Ltd. v. MAPHIA,</u> 857 F. Supp. 679 (N.D. Cal. 1994).....	23
<u>Swallow Turn Music v. Wilson,</u> 831 F. Supp. 575 (E.D. Tex. 1993)	23
<u>Triad Systems Corp. v. Southeastern Express Co.,</u> 64 F.3d 1330 (9th Cir. 1995)	17
<u>UMG Recordings, Inc. v. MP3.com, Inc.,</u> 92 F. Supp. 2d 349 (S.D.N.Y. 2000).....	15
<u>United States v. W.T. Grant Co.,</u> 345 U.S. 629 (1953)	22
<u>Walt Disney Co. v. Powell,</u> 897 F.2d 565 (D.C. Cir. 1990).....	23
<u>West Publishing Co. v. Mead Data Central, Inc.,</u> 799 F.2d 1219 (8th Cir. 1986)	20

STATUTES

17 U.S.C. § 502(a).....	20
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1 **INTRODUCTION**

2

3 Napster has failed to abide by either the letter or spirit of this Court's Preliminary
4 Injunction. Plaintiffs have provided Napster with notice of over 675,000 copyrighted works.
5 Stunningly, every single song listed in the original complaint remains easily available on the Napster
6 system. In a very recent search for approximately 7000 of those works that Napster claims to have
7 filtered pursuant to plaintiffs' notices, approximately 70% of them could be found by simply searching
8 for the artist and song name.

9

10 Napster's so-called "filter" utterly fails to exclude even those files Napster claims it was
11 designed to filter. Moreover, even if Napster actually did what it said it was doing, innumerable other
12 gaps in its filter doom it to failure. Napster could have chosen to implement a much more effective filter
13 than it currently has by:

- 14 · implementing its checksum or MD5 hash technology, using fingerprinting
15 technology,
16 · using track unique identifier technology,
17 · using a filter-in methodology,
18 · making its text-based filter algorithm as "smart" as its search algorithm,
19 · having its text-based filter exclude files named with just songs, just artist, or
20 pieces thereof, and/or,
21 · incorporating fuzzy logic into the filter's algorithm.

22

23 Rather, Napster built an easily circumvented text-based filter that freely permits virtually
24 all of plaintiffs' recordings into the Napster system. Among the obvious ways that Napster users can
25 avoid the effect of the filter are by searching by and naming files by:

- 26 · song name,
27 · artist name,
28 · partial song name,
· partial artist name,

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- with obvious misspellings,
- with common words or numbers inserted into the song name,
- or by converting the artist or song name into "Pig Latin."

It is doubtful that Napster's self-selected, technologically archaic filter ever could significantly limit access to plaintiffs' music. Yet, Napster contemptuously refuses to employ an effective filter-- for fear that it might actually work.

It is not, and should not be, the plaintiffs' burden to dictate how Napster should filter. However, there are technologies readily available that would permit Napster more effectively to filter the files available on its system. (Napster already has built the capability into its system to implement immediately at least one of these -- checksum or MD5 hash -- but has chosen not to use it.) Plaintiffs should not have to stand idly by, while they watch their music unlawfully copied tens of billions of times, while Napster cynically claims that it is doing all that it can. Plaintiffs should not be required to endure the systematic theft of their property while Napster climbs a learning curve of what it can and must do.

This Report will detail overwhelming evidence that Napster is not filtering plaintiffs' music, regardless of how it interprets the Preliminary Injunction. Napster's Compliance Reports seek to distract this Court from focusing on Napster's almost willful disobedience of the Preliminary Injunction by attacking plaintiffs for their so-called "non-compliant" notices -- a disingenuous, easily refuted charge. This Court's intervention is necessary to prevent the Preliminary Injunction from being illusory -- with Napster continuing to operate its infringement business "as usual".

This Report on Napster's Non-Compliance will address five issues:

(1) Plaintiffs have undertaken substantial efforts to facilitate Napster's compliance with the Preliminary Injunction, an unprecedented burden for copyright owners. Napster's complaints that plaintiffs have provided "non-compliant" notices² is totally unfounded. In fact, plaintiffs' Notices have

1 an extremely high level of accuracy especially given the form in which plaintiffs normally maintain this
2 information, and the speed with which they provided it to Napster.

3 (2) Neither this Court nor the Court of Appeals limited Napster's obligations to the
4 particular, very limited filtering method that Napster alone selected. Napster has chosen to use the most
5 porous method to filter, ensuring virtually no impact on its system. Napster's Compliance Reports
6 completely fail to mention readily available, superior filtering methods, including the use of a MD5 hash
7 or checksum, a digital fingerprint, a track unique identifier or a filter-in methodology. In tandem, these
8 technologies would substantially assist Napster in complying with this Court's Preliminary Injunction.

9 (3) Both this Court and the Court of Appeals found that Napster created a system
10 which facilitates massive copyright infringement and that Napster is both a contributory and vicarious
11 infringer. Napster designed its system and business model in a way that makes it impossible for plaintiffs
12 to identify all of their copyrighted works that have been, are, or may be available over the Napster
13 system. Having said that, plaintiffs have provided to Napster file names that could be found at the
14 particular time searched. If no file names were found at that time, Napster was still provided notice of
15 the work in need of protection. Notwithstanding, Napster, turning a blind eye, deliberately ignored
16 plaintiffs' notices of copyrighted music that have not conveyed file name information. This abrogates
17 Napster's affirmative duty to monitor its system, and is indefensible given that file names are unnecessary
18 for Napster to filter.

19 (4) Napster's oft-repeated "defense" of overfiltering is an unnecessary problem of
20 its own making. The use of a more precise filter, rather than a rudimentary text-based filter, largely
21 would eliminate this issue, as would filtering in authorized content rather than attempting to filter out
22 unauthorized content. To the extent any overfiltering occurs, it is minimal, and it is the price Napster
23 must pay given the intentionally infringing system it built.

24 (5) Plaintiffs have set up a system to convey notices to Napster that provide vast
25 amount of information that otherwise would not be available to Napster. Confidentiality is important to
26 avoid circumvention of the Preliminary Injunction and to preserve plaintiffs' rights. Napster has
27 breached its confidentiality obligations, in direct violation of the Court's Protective Order.

28

1 The Court of Appeals determined that a preliminary injunction was "not only warranted,
2 but required." 239 F.3d at 1027. Its intent clearly was that Napster do all that it can to prevent
3 infringement before it occurred -- not to half-heartedly "cure" a relative handful of infringements after the
4 fact. The purpose of an injunction is to prevent continued harm in the future -- not to wait and give
5 lip-service to removing infringing material after infringement has occurred. Plaintiffs' copyrighted works
6 continue to be available on the Napster system in droves. Napster must be compelled to immediately
7 comply with the Preliminary Injunction. If Napster continues to demonstrate its unwillingness to comply
8 with the Court's Order and to block access to plaintiffs' copyrighted material, then the Court will have to
9 consider additional remedies.

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14 **I. PLAINTIFFS HAVE FULLY COMPLIED WITH THE UNPRECEDENTED**
15 **REQUIREMENT TO PROVIDE LENGTHY LISTS OF COPYRIGHTED**
16 **WORKS TO NAPSTER.**

17
18 In the eighteen days from March 5, 2001, to March 23, 2001, record company
19 plaintiffs created and provided to Napster (1) lists of 660,715 copyrighted works they own or control,
20 including artist name, album name, and song name; and (2) lists of 8,001,913 file names corresponding
21 to 328,074 works (with corresponding artist, album and song information) available on the Napster
22 system for those works where a file was available when plaintiffs searched the system. Plaintiffs put all
23 of this information into a commonly-used electronic format and conveyed it to Napster so that Napster
24 could easily and quickly use it. Record company plaintiffs also identified 75 pre-release recordings,
25 pursuant to paragraph 7 of the Preliminary Injunction. See generally Declaration of Stanley Pierre-
26 Louis.

27
28 In addition, the publisher plaintiffs created and provided to Napster lists with over
26,000 songs, identifying approximately five million⁴ file names. Declaration of Michael Keats

¶ 2. Though not required under the Court's Order, the publisher plaintiffs provided the names of recording artists for their works -- at substantial cost. Id. ¶¶ 14-17. As for the putative members of the publisher class, Napster has been provided with a data base of over 2.5 million copyrighted musical works owned or controlled by the putative class members. Id. ¶¶ 5-11.

Providing the information described above to Napster has required a gargantuan effort by plaintiffs. Because the lists of plaintiffs' works (which necessitated song-by-song identification) were not readily available, plaintiffs were required, among other things, to identify appropriate company sources to search for and review documents to certify ownership or control of the rights to the works, and create electronic lists of the works. To do so, plaintiffs needed the input of executives, attorneys, legal assistants, accountants, administrators, studio librarians, database specialists, and file clerks. Plaintiffs estimate that, to date, they have expended over 1,800 person hours, and the RIAA has expended over 600 additional person hours. Pierre-Louis Decl. ¶ 2; Keats Decl. ¶¶ 25-30.

In order for plaintiffs to provide the lists of file names, plaintiffs again shouldered a sizeable burden. Plaintiffs arranged for automated searches of the Napster system at various times in order to locate corresponding file names. By necessity, this searching had to be done in an automated manner given the enormous number of copyrighted works involved. These searches were conducted using combinations of artist name, album title, and song title. Whenever a search or series of searches disclosed any file names correlated to a work, all of the identified file names were provided to Napster. When no file name was located, Napster specifically was advised of that fact by the inclusion of the word "null" in the file name column. The file names also disclosed name variants that correlated to the works specified. All of these were provided to Napster, as were various naming conventions apparently implemented by Napster users to disguise the identity of a file's content so as to circumvent the filter.

Plaintiffs retained a specialized outside consulting firm to conduct the automated searches. Thus far, this retention has cost plaintiffs tens of thousands of dollars. By providing lists of their copyrighted works and also file names, when available, plaintiffs are doing far more than

1 customarily is required of copyright owners. See, e.g., Hulex Music v. Santy, 698 F. Supp. 1024,
2 1029 (D.H.H. 1988) (“ASCAP is under no legal obligation to provide defendant with a complete list of
3 the songs in its repertory.”); Broadcast Music, Inc. v. Niro’s Palace, Inc., 619 F. Supp. 958, 962-64
4 (N.D. Ill. 1985) (rejecting defense that BMI failed to provide defendants with a list of its copyrighted
5 material).

6
7 Plaintiffs coordinated with Napster to deliver the information they gathered electronically
8 through password-protected lists at an agreed upon Internet site. This practice was changed after
9 Napster publicly disclosed the password information and location. Currently plaintiffs deliver
10 password-protected lists to a site selected by Napster. Plaintiffs will continue to deliver lists of their
11 copyrighted works on an ongoing basis, together with file names when available.

12
13 Plaintiffs undertook substantial efforts to provide Napster with lists of works that
14 plaintiffs own in a format in which plaintiffs do not normally keep this information and to do so very
15 quickly. Pierre-Louis Decl. ¶¶ 8-15, 26-36. In a disingenuous attempt to disparage these efforts while
16 hiding its own wholesale non-compliance with this Court’s Preliminary Injunction, Napster attempts to
17 attack the lists of works that plaintiffs have sent hundreds of hours compiling. Its broadsides are
18 transparent and utterly meritless. For example, Napster asserts that certain of the file names that
19 plaintiffs provided to Napster supposedly have no connection with the actual artist name and work with
20 which plaintiffs supplied Napster. See Declaration of Rajeev Motwani. Yet the Motwani Declaration
21 dishonestly hides from the Court the fact that, even in those occasional instances where *certain* file
22 names provided by plaintiffs did not actually match the particular artists and song titles with which they
23 were associated, *numerous other files names were, in fact, exact matches to those very same*
24 *artist and song titles*, and thus should have been blocked by Napster under the Preliminary
25 Injunction. Pierre-Louis Decl. ¶¶ 52-59 and Exs. 14-18; Declaration of Dr. Ingram Olkin ¶ 5. Napster
26 also fails to inform the Court that, for a substantial percentage of supposed mismatched files, *plaintiffs*
27 *nevertheless own or control the rights to the work listed in the file name*. Pierre-Louis Decl. ¶
28 60 and Ex. 13; Olkin Decl., ¶ 12. There are numerous other examples of baseless accusations made by

1 Napster about the lists provided to it by plaintiffs, see Pierre-Louis Declaration, ¶¶ 18-25, all of which
2 render Motwani's data and conclusions suspect.¹

3
4 Ultimately, Napster's claim that plaintiffs' lists are "only" 88% accurate is unsupported.
5 In fact, the accuracy rate of the lists the A&M Records Plaintiffs provided to Napster is significantly
6 higher than even the 88% Napster concedes. Olkin Decl., ¶¶ 8-10. Indeed, even 88% is itself a
7 significantly high level of accuracy. *Id.* ¶ 11.

8
9 In the future, this process of providing Napster with file names will be increasingly
10 difficult for plaintiffs since many of their works are not readily available in contemporary database form.
11 Because it is necessary to have the works in such a form in order to use any automated technology to
12 locate file names on the Napster system, plaintiffs will be forced either to convert their works to
13 database form or search the Napster system manually for their works. Under either scenario, this
14 process will be an extremely time-consuming and expensive endeavor. Since Napster does not need
15 file names to filter, whether textually or technologically, an unfair burden would fall to plaintiffs if
16 filenames were deemed necessary as a precondition to obtaining protection..

17
18 Finally, the effort of gathering and collecting the information contained in this Report,
19 describing and quantifying how Napster's so-called "filter" is not working, has been very substantial.
20 Among the automated and non-automated searching, the retention of experts, and the analysis of and
21 response to Napster's Compliance Reports, plaintiffs have expended additional hundreds of person-
22 hours and tens of thousands of dollars. Much of this could have been avoided had Napster chosen to

23
24
25 ¹ Motwani's analysis was flawed or incomplete in several other respects, including: (1) he
26 used a "chunking" analysis that his own sample showed had a 7.5% error rate *against* plaintiffs (and
27 refused to change his methodology because it might err on the other side); (2) he does not describe the
28 sampling process that yielded the error rate; (3) he concedes that some undisclosed number of errors
were "trivial", but nevertheless counts these "trivial errors" *against* the accuracy of plaintiffs' lists; and
(4) the very real potential of bias permeates his results. See generally Olkin Declaration; Pierre-Louis
Decl. ¶¶ 46-60 and Exs. 13-18. Given the number of people involved, the number of recordings and
file names, the short time frame, and the difficulties inherent in the Napster file naming process (e.g., for
soundtracks), the errors were minimal.

1 comply with the Court's Preliminary Injunction and blocked access to plaintiffs' music in the first
2 instance.

3
4 **II. BY USING AN INEFFECTIVE METHOD TO FILTER, NAPSTER**
5 **IS NOT FULFILLING ITS OBLIGATION TO BLOCK ACCESS TO**
6 **PLAINTIFFS' WORKS.**

7
8 The Preliminary Injunction orders Napster to stop facilitating the copying and viral
9 distribution of plaintiffs' music. Files, however, are named by users. Therefore, the text-based filtering
10 Napster employs is inherently flawed. Declaration of Daniel Farmer, ¶ 11. As Napster knows, "names
11 of files can be modified on any modern computer operating system so that users can name and organize
12 them in any manner they choose. Napster has received reports of users intentionally misnaming files
13 different than the actual title of the song." Declaration of Richard Ault, ¶ 6. Despite this readily
14 apparent problem, Napster has chosen to filter based on the name of a file as opposed to filtering based
15 on what is *in* the file. By looking at the actual file, which its system is fully capable of doing, Napster
16 could employ a much more precise and reliable filter. Moreover, Napster could and should employ
17 multiple, complementary methods to increase the precision and reliability of its filter. Farmer Decl. ¶¶
18 14-21. In fact, the concept of using complementary, redundant, and/or duplicate methods is customary
19 and highly advisable to solve the type of problem presented by Napster's obligation to filter plaintiffs'
20 music. Farmer Decl. ¶ 3. There are several ways Napster can, but refuses to, significantly increase the
21 efficacy of its filtering.

22
23 A. Napster's Defective Textual Filter

24 By understanding just how completely ineffective Napster's text-based filter is, it
25 becomes clear that Napster must also employ a technology-based filter or other methodology for
26 determining which music may be distributed on its system.

27
28 1. Virtually All of Plaintiffs' Works Remain Available on Napster.

1 The ineffectiveness of Napster's filter is proven by how readily anyone can still obtain
2 virtually any of plaintiffs' copyrighted works. Of the 212 songs in the complaint, *every single one*
3 remains available on Napster. The overwhelming majority of these, over 70%, were located simply by
4 searching just the artist name *and* title provided by plaintiffs to Napster -- the very information Napster
5 claims specifically to have filtered. Declaration of Mark McDevitt ¶ 4. Each of the remaining
6 recordings in the complaint was found easily by conducting a simple modified search, including searching
7 for:

- 8 · only artist name;
- 9 · only song title;
- 10 · full artist name and obvious shortened titles;
- 11 · full song title and shortened artist name;
- 12 · obvious misspellings of artist name and correct song titles;
- 13 · obvious misspellings of song titles and correct artist names;
- 14 · artist name and a song title with a common word or number inserted; and
- 15 · artist name or song title in "Pig Latin".² McDevitt Decl. ¶¶ 5-13 and Exs. 2-10.

16
17 Additionally, plaintiffs have determined that from 65% to 78% of their music
18 specifically identified in three other lists given to Napster remain readily available when searched for
19 simply by artist name and song title. Pierre-Louis Decl. ¶ 44.

20
21 Finally, plaintiffs thus far have notified Napster of the names and titles of 75 "pre-
22 release" songs under paragraph 7 of the Preliminary Injunction. Astonishingly, at least 69 of the 75, or
23 92%, of these are available on Napster. McDevitt Decl. ¶ 15 and Exhibit 12.³

24
25 ² Plaintiffs advised Napster on March 9, 2001, of the "Pig Latin" naming convention
26 among users to circumvent blocking. Pierre-Louis Decl. ¶ 16, Ex. 1.

27 ³ As a further example, Napster claims to have blocked Madonna's recording of "Music"
28 (Second Compliance Report at 13); however, numerous copies of this recording remain available.
McDevitt Decl. ¶ 17 and Ex. 14. See also Declaration of Howard King, ¶¶ 3-5 (continued availability
of Metallica music).

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In the face of this damning evidence, Napster’s claim that it has reduced the average number of files made available by its users from 220 to 110 is meaningless. Among its claimed 70 million users' remaining **7.7 billion** files, plaintiffs’ copyrighted music is readily available.

2. The Gaping Hole In Napster’s Filter-- Only Filtering Files Named with **Both** Artist and Song.

Apart from the fact that Napster is not filtering works in the manner it claims to be filtering, Napster has indicated that it will only block those files that are named with **both** the artist name and title of the track (or those where they have inputted a “reasonable variation” -- discussed below). This method is a sham.

What surely makes Napster's refusal to filter by either artist **or** title clearly contemptuous is that Napster, right now, continues to instruct its users to do just that -- search by "artist name **or** title." See www.napster.com/help/win/gettingstarted (emphasis added)

As Napster knows, the files available on Napster may be named or searched by artist, title **or** album. (Mr. Boies: “In some cases, you may not even have the artist on the file name.” Tr. of Proceedings, March 2, 2001, at 43.) For example, by searching only "Robbie Williams," plaintiffs located his song “Millennium,” and by searching only “Busta Rhymes,” plaintiffs located his song “Whoo Hah!! Got You All In Check.” Conversely, by entering “Hound Dog,” “All Shook Up,” and “Don’t Be Cruel,” plaintiffs located each of those recordings by Elvis Presley. McDevitt Decl. ¶¶ 6, 7 and Exhibits 3 and 4. Any user similarly can search the Napster index for a specific recording by either artist **or** title and readily find exactly what she is looking for. (The user “enters either the name of a song **or** an artist as the object of the search.” 239 F.3d at 1012 (emphasis added).)

3. Napster’s Search Algorithm Finds More Than Its Filter Blocks.

Napster's search functionality is smarter than its filter. Thus, Napster's search engine intentionally finds **inexact** matches which should be filtered out. As Napster admits: “Napster’s

1 ordinary search algorithm is far broader than its screening algorithms.” Second Compliance Report at 5;
2 see also Farmer Decl. ¶ 7.

3
4 It appears that Napster ignores common words, such as the articles “it,” “a,” or “the,”
5 in matching searches, but does not do the same in blocking access to infringing music. Farmer Decl. ¶¶
6 7-8. Thus, a search of the Napster index for a particular copyrighted recording will locate files with
7 minor variations of the artist and song name. At the same time, the filter is limited to the precise artist
8 and title in file names given to Napster. Napster's example of Metallica’s “Enter Sandman” is
9 illustrative. (First Compliance Report at 22.) One of the combinations Napster will *not* block is the
10 common variation “Metallica,” and “Enter *the* Sandman.” However, if a user searches for “Metallica”
11 and “Enter Sandman,” the search will return “Metallica, Enter *the* Sandman.” Similarly, plaintiffs’
12 search for “Sting,” “Fields of Gold” not only returned many copies of that artist’s song with the precise
13 file name, but also returned file names such as “Fields of the Gold” and “Fields of Black and Gold.”
14 McDevitt Decl. ¶ 14.

15
16 Napster’s filtering program is narrower than its search program for no justifiable reason
17 other than to permit circumvention of the Preliminary Injunction. This is in direct violation of the Court
18 of Appeals' pronouncement that “Napster has . . . the ability to use its *search function* to identify
19 infringing music recordings,” 239 F.3d at 1027 (emphasis added), and in violation of the Preliminary
20 Injunction.

21
22 4. Napster is Not Filtering Obvious Variations.

23 While Napster claims to have blocked reasonable variations (including, at plaintiffs’
24 suggestion, using the Gracenote database), it clearly is not doing so. Simple variations are not being
25 blocked. Farmer Decl. ¶ 7. Plaintiffs have located music identified in the complaint which is still
26 available on the Napster system by searching:

27 · full artist name and obvious shortened titles (e.g., searching “Eurythmics,” “Sweet
28 Dreams” located their recording of “Sweet Dreams Are Made of This”);

- 1 · searching full song title and shortened artist name (e.g., searching “Marley," "Tomorrow
- 2 People” located Ziggy Marley’s recording of that name, and entering “Bob," "Blowin’ in
- 3 the Wind” located Bob Dylan’s recording of that song);
- 4 · searching obvious misspellings of artist names and correct song titles (e.g., searching
- 5 “Elivs” and several of his songs -- “Are You Lonesome Tonight,” “Heartbreak Hotel,”
- 6 “All Shook Up,” and “Don’t Be Cruel” -- located recordings for each of these by Elvis
- 7 Presley);
- 8 · searching obvious misspellings of song titles and correct artist names (e.g., searching
- 9 “Beatles," "Yesterdays” located their recording of “Yesterday”);
- 10 · searching artist name and a song title with a common word or number inserted (e.g.,
- 11 searching “Eve 6," "Inside *and* Out” located their recording titled, “Inside Out”); and
- 12 · searching artist name or song title in “Pig Latin” (e.g., searching "enniferJ opezL"
- 13 located songs by Jennifer Lopez). McDevitt Decl. ¶¶ 6-13 and Exs. 3-10.

15 5. Napster is Facilitating Its Users' Avoidance of the Filter.

16 Napster permits its bulletin boards to be used to discuss and disseminate ways to avoid

17 blocking, including how to rename a file, what to rename a file, and renaming conventions. Pierre-Louis

18 Decl. Ex. 22. Plaintiffs advised Napster of that fact on March 9, 2001. *Id.*, Ex. 1. Napster has done

19 nothing to discourage this misuse of its “premises.”

21 B. The Checksum or MD5 Hash

22 Napster currently has, and always has had, available to it a means to identify specific

23 sound recordings by its unique digital checksum or MD5 hash. A checksum is a numerical value that

24 may be used as an identifier or key for a particular piece of data, such as the contents of a computer file.

25 Farmer Decl. ¶ 14. Identifying files using a checksum is a process widely used throughout the world.

26 *Id.* As this Court found:

27

28 “Every MP3 file has a mathematically generated and unique fingerprint

 or ‘checksum.’ Any requesting user¹² who is unable to download a

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particular MP3 file may use the client software to send the file's
checksum and full intended size to the Napster servers and attempt to
locate a match for download.” 114 F. Supp. 2d at 907. (emphasis
added)

While the checksum originally was used by Napster for its “resume” function (Kessler
Depo. 117), as noted by the Court, its purpose was to locate *identical* MP3 music files offered by
various users on the Napster system. *Id.* at 120-21, 231. Napster still takes the checksum (through
the client software) of each MP3 file made available every time a user logs on to the Napster system.
Kessler Depo. at 112, 231. It receives that information on the Napster server (*id.*), and stores it. *Id.* at
153-54; see also Napster's response to Interrogatory No. 17 from all MDL plaintiffs ("approximately
300,000 bytes commencing at the beginning of the audio content are passed between the client and the
Napster servers"). Napster easily can match a specific checksum to other MP3 files which have the
same checksum. Farmer Decl. ¶ 15. All copies of a particular MP3 music file (i.e., all subsequent
copies of a file originally ripped by a single user) will have the same checksum. Because of the viral
nature of the Napster system (each file downloaded by a user immediately becomes available for
distribution and redistribution), innumerable copies of a particular recording on the Napster system will
have originated with the same MP3 file and will have the same checksum.⁴

⁴ The same recordings ripped by different software, or modified in some way, may have
slightly different checksums; however, the overwhelming number of specific recordings available on
Napster have been distributed from one user to another to another (and so on). Each of these has the
same source and the same checksum. Farmer Decl. ¶ 17.

1 Thus, blocking files by unique checksum is not only available to Napster (and has been
2 virtually since its inception),⁵ it is complementary to blocking files by textual description -- it will block
3 all files with the same checksum regardless of user-designated title, whereas (at best) text-based
4 blocking will only block files of the same title and/or artist. Farmer Decl. ¶ 14. Napster would have to
5 do very little to employ this technique. Id. ¶ 16.

6
7 C. Fingerprinting

8 All of the MP3 music files that Napster enables to be copied and distributed have a
9 recognizable digital "fingerprint." A recording can be analyzed for traces of unique digital characteristics,
10 usually through the use of a proprietary or patented algorithm. As a result, a "fingerprint" of these
11 characteristics is derived. This "fingerprint" can be used to identify specific recordings, regardless of the
12 name placed on the file by the Napster user, the source of the recording or technical differences such as
13 frequency or sampling rate. Farmer Decl. ¶ 18, 20. The "fingerprints" of copyrighted sound recordings
14 could, and should, be used by Napster to block access to plaintiffs' works. Id. ¶ 19.

15
16 The availability of this technology is well-known in the industry and readily available to
17 Napster. See, e.g., Farmer Decl. ¶ 20; Declaration of Bruce Block; see also UMG Recordings, Inc. v.
18 MP3.com, Inc., 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000) (defendant could identify users' specific
19 CD recordings). Numerous companies use their own proprietary fingerprinting technology to identify
20 recordings. Napster also has met with several of these companies, but has failed to use the technology
21 of a single one to complement its textual filtering. While plaintiffs do not suggest that any particular
22 company or method is superior, Napster's failure to implement *any* such technology represents a failure
23 to properly block access or to police its system.

24
25 D. Gracenote's Digital Object Identifier

26 Napster (after suggestion by plaintiffs) has entered into an agreement with Gracenote
27 (formerly known as CDDB) to provide certain name variations. As Napster must know, Gracenote
28

⁵ Metallica provided to Napster the checksum for its various files distributed and copied
without authorization over the Napster system. Napster did not deny its ability to block access to that
music by checksums, but refused to do so. Farmer Decl. ¶ 16.

1 also has available a system for identifying music files compressed in MP3 form. Gracenote's technology
2 exists in virtually every MP3 encoding device -- which consumers use to create MP3 files from compact
3 discs. The Gracenote technology inserts into the beginning of an MP3 file that was ripped with a
4 Gracenote-enabled encoder a Track Unique Identifier (TUID). The TUID is a unique identifier that
5 may be used to identify music tracks. Further, applications exist, and in the future could be put into the
6 Napster client software, that would retroactively insert a TUID into MP3 files that had been ripped with
7 a Gracenote-enabled ripper that had not previously inserted a TUID. Using this TUID, Napster could
8 filter files based on their content rather than their name. Block Decl. ¶ 7.

9
10 E. Filtering In

11 Napster currently claims to comply with the Preliminary Injunction by its admittedly
12 limited method of filtering *out* specific works. If Napster genuinely wanted to ensure that unauthorized
13 works did not appear on its system, that is a backward way to accomplish the goal. Napster ought first
14 to determine if a work is authorized to be on its system, and only then permit it to be distributed and
15 copied by its users. This practice of "filtering-in" is consistent with the practices of all businesses that
16 use copyrighted material. The copyright law always has required users of copyrighted material to obtain
17 permission to use protected material first, before using it. This business practice is followed whether the
18 number of music copyrights is singular (e.g., music in a television commercial), multiple (e.g., music in a
19 motion picture) or massive (e.g., performance of musical compositions on the radio). This method
20 would be far more effective than the one currently employed by Napster. Farmer Decl. ¶¶ 4, 24.

21
22 Napster itself has implemented this traditional model in the case of its New Artist
23 Program: it requires specific authorization from its new artists to use their recordings in its program -- if
24 permission is not given, the material is not made a part of the New Artist Program. See 114 F. Supp.
25 2d at 907. The same could be done by Napster on a system-wide basis.

26
27 Since Napster apparently is unwilling to implement a proper or effective "filtering out"
28 system, the Court should require it to implement a "filtering in" system. Its operation would be simple
and effective. Farmer Decl. ¶¶ 4, 24. Napster would¹⁵ index and permit the distribution only of those

1 musical works for which it has obtained permission; no other works would be permitted on the Napster
2 system. Napster would then operate as all other copyright distributors are required to operate,
3 including Internet distributors (see, e.g., Kohn [e-music] and Robertson [MP3.com] Decls., previously
4 filed in support of plaintiffs' motion for preliminary injunction). This method would not only prohibit
5 transfer of unauthorized material, but would permit the transfer of material that copyright owners (like
6 Napster's "new artists") consent to be distributed, without Napster's claimed overfiltering.

7
8 F. The Burden on Napster is Minimal

9 Napster's claim that it thus far has spent \$150,000 in compliance costs, and anticipates
10 spending \$883,920 *a year* on compliance rings hollow (and sounds cheap) given that it has built a
11 business worth, according to Napster, \$500 million to \$1.5 billion This is particularly true since their
12 business to date has relied almost entirely on infringing plaintiffs' works. Similarly, unimpressive is its
13 claim that it was "required to shut down its service for several hours" in order to comply with an
14 injunction designed to prevent literally tens of billions of infringements from occurring. (Indeed, Napster
15 experienced similar service interruptions long before the issuance of the injunction.) See, e.g., Triad
16 Systems Corp. v. Southeastern Express Co., 64 F.3d 1330, 1338 (9th Cir. 1995) (defendant "cannot
17 complain of the harm that will befall it when properly forced to desist from its infringing activities").
18 These costs seem especially low given the expense *plaintiffs* are undertaking to help Napster avoid
19 infringing their works. Pierre-Louis Decl. ¶¶ 2, 18.

20
21 Although Napster complains of the possibility of system degradation, it does not
22 provide any evidence to back up its vague claim. In fact, even if Napster, using its text-based filter, had
23 to filter out substantially more music files from its system than it currently is doing, the burden on
24 Napster would be inconsequential. The amount of material that Napster would have to filter through its
25 system is small when compared with, for example, any of the more popular search engines on the
26 Internet (such as Altavista, Google, Excite, etc.), which easily can search through their databases of
27 over a billion web pages in fractions of a second. Farmer Decl. ¶ 12. Further, the lists of recordings
28 that plaintiffs are supplying Napster to remove from the Napster system are in electronic form.

1 Consequently, it is easy for Napster to input those data into its filter quite rapidly without affecting the
2 functioning of its system. *Id.*

3
4 The burden on Napster would not increase markedly if it also employed more
5 technologically sophisticated and effective filtering technology, such as by checksum or digital
6 fingerprinting. Napster could maintain a database of checksums (which it already gathers)
7 corresponding to authorized or unauthorized sound recordings, similar to what it currently does with
8 filenames and artist information. It then would simply match the checksum of the MP3 files that a
9 Napster user wishes to make available over the Napster system when that user logs on against the
10 database and then screen out the titles of unauthorized files from the Napster search index, just as
11 Napster currently claims to do with its text-based filtering. Because Napster already determines the
12 checksums of its users' MP3 files and has a system to deny users access to files already in place,
13 Napster would have to do very little to employ this filtering technique. Farmer Decl. ¶¶ 15-16. Digital
14 fingerprinting would operate on similar principles. *Id.* ¶ 19.

15
16 The reasonable use of checksums and fingerprint filtering on the Napster system would
17 pose no additional scalability problems significantly greater than ones caused by text-based filtering.
18 Indeed, all of the methods use essentially the same process – take a digital recording, determine some
19 fundamental aspect(s) of it (whether it is the artist, song title, checksum, digital fingerprint, or anything
20 else), and then compare these aspect(s) to a list of a predefined set of attributes from a database that
21 contains authorized or unauthorized files. While all the different methods use a different approach to
22 create such a database of recordings attributes, the end result is the same. Farmer Decl., ¶ 23.
23 Additionally, filtering in, such as for authorized music files, rather than filtering out unauthorized files,
24 requires a much smaller database and a substantially smaller number of file names, checksums, or
25 fingerprints to match authorized song files rather than unauthorized ones. At the same time, the
26 performance of the system under a filtering in process would also be enhanced because the system
27 would have to compare files with a much smaller database. *Id.* ¶ 24.

28
III. PLAINTIFFS ARE NOT *REQUIRED*⁷ TO PROVIDE A FILE

1 **NAME PRIOR TO OBTAINING PRELIMINARY RELIEF.**

2

3 The Court of Appeals found that plaintiffs were likely to prevail on both their

4 contributory infringement and vicarious liability claims. The Court analyzed each claim independently

5 (compare 239 F.3d at 1019-1022, with 239 F.3d at 1022-1024), and recognized that each claim

6 warranted separate injunctive relief. It directed the entry of a preliminary injunction that would cover the

7 different elements of *each* of these claims. (“*Conversely*, Napster may be vicariously liable . . .” 239

8 F.3d at 1027.) With respect to the contributory infringement claim, where knowledge is necessary, the

9 Court of Appeals required plaintiffs to provide Napster with certain identifying information. *Id.*

10 However, the Court of Appeals applied well-established standards to the vicarious infringement claim,

11 where knowledge is *not* required: “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 infringement for

13 the sake of profit gives rise to liability.” 239 F.3d at 1023. Thus, the Court of Appeals held that

14 appropriate injunctive relief would require Napster also “to affirmatively use its ability to patrol its

15 system and preclude access to *potentially* infringing files. . . .” 239 F.3d at 1027 (emphasis added).

16 As described below, this Court’s Preliminary Injunction mirrors the Court of Appeals’ distinction

17 between contributory infringement and vicarious liability. However, Napster ignores that important

18 distinction.

19

20 Paragraph 2 of the Preliminary Injunction imposes a duty on Napster based on

21 contributory infringement. It requires certain information be provided to Napster, including file names, if

22 available. Paragraph 4 of the Preliminary Injunction quotes the Court of Appeals and imposes the

23 separate duty on Napster “of policing the system within the limits of the system.” This obligation is

24 independent of *specific file information* -- it is a burden imposed on Napster given its ability to

25 control its system and the financial benefit it derives from the system. The Court of Appeals found that

26 “Napster . . . has the ability to locate infringing material listed on its search indices.” 239 F.3d 1024.

27 This Court's Preliminary Injunction follows that reality: “It may be easier for Napster to search the files

28 available on its system at any particular time against lists of *copyrighted recordings* provided by

plaintiffs.” Preliminary Injunction, ¶ 4.

1
2 Napster must affirmatively police its system to prevent infringement, not wait until
3 infringement occurs and plaintiffs locate it and notify Napster. This well-established principle is
4 consistent with the Court of Appeals' opinion, and is key to all copyright protection. See 17 U.S.C. §
5 502(a) (injunctions to *prevent* or restrain infringement of copyright); RCA/Ariola International, Inc. v.
6 Thomas & Grayston Co., 845 F.2d 773, 778 (8th Cir. 1988) (affirming injunction requiring defendant
7 retailers with tape-copying machines to control access to the blank tapes, to inspect the originals their
8 customers proposed to copy, and to insert the blank into the machine.”); West Publishing Co. v. Mead
9 Data Central, Inc. 799 F.2d 1219 (8th Cir. 1986) (preliminarily enjoining defendant's proposed use of
10 star pagination keyed to plaintiff's case reports); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F.
11 Supp. 1522 (S.D.N.Y. 1991).

12
13 Napster's monitoring duty is all the more crucial because the files available on Napster
14 constantly change. As users log on and off, they make different music available, and the specific music
15 available to be indexed and distributed on the system varies widely. Plaintiffs cannot physically, nor
16 should they have to, perpetually monitor the Napster system 24 hours per day, seven days per week.
17 Not surprisingly, plaintiffs have not been able to find all the copyrighted recordings they have searched
18 for on the Napster system. This is not because these recordings are not available on Napster; they
19 simply may not have been available at the time searched. Where plaintiffs did locate specific files, they
20 were provided to Napster.⁶ In those instances where plaintiffs have not found files that appear to
21 contain their music at the time that they searched, plaintiffs provided to Napster the names of the artists,
22 albums, and individual tracks that they own or control. Napster has refused even to attempt to filter or
23 monitor its system to prevent infringement of this music.

24
25
26
27 ⁶ Napster even claims that plaintiffs are required to search for files for pre-release
28 recordings. Pierre-Louis Decl. ¶ 40. Such a requirement directly contradicts paragraph 7 of the
Preliminary Injunction.

1 Plaintiffs' inability to locate specific infringing files for some of their copyrighted music at
2 any particular time is attributable to the following:

3
4 (1) Plaintiffs can only search at a given moment in time. On the other hand,
5 Napster's "collective directory is fluid; it tracks users who are connected in real time, displaying only file
6 names that are immediately accessible." 239 F.3d at 1012. Napster claims almost 70 million users.
7 Less than one million (or about 1%) are on-line at any time. Pierre-Louis Decl. ¶ 25. And, "given the
8 transitory nature of its operation," only files of those current users are indexed by Napster. See
9 Preliminary Injunction n.1 ("The Court observes that each file is available only as long as the user
10 offering that file is logged on to the Napster system"). This index is changing all the time. (Mr. Boies:
11 "They're [users] logging on and logging off in . . . nano seconds. . . . If you tried to freeze every single
12 index, you would be freezing millions of indexes of [sic] a day." Tr., March 2, 2001, at 27.) In fact,
13 when plaintiffs conducted seriatim searches for files associated with particular recordings, each time (as
14 presumably other users go on-line) plaintiffs located files for some of the recordings not previously
15 located. Pierre-Louis Decl. ¶ 18.

16
17 (2) As this Court has noted, *Napster* makes it impossible to search historically the
18 multi-billions of files previously made available over the Napster system. Neither plaintiffs nor Napster
19 can determine which of plaintiffs' music has ever been on Napster. For example, Napster's counsel
20 represented to the Court that "a lot of the songs on the Greer Declaration [the music publishers' list] are
21 not on Napster." When the Court inquired: "Are not *or never have been*, is that it?," counsel
22 responded, "*Are not*." Tr., March 2, 2001, at 65. If Napster cannot determine what has been
23 available over its system, how can plaintiffs carry that burden? No doubt most or all of the music for
24 which corresponding files cannot be located (based on plaintiffs' limited searching capabilities) was
25 available at another time. Indeed, Napster boasted that was the case: "you'll never come up empty
26 handed when searching for your favorite music again." It should be held to that representation.

1 (3) The fact that a specific file is not located by plaintiffs on Napster does not mean
2 that it will not be made available tomorrow (or thereafter) by one of Napster's claimed 70 million users.

3
4
5 This Court recognized that the Court of Appeals' requirement that plaintiffs provide the
6 names of specific infringing files referred to "the titles of specific files containing copyrighted material
7 *that appear on the Napster system at any give time.*" Preliminary Injunction at n.1 (emphasis
8 added). Otherwise, "[g]iven the limited time an infringing file may appear on the system and the
9 individual user's ability to name her files, relief dependent on plaintiffs' identifying each 'specific
10 infringing file' would be illusory." *Id.* at n.2.

11
12 While it is possible that some small percentage of plaintiffs' copyrighted music may
13 never have been and may never be available over Napster (contrary to Napster's initial representations
14 to its users), that likelihood is small, and more than balanced by the potential harm to plaintiffs. If, in
15 fact, the music is not available on Napster's system, requiring it to make sure that it does not become
16 available simply comports with the purposes of a preliminary injunction to *prevent* future harm. *See,*
17 *e.g., United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953) ("the purpose of an injunction is to
18 prevent future violations"); *see also Diamontiney v. Borg,* 918 F.2d 793, 795 (9th Cir. 1990) ("requiring
19 a showing of actual injury would defeat the purpose of a preliminary injunction, which is to prevent
20 injury from occurring").

21
22 Finally, since Napster acknowledges that it does not need to have a file name in order
23 to filter, the burden on Napster to search for music that does not have file names is inconsequential.
24 Ault Decl. ¶ 18. Napster is asked to do nothing more (and, in fact, less) than others who make use of
25 copyrighted works in their businesses. Courts customarily enjoin parties who have infringed one or
26 more copyrights from infringing *any* work in a plaintiff's catalogue. *See, e.g., Sega Enterp. Ltd. v.*
27 *MAPHIA* 857 F. Supp. 679, 690 (N.D. Cal. 1994) (preliminary injunction preventing a bulletin board
28 operator from infringing the trademarks and copyrights in any of the plaintiffs' video games); *Swallow*
Turn Music v. Wilson, 831 F. Supp. 575, 581 (E.D. Tex. 1993) (injunction against performance of any

1 music by members of composers society without permission from the copyright owner or a license from
2 the society); Marvin Music Co. v. BHC Ltd Partnership, 830 F. Supp. 651, 655 (D. Mass. 1993)
3 (injunction prohibiting performing without authorization any musical composition in the ASCAP
4 repertory); see also Walt Disney Co. v. Powell 897 F.2d 565, 568 (D.C. Cir. 1990) (enjoining
5 defendant from infringing all Disney characters, including those not in suit).

6
7 **IV. NAPSTER’S “DEFENSE” OF OVER-FILTERING IS A RED HERRING.**

8
9 Napster’s response to most of plaintiffs’ objections is the invocation of “over-filtering.”
10 This “defense” simply is wrong:

11
12 First, if Napster adds a combination of technologically proficient filtering methods
13 described herein, any over-filtering should be minimal. Filtering based on the underlying file, rather than
14 text, can much more easily target the specific music to be excluded such that over-filtering need not be
15 an issue. Farmer Decl. ¶¶ 14, 20.

16
17 Second, as a factual matter, much of the over-filtering Napster claims is, in fact,
18 unauthorized material in any event.⁷ Pierre-Louis Decl. ¶ 23; Olkin Decl. ¶ 12.

19
20 Third, as a legal matter, Napster created a system with the intent of infringing plaintiffs’
21 copyrights -- and Napster succeeded, billions and billions of times over. For this reason, Napster now
22 has the burden to ensure the blocking of infringing material, even at the risk of some over-filtering.
23 Otherwise, for example, Napster can facilitate the distribution and copying of 99 copyrighted recordings
24 because the same song is available once by another artist (or is not available at all, but simply is named

25 _____
26 ⁷ Based on the record, the Court of Appeals affirmed this Court's finding that “as much
27 as eighty-seven percent of the files available on Napster may be copyrighted and more than seventy
28 percent may be owned or administered by plaintiffs.” 239 F.3d at 1013. In fact, all sound recordings
are protectible -- either under copyright law (if fixed after February 15, 1972) or state laws, if fixed
prior to then. Virtually all musical compositions are protected under federal copyright.

1 by a user with the name of another artist or no artist at all). See, e.g., Dr. Seuss Enterprises, L.P. v.
2 Penguin Books USA, Inc., 109 F.3d 1394, 1406 (9th Cir. 1997) (defendant infringers “created the all
3 or nothing predicament in which they currently find themselves”); Orth-O-Vision v. Home Box Office,
4 474 F. Supp. 672, 686 n.14 (S.D.N.Y. 1979) (where “it is technologically impossible to separate out
5 the infringing material, the copyright owner ought not to go unprotected.”). Napster should not be
6 permitted to unilaterally decide that it is more important to permit some small number of works to be
7 copied on Napster at the expense of the owners' of the vast majority of works on the system.

8
9 Finally, Napster could filter in any recordings that it wanted to be certain were not
10 filtered out. Specifically authorized music, even music that shares the same name as unauthorized music,
11 could be *filtered in* (as in the “new artist” program).⁸ Farmer Decl. ¶ 13.

12 **V. CONFIDENTIALITY OF THE LISTS IS CRUCIAL TO ENSURE**
13 **EFFECTIVENESS OF THE INJUNCTION.**

14
15 The lists provided by plaintiffs to Napster must be maintained as confidential in order to
16 help ensure compliance with the Preliminary Injunction, among other reasons.

17
18 Plaintiffs have designated these lists as confidential subject to the Protective Order in
19 this case. It is the *combination* of information on these lists (plaintiffs' complete listing of their database
20 of artists, album titles, and song titles) that is not readily available to the public, should not be revealed,
21 and would prejudice plaintiffs' businesses. As well, there are a number of third-party companies that
22 have built business on the collection of this information. See Plaintiffs' Plan for Ascertaining Plaintiffs'
23 Rights, filed September 5, 2000, at 4-5.

24
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26
27
28 ⁸ Even Napster's claim that plaintiffs' notices had wrongly blocked two recordings
expressly authorized for distribution over the Napster system is incorrect -- both were still readily
available over Napster. McDevitt Decl. ¶ 16.

1 Notwithstanding the Protective Order designation, Napster has publicly released the
2 lists publicly. Napster has not followed the Protective Order procedures to challenge the confidential
3 designation. Additionally, Napster nowhere states any reason why the specific listed information should
4 be made public. Its vague statement that "Napster will allow the press to review, but not substantially
5 duplicate," the lists does nothing to explain its rationale.⁹

6
7 Most important, Napster is under an obligation to help ensure that the Preliminary
8 Injunction is not circumvented. By providing information contained on plaintiffs' Infringement Notices to
9 its users, all of whom are direct infringers, it will be aiding circumvention, as follows: (1) users will be
10 advised which specific music Napster is purporting to block. They will know exactly which files they
11 will have to "encrypt" to make available or "decrypt" to locate; (2) the file names listed will provide the
12 specific variations being blocked; (3) to the extent Napster does not block music without file names (see
13 above), it will be providing its users with lists of plaintiffs' copyrighted music that the users will be free to
14 distribute and copy over the Napster system.

15
16 **CONCLUSION**

17
18 Napster has flagrantly and intentionally refused to comply with the Preliminary
19 Injunction. It is respectfully submitted that this Court should order Napster to comply fully and
20 immediately by (a) implementing a "filtering in" system or (b) implementing an effective "filtering out"
21 system, as described herein. If Napster continues to demonstrate its unwillingness to comply with the
22 Court's Order and to block access to plaintiffs' copyrighted material, then the Court will have to
23 consider additional remedies.

24
25 Dated: March 27, 2001

RUSSELL J. FRACKMAN
MITCHELL SILBERBERG & KNUPP LLP

26
27 By _____

28 ⁹ Napster not only provided at least one newspaper with a portion of an actual list
submitted by plaintiffs, it also provided its second compliance report the day before it was given to
plaintiffs. Pierre-Louis Decl. ¶ 37.

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