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18

19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

21
22 METRO-GOLDWYN-MAYER
STUDIOS INC., et al.,

23 Plaintiffs,

24 vs.

25 GROKSTER, LTD., et al.,

26 Defendants.
27
28

Case No. 01-08541 SVW (PJWx)

MEMORANDUM OF POINTS AND
AUTHORITIES OF DEFENDANTS
STREAMCAST NETWORKS, INC.
(FORMERLY KNOWN AS
MUSICCITY.COM, INC.) AND
MUSICCITY NETWORKS, INC. IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT;
DECLARATIONS OF DARRELL
SMITH, WILLIAM CLAY SHIRKY,
ANDREW P. BRIDGES, GREGORY

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BREWSTER KAHLE, RICHARD
PRELINGER, STEVE W. GRIFFIN AND
RICHARD NESSARY IN SUPPORT OF
MOTION

[Notice of Motion and Motion, and
Statement of Uncontroverted Facts and
Conclusions of Law, filed concurrently
herewith]

Date: February 25, 2002
Time: 1:30 p.m.
Ctm: 6 (Spring Street)
Hon. Stephen V. Wilson

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The MusicCity defendants¹ (hereafter “MusicCity”) bring this motion for
3 partial summary judgment to narrow the issues in dispute in this case. They
4 specifically request that the Court enter partial summary judgment against the
5 plaintiffs’ claims of contributory copyright infringement arising from MusicCity’s
6 distribution of the Morpheus software program to the general public.²

7 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

8 The basis for this motion is *Sony Corporation of America v. Universal City*
9 *Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984) (hereafter
10 “*Sony-Betamax*”), the landmark Supreme Court decision that was followed and
11 reinforced by the Ninth Circuit last year in *A&M Records, Inc. v. Napster, Inc.*, 239
12 F.3d 1004 (9th Cir. 2001) (hereafter “*Napster*”).

13 In *Sony-Betamax*, the Supreme Court was required to balance the benefits of
14 technological innovation with the risks of copyright infringement made possible by
15 new technology. The Supreme Court established the rule that manufacturers and
16 distributors of mass-market technology for a variety of uses (“staple articles of
17 commerce”) may not be subjected to liability for distribution of the products to the
18 general public so long as their products are “merely capable of substantial
19 noninfringing uses.” The rule applies even if the technology is and may be expected
20 to be used by the public for infringing uses as well. As the Supreme Court stated in
21 that case:

22 _____
23 ¹ The MusicCity defendants are StreamCast Networks, Inc. (formerly known as
24 MusicCity.com, Inc.) and MusicCity Networks, Inc. MusicCity Networks, Inc. has
25 never begun operations and has never completed formalities of its corporate
26 formation. It will soon be dissolved. Declaration of Steve W. Griffin (“Griffin
27 Decl.”) at ¶ 3. It joins in this motion only because it has been named as a defendant.
28 The only MusicCity defendant engaged in the development and distribution of the
Morpheus software product is StreamCast Networks, Inc. *Id.*

² This motion is directed specifically and only to the Morpheus program (up
through version 1.3) as distributed by MusicCity up through the filing date of this
motion.

1 [T]he sale of copying equipment, like the sale of other articles of
2 commerce, does not constitute contributory infringement if the product
3 is widely used for legitimate, unobjectionable purposes. Indeed, *it need*
4 *merely be capable of substantial noninfringing uses.* ¶ The question
5 is thus whether the Betamax is *capable* of commercially significant
6 noninfringing uses.

7 *Sony-Betamax*, 464 U.S. at 442 (emphasis added). Holding that the Betamax video
8 tape recorder was capable of at least one noninfringing use, namely the fair use
9 involving “time shifting” of television programs, the Supreme Court upheld a decision
10 in favor of the manufacturer. *See id.*

11 In *Napster*, the Ninth Circuit considered the case of a defendant sued for
12 conducting and operating an integrated service that facilitated the sharing of
13 commercial musical recordings. In vacating and remanding the district court’s
14 injunction, the court of appeals emphasized a “clear distinction between the
15 *architecture of the Napster system* and *Napster’s conduct* in relation to the operational
16 capacity of the system.” *Napster*, 239 F.3d at 1020 (emphasis added). It continued,
17 “To enjoin simply because a computer network allows for infringing use would, in
18 our opinion, violate *Sony* and potentially restrict activity unrelated to the infringing
19 use.” *Id.* at 1021.

20 In this case, MusicCity’s product is exactly the kind of technology that is
21 protected under the *Sony-Betamax* and *Napster* decisions. Like the Betamax, the
22 Morpheus software program is a product with a variety of uses. The Morpheus
23 software program distributed by MusicCity allows users to search for, obtain, and
24 disseminate a wide variety of digital content: software, video, audio, graphics, and
25 documents. Many actual uses of the program are beneficial and noninfringing; the
26 potential uses are vast and still unfolding. Like Sony, MusicCity has no particular
27 knowledge, at the time it delivers its product, that the product will be used by a
28 specific consumer for infringing or noninfringing uses. Like Sony, MusicCity lacks

1 the power to control or stop infringing uses after the product is delivered to a user.
2 Unlike Napster, MusicCity does not operate a centralized service that participates in
3 or can prevent infringing uses of the software product, and it cannot take action
4 against a particular user based on knowledge that the user has abused the product.

5 As a consequence, under *Sony-Betamax* and *Napster*, MusicCity cannot be
6 liable for contributory copyright infringement based on distribution of the Morpheus
7 software program to the general public.

8 II. FACTUAL BACKGROUND

9 A. The Morpheus Software Program

10 The Morpheus software program is a communications tool that allows users
11 to connect together to form a user network.³ Using the Morpheus software
12 program, users may search for and share any kind of computer file (including text,
13 images, audio, video, and software files) with any other user of the network. The
14 network itself creates indexes of resources available to it, without relying upon a
15 central server to index the entire network. The Morpheus software program also has
16 the ability to send and receive instant messages within the network, to organize media
17 files on a user's computer, and to display or play the contents of media files on a
18 user's computer. Declaration of Darrell Smith ("Smith Decl.") at ¶ 4. Screen
19 displays of Morpheus's "start" and "search" interfaces are attached to the Smith
20 Decl. as Exhibits A and B.

21 The network created by users of the Morpheus software program (and the
22 programs of the other defendants) is "self-organizing," in that the users communicate
23 with each other without assistance from MusicCity. The network itself shares and
24 updates information, and allocates different resources as needed. *Id.* at ¶ 5.
25 MusicCity invites the Court's attention to the Declaration of William Clay Shirky
26 ("Shirky Decl.") for a general description of the function, capabilities, benefits, and

27
28 ³ The network consists of users of the Morpheus, KaZaA, or Grokster software products.

1 potential of the Morpheus software program and the network created by its users.

2 One particularly useful and innovative feature of the network created by users
3 of the Morpheus software program is the “dynamic,” or variable, use of
4 “supernodes.” A “node” is an end-point of the Internet, typically a user’s computer.
5 A “supernode” is a node that has a heightened function, accumulating information
6 from multiple other nodes. In the network created by users of the Morpheus
7 software program, nodes become supernodes and may revert to being mere nodes
8 depending upon network demands and the nodes’ ability to assume heavier network
9 duties. The network self-selects supernodes; a user’s node may be a supernode one
10 day and not on the following day, depending on resource needs and availability on the
11 network. Smith Decl. at ¶ 7. Supernodes help the network operate efficiently by
12 aggregating information from many nodes so that each node, by searching one
13 supernode, needs to connect with fewer other nodes to find resources. *Id.* at ¶ 8.
14 MusicCity does not operate any supernodes. *Id.* at ¶ 9.

15 When a user installs the Morpheus software program, the program comes with
16 an initial list of supernodes, just as a browser generally comes pre-loaded with a list
17 of popular web site addresses and Internet service providers. When the person’s
18 computer first connects to one of the supernodes, the supernode updates the initial
19 list that came with the program. *Id.* at ¶ 10.

20 When a user first operates the Morpheus software program, it interacts briefly
21 with MusicCity’s server to establish a username and password. MusicCity itself
22 does not use the username or password for any purpose; instead, the username
23 identifies the user uniquely to other nodes within the user network. If the software
24 cannot access the MusicCity server, the user may still access the user-created
25 network, but the user’s username will not be properly displayed and other users will
26 not know that this is the same user who has connected before. *Id.* at ¶ 11. Indeed,
27 this has happened many times when MusicCity’s servers have been unavailable. *Id.*

28 After attempting to submit the user’s username (and even if MusicCity’s

1 server is unavailable), the Morpheus software program connects to the user-created
2 network by connecting to another user who is functioning at that time as a
3 supernode. To search the network, the Morpheus software program sends search
4 requests to a supernode; the supernode reports results from the nodes and
5 supernodes with which it communicates. *Id.* at ¶ 12.

6 A user who wishes to locate a file on another user's computer enters a search
7 term into a search request page. The software connects the user to a supernode,
8 which searches other nodes connected to it and, if necessary, other supernodes. The
9 local supernode then sends to the requester a list of other users on the network who
10 have files that are associated with the search terms. *Id.* at ¶ 13.

11 MusicCity has no involvement in making search requests, maintaining file
12 indexes, processing search requests, compiling search results, sending search results
13 to a user, controlling searches or displays of results, or monitoring searches or
14 displays of results. The Morpheus product does not report any information on the
15 content of searches to any MusicCity server. *Id.* at ¶ 20.

16 Next, to obtain files, a user of the Morpheus software program selects files
17 from the search results and connects directly to the other users' computers and
18 downloads the files directly from the other users' computers. MusicCity's servers
19 do not participate in identifying locations that host user files, requesting those files
20 for transfer, communicating with the host users, transferring files from one user to
21 another, controlling or monitoring transfers of user files, or controlling or monitoring
22 management or use of files. MusicCity's servers have no knowledge of particular
23 files being transferred among users. *Id.* at ¶ 15.

24 MusicCity's involvement with use of the Morpheus software after delivery of
25 the software is very limited. The software contains two components that activate
26 the user's Microsoft Internet Explorer "browser" software when the software is
27 running on a user's computer, regardless of any activity by the user. One
28 component calls on a MusicCity server to obtain changeable background graphics

1 for the “start” page of the Morpheus user interface. The background graphics make
2 the software user interface attractive, give MusicCity the chance to broadcast
3 messages to Morpheus software users, and permit advertising. The other component
4 calls on other servers of MusicCity or other companies, which send additional
5 advertisements into a window at the bottom of the software’s user interface. *Id.* at
6 ¶ 16. Both the “start” page graphics and the advertisements are obtained by the
7 user’s Microsoft Internet Explorer program whenever the Morpheus software
8 program is running and is connected to the user network, regardless of the activity
9 of the user. *Id.* at ¶ 17. Thus, even if one engages in no searching, sharing,
10 downloading, or playing of media files, the graphics and advertising will be displayed
11 on the software interface. *Id.* at ¶ 18.

12 Once a user has obtained the Morpheus software program, neither MusicCity
13 nor any of its computer servers participates in, or contributes in any way to, the
14 transfer of media files on the network created by users of the Morpheus software
15 program. *Id.* at ¶ 19.

16 As noted above, once the user obtains the Morpheus software program,
17 MusicCity has no involvement in any of the steps for searching and the transfer of
18 files. In addition, the Morpheus software program does not communicate to
19 MusicCity or its servers any information about possession, receipt, transfer,
20 searching, or indexing of the media files by the user. *Id.* at ¶ 20. Nor does it use
21 MusicCity or its servers to search for, index, transfer, download, manage, display
22 or play any files of the plaintiffs’ media content. *Id.*⁴

23 _____
24 ⁴ To foster a sense of community among users of the Morpheus software program,
25 MusicCity operates at its web site a chat service and a discussion board, but the
26 Morpheus software has no direct connection to those services. A user of the
27 software may click on a link displayed in the “Start” page graphical interface in order
28 to go to MusicCity’s web-based chat or discussion services, but the access to those
services is through a web interface that exists regardless of whether one arrives from
the Morpheus interface or directly from the web via its Internet address
www.musiccity.com. Morpheus usernames and passwords do not gain access to
(continued...)

1 In sum, once a user has installed a copy of the Morpheus software program,
2 MusicCity has no effective involvement with or control over what a user does with
3 the program. Users must elect to run the software, determine what (if any) files they
4 wish to store on their hard drive or to share, decide what bandwidth to allocate to the
5 application, and indicate whether they may be designated to serve as a transient
6 supernode. Users decide whether to use the software to join and form a public, user-
7 created network. Users decide whether to search for, find, send, or receive files
8 over the user-created network. The Morpheus product does not report any
9 information about a user's conduct to MusicCity's servers. It sends only
10 username/password information when the user starts running Morpheus. Smith
11 Decl. at ¶ 22.

12 If MusicCity ceased to operate, or if its servers became inoperative (as has
13 happened on occasion owing to technical malfunctions or maintenance), the
14 searching, indexing, transferring, downloading, managing, display and play functions
15 of the software would continue unaffected. *Id.* at ¶ 23. The only changes would be
16 (1) the display of advertisements and the display of graphics on the software user
17 interface would be interrupted, and (2) the user's username would not be properly
18 displayed on the user network. *Id.* at ¶ 24.

19 **B. Media Interests' Attacks on New Technologies**

20 The Morpheus software program joins a long list of new technologies that
21 have drawn attacks from copyright holders. From player pianos to cable TV, media
22 interests have attempted to eliminate new technologies, until those interests learned
23 to adapt to the new technologies and, in turn, to profit from them. *See White-Smith*
24

25 _____
26 (...continued)
27 the chat and discussion services; one must register a username and password
28 separately for those services. Smith Decl. at ¶ 21. Plaintiffs have not challenged the
chat and discussion board services of MusicCity, but MusicCity includes this
discussion of them so that the Court may have a complete view of MusicCity's
offerings.

1 *Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 28 S. Ct. 319, 52 L. Ed. 655 (1908)
2 (player piano rolls not governed by Copyright Act); *Fortnightly Corp. v. United*
3 *Artists Television, Inc.*, 392 U.S. 390, 88 S. Ct. 2084, 20 L. Ed. 2d 1176 (1968)
4 (cable TV transmission of local signals not governed by Copyright Act);
5 *Teleprompter Corp. v. CBS*, 415 U.S. 394, 94 S. Ct. 1129, 39 L. Ed. 2d 415 (1974)
6 (cable TV importation and transmission of distant signals not governed by Copyright
7 Act).

8 The most notable modern attacks on technology by copyright holders involved
9 the introduction of the Sony Betamax video tape recorder, the Sony digital audio tape
10 (“DAT”) recorder, the Rio MP3 music player, and the Napster file sharing service.
11 This case should be analyzed in the light of these previous battles.

12 **1. The Betamax Video Tape Recorder**

13 The Betamax allowed users to make copies of television programs on
14 videotape. This new technology struck fear in the motion picture industry, including
15 a plaintiff in this case, Universal City Studios, which brought suit to enjoin
16 distribution of the Betamax. See generally James Lardner, *Fast Forward:*
17 *Hollywood, the Japanese, and the VCR Wars* (1987). At the time of the suit against
18 the Betamax, the motion picture industry was outspoken in condemning the new
19 technology, and it made the same arguments it now makes in this case. Jack Valenti,
20 the powerful chief of the Motion Picture Association of America, voiced his
21 industry’s position most memorably in a 1982 Congressional hearing: “I say to you
22 that the VCR is to the American film producer and the American public as the Boston
23 Strangler is to the woman home alone.” *Home Recordings of Copyrighted Works:*
24 *Hearings on H.R. 4783 et al. Before the Subcommittee on Courts of the House*
25 *Comm. on the Judiciary, 97th Cong. 8* (1982)(attached as Ex A. to Declaration of
26 Andrew P. Bridges (“Bridges Decl.”)).

27 Since the Supreme Court’s decision protecting Sony’s distribution of the
28 Betamax, the video recorder has become a source of huge profits for the industry.

1 As the *Boston Globe* reported, in 1989 box office revenues hit an all-time high of
2 \$4.4 billion and US consumers spent even more -- \$6.6 billion -- on prerecorded
3 video cassettes. *See Sit Down, Jack, Boston Globe*, Jan. 17, 1989, at 51 (Ex. B to
4 Bridges Decl.).

5 As Mr. Valenti explained at greater length in 1992: “Fifteen years ago, when
6 the VCR made its appearance, I thought, among others, that it would be the death of
7 the movie business, but what we have done, in an astonishing reversal of prediction
8 is the movie business stays the same, stable, and we have built a second movie
9 audience, even bigger than our theatrical movie audience, called home video, with a
10 \$6 billion world-wide revenue. It’s really one of the most marvelous things that’s
11 happened to the movie industry. Not only has the movie industry remained healthy,
12 but we’ve built side-by-side, a whole new business that didn’t exist before.” *See*
13 *Business World* (ABC television broadcast, Aug. 30, 1992) (transcript attached as
14 Ex. C to Bridges Decl.).

15 **2. The Sony DAT Recorder**

16 In 1989, Sony’s introduction of the DAT recorder likewise provoked an attack
17 by the music industry. That industry had long tolerated “home copying” of recorded
18 music, a practice it condemned as illegal but thought by many to be an acceptable
19 and “fair” use of the works. *See Sony-Betamax*, 464 U.S. at 471 n.23 (Blackmun,
20 J., dissenting)(quoting Congressional testimony about fair-use home copying).

21 The music industry’s tolerance of home copying came to an abrupt end with
22 the advent of digital technology, leading to a class action lawsuit brought by
23 songwriter Sammy Cahn against Sony Corporation. As in the Betamax context, the
24 answer to this new technological challenge did not come from judicial imposition of
25 contributory copyright infringement liability on the developer. Instead, the parties
26 settled the case by convening a series of negotiations that led to the Audio Home
27 Recording Act of 1992, codified at 35 U.S.C. § 1001 *et seq.* *See generally* Paul
28 Goldstein, *Copyright’s Highway* 158-63 (1994).

3. The Rio MP3 Music Player

Internet music prompted yet another attack by media interests on new technology in 1998. The Recording Industry Association of America (“RIAA”) sued the manufacturer of a computer peripheral, the Rio MP3 Player, which stores and plays MP3-format music files transferred from a computer. RIAA sued under the Audio Home Recording Act (“AHRA”), alleging that the manufacturer violated the law by failing to incorporate copy restriction technology that is required to be in certain types of digital audio recording devices. The Ninth Circuit held that the AHRA did not apply to the Rio at all since it was a computer peripheral device. *Recording Indus. Ass’n of America v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999). Responding to RIAA’s concern that exempting computer equipment from the Act would eviscerate the Act, the Ninth Circuit responded: “[w]hile this may be true, the Act seems expressly designed to create this loophole.” *Id.*, 180 F.3d at 1078.

4. The Napster File Sharing Service

The most recent clash between media interests and the technology industry arose within this Circuit over the Napster service. The Ninth Circuit affirmed findings that Napster’s operation of its service likely constituted both contributory and vicarious infringement. *Napster*, 239 F.3d at 1027.

Notwithstanding all the attention and notoriety of the *Napster* case, a number of facts have become obscured. First, neither the district court nor the Ninth Circuit enjoined Napster’s *distribution* of its file searching and transfer *software*. That distribution continued after the injunctions and appeal. Bridges Decl. at ¶ 6 and Ex. D. Second, as discussed below, the Ninth Circuit clearly distinguished between the *Napster software and the architecture* of its system on the one hand and *Napster’s conduct, namely its operation of a file-indexing service*, on the other hand. Third, Napster’s famous shutdown was not directly ordered by any court; Napster kept the service down because of the difficulty of meeting, through filtering techniques, a

1 “zero-infringement” standard imposed by the district court in the operation of
2 Napster’s centralized file-indexing service. *See A&M Records, Inc. v. Napster, Inc.*,
3 no. C-99-05183 MHP, 2001 WL 227083 at *1-*2 (N.D. Cal. March 5, 2001)
4 (injunction after remand); *see also* Napster, Inc.’s Emergency Motion for Stay,
5 appeal no. 01-163908 (9th Cir. July 12, 2001) (attached as Ex. A to Declaration of
6 Richard Nessary (“Nessary Decl.”)).

7 **C. The Morpheus Software Program’s Undisputed Capability for Substantial**
8 **Noninfringing Uses.**

9 As explained further below, the Supreme Court in *Sony-Betamax* made it clear
10 that the *mere capability of substantial noninfringing uses* is all that is required to
11 protect a new technology from an attack grounded on allegations of contributory
12 copyright infringement. As the examples below demonstrate, it is beyond dispute
13 that the Morpheus software program is capable of substantial noninfringing uses.

14 **1. Project Gutenberg and other eBooks**

15 One of the most exciting uses of the Morpheus software program is in
16 furtherance of Project Gutenberg. As described more fully in the Declaration of
17 Gregory Newby (“Newby Decl.”), Project Gutenberg seeks to convert to digital
18 form, and widely distribute over the Internet, many different types of documents
19 from the King James Bible to Shakespeare to the CIA World Fact Book. Newby
20 Decl. at ¶¶ 4, 7. Project Gutenberg prepares and distributes over 4,500 works that
21 are either in the public domain or authorized for distribution by the copyright holders.
22 There are expected to be over 20,000 public domain eBooks available on the Internet
23 by February 2002. Newby Decl. at ¶ 8. The Morpheus software program allows
24 more de-centralized (and thus less expensive) distribution of Project Gutenberg’s
25 eBooks. As a result, the eBooks are readily available through the Morpheus software
26 program and the network of Morpheus users. Declaration of M. Tally George
27 (“George Decl.”) at ¶ 5. As Project Gutenberg’s CEO has stated: “Any technology
28 that makes it easier and cheaper for individuals to redistribute eBooks over the

1 Internet helps achieve Project Gutenberg’s goals of making public domain
2 information freely available to the general public.” Newby Decl. at ¶ 12.

3 **2. Government Documents**

4 Another significant noninfringing use of the Morpheus software program is for
5 the distribution of government documents. Under Section 105 of the Copyright Act,
6 17 U.S.C. §105, there is no copyright in U.S. government works. Some government
7 documents are already being made available through Project Gutenberg as noted
8 above. The Morpheus software program allows easy distribution of other
9 government works, including videos of Presidential addresses, NASA photographs,
10 and so forth. *See* George Decl. at ¶¶ 4, 6.

11 A vivid example of this substantial noninfringing use is the availability via the
12 Morpheus software program of President George W. Bush’s addresses after the
13 attacks on the World Trade Center and the Pentagon. Videos of the speeches both
14 preserve the record for posterity and allow students, researches, and members of the
15 general public around the world to access the speeches easily and freely. *See* George
16 Decl. at ¶ 4. And the product not only allows easy access to *current* information:
17 thanks to the Morpheus software program one could easily compare President
18 Bush’s speech after the recent attacks to Franklin D. Roosevelt’s “A Date Which Will
19 Live in Infamy” speech delivered after the bombing of Pearl Harbor. *Id.* at ¶¶ 3-4.

20 **3. “Authorized” Media Content**

21 The Morpheus software program provides a technology for wide and
22 economical distribution of noninfringing entertainment media as well. Distributors
23 of “authorized” content such as J!VE Media and its media sources (including major
24 companies) welcome Morpheus and other similar peer-to-peer software programs
25 as providing content owners distinct business advantages over alternate online
26 distribution technologies. By using peer-to-peer file-sharing networks, content
27 owners are able to rely almost entirely on users to provide the most costly computing
28 resources involved in digital distribution, such as storage and “bandwidth.”

1 Declaration of Sean Mayers (“Mayers Decl.”) at ¶¶ 8, 11. J!VE Media represents a
2 variety of content owners and distributes their content using digital rights
3 management technology.⁵ Mayers Decl. at ¶¶ 5-7, 14-17.

4 In addition, some entertainment rights holders are pleased to have their works
5 attain wide distribution through peer-to-peer software networks. John Perry Barlow,
6 a songwriter for the Grateful Dead and author, welcomes distribution of his works.
7 He anticipates that peer-to-peer networks and direct file sharing software programs
8 like Morpheus will provide enormous benefit to musicians and authors, and will
9 broaden and improve distribution opportunities of entertainment works, political and
10 social commentary, public domain documents, software and other materials.
11 Declaration of John Perry Barlow (“Barlow Decl.”) at ¶¶ 8-9.⁶

12 **4. Public Domain Content**

13 There is an abundance of public domain material available that may be
14 distributed by users of the Morpheus software program. The public domain material
15 includes material as to which copyright was never obtained or asserted, as well as
16 material as to which copyright protection lapsed or expired. *See generally* Stephen
17 Fishman, *The Public Domain: How to Find & Use Copyright-Free Writings, Music,*
18 *Art & More* (2000).

19
20 ⁵ With the advent of “digital rights management” techniques, media content
21 providers have begun to authorize widespread distribution of their content. Those
22 who download the content will be able to enjoy it under certain restrictions, such as
“timeouts” that will allow limited-duration or limited-playback enjoyment of the
content. *See* Richard Klosa, “J!VEMedia White Paper: A New Form of Digital
Distribution” (Ex B to Nessary Decl.).

23 ⁶ Even unauthorized copies of commercial recordings facilitated through use of
24 Morpheus may be noninfringing. The Audio Home Recording Act of 1992 expressly
25 immunizes non-commercial recordings by consumers of digital musical recordings
26 using digital audio recording media. 17 U.S.C. §1008. Audio CD-ROMs sold for
27 making digital musical recordings are governed by the Audio Home Recording Act,
28 and are commonly used for making copies of recordings off the Internet via
computers using programs such as Morpheus and other “CD-burning” software. *See*
Bridges Decl. at ¶ 7 and Ex. E. *These copies, for which recording artists and other*
stakeholders have received royalty payments through the mechanisms of the Audio
Home Recording Act, see 17 U.S.C. § 1007 (procedures for distributing royalty
payments), are noninfringing, even if they come from unapproved sources.

1 Two significant distributors of public domain materials that are delighted with
2 the Morpheus software program's capability for wide distribution of media are the
3 Internet Archive and Prelinger Archives. As Brewster Kahle, the Internet pioneer and
4 entrepreneur who established the non-profit Internet Archive, has noted: "Peer-to-
5 peer file sharing technologies, like those offered by the Morpheus, Grokster and
6 KaZaA software, overcome many of the limitations of centralized download and
7 streaming technologies and constitute a valuable advance in technology for those
8 seeking to provide universal access to public domain material." Declaration of
9 Brewster Kahle at ¶14.

10 Prelinger Archives is a for-profit company that has assembled over 48,000
11 "ephemeral" (advertising, educational, industrial, documentary, and amateur) films
12 produced between 1903 and 1990. Approximately 60% of its holdings are in the
13 public domain; it owns the copyright in approximately 5% of its holdings. Prelinger
14 Archives furnishes stock footage for the motion picture industry, television
15 networks, software publishers; educational media producers; advertising agencies;
16 and artists and non-profit organizations. Declaration of Richard Prelinger ("Prelinger
17 Decl.") at ¶¶ 5-6.

18 Prelinger Archives has furnished over 1000 of its films to the Internet Archive
19 for redistribution. Prelinger Archives profits from providing access to its archives,
20 even when its materials are in the public domain, and it welcomes redistribution by
21 users of the defendants' software. *See* Prelinger Decl. at ¶¶ 11-18.

22 **5. Permitted Distribution of Computer Software**

23 Another significant noninfringing use of the Morpheus software program is the
24 authorized distribution of computer software. Many software developers grant
25 express, blanket authorizations for redistribution of their software. This is true for
26 several categories of software developers: (1) artistic or creative developers who are
27 happy for their creative works to have wide distribution; (2) developers of
28 "complementary" software products, where widespread distribution of one, free

1 product will stimulate sales of a related, revenue-generating product; (3) developers
2 of software that rely upon distribution of “evaluation” or “demo” versions to
3 stimulate sales of full-featured software; (4) developers of “freeware,” or software
4 that is distributed for free that leads to other revenue generating opportunities for the
5 developer; and (5) developers of “shareware,” which is distributed for free on a trial
6 basis but which asks the user to send a voluntary payment to the developer. *See*
7 *George Decl.* at ¶¶ 7, 8. An example of the second and third categories is WinZip,
8 one of the most popular software titles in the world. WinZip is available from users
9 of the Morpheus software program, and redistribution is expressly authorized by the
10 WinZip license agreement. *George Decl.* at ¶ 8.

11 III. ARGUMENT

12 THE MUSICCITY DEFENDANTS CANNOT BE HELD LIABLE FOR 13 CONTRIBUTORY COPYRIGHT INFRINGEMENT BASED ON 14 DISTRIBUTION OF THE MORPHEUS SOFTWARE PROGRAM TO THE 15 GENERAL PUBLIC.

16 A. The Standard for Contributory Copyright Infringement

17 The Ninth Circuit recently summarized the standard for contributory copyright
18 infringement as follows:

19 Traditionally, “one who, with knowledge of the infringing activity,
20 induces, causes or materially contributes to the infringing conduct of
21 another, may be held liable as a ‘contributory’ infringer.” Put
22 differently, liability exists if the defendant engages in “personal conduct
23 that encourages or assists the infringement.”

24 *Napster*, 239 F.3d at 1019 (citations omitted).

25 The key question in this case is whether distribution of a product with known
26 potential infringing uses causes the distributor to have constructive “knowledge of
27 the infringing activity” that must underlie contributory infringement liability. As
28 shown below in greater detail, under *Sony-Betamax*, a defendant cannot be charged

1 with the required constructive knowledge so long as the product is capable of
2 substantial noninfringing uses. *Sony-Betamax*, 464 U.S. at 442.

3 **B. The Standard for Partial Summary Judgment**

4 To be successful in a motion for summary judgment, defendants need not
5 “negate the opponent’s claim . . . [or] . . . produce *any* evidence showing the
6 absence of a genuine issue of material fact.” *Idema v. Dreamworks, Inc.*, 162 F.
7 Supp. 2d 1129, 1141 (C.D. Cal. 2001) (citation omitted) (emphasis in original).
8 Instead, once the defendants have “‘show[n]’ – that is, point[ed] out to the district
9 court – that there is an absence of evidence to support the nonmoving party’s case,”
10 then, under Rule 56(e), Fed. R. Civ. P., the non-moving party must identify specific
11 facts that show there is a genuine issue for trial. *Fairbank v. Wunderman Cato*
12 *Johnson*, 212 F.3d 528, 531 (9th Cir. 2000)(quoting *Celotex Corp. v. Catrett*, 477
13 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

14 As applied to this case, the summary judgment and contributory infringement
15 standards together mean that, to avoid partial summary judgment on this issue,
16 plaintiffs must provide evidence that the Morpheus software program is *incapable*
17 of substantial noninfringing uses. It is insufficient for plaintiffs to show that the
18 Morpheus software program may be used, or is actually used, for infringing
19 purposes. They must provide evidence *excluding the potential for* the Morpheus
20 software program’s noninfringing use. They cannot do so.

21 **C. Under the Supreme Court’s Bright-Line Test for Contributory Copyright**
22 **Infringement Arising from Distribution of a Product to the General**
23 **Public, the MusicCity Defendants Are Entitled to Partial Summary**
24 **Judgment.**

25 The *Sony-Betamax* decision is a landmark for two distinct holdings.⁷ The
26

27 ⁷ The holding that consumers’ home taping of movies from television for “time-
28 shifting” purposes (to view the movies at a more convenient time than when
(continued...))

1 holding relevant to this motion is that one who distributes a product to the general
2 public will not be liable for contributory copyright infringement merely because the
3 product may be used for infringing purposes. The Court stated that, to avoid liability,
4 the product “need merely be capable of substantial noninfringing uses.” *Sony-*
5 *Betamax*, 464 U.S. at 442.

6 The Supreme Court’s analysis started from the principle that contributory
7 copyright infringement depends upon a *knowing* contribution to infringing conduct.
8 It first addressed the district court’s finding that Sony had constructive knowledge
9 of infringing uses of the product: “If vicarious liability is to be imposed on *Sony* in
10 this case, it must rest on the fact that they have sold equipment with constructive
11 knowledge of the fact that its customers may use that equipment to make
12 unauthorized copies of copyrighted material.” *Sony-Betamax*, 464 U.S. at 439.

13 The Court found no precedent for such a theory in copyright law. *Id.* In fact,
14 the Court expressly noted that such a rule would improperly extend the copyright
15 monopoly to include consumer technologies generally. *Id.* at 441 n.21. The Court
16 therefore turned to patent law for an analogy. Under patent law, the Court observed,
17 “[t]he prohibition against contributory infringement is confined to the knowing sale
18 of a component especially made for use in connection with a particular patent.” *Id.*
19 at 440. The Court also noted that the Patent “Act expressly provides that the sale of
20 a ‘staple article or commodity of commerce suitable for substantial noninfringing
21 use’ is not contributory infringement.” *Id.* at 440.⁸

22
23 ⁷ (...continued)
24 broadcast) was a fair use under the Copyright Act, 464 U.S. at 454-55, is not at issue
25 in this motion.

26 ⁸ The Court quoted from 35 U.S.C. § 271, which provides, in part:
27 (c) Whoever sells a component of a patented machine, manufacture,
28 combination or composition, or a material or apparatus for use in
practicing a patented process, constituting a material part of the
invention, knowing the same to be especially made or especially adapted

(continued...)

1 The Court, continuing the analogy from patent law, explained the rationale for
2 limits upon contributory infringement liability:

3 [I]n contributory infringement cases arising under the patent laws the
4 Court has always recognized the critical importance of not allowing the
5 patentee to extend his monopoly beyond the limits of his specific grant.
6 These cases deny the patentee any right to control the distribution of
7 unpatented articles unless they are “unsuited for any commercial
8 noninfringing use.” Unless a commodity “has no use except through
9 practice of the patented method,” the patentee has no right to claim that
10 its distribution constitutes contributory infringement. “To form the basis
11 for contributory infringement the item must almost be uniquely suited
12 as a component of the patented invention.” “[A] sale of an article which
13 though adapted to an infringing use is also adapted to other and lawful
14 uses, is not enough to make the seller a contributory infringer. Such a
15 rule would block the wheels of commerce.”

16 *Sony-Betamax*, 464 U.S. at 441 (citations omitted).

17 Applying the contributory infringement analogy directly to copyright law from
18 patent law, the Court concluded and held:

19 Accordingly, the sale of copying equipment, like the sale of other
20 articles of commerce, does not constitute contributory infringement if
21 the product is widely used for legitimate, unobjectionable purposes.
22 Indeed, *it need merely be capable of substantial noninfringing uses.*

23 [¶] *The question is thus whether the Betamax is capable of*
24 *commercially significant noninfringing uses.*

26
27 ⁸ (...continued)

28 for use in an infringement of such patent, and not a staple article or
commodity of commerce suitable for substantial noninfringing use, shall
be liable as a contributory infringer.

1 *Id.* at 442 (emphasis added).

2 The “capability” standard was at the core of the Supreme Court’s holding, and
3 it imposed a bright-line test that is readily amenable to summary judgment. Although
4 plaintiffs presumably wish to dwell on the potential for infringing uses, or measure
5 the proportions of use at a point frozen in time, that view looks at the wrong
6 standard. In *Sony-Betamax*, the Supreme Court observed:

7 [The Ninth Circuit] held that Sony was chargeable with knowledge of
8 the homeowner’s infringing activity because the reproduction of
9 copyrighted materials was either “the most conspicuous use” or “the
10 major use” of the Betamax product.

11 464 U.S. at 428 (citing decision below, 659 F.2d 963, 974 (C.A. Cal. 1981)). It was
12 on that very point that the Supreme Court reversed the Ninth Circuit. The Supreme
13 Court’s analysis did not turn on “the most conspicuous use” or “the major use” of
14 the Betamax product. *See Sony-Betamax*, 464 U.S. at 498-99 (Blackmun, J.,
15 dissenting).⁹

16 Indeed, the Supreme Court expressly acknowledged the existence of improper
17 uses of the Betamax: “The respondents and Sony both conducted surveys of the
18 way the Betamax machine was used by several hundred owners during a sample
19 period in 1978. . . . Both surveys . . . showed . . . that a substantial number of
20 interviewees had accumulated libraries of tapes.” *Sony-Betamax*, 464 U.S. at 423.
21 The Supreme Court also noted that the trial court (which had found no infringement)
22 “assumed that Sony had constructive knowledge of the probability that the Betamax
23

24 ⁹ This point is especially clear by comparing the majority opinion with the dissent
in *Sony-Betamax*. As Justice Blackmun stated for the dissenters:

25 I therefore conclude that if a *significant* portion of the product’s use is
26 *noninfringing*, the manufacturers and sellers cannot be held
27 contributorily liable for the product’s infringing uses. If virtually all of
28 the product’s use, however, is to infringe, contributory liability may be
imposed; if no one would buy the product for noninfringing purposes
alone, it is clear that the manufacturer is purposely profiting from the
infringement, and that liability is appropriately imposed.

464 U.S. at 491 (citation omitted) (emphasis in original) (Blackmun, J., dissenting).

1 machine would be used to record copyrighted programs, but found that Sony merely
2 sold a ‘product capable of a variety of uses, some of them allegedly infringing.’ *Id.*
3 at 426 (citation omitted).

4 In light of the Supreme Court’s express acknowledgment of infringing uses
5 of the Betamax, its bright-line standard is all the clearer: capability of substantial
6 noninfringing uses, rather than any particular proportion of current uses, is alone
7 relevant to the question of constructive knowledge for contributory infringement
8 liability.

9 Because Morpheus software is capable of present and future substantial
10 noninfringing uses, MusicCity cannot be charged with constructive knowledge that
11 the general public will use the software program to infringe upon any copyrights of
12 plaintiffs.¹⁰ The MusicCity defendants are entitled to partial summary judgment under
13 *Sony-Betamax* with respect to contributory infringement liability based on distribution
14 of Morpheus software to the general public.

15 **D. The Ninth Circuit’s Decision in *Napster* Reinforced the *Sony-Betamax***
16 **Rule and Supports Partial Summary Judgment for the MusicCity**
17 **Defendants.**

18 The Ninth Circuit’s decision in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d
19 1004 (9th Cir. 2000), also strongly supports partial summary judgment for the
20 MusicCity defendants with respect to contributory copyright infringement.

21 The Ninth Circuit’s decision in *Napster* recognized the prominence and force
22 of the Supreme Court’s *Sony-Betamax* decision. As the Ninth Circuit observed:

23 The *Sony* Court refused to hold the manufacturer and retailers of

24
25 ¹⁰ Plaintiffs have sent notices to MusicCity accusing users of the Morpheus
26 software program of engaging in infringing activity. These notices about Morpheus
27 users by necessity arrive after distribution to them of the Morpheus program. Griffin
28 Decl. at ¶ 4. Notices to MusicCity after the software has been distributed are
ineffective in showing that the software was distributed to the users with knowledge
of their infringing activity. For this reason the notices cannot establish the requisite
knowledge to make distribution of the Morpheus software program a contributory
copyright infringement.

1 video tape recorders liable for contributory infringement despite
2 evidence that such machines could be and were used to infringe
3 plaintiffs' copyrighted television shows. . . . The *Sony* Court declined
4 to impute the requisite level of knowledge where the defendants made
5 and sold equipment capable of both infringing and "substantial
6 noninfringing uses."

7 We are bound to follow *Sony*, and will not impute the requisite
8 level of knowledge to Napster merely because peer-to-peer file sharing
9 technology may be used to infringe plaintiffs' copyrights. *See* 464 U.S.
10 at 436 (rejecting argument that merely supplying the "means" to
11 accomplish an infringing activity" leads to imposition of liability).

12 *Napster*, 239 F.3d at 1020-21 (citations omitted).

13 The Ninth Circuit in *Napster* also underscored the Supreme Court's bright-line
14 standard of a product's capability of substantial noninfringing uses. On this point the
15 court of appeals criticized the district court:

16 We depart from the reasoning of the district court that Napster failed to
17 demonstrate that its system is capable of commercially significant
18 noninfringing uses. *See A&M Records, Inc. v. Napster, Inc.*, 114 F.
19 Supp. 2d 896, 916, 917-18 (N.D. Cal. 2000). The district court
20 improperly confined the use analysis to current uses, ignoring the
21 system's capabilities. *See generally Sony*, 464 U.S. at 442-43, 104 S.
22 Ct. 774 (framing inquiry as whether the video tape recorder is "capable
23 of commercially significant noninfringing uses") (emphasis added).
24 Consequently, the district court placed undue weight on the proportion
25 of current infringing use as compared to current and future
26 noninfringing use. *See generally Vault Corp. v. Quaid Software, Ltd.*,
27 847 F.2d 255, 264-67 (5th Cir. 1988) (single noninfringing use
28 implicated *Sony*).

1 *Napster*, 239 F.3d at 1021.

2 In this case, plaintiffs rely heavily on the existence of allegedly infringing uses
3 of the Morpheus software program. But under both *Sony-Betamax* and *Napster* that
4 fact cannot alone give rise to contributory infringement liability.

5 The Ninth Circuit in *Napster* faced the finding that, during its ongoing
6 operation of its central file-indexing service, Napster had knowledge of specific
7 infringements by specific users with specific files using the Napster service. As
8 noted above, the court of appeals stated that “Napster’s actual, specific knowledge
9 of direct infringement renders *Sony’s* holding of limited assistance to Napster. We
10 are compelled to make a clear distinction between the *architecture of the Napster*
11 *system* and Napster’s *conduct* in relation to the operational capacity of the system.”
12 *Napster*, 239 F.3d at 1020 (emphasis added).

13 Throughout the Ninth Circuit’s *Napster* opinion, the court made it clear that
14 it was Napster’s operation and conduct of its system, not its software and
15 architecture, that were the basis for Napster’s liability. The court observed:
16 “Napster has designed *and operates* a system which permits the transmission and
17 retention of sound recordings employing digital technology.” *Id.* at 1011 (emphasis
18 added).

19 The court held that “Napster, *by its conduct*, knowingly encourages and assists
20 the infringement of plaintiffs’ copyrights.” *Id.* at 1020 (emphasis added). The court
21 also explained: “We agree that if a computer *system operator* learns of specific
22 infringing material available on his system and fails to purge such material from the
23 system, the *operator* knows of and contributes to direct infringement.” *Napster*, 239
24 F.3d at 1021 (emphasis added).¹¹

25 _____
26 ¹¹ Indeed, by directing the district court on remand to restrict its injunction to
27 specific infringing files indexed on the Napster index after plaintiffs gave Napster
28 notice of those infringing files, *see Napster*, 239 F.3d at 1020-21, the Ninth Circuit
indicated how specific the relevant knowledge must be before even ongoing conduct
(continued...)

1 With respect to the system itself, independent of a defendant's role in operating
2 it, however, the Ninth Circuit indicated otherwise: "To enjoin simply because a
3 computer network allows for infringing use would, in our opinion, violate *Sony* and
4 potentially restrict activity unrelated to infringing use." *Id.*

5 The court of appeals elsewhere specifically noted that it was Napster's
6 services, not its software, that made it liable for contributory infringement:

7 Under the facts as found by the district court, Napster materially
8 contributes to the infringing activity. Relying on *Fonovisa Inc. v.*
9 *Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996)], the district court
10 concluded that "[w]ithout the *support services* defendant provides,
11 Napster users could not find and download the music they want with
12 the ease of which defendant boasts." *Napster*, 114 F. Supp. 2d at 919-
13 20 ("Napster is an *integrated service* designed to enable users to locate
14 and download MP3 music files.") We agree that Napster provides the
15 "site and facilities" for direct infringement.

16 *Napster*, 239 F.3d at 1022 (emphasis added); *see also id.* at 1021 (discussing role of
17 "system operator" in an online context).

18 In stark contrast to Napster, MusicCity does not "operate" the Morpheus user
19 network, and it does not operate a file-indexing service. In even starker contrast to
20 Napster, Morpheus software program users can (and in fact do) take advantage of
21 the program's full communication functionality without MusicCity's continuing
22 involvement. *Even when MusicCity's servers have been down, Morpheus use has*
23 *been ongoing, with Morpheus users able to find and download files on their own.*
24 Smith Decl. at ¶ 25. Napster's operation of its service and its essential involvement
25 in alleged infringing activity distinguished *Napster* from *Sony-Betamax*; it also
26

27
28 ¹¹ (...continued)
(not at issue here) can be challenged.

1 distinguishes *Napster* from this case.

2 As the Ninth Circuit, citing *Sony-Betamax*, noted, the Supreme Court rejected
3 the argument that merely supplying the “means” to accomplish an infringing activity
4 leads to the imposition of liability. *See Napster*, 239 F.3d at 1021. This Court should
5 similarly reject the plaintiffs’ effort to impose liability on MusicCity on that basis.

6 **E. This Case Has Implications for Many Technologies that May Be Used for**
7 **Infringing Purposes.**

8 Because all computer technology relies on copying and the Internet is devoted
9 to the transfer and copying of digital content, the Internet is itself a tool of massive
10 copyright infringement. There can be no doubt that every day the Internet is used for
11 substantial infringing purposes; and it may be postulated that for some a primary use
12 of the Internet – and a reason for widespread adoption of high-speed Internet access
13 – is precisely the ability to seek and obtain infringing content.

14 A variety of related digital technologies, some of which may be used in
15 conjunction with Morpheus, may equally be accused of being “essential tools” for
16 copyright infringement. They include:

- 17 • high-speed communications devices such as DSL and cable modems,
18 favored by those who want to download video or sound files;
- 19 • browser software (such as Microsoft Internet Explorer or America
20 Online’s Netscape Communicator), for viewing, editing, and copying
21 files that are posted to the Web;
- 22 • server software such as Microsoft Internet Information Server and
23 Apache HTTP Server, for distributing content across the Internet;
- 24 • media player software (such as Microsoft Media Player), for viewing
25 and displaying media files;
- 26 • e-mail and instant messaging software, favored by those who want to
27 send or receive files privately;
- 28 • Internet Relay Chat servers, commonly used for file sharing activities;

- 1 • newsgroup software (often bundled into e-mail software), favored by
- 2 those who want to choose and download music and video files from
- 3 newsgroups;
- 4 • FTP (file transfer protocol) software for obtaining files over the
- 5 Internet;
- 6 • scanners, fax modems, and printers, for those who want to copy and/or
- 7 transmit images over the Internet and otherwise; and
- 8 • large-capacity storage devices such as hard drives, CD-ROM burners,
- 9 DVD burners, and Zip drives, and their recording media, favored by
- 10 those who want to keep libraries of video or sound files.

11 Smith Decl. at ¶ 27. These technologies exist in a context in which the public
12 (including manufacturers) is aware of massive copyright infringement through their
13 use – indeed the whole Internet-connected world may be considered to have
14 constructive knowledge that infringements using these technologies occur widely.
15 A ruling against MusicCity on this motion could apply just as easily to, and would
16 jeopardize, all of these technologies.

17 **IV. CONCLUSION**

18 With this case, the entertainment industry seeks once again to use the courts
19 to ban a nascent technology. A ruling against MusicCity on this motion would make
20 all new technologies potentially subject to “veto” (through litigation or mere threats)
21 by powerful media interests, including the same interests that two decades ago saw
22 the Betamax as equivalent to “the Boston Strangler [with] a woman home alone.”

23 When faced with claims of contributory copyright infringement by media
24 interests against new technologies with the capability of noninfringing uses, the
25 Supreme Court and Ninth Circuit have taught that the answer is not to ban those
26 technologies. Infringing users of those technologies remain subject to liability for
27 their conduct, so plaintiffs do not lack a remedy – and if new remedies are needed,
28 that is a role for Congress. *See Sony-Betamax*, 464 U.S. at 430-31 (referring to the

1 Supreme Court’s “consistent deference to Congress when major technological
2 innovations alter the market for copyrighted materials”).

3 Because plaintiffs cannot show that there is a genuine dispute regarding the
4 Morpheus software program’s capability of substantial noninfringing uses, the Court
5 should grant partial summary judgment to the MusicCity defendants with respect to
6 the distribution of the Morpheus software program to the general public.

7 Respectfully submitted,

8 Dated: January 22, 2002

WILSON SONSINI GOODRICH & ROSATI

9
10 By: _____
11 Andrew P. Bridges
12 Attorneys for Defendants MusicCity.com, Inc.
13 (now known as StreamCast Networks, Inc.) and
14 MusicCity Networks, Inc.
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