

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

**DEFENDANT MP3BOARD'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Plaintiffs' motion for summary judgment presents one issue of importance: whether MP3Board, Inc. ("MP3Board") "materially contributes" to copyright infringement. I.e., "one, who with knowledge of the infringing activity, *materially contributes* to the infringing conduct of another may held liable as a 'contributory' infringer." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (emphasis added). Search engines are vital for finding files on the Internet including mp3 files, html files, jpg files, gif files, and pdf files. Requiring the "clearing of rights" before allowing search engines to link to a particular file- html, mp3, jpg or otherwise - is technically, legally, and economically burdensome to the point that automated search engines would become extinct and one would not be able to search the Internet as whole. MP3Board's automated processes search the Internet mainly for mp3 and other music files. MP3Board uses a generic search engine technology, generic third party submissions, and provides generic automated hyperlink results. MP3Board's generic search engine, which is copyright agnostic, is tailored to searching for generic mp3 and related file formats. If MP3Board's method of searching for mp3 or any other files on the Internet is found unlawful – there are no other practical alternative methods available for searching for such files. Since MP3Board does not provide any enhancement to using ordinary search engine technology for finding mp3 format files on the Internet, its contribution to "infringing conduct" arising out of hyperlinking to mp3 format files is not and cannot be considered "material" in nature. This opposition memorandum explores that issue in greater depth than was possible in MP3Board's motion for summary judgment, but the conclusion is the same: the extent, if any, of contribution of MP3Board to copyright infringement is not sufficient to create a triable issue of fact. MP3Board is entitled to summary judgment and plaintiffs'

motion must be denied.

"Materiality" is an example of a general legal technique of using an ambiguous word or phrase to mark an issue (rather than providing an inherent guide to resolution of that issue). The word "material" thus serves the same function as words and phrases like "reasonable," "obscene" and "fair use." There is a *spectrum* of possible factual scenarios involving varying degrees of contribution, ranging from those where no triable issue of fact is presented because the defendant must prevail (e.g. a suit against inventors of MP3 technology), through those where triable issues of fact are presented, to those where no triable issue of fact is presented because the plaintiff must prevail [e.g. an "I know it when I see it" case like *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp.2d 1290 (D. Utah 1999)].

There are two recognized approaches to the kind of unmarked territory this case presents. In a *factor* approach used to resolve many issues, including fair use and obscenity, precedents are examined to identify characteristics considered important and the facts of the case at hand are weighed against those characteristics and the language of the precedents. A *policy* approach looks to statements of national purpose from the Congress and judicial attitudes stated by the United States Supreme Court.

The factor approach applied to the term "material" in this case leads to a factor of: (1) *actual contribution* to copyright infringement, as opposed to "*virtual*" or *possible* contribution. There is no contributory infringement without actual infringement and contribution must involve actual contribution. A second major factor has been described by the word *substantial* and this factor calls for examination of the *participation* of the alleged contributor in actual contribution as characterized by *active vs. passive* participation and *direct vs. tangential* participation. Finally, the alleged contributor's *specific infringing purpose* has repeatedly been

emphasized; if, as authorities indicate, ***constructive knowledge*** may be sufficient for liability to attach, such a subjective element must figure into the materiality element.

In this case, there is an absence of evidence of any actual contribution by MP3Board to copyright infringement and this absence requires a determination that materiality is absent here. ***There is no evidence because any contribution of MP3Board to copyright infringement is insufficiently substantial*** to qualify as "material." Any participation by MP3Board in infringement is passive because MP3Board is a tool and users of MP3Board's systems have a multitude of alternative means to satisfy any infringing desires. Contrary to plaintiffs' accusations, MP3Board is not purposefully involved in copyright infringement.

In *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*"), on the other hand, each factor was established through solid evidence. This case is thus the polar opposite of *Napster*.

Important ***policies*** declared by Congress and the courts include: (1) ***a reluctance to expand copyright protections without explicit legislative guidance***, especially when restrictions on evolving technology may have unforeseeable prejudicial consequences; (2) ***promoting the continued development of the Internet*** and (3) ***preserving the vibrant and competitive Internet free market***. In addition, there are policies discussed in MP3Board's own motion for summary judgment: (4) ***establishing a balance between copyright and creativity***, (5) ***refraining from chilling free speech*** and (6) ***protecting noninfringing uses***. All these policies further weigh toward a determination that materiality is absent here.

Tell-tale flaws in plaintiffs' motion demonstrate their lack of merit. Plaintiffs rely heavily on systems or features of MP3Board that have been discontinued or radically modified, including

the message board, the third party submissions and the tutorials. Plaintiffs fail to connect their arguments to any consequential determination such as a claim for damages or an application for a preliminary injunction. At most, plaintiffs are seeking a meaningless advisory opinion that, as of June 23, 2000, MP3Board was "bad." Throughout their moving papers, plaintiffs isolate and present *out of context* each and every item of evidence that might support a finding of contributory copyright infringement. *Context is the essence of materiality.* Just as seriously, in order to provide color to their arguments, plaintiffs are compelled to, and do, falsify the facts and rely on factual assertions that are not only unsupported but, indeed, contradicted by the evidence.

Because the factors and policies overwhelmingly weigh against a finding of materiality, summary judgment in favor of MP3Board should be granted. At worst, there is a triable issue and plaintiffs' factually false and conceptually flawed motion must be denied.

Other claims made in plaintiffs' motion do nothing more than identify triable issues of fact, namely (1) the extent of MP3Board's knowledge of copyright infringement and (2) whether MP3Board's financial benefit is sufficiently direct as to support a finding of vicarious liability. One issue, MP3Board's right and ability to supervise any activities of its users involving copyright infringement, usually called *policing*, requires a finding in favor of MP3Board as a matter of law.

In sum, plaintiffs' motion confirms the arguments presented in MP3Board's motion for summary judgment: plaintiffs' claim of contributory copyright infringement fails to satisfy the element of materiality and plaintiffs' claim of vicarious copyright infringement is devoid of merit. Plaintiffs do not even address central matters raised in MP3Board's motion, including the chilling effect on free speech that a judgment against MP3Board would entail, the substantial noninfringing uses provided by MP3Board's systems and plaintiffs' lack of any genuine damages.

For all these reasons, MP3Board's motion for summary judgment should be granted and plaintiffs' motion for summary judgment, and each part thereof, should be denied.

FACTUAL BACKGROUND

A. Plaintiffs' False and Stale Evidence. Throughout, plaintiffs present false statements, as well as seriously slanted representations. Plaintiffs distort the evidence in their statement of facts and then further distort their own statements in the memorandum. Space does not permit a detailed discussion. See especially MP3Board's response to plaintiffs' fact 75.

At page 1, n.1 of their memorandum, plaintiffs declare that their motion "is based on the Site as it existed as of the time of the filing of the complaint in this action on June 23, 2000. The Site has been significantly altered since that time..." Plaintiffs emphasize the discontinued message board once provided through a third-party provider (Coolboard), the discontinued tutorials, the discontinued link to Freedrive (an online storage facility) and the altered third party submission system and link exchange.

B. Plaintiffs' False Accusations of Infringing Purpose. The changes in MP3Board's operations are also important because they demonstrate the falsity of plaintiffs' unsupported accusation that that MP3Board "had one primary purpose" to foster the copying and distribution of "illegal copies of famous sound recordings." (Plaintiffs' preliminary statement at page 1) The truth is very different. MP3Board aggregated MP3 content on its site *regardless* of whether that content was authorized by Record Companies, *regardless* in large measure because it is impossible to ascertain in any efficient fashion what content is authorized and what content is not. MP3Board's real purpose, as shown by the evidence presented by plaintiffs themselves, was to generate advertising revenue and maximize profits. For this reason, MP3Board prefers to

operate legally: it deleted links when given specific notification, made LinkBlaster available and changed systems to err on the side of caution when such changes could be made efficiently.

C. Plaintiffs' Illogical Accusations Involving Pre-Existing Infringement. Plaintiffs' factual presentation incorporates an obvious logical error. Sites maintained by other persons, such as "Superillegal MP3z," must exist before links to them can be posted on MP3Board and MP3Board cannot be blamed for their presence on the Internet. There is not, and cannot be, any genuine argument that MP3Board "cultivates," encourages or facilitates the establishment of such other sites. They would exist if MP3Board had never gone online. Any link to infringing materials submitted to or exchanged with MP3Board is the result of the infringer's desire without any involvement of MP3Board. Likewise, individuals who submit links choose the "genre" — it is not MP3Board that makes or executes that choice. Plaintiffs' logical error does not, of course, resolve the question of whether MP3Board contributes to *downloading* of pirated music files by MP3Board visitors but such infringement is obviously less serious. The distinction between non-involvement in posting infringing materials and allegedly contributing to downloading was the pivot of a split decision in *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp.2d 1290 (D. Utah 1999), on which plaintiffs rely, where *purposeful infringement* was clear. Compare section 1(b) with section 2 of that decision at pp. 1293-1295.

D. Plaintiffs' Reliance on RIAA Notices. Plaintiff Record Companies rely on purported DMCA notices sent by the Recording Industry Association of America ("RIAA"). Those ambiguous notices, discussed more thoroughly in MP3Board's opposition to RIAA's motion for summary judgment, simply attempted to throw the whole burden of copyright investigation and enforcement onto MP3Board. RIAA "demand[ed] the removal of any and all links to sound recordings that are copyrighted by our member companies" (letter of May 25,

2000, emphasis in original) and RIAA had no better suggestion to MP3Board than to look up individual song titles at a commercial retailer's website.

In sum, plaintiffs logically fallacious and overblown factual statement does not support plaintiffs' motion but demonstrates that their position is devoid of merit.

LEGAL ARGUMENT

I. NO AUTHORITY SUPPORTS SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS.

Although plaintiffs title the first part of their argument "The Applicable Legal Standard," the text following this title does not address that standard. Plaintiffs cite a string of cases. The most important, *Napster*, supra, involved a preliminary injunction. In *EZ-Tixz, Inc. v. Hit-Tix, Inc.*, 919 F.Supp. 919 (S.D.N.Y. 1996), summary judgment as to contributory infringement was denied.

In *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1163 (2d Cir. 1971) the court addressed defendant's "pervasive participation in the formation and direction" of an association that sponsored concerts featuring infringing compositions "and its programming of compositions presented" supported a finding of liability. A corresponding finding here would require that MP3Board sponsor and direct those who rip and post tracks. In *Peer International Corp. v. Luna Records, Inc.*, 887 F.Supp. 560 (S.D.N.Y. 1995), a licensee underpaid royalties. None of the other cases string-cited in footnote 5 of plaintiffs' memorandum present circumstances any closer to this case.

The legal standard for summary judgment is conveniently stated in *EZ-TIXZ*, supra, at 919 F.Supp. 732 (citations omitted):

"In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party."

There is, in addition, a serious defect in plaintiffs' approach. Although their Notice of Motion refers to F.R.Civ.Pro. 56, they are not seeking any judgment. Nor does their request

for relief seek a genuine determination of "material facts [that] exist without substantial controversy" as required by Rule 56(d). As stated in 10B Wright, Miller & Kane, *Civil Practice and Procedure* (1998) § 2737 at 316-318, "Rule 56(d) does not authorize the entry of a judgment on part of a claim or the granting of partial relief, however. It simply empowers the court to withdraw sham issues from the case and to specify those facts that really cannot be controverted." Thus, in *Durant v. Traditional Investments, Ltd.*, 135 F.R.D. 42, 52 (S.D.N.Y. 1991), the court denied a party's motion for an order pursuant to Rule 56(d) because such an order "would not materially expedite the adjudicative process." Plaintiffs' motion, even if granted, would not expedite resolution of this case. See also *United States v. Copacabana*, 17 F.R.D. 297, 298 (S.D.N.Y. 1955) quoted in 10B Wright, Miller & Kane, *supra* at p. 320, n. 14.

II. THERE IS SO LITTLE CONTRIBUTION TO COPYRIGHT INFRINGEMENT ON THE PART OF MP3BOARD THAT SUMMARY JUDGMENT IN ITS FAVOR SHOULD BE GRANTED.

A. Background for Analysis of a Novel Issue.

The question of "materiality" in the circumstances of this case is both novel and important. MP3Board submits that a standard for adjudication *can* be defined and that MP3Board is entitled to judgment on the issue of "materiality" as a matter of law.

Definition of a standard for adjudication looks to fundamental principles that rationalize established methods of legal reasoning. Two approaches are appropriate.

The *analytic approach* employs a *factors*, used, e.g., to evaluate fair use under 17 U.S.C. § 106 or obscenity under *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607 (1973). We are not dealing with fair use of obscenity here, of course, but examining an approach to a difficult issue. The factors used in evaluating fair use were defined by Congress in § 106 and applied, e.g., in *Napster*. The "three-prong" definition of obscenity, developed over many years, was applied in *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 2345 (1997), where the Court noted: "Just because a definition including three limitations [prongs] is not vague, it does not follow that one of those limitations [prongs], standing by itself, is not vague."

The second approach looks to *policies* enunciated by Congress and the courts that apply

to a case, such as this, that has important social and technological consequences

A *factor approach* begins with the *Gershwin* formula¹ and is consistent with the methodology developed by the leading British legal scholar of the twentieth century, H. L. A. Hart, in *The Concept of Law*:

"Whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*." *Id.* at 124 (emphasis in original).

"In fact, all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed official choice, issues which can only be properly appreciated and settled when they arise in a concrete case." *Id.* at 127.

There is a need to steer between two extremes, one where "too much is sacrificed to certainty" and the other where "too much is treated by the courts as perennially open or revisable in precedents." *Id.* Here, there is a danger in leaving the issue of materiality "perennially open." Plaintiffs are wealthy and have stakes they consider important enough to pursue lawsuits vigorously against those who may not have sufficient resources to litigate or who, like general purpose search engines in the mold of Yahoo! will appease aggression. The "open texture" can be shaped through factors to protect all concerned.²

¹ "...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)

² In developing the concept of "open texture," Hart relied on a technique of linguistic analysis invented by Ludwig Wittgenstein in his *Philosophical Investigations*, ¶¶ 66-76. See Hart, *supra*, p. 15 and the supporting note. Wittgenstein considered a wide variety of "proceedings we call 'games'" and rejected the notion that they must share some common characteristic. Rather "**look and see** whether there is anything common to them all." In Olympic games, patience, throwing a ball against a wall and catching it, tennis, chess and "ring-a-ring-a-rosies," characteristics such as competition, winning or losing, amusement, skill or luck sometimes appear and sometimes disappear. "And the result of the examination is: we see a complicated network of similarities, overlapping and criss-crossing." "We do not know the boundaries because none have been drawn. To repeat, we can draw a boundary—for a special purpose. Does it take [a boundary] to make the concept usable? Not at all! ... One might say that the concept 'game' is a concept with

Policy analysis. In *Towne v. Eisner*, 245 U.S. 418, 425 (1918), in an admonition applicable to the term "material," Justice Holmes declared: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." This maxim summed up an earlier, even more famous passage that opened Holmes' *The Common Law*:

"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, ***intuitions of public policy, avowed or unconscious***, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." (emphasis added)

Policy analysis matured in work carried out at Yale Law School by Myres S. McDougal. In a summary of his approach, "The Law School of the Future: From Legal Realism to Policy Science in the World Community," *Yale L. J.* LVI (1947) 1345, McDougal began with a recognition that "the doctrines, the verbal propositions, commonly called law are meaningful only when located in the total context in which they are used— in the community process in which people are using these doctrines to effect, or justify, some specific distribution of values." He cautioned against "acting alone and in splendid isolation from our effects on the rest of the world" because there is "a clear planetary indivisibility," advice especially appropriate in the global Internet economy, and recommended giving "predominant emphasis to policy science, in the world community and all its constituent communities." *Id.* at 1348, 1349. His approach has led to the incorporation of specific policy statements in statutes and judicial opinions.

We have, therefore, two tools for defining a standard of adjudication of the issue of materiality: an examination of factors involved in making "a determination of the function that [the alleged infringer] plays in the total [reproduction] process" (*Gershwin*, quoting *Fortnightly*; see note 1, *supra*) and a review of policies enunciated by Congress and the courts that such a decision should carry out.

blurred edges.— 'But is a blurred concept a concept at all?'— Is an indistinct photograph a picture of a person at all? Is it even always an advantage to replace an indistinct picture by a sharp one? ***Isn't the indistinct one often exactly what we need?***" (final emphasis added)

B. Evaluation of Critical Factors Demonstrates That MP3Board Does Not Materially Contribute to Copyright Infringement.

Examination of plaintiffs' argument in support of "material contribution" reveals a vacuum that plaintiffs' attempt to fill by unsupported conclusory accusations ("MP3Board not only provided the requisite 'site and facilities,' but built its entire business on facilitating and encouraging infringement"); logical fallacies ("MP3Board Cultivated a Network of Infringers by Encouraging the Posting of Illegal MP3 Files") and an emphasis on discontinued or altered systems. Plaintiffs cite cases such as *Napster*, *Gershwin* and *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), and quote snippets therefrom, but there is no serious analysis.

Nonetheless, analysis of "materiality" is possible in the context of this case, precisely by examination of the significant cases. [The "knowledge" element is considered separately below where it is shown that a triable issue of fact is presented. A charge of contributory copyright infringement requires *both* knowledge and material contribution and the absence of material contribution here is fatal to plaintiffs' cause.]

To ascertain appropriate factors, we *look and see* (as Wittgenstein suggested in the extract quoted supra, note 2) what factual features courts have considered significant.

First, all the authorities (and plaintiffs also) agree that an alleged contribution must involve *actual infringement*. Second, as stated in the scholarly and oft-cited opinion, *Demetriades v. Kaufman*, 690 F.Supp. 289, 294 (S.D.N.Y. 1988), liability cannot be imposed on too "attenuated a basis. Something more — deriving from one's *substantial* involvement is needed." (emphasis in original) Third, even though it introduces a subjective element, it is clear from the cases that a defendant's *consciously intentional infringing purpose* is considered important. The subjective element must fit in somewhere and, because constructive knowledge has been deemed sufficient to make one a contributory infringer, it is appropriate to include purpose as a factor in materiality.

The word "substantial" is itself ambiguous, but examination of the cases discloses that it can be analyzed in terms of *the nature and extent of participation in any infringement*, meaning a participation active rather a passive and direct rather than tangential. As Judge Whyte stated in *Religious Technology Center v. Netcom On-Line Communications*, 907 F.Supp. 1361,

1372 (N. D. Cal. 1995), "The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred."

1. The requirement of actual infringement connected to the defendant. We begin by assuming that there is copyright infringement occurring through the use of MP3 technology and distribution of sound files over the Internet. Although evidence of such copyright infringement is not solid here, it was solidly established in the *Napster* case through surveys, especially those measuring sales of compact discs near colleges and universities. See 114 F.Supp.2d at 909-911. But MP3Board cannot be held liable for infringement by users of Napster, an entirely different and separate system. Nor should MP3Board be responsible for infringement that results from users' access to other Internet resources like Yahoo! or MusicGrab.com. ***Actual infringement must be connected to MP3Board.*** Thus, the *Napster* district court held at 911 (emphasis added):

"To prevail on a contributory or vicarious copyright infringement claim, a plaintiff ***must show*** direct infringement by a third party. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984). As a threshold matter, plaintiffs in this action ***must demonstrate*** that Napster users are engaged in direct infringement."

Similarly, in *Sega Enterprises, Ltd. v. MAPHIA*, 948 F.Supp. 923, 932 (N.D. Cal. 1996), on which plaintiffs rely, the court stated (emphasis added): "To impose liability on Sherman for contributory infringement, Sega ***must first establish*** that the users of Sherman's MAPHIA BBS directly infringed Sega's copyright."

Here, plaintiffs have made no demonstration that MP3Board's users are engaged in direct infringement. All they have shown is the ***possibility*** of infringing activity that might be carried out by users who access MP3Board's systems. To borrow a word from Internet technology, they are attempting to present a case of ***virtual infringement*** by isolating fragments of MP3Board's operations and assembling them into a constructed image. MP3Board submits that this is insufficient to carry their burden of proof.

MP3Board submits that the absence of evidence is a consequence of the ***insubstantial*** involvement of MP3Board in copyright infringement involving Internet exchange of MP3 files. Or to put it another, there is ***no measurable participation by MP3Board*** because MP3Board is

a tool employed by its visitors and because there are many equivalents. It is this factor that leads to an absence of evidence. All plaintiffs can do is point to advertising revenue MP3Board has earned (Plaintiffs' facts 64-69) and MP3Board's success at achieving "traffic." (*Id.*, Fact 59). (MP3Board objects to Facts 60-61 where plaintiffs attempt to elevate a "possibility" into a certainty and Facts 62-63, based on the unsubstantiated opinion of Mr. Teitelbaum, whose company National Record Mart once considered purchasing MP3Board.) There is no way to connect advertising revenue or "traffic," viewed in isolation, to infringing activity. Advertising revenues and Internet traffic are achieved by skillful promotions regardless of whether the flow of visitors leads to copyright infringement. Accordingly, MP3Board submits that plaintiffs fail to establish the actual infringing activity that is necessary to support a finding of contribution.

2. Nature and extent of participation in alleged copyright infringement.

"[M]ere quantitative contribution cannot be the proper test to determine copyright liability * * * Rather the resolution of the issue * * * depends upon a determination of the function that [the alleged infringer] plays in the total [reproduction] process. * * *" *Gershwin Publishing*, supra, at 443 F.2d 1162, n. 8, quoting from *Fortnightly Corp.* supra at 392 U.S. 396-397 (all editing done in *Gershwin*). MP3Board submits that the "determination of the function" it plays in any infringement can be analyzed in terms of the "nature and extent of participation" of MP3Board in any alleged contribution. This factor emerges from the authorities, which also provide standards for evaluation of MP3Board's function.

In *Demetriades v. Kaufmann*, 690 F.Supp. 289, 294 (S.D.N.Y. 1988), the court quoted from the earlier *Gershwin* opinion and distinguished the result because of "the [*Gershwin*] promoter's '*pervasive participation*' in creating an audience for the artists" (emphasis added) and held that "The mere fact that the Doernberg defendants brokered a real estate transaction that ultimately was connected to a copyright infringement is not enough." "A simple knowledge and benefit test would case wide the net of third-party liability ensnaring individuals far too remotely or only tangentially involved in the infringement." *Id.*

The operator of a Community Antenna Television Service ("CATV") was exonerated from charges of copyright infringement in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 397, 88 S.Ct. 2084 (1968) because, without active, direct participation "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."

In *Netcom*, supra, the court quoted from a Nimmer treatise for the principle that "where information service is *less directly involved* in the enterprise of creating unauthorized copies, a finding of contributory infringement is not likely." 907 F.Supp. at 1374 (emphasis added) "**Such participation must be substantial.**" *Id.* at 1375 Assimilating the *Netcom* situation (i.e., prior to enactment of the DMCA) to the facts of this case, a court would never hold a service provider like AOL liable for contributory infringement involving MP3 file exchange between private parties, even though the magnitude of such file exchange over AOL is provably huge and even though AOL, through whose systems files are transferred, could install controlling filters more efficiently than MP3Board — because AOL's participation is passive and tangential.

The extent of participation was also considered significant by the court in *Napster*, supra, which found, e.g., that: "The content of the actual MP3 file is transferred over the Internet between users, not through the Napster servers. [evidentiary citation] **However, users would not be able to access the uploaded file names and corresponding routing data without signing on to the Napster system.**" 114 F.Supp.2d at 907 (emphasis added). "Without the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts." *Id.* at 920. Here, of course, there are many Internet resources that can substitute for MP3Board. Files are accessed through third-party sites.

The *Napster* court also referred to *Sega Enterprises, Ltd. v. MAPHIA*, supra at 948 F.Supp. 933, where the BBS "provided software, hardware and phone lines needed for uploading and downloading copyrighted material." *Napster, Id.* The MAPHIA operator "did more than provide the site and facilities for the known infringing conduct. He actively

solicited users to upload unauthorized games and provided a road map on his BBS for easy identification of SEGA games available for downloading." 948 F.Supp. at 933. The *Sega* court titled the pertinent section "*Sherman's participation in his users' activities.*" *Id.*

Similarly, in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996), the court held, **at the pleading stage**, that the complaint was sufficient because "it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the swap meet. ... [As] described by the plaintiffs, ...Cherry Auction actively strives to provide the environment and the market for counterfeit recordings to thrive. Its participation in the sales cannot be termed 'passive,' as Cherry Auction would prefer."

MP3Board submits that its participation in any infringement is more closely similar to that of the brokers in *Demetriades*, the CATV operator in *Fortnightly* or a service provider like AOL than that of Napster, the MAPHIA BBS or a swap meet whose services are essential to infringement and that actively strives to provide them. MP3Board **is a tool** used by those who want to download music files and, as such, any participation is passive rather than active. It is a tool **equivalent to** or **less powerful than** many other tools for the location of music files. Any participation by MP3Board in its users' infringement is tangential to their direct downloading from a **third-party website**. People who want to infringe may come to MP3Board to accomplish their purposes, but they also use computers, service providers and all the technology that is involved in the Internet. Plaintiffs' accusations are not based on facts showing actual participation in infringement, but only a desire on the part of MP3Board to provide general services. There is, in fact, no evidence at all of actual participation

For these reasons, the factor of "nature and extent of participation" weighs against a finding of materiality.

3. Intentional Infringing Purpose. In the second sentence of their memorandum, on page 1, plaintiffs accuse MP3Board of having "had one primary purpose— to make it as simple as possible for Internet users to locate, copy and distribute illegal copies of famous sound recordings." In the next sentence, plaintiffs declare that MP3Board "deliberately aided users in copying and distributing plaintiffs' sound recordings." There is not one shred of

evidence to support these accusations. On the contrary, the evidence indisputably establishes a contrary fact: *at worst, MP3Board is and was indifferent as to the status of copyrights.* In large measure, MP3Board's indifference is simply a result of automated systems that cannot distinguish between copyrighted recordings and those posted by or with the consent of their owners. In addition, MP3Board does not want to bear the burden and the risks of ascertaining copyright status. In fact, MP3Board was not wholly indifferent: it deleted specific links when properly notified and invented LinkBlaster. Whether or not indifference is laudable, *plaintiffs cannot twist indifference into purposeful action.*

Examination of the authorities demonstrates that *intentionally infringing purpose* has been considered of importance in affixing liability for contributory copyright infringement. Such intentionally infringing purpose contrasts sharply with MP3Board's general indifference.

Napster declared its intentions in materials emphasized by the court. "Defendant's internal documents indicate that it seeks to take over, or at least threaten, plaintiffs' role in the promotion and distribution of music." 119 F.Supp.2d at 903. One document foresaw the possibility of Napster "usurping the record industry as we know it today" and another stated that "[W]e are not just making *pirated* music available but also pushing demand." *Id.* (emphasis in court opinion).

In *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp.2d 1290, 1292 (D. Utah 1999), defendants not only "placed a notice on their website that the Handbook was online, and gave three website addresses of websites containing the material defendants were ordered to remove from their website" but also "posted emails on their website that encouraged browsing those websites, printing copies of the Handbook and sending the Handbook to others."

The defendant in *Sega* "actively solicited users to upload unauthorized games," which amounted to "encouragement," 948 F.Supp. at 933, while in *Fonovisa*, Cherry Auction had "agreed to provide the Sheriff with identifying information from each vendor" and then broke its word. 76 F.3d at 261.

In contrast, in *Demetriades* (where defendant brokers obtained summary judgment), "There is no indication that the Doernberg defendants made these or other any other contacts with the *purpose* of providing any direct assistance in expediting the copying process." (emphasis added) Similarly, in *Netcom* at 907 F.Supp. 1369-1370, the court refused to affix liability to parties that "do no more than operate or implement a system that is essential if Usenet messages are to be widely distributed. ... ***Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.***" (emphasis added)

The subjective element of purpose or volition is absent here. Plaintiffs cannot manufacture it out of whole cloth. The absence of an intentionally infringing purpose weighs in favor of granting summary judgment in favor of MP3Board. In any event, plaintiffs' motion must be denied.

C. Public Policies Stated by the Supreme Court and Congress Weigh in Favor of MP3Board.

In contrast to the detailed dissection needed for the analytic approach, applicable policies are easily stated and directly applied.

1. Judicial reluctance to expand copyright protections. In *Sony Corp. v. Universal City Studios* at 464 U.S. 430-431, the Supreme Court noted that "From its beginning, the law of copyright has developed in response to significant changes in technology" and that "it has been the Congress that has fashioned the new rules that new technology made necessary."

"The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurrent theme. [Citations] Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

"In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests." *Id.*

Although the Supreme Court spoke of "vicarious liability" at 464 U.S. 439, it was plainly referring to the doctrine of contributory infringement:

"If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material. ***There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory.***" (emphasis added)

The Supreme Court accordingly explained "our rejection of respondents' unprecedented attempt to impose liability upon the distribution of copying equipment," *Id.* at 421, and implicitly adopted the district court's opinion that "this kind of 'contribution,' if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management." *Id.* at 426.

These principles apply *a fortiori* here. Congress has not spoken. [The DMCA specifically provides that a failure to qualify for immunity under its provisions "shall not bear adversely upon the consideration of a defense by a service provider that the service provider's conduct is not infringing under this title or any other defense." 17 U.S.C. § 512(l)]

The United States Supreme Court recommends judicial reluctance in expanding copyright protection in an area of new technology and such policy supports a determination in favor of MP3Board.

2. The Telecommunications Act of 1996. Although part of Communications Decency Act of 1996 was declared unconstitutional in *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329 (1997), the Congressional Findings and Policies stated in 47 U.S.C. § 230 remain in force and were applied, e.g., in *Zeran v. America On-Line, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied* 118 U.S. 2341. These Findings and Policies, although not directly on point in the circumstances presented here, should be considered in connection with the consequences of a ruling affixing liability to an information service provider, search engine and publisher of technological materials like MP3Board.

"(a) Findings

The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great deal of control over the information they receive, as well as the potential for even greater control in the future as the technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly, Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

"(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services."

Application of these policies is straightforward. The Internet is young, rapidly developing and of enormous potential importance. Encouragement of "user control" is in the national interest as is protection of "unique opportunities for cultural development" with "a minimum of government regulation." There is a national policy in favor of the preservation of "the vibrant and competitive free market that presently exists for the Internet ... unfettered by Federal or State regulation." These policies underscore the importance of "judicial reluctance to expand the protections of copyright" in connection with the Internet without a clear Congressional mandate, as discussed above. (*Sony*) Stifling the development of the Internet through imposition of "contributory copyright liability" on automated systems is contrary to the national interest as defined by Congress. The facts here do not support such an imposition.

There are additional policies that were set forth in MP3Board's motion for summary judgment that correlate closely with those set forth above, including (1) limiting copyright protections so as not to stifle individual creativity and technological innovation, (2) the constitutional mandate to avoid chilling free speech and (3) the protection of automated

systems that have substantial noninfringing uses. For all these reasons, a judgment in favor of MP3Board should be entered.

III. THERE IS A TRIABLE ISSUE OF FACT AS TO MP3BOARD'S KNOWLEDGE OF INFRINGING ACTIVITIES BY ITS USERS.

A. Plaintiffs' Argument Based on MP3Board's Operations. Plaintiffs want to make the appearance of suggestive words displayed through MP3Board's automated systems into a finding of constructive knowledge of copyright infringement as a matter of law. This amounts to the imposition of a duty on the part of MP3Board to conduct surveillance of its automated systems and to monitor the entire Internet, all to protect plaintiffs' interests. No authority supports the imposition of that kind of duty that would expand without any limit or boundary. An imposition of such a duty on MP3Board is particularly inappropriate when plaintiffs have taken no serious steps, other than accusing others, to protect themselves. Plaintiffs and RIAA provide no centralized database that would assist an organization like MP3Board that wants to respect copyrights.

The defects in an argument that "suggestion" and "statistical probability" add up to *knowledge* are demonstrated by the language plaintiffs must resort to, as found on pages 8 and 9 of their memorandum, such as "bore titles indicating that they were sound recordings owned by RIAA's member companies," "beacons of infringement," "inflammatory signals," and "touted their unauthorized nature through descriptions." Plaintiffs argue that MP3Board must bear the burden of pursuing indications, tracking beacons, taking the temperature of signals and interpreting descriptions, that MP3Board must judge each such indication, beacon, signal and description as its peril and must sail repeatedly, like a compulsive Odysseus, between the Scylla of copyright infringement and the Charybdis of improper censorship.

None of plaintiffs' authorities supports their expansive view of constructive knowledge. In *A & M Records, Inc. v. Abdallah*, 948 F.Supp. 1449, 1454 (C.D. Cal. 1996), defendant provided "blank cassettes timed to specific lengths in order to produce marketable counterfeit tapes" and the direct infringer "met with Mr. Abdallah and informed him about the nature of the counterfeit operation, and the two agreed on a price for blank time-loaded cassettes."

In *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F.Supp. 503, 513 (N.D. Ohio 1997), the court concluded:

"Defendant *themselves* ... ***distributed and displayed*** copies of PEI photographs in derogation of PEI's copyrights. This finding hinges on two crucial facts: (1) Defendants' policy of encouraging subscribers to upload files, including adult photographs, onto the system, and (2) Defendants' policy of using a screening procedure in which [defendants'] employees ***viewed*** all files in the upload file and ***moved them*** into the generally available files for subscribers." (emphasis in original)

Such "crucial facts" are entirely absent here. In *Sega Enterprises v. MAPHIA*, 857 F.Supp. 679 (N.D. Cal. 1994), further proceedings at 948 F.Supp. 923 (N.D. Cal. 1996), defendants ran a "computer BBS which ***contained and distributed*** pirated and unauthorized versions of Sega's video game software." 948 F.Supp. at 927 (emphasis added).

Defendants in *RSO Records, Inc. v. Peri*, 596 F.Supp. 849, 857-858 (S.D.N.Y. 1984) were intimately involved with the direct infringers, were willing to provide services for an FBI investigatory agent they believed to be a counterfeiter, took the Fifth Amendment when later questioned by the FBI and engaged in "photographing of the packaging of copyrighted records and tapes" and producing products for which there was "simply no other realistically imaginable use" except for infringement. Judgment was rendered after a court trial lasting seven days. 596 F.Supp. at 852 Such a case does not support a finding of knowledge as a matter of law or undisputed fact.

Plaintiffs state that *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F.Supp. 399, 404 (S.D.N.Y. 1966) stands for the proposition that "defendants should have known of infringing activities." Plaintiffs' memorandum at 11. What the court said was that "The foregoing allegations ... ***would be sufficient to permit a finding*** that Metlis & Lebow had either actual or constructive knowledge of Mark-Fi's infringement." (emphasis added) At 256 F.Supp. 405, the court found that "an issue of fact" was presented as to whether a "practice was so pervasive that a service packaging organization should have been alerted to the illicit operation upon the basis of its activities and relationship to Mark-Fi."

MP3Board is ***not*** seeking summary judgment finding that it lacked knowledge of infringing activity carried out by visitors to its site. But the facts do not support a finding of

knowledge *as a matter of law* based upon suggestive language and "statistical likelihood." To hold that knowledge is established as a matter of law would render every search engine and web resource providing "MP3-related content" equally liable. There is a middle ground staked out by the phrase "triable issue of fact." Plaintiff's motion must be denied.

B. Plaintiffs' Argument Based on RIAA Notifications.

Many of the facts pertinent to the RIAA notifications have been brought to the court's attention in connection with MP3Board's opposition to the RIAA's motion for summary judgment. In brief, MP3Board submits that the RIAA notifications based on ambiguous references to artists and song titles were not sufficient to establish actual knowledge as a matter of law. Plaintiffs are arguing that, given such ambiguous notifications, MP3Board was *compelled to conduct an independent investigation* of hundreds of thousands of references in MP3Board's database that is continually reconstructed.

Such arguments seek to turn every information provider into an unpaid censor bound to work for plaintiffs' benefit, except, of course, those information providers controlled by RIAA member companies or those who are willing, ready and able to pay "protection money" for the privilege of operating without the threat or burden of litigation.

In *Netcom*, at 907 F.Supp. 1374, the court ruled:

"Where a BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defense, *the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement*, the operator's lack of knowledge will be found reasonable and there will be no liability for contributory infringement for allowing the continued distribution of works on its system. (emphasis added)

Here, there are no "copyright notices" on MP3 files and RIAA did nothing more than list artists and/or song titles, declare that these were "representative samples" and "demand the removal of any and all links to sound recordings that are copyrighted by our member companies." (RIAA letter of May 25, 2000, emphasis in original)

As shown more fully in MP3Board's memorandum in opposition to the RIAA's motion, none of the RIAA notices provided the identification of material and information reasonably sufficient to enable anyone to locate the infringing material. Under the DMCA, 17 U.S.C.

§ 512(c)(3)(B)(i), "a notification ... that fails to comply substantially with the provisions [defining the requirements for proper notification] shall not be considered ... in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which the infringing activity is apparent."

Just as important, 17 U.S.C. § 512 is titled "***Limitations on liability relating to material online.***" As stated in § 512(l): "The failure of a service provider's conduct to qualify for limitation of liability under this section ***shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.***" (emphasis added) For this reason, plaintiffs also miss the mark at page 14 of their memorandum, devoted to lengthy quotations from *ALS Scan, Inc. v. Remarq Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001) (district court erred in dismissing claims of infringement on asserted basis of insufficient DMCA notification and held that neither side was entitled to summary judgment).

The ***undisputed evidence demonstrates*** that on every occasion when MP3Board was provided with an ***actual, specific link*** to a file said to be infringing, MP3Board did investigate and did delete infringing links. Not all the ambiguous references turned out to be valid. As shown in the RIAA's undisputed facts 41-46, an ambiguous reference to "Third Blind Eye" led MP3Board to a link to an ***authorized file***. MP3Board's refusal to delete links wholesale on the strength of ambiguous references was justified.

The simple fact is that neither plaintiffs nor RIAA has provided a resource that identifies ***authorized files***. Not having kept up with the flood of authorized files posted by RIAA member companies, they want to throw the entire burden onto information providers like MP3Board and to turn the confusion that they have engendered into a badge of illegitimacy. Such a reversal of burdens would not support a preliminary injunction (which is undoubtedly one reason why one has not been sought); it cannot support a finding as a ***matter of law*** that MP3Board must bear either the onus of investigation or the stigma of infringer.

Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 259). on which plaintiffs rely, is seriously inapposite. "The district court dismissed on the pleadings," 76 F.3d at 260

and the court of appeals reversed, holding that "plaintiff adequately alleged the element of knowledge in this case." 76 F.3d at 264. Plaintiffs want to turn the case into a caricature of itself, making a legally sufficient pleading into a finding of liability as a matter of law.

Plaintiffs are entitled to argue to a jury that "indications," "beacons," "signals" and "descriptions" add up to "knowledge." Plaintiffs are entitled to argue to a jury that every time RIAA sends a letter, the recipient must hasten to track down every reference and comply with every demand. Plaintiffs are not entitled to rulings on such arguments as a matter of law. Their motion as to the knowledge element must be denied.

IV. THERE IS NO SHOWING OF SUPERVISION OR CONTROL THAT CAN SUSTAIN A FINDING OF VICARIOUS LIABILITY AND MP3BOARD'S ALLEGED FINANCIAL INTEREST IN INFRINGING ACTIVITIES RISES TO NOTHING MORE THAN A TRIABLE ISSUE OF FACT.

It is difficult to give serious consideration to plaintiffs' argument that, as a matter of law, MP3Board had the right and ability to supervise and control its users. The obvious and undisputed facts are that MP3Board's visitors come and go as they please; they do not register with MP3Board; MP3Board does not know their identities, does not follow the course of their travels over the Internet and has no sanctions to apply even if it desired to police them.

Examination of the authorities demonstrates the lack of merit in plaintiffs' arguments. *Demetriades v. Kaufmann*, 690 F.Supp. 289, 292 (S.D.N.Y. 1988) traced vicarious copyright liability to the tort concept of *respondeat superior*. *Respondeat superior* is based on a policy of requiring a principal to oversee and be responsible for the torts of his or her agent. Such a policy cannot be applied to an open website and its visitors. In its own motion for summary judgment, MP3Board discussed other authorities that mandate a ruling in its favor, including *Banff Ltd. v. Limited, Inc.*, 869 F.Supp. 1103, 1009 (S.D.N.Y. 1994). There is no need fully to repeat that discussion here.

Lines of cases reviewed in *Shapiro, Bernstein & Co. v. H. L. Green & Co.*, 316 F.2d 304, 307-308 (2d Cir. 1963) and *Fonovisa*, supra, at 76 F.3d 262, involved landlord-tenant relationships and "dance hall cases" where a proprietor allowed a band or orchestra to play

unlicensed works. Such a *physical nexus for supervision and control* was the basis for the ruling in *Fonovisa* that defendants were not entitled to a judgment on the pleadings where "the vendors occupied small booths within premises that Cherry Auction controlled and patrolled" and in which counterfeit recordings were sold. 76 F.3d at 262. In *Napster*, as shown above, defendant provided the equivalent of such a *physical nexus* by reason of its intimate involvement with its registered users; "Napster's reserved 'right and ability' to police is cabined by the system's current architecture." 239 F.3d 1024. Here there are no "small booths" and no "cabin." There is simply an open field where individuals come and go and where policing would be constitutionally suspect and privacy-invasive even if MP3Board wanted to attempt it. If policing were attempted, visitors would simply go elsewhere.

The proposition that MP3Board has the "right and ability to supervise and control" or "police" its users cannot be legitimately asserted. On the contrary, the facts show that proposition is so indefensible that MP3Board is entitled to a summary judgment on this issue.

Plaintiffs' argument that "MP3Board Had a Direct Financial Interest in Users' Infringing Activities" is not suitable for summary judgment. *Roy Export Company Establishment v. Trustees of Columbia University*, 344 F.Supp. 1350, 1352-1353 (S.D.N.Y. 1972), involving unlicensed films shown by an autonomous organization of students, supports a judgment in favor of MP3Board. Any connection between accusations of infringing activity and MP3Board's income is tenuous and speculative, based on "statistical likelihood," made-up representations about "the lynchpin of MP3Board's business plan" (sic) and unsupported assertions of counsel. It was MP3Board's system, not its "traffic" that appealed to National Record Mart and National Record Mart's CEO was not qualified to render an opinion about the reasons for that "traffic."

This case differs from those cited by plaintiffs both procedurally and on the facts. *Napster* involved a preliminary injunction and plaintiffs there presented solid evidence of a kind totally absent here. Appellate courts in *Fonovisa* and *Shapiro* reversed lower court decisions entered in favor of defendants as a matter of law. Other cases cited by plaintiffs are even more remote, involving defendants' ownership of direct infringers and/or evidentiary rulings.

The inability of plaintiffs to make a requisite showing on the first element of "right and ability to supervise and control" renders the issue of financial interest or benefit moot. Even if it were not moot, there is an insufficient showing for a judgment in plaintiffs' favor.

CONCLUSION

For the foregoing reasons, plaintiffs motion and each part thereof should be denied. MP3Board is entitled to summary judgment as requested in its motion.

Dated: April 23, 2001

Respectfully submitted,

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PROOF OF SERVICE

Arista Records, Inc., et al. V. MP3Board, Inc.
Case No. 00 CV 4660 (SHS)
US District Court, Southern District of New York

I am over the age of 18 years, employed in the county of Marin, and not a party to the within action; my business address is 1050 Northgate Drive, Suite 520, San Rafael, CA 94903.

On April 23, 2001, I served the within:

**DEFENDANT MP3BOARD'S MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT; MP3BOARD'S STATEMENT OF MATERIAL FACTS IN
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT;
DECLARATION OF IRA P. ROTHKEN IN SUPPORT OF OPPOSITION;
DECLARATION OF ROBERT KOVSKY IN SUPPORT OF OPPOSITION**

on the parties in said action via Facsimile and by U.S. Priority Mail, by placing a copy in a sealed, postage prepaid envelope and depositing in a U.S. Mailbox and by Facsimile addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 23, 2001, at San Rafael, California.