

**Appeal Nos. 01-15998, 01-16003, 01-16011 and 01-16308**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**A&M RECORDS, INC., et al. and JERRY LEIBER, et al.**

**Plaintiffs – Appellants - Cross-Appellees,**

**and**

**METALLICA; ANDRE YOUNG; CASANOVA RECORDS,**

**Plaintiffs - Cross-Appellees,**

**v.**

**NAPSTER, INC.,**

**Defendant – Appellee – Cross-Appellant.**

**(For Full Captions See Following Pages)**

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

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**REPLY BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT  
NAPSTER, INC.**

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

LAWRENCE S. ROBBINS  
ALAN E. UNTEREINER  
ROBBINS, RUSSELL, ENGLERT, ORSECK &  
UNTEREINER LLP  
1801 K Street, Suite 411  
Washington, D.C. 20006  
Telephone: (202) 775-4500  
Facsimile: (202) 775-4510

STEVEN M. COHEN  
KRONISH LIEB WEINER & HELLMAN LLP  
1114 Avenue of the Americas  
New York, New York 10036  
Telephone: (212) 479-6223  
Facsimile: (212) 479-6275

JOSEPH W. COTCHETT, JR. (CSB No. 36324)  
COTCHETT, PITRE & SIMON  
840 Malcolm Road, Suite 200  
Burlingame, CA 94010  
Telephone: (650) 697-6000  
Facsimile: (650) 697-0577

Attorneys for Defendant/Appellee/  
Cross-Appellant NAPSTER, INC.

**A & M RECORDS, INC., a corporation, GEFLEN 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, WARNER BROS. RECORDS INC., a corporation,**

**Plaintiffs – Appellees,**

**v.**

**NAPSTER, INC., a corporation,**

**Defendant – Appellant**

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

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

**Plaintiffs – Appellees,**

**v.**

**NAPSTER, INC., a corporation,**

**Defendant – Appellant.**

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

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

**Plaintiffs – Appellees,**

**v.**

**NAPSTER, INC., a corporation,**

**Defendant –Appellant.**

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

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

**Plaintiffs – Appellees,**

**v.**

**NAPSTER, INC., a corporation,**

**Defendant –Appellant.**

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

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

**Plaintiffs – Appellees,**

**v.**

**NAPSTER, INC., a corporation,**

**Defendant –Appellant.**

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

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## INTRODUCTION

Most of Plaintiffs' answering brief is little more than an (untimely and unpersuasive) petition for rehearing of this Court's February 12, 2001 opinion. Not until page 34 of their brief do Plaintiffs even acknowledge that the "novel construct" they so roundly condemn as "superfluous, ineffective, burdensome, . . . legally irrelevant," and lacking "any basis in law or logic" (Pl. Answ. Br. 2, 31) – *i.e.*, the requirement that Plaintiffs identify specific infringing files available through the Napster system "before Napster has the duty to disable access to the offending content" (*A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1013, 1027 (9<sup>th</sup> Cir. 2001)) – is, in fact, a requirement *explicitly imposed by this Court in its prior opinion*. Even more remarkably, not once in their 80-page brief do Plaintiffs quote the language of this Court's holding, much less explain what that language could possibly mean if not what the district court said it means when the district court issued the March 5, 2001 Modified Injunction.

Plaintiffs' evident discomfort with this Court's February 12 decision does not end there. Throughout their brief, Plaintiffs repeatedly seek to relitigate a fundamental issue of copyright law: Must a copyright holder meet a higher standard of proof when it sues an Internet service company as a *secondary* infringer than it would when it sues users of the Internet service as *direct* infringers? This Court has already answered that question. It held that the district

court’s original preliminary injunction was overbroad precisely “because it place[d] on Napster the *entire* burden of ensuring that no ‘copying, downloading, uploading, transmitting, or distributing’ of Plaintiffs’ works occurs on the [Napster] system.” *Id.* (emphasis added). Relying on the limitations that inhere in the law of secondary liability, as well as on the principle that noninfringing uses must be preserved under *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), this Court held that “absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted information.” 239 F.3d at 1021. This Court faulted the district court for “fail[ing] to recognize that the boundaries of the premises that Napster ‘controls and patrols’ are limited,” and it explained that Napster’s duty to police its system “is cabined by the system’s current architecture.” *Id.* at 1023, 1024. Finally – in language Plaintiffs cannot bring themselves even to quote – this Court “place[d] the burden on plaintiffs to provide notice to Napster of copyrighted works and files containing such works available on the Napster system *before* Napster has the duty to disable access to the offending content.” *Id.* at 1027 (emphasis added).

Plaintiffs want this Court to act as if it never said any of this. They cannot abide the idea (inherent in the very notion of secondary liability, especially where

primary users are not sued directly) that some direct infringement of their copyrighted works might continue to occur even after Napster is fully enjoined from engaging in secondary infringement. Neither can Plaintiffs accept the notion that Napster's "policing" obligation has limits. As far as Plaintiffs are concerned, no amount of policing will suffice – even if additional screening methods result in massive overblocking of noninfringing works, and even if Napster must radically change its architecture by adopting a "filter in" scheme in which all content is preapproved before being made available. Plaintiffs pursue this demand even though their insistence on a "filter in" scheme was previously rejected by this Court.

Throughout their brief, Plaintiffs repeatedly suggest that these consolidated appeals are about Napster's compliance with the March 5 Modified Injunction (rather than about revisiting this Court's previous decision). Indeed, to read Plaintiffs' brief, one might think that the district court made a finding that Napster somehow failed to comply with the modified injunction. In fact, no finding of noncompliance was ever entered by the district court – nor would such a finding have been warranted. This is *not* an appeal from a sanction for noncompliance or from an order of contempt; it is a series of consolidated appeals and cross-appeals from specific directives contained in two injunctive orders (dated March 5 and July 11, 2001).

Plaintiffs' attempt to recast this appeal as involving Napster's compliance, moreover, is more than a little ironic. Almost from the moment that the ink was dry on the district court's March 5 Modified Injunction, Plaintiffs have waged a campaign of non-cooperation (if not obstructionism) relating to the discharge of their "shared" obligations under that decree. Paragraph 2 of the March 5 Modified Injunction states unambiguously: "Plaintiffs *shall* provide notice to Napster of their copyrighted musical compositions [or sound recordings] by providing *for each work*" not only the "title" and artist (or composer) name but also "the name(s) of one or more files available on the Napster system containing such work" (ER000671, ER000676 (emphasis added)). *Plaintiffs indisputably have failed to honor this obligation.* Nor is this all. Plaintiffs also initially refused to fulfill their independent obligation to identify "variants" of file names because they did not want to set a "precedent" (Napster Op. Br. 18 n.8); and they subsequently dumped on Napster 200,000 *machine-generated theoretical* permutations, insisting at the same time that Napster block these theoretical variants even though there was no indication that the made-up file names had ever existed in the Napster index. *Id.* at 18. Plaintiffs seek to excuse, but they do not deny, their own failure to obey the March 5 Modified Injunction. *See* Pl. Answ. Br. 17 n.7. For example, they suggest that they should be relieved of their obligation under paragraph 2 because "Napster's current fileID system does not need file names at all." *Id.* at 30. For

the reasons set forth in our opening brief (at 50-52 & n.18), but ignored by Plaintiffs, the factual premise of this excuse is untrue: Napster did, and still does, need the file names.

Plaintiffs are doubtless emboldened in their efforts to avoid their obligations and obtain rehearing in this Court by the recent events in the district court. Since the entry of the March 5 Modified Injunction, the district court has forced Napster to alter its architecture from a text-based system to fileID. In addition, the district court on July 11 ordered the company's "policing" to continue until "zero tolerance" is achieved (and the file-sharing system to remain shut down until then). This is tantamount to a reinstatement of the original preliminary injunction, which this Court reversed as overbroad.

As for their arguments concerning the July 11 order and the excess delegation of authority to the technical advisor, Plaintiffs fare no better. In an attempt to defend the far-reaching authority wielded by Dr. Nichols, which even Plaintiffs' lawyer (in open court below) acknowledged was problematic, Plaintiffs attempt to persuade this Court that all Dr. Nichols has done is to "assist" the district judge in "understanding" the technical issues. In fact, the record demonstrates that Dr. Nichols has exercised a wide variety of powers that should never have been delegated to him in the first place. Equally unpersuasive are

Plaintiffs' efforts to defend the July 11 order as within the district court's jurisdiction and consistent with this Court's prior decision.

Plaintiffs evidently believe that if they can brand Napster a "music pirate" often and loudly enough (Pl. Answ. Br. at 1, 2, 5, 16, 24, 31, 54), this Court will eventually come to adopt their mantra. This Court should not be deceived. Copyright "pirates" are individuals or entities "who ma[k]e and s[ell] large numbers of counterfeit copies." JESSICA LITMAN, DIGITAL COPYRIGHT 85 (2001). There is no allegation that Napster itself copied any of Plaintiffs' songs; nor has Napster sold the songs, even in small numbers. On the contrary, this is a case about *secondary* liability – a fact that Plaintiffs do everything in their power to obscure.

**I. PLAINTIFFS' ABSOLUTIST CONCEPTION OF COPYRIGHT LAW – UNDER WHICH NAPSTER MUST PREVENT ALL INFRINGEMENT THROUGH ITS SYSTEM, OVERBLOCK NONINFRINGEMENT USES, AND ALTER ITS BASIC ARCHITECTURE – IS INDEFENSIBLE**

Before addressing Plaintiffs' specific responses to our contentions, we identify three fundamental misapprehensions about the law that permeate their arguments.

*Misapprehension 1: There is no difference between secondary and direct infringement.* As Plaintiffs put it, "there is no sliding scale of infringement" and Napster should be compelled, on pain of contempt, to "do everything possible to

reach the objective of no infringement.” Pl. Answ. Br. 46. In Plaintiffs’ view, Napster must implement the latest and best screening technology no matter what the incremental benefit or the cost to Napster, and must undertake screening measures that inevitably result in massive overblocking of noninfringing works. Plaintiffs’ absolutist view concerning the proper scope of the preliminary injunction ignores fundamental limitations imposed by the law – and by this Court’s prior decision – on Napster’s obligations.

While copyright law imposes strict liability on direct infringers, *Religious Technology Center v. Netcom On-Line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995), this case involves no claim of direct infringement by Napster. Instead, the underlying legal theory of Plaintiffs’ claims – and thus the basis for the preliminary injunction – is one of secondary liability. The standards for establishing secondary liability are substantially more stringent, featuring additional elements of notice and control. *See id.* at 1373-77. As this Court recognized in its prior decision, Plaintiffs’ claim of contributory infringement requires proof that Napster, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” 239 F.3d at 1019 (internal quotations omitted). And Plaintiffs’ claim of vicarious liability depends on whether Napster “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Id.* at 1022.

Precisely because Napster’s liability (if any) arises only after it obtains the requisite “knowledge” and “ability to supervise” – and then fails to respond appropriately – this Court instructed the district court, on remand, to “place the burden on plaintiffs to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content.” *Id.* at 1027 (emphasis added).<sup>1</sup>

Plaintiffs’ absolutist position also conflicts with Congress’s recognition of express limitations on the liability of Internet service providers for copyright infringement engaged in by third parties who use the service. In enacting the Digital Millennium Copyright Act, Congress acted out of a serious concern that “[i]n the ordinary course of their operations,” Internet service providers “must engage in all kinds of acts that expose them to potential copyrighted infringement liability.” S. Rep. No. 105-190, at 8 (1998). Congress sought to place limits on such liability to “ensure that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.” *Id.* Toward that end, Congress sought to codify the standard articulated in the *Netcom* decision, under which copyright holders must provide “the necessary documentation to show that there is a likely infringement.” 907 F. Supp. at 1374;

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<sup>1</sup> In its opinion of April 26, 2001, the district court properly recognized that this Court had not limited Plaintiffs’ obligation to provide Napster with file names to their claims of contributory infringement. *See* ER005251 (holding that Plaintiffs’ obligation applies as well to their claims of vicarious infringement).

*see* Napster Op. Br. 45. Congress also expressly rejected a liability standard for online services based on “constructive knowledge,” requiring instead a higher level of knowledge before secondary liability can be imposed in this special setting. S. Rep. No. 105-90 at 48 (1998) ; 3 NIMMER ON COPYRIGHT, §12B.07 at 12B-5. Finally, Congress recognized that Internet service providers’ protections should not be conditioned on their “monitoring [their] system or affirmatively seeking facts indicating infringing activity.” 17 U.S.C. §512(m).

*Misapprehension 2: Napster should be required to make any and every change in its architecture that may conceivably reduce the total number of infringing acts by its users.* In reversing the original preliminary injunction and remanding, this Court faulted the district court for “fail[ing] to recognize that the boundaries of the premises that Napster ‘controls and patrols’ are limited.” 239 F.3d at 1023. “Napster’s reserved right and ability to police,” this Court explained, “is cabined by the system’s current architecture” (*id.* at 1024) and can be discharged only “within the limits of its system” (*id.* at 1027). In addition, this Court recognized that “policing” is “not an exact science” because file names “are user named.” *Id.*

As explained in greater detail below, Plaintiffs simply ignore this Court’s repeated emphasis on architectural constraints. They fault Napster for failing “to implement anything other than incomplete text-based filtering” and for “refus[ing]

for months to use any number of available digital fingerprinting filtering systems” (Pl. Answ. Br. 8, 9) – as if the law required Napster to change its basic architecture.

*Misapprehension 3: So long as any infringing activity continues anywhere on the system, the suppression of significant non-infringing uses does not matter.* In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court held that supplying the means to accomplish infringing activity, and even encouraging that activity through advertising, are insufficient to establish secondary liability where the product or service supplied is capable of significant noninfringing uses. *Id.* at 442-43. Mere knowledge that a product is likely to be used for infringing activities does not meet the heightened standard required for secondary liability. *Id.*

Plaintiffs argue (Pl. Answ. Br. 52-55) that *Sony* is inapplicable, but their argument is unavailing. This Court’s prior decision made clear not only that *Sony* applies here (*see* 239 F.3d at 1020), and that by virtue of *Sony* “a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material” (*id.* at 1021), but also that it would “violate *Sony* [to] potentially restrict activity unrelated to infringing use.” *Id.* Likewise, this Court held that the district court was wrong to conclude that Napster had “failed to demonstrate that its system is capable of

commercially significant noninfringing uses.” *Id.*<sup>2</sup> Plaintiffs’ attempt to relitigate those points in this appeal simply comes too late.

## **II. NAPSTER’S “POLICING” OBLIGATION SHOULD BE CLARIFIED SO THAT IT IS CONSISTENT WITH *SONY*, THIS COURT’S FEBRUARY 12 DECISION, AND THE REQUIREMENTS OF FED. R. CIV. P. 65(D)**

We demonstrated in our opening brief (at 56-65) that the March 5 Modified Injunction includes serious ambiguities in the provisions that place obligations on Napster. Most important, the injunction’s directive that Napster “police” the system is unduly vague. It fails to make clear how, to what extent, and at what cost, Napster is supposed to discharge its “policing” obligation.<sup>3</sup>

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<sup>2</sup> Plaintiffs suggest in passing that Napster has few noninfringing uses (Pl. Answ. Br. 53-54 & n.25), but this assertion ignores ample evidence in the record to the contrary: thousands of artists have expressly authorized Napster users to share their music; hundreds of artists let their fans record live concerts and exchange the recordings; and music already in the public domain is available through the Napster system. *See* SER00131, 00306-00351, 00440-00441, 00450, 00458, 00467.

<sup>3</sup> We also identified as problematic the command in Paragraph 3 directing Napster (and Plaintiffs) to use “reasonable measures” to “identify[] variations of the filename(s), or of the spelling of the titles or artists’ names, of the works identified by plaintiffs.” ER000677 ¶ 3. Likewise ambiguous is Paragraph 3’s directive that Napster must take “appropriate action within the context of this Order” where “it is reasonable to believe that a file available on the Napster system is [such] a variation.” *Id.* Plaintiffs observe (at 45-46 n.18) that in submitting a form of injunction to the district court Napster itself proposed that the word “reasonable” be used “in connection with locating variations.” But Plaintiffs neglect to add that what Napster was proposing was to permit *Plaintiffs* to identify not only specific file names, but also “reasonable variations” thereof for Napster to block. PSER0002:15. That, of course, is a far cry from Paragraph 3 of the March 5 Modified Injunction, which requires Napster (not the Plaintiffs) to take

Plaintiffs offer a number of responses. First, they misleadingly point to a variety of provisions (*e.g.*, ¶¶ 1, 5) of the Modified Injunction that we are *not* claiming are ambiguous, and then argue that the provisions they identify are not ambiguous. *See* Pl. Answ. Br. 40-41. That, however, is not how the specificity inquiry is conducted. Instead, courts focus on the provisions claimed to be unduly vague and evaluate whether they comply with Fed. R. Civ. P. 65.

When Plaintiffs address the “policing” provisions that we have identified as problematic (Pl. Answ. Br. 45-46), they are unable to identify any limiting principles. Plaintiffs first say that the obligation to police “must be exercised to its fullest extent.” 239 F.3d at 1023. As we explained in our opening brief (at 59), however, that formulation merely restates the standard governing vicarious liability, and an injunction not to violate the law does not provide the explicit notice required by Rule 65(d). In any event, what does “fullest extent” mean? After all, the district judge imposed a “zero tolerance” standard on July 11 in the name of “fullest extent”; yet (as discussed further below) that standard runs afoul of this Court’s recognition that the reach of any preliminary injunction against Napster must be “cabined by the system’s current architecture.” 239 F.3d at 1024.

Plaintiffs next attempt to circumscribe the policing duty by contending that it means that “Napster must search *frequently enough*, achieve *a sufficient level of*

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“reasonable measures” to find variants – an impossibly vague burden which bears no resemblance to Napster’s proposal to the district court.

*accuracy*, and incur *as much cost as it takes* to do everything it can possibly do to prevent *any and all* infringement on its system.” Pl. Answ. Br. 46 (emphasis added). But these words – which, of course, do not appear in the injunction – provide no greater specificity to the policing command. Indeed, Plaintiffs’ gloss bears a striking resemblance to a proposed command that the district judge *declined* to include because it was too vague.<sup>4</sup> More fundamentally, the very fact that Plaintiffs read the “policing” duty to require Napster to do “everything it can possibly do” to prevent “any and all infringement on its system” is proof positive that the policing provisions need fixing. Pl. Answ. Br. 46.

As we explained in our opening brief (at 21-23, 61-64), the vagueness of the “policing” obligation has resulted in massive overblocking of non-infringing works. This result is squarely at odds with the principles of *Sony*. Plaintiffs complain (Pl. Answ. Br. 48) that we never “presented any evidence” of how serious the overblocking was, but in fact we provided numerous examples of how generic word screens demanded by Plaintiffs would have resulted in massive overblocking. *See* Napster Op. Br. 22-24. We also demonstrated (at 24) that 92% of works were being blocked, although the *A&M* Plaintiffs claimed to own only

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<sup>4</sup> At a hearing on March 2, 2001, Plaintiffs asked the court to require Napster to “employ such measures and technology as are reasonably available to affirmatively patrol its system.” SER00397. The court demurred, however, because it was “not sure what that phrase...really means” and because injunctions must have “the specificity requisite to enforcement.” ER000632-633.

74% of works available.<sup>5</sup> Plaintiffs never took issue with this below; instead, their response (like the district court's, *see* Napster Op. Br. 25) was that *it didn't matter* whether overblocking (even on a massive scale) was occurring. And, in fact, that is really their principal argument here too. *See* Pl. Answ. Br. 48. Plaintiffs' other major argument (Pl. Answ. Br. 49) is that overblocking can be avoided if Napster just changes over to a "filter in" system. But again, that overlooks this Court's holding that Napster's policing obligation is subject to architectural constraints. 239 F.3d at 1024, 1027. Put another way, Napster's duties under the copyright laws do not require it to invent a new "system" favored by Plaintiffs.

Relying on *Syntex Ophthalmics, Inc. v. Tsuetaki*, 701 F.2d 677, 689 n.1 (7<sup>th</sup> Cir. 1983), however, Plaintiffs maintain (Pl. Answ. Br. 44) that any ambiguity in the policing obligation is cured by the inclusion in the Modified Injunction of a provision allowing the parties to "set the matter for a hearing before the court" if, "in implementing this preliminary injunction," the parties "dispute the ability of Napster or of the Napster system to carry out the duties established under this

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<sup>5</sup> Plaintiffs unsuccessfully attempt (at 48 n.21) to explain away this powerful statistical evidence of overblocking. Contrary to their submission, the *A&M* Plaintiffs *did* claim that 74% – 834/1150 (not merely "more than" 70%) – of the works available through the Napster system were theirs. SER0005 ¶ 8. Nor does the fact that 92% of all works available on Napster were blocked by the company's filtering suggest a sudden and unexplained surge in the percentage of works owned by Plaintiffs. On the contrary, the disparity strongly confirms what the many examples provided by Napster also demonstrate: that the district court required substantial overblocking on Napster's part.

Order.” ER000677. But *Syntex Ophthalmic* provides no assistance to Plaintiffs. The Seventh Circuit determined that the injunction in that case not only “placed defendants on notice of the restrained acts” (*id.* at 684), but also authorized the parties to seek the court’s intervention “for interpreting and applying the injunction.” *Id.* Here, by contrast, the “policing” provision affords no notice whatsoever of the restrained acts, and the provision in the Modified Injunction aimed at resolving disputes involves only disputes about *technical feasibility*, not the scope of the basic injunctive command. What is more, far from providing a vehicle for obtaining greater clarity, the various hearings conducted by the district court following entry of the March 5 Modified Injunction were marked principally by the trial judge’s *refusal* to provide Napster with any guidance concerning how much “policing” was enough. *See* Napster Op. Br. 29-32, 37. It was not until the July 11 order that the district court finally told Napster how much “policing” it had to do – and that was the blunderbuss modification requiring 100% effectiveness in screening.

Plaintiffs also find fault in our suggestions for how this Court could clarify the policing obligation on remand. In our opening brief (at 64-65), we urged this Court to make clear that once Plaintiffs have provided the requisite notice of a copyrighted work and a specifically infringing file, Napster’s duty (beyond that of blocking the noticed file and any variant file names that Plaintiffs found and

provided) is to police the system in an effort to detect other file names, not specifically noticed by Plaintiffs, that “reasonably or roughly correspond” to the file names Plaintiffs provided. We also suggested (at 65) that this Court make clear once again that the duty to police does not require Napster to change its architecture or use blocking techniques that are likely to screen a significant number of non-infringing works. According to Plaintiffs, these changes are “so indeterminate” that they “would provide Napster with virtual immunity from being held accountable for the wide-spread infringement on its system.” Pl. Answ. Br. 50. That is simply not so. “Reasonable” and even “rough” correspondence to specifically noticed file names meaningfully circumscribes the universe of files that must be “policed.” And while there may well be other ways to formulate a limitation on the otherwise boundless duty to “police,” Plaintiffs don’t suggest any.

Finally, Plaintiffs suggest (at 30) that file names are no longer needed by Napster to block infringing works. As we explained in our opening brief (at 50-52 & n.18), this is untrue. Under the new fileID system, the identification of an infringing file available through the system permits Napster to match with certainty the relevant metadata and ensure that the proper fingerprint is thereafter blocked.

SER00928-30 ¶¶ 12-22 & n.2.

### III. THE JULY 11 ORDER IS CONTRARY TO THIS COURT'S PREVIOUS DECISION

In our opening brief (at 78-82), we explained that the July 11 order should be vacated because it is fundamentally at odds with this Court's February 12 decision. That inconsistency, we pointed out, is not limited to the district court's unreasonable insistence that Napster achieve absolute perfection in screening out infringing works. It also includes the trial court's command that Napster keep its file-sharing system offline – a mandate that this Court previously criticized and reversed as part of the “overbroad” original injunction and has now stayed not once but twice.<sup>6</sup>

As an initial matter, Plaintiffs dispute that the district court commanded Napster to refrain from operating its file-sharing technology until the company had achieved the level of 100% effectiveness in excluding infringing works. Pl. Answ. Br. 76. According to Plaintiffs, zero tolerance was merely the “‘objective’ toward which” Napster was told it should be “striving,” not a mandatory goal. *Id.* at 6 n.1, 76. Plaintiffs also attempt to draw a distinction between a directive to do everything “humanly possible” to achieve zero tolerance (which they say the

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<sup>6</sup> The trial judge has stated in open court that she regards this Court's February 12 opinion as not “particularly workable” (ER005282 (05/03/01)), and has opined that this Court never “really fully understood all the implication [sic] of how [the Napster system] works. . . .” ER006184-6185 (06/06/01). The trial judge has further stated that “[m]aybe [the Court of Appeals] need[s] to take another look at it,” and “I still think I was right.” ER005069.067, 5069.051 (4/10/01).

district court issued) and an order that Napster actually satisfy that goal (which they claim is vastly different and was *not* issued by the district court). *Id.* at 6 n.1.

But the record leaves no doubt that the district judge ordered Napster to *achieve zero tolerance*. She could hardly have been more emphatic:

- “There should be no copyright infringement, period” (SER01006);
- “The standard is to get it down to zero. Do you understand that?” (SER01009);
- “I told you what the standard is, to get it down to zero.” (SER01011).

*See also* Napster Op. Br. 74 n.20. In any event, there is no meaningful distinction – especially for a litigant such as Napster that has been repeatedly threatened with contempt – between an order “to get down to zero, essentially down to zero, as close thereto as *possible*” (SER01008 (emphasis added)) and an order to “get it down to zero” (SER01009). In the area of technical refinements, there is always more that can be done, additional improvements that can be made to software, more personnel who can be hired to monitor the system, and more that can be spent on consultants or technology. And, of course, Plaintiffs will continue to demand that Napster fundamentally alter its system by converting it to a “filter in” system, which is “humanly possible” and would meet the goal of “zero tolerance.” Pl. Answ. Br. 6, 76-77. Thus, unless Napster in fact satisfies zero tolerance, Plaintiffs can be counted on to argue that the company is not doing everything “humanly possible” because it has not converted to “filter in.”

Even if the distinction drawn by Plaintiffs were consistent with the record, it would make no difference to the analysis. Whether the district court ordered Napster to satisfy the “zero tolerance” standard (as the court said numerous times) or merely directed the company to do everything “humanly possible” to satisfy that standard, there is still a glaring inconsistency between the July 11 order and this Court’s February 12 opinion. In its previous opinion, this Court held that the reach of any preliminary injunction against Napster is subject to architectural constraints. 239 F.3d at 1024. Moreover, the Court expressly recognized the need for shared burdens – and made Napster’s duty to screen expressly contingent upon Plaintiffs’ provision of the required notice. *See id.* at 1027. Under these circumstances, the district court’s insistence on perfect screening by Napster (or screening to the extent “humanly possible”) cannot be reconciled with the plain language of this Court’s remand instructions. Nor can either command be reconciled with the limitations recognized in this Court’s previous opinion on *secondary* liability for contributory or vicarious infringement of copyright. Secondary liability theories inherently presuppose that some direct infringement may occur without liability extending to secondary defendants. *Sony*, 464 U.S. at 442. The district court’s requirement of “zero infringement” is, on its face, contrary to that essential principle.

Next, Plaintiffs disagree that the July 11 order – which directs file-sharing to stay down until the fileID system is perfected – requires any change in Napster’s “architecture.” Pl. Answ. Br. 23, 78. They can make that assertion, however, only by defining “architecture” in a way that is squarely at odds with this Court’s previous opinion. According to Plaintiffs, Napster’s “architecture” means its “peer-to-peer” quality (which, quite obviously, has not changed). In its February 12 decision, however, this Court made clear that the “current architecture” it had in mind was the *text-based system* then at issue, not just peer-to-peer file sharing in general. Indeed, after holding that “Napster’s reserved ‘right and ability’ to police is cabined by the system’s current architecture” (239 F.3d at 1024), this Court observed in the very next sentence: “As shown by the record, the Napster system does not ‘read’ the content of indexed files, other than to check that they are in the proper MP3 format.” *Id.* Two sentences after that, the Court wrote: “The file name indices ... are within the ‘premises’ that Napster has the ability to police.” *Id.* Later, in describing Napster’s part of the shared compliance burden, the Court wrote: “Napster has both the ability to *use its search function* to identify infringing musical recordings and the right to bar participation of users who engage in the transmission of infringing files.” *Id.* at 1027 (emphasis added). And it recognized that policing “is not an exact science in that the files are user

named.” It could hardly be clearer that this Court had Napster’s *text-based architecture* in mind, not merely the generic concept of peer-to-peer file sharing.

Remarkably, Plaintiffs also contend that, by “current” architecture, this Court meant whatever architecture Napster happens to develop anytime after the February 12 decision (even if that turned out to be as radically different from text-based searching as fileID). That argument is baseless. This Court could hardly have been clearer in its February 12 decision that by “current” architecture it meant the architecture that was *then* current, which was entirely text-based. By imposing a novel audio fingerprinting technology on Napster – and compounding matters by holding that new technology to a standard of “zero tolerance” on July 11 – the district court fundamentally abandoned the “current” architecture limitation.

The district court’s error, however, went beyond its failure to adhere to this Court’s remand instructions. At Plaintiffs’ insistence, the district court eventually got into the business of directing Napster, on pain of contempt, to engage in a prolonged course of judicially supervised technological innovation. That, we respectfully submit, is an improper and unworkable role for a federal judge to play. This Court should take this opportunity to reject the notion that the district court’s proper function may include supervising Napster’s technological innovation with possible sanctions if the company fails to research, develop, and integrate as quickly as possible the next technology over the horizon – no matter what the cost,

the vagaries of research and development, and the ultimate effectiveness of the technology.

Relatedly, Plaintiffs also suggest that, although the district court “insist[ed] that Napster adopt [fileID],” it never “force[d]” the company to adopt that new technology. Pl. Answ. Br. 78. That distinction, meager on its own terms, also overlooks the very real threat of contempt repeatedly leveled by Plaintiffs in the trial court. Napster Op. Br. 80 n.23.<sup>7</sup> It also is contrary to the record. In our August 13 filing in the district court, we submitted sworn evidence, which Plaintiffs have never contradicted, that it was only “[u]nder intense pressure from the [District] Court and Dr. Nichols” that Napster began “to implement what became known as the fileID system.” Declaration of Edward Kessler, Appendix in Support of Napster’s Emergency Motion to Stay District Court Proceedings (filed on 8/19/01) (“Kessler Decl.”), APP 1077 ¶ 4.

Plaintiffs contend that there is no inconsistency between the district court’s July 11 directive that Napster refrain from operating its file-sharing system until

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<sup>7</sup> Plaintiffs suggest (Pl. Answ. Br. 47 n.19) that Napster’s fears about being threatened with contempt are “unsupported.” They are wrong. *See, e.g.*, ER005069.076 (4/10/01) (Plaintiffs describe Napster’s conduct as “contemptuous”); ER005279-5280 (5/3/01) (district court states: “*we’ll have a contempt hearing if we have to . . .*”) (emphasis added); ER005319 (5/3/01) (Plaintiffs state that “up until now Napster’s been in contempt” and ask the court to “set a hearing date” at which contempt issues could be addressed); ER006204-6205 (6/6/01) (Plaintiffs request “sanctions” including a “daily fine” of \$100,000); ER006206, 6220, 6224 (6/6/01) (additional discussion by court and counsel of “contempt” and “sanctions”).

“zero tolerance” is achieved and this Court’s prior decisions, including its February 12 opinion and its decision to stay the original injunction. Plaintiffs assert that the original injunction did not “order Napster to shut down” (Pl. Answ. Br. 78), but that is true only in the sense that the operative language of the first injunction did not specifically order a shut down of file sharing. As Napster demonstrated in the emergency stay motion it filed in July 2000 (No. 00-16401 Appellant Napster Inc.’s Emergency Motion for Stay, at 6-10), the original injunction, if left unstayed, would have had the practical effect of forcing Napster to close its service within 48 hours. In opposing Napster’s request for a stay, Plaintiffs did not dispute this.

Plaintiffs also suggest (Pl. Answ. Br. 78) that the July 11 order is not inconsistent with this Court’s February 12 opinion because Napster had already suspended file transfers. But as we explain above, there is a world of difference between a temporary, voluntary decision to suspend the system and a judicial mandate compelling that result indefinitely unless and until Napster can satisfy a technical advisor (and the Court) that “zero tolerance” has been achieved.<sup>8</sup> As for the suggestion (Pl. Answ. Br. 79) that the district court’s modifications should be ignored because Napster has not sought, in the wake of the Court’s July 18 stay, to

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<sup>8</sup> Moreover, *the district court itself* acknowledged – correctly – on several occasions before the July 11 hearing that it was foreclosed by this Court’s decision from ordering Napster to shut down its file-sharing system. *See* Napster Op. Br. 81-82.

resume its file-sharing service, that too is beside the point. In our view, the district court has continued, notwithstanding the stay, to insist on zero tolerance. As long as that regime is in force, Napster can resume file-sharing only at its peril.<sup>9</sup>

Finally, in an effort to justify the incompatibility between the July 11 order and this Court's previous decisions, Plaintiffs repeatedly suggest that the July 11 order was warranted as a response to Napster's failure to comply with the March 5 Modified Injunction. That is simply untrue. As explained above, *no* finding has ever been entered that Napster actually failed to comply with the Modified Injunction.<sup>10</sup> This is simply *not* an appeal from any order holding Napster in

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<sup>9</sup> In an effort to shore up the July 11 order, Plaintiffs also attempt (Pl. Answ. Br. 13 n.6) to brush aside the unrebutted evidence presented by Napster during the July 11 hearing, which showed that the new fileID architecture was approaching 99% effectiveness in screening out infringing files. *See* Napster Op. Br. 36-37 & n.14. But Plaintiffs never objected to this evidence in the trial court, and their purported objections in this Court to such unrebutted evidence accordingly come too late.

<sup>10</sup> In the absence of express findings from the district court, Plaintiffs evidently feel free simply to make findings of their own – no matter how much they may be contravened by the actual record. Thus, for example, they assert (Pl. Answ. Br. 9) that Napster “permitted” its bulletin boards to be used by persons seeking to avoid text-based filtering; but the evidence shows that Napster in fact instituted a program of policing its bulletin boards to remove such content and persuaded other websites to do the same. ER003465 ¶ 9. Similarly, they complain (Pl. Answ. Br. 9) that Napster “instruct[ed]” users “how to change file names” stored on their hard drives but neglect to mention that this convenience feature of Napster’s program predated any screening of files, and that the likeliest effect of such changes was to change variant and inaccurate spellings into ones that could be captured by screens. And although Plaintiffs chastise Napster (*id.*) for failing “to maintain a log of user activity,” the evidence in the record confirms that such logs would have made no difference in policing the files.

contempt or ruling that Napster failed to comply with the March 5 Modified Injunction.<sup>11</sup>

#### **IV. THE MODIFIED INJUNCTION, AS IMPLEMENTED BY THE COURT, IMPERMISSIBLY DELEGATED ARTICLE III POWER TO A “TECHNICAL EXPERT”**

In our opening brief, we documented and described (at 26-38) the steady expansion of authority vested by the district court in Dr. Nichols, a “technical advisor” who has come to function, in effect, as Napster’s chief technical officer. We further demonstrated (at 66-72) that, under the controlling case law, this excessive delegation of judicial authority to Dr. Nichols violates Article III and should accordingly be vacated. Notably, Plaintiffs themselves found Dr. Nichols’s burgeoning role so troubling that, as early as May 3, 2001 – more than two months before the July 11, 2001 order – they complained in open court that Dr. Nichols was straying beyond his constitutional mandate:

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<sup>11</sup> In *every single instance* where the Plaintiffs have fulfilled their obligation under Paragraph 2 of the March 5 injunction (ER000671, ER000676) by providing Napster with an infringing file name available on the Napster system, *Napster has promptly blocked that file and artist/title pair*. Plaintiffs do not dispute this. It is also undisputed that Napster has taken a wide array of measures under Paragraph 3 (ER000672, ER000676) to identify variants of file names, titles, artists, and composers, and has successfully blocked these variants from the Napster system as well. *See* Napster Op. Br. 16-18. Plaintiffs could hardly claim that Napster has not satisfied its obligation to identify variants, since that duty applies with equal force to Plaintiffs and Napster has done vastly more to identify variants than have Plaintiffs. Although the parties disagree over the scope of the nebulous “policing” obligation under Paragraph 4 (ER000672, ER000676), it cannot be seriously disputed that Napster has done much to police its system “within the limits of the system.” 239 F.3d at 1027.

MR. FRACKMAN: ... Having sat through with Dr. Nichols, I believe, frankly, *the Court is putting him in an untenable position*, and in all due respect, I think that we need an order from the Court, and *I don't think actually that [sic] Dr. Nichols can or has the authority to implement anything but only to advise the Court*, and we're here today –

THE COURT: Well, I'll give him the authority then. How is that?

MR. FRACKMAN: *I'm not sure you can, under federal rules and under the cases that I've read. . . .*

ER005279 (emphasis added).

But now, Plaintiffs tell this Court that Dr. Nichols's activities were in fact limited to advising the district court on technical issues and, accordingly, Nichols was doing “no more than what is permissible” for a technical advisor to do. Pl. Answ. Br. 57.<sup>12</sup> The argument is refuted by the record. It overlooks, for example, the district court's express delegation to Dr. Nichols at the May 3, 2001 hearing of the authority to determine how to address short-term compliance issues:

I'm going to authorize Dr. Nichols to work with Napster and the experts—with all of you—and to come up with the—or at least *supervise the decision-making* with respect to short-term solutions that are a wise use of time, will be efficient, and can be accomplished without having the consequence of delaying the June 8<sup>th</sup> implementation.

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<sup>12</sup> Plaintiffs place a disingenuous spin on their counsel's contrary claim in open court, going so far as to suggest (Pl. Answ. Br. 60 n.30) that Napster has taken his remarks “out of context.” We invite the Court to look closely at the material that Plaintiffs have replaced by ellipses in their quotation. It is clear that what the district court took “the onus for” was the power to impose contempt – not the power to determine the standard for compliance, which had been delegated to Dr. Nichols.

ER005277 (emphasis added). The district court went on to instruct Dr. Nichols: “You just tell them what short-term remedies you think would be most efficacious.” ER005278, ER005323 (directing the parties to “abide by his priorities as he sees fit to set them”); *id.* (stating “I will leave that to him . . . I prefer to have him direct that”). Plaintiffs’ characterization of Dr. Nichols’ activities as purely advisory also overlooks a raft of contrary evidence set forth in our opening brief (at 30-32) and in our Rule 27-3 Motion that we filed on August 20, 2001 (at 8-11).<sup>13</sup>

Plaintiffs next contend (Pl. Answ. Br. 60-61) that the additional delegations of authority made to Dr. Nichols on July 11 are not constitutionally problematic because the district court retained the ultimate power to determine Napster’s compliance with the new “zero tolerance” standard. In making that argument, Plaintiffs rely largely (Pl. Answ. Br. 57) on a selective quotation from our brief. But as the full sentence makes clear, and as we explained in our opening brief (at 68-70), the district court not only invested Dr. Nichols with the power to “certify” when compliance had been met (SER01006-1007); it also delegated to Dr. Nichols the power to determine what *the standard* for compliance would be. Further, the

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<sup>13</sup> Plaintiffs observe that Dr. Nichols’s activities did not include “any of the powers that typically are given to a special master,” such as the power to “hold hearings” or “rule on the admissibility of evidence.” Pl. Answ. Br. 57 n.28, 62-63. That is true but irrelevant. Obviously, it was theoretically possible for the constitutional violation here to have been *even more severe* than it was.

district court indicated that although it would make a final determination of compliance, it would do so only after Dr. Nichols had set the standard and found that it had been satisfied. The court also strongly suggested that, even at that final stage, it would not permit Napster to resume service without a concurrence by Dr. Nichols. “If you think you’ve got to the point where you can, in fact, block out all noticed works,” the district court stated, “you can come in and show me that” and if “*he can attest to [compliance], then fine.*” SER01009 (emphasis added). As a careful reading of the record makes clear, the district court not only delegated substantial power to Dr. Nichols but also repeatedly accepted his conclusions at face value, without probing their reliability or engaging in any fact-finding that would test them. At bottom, Dr. Nichols tells Napster what it must do, and if Napster does not do it then the district court orders it. *See, e.g.*, EMR0978 (7/11/01) (“Dr. Nichols knows what is expected. I expect you to get down to zero, essentially down to zero, as close thereto as possible.”).<sup>14</sup>

Nor can Plaintiffs take much solace from the district court’s August 16, 2001 order denying Napster’s miscellaneous administrative request. Although the

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<sup>14</sup> Plaintiffs’ argument also overlooks a line of cases holding that trial courts may not delegate to a special master (or any other non-Article III decision-maker) the power to decide certain key issues, including questions of substantive liability, even when those courts reserve to themselves the power to review the magistrate’s findings and make a “final determination.” *See, e.g., Burlington Northern R.R. v. Department of Revenue*, 934 F.2d 1064, 1072 (9<sup>th</sup> Cir. 1991); *United States v. Microsoft*, 147 F.3d 935, 954-55 (D.C. Cir. 1998).

district judge complimented Dr. Nichols for his assistance in helping her “understand” the Napster system – and noted that he had “executed his role diligently and professionally” (PSER 0005) – she manifestly did not find, and on this record could not find, that Dr. Nichols’s role was confined merely to advising her on technical issues. And it is perfectly clear that Dr. Nichols has gone far beyond merely “advising” the district court on technical issues. *See* Kessler Decl., APP 1076-1106. Accordingly, this Court should confine the delegation of authority to Dr. Nichols to its proper, far more limited bounds: providing technical advice to the court.

Finally, Plaintiffs erroneously contend (Pl. Answ. Br. 58-59) that Napster somehow waived its objections by cooperating with Dr. Nichols, rather than refusing to do so and risking contempt. Napster never relinquished its right to be judged by an Article III decision-maker. Nor did Napster “waive” its objection to the unlawful delegation of authority to Dr. Nichols merely by agreeing to his appointment as a technical advisor. Plainly, acceding to Dr. Nichol’s participation

as a technical advisor to the court does not amount to accepting Dr. Nichols as a surrogate for the district judge.<sup>15</sup>

## **V. THE DISTRICT COURT LACKED JURISDICTION TO ENTER THE JULY 11 ORDER**

In our opening brief (at 71-77), we explained that the district court was without jurisdiction to enter the July 11 order, which substantially modified the March 5 Modified Injunction while an appeal of that injunction was pending before this Court. Plaintiffs contend (Pl. Answ. Br. 67-69) that the dramatic alterations made in the status quo on July 11 were nothing more than an effort by the district court to “clarify” Napster’s duties under the March 5 order. According to Plaintiffs, this case is no different from *Natural Res. Def. Council v. Southwest Marine*, which upheld several post-appeal “minor adjustments” made by the trial judge to an injunction where the adjustments “preserved the status quo” existing at

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<sup>15</sup> Contrary to Plaintiffs’ suggestion, Napster is not seeking to appeal from the April 4, 2001 order appointing Dr. Nichols. Instead, Napster is appealing from various aspects of the March 5, 2001 order (which modified the original preliminary injunction) and from the July 11, 2001 order (further modifying the March 5 injunction). Because both of these orders modify an injunction, both are appealable. Nor are Plaintiffs correct to argue that the additional, unlawful delegation of judicial authority effectuated by the district court on July 11 (*see* Napster Op. Br. 67-71) – which Plaintiffs misleadingly describe as an instruction to Napster “to continue to work with Dr. Nichols” (Pl. Answ. Br. 55-56) – is unreviewable because it is tantamount to an order appointing Dr. Nichols in the first place. Finally, Plaintiffs are also wrong to say that Napster’s challenge to the sweeping delegation of authority to Dr. Nichols is “premature.” Dr. Nichols’s micromanagement of Napster’s business is in no way speculative or hypothetical; in fact, it has continued unabated throughout the pendency of this appeal. *See* Kessler Decl., APP 1076-1106.

the time the appeal was taken. 242 F.3d 1163, 1167, 1168 (9<sup>th</sup> Cir. 2001), *cert. denied*, 2001 LEXIS 4346 (2001).

In fact, *Southwest Marine* provides a telling contrast. There, the district court had issued an injunction requiring a shipyard operator, among other things, to (1) conduct certain environmental testing “at the surface” and (2) to carry out on a “reasonably expeditious” basis the construction of a new facility to capture runoff. While the injunction was on appeal, the district judge, in response to the shipyard operator’s request for greater guidance, clarified that “at the surface” meant at the surface “microlayer” (the top 50 micrometers of the water) and that “reasonably expeditious” meant “within 18 months.” These minor clarifications – which were made at the request of the very party who later complained about the alleged “modification” – bear no resemblance to the complete reshuffling of the deck effected on July 11: the imposition of a zero tolerance standard and an immediate take-down order.

As we explained in our opening brief (at 72-75), it is hard to imagine an order that more fundamentally “changed the underlying legal relationship between the parties” than did the July 11 order. *Stone v. City and County of San Francisco*, 968 F.2d 850, 859 (9<sup>th</sup> Cir. 1992). Before the July 11 order, Napster was indisputably free to operate its file-sharing system; after the order (at least until this Court issued a stay), Napster was judicially barred from operating the system.

Likewise, whereas the March 5 Modified Injunction did not purport to define the percentage of infringing works that could appear on the Napster system, the July 11 order imposed the “zero tolerance” standard.

Equally baseless is Plaintiffs’ suggestion that the July 11 order was intended merely to “enforce” or “implement” the March 5 Modified Injunction. The July 11 order in fact had virtually nothing to do with the burden-allocation provisions of the March 5 Modified Injunction. The March 5 order directed how infringing transfers through the Napster system were to be avoided; in contrast, the July 11 order directed that *all* transfers, infringing or noninfringing, must cease. *See also* Napster Op. Br. 75 n.21 (explaining that other, serious problems would arise if July 11 order were an “enforcement” of the March 5 order).

Plaintiffs are also wrong in suggesting (Pl. Answ. Br. 73, 75-76) that the July 11 order does not affect the legal issues currently before this Court in the appeals from the March 5 Modified Injunction. The issues raised in this Court concerning the meaning and scope of the “policing” duty (and its consistency with this Court’s prior decision) are plainly intertwined with challenges leveled at the “zero tolerance” standard imposed in the July 11 order. In addition, Plaintiffs’ appeal of the March 5 Modified Injunction raises the question whether that injunction properly imposed notice obligations on Plaintiffs before certain duties

on Napster's part are triggered; yet by ordering the Napster file-sharing system to remain down, the July 11 order renders that question moot as a practical matter.

Plaintiffs also seek refuge in this Court's decisions in *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268 (1976), and *Meinhold v. United States Department of Defense*, 34 F.3d 1469 (1994). In Plaintiffs' view, these cases allow a district court to modify an injunction, after appeal, so long as the modification can be characterized as "supervision" of the injunction's "implementation" or as serving the "purposes" of the underlying injunction. But almost any modification of an injunction – even one as radical as the "zero tolerance" standard and the shutdown order – can plausibly be characterized as the "supervision" and "implementation" of the initial decree. Likewise, with sufficient ingenuity, even dramatic alterations to the status quo can be deemed to be within the broad sweep of the injunction's "purpose."

Not surprisingly, therefore, neither *Hoffman* nor *Meinhold* creates such exceptions from the general rule that a district court may not modify an injunction that is already on appeal. *Hoffman*, which arose in the special context of a statutory labor law scheme, took pains to point out that the decision related only to "the problem here presented" and must be understood "against this background." 536 F.2d at 1276. As for *Meinhold*, the Court's cursory discussion there (which was limited to a single footnote) hinged on the fact that the district court's

amended order merely “clarif[ied] its original injunction” and was taken “in the wake of Meinhold’s motion for contempt.” 34 F.3d at 1480 n.14.

Instead, this case closely resembles *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731 (9<sup>th</sup> Cir. 1982). There, a publisher entered into an agreement with a union recognizing a guarantee of lifetime jobs to certain employees, with the qualification that the guarantee would be revoked in the event of a “strike or lockout.” After a different union at the newspaper went on strike and some of the guaranteed workers refused to cross the picket lines or participated in their picketing, the publisher took the position that the guarantees were rescinded. The union disagreed, and the parties submitted the question to arbitration. After the arbitrator ruled against the publisher, and the district court ordered that the award be confirmed, the publisher appealed. Subsequently, the union asked the district court to rule that its confirmation and enforcement of the award meant that the affected workers must be reinstated by the publisher. The district court agreed and ordered the reinstatement. In reversing, this Court held that the district court lacked jurisdiction to amend its judgment while an appeal was pending:

[T]he district court’s amended judgment was not addressed to maintenance of the status quo during the pendency of the appeal; in fact, by ordering the publisher to reinstate employees who were not working when the appeal was filed, the amended judgment required a change from the status quo. If we were to affirm the district court’s

amended judgment, the order would affect substantial rights of the parties after the appeal.

*Id.* at 735. That analysis applies with equal force here.

### CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, Napster respectfully requests that the Court (i) affirm the Modified Injunction's requirement in Paragraph 2 that Plaintiffs provide notice before Napster's blocking and policing obligations are triggered; (ii) vacate Paragraphs 3, 4, and 6 of the Modified Injunction and remand (to clarify the limitations on the "policing" duty and to impose limitations, consistent with case law, on the delegation of authority to Dr. Nichols); and (iii) vacate the July 11, 2001 Order directing Napster to achieve "zero tolerance" and to refrain from operating its file-sharing system.

Dated: September 21, 2001

FENWICK & WEST LLP

By: \_\_\_\_\_  
Laurence F. Pulgram  
Attorneys for Defendant/Appellee/  
Cross-Appellant NAPSTER, INC.

22179/00415/SF/5058648.1

**“FORM 8” CERTIFICATION OF COMPLIANCE TO  
FED. R. APP. P.32(a)(7)(C) AND CIRCUIT RULES 32-1 AND 32-2  
FOR CASE NOS. 00-16401 and 00-16403**

I certify, pursuant to Fed R. App. P. 32(a)(7)(C) and Circuit Rules 32-1 and 32-2, that the attached Reply Brief of Appellant Napster, Inc. is proportionately spaced, has a typeface of 14 points or more, and contains 8,943 words (based on the word processing system used to prepare the brief).

Dated: September 21, 2001

FENWICK & WEST LLP

By: \_\_\_\_\_  
Elaine Wallace  
Attorneys for Defendant-Appellant  
Napster, Inc.