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NAPSTER, INC.

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

18 A&M RECORDS, INC., a corporation, et al.  
19 Plaintiffs,

20 v.

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

23 JERRY LEIBER, individually and doing business  
as JERRY LEIBER MUSIC, et al.

24 Plaintiffs,

25 v.

26 NAPSTER, INC.,

27 Defendant.

Case Nos. C 99-5183 MHP (ADR)  
C 00-0074 MHP (ADR)

**DECLARATION OF HANK  
BARRY IN SUPPORT OF  
DEFENDANT NAPSTER, INC.'S  
OPPOSITION TO PLAINTIFFS'  
JOINT MOTION FOR  
PRELIMINARY INJUNCTION**

Date: July 26, 2000

Time: 2:00 p.m.

Courtroom: 15

Hon. Marilyn H. Patel

1 I, Hank Barry, declare as follows:

2 1. Since May 22, 2000, I have been the interim Chief Executive Officer and a  
3 member of the Board of Directors of Napster, Inc. (“Napster” or the “Company”). In that  
4 capacity, I am responsible for the daily operations of the Company’s business, and I report to the  
5 Board of Directors. I make the following declaration in support of Napster’s Opposition to  
6 Plaintiffs’ Joint Motion for Preliminary Injunction. Unless otherwise stated on information and  
7 belief, I have personal knowledge of the following facts and, if called to testify, I would and  
8 could competently testify thereto.

9 2. Prior to joining Napster, I had been a member of the legal profession for over  
10 sixteen years. I graduated from Stanford Law School in 1983. From August 1983 to January  
11 1986, I was an associate at the law firm of Paul Weiss Rifkind Wharton & Garrison in New York.  
12 I joined the law firm of Cooley, Godward, Castro, Huddleson and Tatum (“Cooley”) in Palo Alto,  
13 California, as an associate in March of 1986, and became partner in December 1989. While at  
14 Cooley, I focused my practice on technology transactions and corporate law. In July 1994, I left  
15 Cooley and joined the law firm of Wilson Sonsini Goodrich & Rosati (“Wilson”), also in  
16 Palo Alto, California, where I remained until September 1999. While at Wilson, my practice  
17 focused almost exclusively on corporate law.

18 3. On September 9, 1999, I became a member of each of the two limited liability  
19 companies that constitute the general partners of Hummer Winblad Venture Partners IV and  
20 Hummer Winblad Technology Fund IV, respectively (collectively, “Hummer Winblad”), a  
21 venture capital fund.

22 4. Hummer Winblad has invested in over 70 companies since 1989, and is generally  
23 regarded as one of America’s foremost venture capital firms. In late March 2000, Hummer  
24 Winblad entered into discussions with Napster regarding Hummer Winblad’s potential interest in  
25 making an investment in Napster. Hummer Winblad ultimately chose to invest in Napster in May  
26 of 2000 based on Napster’s innovative and revolutionary technology, which potentially allows its  
27 users to communicate with one another and share access to files of all types in all locations on the  
28 Internet.

1           5.       Hummer Winblad believes that Napster’s technology may very well “turn the  
2 Internet inside out” because rather than relying on a centralized engine to collect internet  
3 navigation information (in the way that Yahoo! and other like services collect such information),  
4 Napster’s architecture empowers the users themselves to build the directory that aids in  
5 navigation. Amazon.com founder Jeff Bezos has stated that Napster is “profound.” Transcript of  
6 June 28, 2000 airing of PBS’ “Charlie Rose” television show (a true and correct copy of an  
7 excerpt of the transcript is attached hereto as Exhibit A). Andy Grove, the Chairman of Intel, has  
8 stated that “The whole Internet could be re-architected by Napster-like technology.” Amy Kover,  
9 Napster: “The Hot Idea of the Year,” Fortune, June 26, 2000 at 128 (a true and accurate copy of  
10 this article is attached as Exhibit B).

11           6.       Another significant reason for Hummer Winblad’s decision to invest in Napster  
12 was the ability of Napster to enable users to engage in a community of sharing MP3 and WMA  
13 music files, to promote the growth of enjoyment of music. Napster users have built a unique  
14 “community,” wherein they can chat with and instant message each other, review each other’s  
15 “hot lists,” and obtain information about new music and artists. Individuals can, and have, used  
16 Napster in a variety of ways – to sample tracks prior to purchase, store their music in a more  
17 convenient location, and communicate with each other regarding musical tastes and preferences,  
18 just to name a few. In addition, artists can, and have, used Napster to make a name for  
19 themselves, and to get their music heard. Indeed, many artists are presently using Napster as a  
20 means to distribute their music directly to fans.

21           7.       As part of its decision whether to invest in Napster, Hummer Winblad negotiated  
22 with Napster’s pre-existing shareholders. As a result of those negotiations, which occurred at  
23 arm’s length, we arrived at a price for Hummer Winblad’s investment that reflected and assigned  
24 an implicit value to the company. That value was \$64.5 million. Hummer Winblad purchased an  
25 approximately 20% ownership in the Company for \$13 million; additional investors  
26 simultaneously contributed approximately \$1.5 million, to a company that was valued for the  
27 transaction at \$50 million before those funds were added to its assets. That \$64.5 million  
28 valuation took into account the risks posed by this litigation. If and when Napster prevails in this

1 litigation, its value would, of course, be significantly higher.

2 8. Internet companies like Napster are valued, in part, by the size of their user base.  
3 The America Online service, for example, has 23 million subscribing users, as opposed to  
4 Napster's approximately 13 million users. America Online's market capitalization is \$134.7  
5 billion. The Yahoo! navigation service estimates that it has 125 million registered users. Its  
6 market capitalization is \$101.5 billion. Lycos estimates that it has 46 million registered users - its  
7 market capitalization is \$5.9 billion. Thus, if Napster is wrongfully enjoined and later  
8 exonerated, its losses stand to be far, far greater than the \$64.5 million implicit value assigned to  
9 the Company four months ago.

10 9. An important part of what Napster offers, and will continue to offer, is an  
11 alternative means for artists (both new and more established) and recording companies to reach  
12 their fans. For example, artists historically have lacked the means to establish a fan base and  
13 reach their fans absent a recording contract with one of the established recording companies.  
14 This process has been expensive. Through Napster, they are now able to establish a connection  
15 with fans both directly and through word of mouth. This greatly reduces their marketing costs.  
16 Napster intends to continue to support new artists and collaborate with them in their efforts to  
17 establish a fan base. New artists are a substantial part of what Napster is about. Napster is not  
18 just committed to new artists, however, it is committed to any artist who wishes to take advantage  
19 of the many services Napster offers, and to its users who enjoy the Napster community.

20 10. Napster respects copyright laws, as reflected in its formal copyright policy, which  
21 is available on our web site, [www.napster.com](http://www.napster.com). As the policy makes clear, Napster requires its  
22 users to agree not to infringe copyrights, and it does not condone any use of Napster for  
23 commercial or profiteering purposes. The policy provides that copyrighted materials may be  
24 shared when authorized, whether by the copyright owner or by law, including a use that  
25 constitutes a "fair use" within the meaning of copyright law. Accordingly, Napster's policy for  
26 barring access to allegedly infringing users requires and has required the copyright owner to state,  
27 in writing, that the use in question is not authorized by law, including the principles of fair use.  
28 Neither the RIAA nor the Plaintiffs have ever requested Napster to assist it in determining the

1 identity of any individuals allegedly making such profiteering uses of Napster.

2 11. Napster makes available on its web site a standard form “takedown notice” that a  
3 copyright owner who believes that his or her rights are being infringed may submit to Napster.  
4 The form requires the copyright owner’s sworn statement that the use in question constitutes an  
5 infringement of his or her rights, and that the use is not authorized whether by them or by law.

6 12. In responding to any such notice, Napster does not attempt to determine the truth  
7 or falsity of such sworn statement. Pursuant to the Digital Millenium Copyright Act (“DMCA”),  
8 Napster errs on the side of the copyright owner, without questioning the truth of the sworn  
9 statements made in the notice, and blocks the user’s access to Napster’s services. The user then  
10 has the right to provide a counter-notice, and to be reinstated in the event the copyright owner  
11 does not initiate action. In effect, the provisions of the DMCA regarding notice operate as a  
12 presumption that the user has in fact committed an infringement, subject to his or her rebuttal by  
13 counter-notice, in which case the federal courts, not Napster, must decide whether the use in  
14 question is permitted. Napster follows the procedure set forth in the DMCA because it respects  
15 the copyright owner’s rights, and the balance that Congress chose to strike respecting procedures  
16 to determine infringement.

17 13. Contrary to the DMCA, the injunction sought by the Plaintiffs in this litigation  
18 would not require the Plaintiffs to identify the songs in which they claim copyright ownership nor  
19 the files at Napster alleged to be copyrighted or unfairly used. Such an injunction would, as a  
20 practical matter, force Napster to exclude all songs from its system. This would deprive all of the  
21 artists whose master recordings the Plaintiffs do not control (an overwhelming majority of all  
22 artists) of a valuable forum to disseminate their works. Moreover, the injunction would have  
23 devastating effects on Napster, including the severance of important relationships with potential  
24 investors, its own employees, and users who would rapidly transition to other services. It would  
25 also permanently destroy Napster’s advantage of being the first name and leader in non-  
26 commercial one-to-one file sharing. Napster’s competitors include several other file sharing  
27 directories, such as Cute MX, i-mesh and Scour Exchange. It is also for practical purposes  
28 competing with programs such as Gnutella and Freenet. Each of these businesses developed after

1 Napster became popular and each allows file sharing among users. If Napster is enjoined, these  
2 companies and others will be able to take Napster's users as their own. This would cause  
3 irreparable injury to Napster that it would be unable to correct when it ultimately prevails in the  
4 litigation.

5 I declare under penalty of perjury under the laws of the United States of America that the  
6 foregoing is true and correct. Executed at Palo Alto, California, this \_\_\_\_\_ day of July, 2000.

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Hank Barry