

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS, INC., ATLANTIC : X
RECORDING CORPORATION, BMG :
MUSIC d/b/a THE RCA RECORDS : 00 Civ. 4660 (SHS)
LABEL, CAPITOL RECORDS, INC. : Judge Sidney H. Stein
ELECTRA ENTERTAINMENT GROUP :
INC., HOLLYWOOD RECORDS, INC., :
INTERSCOPE RECORDS, INC., :
LAFACE RECORDS, MOTOWN :
RECORD COMPANY, L.P., SONY :
MUSIC ENTERTAINMENT, INC., :
 :
Plaintiffs — Counterclaim Defendants, :
 :
-against- :
 :
MP3BOARD, INC., :
 :
Defendant — Counterclaimant. :
 :
X
RECORDING INDUSTRY ASSOCIATION :
OF AMERICA, :
 :
Additional Counterclaim Defendant :
 :
MP3BOARD, INC., :
 :
Third-Party Plaintiff :
 :
-against- :
 :
TIME WARNER CORP., AMERICA :
ONLINE, INC. and NULLSOFT, INC. :
 :
Third-Party Defendants. :
 :
X

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT
MP3BOARD, INC.'S MOTION FOR SUMMARY JUDGMENT, OR, ALTERNATIVELY,
PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFFS' COMPLAINT**

THE ROTHKEN LAW FIRM
1050 Northgate Drive, Suite 520
San Rafael, CA 94903
(415) 924-4250

Attorneys for defendant, counterclaimant and third-party plaintiff MP3Board, Inc.

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
FACTUAL BACKGROUND	4
A. Digital Audio Technology	5
B. The Internet	5
C. MP3Board's Systems in Context of the Internet	6
LEGAL ARGUMENT	10
I. Summary Judgment, or, Alternatively Partial Summary Judgment, In Favor of a Defendant Is Appropriate When, As Here, Plaintiffs Cannot Prove an Essential Element of a Claim for Relief.	10
II. The Complaint Should Be Dismissed In Its Entirety Because the First Amendment to the United States Constitution Protects MP3Board's Speechlike Information.	12
III. Plaintiffs' Count I Alleging Contributory Copyright Infringement Should Be Dismissed.	16
A. Mp3Board's Systems Have Substantial Noninfringing Uses.	16
B. Plaintiffs Have Not Produced And Cannot Produce Evidence of a Material Contribution to Copyright Infringement by Mp3Board. ...	19
IV. Plaintiff's Count II Alleging Vicarious Copyright Infringement Should Be Dismissed Because Mp3Board Lacks The Right And Ability To Supervise Any Infringing Conduct Performed By Others.	22
V. Plaintiff's Count III Alleging Unfair Competition As To Pre-1972 Recordings Should Be Dismissed.	23
VI. Each Plaintiff's Claim For Damages Fails.	24
A. Plaintiffs Have No Substantial Evidence of Actual Damages.	25
B. There is No More Than Speculation Connecting MP3Board's Profits to Claims of Copyright Infringement.	25
C. Plaintiffs Have Not Established Copyright Infringement Such as to Support Statutory Damages.	25
CONCLUSION	25

INDEX OF AUTHORITIES

	<u>Page</u>
<i>Constitutional Provisions</i>	
United States Constitution, First Amendment.....	3
 <i>Decisions of the United States Supreme Court</i>	
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	12
<i>CBS, Inc. v. Davis</i> , 510 U.S. 1315, 114 S.Ct. 912 (1994).....	13
<i>Celotex Corporation v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548 (1986)	11
<i>Feist Publications, Inc. v. Rural Telephone Service Co.</i> , 499 U.S. 340 (1991).....	15
<i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390, 88 S.Ct. 2084 (1968).....	21, 23
<i>Manual Enterprises, Inc. v. Day</i> , 370 U.S. 478, 82 S.Ct. 1432 (1962)	13
<i>R.A.V. v. St. Paul</i> , 505 U.S. 377, 112 S.Ct. 2538 (1992)	13
<i>Reno v. ACLU</i> , 521 U.S. 844, 117 S.Ct. 2329 (1997)	6, 7, 13, 22
<i>Sony Corp. v. Universal City Studios, Inc.</i> , 464 U.S. 417, 104 S.Ct. 774 (1984)	3, 16, 18, 22
<i>Turner Broadcasting System Co., Inc. v. FCC</i> , 408 U.S. 612, 114 S.Ct. 2445 (1994)	14
<i>United Mine Workers of America v. Gibbs</i> , 383 U.S. 715, 86 S.Ct. 1130 (1966).....	26
 <i>Decisions of the Lower Federal Courts</i>	
<i>A&M Records, Inc. v. Napster, Inc.</i> , 114 F.Supp.2d 896, 917 (N.D. Cal. 2000) <i>affirmed in part, reversed in part and remanded</i> , 239 F.3d 1004 (9th Cir. 2001).....	16, 18, 22
<i>Banff Ltd. v. Limited, Inc.</i> , 869 F.Supp. 1103 (S.D.N.Y. 1994).....	25
<i>Business Trends Analysts, Inc. v. The Freedonia Group, Inc.</i> , 887 F.2d 399 (2d Cir. 1989).....	27
<i>Chambers v. Time Warner, Inc.</i> , 123 F.Supp.2d 198 (S.D.N.Y. 2000)	26
<i>Demetriades v. Kaufmann</i> , 690 F.Supp. 289 (S.D.N.Y. 1988)	22, 23, 24

<i>Gershwin Publishing Corp. v. Columbia Artists Management, Inc.</i> , 443 F.2d 1159 (2d Cir. 1971)	21, 23
<i>Lockheed Martin Corp. v. Network Solutions, Inc.</i> , 985 F.Supp. 949 (C.D. Cal. 1997) <i>affirmed</i> 194 F.3d 980 (9 th Cir. 1999).....	17
<i>Matthew Bender & Co., Inc. v. West Publishing Co.</i> , 158 F.3d 693 (2d Cir. 1998) <i>cert. den.</i> 119 S.Ct. 2039 (1999).....	19
<i>New York State Association of Realtors, Inc. v. Shaffer</i> , 27 F.3d 834 (2d Cir. 1994), <i>cert. den.</i> 513 U.S. 1000 (1994).....	14
<i>Odegard, Inc. v. Costikyan Classic Carpets, Inc.</i> , 963 F.Supp. 1328, 1240 (S.D.N.Y. 1997).....	27
<i>Rainey v. Wayne State University</i> , 26 F.Supp.2d 963 (E.D. Mich. 1998).....	28
<i>Recording Industry Association of America v. Diamond Multimedia Systems, Inc.</i> , 29 F.Supp.2d 624 (C.D. Cal. 1998) <i>aff'd</i> , 180 F.3d 1072 (9 th Cir. 1999).....	20
<i>Religious Technology Center v. Netcom On-Line Communication Services, Inc.</i> , 907 F.Supp. 1361 (N.D. Cal. 1995).....	15, 17
<i>Shapiro, Bernstein & Co. v. H. L. Green Co.</i> , 316 F.2d 304 (2d Cir. 1963).....	24
<i>Vault Corp. v. Quaid Software Ltd.</i> , 847 F.2d 255 (5 th Cir. 1988).....	20
 <i>State Court Decisions</i>	
<i>Goldstein v. Garlick</i> , 65 Misc.2d 538, 318 N.Y.S.2d 370 (1971).....	26
 <i>Federal Statutes</i>	
17 U.S.C. § 504(b).....	27
17 U.S.C. § 107.....	18
17 U.S.C. § 301(a).....	25
17 U.S.C. § 301(c).....	25
17 U.S.C. § 504(c).....	27
 <i>Federal Rules</i>	
Federal Rule of Civil Procedure 56(b).....	11

Federal Rule of Civil Procedure 56(d)..... 11

Other

1 *Nimmer on Copyright*, § 1.10[A] (2000 ed.)..... 15

11 *Moore's Federal Practice* (3d ed. 2000 revision), § 56.03 11, 12

Hill, "Pirates of the 21st Century: The Threat and Promise of Digital Audio Technology on the Internet," 16 *Computer High Technology Law Journal* 311, 313 (2000).....4, 18

PRELIMINARY STATEMENT

Distilled to its essence, MP3Board indexes the Internet and provides automated hyperlinks arising out of search results to third party sites. MP3Board emphasizes the indexing of sound files in the “dot MP3” file format. MP3Board is the Internet’s equivalent of an address book – namely addresses (commonly known as URLs) to information found on the Internet in various file format(s) are obtained through automated processes, and persons can query/read the book online via automated processes and look up addresses related to words and strings. Like a book, MP3Board is purely informational and since its only role is in providing an automated book of addresses in the only way practical on the web - namely hyperlinks - its information is protected by the First Amendment.

In this case, the RIAA and its members via the Complaint in this action, are attempting to craft an erroneous rule, disguised as contributory and vicarious copyright infringement, that would bypass the First Amendment and hold a search engine liable in “strict liability” for merely indexing and manifesting “hyperlinks” to third party web sites and files with the “dot mp3” extension – just because some of those “hyperlinks” happen to provide the addresses of some unauthorized third party sound files. The RIAA would like to force search engines, like MP3Board, who host no “dot mp3” files to “ask permission first” of the RIAA and its members before its search engine spiders and automated processes index the Internet’s “dot mp3” files or risk massive statutory damages under a “strict liability” theory.

The RIAA’s strict liability theory, if embraced by this Court, would not stop with just a search engine “spidering” and “indexing” information with the “dot mp3” extension – all search engines then become as vulnerable as their first link to an unauthorized “rock star fan site” written in “dot html” or unauthorized image file written in a “dot jpg” or, for that matter, an excessive book sample written in a “dot pdf” text file format. In summary, the theory proposed

by the RIAA would not only stifle Free Speech and act as a "prior restraint" on search engines, it would destroy all automated search engines and lead to paralysis of Internet and infinite liability for providing links and addresses on the Internet.

Defendant MP3Board, Inc. ("MP3Board") is accused by plaintiff Record Companies of contributing to copyright infringement occurring over the Internet involving sound recordings. MP3Board does not copy sound recordings, does not play sound recordings and does not distributes copies of sound recordings. What MP3Board does is provide *speechlike information, like a book*, primarily addresses of other Internet resources. Such addresses are called "hypertext links," hyperlinks" " or simply "links." Visitors to MP3Board's website use its systems to obtain addresses for legitimate purposes, but such visitors may also be using its systems to locate addresses to pirated copies of plaintiffs' sound recordings. MP3Board also posts general information about and pointers to "MP3 technology" used to process sound recordings.

MP3Board's link information is generated by automated processes such as search engines. MP3Board's automated processes are copyright agnostic - they cannot distinguish between files posted on the Internet by or with the consent of the owners and files that contain infringing materials. There are millions of sound recordings on the Internet. MP3Board, a small organization, created and operated by three brothers with only a few other contractors, earns income from advertising displayed on its site. It cannot monitor the Internet.

No information on MP3Board encourages copyright infringement. MP3Board has a stated policy against copyrights violation and removes specific links to infringing materials when properly notified. Partly out of frustration with the nature of pre-litigation complaints from counterdefendant Recording Industry Association of America ("RIAA"), MP3Board even invented and makes available an automated system, "LinkBlaster," to allow copyright owners to

immediately and automatically remove such links.

MP3Board brings this summary judgment motion because plaintiffs cannot prevail on any theory. In the alternative, MP3Board seeks an early determination of the theories and forms of relief that are suitable for trial.

1. MP3Board is entitled to judgment as a matter of law because its *speechlike information* is protected by the First Amendment to the United States Constitution. MP3Board is not copying. Plaintiffs cannot restrict the right to speak based on "MP3-related content."

2. Copyright law protects systems that have *substantial noninfringing uses*, including MP3Board's systems that are essential to the developing culture of independent musical artists who market their works without the assistance of Record Companies. Plaintiffs are trying to leverage their monopoly copyright privilege into control over sources of information on the Internet, including sources of information that are indisputably legitimate. Such an attempt is contrary to fundamental principles that declare the monopoly privilege a limited one granted only for the public benefit. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774 (1984) (manufacturer of consumer videotape recorder could not be held liable for contributory copyright infringement).

3. MP3Board is entitled to summary judgment because plaintiffs *cannot prove* the element of materiality necessary for a finding of contributory copyright infringement, *cannot prove* the element of control necessary for a finding of vicarious copyright infringement and *cannot prove* any damages. Any alleged actions of MP3Board's visitors are performed at other Internet sites, beyond the knowledge of MP3Board, and there is no evidence of *any involvement whatsoever* of MP3Board in actual copyright infringement. All of MP3Board's informational systems and materials are generic and duplicated many-fold at other Internet sites, including sites controlled provided by giants like Lycos, Metacrawler, and AltaVista or by plaintiffs themselves.

There is such an abundance of Internet resources for those inclined to engage in copyright infringement that if MP3Board were to disappear tomorrow, there would no discernible reduction in Internet copyright infringement. Namely, searching all popular search engines with a “famous” term or the name of a “famous” person is likely going to give rise to hyperlinks to third party web sites and files containing unauthorized text/html files, image files, and in some cases music or audio files – this should not and cannot be a basis for liability for search engines.

Plaintiffs face problems arising from developing technology, but they cannot solve these problems by stifling free speech, trying to dominate the Internet or scapegoating a relatively minor information provider. As stated in Hill, "Pirates of the 21st Century: The Threat and Promise of Digital Audio Technology on the Internet," 16 Computer High Technology Law Journal 311, 313 (2000), attached hereto as convenient background for the entire area:

"the recording industry, 'accustomed to having solid control over product distribution,' is especially concerned by the way the Internet is changing models of music distribution and transmission." (citation omitted)

At 315 Hill concludes that:

"just as targeting the 'players' for contributory copyright infringement has failed in the past, the RIAA and other copyright owners will probably not significantly deter business and consumer interest in digital audio technology by advocating radical changes in copyright law. ...any measure to curb piracy must also consider the public interest in addition to the limitations on the copyright monopoly — legitimate noninfringing uses of digital audio technologies, like MP3."

At p. 339, Hill quotes MacArthur Fellow and University of California Law Professor Pamela Samuelson for a pertinent observation: "***The kind of Draconian measures it would take to stop [piracy] would make us a copyright police state which we wouldn't want to live in.***" (emphasis added, emendation in Hill)

FACTUAL BACKGROUND

The technology at issue involves the intersection of two areas, digital audio technology and the Internet. The systems provided to visitors to MP3Board's website are also at issue,

especially in context of the Internet as a whole.

A. Digital Audio Technology. The current recording standard is embodied on the commercial compact disc ("CD"), which uses digital coding of music. Digital code uses two streams of digits, "1's" and "0's", one for each of two stereo channels. Transmission of music over the Internet in digitally coded form equivalent to that found on compact discs is, at present, too slow to be convenient.

Software based on international standards called "MPEG-3" is used to compress or reduce the size of audio and visual files to approximately 1/12 the original size. The acronym stands for "Moving Picture Experts Group, Layer 3," often abbreviated to "MP3". MPEG is the most powerful compression available and the most popular vehicle for delivering online content. There are millions of MPEG files available on the Internet, including sound recordings, digital satellite programs and homemade movies.

Hardware and software available commercially and free over the Internet includes encoders (that compress files), decoders (the reverse) and players (converting MPEG materials directly into sound or visual images). MPEG technology is used for a wide variety of research, productivity and entertainment applications. For example, Apple Computer is currently running an ad that highlights the ability to create and produce one's own MPEG movies.

New audio technology enables hobbyists, amateur musicians and professionals to create their own original content. Today, at low cost and without advanced technical expertise, independent musicians, even teen-agers, are performing, recording, processing, promoting and marketing their songs over the Internet without any need for the services and support of large Record Companies that have traditionally dominated the industry. Record Companies, like plaintiff Sony Music Entertainment also post downloadable files online, that, according to its own representative, include "samples" and files posted for "special promotions with both retailers and nonretailer web sites to maximize the overall marketing objectives."

B. The Internet. "The Internet is an international network of interconnected computers" that "has experienced extraordinary growth." *Reno v. ACLU*, 521 U.S. 844, 849-850,

117 S.Ct. 2329 (1997) (inner quotation marks and citation to district court opinion omitted).

"The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, *the Web consists of a vast number of documents stored in different computers all over the world*. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web pages, are also prevalent. *Each has its own address--rather like a telephone number*. Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or 'site's') author. *They generally also contain 'links' to other documents created by that site's author or to other (generally) related sites. Typically, the links are either blue or underlined text--sometimes images.*

"*Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial 'search engine' in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the 'surfer,' or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer 'mouse' on one of the page's icons or links. Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and to a sprawling mall offering goods and services.*

"*From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web.*" *Id.* at 521 U.S. 852-853 (emphases added, inner quotation marks and citations to district opinion omitted)

C. MP3Board's Systems in the Context of the Internet.

Plaintiffs' complaint identifies the MP3Board's automated processes at issue. Additional details are provided by MP3Board's CEO, Lars Mapstead, and its retained expert, Matt Curtin.

As noted in *Reno v. ACLU*, supra, above a "link" is "rather like a telephone number" or a citation that allows a user to locate the cited material (e.g., document, sound or movie) with a click of a mouse. A link is identified by a Uniform Resource Locator ("URL"), an address that states where on the Internet the cited file will be found. A URL might, but need not describe the file's contents.

Determination of whether a file at another Internet site contains copyrighted material

requires information outside of the file itself and might require a human's judgment call. Computers are simply not smart enough to decide whether something is or isn't licensed.

Paragraph 1 of the complaint alleges that "Defendant operates an Internet website which knowingly indexes, organizes and posts link to thousands of pirate copies of plaintiffs' protected sound recordings. By clicking on these links, Internet users can download directly to their computer infringing copies of plaintiffs' copyrighted sound recordings at no cost." This allegation identifies MP3Board's *search engine systems*, which constitute the most important of MP3Board's automated processes here is issue.

Search engine are large indices of available online content. They are built by automated programs (sometimes called "spiders") that explore link structures on the Web starting with one URL. Once indices are built, they can be navigated through categories organized by human-generated directories (such as Yahoo!) or the user can type in words or phrases that he or she believes is likely to find the desired resources.

MP3Board restricts its indices to mostly MPEG materials, including both MPEG video and MPEG audio. It is a traditional search engine with a specialty in MPEG material. A visitor could achieve the same end result by including "mp3" as a search term in a general purpose search engine like Lycos, Yahoo! or AltaVista, which also have specific indices and directory categories devoted to MP3 files. MusicGrab.com, a Web site controlled by plaintiffs here, has a functionally similar search engine. There is even an Internet resource, "MetaCrawler," that searches other search engines rather than its own indices and that has a search facility for "Audio/MP3."

A URL found on MP3Board's index is likely to be found on many other search indices. A randomly-chosen sample of URLs found on MP3Board and analyzed using a feature of the AltaVista search engine shows that the results of MP3Board's systems can be duplicated on dozens of other sites around the Internet.

Plaintiffs' allegation that MP3Board "knowingly" organizes links to pirated copies of sound recordings is mendacious semantic gamesmanship. Of course, MP3Board generally understands that individuals seeking to locate pirated recordings can use its search engine.

But MP3Board has no *specific knowledge*. When specifically notified about links to infringing materials, MP3Board disables such links.

In paragraph 38, plaintiffs complain that: "when the visitor 'clicks' on that hypertext link, the visitor's software is instructed to download the file constituting the sound recording from a distant server and deliver it directly to the visitor's computer." "Click to download" is a standard feature of links and is part of personal computer operating systems (such as Microsoft Windows), Web browsers (such as Netscape) and Web sites across the Internet.

Paragraph 2 of the complaint refers to a system where "visitors ... post their own infringing links" (identifying *third party submissions*). Paragraph 3 complains of genre categorizations that are part of third party submissions. In brief, third parties who use automated processes on MP3Board to submit links can choose a category where those links are displayed. But MP3Board cannot distinguish between legitimate and infringing postings. Third party submissions are available on essentially every search engine and are invited for data accumulation. Plaintiffs' MusicGrab.com facilitates third party site submission. Yahoo! invites submissions and provides directories. There are companies that specialize in promoting Web sites by submitting sites to a spectrum of search engines.

Paragraph 2 of the complaint alleges: "Defendant provides a step-by-step *tutorial* that teaches visitors how to find and download infringing sound recordings" Paragraph 40 complains in greater detail about the tutorial including allegations about "instruction on how to transfer the downloaded files from the end users' hard drives to blank CD's and from CD's back to web." But tutorials on the manipulation of MP3 files are widely available from thousands of sources. Billboards advertising the Macintosh personal computer are captioned "Rip, Mix, Burn." ["Ripping" means to pull digital audio from CD's and save it to a computer hard disk; "mixing" allows the audio data to be modified; and "burning" writes data to new CD's.]

Paragraph 47 complains about *link exchange* where operators of "third party MP3 sites can post links to their own sites in exchange for a parallel listing of the MP3Board site." Link exchange is a courtesy that Web sites extend to each other, where a site will link to another site in exchange for a link back. MP3Board's link exchange is implemented in a typical, traditional

way. Plaintiffs' MusicGrab.com likewise provides links to other music-related sites.

"[Th]e end user can download MP3 files via a direct link to ... *Freedrive*, Inc. ... [a] third-party provider of web-based storage that supplies 50 megabytes of free 'online disk space' to subscribers." (Complaint, ¶ 49) At one time, MP3Board offered a link so that visitors could sign up with Freedrive.com, a generic Internet service supported by advertising that allows visitors to store files on the Freedrive site just as they would on their own computers. [Although the status of Freedrive is not at issue, it is readily apparent that Freedrive has substantial noninfringing uses such as allowing a subscriber to access his or her own files from different computers. All sorts of materials can be stored on Freedrive.]

In paragraph 70 of their complaint, plaintiffs allege that "MP3Board had the right and ability to supervise and/or control the infringing conduct of the users of the MP3Board site." This allegation is false under any reasonable interpretation of the words used. MP3Board has no relationship with its visitors other than through Internet connections the visitors make or break as they wish. MP3Board's automated systems generate links that the visitor may or may not choose to activate. MP3Board does not follow the clickthroughs of visitors to determine what uses they make of information obtained. Mechanisms that might follow such clickthroughs would invade the users' privacy. Even if such mechanisms were to be implemented, MP3Board could not ascertain the results of the user's interaction with the third party site. It is at the third party site that any "infringing conduct" takes place. At that point, MP3Board has been left behind.

The declaration of Lars Mapstead, MP3Board's CEO, MP3Board's retained expert, Matt Curtin, and testimony of deposition witnesses address matters not alleged in plaintiffs' complaint.

Partly out of frustration with the with the nature of complaints from the RIAA about links to allegedly infringing files, and before the litigation was commenced, MP3Board developed and now makes available an automated system called "LinkBlaster" that allows a copyright owner to report to MP3Board that an offsite file is not properly licensed. Because a human is needed to make a meaningful decision about proper licensing, this is the best means

available for such monitoring. Not all search engines and directories provide such a mechanism.

There are systems more radical than MP3Board available online, including peer-to-peer application networks such as Napster, Gnutella and Internet Relay Chat ("IRC") and novel twists on traditional models built on File Transfer Protocol ("FTP"). Some such systems have advanced features providing for user privacy (no one knows about the file exchange other than those engaging in it), anonymity (an individual has no way to identify his or her exchange partners) and transience (once a connection is broken is cannot be traced). Privacy, anonymity and transience are facilitated by numerous Internet resources such as pseudonymous free email services (e.g. Microsoft Hotmail), pseudonymous web postings (e.g. Yahoo Geocities), Internet messaging (e.g. AOL Internet Messenger) and anonymous newsgroup postings.

If MP3Board were to disappear tomorrow, there would be no noticeable diminution in copyright infringement. Those inclined to exchange materials that infringe on copyrights would find many other resources to accomplish the same ends.

MP3Board's technology has many legitimate uses. William Teitelbaum The CEO of National Record Mart, a national retailer of music downloadable over the Internet, testified that his company agreed to acquire MP3Board for use as "the core backbone" in a planned Internet-based company. This litigation killed that deal.

Musical artists who use modern technology to promote their music independently of Record Companies need systems such as are provided by MP3Board. Even Record Companies providing music online need search engines.

LEGAL ARGUMENT

I. Summary Judgment, or, Alternatively Partial Summary Judgment, In Favor of a Defendant Is Appropriate When, As Here, Plaintiffs Cannot Prove an Essential Element of a Claim for Relief.

Federal Rule of Civil Procedure 56(b) authorizes a defending party to move for summary judgment as to all or any part of a claim. Federal Rule of Civil Procedure 56(d)

further provides that, if judgment is not rendered upon the whole case or for all the relief asked, the court, shall, if practicable, ascertain what material facts exist without substantial controversy and enter an order so specifying.

In the 1980's, the Supreme Court redefined the rules governing motions for summary judgment through a series of cases culminating in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). See generally 11 *Moore's Federal Practice* (3d ed. 2000 revision), § 56.03. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, supra, at 477 U.S. 327, 106 S.Ct. 2555 (inner quotation marks and citation omitted).

"In our view, the plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. In such a situation, there can be no 'genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 477 U.S. 322-323.

The *Celotex* rule has a particularly strong application in this alleged case of "contributory copyright infringement" and "vicarious copyright infringement" because there is no evidence available showing how a visitor to MP3Board's website uses the information found there. Any copyright infringement is taking place elsewhere. And, although a visitor to MP3Board's website might conceivably use information found there to engage in copyright infringement, that person has access to an abundance of other Internet resources that provide the same information. The intensively linked environment of the Internet, with dispersed, redundant automated facilities for information-retrieval, provides a multitude of paths to any location. It is not enough to speculate, as plaintiffs must in this case, that MP3Board "might have" contributed to copyright infringement; contribution must be proved by competent substantial evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-254; 11 *Moore's*, supra, at pp. 56-34 — 56-35 ("...the Court in *Liberty Lobby* decisively disapproved a scintilla rule for future use in deciding summary judgment motions ... evidence opposing summary

judgment [must] be more than merely *possible or colorable.*" — emphasis added)

II. The Complaint Should Be Dismissed In Its Entirety Because the First Amendment to the United States Constitution Protects MP3Board's Speechlike Information.

Of paramount importance is that MP3Board 's provides its visitors with *speechlike information*. MP3Board does not copy music files, does not play music files and does not distribute music files. Nor does MP3Board provide information specifically encouraging copyright infringement. Whenever notified that *actual, specific links* pointing to infringing materials, MP3Board has removed those links from its database. MP3Board even invented and makes available an automated system, LinkBlaster, to assist copyright owners in removing specific links to infringing files.

Plaintiffs are trying to shut MP3Board down or to restrain its speech because they do not like "MP3-related content." Restraints on free speech are permissible in only a few, carefully delineated areas, chiefly "fighting words," defamation and obscenity. Even then, restrictions must be "content-neutral." *R.A.V. v. St. Paul*, 505 U.S. 377, 112 S.Ct. 2538 (1992) (unconstitutionality of statute banning symbolic display that arouses hostility on the basis of race, color, religion, or gender). See also *CBS, Inc. v. Davis*, 510 U.S. 1315, 114 S.Ct. 912 (1994) (Blackmun, J. as Circuit Justice) (staying injunction against broadcast of footage that offended meat packing company and that was allegedly obtained through espionage).

In *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329 (1997), (quoted supra for facts about the Internet), the Supreme Court held that the Communications Decency Act that sought to protect minors from harmful material on the Internet could not pass Constitutional review because "the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech." 117 S.Ct. at 2346 (beginning of part VII of the opinion). The majority opinion concluded with the following:

"...the growth of the Internet has been and continues to phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." 117 S.Ct. at 2351.

The Constitution protects MP3Board's right to speak about MP3 technology on the Internet whether through human direction or by use of automated systems. Although MP3Board is not pressing the issue at this time, it is submitted that the Constitution would protect MP3Board's right to give a visitor the address of a sound file even if MP3Board knew that the sound file was pirated.

In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 493, 82 S.Ct. 1432 (1962) the Supreme Court held that a publisher of magazines containing non-obscene photographs of nude males and advertisements of photographers offering nudist photographs for sale could not be denied mail services even though some of those photographers were being prosecuted for sending obscene materials through the mails, especially when the publishers had deleted advertisements of certain studios after being informed of convictions of their proprietors:

"Since publishers cannot practicably be expected to investigate each of their advertisers, and since economic consequences of an order barring even a single issue of a periodical from the mails might entail heavy financial sacrifice, a magazine publisher might refrain from accepting advertisements from those whose own materials could conceivably be deemed objectionable by the Post Office Department. This would deprive such materials, which might otherwise be entitled to constitutional protection, of a legitimate and recognized avenue of access to the public."

Here, MP3Board cannot be expected to investigate each of the links aggregated in its automated search engine, each link submitted through an automated system and each participant in a link exchange simply because such a link might be deemed objectionable by a Record Company. Such a burden would impose a heavy financial sacrifice and result in precautionary errors that would block independent musicians and legitimate purveyors of downloadable music from public access. The chilling effect is especially improper given MP3Board's demonstrated willingness to delete specific links to infringing files when unequivocally notified.

See also *New York State Association of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 839, 842 . (2d Cir. 1994), *cert. den.* 513 U.S. 1000 (1994) (party seeking to uphold even legitimate speech restriction cannot satisfy its burden by "mere speculation and conjecture" and "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree").

In *Turner Broadcasting System Co., Inc. v. FCC*, 408 U.S. 612, 641, 114 S.Ct. 2445 (1994), the Supreme Court held that regulations applicable to broadcast media could not be extended to cable television service.

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system *and cultural life* rest upon this ideal. ... For these reasons, *the First Amendment, subject only to narrow and well-understood exceptions, does not countenance government control over the content of messages expressed by private individuals.*" (emphasis added)

First Amendment problems were noted in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361, 1377-1378 (N.D. Cal. 1995), dealing with *specific* secret Church of Scientology materials published on Internet newsgroups ("Usenet") that allow for anonymous postings.

"If Usenet servers were responsible for screening all messages coming through their systems, this could have a serious chilling effect on what some say may turn out to be the best public forum for free speech yet developed."

* * *

Viewing the matter from a broad policy perspective, there is an inherent contradiction between First Amendment freedom of expression and the exclusive publishing privilege protected by copyright. 1 *Nimmer on Copyright*, § 1.10[A] at 1-66.43 (2000 ed.). An ad hoc balancing test would create "a 'chilling effect' that would deter many from exercising their right to speak, even if the courts might ultimately uphold their right to speak." *Id.* at 1-67. Caution is also warranted here because technology is rapidly developing new forms of communication.

The juridical resolution of these dilemmas is achieved through "definitional balancing," the identification of categories that guide both courts and private parties. *Nimmer*, supra, at 1-67. When *actual copying* is alleged, the categories distinguish between "facts or "ideas" (speakers may freely appropriate information and general concepts) and "expression" (particular compilations or formulations can be monopolized). *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); see generally *Nimmer*, supra, at 1-78. Here there is *no copying occurring on MP3Board's website*. Nonetheless, we offer an approach that demonstrates that MP3Board is voluntarily well within the law. MP3Board

deletes infringing links when given *specific notification of actual, unequivocal* infringement.

This practice is consistent with *A&M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896, 917 (N.D. Cal. 2000) *affirmed in part, reversed in part and remanded*, 239 F.3d 1004 (9th Cir. 2001) (hereinafter "*Napster*"). There is an important difference: the injunction against Napster dealt with *activity*, not simply speech.

In order to accomplish MP3 file exchange through Napster, users must download proprietary software from the Napster website, register with Napster, log onto the Napster system, upload MP3 file names from the individual's hard disk to Napster's master servers, allow the Napster system to validate MP3 files on the individual's hard disk and remain logged on to Napster during essential connection processes. See 114 F.Supp.2d at 905. "Napster provides its users with more than hyperlinking; Napster is an integrated service." 114 F.Supp.2d at 920. "[T]he Napster service appears to enjoy a cult following." *Id.* at 926, n. 30. In brief, Napster was the active center of a community devoted to the collection and exchange of pirated music files. Plaintiffs submitted solid evidence in support of these facts.

The situation is different here. MP3Board is just a directory. Plaintiffs are in the position of a drug enforcement agency seeking to outlaw sales to laypersons of a Physicians' Desk Reference ("PDR") that describes the properties of pharmaceuticals because of speculation that drug addicts search its pages for new ways to ingest mind-altering substances.

After discussion of the *Sony* doctrine, discussed below, the *Napster* Court of Appeals reversed a district court decision ruling that the law does not require knowledge of specific acts of infringement. *Napster*, supra, 239 F.3d at 1020-1022. The court of appeals held:

"We observe that Napster's *actual, specific knowledge* of direct infringement renders *Sony's* holding of limited assistance to Napster. We are compelled to make a clear distinction between the architecture of the Napster system and Napster's conduct in relation to the operational capacity of the system. ... We are bound to follow *Sony*, and *will not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights*. See 464 U.S. at 436, 104 S.Ct. 774. ... The analysis is similar to that of *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* which suggests that in an online context, evidence of *actual knowledge of specific acts of infringement* is required to hold a computer system operator liable for contributory copyright infringement. 907 F.Supp. at 1371. ... We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct

infringement. *See Netcom*, 907 F.supp. at 1374. Conversely, absent any *specific information which identifies infringing activity*, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. *See Sony*, 464 U.S. at 436, 442-43, 104 S.Ct. 774. To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use. *Id.* at 1020-1022 (emphasis added)

See also *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F.Supp. 949, 962 (C.D. Cal. 1997) *affirmed* 194 F.3d 980 (9th Cir. 1999), involving an Internet domain name registrar, where "the Court finds it is inappropriate to extend contributory liability to NSI absent a showing that NSI had *unequivocal knowledge* that a domain name was being used to infringe a trademark." (emphasis added) Although a trademark case, the *NSI* opinion relied on *Religious Technology Center v. Netcom*, *supra*, and other copyright cases.

The undisputed evidence shows that, when presented with such *actual, specific notification* that gave MP3Board *unequivocal knowledge* of infringement, MP3Board disabled the allegedly offending links. Its speech cannot be restricted because of "MP3-related content." To prevent an unconstitutional chilling effect on the right of MP3Board to speak, summary judgment must be granted.

III. **Plaintiffs' Count I Alleging Contributory Copyright Infringement Should Be Dismissed.**

A. **Mp3Board's Systems Have Substantial Noninfringing Uses.**

Plaintiffs allege that, by providing information to visitors to its website, MP3Board is guilty of contributory copyright infringement. Plaintiffs, however, ignore the facts showing that MP3Board's systems are and can be used for *noninfringing purposes*. According to its CEO, National Record Mart, a retailer of music downloadable over the Internet, intended to acquire MP3Board for use as "the core backbone" in its planned Internet-based company. Musical artists who take advantage of modern technology to promote their music independently of Record Companies need systems such as are provided by MP3Board. Even Record Companies need search engines to market their products online. See also the Hill article attached hereto at p. 330, noting that Internet technologies "provide unconstrained market entry for independent record companies and individual musicians."

Because of these substantial noninfringing uses, MP3Board is entitled to summary

judgment on Count I alleging contributory copyright infringement. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774 (1984) (manufacturer of consumer videotape recorder could not be held liable for contributory copyright infringement).

In *Sony*, supra, the court explained its “rejection of respondents’ unprecedented attempt to impose copyright liability upon the distributor of copying equipment.” 464 U.S. at 778. The Sony video recorder was protected by the rule that “the sale of copying equipment, like the sale of other articles of commerce, does not constitute copyright infringement if the product is widely used for legitimate, unobjectionable purposes. ***Indeed, it need merely be capable of substantial noninfringing uses.***” 464 U.S. at 442 (emphasis added) See also *Napster*, supra, at 239 F.3d at 1021 (“The district court improperly confined the use analysis to current uses, ignoring the system's capabilities.”)

[“Substantial non-infringing use” is distinct from a “fair use defense” based on 17 U.S.C. § 107. See the first paragraph of part IV of the *Sony* decision at 464 U.S. 442. The distinction has been obscured in some cases. In *Sony*, the video recorder had a substantial non-infringing use ***because*** even “unauthorized time shifting” is a fair use, but there was also another substantial non-infringing use, “authorized time shifting.” See 464 U.S. at 442-447. MP3Board does not rely on the fair use defense in these motions.]

In formulating the “substantial noninfringing use” doctrine, the *Sony* court drew upon patent law that expressly provides penalties for contributory infringement. *Id.* at 434-435 and 439-440. “A finding of contributory infringement ... give[s] the patentee effective control over the sale of [an] item” that is used for infringement and “is normally the functional equivalent of holding that the disputed article is within the monopoly grant of the patentee.” *Id.* at 441.

“For that reason, in contributory infringement cases arising under the patent laws the Court has always recognized the critical importance of not allowing the patentee to extend his monopoly beyond the specific limits of his grant. These cases deny the patentee any right to control the distribution of unpatented articles unless they are unsuited for any commercial noninfringing uses.” *Id.* (inner quotation marks and citation omitted)

Holding that the informational systems operating on MP3Board can be enjoined by plaintiffs would extend plaintiffs' copyrights in sound recordings into a monopoly over information relating to any and all sound recordings, authorized or unauthorized. Through the

website MusicGrab.com, plaintiffs are competing with MP3Board. Finding that there are triable issues of fact would enable Record Companies to stifle a competitor, to choose which information providers can function and to charge for the privilege.

Protection of substantial noninfringing uses is an integral function of copyright law. In *Sony*, supra, the Supreme Court stated that monopoly privilege is a “a means by which an important public purpose can be achieved. It is intended to motivate the creative activity of authors and inventors...” 464 U.S. at 429. ***“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. ... The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”*** *Id.* (emphasis added, inner quotation marks and citations omitted) Finding that MP3Board's systems, generic and widely duplicated and of value to both the general public and independent artists, can be declared illegal simply because they can also be used by copyright infringers, would turn the law and the purposes of copyright on their heads and, if generalized, would make valuable technology into an exclusive preserve of holders of monopoly privileges like plaintiff Record Companies,

Lower court decisions are in accord. In *Matthew Bender & Co., Inc. v. West Publishing Co.*, 158 F.3d 693, 707 (2d Cir. 1998) *cert. den.* 119 S.Ct. 2039 (1999), the court granted summary judgment, ruling that Bender did not contribute to copyright infringement by distributing CD-ROM discs containing copies of judicial opinions with references to West's pagination. The court quoted adopted the rule stated in a copyright treatise by Goldstein:

"To hold that a distribution of such materials or equipment constitutes contributory copyright infringement and thus to bring them within the scope of the copyright owner's control may enable the copyright owner to influence the price and availability of goods that are not directly connected to its copyrighted work."

In *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 29 F.Supp.2d 624, 633 (C.D. Cal. 1998) *aff'd*, 180 F.3d 1072 (9th Cir. 1999), the District Court refused to enjoin the sale of the “Rio,” an MP3 payer that expanded MP3 usage, in part, “because the Rio is capable of recording legitimate digital music.” In *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988), the court held that the maker of a product that defeated an anticopying system for software was not liable for contributory copyright

infringement because the law allowed for “making of fully functional archival copies.”

Because MP3Board's systems have substantial noninfringing uses both now and, even more, in the future, they cannot be held liable for contributory copyright infringement.

MP3Board is entitled to summary judgment as to Count I of plaintiffs' complaint.

B. Plaintiffs Have Not Produced And Cannot Produce Evidence of a Material Contribution to Copyright Infringement by Mp3Board .

The classic formulation of contributory copyright infringement was stated in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971):

"...one who, with knowledge of the infringing activity, induces, causes or materially contributes⁸ to the infringing activity of another, may held liable as a 'contributory' infringer.

⁸ See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396-397, 88 S.Ct. 2084, 2088, 20 L.Ed.2d 1176 (1968) in which the Court explained that 'mere quantitative contribution cannot be the proper test to determine copyright liability *** Rather, resolution of the issue *** depends upon a determination of the function that [the alleged infringer] plays in the total [reproduction] process*** ' " (all editing in original)

In *Fortnightly*, the Court held that an operator of a community antenna television service could not be charged with copyright infringement. "If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement— not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed every television set manufacturer." 392 U.S. at 397.

There is no evidence and indeed no allegation that MP3Board is responsible for the ripping of tracks from plaintiffs' CD's, compressing of the files through MP3 encoders or posting of MP3 files on the Internet. All of those activities must occur before links to such files can be found by MP3Board's spiders or submitted to MP3Board's website. Rather, what is alleged that when an individual wants to locate an infringing file, he or she comes to MP3Board to learn an address. For purposes of this issue, it will be assumed that if an individual learns of such an address and that if the individual then downloads a pirated file found at that address, that individual is infringing the copyright through the download. MP3Board does not *induce* or *cause* the infringing activity because the visitor's desire and

intention to infringe is in existence before MP3Board is visited. For example, to use the search engine, the visitor must enter search terms before MP3Board's automated processes can generate a link list. It is black-letter law that a showing of *direct copyright infringement* is a prerequisite before a *contributor* can be found liable. *Sony*, supra, at 464 U.S. 364; *Napster*, supra at 239 F.3d 1013, n.2.

MP3Board uses automated processes in all of its essential functions. The "activity" MP3Board is charged with carrying out is not an "activity" at all, but a *failure to monitor and censor* links to files that appear to contain infringing materials. There is no reasonable way for MP3Board to evaluate millions of ever-changing files on the Internet and render a judgment as to their copyright status. An artist or song may be newly represented by a "sample" or authorized file at any time and the address of such an authorized file should be available through MP3Board. Only through automated processes can MP3Board keep up with the every-changing content on millions of websites; as stated by the Supreme Court in *Reno v. ACLU* quoted in part B. of the Factual Background, supra: "*No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web.*"

The pivotal element of materiality is a requirement of *substantiality*, as shown by *Demetriades v. Kaufmann*, 690 F.Supp. 289 (S.D.N.Y. 1988), where realtors were accused of contributing to the copying of architectural plans. The realtors received "a handsome fee ... [that] although larger than the standard percentage for sale of an unimproved lot, was not pegged to the value of the house ultimately constructed." 690 F.Supp. at 291. The realtors also became aware during negotiations that the purchasers sought to construct a house that was "of substantially identical" design to that of the plaintiffs' nearby residence. *Id.* The role of the realtors, their enlarged fee, their knowledge that the deal was dependent on an imitative house and their alleged knowledge of the copying of the plans were, even in combination, insufficient to make out a case of contributory copyright infringement. In an oft-cited scholarly opinion, the district court granted summary judgment:

"Something more — deriving from one's *substantial* involvement is needed." 690 F.Supp. at 294. (emphasis in original)

"Plaintiffs ... argue that knowledge and benefit are enough to warrant third-party liability in this case. ... In essence, they rely on a hybrid form of liability, confusing and combining the knowledge prong of contributory infringement with the benefit prong of vicarious liability. ... A simple knowledge and benefit test would cast wide the net of third-party liability, ensnaring individuals far too remotely or only tangentially involved in the infringement. Such an approach would drain the concept of liability of its substantive meaning." *Id.*

Hence, in order to survive summary judgment on the contributory copyright claim, plaintiffs here must present evidence that MP3Board *substantially* contributed to copyright infringement carried out by its visitors. Defendants *cannot* produce the essential evidence because MP3Board does not and should not (out of respect for its visitors' privacy) follow visitors when they access third party sites. The visitors are using their own computers and their own Internet Service Providers. Even if MP3Board were to use mechanisms to follow the visitor, MP3Board could not ascertain what the visitors do at those third-party sites, e.g. cannot ascertain whether the former MP3Board visitor simply looks at the third-party site or downloads files therefrom.

Like the plaintiffs in *Demetriades*, plaintiffs here want to build a case on benefit and knowledge, even "constructive benefit" and "constructive knowledge." This is insufficient. Plaintiffs must first produce evidence of *actual copyright infringement* by MP3Board's visitors and then produce evidence that MP3Board *substantially contributed* to that infringement. Because plaintiffs cannot produce the essential evidence to support their claims, defendant's motion for summary judgment must be granted under the rules set forth in part I. of this Legal Argument, *supra*.

Materiality has another aspect that independently requires that summary judgment be entered in favor of MP3Board on Count I. As shown in the extract from *Gershwin Publishing* quoted at the beginning of this point, a finding of material contribution "depends upon a determination of the function that [the alleged infringer] plays in the total [reproduction] process." 443 F.2d at 1162, n.8 (quoting from the Supreme Court *Fortnightly* opinion, editing by the court). "[M]ere quantitative contribution cannot be the proper test." *Id.*

Here the function played by MP3Board's systems is generic and duplicated many-fold on the Internet. An individual desiring to locate and download pirated sound files has a

multitude of alternative search engines to draw upon, including Lycos, Yahoo!, AltaVista and plaintiffs' MusicGrab.com, all with directory categories devoted to MP3 files. Links found on the MP3Board website are also found on dozens of other sites around the Internet. One resource, MetaCrawler, searches a multitude of search engines and can do so specifically for "Audio/MP3." There are more advanced technologies, such as Gnutella, Internet Relay Chat and FTP models. MP3Board is a small player in an arena full of giants. If MP3Board were to disappear tomorrow, there would be no discernible diminution in copyright infringement.

Plaintiffs cannot prove any actual infringement to which MP3Board substantially contributed and summary judgment in favor of MP3Board must be entered.

IV. Plaintiff's Count II Alleging Vicarious Copyright Infringement Should Be Dismissed Because Mp3Board Lacks The Right And Ability To Supervise Any Infringing Conduct Performed By Others.

In paragraph 70 of their complaint, in Count II, plaintiffs allege: "At all relevant times, MP3Board had the right and ability to supervise and/or control the infringing conduct of the users of the MP3Board Site." This formulation identifies elements of a proper cause of action for vicarious copyright infringement. But the allegation is factually false and plaintiffs know it is false. The evidence contradicts the allegation.

In *Demetriades v. Kaufmann*, supra, at 690 F.Supp. 292-293, the court noted that the vicarious liability is "grounded in the tort concept of *respondeat superior*." Summary judgment was granted in favor of defendant realtors because "[c]ourts relying on this theory of third-party liability repeatedly have emphasized that some degree of control of control or supervision over the individual(s) directly responsible for the infringement is of crucial importance" and "there is no meaningful evidence (as one might expect) suggesting that the [realtors] exercised any degree of control over the direct infringement. Compare *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963)], 316 F.2d at 308 (holding defendant vicariously liable since it had 'the power to police carefully' the infringer's conduct)."

In *Banff Ltd. v. Limited, Inc.*, 869 F.Supp. 1103 (S.D.N.Y. 1994), the court treated a motion to dismiss as one for summary judgment, which it granted in favor of defendant as to a claim for vicarious copyright infringement based on a parent-subsidary relationship. After

reviewing numerous authorities, the court stated that:

"the formal relationship between parties is not the driving force behind liability; rather, *the parties' paths must cross on a daily basis, and the character of this intersection must be such that the party against whom liability is sought is in a position to control the personnel and activities responsible for the direct infringement.*" 869 F.Supp. at 1109 (emphasis added).

The requisite showing is entirely absent here. Visitors to the MP3Board website come and go as they wish. MP3Board cannot "supervise" them and has no control over them whatsoever. One might as well blame a gardener for a bee sting because she benefits from the pollination. Summary judgment in favor of MP3Board on Count II must be granted.

V. Plaintiff's Count III Alleging Unfair Competition As To Pre-1972 Recordings Should Be Dismissed.

In Count III of their complaint, paragraph 80. plaintiffs allege that "MP3Board has violated plaintiffs' rights in the Pre-1972 Recordings and are guilty of misappropriation and unfair competition under the common law of the State of New York." The temporal restriction makes it impossible for plaintiffs to produce evidence in support of their claim.

Under 17 U.S.C. § 301(a), all legal or equitable rights that are equivalent to copyright are governed exclusively by federal law. There is an exception for "sound recordings fixed before February 15, 1972." Section 301(c).

Accordingly, in order to avoid summary judgment, plaintiffs must show some wrongful act involving pre-1972 recordings. The claim cannot hang on speculation. Plaintiffs must not only overcome the barriers previously discussed, but the additional temporal barrier. Without a supporting federal claim for contributory copyright infringement or vicarious copyright infringement, the supplemental state claim must be dismissed. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130 (1966); *Chambers v. Time Warner, Inc.*, 123 F.Supp.2d 198, 202 (S.D.N.Y. 2000).

The First Amendment in and of itself requires that this Count be dismissed. In *Goldstein v. Garlick*, 65 Misc.2d 538, 318 N.Y.S.2d 370, 375-376 (1971), the court granted defendant newspaper's motion for summary judgment against charges of misappropriation and unfair competition based on advertising. In that case, plaintiffs:

"would have this court set forth a rule that once a newspaper received notice from a competitor of an advertiser that an advertisement which was published was false or misleading that newspaper would publish the advertisement at its peril. This court does not agree. *Such a rule would make a newspaper an arbiter of the conflicting claims of competing advertisers and* would impose an intolerable burden upon newspapers and would, in the end, *have a chilling effect upon them since they would have to refuse many items submitted to them because of the possibility that publication would lead to liability. Nor should the onerous burden be placed upon newspapers under ordinary circumstances to conduct investigations in order to determine the effect of a questioned advertisement.*" (emphasis added)

The same reasoning applies here. When its systems provide links to other sites on the Web, MP3Board should not be required to investigate the source materials, at its peril, and render actionable judgments as to the copyright status of links or the legitimacy of those sites. The burden would be made intolerable by Record Companies whose interest is in emasculating MP3Board, which competes with their own sites and which provides systems needed by independent artists who eschew the industrial style of plaintiffs. The "chilling effect" would be that MP3Board would have to remove *every link* that the Record Companies claim is objectionable or face the intolerable burden of investigation and threatened litigation.

For all the foregoing reasons, summary judgment in favor of MP3Board should be granted. In the alternative, Count III should be dismissed because supplemental jurisdiction is not supported by a jurisdictionally viable claim.

VI. Plaintiffs' Claim For Damages Fails.

17 U.S.C. § 504(b) authorizes an award of damages (in addition to injunctive relief) for "actual damages suffered by [the copyright owner] as a result of the infringement" and "any profits of the infringer that are attributable to the infringer." Plaintiffs cannot make any sufficient showing of actual damages or attributable profits — they have nothing more than speculation. Similarly 17 U.S.C. § 504(c) authorizes "statutory damages for all the infringements involved in the action, with respect to any one work" for infringements shown. Here, too, plaintiffs fall short. They cannot show that a visitor to MP3Board's web site has downloaded even one copyrighted work as a result of the activity of MP3Board. Hence, partial summary judgment should be granted as to each of plaintiffs' claims for damages.

A. Plaintiffs Have No Substantial Evidence of Actual Damages. In *Banff Ltd.*

v. Express, Inc., 921 F.Supp. 1065, 1068 (S.D.N.Y. 1995), the court held:

"actual damages are only available where there is a causal connection between the infringement and the copyright owner's losses. In order to sustain an award for actual damages, Banff was required to prove that it would have made the sweater sales in question **but for** the infringing activity." (emphasis in original)

See also *Odegard, Inc. v. Costikyan Classic Carpets, Inc.*, 963 F.Supp. 1328, 1240 (S.D.N.Y. 1997). Here, plaintiffs cannot show anything more than speculation.

B. There is No More Than Speculation Connecting MP3Board's Profits to Claims of Copyright Infringement. Defendant's profits "attributable to the infringement" cannot be based on speculation and plaintiffs cannot simply appropriate the earnings of a defendant. *Business Trends Analysts, Inc. v. The Freedomia Group, Inc.*, 887 F.2d 399, 405 (2d Cir. 1989) (the statute had a "conventional view of profits in mind"); *Rainey v. Wayne State University*, 26 F.Supp.2d 963 (E.D. Mich. 1998).

C. Plaintiff Have Not Established Copyright Infringement Such as to Support Statutory Damages. It is submitted that plaintiffs have not produced evidence in support of a claim for statutory damages and have not produced evidence that any MP3Board visitor downloaded even a single copyrighted file as a result of the activities of MP3Board.

CONCLUSION

For the foregoing reasons, MP3Board submits that it is entitled to summary judgment as to the entire complaint. In the alternative, partial summary judgment should be granted as to each Count and/or each claim for damages.

Dated: April 6, 2001

ROTHKEN LAW FIRM

Ira P. Rothken (IPR 1066)
1050 Northgate Drive, Suite 520
San Rafael, CA 94903
Telephone: (415) 924-4250
Facsimile: (415) 924-2905

Attorney for defendant, counterclaimant
and third-party plaintiff
MP3Board, Inc.

