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16 **UNITED STATES DISTRICT COURT**

17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

18 ONLINE POLICY GROUP, NELSON CHU) No. C-03-04913 JF
PAVLOSKY, and LUKE THOMAS SMITH,)
19) **PLAINTIFFS' SUPPLEMENTAL**
Plaintiffs,) **MEMORANDUM OF POINTS AND**
20) **AUTHORITIES IN SUPPORT OF**
v.) **APPLICATION FOR PRELIMINARY**
21) **INJUNCTION**
DIEBOLD, INCORPORATED, and DIEBOLD)
22 ELECTION SYSTEMS, INCORPORATED,)
23 Defendants.) Hearing Date: November 17, 2003
Time: 9:00 a.m.
Courtroom: 3
24)
_____)

1 Pursuant to this Court’s Order of November 4, 2003, Plaintiffs Online Policy Group
2 (“OPG”), Nelson Chu Pavlosky, and Luke Thomas Smith submit this supplemental memorandum
3 of points and authorities and two supplemental declarations in support of their motion for
4 Preliminary Injunction to remove the unfounded legal threats that currently restrain them from
5 publishing, linking to or hosting websites that link to or publish speech critical of Defendants’
6 electronic voting machine product.

7 I. INTRODUCTION

8 This case arises from ongoing effort to squelch speech that embarrasses a large, publicly-
9 traded corporation. Defendants Diebold, Incorporated and Diebold Election Systems, Inc.,
10 (collectively “Diebold”) have embarked upon a campaign of sending cease-and-desist letters
11 threatening copyright infringement lawsuits to Internet service providers (“ISPs”) and to *their*
12 service providers (i.e., “upstream”) if they do not take steps to remove from the web an archive of
13 Diebold employees’ e-mails revealing problems with the company’s electronic voting machine
14 product. Diebold has not filed lawsuits against any of the ISPs, nor has it sent any letters to the
15 alleged direct copyright infringers. Rather, Diebold has threatened the ISPs in order to obtain what
16 it could not get through a lawsuit: mass, expedited removals of critical speech without judicial
17 scrutiny. Diebold’s legal threat letter campaign¹ continues to be successful; the two individual
18 plaintiffs here continue to be muzzled by their ISP and the ISP plaintiff OPG continues to demand
19 that its users remove the e-mail archive from their websites out of fear of losing its upstream
20 Internet connection.

21 Contrary to Defendants’ assertions, their cease-and-desist letters are not “petitions to
22 government;” sham threats to private parties are entitled to no special First Amendment protection.
23 Instead, Plaintiffs have demonstrated more than a substantial likelihood that they will prevail in
24 this action. They have demonstrated Diebold’s bad faith in sending the letters, first because
25 publication of the e-mail archives constitutes fair use and second because the claims of tertiary and
26 quaternary liability leveled by Diebold against OPG and its upstream provider Hurricane Electric
27 stray far outside the bounds of legitimate copyright liability. Nor do the counter notification

28 ¹ Plaintiffs believe that Diebold has sent at least a dozen cease and desist letters to ISPs so far.

1 provisions of the Digital Millennium Copyright Act (“DMCA”) alleviate problems caused by
2 Diebold’s actions; Plaintiffs have been silenced at a critical time in the discussion of electronic
3 voting machines, an election. And the counter-notice provisions do not even apply to Plaintiff
4 OPG. Finally, the DMCA did not eliminate the role of the judiciary in granting timely relief to
5 individuals and ISPs who face unfounded copyright claims.

6 **II. THE HARM CONTINUES**

7 Since the filing of this lawsuit and request for Order to Show Cause on November 4, 2003,
8 OPG has continued to suffer harm from Diebold’s false claims and continues to need immediate
9 relief from this Court. This is because the current effect of the legal threats is to force OPG to
10 censor its clients for fear of losing its own Internet access. For example, on November 4, 2003,
11 OPG learned that another of its users was hosting the e-mail archive. Weekly Supp. Decl., ¶2.
12 Because of Diebold’s cease and desist letter, and the warning from Hurricane Electric that it would
13 consider terminating OPG’s Internet service entirely (turning off over 1,000 websites) if any OPG
14 user hosted the archive, OPG required its user to remove the e-mail archive. *Id.*, ¶3. OPG
15 reasonably expects that it will have to demand that other users to remove the e-mail archive unless
16 protected by this Court. *Id.*, ¶5.

17 The harm to Pavlosky and Smith also continues. Their ISP, Swarthmore College, required
18 them to remove the e-mail archive and even refrain from linking to it over two weeks ago, on
19 October 22, 2003, and has not yet allowed them to republish or link. However, Swarthmore did
20 issue a public statement at the end of the day on October 31, 2003 that it would accept a counter
21 notice from the students and follow the provisions of DMCA §512(g)(3)(C). Smith Supp. Decl.,
22 ¶4. Based upon this, Pavlosky and Smith have now issued a counter notice which will come due
23 on or about November 24, 2003. Smith Supp. Decl., Exh. A. Assuming Swarthmore allows the
24 information to be reposted at the end of that period, and that Diebold does not take additional
25 action to prevent republication, Pavlosky and Smith may be able to republish the e-mail archive,
26 but this will be a full week after the hearing on the preliminary injunction and over a month since
27 the e-mail archive and links were removed.

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III. ARGUMENT

A. Plaintiffs Have a Likelihood of Success on the Merits.

1. The Right to Petition Does Not Immunize Defendants From Suit For Sending Cease and Desist Letters.

Defendants claim that this lawsuit violates their right to petition the government. Diebold's TRO Opposition at 5:17-6:11. This is plainly wrong. As noted previously, "A letter from one private party to another private party simply does not implicate the right to petition, regardless of what the letter threatens." *Cardtoons, L.C. v. Major League Baseball Players Association*, 208 F.3d 885, 892 (10th Cir. 2000) (*en banc*). See also, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988)(communications with private organization were not immune from antitrust law based on a claimed right to petition). Defendants did not send their cease-and-desist letters to a government agency or a court – they sent them to three private ISPs, Swarthmore College, Online Policy Group, and Hurricane Electric. Defendants have not sent threats to the alleged direct infringers, but instead put their copyright claims into DMCA notifications to ISPs because that was the fastest route to removal of the archives without judicial or governmental oversight. The letters were intended to, and did, induce the ISPs privately to assess the risks and costs of the threatened lawsuit, balanced against their customers' and users' online speech interests. Swarthmore removed its students' postings of the e-mail archive and forbade them even to link to it; OPG concluded that the risks were worth taking; while its ISP, Hurricane Electric, agreed to maintain a cautious status quo pending this Court's determination.

While the First Amendment protects against government interference with "the right of the people ... to petition the Government for a redress of grievances," an objectively baseless lawsuit instituted to achieve unlawful purposes rather than in good faith to vindicate a legal right can subject the party to litigation. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 51 ("Under the sham exception, activity 'ostensibly directed toward influencing governmental action' does not qualify for *Noerr* immunity if it 'is a mere sham to cover ... an attempt to interfere directly with [] business relationships,'" (*quoting Eastern Railroad*

1 *Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)).² Even processes
2 within litigation incur liability if misused, such as the “transparently and egregiously’ overbroad”
3 subpoena by which the defendant was found to have violated the Stored Communications Act in
4 *Theofel v. Farey-Jones*, 341 F.3d 978, 987 (9th Cir. 2003). Given that Diebold has threatened
5 private parties with an objectively unreasonable suit, this court has wide latitude to conclude that
6 Diebold’s threats are motivated to suppress protected speech and grant relief accordingly.

7 Plaintiffs do not seek to bar Diebold from filing meritorious lawsuits. Plaintiffs seek only
8 to bar Diebold from slinging bad faith threats of baseless lawsuits designed to induce speech
9 intermediaries to silence criticisms of Diebold’s products.

10 **B. Diebold’s Legal Threats Are Manifestly Without Merit**

11 Defendants barely engage Plaintiffs’ fair use argument, and do not even address how OPG
12 or Hurricane Electric might be liable for infringement. They curiously ignore the fourth and most
13 important fair use factor, the effect on the market for the work. *Harper & Row Publishers, Inc. v.*
14 *Nation Enterprises*, 471 U.S. 539, 566 (1985). Yet on all counts, Plaintiffs’ have established a
15 strong likelihood of success on the merits.

16 1. Posting Is Fair Use

17 Defendants address only one of the four fair use factors, criticizing Plaintiffs Smith and
18 Pavlosky for not making a sufficiently “transformative use” by posting the entire e-mail archive.
19 Defendants’ Opposition at 4:13-5:2. On November 6, 2003, the Ninth Circuit confirmed: “Courts
20 have described new works as ‘transformative’ when the works use copyrighted materials for
21 purposes distinct from the purpose of the original material.” *Elvis Presley Enter’s v. Passport*
22 *Video*, No. 02-57011 (Nov. 6, 2003)
23 <<http://caselaw.lp.findlaw.com/data2/circs/9th/0257011p.pdf>>. Here it is undisputed that Pavlosky
24 and Smith’s purpose is noncommercial criticism of Diebold’s product. OPG client IndyMedia’s
25 purpose is to link to original source material in their coverage of legitimate news. In both

26 ² California has a specific statute addressing such situations. California Code of Civil Procedure
27 §425.16 provides for early dismissal and attorneys fees for lawsuits aimed at private citizens to
28 deter or punish them for exercising their political or legal rights. *Wilcox v. Superior Court*, 27 Cal.
App. 4th 809 (1994). The right to petition government does not provide immunity for those issuing
unfounded legal threats or bringing baseless litigation under either state or federal law.

1 instances, it is hard to imagine a more distinct purpose from Diebold’s own in creating the archive.

2 Nothing in the fair use doctrine prohibits a finding that use of an entire work is fair. *Sony v.*
3 *Universal City Studios*, 464 U.S. 417, 450 (1984). Instead, concerns about the amount of a work
4 taken arise from the presumed loss of revenue to a copyright owner when a complete copy acts as a
5 substitute in the market. Here, there is no “market” for internal e-mails that is displaced by having
6 complete copies available from Plaintiffs’ websites, distinguished from only portions of the e-
7 mails. In light of this, Defendants’ analogies to a “purloined, full-length movie” or “bootleg
8 recording” are absurd. Diebold TRO Opp. at 4.

9 “The purpose of copyright is to create incentives for creative effort.... [A] use that has no
10 demonstrable effect upon the potential market for, or the value of, the copyrighted work need not
11 be prohibited in order to protect the author’s incentive to create. The prohibition of such
12 noncommercial uses would merely inhibit access to ideas without any countervailing benefit.”
13 *Sony*, 464 U.S. at 450-51. The e-mail archive at issue here was created because Diebold employees
14 and contractors needed to communicate and record their responses to frequent questions in order to
15 perform their jobs. Copyright and its incentive function never entered the picture then, nor should
16 it enter now.

17 Moreover, Defendants themselves contributed to the circumstances where the entirety of
18 the archive is relevant and necessary for the purposes of the criticism. In response to reports about
19 the archive, Diebold officials asserted that the criticisms of it based upon the archive were based on
20 incomplete or out-of-context statements. In a press interview Diebold spokesman Mike Jacobsen
21 reportedly said “that the internal documents were probably deliberately corrupted or changed by
22 anyone who had access to them.” Mr. Jacobsen continued, “The memos are incomplete. . . They
23 [People] saw a memo or two and I think a lot of folks are making claims based on one or two
24 memos and its probably part of a long conversation e-mailed back and forth between Diebold
25 folks.” Seltzer Decl., Exh. G. Thus, even were it not initially necessary for Diebold’s critics to
26 copy the entire archive, such copying became necessary in order to respond to Diebold’s claims by
27 assuring readers that the information was complete and allowing them to view the full context of
28 the relevant discussions.

1 2. Copyright Law Does Not Provide for Tertiary Liability for ISPs Hosting or
2 Colocating Websites that Link to Infringing Works.

3 Defendants’ cease-and-desist letter to OPG asserted that the ISP might be liable for
4 “hosting a web site that contains information location tools that refer or link users to one or more
5 online location containing Diebold property,” because “[t]he web page you are hosting clearly
6 infringes Diebold’s copyrights.” (Weekly Decl., Exh. B). But hyperlinks on OPG client
7 IndyMedia’s site, comprised of text and Hypertext Markup Language (HTML) tags such as
8 <“http://d176.whartonab.swarthmore.edu/diebold_internalmemos.pdf”> do not infringe Diebold
9 copyrights. At most, Diebold might argue that IndyMedia is a contributory (secondary) infringer,
10 if its website leads third parties to follow the links to infringing copies of Diebold works. That still
11 leaves OPG – hosting an alleged secondary infringer – yet another degree removed from the
12 underlying infringement. The judge-made doctrine of secondary liability cannot equitably stretch
13 that far: “the concept of contributory infringement is merely a species of the broader problem of
14 identifying the circumstances in which it is just to hold one individual accountable for the actions
15 of another.” *Sony*, 464 U.S. at 435 (refusing to hold Sony secondarily liable because its Betamax,
16 although capable of being used for infringement, was also “capable of substantial non-infringing
17 use.”).

18 Tertiary and quaternary infringement claims have no place in the copyright schema. *See In*
19 *Re Napster Copyright Litigation*, Cases No. 00-1369MHP and 00-4725MHP, Order filed July 9,
20 2001, attached as Exhibit A (“Katz asks this court to adopt what is best described as a ‘tertiary
21 theory’ of [copyright] liability.... The court finds no support for this legal proposition.”) The First
22 Amendment *does* protect those who talk about what others are doing online (linkers), and it
23 protects those who give speakers the general-purpose tools of online speech (ISPs providing
24 hosting and colocation services). Moreover, the equities weigh strongly against creating liability
25 so attenuated from an underlying infringement. Indeed, were it embraced here it is difficult to see
26 where it would end. It is but a short step from Diebold’s cease-and-desist letter to Hurricane
27 Electric – imputing liability to the host of a host of a linker to alleged infringement – to demands
28 that would compromise the very backbone of the Internet by requiring that all Internet providers

1 stop routing requests to and from websites containing allegedly infringing material.

2 **C. The DMCA Does Not Support Defendants' Actions**

3 Injunctions against unfounded legal threats exist throughout the law. In the context of
4 patent cases, the Federal Circuit Court of Appeals has confirmed:

5 Infringement notices have been enjoined when the patentee acted in bad faith, for
6 example by making threats without intending to file suit, *Betmar Hats, Inc. v.*
7 *Young America Hats, Inc.*, 116 F.2d 956, 48 USPQ 266 (2d Cir. 1941); or when the
8 patentee sent notices indiscriminately to all members of the trade, *International*
9 *Industries & Developments, Inc. v. Farbach Chemical Co.*, 241 F.2d 246, 112 USPQ
349 (6th Cir. 1957); or when the patentee had no good faith belief in the validity of
its patent, *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 84
USPQ 105 (2d Cir. 1950).

10 *Mallinckrodt, Inc. v. Medipart*, 976 F.2d 700, 710 (Fed. Cir., 1992). Here Diebold's infringement
11 claim against Pavlosky and Smith is facially untenable in light of the fair use doctrine and its claim
12 against OPG is plainly outside copyright's legitimate scope. Diebold's failure to file any litigation
13 in the eight months since the memos have been available to the public supports the conclusion that
14 it never intended to do so. Both law and experience support a finding of bad faith.

15 Defendants' argue that no judicial relief is available to Plaintiffs, asserting that such relief
16 would "dramatically alter the rights of the parties as established by" the DMCA. Diebold TRO
17 Opp. At 6:12-13. They claim that the DMCA foreclosed any claim of injunctive relief against a
18 copyright owner to prevent the injury caused by unfounded copyright claims and that it foreclosed
19 use of any legal doctrines other than the DMCA. These claims are plainly wrong, so it is not
20 surprising that Defendants cite neither cases, statutory authority nor legislative history in support of
21 them. Had Congress intended the DMCA notice and counter notice provisions to pre-empt any
22 other relief arising from the issuance of unfounded copyright litigation threats, it certainly could
23 have done so. It did not.³

24 To the contrary, the relief that Plaintiffs seek here is entirely compatible with the
25 Congressional aims in passing the DMCA. Congress sought to strike a balance between legitimate
26 copyright claims and the rights of ISPs who host other people's speech. It did so by giving ISPs an

27 ³ Indeed, had the DMCA actually eliminated the possibility of injunctive relief or other causes of
28 action arising from claims of copyright infringement online, the screams of protest from the
copyright holders and others would have already been heard.

1 optional “safe harbor” to secure complete protection against liability for the conduct of their users
2 in exchange for promptly responding to cease and desist letters and a few other steps. The statute
3 does not require that ISPs use the safe harbor,⁴ nor does it require speakers or ISPs who believe
4 that a cease-and-desist is unfounded to refrain from seeking immediate relief. Most importantly,
5 Congress plainly did not seek to create a haven for those who might use the process to issue
6 unfounded copyright claims or to limit the remedies for those injured by such abuse.

7 Moreover, Diebold’s argument is entirely inapplicable to OPG. OPG has no standing to
8 send a counter notice to itself on behalf of San Francisco IndyMedia. More importantly, it has no
9 ability to file a counter-notice under the DMCA in response to the threat to cut off its Internet
10 service caused by Diebold’s cease and desist letter to Hurricane Electric. The Hurricane Electric
11 letter was not sent under 512(c), which allows for counter notice by the publisher. It was sent
12 pursuant to U.S.C. §512(a), which has no such counter notice provision.

13 Finally, for Pavlosky and Smith the counter-notification process is not a complete remedy.
14 Pavlosky and Smith were informed by Swarthmore that it was against school policy for them to
15 republish or link to the e-mail archive and so reasonably believed that the counter-notice provisions
16 were not available to them. Smith Decl., ¶¶2, 3. Even if it had been clear to Plaintiffs Pavlosky
17 and Smith from the start that Swarthmore would accept counter-notification pursuant to § 512(g),
18 and even if Swarthmore had responded as quickly as permitted while staying within the safe
19 harbor, Plaintiffs would have been unable to post the e-mail archive to the SCDC website for a
20 minimum of 10 business days, including the period just prior to the November 4, 2003 elections, a
21 critical time for discussion of the security of e-voting machines. Thus the counter-notice provision,
22 while useful in some instances, is insufficiently protective of the speech interests at stake here.

23 ///

24 ///

25 ⁴ The Senate Judiciary Committee Report (105th Cong. 2d, S. Rep. 105-190) p.20, specifically
26 preserves other causes of action: "There have been several cases relevant to service provider
27 liability for copyright infringement. Most have approached the issue from the standpoint of
28 contributory and vicarious liability. Rather than embarking upon a wholesale clarification of these
doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a
series of 'safe harbors', for certain common activities of service providers. A service provider
which qualifies for a safe harbor, receives the benefit of limited liability."

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IV. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that their Preliminary Injunction against Diebold be granted.

DATED: November 7, 2003

ELECTRONIC FRONTIER FOUNDATION

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EXHIBIT A

FILED

JUL - 9 2001

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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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IN RE NAPSTER, INC. COPYRIGHT
LITIGATION

No. C 00-1369 MHP
No. C 00-4725 MHP

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
For the Northern District of California

Plaintiff Matthew Katz, a music producer, alleges copyright infringement, trademark infringement, unfair competition and interference with economic relations by Napster, Inc. ("Napster"), and individual defendants John W. Fanning, Sean Fanning, Sean Parker, Hank Barry, Hummer Winblad, Bob Bozeman, Yosi Amram, Joe Kraus, Fred Durst, Roger McGuinn, Jonathan H. Greene and Does 1 through 10. Now before the court are the motions of defendants Hank Barry, Yosi Amram, Shawn Fanning, Hummer Winblad, Bob Bozeman and Fred Durst to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and John W. Fanning's motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Fred Durst's motion for sanctions is also before the court. Having considered the parties' arguments and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

This action is one of several copyright infringement actions against Napster, an Internet service that facilitates the downloading of MP3 music files, currently pending before this court. See In re Napster, C 00-1369 MHP. Because the court has discussed the Napster service at length in prior orders in this proceeding, and because the parties are familiar with the system, the court will

1 limit this background section to information relevant to defendants' motions. For the purposes of
2 these motions, the court draws on the factual allegations of the complaint.

3 Matthew Katz describes himself as a "producer and owner of music" having created several
4 musical bands including "jefferson airplane," "Moby Grape," "It's a Beautiful Day," "Indian
5 Puddin' and Pipe," "Tripsichord" and "Fraternity of Man." Complaint ¶ 4.

6 Katz contends that Hank Barry is the CEO of Napster, Shawn Fanning is the co-founder of
7 napster.com and John W. Fanning is the registrant of the domain name "napster.com." Complaint
8 ¶¶ 6-7, 9. According to the complaint, Hummer Winblad, a company operating within the state of
9 California, is a "part-owner of [Napster] by virtue of a \$15 Million venture capital investment."
10 Complaint ¶ 10. Katz alleges that Yosi Amram is a part-owner of Napster "by virtue of a \$2 Million
11 private investment" and Bob Bozeman is a part-owner "by virtue of a \$2 Million private investment
12 by his company svangels.com." Complaint ¶¶ 11-12. Fred Durst is a member of the musical band
13 "Limp Bizkit." Complaint ¶ 14.

14 On July 24, 2000, Katz filed this action in the United States District Court for the Central
15 District of California alleging copyright infringement, trademark infringement, unfair competition
16 and interference with economic relations. See Katz v. Napster, Inc. et al., C00-07966 CAS. On
17 December 20, 2000, the action was transferred to this court, reassigned to Case No. C 00-4725 MHP
18 and coordinated with the Multi-District Litigation pending before this court in In re Napster, Inc., C
19 00-1369 MHP.

20 21 LEGAL STANDARD

22 I. Rule 12(b)(6)

23 In considering the sufficiency of a complaint under Rule 12(b)(6), the court will not grant a
24 motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in
25 support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46
26 (1957). The Federal Rules do not require plaintiff to plead in detail the facts upon which he bases
27 his claim; he must merely set forth a "short and plain statement of the claim" that gives the
28 defendant fair notice of its nature and grounds. See id. at 47 (citing Fed. R. Civ. P. 8(a)(2)). Courts

1 in the Ninth Circuit have often stated that unwarranted inferences and conclusory allegations of law,
2 even when pled as facts, are insufficient to defeat a motion to dismiss. See In re Verifone Sec.
3 Litig., 11 F.3d 865, 868 (9th Cir. 1993).

4
5 II. Rule 12(c)

6 Any party may move for judgment on the pleadings after the pleadings are closed but within
7 such time as not to delay the trial. Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings is
8 properly granted when, taking all the allegations in the pleading as true, the moving party is entitled
9 to judgment as a matter of law. See Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir. 1998).

10
11 DISCUSSION

12 I. Copyright Infringement

13 In his Second Claim for Relief, Katz alleges contributory copyright infringement against all
14 defendants. Although the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, does not expressly impose
15 liability on anyone other than direct infringers, courts have long recognized that in certain
16 circumstances, vicarious or contributory liability will be imposed. See Fonovisa, Inc. v. Cherry
17 Auction, Inc., 76 F.3d 259, 261 (9th Cir. 1996).

18 A. Contributory Infringement

19 Katz asks this court to adopt what is best described as a "tertiary theory" of liability for
20 contributory infringement. He argues that defendants are liable for contributory infringement on the
21 basis of their relationship to Napster. Katz does not allege that Napster is a direct infringer, but
22 would hold Napster liable for contributory infringement on the basis of the service Napster provides
23 to its users. Under this formulation, Napster users are the direct infringers, Napster is the secondary
24 infringer and the individual defendants are tertiary infringers. The court finds no support for this
25 legal proposition. Rather, courts have consistently held that liability for contributory infringement
26 requires substantial participation in a specific act of direct infringement. See e.g. Cable/Home
27 Communication Corp. v. Network Prod., Inc., 902 F.2d 829, 845 (11th Cir. 1990) ("Contributory
28 infringement necessarily must follow a finding of direct or primary infringement."); Gershwin

1 Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162-63 (2nd Cir. 1971); see also 3
2 Nimmer on Copyright § 12.04[A][2][a] at 12-73 ("in order to be deemed a contributory infringer,
3 the authorization or assistance must bear some direct relationship to the infringing acts, and the
4 person rendering such assistance or giving such authorization must be acting in concert with the
5 infringer").

6 Even if the "tertiary theory" were a sound basis for the assertion of claims of contributory
7 infringement against individuals other than the direct infringers, Katz's complaint against the
8 individual defendants must be dismissed.

9 (1) Hank Barry

10 Katz alleges that Barry is liable for contributory infringement because he "substantially
11 contribute[s] to the international unauthorized copying and distribution of musical sound recordings
12 by investing substantial sums of money, supporting, guiding, encouraging, and promoting Defendant
13 NAPSTER, INC. for their own future benefit." Complaint ¶ 51. The complaint offers no factual
14 support for this conclusory assertion.² Moreover, Katz does not allege that Barry "knowingly"
15 contributes to the infringing conduct of another. Katz therefore has failed to state a claim for
16 contributory infringement against Barry.

17 (2) Bob Bozeman

18 Katz alleges that Bozeman is liable for contributory infringement because he "substantially
19 contribute[s] to the international unauthorized copying and distribution of musical sound recordings
20 by investing substantial sums of money, supporting, guiding, encouraging, and promoting Defendant
21 NAPSTER, INC. for [his] own future benefit." Complaint ¶ 51. According to Katz, Bozeman is a
22 part-owner in Napster by virtue of a two million dollar investment in Napster by Bozeman's
23 company. Complaint ¶ 11.

24 Katz has not identified any specific actions by Bozeman. Rather, he alleges in purely
25 conclusory fashion that Bozeman's firm "substantially contribute[s]" to unauthorized copying by
26 reason of its investment in Napster. The court detects no factual basis to conclude that Bozeman
27 substantially contributed to a specific act of infringement.

28 (3) Hummer Winblad

1 Katz alleges that Hummer Winblad "substantially contribute[s] to the international
2 unauthorized copying and distribution of musical sound recordings by investing substantial sums of
3 money, supporting, guiding, encouraging, and promoting Defendant NAPSTER, INC. for [its] own
4 future benefit." Complaint ¶ 51. Once again, the complaint offers conclusory allegations in place of
5 specific factual allegations.³ Katz does not allege that Hummer Winblad substantially contributed to
6 a specific act of direct infringement.

7 (4) Yosi Amram

8 Katz alleges that Yosi Amram "substantially contribute[s] to the international unauthorized
9 copying and distribution of musical sound recordings by investing substantial sums of money,
10 supporting, guiding, encouraging, and promoting Defendant NAPSTER, INC. for [his] own future
11 benefit." Complaint ¶ 51. Katz offers no factual support for this conclusory allegation. According
12 to an earlier portion of the complaint, Amram is a part-owner of Napster "by virtue of a \$2 Million
13 private investment." Complaint ¶ 11. This allegation, standing alone, is insufficient to support a
14 contributory infringement cause of action.

15 (5) Shawn Fanning and John W. Fanning

16 The Second Claim for relief contains no specific factual allegations relating to Shawn
17 Fanning or John W. Fanning. Katz alleges that Shawn Fanning is a co-founder of napster.com.
18 Complaint ¶ 7. Katz alleges that John W. Fanning is the registrant of the domain name
19 "napster.com." Complaint ¶ 6. These allegations provide an insufficient basis on which to conclude
20 that both individuals contributed, in a substantial way, to a specific act of direct infringement.

21 (6) Fred Durst

22 Katz alleges that Durst "substantially contribute[s] to the international unauthorized copying
23 and distribution of musical sound recordings by encouraging, speaking positively, and by
24 participating in free concerts promoting Defendant NAPSTER, INC." Complaint ¶ 50. Katz does
25 not allege that Durst participated in any way in the development or administration of the Napster
26 system. The allegations that Durst "encouraged" or "spoke positively" about Napster, or that he
27 "participated" in some fashion in free concerts "promoting" Napster, are vague and unspecific. Katz
28 fails to allege that Durst knowingly and substantially participated in a specific act of direct

1 infringement.

2 In light of the court's conclusion regarding the proposed "tertiary theory" of liability and the
3 deficiencies of Katz's complaint, the court will dismiss with prejudice the contributory infringement
4 causes of action against the individual defendants.

5 B. Vicarious Infringement

6 Katz alleges vicarious copyright infringement by all defendants in his Third Claim for Relief.
7 To sustain a cause of action for vicarious copyright infringement, a plaintiff must prove that the
8 vicarious infringer has (1) the right and ability to supervise or control the infringing activity, and (2)
9 a direct financial interest in the infringing activities. See Fonovisa, 76 F.3d at 262-63; Gershwin,
10 443 F.2d at 1162. Once again, the court finds no support for Katz's assertion that an individual can
11 be held vicariously liable for acts of someone other than the direct infringer.

12 (1) Hank Barry, Hummer Winblad, Bob Bozeman and Yosi Amram

13 Katz alleges that Barry, Hummer Winblad, Bozeman and Amram are liable for vicarious
14 infringement because they "substantially contribute to the international unauthorized copying and
15 distribution of musical sound recordings by investing substantial sums of money, supporting,
16 guiding, encouraging, and promoting Defendant NAPSTER, INC. for their own future benefit."
17 Complaint ¶ 68. In addition, Katz alleges that Napster has received over \$17 million in investment
18 capital from Barry, Hummer Winblad, Bozeman and Amram, "all of whom intend to profit from the
19 widespread copyright infringement described [in the complaint.]" Complaint ¶ 70. Katz adds that
20 Hummer Winblad, as owner of website similar to napster.com, also stands to benefit if Napster
21 compiles a list of its users. Complaint ¶ 71.

22 Katz does not allege that any of these defendants have the right or ability to supervise or
23 control the infringing activity. Although the complaint alleges that these defendants "intend to
24 profit" from use of the Napster system, Katz does not assert that they have a direct financial interest
25 in the infringing activity.

26 (2) Shawn Fanning and John W. Fanning

27 In pleading the vicarious infringement cause of action, the complaint contains no factual
28 allegations relating to Shawn Fanning or John W. Fanning. It appears from the entirety of the

1 complaint that Katz would hold Shawn Fanning liable for vicarious infringement as one of the "co-
2 founders" of napster.com. See Complaint ¶ 7. Katz would hold John W. Fanning liable as the
3 registrant of the domain name "napster.com." See Complaint ¶ 6. The complaint does not allege
4 that either individual has the right or ability to control the infringement, or a direct financial interest
5 in the infringement. As pled, the cause of action for vicarious infringement cannot stand against
6 Shawn Fanning and John W. Fanning.

7 (3) Fred Durst

8 Katz alleges the Durst "substantially contribute[s] to the international unauthorized copying
9 and distribution of musical sound recordings by encouraging, speaking positively, and by
10 participating in free concerts promoting Defendant NAPSTER, INC." Complaint ¶ 67. Setting
11 aside Katz's conclusory assertion, Katz does not allege a factual basis on which to conclude that
12 Durst has the right or the ability to supervise or control the infringing activity. Absent such an
13 allegation, Katz cannot maintain a vicarious infringement cause of action against Durst.

14 The individual defendants are entitled to the dismissal of Katz's vicarious infringement cause
15 of action.

16
17 II. California Civil Code Section 980(a)(2)

18 Katz alleges in his Fourth Claim for Relief that all defendants have violated Katz's exclusive
19 ownership interests in certain sound recordings in violation of California Civil Code section
20 980(a)(2). Section 980(a)(2) provides in part that the author of an original work of authorship
21 consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive
22 ownership interest therein until February 15, 2047. See Cal. Civ. Code § 980(a)(2). To recover for
23 infringement under this section, a plaintiff must show three elements: (1) ownership by plaintiff of a
24 protectible property interest; (2) unauthorized copying of the material by defendant; and (3) damage
25 resulting from the copying. See Golding v. R.K.O. Pictures, Inc., 35 Cal. 2d 690, 694 (1950).

26 Katz does not allege a single fact relating to the individual defendants in support of this
27 claim. See Complaint ¶ 78. He does not allege that any of the individual defendants engaged in
28 unauthorized copying of the material. Moreover, Katz does not allege with any factual detail that he

1 owns a protectible property interest or that he was damaged as a result of the copying. Katz's
2 Fourth Claim for Relief must be dismissed.

3
4 III. Trademark Infringement

5 In his Fifth and Sixth Claims for Relief, Katz alleges that all defendants violated his
6 trademarks in the names "It's A Beautiful Day" and "Moby Grape," respectively. A plaintiff may
7 establish a prima facie case of trademark infringement by showing rightful ownership of the marks
8 in suit and a likelihood of confusion or mistake amongst the public from defendants' use of the
9 mark. See Sony Computers Entm't America, Inc v. Gamemasters, 87 F. Supp. 2d 976, 984 (N.D.
10 Cal. 1999).

11 (1) Hank Barry, Hummer Winblad, Bob Bozeman and Yosi Amram

12 Katz alleges that moving defendants Barry, Hummer Winblad, Bozeman and Amram are
13 liable for trademark infringement because they "substantially contribute to the international
14 unauthorized use of plaintiff's mark by investing substantial sums of money, supporting, guiding,
15 encouraging and promoting Defendant NAPSTER, INC. for their own future benefit." Complaint ¶¶
16 87, 95. This generalized, conclusory allegation is insufficient to sustain causes of action for
17 trademark infringement. Katz has failed to allege that any of these defendants actually used a mark
18 owned by plaintiff.

19 (2) Shawn Fanning and John W. Fanning

20 The trademark infringement claims contain no allegations relating to Shawn Fanning or John
21 W. Fanning. Katz does not allege that either Shawn Fanning or John W. Fanning used a mark
22 owned by plaintiff, or that such use created a likelihood of confusion or mistake.

23 (3) Fred Durst

24 The trademark infringement claims are entirely devoid of factual allegations relating to
25 defendant Durst. Katz does not allege that that Durst actually used the "It's A Beautiful Day" or
26 "Moby Grape" marks, or that Durst had any direct involvement in the alleged infringement of Katz's
27 trademark rights.

28 Defendants are entitled to dismissal of Katz's trademark infringement causes of action.

1 IV. Unfair Competition

2 In his Seventh Claim for Relief, Katz alleges that all defendants engaged in unfair
3 competition in violation of California Business and Professions Code section 17200. Under
4 California's Unfair Competition Act, unfair competition means and includes any unlawful, unfair or
5 fraudulent business act or practice. See Cal. Bus. & Prof. Code § 17200; Klein v. Earth Elements
6 Inc., 59 Cal. App. 4th 965, 968 (1997); see also People ex rel. Renne v. Servantes, 86 Cal. App. 4th
7 1081, 1087 (2001) (defining "unlawful business practice" as "one that is forbidden by law, whether
8 civil, criminal, federal, state, or municipal, statutory, regulatory, or court-made").

9 Katz alleges that the "acts and conduct" of defendants described in the complaint
10 "constitute[] an appropriation and invasion of property rights of plaintiff, and constitute unfair
11 competition" under section 17200. Complaint ¶ 100. Katz seeks to recover "all proceeds and other
12 compensation received or to be received by Napster arising from its users' direct infringements of
13 Plaintiff's music." Complaint ¶ 101. Katz's unfair competition cause of action does not contain any
14 specific factual allegations relating to the individual defendants.

15 Although the nature and scope of the unfair competition claim is ambiguous, it appears from
16 the allegations of the complaint, as well as Katz's representations at the hearing on this matter, that
17 the allegedly unlawful business practice at the heart of the unfair competition claim is copyright
18 infringement. As copyright infringement lies at the heart of the unfair competition claim, the unfair
19 competition action is preempted by federal copyright law. See Kodadek v. MTV Networks, Inc.,
20 152 F.3d 1209, 1213 (9th Cir. 1998) (holding section 17200 unfair competition claim "based solely
21 on rights equivalent to those protected by the federal copyright laws" and is preempted); Xerox
22 Corp. v. Apple Computer, Inc., 734 F. Supp. 1542, 1551 (N.D. Cal. 1990) (holding unfair
23 competition claim preempted where essence of unfair competition claim is defendant's alleged
24 unauthorized use of plaintiff's copyrighted work). Katz's Seventh Claim for Relief must be
25 dismissed.

26
27 V. Interference With Economic Relations

28 In his Eighth Claim for Relief, Katz alleges that defendants interfered with his economic

1 relationship with retailers and distributors, including Valley Media, by distributing copies of Katz's
2 music without permission and with the intent to harm him financially. Complaint ¶ 108. According
3 to the complaint, Valley Media ended its relationship with plaintiff as a result of defendant's
4 conduct. Complaint ¶ 109.

5 To state a cause of action for the tort of interference with prospective economic advantage,
6 plaintiff must show (1) an economic relationship between the plaintiff and some third party, with the
7 probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the
8 relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4)
9 actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by
10 the acts of the defendant.⁵ See Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118,
11 1126 & n.2. (1990).

12 Once again, Katz relies on purely conclusory allegations and proffers no specific facts on
13 which to conclude that any of the individual defendants interfered with Katz's economic
14 relationships. This cause of action must be dismissed because Katz has not alleged that defendants
15 knew of the relationships between Katz and the retailers and distributors, intended to interfere with
16 such relationships or actually did so.

17
18 VI. Motion for Sanctions

19 Durst asks the court to award sanctions in the amount of \$45,569.25, the amount of Durst's
20 fees and costs, pursuant to Rule 11 of the Federal Rules of Civil Procedure. Rule 11 requires the
21 imposition of sanctions when a cause is frivolous, legally unreasonable or without factual
22 foundation, or when it is brought for an improper purpose. See Conn v. Borjorquez, 967 F.2d 1418
23 (9th Cir. 1992). Durst contends that sanctions are appropriate because Katz's allegations contain no
24 factual support and because Durst was named in the suit solely for publicity purposes.

25 Katz's comments at the hearing on this matter suggest to the court that he might have had an
26 improper motive, such as harassment, in bringing suit against Durst. See Fed. R. Civ. P. 11(b)(1)
27 (defining "improper purpose" to include harassment); see also Fed. R. Civ. P. 11(c) (authorizing
28 court to impose sanctions upon parties who have violated Rule 11(b)). The record, however, is

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insufficient to determine that such an improper purpose actually motivated Katz. The court is unwilling to grant Durst's motion for sanctions on this record. If Durst can establish that Katz brought the suit for the purpose of harassment, the court will reconsider its ruling.

CONCLUSION

For the reasons stated above, the court hereby GRANTS defendants' motions to dismiss, DISMISSES WITH PREJUDICE Katz's complaint and DENIES defendant Durst's motion for sanctions.

IT IS SO ORDERED.

Dated: *July 9, 2001*



MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

1 ENDNOTES

2 1. The complaint identifies Bozeman's company as svangels.com. Complaint ¶ 11. Bozeman
3 represents that svangels.com is the web site of his venture capital firm, Angel Investors.

4 2. In opposition to Barry's motion to dismiss, Katz contends that Barry contributes to the
5 infringement by "tout[ing] Napster as a legitimate service" and argues that Barry, as an active
6 member of the Napster management team, has "helped guide the growth" of the infringing activity.
Katz's Opp. at 5, 8. Even if these conclusory allegations appeared in the complaint, they would be
insufficient to satisfy Katz's pleading obligation.

7 On April 30, 2001, Katz submitted an additional declaration, accompanied by various
8 exhibits, purporting to support his opposition to the motions to dismiss. Because these materials are
9 confidential within the meaning of the protective order entered in this case, and because Katz
submitted the documents after the close of briefing in violation of Civil Local Rule 7-3(e), the court
by separate order directs that the documents be lodged under seal rather than filed.

10 It appears to the court that the only document ostensibly relating to defendant Barry is an e-
11 mail addressed to Barry suggesting a possible relationship with a third party that would enable
12 Napster to work with the major record labels. Nothing in this document would support an assertion
that Barry substantially contributes to the alleged acts of direct infringement.

13 3. Included in Katz's April 30, 2001 submission are e-mails to John Hummer regarding potential
14 business relationships between third parties and Napster and references to Napster's funding. These
documents do not provide a factual basis on which to conclude that Hummer Winblad occupies a
15 position of control vis-à-vis Napster or that it substantially contributes to the alleged acts of
infringement in some meaningful way.

16 4. In opposition to the motion, Katz adds that Durst has "publicly stated that the activity by Napster
17 has increased [his] sales and [his] public celebrity." Katz Opp. at 3. Katz contends that Durst has
18 benefitted financially from the "pirating activity" of Napster. *Id.* Katz offers similar allegations in
19 his declaration submitted on April 30, 2000. Even if these allegations were included in the
complaint, none would rise to the level of substantial participation required to sustain a claim for
contributory infringement.

20 Katz's reliance on Cable/Home Comm. Corp. v. Network Prod., Inc., 902 F.2d 829 (11th Cir.
21 1990), is unwarranted. In Cable/Home, the court required evidence that the promoter engaged in
22 substantial participation in the alleged infringement. The court found the promoter liable for
contributory infringement upon a showing that the promoter provided funds and equipment to
23 facilitate the duplication. *See Cable/Home*, 902 F.2d at 846.

24 5. To state a claim for intentional interference with contractual relations, plaintiffs must allege (1) a
25 valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3)
26 defendant's intentional acts designed to induce a breach or disruption of the contractual relationship;
(4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *See Pacific*
27 *Gas & Elec.*, 50 Cal. 3d at 1126. The tort of intentional interference with contractual relations
protects the same interest in stable economic relationships as does the tort of interference with
28 contract, though interference with prospective advantage does not require proof of a legally binding
contract. *See id.*

awb

United States District Court
for the
Northern District of California
July 10, 2001

* * CERTIFICATE OF SERVICE * *

Case Number:M:00-cv-01369

Napster, Inc.

vs

Napster, Inc.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 10, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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BY: 
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FILED

JUL - 9 2001

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE NAPSTER, INC., COPYRIGHT MDL No. C 00-1369
LITIGATION

ORDER

Plaintiff Matthew Katz in Katz v. Napster, Inc. et. al, C 00-4725 MHP, has submitted to the court an ex parte application for an order permitting the Declaration of Matthew Katz dated April 30, 2001, and six exhibits to be filed under seal. Katz argues that the documents support his opposition to defendants' motions to dismiss the complaint, which are currently under submission.

After reviewing the documents, the court agrees that they are confidential within the meaning of the protective order entered in this action. Pursuant to Civil Local Rule 7-3(e), however, no additional memoranda, paper or letters shall be filed once a reply is filed without prior court approval. See Civ. Local R. 7-3(e). Katz represents that he obtained the material after the April 10, 2001, hearing on the motion by reviewing the documents produced by defendant Hummer Winblad in the offices of Mitchell, Silberberg & Knupp, plaintiffs' liaison counsel in In re Napster, MDL No. 00-1369. Katz offers no explanation as to why he did not review or obtain copies of the material before the court took the matter under submission on April 10, 2001. Under these circumstances, Katz has not made an adequate showing as to why the documents should be filed at this stage of the proceedings.

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Accordingly, the court hereby ORDERS that the Declaration of Matthew Katz dated April 30, 2001, and the six exhibits accompanying the declaration be LODGED UNDER SEAL.

IT IS SO ORDERED.

Dated: *July 9, 2001*



MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

awb

United States District Court
for the
Northern District of California
July 10, 2001

* * CERTIFICATE OF SERVICE * *

Case Number:M:00-cv-01369

Napster, Inc.

vs

Napster, Inc.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 10, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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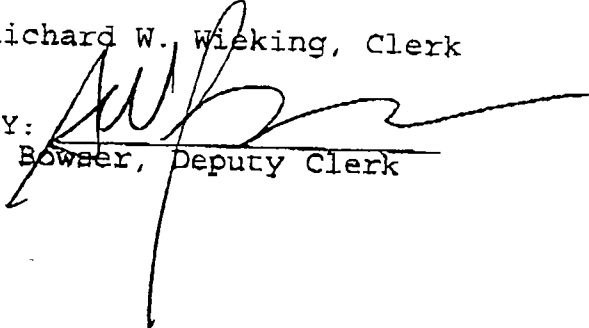
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