

RUSSELL J. FRACKMAN (State Bar No. 049087)
GEORGE M. BORKOWSKI (State Bar No. 133416)
JEFFREY D. GOLDMAN (State Bar No. 155589)
DREW E. BREUDER (State Bar No. 198466)
MITCHELL SILBERBERG & KNUPP LLP
11377 West Olympic Boulevard
Los Angeles, California 90064-1683
Telephone: (310) 312-2000
Facsimile: (310) 312-3100

STEVEN B. FABRIZIO (Pro Hac Vice)
RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
1330 Connecticut Avenue NW, Suite 300
Washington, DC 20036
Telephone: (202) 775-0101
Facsimile: (202) 775-7253
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

A&M RECORDS, INC., a corporation; GEFFEN RECORDS, INC., a corporation; INTERSCOPE RECORDS, a general partnership; SONY MUSIC ENTERTAINMENT INC., a corporation; MCA RECORDS, INC., a corporation; ATLANTIC RECORDING CORPORATION, a corporation; ISLAND RECORDS, INC., a corporation; MOTOWN RECORD COMPANY L.P., a limited partnership; CAPITOL RECORDS, INC., a corporation; LA FACE RECORDS, a joint venture; BMG MUSIC d/b/a THE RCA RECORDS LABEL, a general partnership; UNIVERSAL RECORDS INC., a corporation; ELEKTRA ENTERTAINMENT GROUP INC., a corporation; ARISTA RECORDS, INC., a corporation; SIRE RECORDS GROUP INC., a corporation; POLYGRAM RECORDS, INC., a corporation; VIRGIN RECORDS AMERICA INC., a corporation; and WARNER BROS. RECORDS INC., a corporation,
Plaintiffs,

v.
NAPSTER, INC., a corporation, and DOES 1 through 100,
Defendants.

CASE NO. C99-5183-MHP

**COMPLAINT FOR
CONTRIBUTORY AND
VICARIOUS
COPYRIGHT
INFRINGEMENT,
VIOLATIONS OF
CALIFORNIA CIVIL
CODE SECTION
980(a)(2), AND UNFAIR
COMPETITION**

Plaintiffs aver:

NATURE OF ACTION

1. This is an action for contributory and vicarious copyright infringement and related state law claims arising out of the willful conduct of defendant Napster, Inc. (“Napster”). Napster is a commercial enterprise that enables and encourages Internet users to connect to Napster’s computer servers in order to make copies of plaintiffs’ copyrighted sound recordings available to other Napster users for unlawful copying and distribution. Napster has thus misused and is misusing the remarkable potential of the Internet, essentially running an online bazaar devoted to the pirating of music. As Napster is well aware, virtually all of the reproductions and distributions it enables and encourages are infringing and in violation of federal copyright and state laws. Indeed, in an effort to ensure its users a safe haven for piracy, Napster promises and delivers user anonymity, and even boasts that it does not maintain logs of activity or other information that could be subpoenaed to reveal the identities of its users. The sound recordings reproduced and distributed are not obscure recordings of unknown or unsigned artists. Quite the contrary, nearly every hit song by every significant recording artist can be found on Napster. To put the sheer magnitude of this activity into perspective, by its own account, Napster is responsible on a daily basis, for making *millions* of sound recordings widely available for copying to countless Internet users around the world. Napster thus has created and is operating a haven for music piracy on an unprecedented scale.

2. Napster enables this massive infringement to occur by providing Internet users with a fully integrated infrastructure and facilities -- including a hub of central computer servers to which they connect; a continuously updated database of “links” to millions of infringing recordings; proprietary software to facilitate the rapid and efficient identification, copying, and distribution of those

recordings; continuous support and back office administration; and a host of other services B all of which, by design, both enable and encourage Napster users to make their individual, and previously private, libraries of sound recordings available over the Internet for instantaneous distribution to and copying by countless other Napster users. The more users Napster is able to attract, the more pirated recordings Napster will be able to offer, and the more attractive Napster will be to other potential users.

3. Plaintiffs are informed and believe, and on that basis aver, that in exchange for providing the facilities and services (all free of charge to Napster users), Napster seeks to cultivate an extensive user base that will attract advertising and investment dollars. Thus, Napster is building a business on B and seeks to profit from B the daily, massive infringement it enables and encourages. Napster's conduct has caused and continues to cause plaintiffs grave and irreparable harm.

JURISDICTION AND VENUE

4. This is a civil action seeking damages and injunctive relief for copyright infringement under the Copyright Law of the United States (17 U.S.C. §§ 101 *et seq.*).

5. This Court has jurisdiction of this action under 17 U.S.C. §§ 101 *et seq.* and 28 U.S.C. §§ 1338(a) and (b).

6. This Court has supplemental jurisdiction over the related Counts III and IV in that these claims are so related to the above federal claims that they form part of the same case or controversy.

7. This Court has personal jurisdiction over defendants in that defendants reside in and/or are doing business in the State of California and in this District. In addition, many of

the acts of infringement and unfair competition complained of herein occurred in the State of California and in this District.

8. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c).

AVERMENTS COMMON TO ALL COUNTS

The Parties

9. Plaintiff A&M Records, Inc., is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in California, and is duly qualified to transact business in the State of California.

10. Plaintiff Geffen Records, Inc., is a corporation duly organized and existing under the laws of the State of California, with its principal place of business in California.

11. Plaintiff Interscope Records is a California general partnership, with its principal place of business in California, and is duly qualified to transact business in the State of California.

12. Plaintiff Sony Music Entertainment Inc. is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in New York, and is duly qualified to transact business in the State of California.

13. Plaintiff MCA Records, Inc., is a corporation duly organized and existing under the laws of the State of California, with its principal place of business in California.

14. Plaintiff Atlantic Recording Corporation, is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in New York, and is duly qualified to transact business in the State of California.

15. Plaintiff Island Records, Inc., is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business in New York, and is duly qualified to transact business in the State of California.

16. Plaintiff Motown Record Company L.P. is California limited partnership, with its principal place of business in New York, and is duly qualified to transact business in the State of California.

17. Plaintiff Capitol Records, Inc., is a corporation duly organized and existing under the laws of the State of Delaware, with a place of business in California, and is duly qualified to transact business in the State of California.

18. Plaintiff La Face Records is a joint venture partnership between Arista Ventures, Inc., a Delaware corporation, and La Face Records, Inc., a Georgia corporation, with its principal place of business in Georgia, and is duly qualified to transact business in the State of California.

19. Plaintiff BMG Music d/b/a The RCA Records Label is a New York general partnership, with its principal place of business in New York, and is duly qualified to transact business in the State of California.

20. Plaintiff Universal Records Inc., is a corporation duly organized and existing under the laws of the State of California, with a place of business in California.

21. Plaintiff Elektra Entertainment Group Inc. is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in New York, and is duly qualified to transact business in the State of California.

22. Plaintiff Arista Records, Inc., is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in New York, and is duly qualified to transact business in the State of California.

23. Plaintiff Sire Records Group Inc. is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in New York, and is duly qualified to transact business in the State of California.

24. Plaintiff Polygram Records, Inc., is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in New York, and is duly qualified to transact business in the State of California.

25. Plaintiff Virgin Records America Inc. is a corporation duly organized and existing under the laws of the State of California, with a place of business in California.

26. Plaintiff Warner Bros. Records Inc., is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in California, and is duly qualified to transact business in the State of California.

27. Plaintiffs are informed and believe and on that basis aver that defendant Napster is a corporation, with its principal place of business in the State of California and within this District.

28. The true names and capacities, whether individual, corporate, associate, or otherwise, of all defendants sued herein as Does 1 through 100, are unknown to plaintiffs, who therefore sue said defendants by such fictitious names. Plaintiffs will seek leave of Court to amend this Complaint to state their true names and capacities when the same have been ascertained. Plaintiffs are informed and believe and on that basis aver that said defendants are liable to plaintiffs as a result of their participation in all or some of the acts hereinafter set forth.

Plaintiffs' Business

29. Plaintiffs are engaged in the business of producing sound recordings, and manufacturing, distributing, selling, and/or licensing the distribution and sale of their sound recordings in phonorecords (as defined in 17 U.S.C. § 101, and including, without limitation, compact discs) or arranging to do so in the United States. Plaintiffs are among the leading manufacturers of such phonorecords in the United States. The names and reputations of plaintiffs as manufacturers of phonorecords of high artistic and technical quality are widely and favorably known in the State of California and throughout the United States and the world.

30. Plaintiffs have invested and continue to invest substantial sums of money, as well as time, effort, and creative talent, to discover and develop recording artists, and to create, manufacture, advertise, promote, sell, and license phonorecords embodying the performances of their exclusive recording artists. In order to create such phonorecords, plaintiffs make payments to these

recording artists, other musicians, various trust funds established for such musicians' benefit, producers, technicians, and other staff personnel, as well as various other payments. Plaintiffs and their recording artists are compensated for their creative efforts and monetary investments largely from the sale of phonorecords to the public and from license fees from the reproduction, distribution, digital performance, or other exploitation of such phonorecords. Absent such compensation, profits and motivation are siphoned away from artists and the record companies that record, manufacture, promote, and distribute those works. The pool of resources available for finding and promoting new artists shrinks, and sound quality and recording integrity are diluted and corrupted. The ultimate result is that the public's access to a wide variety of high-quality musical recordings is sharply curtailed.

31. Plaintiffs are the copyright owners or owners of exclusive rights under copyright with respect to certain copyrighted sound recordings embodied in their phonorecords, including but not limited to those listed on Schedule A hereto and incorporated by reference herein (the "Copyrighted Recordings"). Each plaintiff has applied for and/or received Certificates of Copyright Registration from the Register of Copyrights for its Copyrighted Recordings. Each plaintiff has the exclusive rights, among other things, to "reproduce the [Copyrighted Recordings] in copies or phonorecords" and to "distribute copies [of the Copyrighted Recordings] in phonorecords . . . to the public."

32. Additionally, plaintiffs have entered into various agreements by which they obtained the sole, exclusive, and complete right to manufacture, distribute, and sell phonorecords embodying certain recorded musical performances of popular recording artists which initially were "fixed" prior to February 15, 1972, and therefore are subject to protection under state statutory and

common law, including but not limited to those identified in Schedule B hereto and incorporated by reference herein (the “Pre-1972 Recordings”).

The Internet and Music Piracy

33. The Internet is a vast collection of interconnected computers and computer networks. It allows millions of people around the world to communicate freely and easily with each other, and to exchange ideas and information, including academic research, literary works, financial data, music, movies, graphics, and an unending and ever-changing array of other data.

34. From shopping for a toy for a newborn infant to the way stockbrokers interact with their customers, the Internet is changing the way people communicate and do business. The Internet has become so prevalent in people’s daily lives that businesses, large and small, and from every imaginable industry, have raced to embrace it.

35. Music has been at the forefront of the Internet explosion, and for good reason: The Internet offers tremendous opportunities for the music business as well as for everyone who loves music. Indeed, the Internet provides distinct advantages for music because, unlike some other products such as sneakers or cars, it is possible not only to market and sell music online, but actually to deliver it to the consumer. Music can be digitized and distributed instantly right over the Internet.

36. The possibilities afforded by the digital distribution of music have sparked an entrepreneurial zeal. Record companies, technology companies, and Internet start-ups alike are creating exciting businesses to take advantage of the opportunities that these new technologies make possible.

37. Unfortunately, in addition to creating opportunities for new and creative models for legitimate business, the Internet also has created opportunities for the wide-scale piracy of sound recordings. Since its inception, the music industry has had to battle physical goods piracy (*i.e.*, the piracy of compact discs, cassette tapes, and LPs). Although physical goods piracy costs the United States recording industry approximately \$300 million a year, through strong laws and aggressive enforcement and education, physical goods piracy in the United States has been kept to relatively tolerable levels. Around the world, however, physical goods piracy costs the worldwide recording industry over \$4.5 billion annually. In some countries and markets, physical goods piracy is so pervasive that it effectively has supplanted the legitimate market for sound recordings in its entirety; in other places, it is preventing a legitimate commercial market from becoming established.

38. Internet piracy poses risks to the development of a legitimate *online* market for digitally distributed music, which is just beginning to emerge. If left unchecked, Internet piracy of sound recordings will mushroom, and may hinder the legitimate market for digital distribution before it has a chance to be successful.

39. To date, Internet piracy of sound recordings has been confined largely to those who establish Internet sites and offer music for others to download, not for profit, but as a hobby. These sites may contain anywhere from a few songs to several hundred songs, with some having a few thousand songs. These are strictly amateur operations: The sites usually are difficult for the typical Internet user to find and access; some are online only a couple of hours at a time; they are notoriously unreliable and slow; and the selection and quality of their sound recordings vary greatly.

40. Such pirate sites are an ongoing problem. However, because these sites are public, the record companies and their trade association, the Recording Industry Association of America, Inc. (“the RIAA”), are able to police these pirate sites and take action against those who operate them. The recording industry devotes significant resources to shutting down and deterring these sites, and to educating the Internet community as to the illegality of, and the harm caused by, Internet piracy.

41. Most Internet piracy of sound recordings is accomplished using a technology known as MP3, which stands for Motion Picture Expert Group 1, Audio Layer 3. MP3 simply is an algorithm that compresses a digital music file by a ratio of approximately 12:1, thereby reducing the size of the file so that it more easily and quickly can be copied, transmitted, and downloaded over the Internet. There are several other compression technologies used for this purpose, and many of them produce a high fidelity sound quality. MP3, however, has become the standard for piracy because it is available for free on the Internet and because it does not incorporate any security to limit copying and distribution of the sound recording. Thus, once a sound recording has been converted into the MP3 format, it can be copied and distributed an unlimited number of times, without meaningful degradation in the sound quality. Once downloaded (i.e. copied and saved to a computer hard drive), a music file can be played from the computer, or further copied onto home or car stereo equipment, or portable players, designed for use with MP3 music.

42. While there is nothing unlawful about the MP3 format *per se*, the predominant use of MP3 is in the trafficking of pirated sound recordings. This fact is well known, has been reported widely in the press, and is known to defendant Napster. It also is well known, and has been widely reported, that no major record companies have authorized their commercially released

sound recordings to be reproduced and distributed in the MP3 format precisely because MP3 does not contain any security. Instead, these record companies generally have opted for one of several other available technologies that incorporate security to limit unauthorized copying and distribution.

43. While some authorized MP3 files can be found on the Internet, these largely are the recordings of unknown artists who do not have record company contracts. Nevertheless, there are companies that obtain proper licenses and authorizations and that are building popular Internet sites and successful businesses around legitimate MP3 music files.

Napster

44. In stark contrast to these legitimate companies, Napster is not developing a business around legitimate MP3 music files, but has chosen to build its business on large-scale piracy. Napster seeks to profit by encouraging and facilitating the distribution and reproduction of millions of infringing MP3 files. Moreover, by deliberately refusing to maintain any information about its users in order to make copyright enforcement next to impossible, Napster has created a virtual sanctuary where music piracy can and does flourish on a monumental scale.

45. Napster is an extensive, highly integrated service that connects people located throughout the world who otherwise would have no contact with each other. Napster encourages and enables them to pool their previously private MP3 music files into a single database containing a listing of millions of music files, such that Napster users easily can distribute and make unlawful copies of any recordings, and as many recordings as, they choose. Napster provides its users with the infrastructure, facilities, technological means, and ongoing support and services to accomplish these infringements. Napster is involved in and enables the process from beginning to end.

46. Specifically, as part of its integrated service, Napster provides to its users (at no cost) Napster's proprietary "MusicShare" software. This Napster-developed software enables users to connect their computers to a hub of computer servers maintained by Napster, and interacts seamlessly with "server side" software developed and maintained by Napster on its computer servers. By using Napster's MusicShare software, once connected to Napster's servers, users choose which of their own MP3 music files stored on their computer hard drives they want to make available for copying by other Napster users. Napster then takes an inventory of the music files each user has so designated and combines and organizes a listing of those song files into an extensive database and directory, which is maintained on Napster's servers and which Napster makes available to all Napster users. Napster further gathers information to uniquely identify each file and to determine the sound quality of each file. These designated files become part of what Napster calls its "virtual collection" of music files.

47. Napster promotes its service as "list[ing] only those files available right now" B ready and available for immediate download. To do this, Napster continuously monitors thousands of users to keep track of when they log on and off. As soon as a user logs on, that user's MP3 music files are inventoried and added to the database. As soon as a user logs off, that user's files are identified and eliminated from the database. Thus, Napster continually updates its database thousands of times each day.

48. Napster also maintains and provides its users with sophisticated tools to search its directory to locate the sound recordings they want. Users can search for a particular artist or even a particular song title. MP3 music files come in varying levels of audio quality, and also can be expected to download at widely varying speeds depending, among other things, on the type of Internet connection maintained by the user posting the sound recording. Napster provides its users with

information about sound quality and connection speed, enables users to tailor their searches to locate only those sound recording files that are of a selected audio quality or only those recordings that can be downloaded at the desired speed, or any combination of the above. Thus, a user could search the Napster database not just for the famous Beatles song “Hey Jude,” but for copies of that song at a certain audio quality level, and only copies of that song that will download at a certain speed.

49. Napster does more than simply tell users what songs are available and which users have them. Napster creates an actual “link” to each responsive music file. Thus, all Napster users need to do is select the file they want and it automatically downloads B *i.e.*, is copied and saved B to their individual computer hard drives. A user desiring a song does not have to do anything to contact the user offering the song other than click on the link provided by Napster. Napster facilitates that entire transaction.

50. Napster stays involved in the entire download process to ensure that the distribution and copying of the selected recording is completed. In the event a download is interrupted because, for example, the user offering the recording has logged off, Napster automatically will locate the same recording from another Napster user and resume the download at the point it was interrupted, all without any involvement by the Napster user downloading the recording.

51. Napster’s service is available throughout the United States and the world. At any given time, millions of MP3 files are available for download through Napster. Napster has created its service and promotes it specifically to capitalize on its infringing use. Napster touts itself as “*the world’s largest MP3 music library.*” It brags that “Napster ensures the availability of *every song online* by connecting you live with *millions of songs* found in other MP3 listeners’ music collections.

With Napster, you'll never come up empty handed when searching for your favorite music again!"

Napster also "virtually guarantees you'll find the music you want, when you want it." Napster also has boasted that, through its service, "you can forget wading through page after page of unknown artists."

52. The recordings made available include many recently released recordings that are available on Napster for copying within days of their release to the public, some even before their official release dates. Among the recordings made available by Napster for copying are those of the most popular recording artists including, but in no way limited to, Madonna, Mariah Carey, Notorious B.I.G., U2, Nirvana, Bruce Springsteen, Puff Daddy, Garth Brooks, Michael Jackson, Sting, Billy Joel, Elton John, Jewel, Faith Hill, Santana, Britney Spears, Fiona Apple, Dixie Chicks, Shania Twain, Ricky Martin, Jimmy Buffett, Eric Clapton, <N Sync, Backstreet Boys, Sarah McLachlan, Melissa Ethridge, Tonic, Natalie Merchant, Whitney Houston, Crosby, Stills, Nash & Young, Cher, Tina Turner, 2Pac, George Strait, Reba McEntire, Tori Amos, Celine Dion, Korn, Kenny G, Barry White, Lenny Kravitz, Smash Mouth, Counting Crows, Tim McGraw, The Police, Sheryl Crow, Brooks & Dunn, Hootie & The Blowfish, Matchbox 20, The Verve Pipe, Dave Matthews Band, Eurythmics, Radiohead, Bonnie Raitt, Busta Rhymes, Steve Miller Band, The Cranberries, Hanson, Will Smith, Indigo Girls, and Van Halen. Virtually the entire collections of such music legends as Bob Dylan, The Grateful Dead, Jimi Hendrix, Elvis Presley, and The Beatles also are available. Indeed, pirated copies of the recordings of every artist on the Billboard Top 200 C as well as every sound recording on the Billboard Hot 100 C can be located on and downloaded from Napster.

53. Napster is far more insidious than a typical pirate MP3 site. Most pirate MP3 sites are located at public Internet addresses, which enables the policing and prosecution of the operators of these infringing sites. By contrast, Napster provides a safe haven for piracy B it operates a

service that enables its users to make vast catalogs of infringing sound recordings available to thousands of other users without the risk of being caught. Napster's users are anonymous, and Napster has marketed itself to would-be music pirates by declaring that it deliberately does not keep any user information that might allow copyright owners to learn their identities.

54. The overwhelming majority of sound recordings that Napster makes available are being distributed and copied in violation of the copyright law and other laws. Napster has full knowledge of this fact.

55. Plaintiffs, through the RIAA, have contacted Napster several times concerning its infringing activities. On or about November 12, 1999, the RIAA notified Napster in writing of its infringing conduct and of its violation of plaintiffs' rights. Prior to notifying Napster, the RIAA had randomly sampled thousands of the sound recordings Napster made available on its service and found that the overwhelming majority, approximately 90%, infringed the rights of the RIAA's members, and so notified Napster. (Notably, this does not mean that the remaining 10% were authorized or legitimate. It simply means that those recordings did not appear to be owned by RIAA member record companies.) Notwithstanding this notice, Napster has continued its unlawful conduct unabated. The very sound recordings that the RIAA had advised Napster were infringing are still available on Napster today.

COUNT I

CONTRIBUTORY INFRINGEMENT OF COPYRIGHTS

[By All Plaintiffs Against Defendants]

56. Plaintiffs incorporate herein by this reference each and every averment contained in paragraphs 1 through 55, inclusive.

57. As described above, a tremendous amount of copyright infringement takes place on and by virtue of Napster's service every day. These infringements occur whenever a Napster user, without authorization of the copyright owner, downloads an MP3 music file from another user's computer onto his or her own, constituting an unauthorized distribution and resulting in an unauthorized copy. Each and every one of these infringements is facilitated, encouraged, and made possible by Napster. Because the "millions of songs" that Napster makes available for unauthorized copying and distribution are stored on individual users' hard drives, rather than on public Internet sites, these sound recordings would not be available for illicit copying *at all* were it not for Napster.

58. Through its conduct averred herein, Napster has engaged and continues to engage in the business of knowingly and systematically inducing, causing, and materially contributing to the above-described unauthorized reproductions and/or distributions of copies of the Copyrighted Recordings and thus to the infringement of plaintiffs' copyrights and exclusive rights under copyright in the Copyrighted Recordings.

59. The infringement of each of plaintiffs' rights in and to the Copyrighted Recordings constitutes a separate and distinct act of infringement.

60. The foregoing acts of infringement by Napster have been willful, intentional, and purposeful, in disregard of and indifference to the rights of plaintiffs.

61. Napster's conduct, as averred herein, constitutes contributory infringement of plaintiffs' copyrights and plaintiffs' exclusive rights under copyright in violation of Sections 106, 115, and 501 of the Copyright Act, 17 U.S.C. §§ 106, 115, and 501.

62. As a direct and proximate result of the contributory infringements by Napster of plaintiffs' copyrights and exclusive rights under copyright, plaintiffs are entitled to damages and Napster's profits pursuant to 17 U.S.C. § 504(b) for each infringement.

63. Alternatively, plaintiffs are entitled to the maximum statutory damages, pursuant to 17 U.S.C. § 504(c), in the amount of \$100,000 with respect to each work infringed, or such other amounts as may be proper under 17 U.S.C. § 504(c). Plaintiffs are informed and believe, and on that basis aver, that such statutory damages shall exceed \$100,000,000.

64. Plaintiffs further are entitled to their attorneys' fees and full costs pursuant to 17 U.S.C. § 505.

65. Napster's conduct, as hereinabove averred, is causing and, unless enjoined and restrained by this Court, will continue to cause plaintiffs great and irreparable injury that cannot fully be compensated or measured in money. Plaintiffs have no adequate remedy at law. Pursuant to 17 U.S.C. § 502, plaintiffs are entitled to preliminary and permanent injunctions prohibiting further contributory infringements of plaintiffs' copyrights.

COUNT II

VICARIOUS INFRINGEMENT OF COPYRIGHTS

[By All Plaintiffs Against Defendants]

66. Plaintiffs incorporate herein by this reference each and every averment contained in paragraphs 1 through 55, inclusive.

67. At all times relevant herein, Napster had the right and ability to supervise and/or control the infringing conduct of its users by, without limitation, preventing or terminating a user's access to Napster's computer servers and/or by refusing to index and create links to infringing music files, but has failed to exercise such supervision and/or control. As a direct and proximate result of such failure, Napster users have infringed plaintiffs' copyrights in the Copyrighted Recordings, as set forth above.

68. At all times relevant herein, Napster derived substantial financial benefit from infringements of plaintiffs' copyrights by its users in that, among other things, Napster solicits advertising and, plaintiffs are informed and believe, charges fees for advertising on Napster. Plaintiffs are informed and believe, and on that basis aver, that the number and amount of these fees is related directly to the number of users of Napster which, in turn, is dependent directly on Napster's facilitation of and participation in the unauthorized reproduction and distribution of plaintiffs' sound recordings. Napster further is undertaking a purposeful strategy to make its company more attractive to potential advertisers and investors by increasing the number of users, and thereby the volume of plaintiffs' sound recordings available for unlawful copying and distribution.

69. The foregoing acts of infringement by Napster have been willful, intentional, and purposeful, in disregard of and indifference to the rights of plaintiffs.

70. Napster's conduct, as averred herein, constitutes vicarious infringement of plaintiffs' copyrights and exclusive rights under copyright, in violation of Sections 106, 115, and 501 of the Copyright Act, 17 U.S.C. §§ 106, 115, and 501.

71. As a direct and proximate result of Napster's vicarious infringement of plaintiffs' copyrights and exclusive rights under copyright, plaintiffs are entitled to damages and Napster's profits pursuant to 17 U.S.C. § 504(b) for each infringement.

72. Alternatively, plaintiffs are entitled to the maximum statutory damages in the amount of \$100,000 with respect to each work infringed, or for such other amounts as may be proper under 17 U.S.C. § 504(c). Plaintiffs are informed and believe, and on that basis aver, that such statutory damages shall exceed \$100,000,000.

73. Plaintiffs further are entitled to their attorneys' fees and full costs pursuant to 17 U.S.C. § 505.

74. Napster's conduct, as hereinabove averred, is causing and, unless enjoined and restrained by this Court, will continue to cause plaintiffs great and irreparable injury that cannot fully be compensated or measured in money. Plaintiffs have no adequate remedy at law. Pursuant to 17 U.S.C. § 502, plaintiffs are entitled to preliminary and permanent injunctions prohibiting further vicarious infringements of plaintiffs' copyrights.

COUNT III

VIOLATIONS OF CALIFORNIA CIVIL CODE SECTION 980(a)(2)

[By Plaintiffs Sony Music Entertainment Inc., MCA Records, Inc., Capitol Records, Inc.,

75. Plaintiffs incorporate herein by this reference each and every averment contained in paragraphs 1 through 55, inclusive.

76. Plaintiffs possess exclusive ownership interests in and to the Pre-1972 Recordings pursuant to California Civil Code section 980(a)(2) and under the common law.

77. Through its conduct as averred herein, Napster has violated plaintiffs' exclusive ownership interests in and to the Pre-1972 Recordings.

78. As a direct and proximate result of Napster's conduct in violation of plaintiffs' exclusive ownership interests in and to the Pre-1972 Recordings, Napster has received proceeds and plaintiffs have been damaged in an amount that shall be proved at trial.

79. Through its conduct averred herein, Napster is guilty of oppression, fraud, and/or malice and plaintiffs, in addition to their actual damages are, by reason thereof, entitled to recover exemplary and punitive damages against Napster.

80. Napster's conduct, as hereinabove averred, is causing and, unless enjoined and restrained by this Court, will continue to cause plaintiffs great and irreparable injury that cannot fully be compensated or measured in money. Plaintiffs have no adequate remedy at law. Plaintiffs are entitled to preliminary and permanent injunctions prohibiting further violation of plaintiffs' rights in the Pre-1972 Recordings.

COUNT IV

STATUTORY AND COMMON LAW UNFAIR COMPETITION

[By Plaintiffs Sony Music Entertainment Inc., MCA Records, Inc., Capitol Records, Inc.,
BMG Music, and Warner Bros. Records Inc. Against Defendants]

81. Plaintiffs incorporate herein by this reference each and every averment contained in paragraphs 1 through 55 and 76 and 77, inclusive.

82. The foregoing acts and conduct of Napster constitute an appropriation and invasion of the property rights of plaintiffs in and to the Pre-1972 Recordings, and constitute unfair competition under California Business & Professions Code section 17200 and under the common law.

83. As a direct and proximate result of Napster's conduct, as averred herein, plaintiffs are further entitled to recover all proceeds and other compensation received or to be received by Napster arising from its users' infringements of the Pre-1972 Recordings. Plaintiffs request the Court to order Napster to render an accounting to ascertain the amount of such profits and compensation.

84. As a direct and proximate result of Napster's unfair competition, plaintiffs, and each of them, have been damaged, and Napster has been unjustly enriched, in an amount that shall be proved at trial for which damages and/or restitution and disgorgement is appropriate. Such damages and/or restitution and disgorgement should include a declaration by this Court that Napster is a constructive trustee for the benefit of plaintiffs and an order that Napster convey to plaintiffs all the gross receipts received or to be received that are attributable to infringement of the Pre-1972 Recordings.

85. Through its conduct averred herein, Napster is guilty of oppression, fraud, and/or malice and plaintiffs are, in addition to their actual damages, by reason thereof, entitled to recover exemplary and punitive damages against Napster.

86. Napster's conduct, as hereinabove averred, is causing and, unless enjoined and restrained by this Court, will continue to cause plaintiffs great and irreparable injury that cannot fully be compensated or measured in money. Plaintiffs have no adequate remedy at law. Pursuant to California Business & Professions Code section 17203, plaintiffs are entitled to preliminary and permanent injunctions prohibiting further acts of unfair competition.

WHEREFORE, plaintiffs pray for judgment against defendants, and each of them, as

follows:

1. On Counts I and II, for defendants' profits and for damages in such amount as may be found; alternatively, for maximum statutory damages in the amount of not less than \$100,000 with respect to each copyrighted work infringed, or for such other amount as may be proper pursuant to 17 U.S.C. § 504(c).

2. On Counts I through IV, for a preliminary and a permanent injunction enjoining defendants, and each of them, and their respective agents, servants, employees, officers, attorneys, successors, licensees and assigns, and all persons acting in concert or participation with each or any of them, from: (i) directly or indirectly infringing in any manner any of plaintiffs' respective copyrights (whether now in existence or hereafter created), including without limitation, the Copyrighted Recordings listed on Schedule A; (ii) from causing, contributing to, enabling, facilitating, or participating in the infringement of any of plaintiffs' respective copyrights, including without limitation, the Copyrighted Recordings listed on Schedule A; (iii) directly or indirectly infringing in any manner any of plaintiffs' Pre-1972 Recordings, including without limitation, those listed on Schedule B; and (iv) from causing, contributing to enabling, facilitating, or participating in the reproduction or distribution of any of plaintiffs' Pre-1972 Recordings, including without limitation, those listed on Schedule B.

3. On Counts III and IV, for an accounting, the imposition of constructive trust, restitution of defendants' unlawful proceeds, and damages according to proof.

4. On Counts III and IV, for punitive and exemplary damages in such amount as may be awarded at trial.

5. For prejudgment interest according to law.

6. For plaintiffs' attorneys' fees, costs, and disbursements in this action.

7. For such other and further relief as the Court may deem just and proper.

RUSSELL J. FRACKMAN
GEORGE M. BORKOWSKI
JEFFREY D. GOLDMAN
DREW E. BREUDER
MITCHELL SILBERBERG & KNUPP LLP

STEVEN B. FABRIZIO
RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.

By _____
Russell J. Frackman
Attorneys for Plaintiffs