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13 Attorneys for Defendant
14 NAPSTER, INC.

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

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

21 v.

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

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

25 Plaintiffs,

26 v.

27 NAPSTER, INC.,
28 Defendant.

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

**DECLARATION OF MILTON E.
OLIN, JR. 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, Milton E. Olin, Jr. declare as follows:

2 1. I am currently the Chief Operating Officer of Napster, Inc. (“Napster”), Defendant
3 in the above-entitled action. In that capacity, I am responsible for managing the company on an
4 operational level. I make the following declaration in support of Napster’s Opposition to
5 Plaintiff’s Motion for Preliminary Injunction. Unless otherwise stated on information and belief,
6 I have personal knowledge of the following facts and, if called to testify, I would and could testify
7 competently thereto.

8 2. I have been involved in the music industry in various capacities for approximately
9 25 years. After graduating from UCLA Law School in 1975, I started out as an associate at the
10 law firm of Mitchell, Silberberg & Knupp in Los Angeles, California, where I was a member of
11 the firm’s music practice. I was elected to partnership in the firm approximately six or seven
12 years later.

13 3. I left Mitchell, Silberberg & Knupp in the summer of 1984, and went to work for
14 A&M Records as their Vice President of Business Development. In that capacity, I was
15 responsible for, among other things, signing artists to the label and acquiring rights for the
16 company, including publishing rights and rights to soundtrack albums and to video product.
17 Shortly after PolyGram acquired A&M Records in early 1990, I became the Senior Vice
18 President of Business and Legal Affairs for A&M Records. At that time I became responsible for
19 heading the company’s business and legal affairs departments. I left A&M Records in January of
20 1999 following Universal’s acquisition of PolyGram in late 1998. Throughout the time I worked
21 at A&M Records I was a member of the RIAA Legal Committee. In June of 1999, I joined
22 Firstlook.com, Inc. as their Senior Vice President of Business Development. Firstlook.com is an
23 Internet startup company that operates a web site offering “previews” of movies, music and
24 games.

25 4. I joined Napster on June 24, 2000. I was drawn to Napster based upon my interest
26 in the intersection of music and the Internet as well as my pre-existing friendship with Hank
27 Barry, Napster’s interim Chief Executive Officer, and the enthusiasm for the potential of Napster
28 expressed by him and so many of my friends in both the music industry and the Internet world.

1 5. Based on my experience in the music industry, I am very familiar with the
2 structure of the recording industry, and the way it traditionally has operated, and still operates.
3 Although there are throughout the world literally thousands of “record companies” there are a
4 currently only five holding companies – often referred to as the “Major Labels” – that dominate
5 the industry – at present, they are: Universal, Sony, Time Warner, BMG and EMI. EMI is in the
6 process of being acquired by Time Warner, which, in turn, is in the process of being acquired by
7 AOL. When those acquisitions are completed, there will be only four Major Label holding
8 companies. The dominance of the Major Labels is attributable largely to their influence in the
9 distribution and promotion channels for recorded music. All of the eighteen named plaintiffs in
10 this action are operated by the Major Labels.

11 6. Historically, artists have had difficulty achieving a significant level of commercial
12 success absent a contractual relationship with one of the Major Labels. Their substantial
13 resources allow new artists to obtain the airplay and other requisite promotional support that will
14 enable them to establish and maintain a fan base and to get their CDs onto the shelves of the
15 major retail chains. Without those resources, independent artists and labels have had great
16 difficulty making a name for themselves. Those independent artists who have managed to
17 establish a presence independently, generally subsequently sign on with one of the Major Labels
18 after achieving their initial independent success in an attempt to maximize their potential success.

19 7. The Major Labels spend large amounts of money to promote select artists’ records.
20 These companies develop and utilize various promotional materials such as press kits, point of
21 purchase promotional materials, special free CD packages to be distributed to radio and the trade,
22 music videos, and print and radio advertisements for promotional purposes. They also, in effect,
23 “buy” prominent shelf space in retail stores (*e.g.* Best Buy, Tower Records, Sam Goody, The
24 Warehouse) for the albums that they wish to promote. They purchase this space from the
25 retailers by giving the retailers so-called “co-op” advertising money in addition to discounting the
26 wholesale prices that the retailers would otherwise have to pay in connection with CDs that they
27 buy from the Major Labels. These allowances are in addition to other benefits that the Major
28 Labels provide to their distributors, such as the provision at times of special free singles (CDs or

1 cassettes with only one or perhaps two songs), which they provide to retailers. These special
2 singles are given to the retailers for free and the retailers are allowed to keep 100% of the
3 revenues that they receive in connection with the sale to consumers of these special free singles.
4 Moreover, if those singles are not “sold” by the retailers, the Major Labels will give the retailers a
5 credit for \$1.00 or more for each unsold “single” that they return to the Major Labels. The Major
6 Labels also provide retailers with print and other advertising materials (such as the large painted
7 displays announcing the release of new albums that appear on the windows of major record retail
8 stores) for their use in promoting the records of selected Major Label artists.

9 8. In addition, the Major Labels spend enormous sums of money on both in-house
10 promotional efforts and with independent promotion companies, in an attempt to insure
11 prominent airplay of their artists’ records on radio. Their promotional efforts include the give
12 away of CDs or cassettes of their artists’ performances at radio station events, concerts and other
13 events related to retail stores, and free licenses of recordings featuring their artists for inclusion
14 on CDs that are sold or given away by radio stations on so-called “compilation CDs” (which may
15 or may not be sold by the applicable radio station). All of these “giveaways” and payments are
16 done to promote consumer awareness and acceptance of the performances of the artists signed to
17 the Major Labels, and in particular, to obtain interest from radio stations and retailers in the
18 artists. Taken together, the various costs of promoting an album lead to substantial variable
19 marketing expenses for sales, marketing and promotion which typically run in the overall range of
20 20% of the wholesale revenues of a Major Label.

21 9. In light of the Major Labels’ power in the industry, they are able to exercise a great
22 deal of control over the terms contained in their agreements with the artists they sign. These
23 recording contracts generally obligate an artist to record up to 7 albums for the Major Label, but
24 the Major Label only commits, in most instances, to fund the recording of one or maybe two
25 albums. This is accomplished through an “option” system where the Major Label has the right, at
26 its election, to compel the artist to record and deliver albums, but the artist is not assured that the
27 Major Label will allow them to record those albums, or even that those albums will be released if
28 recorded.

1 10. The Major Label recording contracts are fairly standardized within the industry,
2 usually containing, among other provisions, the following:

3 • A “pay or play” clause, which provides that if a Major Label chooses not to
4 allow an artist to produce an album otherwise contracted for by the Major Label, the
5 Major Label can avoid its obligations to the artist by paying the artist a specified amount
6 which will often be less than the amount the Major Label would be committed to pay to
7 allow the artist to record the committed album.

8 • An advance, production budget or “recording fund” for each album,
9 constituting the amount the record company will advance the artist to fund the costs
10 associated with production of an album, which costs are recoupable from the artist’s
11 royalties.

12 • A “re-recording restriction,” which provides that an artist cannot re-record
13 a song for a third party (or even for himself or herself) for a period of five years from the
14 initial recording or release of a song, or for a period of two years from the end of the
15 contract with the Major Label, whichever is longer. This restriction guarantees the Major
16 Label a certain measure of exclusivity with respect to that particular artist and that
17 particular song, and is utilized so that an artist cannot re-record his or her hit song and
18 release it “in competition” with the “official version” after being “dropped” by the Major
19 Label.

20 • A set of royalty rates, covering the contingent payments to be made to the
21 artist in respect of the exploitation of his or he recorded music. These royalty rates
22 generally vary from 12% to 18% of an imputed “retail price” for “normal” sales of a
23 record, and provide for a payment to the artists of 50% of the monies received by the
24 Major Label in respect of forms of exploitation of such recorded music other than from
25 “normal” sales of records, such as from the exploitation of an artist’s recorded music in,
26 for example, motion pictures, commercials, and so forth. Under a Major Label recording
27 agreement, artist royalties are reduced for record sales outside the “home” territory of the
28 Major Label (i.e. an artist signed to a US company would receive a reduced royalty rate

1 for sales in most other territories of the world). Such reductions in the royalty rates
2 payable to an artist would typically range from 50% to 85% of the domestic royalty rate
3 depending on the territory of sale. In addition, an artist's royalties are reduced for sales of
4 his or her recorded music through record clubs, as so-called "premiums," or for sales at a
5 so-called "budget" or "mid-price." These reductions in the royalty rate are in addition to
6 the reduction in the effective royalty payable to an artist in respect of such sales based
7 upon the reduced "retail price" that the artist royalty is calculated on. In addition, in
8 connection with digital distribution (or download) of recorded music, the Major Labels
9 have attempted to insure that the favorable royalty calculation provisions of their current
10 form recording agreements will continue to apply in a digital world, entitling them to
11 reduce the artists' royalties by virtue of ephemeral "packaging deductions" and "free
12 goods" even though, in the world of digital distribution, these concepts are not applicable
13 at all. The object of this effort is an attempt to insure that the calculation of the royalties
14 payable to an artist for digital distribution of his or her recorded music will be accounted
15 to as "normal" sales (with royalties calculated in the 12% to 18% range outlined above).
16 The Major Labels are determined that payments to artists on digital distributions must not
17 be covered by the catch-all provisions of their form recording agreements which provide
18 for an artist to receive 50% of the monies received by the Major Label from other than
19 "normal" sales of records.

20 • Recoupment provisions, which provide that artist royalties are not payable
21 until the Major Label has recouped all "advances" made to or on behalf of the artist from
22 the royalties otherwise payable to the artist. Those advances include the recording costs
23 of the album; any cash payments made to or on behalf of the artist; 50% or more of the
24 monies expended as so-called "tour support" for the artist; 50% or more of the costs
25 incurred in connection with the creation of music videos featuring the performance of that
26 artist; and some portion (usually 50%) of the monies expended by the Major Label on
27 independent promotion and other marketing costs incurred in connection with the
28 marketing of the artist's records.

1 • A so-called “controlled composition” reduction from the otherwise
2 statutorily required mechanical copyright royalty payments to be made to copyright
3 proprietors for the musical compositions embodied in master recordings. These
4 reductions typically result in the owners of “controlled compositions” receiving less than
5 75% of the monies that would otherwise statutorily be payable to them absent such
6 provisions in the recording contracts of the Major Labels.

7 11. The computation of the royalty payable to the artist is also subject to a multitude of
8 “reductions” and “deductions” which significantly reduce that actual dollar amount of royalty
9 than an artist ultimately receives. For example, there is typically a “standard” reduction of 25%
10 of the “retail” price of a CD as a so-called “packaging deduction” (which, of course, represents a
11 gross overstatement of the actual packaging costs incurred by the Major Label for the CD
12 packaging), and a reduction of an additional 15% (from the remaining 75% of the “retail” price)
13 in respect of so-called “free goods,” which are CD units shipped to a retailer on a so-called
14 “royalty-free” basis at the same time, and in the same shipment, as those for which an artist does
15 receive a royalty. In addition, an artist’s royalty under a recording agreement with a Major Label
16 is reduced most frequently in respect of actual discounts from standard “wholesale” prices
17 charged to retailers – and these reductions are in addition to the “standard” 15% “free goods”
18 artificial reduction taken against the artist’s royalty. Although successful artists often have the
19 ability to renegotiate more favorable terms in subsequent contracts that they enter into with the
20 Major Labels, new artists, and those who never become so successful, do not.

21 12. An additional reason the Major Labels have been able to maintain their dominance
22 of the industry is that, for the most part, they have been able to claim and retain copyright
23 ownership in the master recordings created by the artists (known as the “Circle P” or “(p)
24 copyright” – the copyright in the phonorecord). Thus, with few exceptions, as in the case of
25 Metallica, the Major Labels, and not the artists, are able to claim the (p) copyright in the albums
26 produced by an artist for that Major Label, and therefore they alone have the right to exploit that
27 recording. This is true in spite of the fact that based upon the royalty system described above,
28 the artist actually “pays” for the costs of the album from their own royalties.

1 13. The (p) copyright in the phonorecord (a right established by law only in 1972) is
2 distinguishable, of course, from the separate copyright in the underlying musical composition
3 (also referred to as the “Circle C” copyright and denoted by the symbol “©”). Prior to 1972,
4 there was no separate copyright in the phonorecord. Thus, in a music recording, there are now
5 two potential copyrights – one in the master recording and one in the underlying musical
6 composition. The copyright rights in a particular recorded work are separable, and thus can, and
7 are frequently, owned by different individuals or entities. This is often true where an artist
8 produces an album under contract with one of the Major Labels, in which case the Major Label
9 owns the (p) copyright in the master recording of each song on the album and the songwriter(s)
10 (which may or may not be the artist) owns the © copyright in the musical compositions embodied
11 in those master recordings. The record companies typically do not file separate (p) copyrights for
12 each individual master recording embodied on a CD, but rather, for their convenience, file only
13 one (p) copyright registration for the entire album. This means there are frequently no (p)
14 copyright registrations filed in the names of individual songs, and thus knowledge of the titles of
15 such songs does not identify their copyright ownership.

16 14. It is not uncommon for an artist to switch from one Major Label to another over
17 the course of his or her recording career, in which case different Major Labels would own the (p)
18 copyrights in the various master recordings produced by that particular artist. Artists such as
19 Janet Jackson, Carlos Santana, Eric Clapton, The Rolling Stones, David Bowie, Annie Lennox,
20 Paul Simon, Bonnie Raitt, Van Morrison, REM and the Red Hot Chili Peppers are all examples
21 of very successful artists who have recorded for more than one of the Major Labels.
22 Additionally, artists such as Soundgarden, the Offspring, Nirvana, REM, Shawn Mullins, Hootie
23 and the Blowfish and Metallica are examples of artists who commenced their careers on smaller
24 “independent labels” and who subsequently entered into agreements pursuant to which Major
25 Labels obtained rights to distribute their future records. In addition, artists sometimes record a
26 particular song more than once over the course of their careers. Consequently, an artist may
27 record a song under one recording company’s label, and record it again under another recording
28 company’s label (subject, of course, to the “re-recording” restriction discussed above), in which

1 case the copyrights in the two different recordings of the same song would be owned by different
2 recording companies. Other circumstances under which a subsequent recording of the same song
3 by a particular artist might be contained on a different album (and perhaps produced under a
4 different label) include recordings of live performances fixed in a sound recording by a record
5 company, and “re-makes” or “re-mixes” of the song. To complicate matters further, any
6 particular song might be subsequently recorded by a different artist and that later recording would
7 frequently be owned by a different recording company.

8 15. It is, accordingly, difficult to determine who owns – or claims ownership – in the
9 copyright to any particular master recording; simply knowing the artist’s or band’s name, the
10 song title, or both, does not provide the answer. The label under which an artist or band is
11 currently producing records, or for whom an artist has produced records in the past, is merely a
12 starting point: this information simply cannot be relied upon to determine the identity of the likely
13 copyright claimant of a particular recording, or even of a particular artist’s recordings generally.

14 16. Unlike in the “physical” world of CDs, Minidiscs (“MDs”) and cassettes, where
15 information on the package inserts (as well as on the CDs, MDs and cassettes themselves)
16 identifies the owners of the various copyrights in the relevant recordings and underlying musical
17 compositions, in the context of the Internet, it can be extremely difficult, if not impossible, to
18 ascertain the copyright ownership of a digitized song. At present, the vast majority of digital
19 music files are not encoded to contain the information necessary to identify the various copyright
20 owner(s).

21 17. In an effort to promote their interests and to maintain their dominant position
22 within the music industry, the Major Labels have joined forces both on a continuing basis
23 (evidenced by the RIAA), and at various times to deal with specific perceived threats, such as the
24 recent Diamond Rio prosecution and their pursuit of Napster in the context of MP3 file-sharing.
25 On the legislative side, the RIAA and the constituent Major Labels were the driving force behind
26 the recent controversial amendment to the Copyright Act of 1976 (incorporated as part of the
27 Satellite Home Viewer’s Improvement Act of 1999). That amendment, for the first time,
28 statutorily provided that phonorecords were to be considered “works for hire.” Another well-

1 publicized example of the Major Labels' parallel or collective activity is their adoption of
2 Minimum Advertising Policies (MAP) in response to the sale of CDs at a low price by Best Buy
3 and other similar new chains of record retailers. The MAP policies specified that the Major
4 Labels would cease providing customary so-called "co-op" support to any retailers who would
5 advertise retail prices lower than those "approved" by the Major Labels as their mutually agreed
6 so-called lowest "Minimum Advertised Price." This MAP policy was recently the subject of an
7 investigation of the Major Labels' practices by the Federal Trade Commission ("FTC"), which
8 resulted in the recently announced settlement agreement pursuant to which each of the Major
9 Labels agreed to discontinue any MAP policies in their entirety for seven years. The FTC
10 estimated that U.S. consumers may have paid as much as \$480 million more than they should
11 have for CDs and other music over the last three years as a consequence of the MAP policies.
12 Attached hereto as Exhibit A is a true and correct copy of a press release issued by the FTC on
13 May 10, 2000 regarding the settlement agreements it reached with each of the Major Labels.

14 18. It appears that the Major Labels perceive Napster, and companies like Napster, to
15 be an enormous threat to their ability to maintain their dominance of the recording industry,
16 because of their perceived potential to turn the way the recording industry, as dominated by the
17 Major Labels, has traditionally operated completely upside down. To begin with, the Major
18 Labels have time and again vocalized their view that if consumers are able to obtain music for
19 free, they will refuse to pay for it in the future, and CDs sales will drop. While there has been
20 much concern expressed that the potential to obtain music for "free" on Napster will result in
21 reduced CD sales, to my knowledge that has not proven to be the case. Attached hereto as
22 Exhibit B is a true and correct copy of an article posted on the Internet entitled "Music Industry
23 Heartbreakers, Dream Makers," discussing the fact that there has been a verifiable and
24 uncontestable increase in CD sales this year in the face of Napster's explosive growth. The fact
25 that there has been an increase in CD sales notwithstanding the impact of file sharing programs
26 such as Napster is explained by many factors, which all point to the fact that consumers do not
27 view MP3 files as a satisfactory replacement for CDs. These factors include the facts that: (1)
28 downloading an entire album is burdensome; (2) the sound quality is inferior to that of CDs; (3)

1 there is an inconvenience to having a song in only the MP3 format (most people have CD players,
2 not MP3 players, in their homes, cars, etc.); and (4) an MP3 does not provide the tangible
3 product, liner notes, pictures, and, often times lyrics, that a CD does.

4 19. In addition to fearing Napster, the Major Labels also fear the Internet generally, for
5 its potential to seriously adversely affect their ability to control the distribution of music. Indeed,
6 this fear is the reason the Major Labels initially resisted entirely the idea of any digital
7 distribution of music. It was only after Napster and other file sharing services appeared and
8 popularized the notion of file sharing and digital distribution that the Major Labels have been
9 forced to recognize the vast potential of the Internet to serve as powerful tool for the promotion
10 and distribution of music – and realize that file sharing services like Napster pose a challenge to
11 their domination of the industry. As explained above, signing with a Major Label has
12 traditionally been nearly the only effective means for an artist to make a name for himself or
13 herself. Now, however, because new artists can reach out to fans directly through file-sharing
14 services like Napster, artists have the opportunity to make names for themselves outside the orbit
15 of control of the Major Labels – and, at a much lower cost. This is especially appealing to artists
16 because they will now, for the first time, be able to retain ownership of the (p) copyright in the
17 artistic output and thus retain the rights to exploit that product themselves. Of course, this is not
18 appealing to the Major Labels.

19 20. From a social perspective, I believe Napster has already fostered, and will continue
20 to foster, great positive changes in the music industry. The opportunity for people to share and
21 discuss music in an online environment, and their ability to sample music before deciding
22 whether or not to purchase a CD, both of which Napster provides, has helped and will continue to
23 help promote a greater interest in music. Even when not chatting or instant messaging, Napster
24 users participate in an interactive environment, where their choice of music is responded to,
25 where individuals, not corporations, respond, and where they can browse, absorb, or speculate
26 about the collections and tastes of other users. Not since the late 60's has interest in music been
27 so much in the forefront of American culture. Napster has happened on its own, out of nowhere,
28

1 because people like the service and want to be involved in an online community dedicated to
2 music.

3 I declare under penalty of perjury under the laws of the United States of America that the
4 foregoing is true and correct. Executed at Los Angeles, California, this _____ day of July, 2000.

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Milton E. Olin, Jr.