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David Balaban
Fordham University School of Law

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David Balaban*

INTRODUCTION

Just a few years ago, the little known phenomenon of the Internet was in its infancy. However, in the last decade of the twentieth century the Internet exploded into an awesome resource of information that is constantly redefining the capabilities of communication, and consequently, the way that business is conducted around the world.[1] With sales over the Internet projected to reach the $717 billion mark in 2001, up from $377 billion in 2000, the Internet has opened up new markets and streamlined old markets.[2] It allows for the transfer of mass amounts of information between users, perhaps even millions of users, with the mere click of a mouse.[3]

However, the growth of the Internet has not been entirely without drawbacks, especially regarding privacy and the protection of

* David Balaban graduated from Rutgers University in 1998 having completed Bachelors Degrees in Music and in Finance. Forthwith, he earned his juris doctorate at Fordham School of Law in 2001. While at Fordham, Mr. Balaban attended undergraduate classes at the Juilliard School of Music. In 2000, he distinguished himself as a winner of the annual Entertainment Law Initiative legal writing contest sponsored by the National Academy of Recording Arts and Sciences (NARAS) and the American Bar Association (ABA).

[1] *See generally* Center for Research in Electronic Commerce, Graduate School of Business, the University of Texas at Austin, and Cisco Systems, *Measuring the Internet Economy,* (Jan. 2001), *at* http://www.Internetindicators.com (last visited Mar. 2001).

[2] *See NUA Analysis: Internet Generated Revenue 1996-2000*, *at* http://www.nua.com/surveys/analysis/graphs_charts/comparisons/total_revenue_generated_2 (last visited Oct. 2001).

[3] *See How Many Online?, at* http://www.nua.com/surveys/how_many_online/index.html (last visited Oct. 2001).

intellectual property.[4] While the increased capacity for worldwide communication has provided many advances for our society, it also poses many problems in its regulation.[5] The anonymity and general unaccountability of users on the Internet coupled with inadequate security measures protecting information transfers hold far-reaching implications concerning the accessibility of privileged, private, or copyrighted information.[6] For example, how secure are credit card and social security numbers submitted on web pages to facilitate purchases via the Internet? What processes are available to web purchasers to verify that orders placed over the Internet have gone through a legitimate service and not through fraudulent Internet services created by scam artists? Moreover, do we really want our children to be able to view pornography with the ease that they can access the latest baseball scores?

In the area of copyright law nowhere has the advent of the Internet stirred up more controversy than in the music industry, specifically, in the distribution of audio works over the Internet.[7] Whereas the growth of the Internet has spawned many other industries, the new medium has the potential to devastate the music industry because it provides an easy means to perpetuate the unauthorized dissemination of copyrighted musical works.[8] Taken to its theoretical limit, without copyright protection, a single copy of a sound recording could be uploaded onto the Internet to provide an unlimited number of perfect but unlicensed copies available for free distribution.[9] Just

[4] *See* Beth Givens, *Internet Privacy: Privacy Expectations in a High Tech World*, 16 COMPUTER & HIGH TECH L.J. 347, 351 (May 2001); *Fighting Fire with Fire: How SDMI Saves Intellectual Property, at* http://pacificresearch.org/issues/tech/eclips9908.html (last visited Oct. 2001).

[5] Some issues of concern on the Internet are gambling, the policy for granting domain names, spamming, security, encryption, First Amendment freedom of speech issues, privacy, and content rating and filtering. *See generally* John F. Delaney & M. Lorraine Ford, *Representing the New Media Company 2001 The Law of The Internet: A Summary of U.S. Internet Caselaw And Legal Developments*, 631 PLI/Pat 31 (Jan. 2001).

[6] *Id.* at 46-59.

[7] *See* Heather D. Rafter, William Sloan Coats, John G. Given & Vickie L. Feeman, *Streaming into the Future: Music and Video Online*, 590 PLI/Pat 559, 563-64 (Feb. 2000).

[8] *Supra* note 1, at 9-10.

[9] *See* Rex S. Heike and Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, COMPUTER LAW, July 1994, at 6. The combination of digital audio technology and networks such as the Internet produces an environment where music can

one compact disc (hereinafter "CD"), once uploaded onto the Internet, can be reproduced at no cost to supply the entire world with unauthorized copies of an artist's songs.[10] Moreover, after a CD has been uploaded onto the Internet, potential purchasers with access to the Internet may have little reason to buy physical copies of the CD. After all, the music is available for free on the Internet. Presently, the music industry has not been able to enforce a reliable means by which to collect royalties for works distributed over the Internet.[11] Hence, artists may find themselves uncompensated for distribution of their music over the new medium.[12]

In fact, Internet services that perpetuate the unauthorized copying of music, such as Napster and Gnutella were created for the sole purpose of facilitating the transfer of music files over the Internet.[13] They give users an easy way of "pirating", or downloading, sound recordings without properly compensating the musical artists who created the recordings.[14] Since it has been estimated that, if left

easily be distributed to an unlimited amount of computer users. *See also* Heather D. Rafter, William Sloan Coats, John G. Given, and Vickie L. Feeman, *20th Annual Institute on Computer Law Streaming Into the Future: Music and Video Online*, 590 PLI/Pat 559, at 569 (Feb. 2000). In accordance with the first sale doctrine a person is permitted to buy a song from the Internet, such as a song downloaded in MP3 format, and then sell or give that same copy of the song to a friend. However, the first sale doctrine does not permit a person to sell or otherwise transfer possession of a song obtained unlawfully, such as a pirated version. Likewise, the first sale doctrine would not allow a person to sell or give away a reproduction of a MP3 file if that same person only paid for one copy and was keeping the original download on his or her own computer.

[10] *See Fighting Fire with Fire: How SDMI Saves Intellectual Property*, *at* http://pacificresearch.org/issues/tech/eclips9908.html (last visited Oct. 2001).

[11] *See* Dawn C. Chmielewski, *Record Labels, Music Publishers at Impasse* (Aug. 23, 2001), *at* http://www.siliconvalley.com/docs/news/svtop/music082401.htm (last visited Nov. 2001).

[12] *See Internet Music Debate Plays Out on Capitol Hill* (July 11, 2000), *at* http://www.cnn.com/2000/ALLPOLITICS/stories/07/11/napster.hearing/ (last visited Nov. 2001).

[13] *See* Damien A. Riehl, *Electronic Commerce in the 21st Century: Article Peer-to-Peer Distribution System: Will Napster, Gnutella, and Freenet Create a Copyright Nirvana or an Gehenna?*, 27 WM. MITCHELL L. REV. 1761, 1767 (2001). Napster and Gnutella link users with other users for the purpose of facilitating the copying of music files. For more information on Napster, Gnutella, and Freenet, *see* zeropaid.com, *at* http://www.zeropaid.com (last visited Nov. 2000).

[14] *See* Robert C. Edwards, *The Napster Litigation: Who Said Nothing in this World is Free? A&M Records, Inc. v. Napster, Inc.: Problems Presented, Solutions Explored, and*

unfettered by ensuing lawsuits, Napster would have had 75 million users by the end of 2000, the music industry has been ardently seeking an equitable balance between copyright owners of sound recordings and the dissemination of their works over the Internet.[15] Without such a balance, the advent of the Internet has the potential to usurp "the record industry as we know it today," leaving musical artists uncompensated for their efforts and redefining the relationships among musicians, record labels, music publishers, and the performing rights societies.[16]

Moreover, the result of litigation in the music industry will have far-reaching implications in other industries as well. The publishing, television, and film industries all have a stake in the development of copyright law on the Internet.[17] For example, although only in its infancy, the publishing industry has already begun the process of online e-book distribution.[18] As of July 2000 Stephen King became one of the first authors to experiment in publishing his books solely on the Internet when he made a portion of his latest serial novel, *The Plant*, available on his website.[19] King experimented with distributing his intellectual property for compensation over the Internet by asking his readers to send him payment after downloading any of the installments of the serial, which he planned to release gradually in eight separate parts.[20] King asked for $1.00 for each download of any of the first three installments in the story and $2.00 for each download of any of the last five installments.[21] Furthermore, he stated that he would continue to release serials of the

Answers Posed, 89 KY. L.J. 835 (2000/2001).

[15] A&M Records, Inc. v. Napster, Inc., 2000 WL 1170106 (N.D. Cal. 2000).

[16] *Id.* at *903.

[17] *See* Jack Valenti, *There's No Free Hollywood*, N.Y. TIMES, June 21, 2000, *at* http://www.eff.org/IP/Video/20000621_valenti_oped.html (last visited Oct. 2001).

[18] *Id.* For evolving case law concerning publication of e-books on the Internet, see Random House v. Rosetta Books, 150 F. Supp. 2d 613 (S.D.N.Y. 2001).

[19] Stephen King's serial was available for download at http://www.stephenking.com (last visited Mar. 2001). Stephen King charged $1.00 to download each of the first three installments in the serial and $2.00 per download for installments IV, V, and VI.

[20] *Id.* King originally speculated that *The Plant* would continue for eight installments and cost readers only $13.00. *See also* Paul Simon, *Stephen King Temporarily Prunes 'Plant' E-Novel*, THE BOSTON HERALD, November 30, 2000, at 24.

[21] *See* Neil J. Rosini & Howard M. Singer, *Music and the Internet*, 545 PLI/Pat 865, 871.

story on the Internet only so long as 75% of the persons who downloaded each serial of the story sent him payment.[22] In the first week of its availability online, an estimated 76.4% of readers, representing 116,200 downloads, mailed King $1.00.[23] However, after a fair showing on the first serial it is estimated that King received payment for just 70% of the downloads of his second serial,[24] which further degraded to only a 46% payment rate by the fourth installment.[25] With such a drop-off in the payment rate, whether or not King will complete the serial is a question that only he can answer.

What this means for the publishing industry is unclear, but following from Stephen King's example, soon entire books or even entire libraries representing multitudes of copyrighted works may be posted on the Internet.[26] Similar advances in technology will modernize the television and film industries. With the impending invention of broadband technology, it is very likely that in the near future users will be able to upload and download even full length movies over the Internet with relative ease.[27]

Some have argued, however, that free downloads available over the Internet will come at the direct expense of visual and recording

[22] *What percentage of downloaders paid for Stephen King's "The Plant"?*, *at* http://bookspot.com/know/kingplant.htm (last visited Aug. 2000).

[23] *Id.*

[24] *Id.*

[25] *See* M.J. Rose, *Stephen King's "Plant" Uprooted* (Nov. 28, 2000), *at* http://www.wired.com/news/culture/0,1284,40356,00.html (last visited Mar. 2001).

[26] *See* Robert Hertzberg, *A Good E-Read?; For now, Electronic Books Will Make their Mark in Education*, INTERNET WORLD (Nov. 1, 2000); s*ee also* http://www.stephenking.com/download.html (last visited Nov. 2001); *Stephen King Buries the Plant*, *at* http://cbsnews.com/now/story/0,1597,253187-412,00.shtml (last visited Nov. 2001). It seems that, at least for the moment in light of the dwindling payments, Stephen King has decided not to continue with installments in the series. Having already written the first six installments, King has decided to devote his energies toward other endeavors for the time being.

[27] To a limited extent the technology already exists in the form of DivX, a new technology that allows PC users with high-speed DSL lines or cable modems to download feature films from the Internet in less than two hours. However, DivX was pulled from the market because of its failure to implement adequate security measures to protect copyrighted content. *See* Clyde H. Wilson, Jr. & M. Susan Wilson, *Cyberspace Litigation: Chasing the Information Highway Bandits*, 36-OCT JTLATRIAL 48, at 50 (Oct. 2000).

artists, reducing the incentive for these creative talents to produce treasured works.[28] Due to the free dissemination of copyrighted works over the Internet, in the long run, our society will suffer from the loss of art, in all of its forms, reducing the profound positive influence that art has upon our culture.[29] In short, the millennium of the Internet will eliminate the modern day Michelangelo because his services are no longer valued. Thus, it is imperative for the prosperity of our art and culture that a balance is accorded between copyright owners and the distribution of their works via the Internet.

This note will examine the existing landscape of copyright law concerning the distribution of audio and video works over the Internet and suggest that a compromise be struck between copyright owners and the distribution of their works over the Internet. Part II elaborates upon the means available to freely disseminate copyrighted audio works over the Internet. Part III contains a summary of the more prominent legislative acts that pertain to the distribution of audio and video works.[30] Part IV analyzes recent case law, and Part V argues that a balance must be accorded between copyright owners and the distribution of their works.

II. THE MEANS BEHIND THE DIGITAL DISTRIBUTION OF AUDIO WORKS

Music can be transmitted over the Internet in two methods, either through audio streaming, which is somewhat analogous to radio

[28] *Supra* note 17. *See also* responses to Valenti's article at the Electronic Frontier Foundation (EFF), *at* http://www.eff.org and http://www.eff.org/IP/Video (last visited Nov. 2000).

[29] *See* Note, *Visual Artists' Rights in a Digital Age*, 107 HARV. L. REV. 1977, 1991 (June 1994).

[30] One legislative act that this note will not review more thoroughly is the No Electronic Theft ("NET") Act. *See* Pub. L. No. 105-147, 111 Stat. 2678. Enacted in December of 1997, the NET Act introduced a number of changes to titles 17 and 18 of the U.S. Code that essentially reversed the decision in United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994). Under the NET Act, computer-based infringement of copyrighted material is now subject to criminal prosecution. This is so regardless of whether the defendant derives a direct financial benefit from the acts of misappropriation. Thus, persons pirating audio and/or video works over the Internet may now be prosecuted as criminals under the NET Act.

broadcasting, or through MP3 files, which are downloaded and may be played repeatedly, similar to CD's or tapes.[31] Traditionally, only performances of music made available to a public audience have been subject to copyright law.[32] However, the American Society of Composers, Authors and Publishers (hereinafter "ASCAP") has, to date, successfully argued that every transmission of music on the Internet constitutes a public performance.[33] ASCAP has argued that the public audience for a sound recording transmitted over the Internet does not need to be located in one place, or even one time.[34] Since music on the Internet can often be downloaded at the convenience of the listener, it need not be broadcast to several listeners at a given time in order to constitute a performance.[35] It is enough that a substantial number of listeners will, over time, access the recording.[36] Thus, copyright law applies to all forms of music transmitted over the Internet.

[31] *See Internet & Wireless Transmission: Music on the Web*, *at* http://www.riaa.org/Audio_Media_2.cfm (last visited Oct. 2001). Audio streaming, also known as webcasting, is the continuous playing of music in real time broadcasts over the Internet. Listeners to webcasts, much like in television and radio, listen to webcasts as they are broadcast. MP3 files, on the other hand, are downloaded by a user for repeated listening at his convenience, more like the playing use of CD's, tapes, and records. Once an MP3 file is downloaded it can be listened to fully independent of the source of the downloaded file.

[32] *See* 17 U.S.C. § 101 (1994) for a definition of public performance: "To perform or display the 'copyrighted work publicly' means: (a) to perform or display it at a place open to the public or where a substantial number of persons are gathered, (b) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (a) above or to the public, by means of any device or process."

[33] *See* Comments of the American Society of Composers, Authors and Publishers on the Preliminary Draft of the Report of the Working Group on Intellectual Property Rights, submitted and filed with the U.S. Patent and Trademark Office on September 7, 1994 (Comments filed on behalf of Marilyn Bergman, President, ASCAP, on the Green Paper by the Working Group on Intellectual Property Rights and the National Information Infrastructure); *Hearing on H.R. 2441 Before the Subcomm. on Courts and Intellectual Prop.*, 104th Cong. (1996) (statement of Frances W. Preston, President and CEO, Broadcast Music, Inc.) *available at* http://www.house.gov/judiciary/462.htm (last visited Oct. 2001).

[34] *See id.*

[35] *See id.*

[36] *See id.*

A. Audio Streaming

Audio streaming is the live flow of music in digital form over the Internet by an Internet Service Provider (hereinafter "ISP").[37] Audio streaming is somewhat analogous to radio broadcasting in that music is broadcast over the Internet for immediate listening.[38] Much like radio, music transmitted in audio streams is presently inferior in quality to that of a CD.[39] Nevertheless, the technology is likely to improve to the point where streaming audio can be broadcast and subsequently recorded while retaining the quality of a conventional CD.[40]

B. MP3 Downloads of Individual Computer Files

Individual computer files, on the other hand, are copies of music that are near to the quality of CD's.[41] Individual files are compressed recordings of music that occupy only a small amount of memory on a computer.[42] Some formats for these recordings are MP3, a2b,

[37] *See Business 2.0: Glossary*, *at* http://www.business2.com/glossary/1,1652,S,FF.html (last visited Oct. 2001).

[38] On Dec. 11, 2000 the Copyright Office came out with a new ruling concerning the broadcast of music over the Internet via audio streaming and webcasting. *See* 37 C.F.R. § 201 (2000).

[39] Heather D. Rafter, William Sloan Coats, Vickie L. Feeman & John G. Given, *Streaming into the Future: Music and Video Online*, 611 PLI/Pat 395 at 400 (2000).

[40] *See* Bob Godwin Jones, *Emerging Technologies: Real-time Audio and Video Playback on the Web*, Language Learning & Technology, July 1997, at 5, *at* http://polyglot.cal.msu.edu/111+/volinum1/emerging.htm (last visited Oct. 2001).

[41] *See MP3 & Real Audio How-to*, *at* http://www.salon.com/audio/2000/10/02/help/ (last visited Oct. 2001).

[42] MP3 files compress music by utilizing audio coding and psychoacoustic compression to remove redundant and irrelevant parts of a sound signal that the human ear, for the most part, does not hear. However, compression algorithms are not perfect and may result in a degradation of the sound quality of the music, most notable to those with highly trained ears. MP3 files accomplish compression by reducing the bit rate for music of 1411.2 kbps of stereo music by a factor of 10 to 14 down to 112-128 kbps. For example, under normal conditions an uncompressed three-minute song will take up approximately 32 megabytes of space. By reducing the bit rate, MP3 compression reduces the amount of space needed down to approximately 3 megabytes of space. For further information, *see How MP3 Files Work*, *at* http://www.howstuffworks.com/mp3.htm (last visited Mar. 2001).

RealAudio, and LiquidAudio files.[43] Of these formats, MP3, which was originally created for the purpose of compressing motion picture files, has become the most popular.[44] MP3 files download much faster than the uncompressed .wav ("wave") files that they replaced and cut download times from up to two hours to less than five or ten minutes per song.[45] Nonetheless, MP3 files occupy only a fraction of the space of .wav files on a hard drive, thereby making them highly desirable in an age where hard drive memory is available at a relatively low cost.[46]

C. File-sharing: Napster and Gnutella Facilitate the Widespread Downloading of MP3 Files.

File-sharing software, available over the Internet, makes it easy to download and thereby distribute music on the Internet in mass levels at no cost to the user, often without providing for compensation to copyright owners for the widespread distribution of their musical works.[47] File-sharing is available free of charge to the user via various websites, such that persons who have downloaded the necessary software can log-on to the Internet and share MP3 music files with other users who are simultaneously logged on to the system.[48] Napster, a start-up company based in San Mateo, California, and the less user-friendly Gnutella, were among the first

[43] *See* Neil J. Rosini & Howard M. Singer, *Music and The Internet 1. Technologies Used In Delivering Music On The Net 2. Summary Of Online Rights, Sources, and Licenses Under Copyright For Music and Sound Recordings 3. Online and Summary Of The Digital Performance Right In Sound Recordings Act Of 1995 As Amended By The Digital Millennium Copyright Act Of 1998 4. ASCAP Experimental License Agreement For Internet Sites On The World Wide Web—Release 2.0 5. BMI Web Site Music Performance Agreement 6. Music Download Questionnaire*, 545 PLI/Pat 865, 870-71 (Jan. 1999).

[44] *See* Whit Andrews, *Downloadable Files Hit Mainstream*, INTERNET WORLD, Apr. 12, 1999. Incidentally, MP3 stands for Motion Picture Experts Group ("MPEG") one layer three.

[45] *Supra* note 42, *at* http://www.howstuffworks.com/mp3.htm (last visited Mar. 2001).

[46] *Id.*

[47] *Supra* note 13, at 1779. Some other popular file swapping services are Freenet and Aimster. *See* John Borland, *File-Swapping Aimster to Tap Into ICQ, Napster*, *at* http://www.news.cnet.com/news/0-1005-200-2776806.html (last visited Dec. 2000).

[48] For a listing of file-sharing services, visit http://www.zeropaid.com (last visited Dec. 2000). *See also supra* note 47.

to offer file-sharing services and have received much press recently in light of recent litigation against Napster.[49]

File-sharing services such as Napster provide "peer-to-peer" (also known as P2P) file-sharing over the Internet.[50] Peer-to-peer file-sharing, made possible through particular software applications, allows account holders to conduct relatively sophisticated searches for music files containing songs from their favorite artists on the hard drives of millions of other anonymous users.[51] Thus, Napster's peer-to-peer filing system, which is run from a centralized location, Napster's website, connects users to one another and facilitates the searching and downloading of music files.[52]

How do music files get onto the Internet in the first place? Converting music from a standard CD into MP3 format for distribution via Napster or Gnutella is a simple process. The required software is available at no cost from many sources, including Napster.[53] The software allows users to "rip", or copy, a song from a CD and convert it into MP3 format. Once the music is in MP3 format, it can easily be uploaded onto the Napster system and is available for others to copy at their discretion. Furthermore, once a sound recording has been uploaded onto the Internet, it can be downloaded by millions of users with little to no sound degradation.[54] Unlike tapes or photocopies, even a fifth or one-

[49] *See How Napster Works*, *at* http://www.howstuffworks.com/napster4.htm (last visited Mar. 2001). *See also* A&M Records, Inc. v. Napster, Inc., 2000 WL 1170106, at *1 (N.D. Cal. 2000).

[50] *See How Napster Works*, *at* http://www.howstuffworks.com/napster4.htm (last visited Mar. 2001).

[51] *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000) (citing Def.'s Mot. for Summ. J.) [hereinafter *Napster I*].

[52] John Borland, *File-Swapping Aimster to Tap into ICQ, Napster*, CNET News.com, September 14, 2000, *at* http://news.cnet.com/news/0-1005-200-2776806.html (last visited Oct. 2001). Gnutella is very similar to Napster in its ability to allow users to share files, but differs primarily in that file-sharing software for Gnutella shifts from computer to computer and is not run primarily from any one website or location.

[53] *See supra* note 8. Visit http://www.zeropaid.com for other sources that provide the necessary software for uploading music (last visited Sept. 2001).

[54] *See How MP3 Files Work*, *at* http://www.howstuffworks.com (last visited Mar. 2001).

thousandth generation copy of an MP3 sound recording will be virtually identical to the original.[55]

III. LEGISLATION: THE BATTLE BEGINS

The recording industry has always been concerned with the consumer's ability to copy and distribute music without compensation to recording artists.[56] Before the creation of the Internet, the technology that first enabled the consumer to make his own copies of music came with the commercial exploitation of magnetic tapes.[57] Although the first magnetic tape recorder was developed in 1898, it wasn't until the middle of the twentieth century that tape recorders became a commercially viable product.[58] For the

[55] Tamber Christian, *Internet Caching: Something to Think About*, 67 UMKC L. REV. 477 (1999) (stating that unlike copying from cassette, materials copied from the Internet retain the same high quality as the original and do not decrease in quality with each additional copy made).

[56] In 1908 musicians and composers began lobbying Congress for protection from the uncompensated distribution of their works following on the heels of the first U.S. court decision concerning the copying of music. *See* White-Smith Music Pub. Co. v. Apollo Co., 290 U.S. 1 (1908), holding that perforated rolls of paper used in automatic player pianos to play musical compositions are not copies of musical compositions and therefore do not infringe upon the rights of copyright owners. As a result of their lobbying, mechanical compulsory licenses were introduced into U.S. copyright law for the first time in the 1909 Copyright Act. Soon after, in 1914, ASCAP was founded by Irving Berlin, among other musicians, as a performing rights society to protect musicians' rights.

[57] For some very informative websites detailing the history of sound recording, including the introduction into the marketplace of magnetic tapes and digital recording equipment, see Steve Schoenherr, *Recording Technology History*, *at* http://history.acusd.edu/gen/recording/notes.html (last visited Mar. 2001); *Jones Telecommunications & Multimedia Encyclopedia Audio Recording: History and Development*, *at* http://www.digitalcentury.com/encyclo/update/audiohd.html (last visited Mar. 2001); and *Sound Recording History*, *at* http://www.inventors.about.com/science/inventors/library/inventors/blsoundrecording.htm?terms=phonograph (last visited Mar. 2001).

[58] *See Sound Recording History*, *at* http://inventors.about.com/library/inventors/blsoundrecording.htm (last visited Nov. 2001). The first magnetic recording device was invented by Valdemar Poulsen in 1898. Poulsen's device recorded sound onto magnetized steel piano wire. Prior to the invention of Poulsen's magnetic recording device, Thomas Edison created the first recording medium, the cylinder phonograph, in 1877. The first magnetic tape recording device was created during World War II by Joseph Begun. *See* http://www.uspto.gov/web/offices/ac/ahrpa/opa/pulse/9807.htm (last visited Nov. 2001).

first time, during the 1960's, consumers could buy tape recorders and make recordings of music at their own discretion.[59] Still, the recording technology remained imperfect.[60] Tape recordings did not fully and accurately capture the essence of musical works.[61] Since successive copies of tapes tended to degrade in sound quality even further, the consumer's ability to distribute music to others was very limited, ensuring the need for consumers to purchase originals of the sound recordings.[62]

However, in the late 1980's manufacturers of recording devices developed the digital audio tape (hereinafter "DAT"), which was the first technology to permit consumers to make perfect copies of sound recordings.[63] At the time of its development, much like the invention of MP3 files, the invention of the DAT concerned the music industry.[64] DAT enabled a consumer to make perfect copies of music and then distribute the copies to others.[65] In turn, these people could then make perfect copies of their copies to distribute to yet more people, and so on down the line without ever compensating the recording artists for what may inevitably be mass distribution of the musical work.[66]

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[59] *See* Steve Schoenherr, *Recording Technology History*, *at* http://history.acusd.edu/gen/recording/notes.html (last visited Nov. 2001). Philips introduced its first compact audio cassette in 1963, which sold the next year in the U.S. along with the Norelco Carry-Corder dictation machine. At about the same time, the eight track recording medium also made its debut.

[60] *See* William Sloan Coats, et al., *PLI's Sixth Annual Institute for Intellectual Property Law: Streaming Into the Future: Music and Video Online*, 616 PLI/Pat 149, 164 (2000).

[61] *See* H.R. REP. NO. 104-274, at 12 (1995) (stating that consumers have embraced digital recordings because of their superior sound quality).

[62] *See* Christopher Yang & William W. Fisher III, *Peer-to-Peer Copying* (Berkman Center for Internet & Society at Harvard Law School 2001), *at* http://con.law.harvard.edu/ilaw/P2P/ (stating that records and cassettes are subject to wear and tear, and multiple generation copies often suffer from poor quality, thereby reducing the threat of large scale high quality piracy).

[63] *See supra* note 60.

[64] *See* H.R. REP. NO. 102-873, pt. 2, at 2 (1992).

[65] *See id.*

[66] *See id.*

A. The Audio Home Recording Act of 1992

In response to the invention of DAT technology, the record labels joined together in worldwide negotiations in 1987.[67] Two years later, after extensive lobbying to gain support from other factions in the music industry, such as music publishers, songwriters, and the performing rights societies, the music industry banded together to lobby Congress for additional copyright protection.[68] Congress, hearing the plea of the music industry, passed the Audio Home Recording Act (hereinafter "AHRA") into legislation in October of 1992.[69]

The AHRA strikes a balance between the owners of copyrights in sound recordings and the manufacturers of recording equipment.[70] On the one hand, it provides manufacturers and distributors of digital and analog audio recording devices protection from copyright infringement actions and thereby promotes the sale of digital and analog recording devices.[71] However, in exchange for the limitations that this places upon the music industry, the AHRA requires manufacturers and distributors of digital audio recording devices and media (hereinafter "DART") that are imported to or distributed in the U.S. to contribute to a royalty fund deposited with the Register of Copyrights.[72] The royalties from the DART fund provide compensation to recording artists, copyright owners, and music publishers that hold copyrights in sound recordings.[73]

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[67] *See id.*; *see also supra* note 60.

[68] *See supra* note 60, at 165.

[69] Audio Home Recording Act of 1992, Pub. L. No. 102-563, § 1623, 106 Stat. 4237 (1992).

[70] *See supra* note 63, at 165. *See* H.R. REP. No. 104-274 (1995) (describing background and need for legislation).

[71] 17 U.S.C. § 1008 (1994).

[72] *See Recent Development In the Legislature/In the Agencies Copyright: Copyright Office Modifies CARP Distribution Order*, 9 No. 4 JPROPR 34 (1997); *see also* 17 U.S.C. §§ 1003-1004 (1994).

[73] *See* 17 U.S.C. § 1006 (1994).

1. Distribution of the DART Fund

Prior to allocating money to individual claimants, the DART fund is divided into Sound Recording Funds, Musical Works Funds and their respective sub-funds.[74] Payments from the Sound Recording Funds and the Musical Works Funds are subsequently distributed to interested claimants pursuant to a negotiated settlement or a distribution order by the Library of Congress following a distribution proceeding by a Copyright Arbitration Royalty Panel (hereinafter "CARP").[75] In the absence of a negotiated settlement, the AHRA establishes the percentages for each fund and sub-fund, and directs the CARP's to determine the appropriate distribution amounts to which each claimant is entitled.[76]

The distribution of DART funds occurs in two phases. In Phase I of the distribution process, royalties from the funds are apportioned among eight classes of claimants.[77] In Phase II, awards are then made to individual copyright owners within each of the classes.[78] If, at either phase, a controversy arises regarding the appropriate disposition of all or a portion of the royalties, the Librarian convenes

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[74] *Id.*

[75] *Id.*

[76] *Id.* For more information on the royalty rates established by the AHRA, *see* DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (1997).

[77] *See* Distribution of 1990, 1991, and 1992 Cable Royalties, 61 Fed. Reg. 55, 655 (Oct. 28, 1996). The eight classes have traditionally been the: (1) Program Suppliers, which are the copyright owners of syndicated television series, movies, and television specials; (2) Joint Sports Claimants, which are the copyright owners of live telecasts of professional and college team sports; (3) National Association of Broadcasters (also known as "Commercial Television"), which are the copyright owners of programs—typically news and local interest programs—produced by broadcast stations; (4) Public Broadcasting Service (also known as "Noncommercial Television"), which are the copyright owners of all programming broadcast by the Public Broadcasting Service that do not fall within another category; (5) Devotional Claimants, which are copyright owners of syndicated programs with a religious theme that do not fall within another category; (6) Canadian Claimants, which are the copyright owners of programs broadcast on Canadian stations that do not fall within another category; (7) Music Claimants, which are the copyright owners of musical works broadcast on all programming, as represented by the performing rights societies ASCAP, BMI and SESAC; and (8) National Public Radio, representing the copyright owners of all programs broadcast on National Public Radio stations that do not fall within the Music Claimants category.

[78] *See id.*

a CARP to propose a settlement.[79] For example, in a Phase II proceeding within the Music Claimants class, the copyright owners represented by ASCAP may be in controversy with the copyright owners represented by BMI as to the division of royalties allotted to the Music Claimants category after the conclusion of the Phase I proceeding.[80] If such a controversy exists, the Librarian would conduct a Phase II proceeding under the same provisions of the Copyright Act applicable to the Phase I proceeding.[81]

2. Serial Copyright Management System

The AHRA also requires that each DAT device incorporate a copy control mechanism, either the Serial Copy Management System (hereinafter "SCMS") or any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.[82] This provision protects copyright owners from an economic loss by preventing subsequent copies of a musical work that would otherwise result in an unlimited amount of permissible copies of their works. The AHRA allows unlimited first generation copies of music to be made from the original recording, but prevents recording a copy from a copy.[83]

3. An Exemption for Computer Hard Drives

Notably, however, the Ninth Circuit Court of Appeals in *Recording Indus. Ass'n of Am. v. Diamond Multimedia* has interpreted the AHRA as wholly exempting computer hard drives and MP3 files copied onto computer hard drives from its provisions.[84] Prior to the Ninth Circuit's decision, the AHRA

[79] *See id.*
[80] *Id.*
[81] 17 U.S.C. § 801-803 (1994).
[82] *Id.* at § 1002 (1994).
[83] 138 CONG. REC. H9029 at 9043 (daily ed. Sept. 22, 1992).
[84] 180 F.3d 1072, 1078 (9th Cir. 1999) [hereinafter *Diamond II*]. *See* discussion *infra* Part IV(A). Some have argued that the Ninth Circuit's determination does not conform with

already exempted professional devices such as dictation machines, answering machines, and other recording devices whose "primary purpose" is the fixation of non-musical sounds.[85] In its decision, the Ninth Circuit extended this exemption to include computer hard drives, stating that the primary purpose of a computer is not to make digital recordings of music and therefore, the AHRA does not govern the copying of music files to and from computer hard drives.[86] The Ninth Circuit, citing 17 U.S.C. § 1008, asserted that such a result was in keeping with the underlying purpose of the AHRA to allow consumers to make copies of audio recordings for their private, noncommercial use.[87] Furthermore, citing *Sony Corp. v. Universal Studios, Inc.*, where time-shifting by users of home video recorders was held to be fair use, the Ninth Circuit suggested that the MP3 player in question, the Rio player, merely performs the equally innocuous function of "space-shifting" music from a computer's hard drive into a portable player.[88]

B. The Digital Performance Right in Sound Recordings Act of 1995

Although the AHRA may have created an effective balance between manufacturers of recording equipment and the music industry, as noted above, it did not sufficiently address music distributed through computers via the Internet.[89] Moreover, the

the underlying purpose of the AHRA and that the drafters of the AHRA did not intend to exclude music fixed on computer hard drives from the definition of digital musical recording under the AHRA. *See* Brendan M. Schulman, *The Song Heard 'Round the World: The Copyright Implications of MP3s and the Future of Digital Music*, 12 HARV. J.L. & TECH. 589, 608-10 (1999); Alex Alleman, *Manifestation of an AHRA Malfunction: The Uncertain Status of MP3 Under Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 79 TEX. L. REV. 189 (2000).

[85] 17 U.S.C. § 1001(3)(B).

[86] *See Diamond II*, 180 F.3d at 1077.

[87] 17 U.S.C. § 1008 (exempting, among other instances, the noncommercial copying of music from the bounds of the AHRA). *See Diamond II*, 180 F.3d at 1079.

[88] *See Diamond II*, 180 F.3d at 1079. *See also infra* Part IV(A) and Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 455 (1984) (holding to be fair use the "time-shifting" of copyrighted material by VCR's, allowing VCR owners to tape programs for later viewing).

[89] Current copyright law is inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of sound recordings and musical works

AHRA, and prior copyright law concerning recording artists, primarily addressed the musician's need to protect against the uncompensated physical distribution of albums, in the form of records, tapes, and CD's, and not the digital distribution of music over the Internet.[90] Copyright law prior to the creation of the Internet, including the Sound Recording Act Amendment of 1971 (granting musicians copyright protection in sound recordings),[91] the 1976 Copyright Act,[92] and the AHRA, could not have anticipated the growth of the Internet and the distribution of sound recordings thereof.

Nevertheless, researchers estimate that Internet sales of music represented 2.4% of all sales in the music industry for the year 2000, which may grow to 25% of revenues (totaling $1.25 billion) by the year 2005.[93] Important to the music industry, the advent of the Internet began a shift in sales away from the physical sale of albums toward the digital distribution of music, leaving artists without legislation supporting their need for compensation from music distributed over the new medium.[94] In response to the shift away from physical album sales, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (hereinafter "DPRA").[95]

and, thus, to protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues derived from traditional record sales. In particular, recording artists and record companies cannot be effectively protected unless copyright law recognizes at least a limited performance right in sound recordings. *See supra* note 7, at 579-82.

[90] *See id*. at 580-81.

[91] Pub. L. No. 92-140, 85 Stat. 391 (1971).

[92] 17 U.S.C. § 106.

[93] Laura Carr, *Net Music Sales Are Still Ringing*, The Standard, August 21, 2000, *at* http://www.thestandard.com/research/metrics/display/0,2799,17774,00.html (last visited Nov. 2000).

[94] S. REP. No. 104-128 (1995). *See also* June Chung, *The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music's New Form of Distribution*, 39 ARIZ. L. REV. 1361, 1365 (1997).

[95] Pub. L. No. 104-39, 109 Stat. 336 (1995).

1. Recording Artists Need Digital Performance Rights.

Traditionally, sound recordings have included two distinct copyrights: a copyright in the underlying musical composition to be performed on a recording and a copyright in the physical sound recording itself.[96] Generally, the songwriter, composer, or his designated music publisher owns the copyright in the underlying musical composition, which includes a performance right, and the record label (which pays royalties to the recording artist) owns the copyright in the sound recording, which has not traditionally included a performance right.[97] Since radio stations have not traditionally had to pay for a performance right to broadcast music, when a song is played on the radio the owner of the copyright in the musical composition receives compensation for a performance of his music, but the record label, the artists, and their producers do not receive compensation.[98] For example, Madonna recorded the song "American Pie" composed by Don McLean. However, unless the parties have specifically negotiated a supervening agreement, only Don McLean receives royalties for the radio station's performance of the music because he, or his designated music publisher, owns the underlying copyright in the music. Madonna receives royalties only from the sale of physical copies of the recording in the form of CD's, tapes, and records and does not receive compensation directly from the broadcast.

Perhaps one reason why performance rights were not granted prior to the DPRA is the status quo in radio broadcasting. Radio stations have argued since well before the advent of the Internet that they provide free advertisement for recording artists through performances of an artist's works during radio broadcasts.[99] Their

[96] *See* Bob Kohn, *A Primer On The Law of Webcasting and Digital Music Delivery*, 20 No. 4 ENT. L. REP. 4 (1998).

[97] *See id.*; *see also supra* note 32 (defining "performance" of a musical work).

[98] *See* Bob Kohn, *A Primer On The Law of Webcasting and Digital Music Delivery*, 20 No. 4 ENT. L. REP. 4 (1998).

[99] *See* Whitmark v. Bamberger, 291 F. 776 (D.C.N.J. 1923); Stuart Talley, *Performance Rights in Sound Recordings: Is There Justification In The Age Of Digital Broadcasting?*, 28 BEVERLY HILLS BAR ASS'N J. 79, 85 (1994); *see also* Jeffrey A. Abrahamson, *Tuning Up For A New Musical Age: Sound Recording Copyright Protection in a Digital Environment*,

argument is that free advertisement popularizes a recording artist's music and induces further sales of his albums, for which the artist will receive compensation.[100] Therefore, because recording artists will receive compensation from increased album sales, the radio stations argue that they should not have to further compensate recording artists by paying for a performance right to broadcast music.[101] Historically the reasoning of the radio broadcasters has been a matter of controversy and undergone severe criticism, including a report by the Register of Copyrights suggesting that Congress should grant "a performance right to the copyright owners of sound recordings."[102] Congress, however, chose not to address the granting of performing rights until the passage of the DPRA into legislation.[103] Moreover, under the traditional regime, radio stations have not had to pay for a performance right for analog broadcasts of music and recording artists have had to rely upon compensation only from the physical sale of CD's, tapes, and records.[104]

However, with the rapid expansion of the Internet, recording artists have an increasing need for performance rights because the digital distribution of music, in the form of MP3 files, has disrupted the recording artists' ability to receive royalties from physical album sales.[105] The introduction of the Internet has begun the shift away

25 AIPLA Q.J. 181, 183 (1997).

[100] *See* Talley, *supra* note 99.

[101] *See id.* It should be noted that although radio stations have been successful in lobbying against compensating artists for analog broadcasts of music, radio stations have not been as successful in lobbying against compensating artists for digital webcasts of music. In December of 2000, the Copyright Office, with perhaps questionable authority, took the position that radio stations are not exempt from copyright owners' digital performance rights in sound recordings for music broadcast over the Internet. *See Public Performance of Sound Recordings: Definition of a Service*, *at* http://www.loc.gov/copyright/fedreg/2000/65fr77292.pdf (last visited Nov. 2001). Regulations set forth by the Copyright Office further defining "broadcast transmissions" for the purposes of 17 U.S.C. § 114 would require radio stations to pay a statutory fee for a compulsory license to broadcast music over the Internet or negotiate with the artists for a license. *Id. See also* 17 U.S.C. § 115. At least one court has upheld the determination of the Copyright Office and granted summary judgment against the radio stations. *See* Bonneville Int'l Corp. v. Peters, 153 F. Supp. 2d 763 (E.D. Pa. 2001).

[102] *Talley*, *supra* note 99, at 85.

[103] *Id.*

[104] 17 U.S.C. § 114(d)(1)(A) (1994 & Supp. V 1999).

[105] *See* David Balaban, *Music in the Digital Millennium: The Effects of the Digital*

from the physical distribution of music toward the digital distribution of musical works.[106] Whereas sales of music are reportedly up 20% overall in the last two years, a study by Michael Fine, CEO of SoundScan, indicates that sales near college areas where Napster has been widespread are down 4%.[107] This could have exponential effects upon the music industry as the younger generations, more apt to acquire music over the Internet, begin to displace the older generations as the major purchasers of music.

Moreover, although the transmission of music over the Internet disrupted the established arrangement for compensating musicians, prior to the enactment of the DPRA recording artists did not have a performance right in music transmitted over the Internet to reflect the shift in the distribution of music from a physical medium to a digital medium. Not only could a recording artist's music be distributed easily via the Internet to many potential consumers, displacing the artist's album sales, but existing legislation did not support compensating the artist for Internet transmissions of his works.

2. Provisions of the DPRA

Acknowledging that the transmission of music over the Internet could cause a shift away from the sale of physical copies of music toward the digital distribution of music, Congress granted musicians a digital performance right in sound recordings.[108] In November 1995, President Clinton signed into law the DPRA, which amended §§ 106 and 114 of the Copyright Act and, for the first time,

Millennium Copyright Act of 1998, 7 UCLA ENT. L. REV. 311 (1998).

[106] *See* John Borland & Rachel Konrad, *Study Finds Napster Use May Cut Into Record Sales*, CNET News.com, May 25, 2000, *at* http://news.cnet.com/news/0-1005-200-1945948.html (last visited Aug. 2001). For background information on SoundScan, *see generally supra* note 60, at 161. SoundScan measures how many records are sold at retail. This information is used for *Billboard's* charts.

[107] *Id.* One reason for the displacement of physical album sales may be that transmissions of MP3 files always result in a perfect additional copy of the music being created and distributed to a new listener. Compare this to radio where a listener merely has the option to make a tape recording of a radio broadcast that will invariably suffer in sound quality due to the broadcast mechanism. *See supra* note 28.

[108] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. §§ 106(6), 114 (1995)).

attempted to give musicians limited protection in sound recordings performed over the Internet.[109] The DPRA was the first act to specifically address the implications of digital transmissions of music.[110] It increased protection for owners of sound recording copyrights in order to compensate for the shift in the distribution of music from physical to digital recordings.[111]

Specifically, the DPRA extended the rights of recording artists to include "digital phonorecord deliveries" and granted, under § 106(6), a new "exclusive right to perform the copyrighted work publicly by means of a digital audio transmission."[112] Digital phonorecord deliveries, under the DPRA, include all transmissions, such as transmissions of MP3 files that result in a specifically identifiable reproduction of music.[113] Furthermore, the DPRA extends performing rights to include some transmissions that may not typically result in a digital phonorecord delivery.[114]

Of those transmissions that do not result in a digital phonorecord delivery, the DPRA distinguishes between interactive and non-interactive services to determine which transmissions are required to be licensed.[115] An interactive service is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient.[116] Services such as audio-on-demand, pay-per-listen, and celestial jukebox transmissions are all examples of interactive services.[117] Interactive services must be licensed under the DPRA because Congress felt that

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[109] *See* 17 U.S.C. §§ 106(6), 114 (1994 & Supp. V 1999).

[110] June Chung, *The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music's New Form of Distribution*, 39 ARIZ. L. REV. 1361, 1365 (1997). *See* Pub. L. No. 104-39, 109 Stat. 336 (1995).

[111] *See* H.R. REP. NO. 104-274 (1995) (describing background and need for legislation).

[112] *See* Nancy A. Bloom, *Protecting Copyright Owners of Digital Music—No More Free Access to Cyber Tunes*, 45 JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A. 179, 200 (1997). *See also* 17 U.S.C. § 115(d) (1995).

[113] *See* Pub. L. No. 104-39, 109 Stat. 336 (1995). *See also* 17 U.S.C. § 115 (1994 & Supp. V 1999).

[114] *See supra* note 72.

[115] *See* 17 U.S.C. § 114(d) (1994 & Supp. V 1999).

[116] *See* H.R. REP. NO. 104-274 (1995).

[117] David Nimmer, *Ignoring The Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 246 (2000).

a consumer who is given the option to listen to a song at his convenience might have little reason to purchase that song in a store.[118] Therefore, interactive services were thought to be likely to displace physical album sales.

Concerning non-interactive services, those with transmissions that do not result in a digital phonorecord delivery yet are not part of an interactive service, there are two types: subscription transmissions and non-subscription transmissions (to be discussed below).[119] A subscription transmission is one that is controlled and limited to particular recipients, and for which the recipients must pay consideration.[120] Because Congress felt that some subscription services were more likely to displace physical album sales than others, subscription transmissions are further subdivided into two categories: (i) voluntary subscription transmissions and (ii) compulsory subscription transmissions.[121]

Both types of subscription transmissions require licenses from the owner of the copyrights in the sound recordings, typically record companies.[122] However, the payment scheme is different for each of the two types of subscription licenses.[123] For voluntary subscription transmissions, the record companies are free to proscribe all applicable fees or to decline to license the music at all.[124] For compulsory subscription transmissions that satisfy the requirements of § 114, the record companies are subject to compulsory licensing at a statutory fee that serves as a maximum amount charged.[125]

Meanwhile, non-subscription broadcasts do not require licenses under the DPRA.[126] Non-subscription transmissions are defined to include any transmission that is not a subscription transmission.[127]

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118 *See* H.R. REP. NO. 104-274 (1995).
119 *See* 17 U.S.C. § 114(d).
120 *See* H.R. REP. NO. 104-274 (1995). *See also* S. REP. NO. 104-128 (1995).
121 *See* H.R. REP. NO. 104-274 (1995).
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *See* H.R. REP. NO. 104-274 (1995).
127 *Id.*

Whereas Congress felt that the risk of a music service that consumers pay for on a subscription basis poses a moderate to high risk of replacing the sales of records, Congress also felt that transmissions that are on a non-subscription basis, like traditional style radio broadcasts over the internet, posed only a low risk of replacing record sales.[128] While the Copyright Office has since taken a somewhat contrary position, as originally enacted non-subscription broadcast transmissions by radio and television stations were exempted from licensing under the DPRA unless they were part of an interactive service.[129]

The classification of a transmission as an interactive, subscription, or non-subscription service determines whether the license should fall under a statutory compulsory rate, or must be individually negotiated and administered.[130] For example, for a non-interactive subscription service fulfilling the requirements of the DPRA, where the end user downloading the music is required to pay for transmission of a sound recording, the provider of the download to the user must pay a licensing fee.[131] However, non-interactive services, such as desktop broadcast sites that automatically play a sound recording, may be exempt from digital public performance fees.[132] Moreover, interactive services, such as a website that delivers sound recordings on demand, must negotiate a non-exclusive license fee for the transmission of music.[133]

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[128] *Id.*

[129] *Id. See supra* note 101. Regulations set forth by the Copyright Office in December 2000 further define "broadcast transmissions" for the purposes of 17 U.S.C. § 114 to require radio stations to pay a statutory fee for a compulsory license to broadcast music over the internet or negotiate with the artists for a license. *Id.*; *See* 17 U.S.C. § 115. At least one court has upheld the determination of the Copyright Office and granted summary judgment against the radio stations. *See Bonneville Int'l Corp v. Peters*, 153 F.Supp.2d. 763 (E.D. Pa. 2001).

[130] *See* H.R. REP. NO. 104-274 (1995).

[131] *Id.*

[132] 17 U.S.C. § 114(d) (1994 & Supp. V 1999). *See* Nancy A. Bloom, *Protecting Copyright Owners of Digital Music—No More Free Access to Cyber Tunes*, 45 JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A. 179 (1997).

[133] *See* Bloom, *supra* note 112, at 200.

3. The DPRA: A Watered Down Version of the Performance Right

Notably, because the DPRA represents a compromise between the recording industry and radio broadcasters who were largely concerned with the audio streaming of music, some have argued that it was so watered down by the time it was passed that its exceptions override its rules.[134] In particular, the act has been criticized for the limits imposed upon the grant of performance rights.[135] Most notably, as originally enacted the DPRA does not cover most instances of radio and television broadcasts of music.[136] Moreover, because of lobbying by broadcasters, the DPRA also excludes certain other services from paying royalties to copyright owners.[137] Therefore, it has been argued that the DPRA does not always grant owners of copyrights in sound recordings protection in situations where the digital transmission of music may compete with actual sales of sound recordings.[138]

C. The Digital Millennium Copyright Act of 1998

Because the DPRA left many gaps in legislation supporting the enforcement of copyright protection, especially for musical works over the Internet, Congress implemented the Digital Millennium Copyright Act (hereinafter "DMCA") in 1998.[139] The DMCA, a compromise between Internet Service Providers (hereinafter "ISP's") and copyright owners, implements two WIPO treaties and provides

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[134] Steven V. Podolsky, *Chasing the Future: Has the Digital Performance in Sound Recordings Act of 1995 Kept Pace with Technological Advances in Musical Performance, or is Copyright Law Lagging Behind?*, 21 HASTINGS COMM. & ENT. L.J. 651, 654, 674 (1999).

[135] *Id.* at 674.

[136] *Id.* But *see supra* note 101.

[137] *Supra* note 134, at 673-74.

[138] *Id.* at 674-75.

[139] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

increased protection for copyrighted material transmitted over the Internet.[140]

1. The Black Box Provision: Protection Against Technology Circumvention

One of the most important aspects of the DMCA is that it provides protection against the circumvention of technological methods implemented in order to further digital rights management.[141] These requirements, also known as a "black box" provision, provide important protection for sound recordings by prohibiting the circumvention of technological methods, such as encryption or watermarking, which control access to copyrighted works.[142] Primarily, the DMCA includes two anti-circumvention provisions under § 1201(a)(1) and § 1201(a)(2).[143] These provisions uphold encryption and watermarking by requiring that users must not interfere in any manner with standard "technical measure[s]" designed to protect or identify copyrighted works.[144] Furthermore, users cannot make available to others any measures developed to defeat such protections against unauthorized access to works.[145]

Encryption is like an electronic lock.[146] It can prevent persons that do not have the correct key, or password, from listening to a sound recording.[147] The downside to the encryption of sound recordings is

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[140] *See id.*

[141] *See* David Balaban, *Music in the Digital Millennium: The Effects of the Digital Millennium Copyright Act of 1998*, 7 UCLA ENT. L. REV. 311, 320-21 (2000).

[142] *Id.* at 321.

[143] Section 1201(a)(1) governs "[t]he act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work." 17 U.S.C. § 1201(a)(1) (1994 & Supp. V 1999). Section 1201(a)(2) supplements the prohibition against circumvention with prohibitions on creating and making available certain technologies developed or marketed to defeat technological protections against unauthorized access to a work. *See* 17 U.S.C. § 1201(a)(2)(A), (B), (C).

[144] *See* 17 U.S.C. § 1201(a)(1).

[145] *See* 17 U.S.C. § 1201(a)(2).

[146] *See* Rosemarie F. Jones, *Wet Footprints? Digital Watermarks: A Trail to the Copyright Infringer on the Internet*, 26 PEPP. L. REV. 559 (1999) (describing encryption as "longstanding means of protection").

[147] *Supra* note 141, at 321.

that once the correct password has been found it can be passed on along with the recording, rendering the encryption useless. Watermarks, on the other hand, are inaudible additions to music that inform devices that play music of the authenticity of a recording.[148] Watermarks can be used by search engines to determine which sound recordings are original and which are illegal copies.[149] They can also provide a trail by which owners of sound recordings can trace the distribution of unauthorized copies throughout the Internet.[150] Furthermore, watermarks cannot be removed from a sound recording without a conspicuous degradation in the quality of the recording.[151]

It is possible that encryption, watermarking, and other technological measures used for digital rights management could provide new, secure methods for the downloading of music.[152] This technology can give the music industry increased control over copies of music. For example, listeners may be permitted to make a copy of downloaded music solely for their own use or perhaps to give to a friend.[153] Technology can also make a recording available only for a limited time period.[154] It is conceivable that an industry standard could be set such that portable players would only play recordings that contain legitimate watermarks.[155] Many organizations, including AT&T, the originators of a2b, and Liquid Audio have experimented with secure digital downloading techniques that incorporate technology that would make this possible.[156]

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[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *See supra* note 21, at 871 (discussing copyright protection tools).

[153] *See* RIAA FAQ, *at* http://www.riaa.com/Music-SDMI-4.cfm (last visited Nov. 2000). *See also* SDMI FAQ, *at* http://www.sdmi.org/FAQ.htm (last visited Nov. 2000).

[154] *See* RIAA FAQ, *at* http://www.riaa.com/Music-SDMI-4.cfm (last visited Nov. 2000).

[155] *See id.* The Secure Digital Music Initiative [hereinafter "SDMI"], a forum of more than 160 companies and organizations representing a broad spectrum of information technology and consumer electronics businesses, is attempting to implement an industry-wide watermarking standard for devices that play music. New music to be distributed will contain watermarks. Compliant devices will be able to play these files, in addition to the existing MP3 files.

[156] *See id.*

However, whether security measures such as encryption and watermarking can be successful in application is a matter of debate. For example, in September of 2000 the Secure Digital Music Initiative (hereinafter "SDMI"), a collaboration including the "big five" record labels and over 160 companies, created for the task of implementing a form of digital protection architecture over music files, attempted to create a secure method for protecting copyrighted music and was met with mixed results.[157] After extensive research, the SDMI consortium developed six protection technologies and presented them to the hacking community, offering $10,000 as an incentive to anyone who could break any of the six technologies.[158] At first glance the results of the contest seemed promising. The official position of SDMI was that two of the 447 submissions to the contest were successful attacks upon a protective technology, but that only one of the attacks was significant because it could be repeated on additional pieces of music.[159]

Still, there are a number of reasons to doubt the success of the protective technologies. Computer experts from Princeton University, Rice University, and Xerox stand by their claim that they hacked through four of the technologies without significantly degrading the music.[160] They state that they did not submit their attacks for consideration in the final round of the contest and that therefore their successful attacks upon the protection systems were not included as part of the contest results.[161] Other experts claim that watermarks are, by definition, hackable, and that even if the watermarks in question did survive for a four-week long contest it

[157] *See* http://www.riaa.com/Music-SDMI-4.cfm (last visited Nov. 2000).

[158] *See* http://www.cs.princeton.edu/sip/sdmi/faq.html (last visited Nov. 2000); *see also* The Industry Standard's Beat Sheet, A Weekly Report on the Convergence of Music and the Net, *at* http://www.thestandard.com (Oct. 17, 2000).

[159] *See SDMI Continues Evaluation of Proposals for Phase II Technologies, at* http://www.sdmi.org/pr/VA_Nov_10_2000_PR.htm (last visited Nov. 2001). *See also* Sue Zeidler, *Hackers Win SDMI Prize*, Reuters (Nov. 28, 2000), *at* http://techtv.com/print/story/0,23102,3013825,00.html (last visited Dec. 2000).

[160] See Robert Lemos, *Secure Digital Music Hits a Sour Note*, ZDNet News (Oct. 23, 2000), *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2643884,00.html (last visited Dec. 2000).

[161] *See* Sue Ziedler, *Hackers Win SDMI Prize*, Reuters (Nov. 28, 2000), *at* http://techtv.com/print/story/0,23102,3013825,00.html (last visited Nov. 2001).

would only be a matter of time before the watermarks or any other protective technology could be effectively removed.[162] A last segment of the hacking community has argued that in determining the success of the attacks SDMI overemphasized the sound degradation of the hacked sound recordings. [163] If this argument has any basis then it is possible that the average listener might use the circumvention technologies, even those that did not survive the contest, to copy encrypted music files without noticing any degradation in the sound quality of the music.

2. Safe Harbors Limit the Liability of Internet Service Providers.

Although the DMCA attempts to protect copyrighted material under the black box provision in consideration of ISP's, it severely limits the circumstances under which ISP's can be found liable for the infringement of sound recordings and does not require them to police their sites.[164] The DMCA, which provides for strict liability for infringement of copyrights, provides four categories that limit the circumstances under which infringement occurs.[165] These categories, specified as "safe harbors", include: 1) Conduit Functions, 2) System Caching, 3) User Storage, and 4) Information Location Tools.[166]

The Conduit Function provision limits an ISP's liability for routing sound recordings from one point to another.[167] This safe harbor resolves the discrepancy in case law between *Religious Technology Center v. Netcom* and *Playboy v. Frena.*[168] The Court in *Netcom* dismissed the possibility of direct or vicarious liability for an ISP

[162] *Id.*

[163] Robert Lemos, *Secure Digital Music Hits a Sour Note*, ZDNet News, Oct. 23, 2000, *at* http://www.zdnet.com/zdnn/stories/0,4586,2643884,00.html (last visited Dec. 2000).

[164] *See* 17 U.S.C. § 512 (1996 & Supp. V 2001).

[165] *Id.*

[166] *See id.*

[167] *See* Carolyn Andrepont, *The Digital Millennium Copyright Act of 1998*, U.S. COPYRIGHT OFFICE SUMMARY, Dec. 1998, at 9.

[168] *See* Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) and Religious Tech. Ctr. v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995).

that provided Internet access for a website that illegally distributed music over the Internet.[169] It held that an ISP is prone only to the lesser transgression of contributory infringement.[170] This contradicted the Court in *Frena*, which found direct infringement for a bulletin board service that, without knowledge of the infringement, provided Internet access for a subscriber that illegally posted copyrighted photographs from Playboy onto the Internet.[171] Under the DMCA, a transmission that occurs automatically, without any selection of material by the ISP, will not subject an ISP to liability.[172] This codifies the decision in *Netcom* and makes it harder to hold an ISP liable for distributing illegal sound recordings over the Internet.[173]

System Caching allows an ISP to make a temporary copy of a sound recording in order to provide quicker access for its users.[174] Courts have not yet addressed the copyright implications of permitting an ISP to temporarily fix a copy of a sound recording on its computer system. ISP's argue that fixation is necessary in order to speed up usage.[175] However, the court in *Mai Systems Corp. v. Peak Computer* held that a work fixed in a tangible means of expression is one that is "sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration."[176] Using this definition, cached sound recordings might have been prohibited under the Copyright Act of 1976.[177] However, under the DMCA, an ISP must limit access to the sound recording to only those people who satisfy the

[169] *Netcom*, 907 F. Supp. at 1372.
[170] *Id.* at 1375.
[171] *Frena*, 839 F. Supp. at 1559.
[172] 17 U.S.C. § 512(b)(1)(c) (1996).
[173] *See* Jennifer E. Markiewicz, *Seeking Shelter From the MP3 Storm: How Far Does the Digital Millennium Copyright Act Online Service Provider Liability Limitation Reach?*, 7 COMM. LAW CONSPECTUS 423, 436 (Summer 1999).
[174] *See* Tamber Christian, *Internet Caching: Something to Think About*, 67 UMKC L. REV. 477 (Spring 1999).
[175] *Id.* at 478.
[176] Mai Systems Corp. v. Peak Computer, 991 F.2d 511, 518 (9th Cir. 1993) (citing 17 U.S.C. § 101 (1976)).
[177] 17 U.S.C. § 101 (1976).

conditions imposed by the individual who posted the recording.[178] If the conditions are broad, then this may allow persons other than the intended recipient to access the sound recording.

User Storage provides the least protection for sound recordings and may be the most far-reaching in terms of the ISP functions to which it applies.[179] It insulates an ISP from liability for storing a copy of an infringing sound recording on its system at the direction of a third party.[180] This reinforces the contributory liability standard suggested in *Netcom.*[181] Under this safe harbor, an ISP could store an illegal copy of a sound recording on its network and allow the average user to access it. The only requirements for limited liability are that the ISP must not have actual knowledge or reason to know that the sound recording is infringing and may not receive a direct financial benefit from having the infringing material reside on its system.[182]

The Information Location Tools provision limits an ISP's liability for providing hyperlinks, online directories, and search engines that link a user to unauthorized copies of sound recordings.[183] The extent of protection for sound recordings under this section is unclear. For example, website operator and search engine, Lycos, claimed immunity from copyright liability under the DMCA.[184] Lycos has argued that it is immune because it merely provides a link to the location of sound files to its users and does not physically store the

[178] 17 U.S.C. § 512(b)(2)(D) (1996 & Supp. V 2001).

[179] *See id.* § 512(c) (1996 & Supp. V 2001). Pursuant to this provision, the popular Internet auction site Ebay won a summary judgment that it is not liable for copyright infringement under the DMCA to the extent that it does not have the right and ability to control infringing activity within the meaning of the DMCA. *See* Hendrickson v. Ebay, 2001 U.S. Dist. Lexis 14420 (C.D. Cal. 2001).

[180] 17 U.S.C. § 512 (b)(2)(D) (1996 & Supp. V 2001).

[181] 907 F. Supp. 1361 (N.D. Cal. 1995).

[182] 17 U.S.C. § 512 (b)(2)(D) (1996 & Supp. V 2001).

[183] *Id.* at § 512(d).

[184] *See* Markiewicz, *supra* note 173, at 425.

sound recordings on its servers.[185] So far the courts have not found much merit in Lycos' argument.[186]

IV. CASE LAW

A. RIAA v. Diamond Multimedia Systems[187]

Late in 1998 the Recording Industry Association of America, Inc. (hereinafter "RIAA"), in conjunction with the Alliance of Artists and Recording Companies brought suit against Diamond Multimedia Systems alleging violation of the AHRA.[188] The recording industry tried to get a preliminary injunction against Diamond Multimedia's introduction of the Rio Player into the marketplace, one of the first devices with the ability to detach from a computer and still play MP3 files.[189] The Rio player is a compact battery-operated music player that comes bundled with software that allows a user to rip music from a CD and change it into MP3 format for storage on a computer's hard drive.[190] By connecting the Rio player to a computer via a parallel port, the user can then transfer the MP3 files from the hard drive to the Rio Player itself.[191] Thus, the innovation of the Rio player is that it allows MP3 files, which had previously been confined only to use in conjunction with a computer, to be taken away from the computer. For the first time, MP3 files could be heard with the technology similar in purpose and function to a typical walkman.

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[185] *See* Patricia Jacobus, *Napster Suit Tests New Copyright Law*, *at* http://news.cnet.com/0~1005~200~1679581.html (last visited Nov. 2001).

[186] *See Napster I*, 114 F. Supp. 2d at 919 n.24. *But see* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1025 (9th Cir. 2001) [hereinafter *Napster II*].

[187] RIAA v. Diamond Multimedia Systems, 29 F. Supp. 2d 624 (C.D. Cal. 1998) [hereinafter *Diamond I*].

[188] *See id.*

[189] *Id.* at 625.

[190] *Id.*

[191] *Id.*

1. District Court

The District Court found in favor of Diamond Multimedia based on its interpretation of § 1001(11) that the "AHRA does not directly prohibit serial copying."[192] In terms of the Rio player, the District Court reasoned that a Rio player used in conjunction with a computer does, in fact, satisfy the definition of serial copying under § 1001(11) of the AHRA, but violates the Act only in a technical sense.[193] In its reasoning, the court divided serial copying into two steps: (1) a user rips a song from a CD, converts it into an MP3 file, and stores it on his hard drive; and (2) the user transfers the MP3 file to the Rio player.[194] Software had already been independently available to accomplish the first step, which was rather commonplace and had not invited litigation.[195] Therefore, the Court concerned itself primarily with the second step, which it considered to be the true innovation of the Rio player.[196]

Focusing on the Rio player itself and its role in facilitating the transfer of MP3 files, the District Court found that Diamond Multimedia's sole violation of the AHRA was that the Rio player was not compliant with § 1002, which requires that digital audio recording devices contain SCMS technology.[197] Concentrating on that aspect, the District Court found that incorporation of SCMS technology would "accomplish nothing" since MP3 files do not contain SCMS information.[198] Therefore, the Court found that a Rio player without SCMS technology was the functional equivalent of a Rio player with SCMS technology incorporated into it.[199] Thus, although the defendant's Rio player satisfied the definition of serial copying under the AHRA, the Rio player only violated the AHRA in a "technical sense."[200]

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192 *Diamond I*, 29 F. Supp. 2d at 631.
193 *Id.* at 632.
194 *Id.* at 631.
195 *Id.*
196 *Id.*
197 *Diamond I*, 29 F. Supp. 2d at 632.
198 *Id.*
199 *Id.*
200 *Id.*

Moreover, the District Court found that the AHRA does not directly prohibit serial copying, and the only wrongful conduct of the defendant was its failure to encode SCMS technology into the Rio player, a technical shortcoming.[201] The Court also found that the failure to encode the SCMS technology was not likely to encourage illegitimate uses of MP3 files since such uses were possible regardless of the Rio player and regardless of the SCMS technology.[202] Therefore, the wrongful act of the defendant was not linked to the irreparable harm claimed by the plaintiff.[203]

2. Ninth Circuit Court of Appeals

Perhaps unfortunate for recording artists, the opinion of the District Court was later expanded upon by the Ninth Circuit Court of Appeals, which went so far as to interpret the AHRA as specifically exempting computer hard drives from coverage under its provisions.[204] The Ninth Circuit Court of Appeals held that computer hard drives simply do not fall within the definition of "digital music recordings" as defined in § 1001 of the AHRA.[205] Under § 1001(5)(B) the AHRA specifically exempts from its provisions devices that are "material object[s] in which one or more computer programs are fixed."[206] The Ninth Circuit held that computer hard drives fall within the category of material objects and are exempted from the AHRA.[207]

The Court also noted that under § 1001(3), the "primary purpose" provision of the AHRA, the primary purpose of computers does not

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[201] *Id.*

[202] *Diamond I*, 29 F. Supp. 2d at 633.

[203] *Id.*

[204] *Diamond II*, 180 F.3d at 1078.

[205] *Id.* at 1078 (citing 17 U.S.C. § 1001(5)(A)) (defining a "digital musical recording" as "a material object (i) in which are fixed, in a digital recording format, *only sounds, and material, statements, or instructions incidental to those fixed sounds,* if any, and (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.") (emphasis supplied).

[206] 17 U.S.C. § 1001(5)(B) exempts "material objects in which one or more computer programs are fixed" from coverage by the AHRA.

[207] *Diamond II*, 180 F.3d at 1076.

include the making or copying of digital audio recordings.[208] Prior to the Ninth Circuit's decision, the AHRA already exempted professional devices such as dictation machines, answering machines, and other recording devices whose "primary purpose" is the fixation of non-musical sounds.[209] However, in its decision the Ninth Circuit extended this exemption to include computer hard drives, stating that the primary purpose of a computer is not to make digital recordings of music and therefore the AHRA does not govern the copying of music files to and from computer hard drives.[210] The primary purpose of a computer, according to the Ninth Circuit, "is to run various programs and to record the data necessary to run those programs and perform various tasks," not to record music.[211]

Citing 17 U.S.C. § 1008, the Ninth Circuit reasoned that the result of its decision is consistent with the purpose of the AHRA, to allow consumers to make copies of audio recordings for their private, noncommercial use.[212] Citing *Sony,* where time-shifting by users of home video recorders was held to be fair use, the Ninth Circuit also suggested that the Rio player merely performs the equally innocuous function of "space-shifting" music from a computer's hard drive to a portable player.[213]

B. UMG Recordings v. MP3.com[214]

Some of the evidence in this case strongly suggests that some companies operating in the area of the Internet may have a

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[208] *Id.* at 1078 (citing 17 U.S.C. § 1001(3)).

[209] *See* 17 U.S.C. § 1001(3). "A 'digital audio recording device' is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for . . ."

[210] *See Diamond II*, 180 F.3d. at 1078-79.

[211] *Id.* at 1078.

[212] *Id.* at 1079.

[213] *Id. See also infra* Part IV(A) and Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (upholding the "time-shifting" of copyrighted material enabled by the introduction of the VCR as a new technology. "Time-shifting" allows VCR owners to tape programs for later viewing.)

[214] UMG Recordings v. MP3.com, 2000 WL 1262568 (S.D.N.Y. 2000).

misconception that, because their technology is somewhat novel, they are somehow immune from the ordinary applications of laws of the United States, including copyright law. They need to understand that the law's domain knows no such limits.[215]

In September of 2000, several record labels brought suit against MP3.com for its services introduced on its MY.MP3.com website on or about January 10, 2000.[216] On its website, the defendant primarily offered two services.[217] The defendant's "Beam-It" service allowed users to access CD's from any computer at any location once the user stepped through a series of low hurdles, which involved the user exhibiting that he was in possession of the CD to be accessed.[218] Moreover, the defendant's "Instant Listening" service allowed users to immediately listen to a sound recording in MP3 format once having agreed to purchase a recording of the music.[219]

MP3.com made this feat possible by copying the contents of tens of thousands of CD's, converting them to MP3 format, and placing them on its computer systems.[220] The service was designed to compete with other websites, such as MyPlay.com, which allowed users to upload their own MP3 files onto the MyPlay website, and the user could access his uploaded songs at a later date from any location.[221] However, unlike MyPlay.com, MP3.com actually provided copies of the songs for its users to access. Users were required only to prove possession of a CD, which is not equivalent to ownership of the CD. Thus, it is estimated that a large number of users were able to borrow, or otherwise obtain, copies of CD's in order to satisfy MyPlay.com's ownership requirement.[222] These users, without ever having purchased a CD, were able to access the content of CD's provided on MyPlay.com.[223] At trial, evidence suggested that even the managers and engineers at MP3.com realized

[215] *Id.* at *6.
[216] *Id.* at *3.
[217] *Id.* at *2.
[218] *Id.*
[219] *MP3.com*, 2000 WL 1262568, at *2.
[220] *Id.*
[221] *Id.* at *3.
[222] *Id.*
[223] *Id.* at *2.

that the copying of music by My.MP3.com would very likely lead to the copyright infringement of music. [224]

Judge Rakoff in the Southern District of New York was unequivocal in his decision against MP3.com. The Judge found that even under the high standard of "clear and convincing evidence," MP3.com infringed plaintiffs' copyrights by contributing to the unauthorized copying of the contents of tens of thousands of copyrighted CD's containing hundreds of thousands of copyrighted songs.[225] Furthermore, the Judge dismissed the defendant's fair use arguments as little more than a sham since the users did not store their own personal collection of CD's on MP3.com's website, but rather accessed the MP3 collection supplied for commercial purposes by MP3.com.[226] The Court held that fair use does not include music copied onto servers solely for the purpose of commercial use.[227]

The Judge also held that the plaintiffs satisfied their burden of proof that the defendant had either actual knowledge of copyright infringement or acted in reckless disregard of the high probability of infringement.[228] Since the plaintiffs offered clear and convincing evidence that the defendant knew it was engaging in unlawful activity, the Judge found that the defendant was willful in its infringement of the plaintiffs' copyrights.[229] Moreover, because the potential for harm from the infringement was deemed to be large, the Judge awarded statutory damages amounting to $25,000 per CD and left the determination of the number of CD's that would qualify for damages for a later date.[230]

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[224] *See MP3.com*, 2000 WL 1262568, at *2.
[225] *See id.* at *1.
[226] *Id.* at *3.
[227] *Id.*
[228] *Id.* at *4.
[229] *See MP3.com*, 2000 WL 1262568, at *2.
[230] *Id.* at *6.

C. Universal City Studios v. Reimerdes[231]

Around the same time period in 2000, Judge Kaplan entered a judgment upholding technical copyright protection measures used to protect copyrighted content, such as full- length motion pictures, found on digital versatile disks ("DVD's").[232] In *Reimerdes*, eight major motion picture studios brought suit against Eric Corley, a leader among the computer hacker community and publisher of 2600 magazine, and two of his cohorts for distributing via a website a computer program designed to circumvent technological measures protecting copyrighted material on DVD's.[233]

Most motion pictures that are distributed on DVD employ Content Scramble System (hereinafter "CSS") technology as a protection against unauthorized access.[234] CSS technology is an encryption-based security and authentication system that requires the use of appropriately configured hardware, such as a DVD player or a computer DVD drive, to decrypt, unscramble and play back, but not copy DVD's.[235] Thus, access to DVD's employing CSS technology is limited to devices licensed with the appropriate decryption technology, which notably does not permit copying of DVD's.[236] Accordingly, the plaintiffs in *Reimerdes* were concerned that distribution of a computer program that hacked through the encryption technology would facilitate copyright infringement on a large scale.[237] This concern was compounded by the fact that DVD revenues may represent up to 35% or 40% of revenue for the motion picture studios (such as Warner Brothers).[238] Therefore, the circumvention of CSS technology would impede the development of

[231] Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

[232] *See id.* (holding that posting computer software that decrypted encrypted movies for download to DVD's was a copyright violation).

[233] *See id.*

[234] *See id.* at 303, 309-10.

[235] *See id.* at 309-10.

[236] *See Reimerdes*, 111 F. Supp. 2d at 309-10.

[237] *See id.*

[238] *See id.* at 310-11 (citing nn.69-70) (estimating the percentage of motion picture studio revenue as represented by DVD sales based on trial transcript (King) at 403).

technology to create new, otherwise lucrative initiatives for the distribution of motion pictures in digital form.[239]

Nonetheless, the defendants were distributing via a website a Windows-executable file (called DeCSS) created by another hacker, fifteen-year-old Jon Johansen, which decrypts DVD's on Windows compatible computers.[240] After decryption, computer files containing the motion picture can easily be copied, repeatedly if desired, for use on computers using either the Windows operating system or the Linux operating system.[241] Furthermore, once a motion picture has been decrypted, it can be compressed using a DivX compression algorithm that enables a full-length motion picture to be compressed into a 650 MB file.[242] The significance of compression is that the file becomes much more manageable and can be burned onto a single writeable CD using a conventional CD burner.[243]

1. Distribution of Anti-circumvention Technology Violates the DMCA.

The *Reimerdes* Court found that the defendants clearly violated § 1201(a)(2), which prohibits making available technologies developed to defeat technological protections against unauthorized access to a work, by distributing anti-circumvention measures via a web-site.[244] The defendants violated § 1201(a)(2) by providing DeCSS on their web site and also by providing links to other web sites created primarily to offer DeCSS for download.[245] The Court held that, by providing links to other sites that automatically begin the process of downloading DeCSS, the defendants were in effect engaged in the functional equivalent of transferring the DeCSS code to the user

239 *Id.* at 315.
240 *See id.* at 311.
241 *See Reimerdes*, 111 F. Supp. 2d at 311.
242 *See id.* at 313.
243 *See id.* at 314.
244 *Id.* at 316.
245 *Id.* at 303-04.

themselves.[246] Moreover, because CSS is a technology developed to effectively control access to copyrighted works, as defined by the DMCA, and DeCSS was designed primarily for the purpose of circumventing that technology, its distribution violated the DMCA.[247]

During trial, the defendants argued unsuccessfully that DeCSS was created primarily so that DVD's could be viewed on the Linux operating system for which no CSS compatible players were available at the time.[248] Therefore, the dissemination of DeCSS should be exempted under § 1201(f) of the DMCA, which allows exemptions for reverse engineering and for circumvention to achieve "interoperability" with another computer program.[249] However, the Court found that under the DMCA, information enabling interoperability with other programs could only be distributed to the extent that it would not constitute infringement.[250] Furthermore, the Court held that the right to achieve interoperability, as defined in the DMCA, "does not apply to public dissemination of means of circumvention."[251] According to the Court, since the "only function of the DeCSS program is to circumvent CSS" protection measures on a Windows operating system, its purpose extended well beyond achieving interoperability with the Linux operating system.[252] Moreover, the Court found that the motivation of the defendants to make DVD's interoperable with the Linux operating system was immaterial to the fact that they widely distributed software that circumvented copyright protection measures.[253]

Similarly, the Court dismissed the defendants' arguments that their actions were exempted under other provisions of the DMCA. The Court rejected the contention that the defendants' actions could be classified as good faith encryption research under the DMCA because it found that the defendants' research did not advance the

246 *Reimerdes*, 111 F. Supp. 2d at 325.
247 *Id.* at 317-18.
248 *See id.* at 319.
249 *See id.* at 320.
250 *See* DMCA § 1201(f).
251 *Reimerdes*, 111 F. Supp. 2d at 320.
252 *See id.* at 319.
253 *Id.*

state of knowledge of encryption technology.[254] This was evidenced by the fact that the results of the research were not communicated to the copyright owner in a timely manner.[255] The Court also dismissed the defendants' weak assertion that they were assessing a security testing system, a use that might be permitted under the DMCA.[256]

2. Distribution of Anti-circumvention Technology is Not a Fair Use.

The defendants in *Reimerdes* claimed that the distribution of DeCSS technology constituted fair use inasmuch as it allowed fair and lawful uses of the protected materials.[257] However, the Court felt that although access control measures, such as CSS, involve some risk of preventing fair and lawful uses of copyrighted material, Congress realized this potential for limiting fair uses and struck a balance through the DMCA.[258] For example, Congress expressly created a series of exceptions considered as fair uses, such as reverse engineering, security testing, good faith encryption research, and certain uses by nonprofit libraries and educational institutions.[259] In addition, Congress enacted a study on the effects of § 1201(a)(1) and expressly prohibited its application to subsequent actions of a person "once he or she obtained authorized access to a copy of a [copyrighted] work. . . ."[260] Therefore, the Court felt that the traditional defenses to copyright infringement, such as fair use, only apply after it has been established that access to the material is authorized under the DMCA.[261]

Notably, the Court rejected the application of fair use under the *Sony* case, stating that the case "involved a construction of the Copyright Act that has been overruled by the later enactment of the

254 *Id.* at 304.
255 *See id.* at 321; *see also* 17 U.S.C. § 1201(g)(2).
256 *Reimerdes*, 111 F. Supp. 2d at 321; *see also* 17 U.S.C. § 1201(j).
257 *Reimerdes*, 111 F. Supp. 2d at 321-22.
258 *Id.* at 322.
259 *Id.* at 323.
260 *Id.*
261 *Id.*

DMCA. . . ."[262] Regardless, the Court felt that it was facing a different question than that faced in *Sony*.[263] In *Sony* the Court faced the question of whether manufacturers could be held liable for infringement by purchasers of equipment for which there were a multitude of non-infringing uses.[264] In *Reimerdes* the Court considered the question of whether it should uphold the dissemination of anti-circumvention technology that held only the possibility (not a multitude) of non-infringing uses.[265] Thus, the Court felt that the mere possibility of non-infringing uses of a technology developed to circumvent access measures protected by the DMCA did not exempt the technology from liability.[266]

3. The DMCA Does Not Unduly Restrict First Amendment Rights.

The Court in *Reimerdes* also held that the "anti-trafficking provision of the DMCA as applied to the posting of computer code that circumvents measures that control access to copyrighted works in digital form is a valid exercise of Congress' authority."[267] The Court made it clear that the anti-trafficking provision of the DMCA serves an important governmental interest by protecting copyrighted works from digital piracy, thereby "promoting the availability of [copyrighted] content in digital form."[268] It found that any impact on the dissemination of a programmer's ideas, through limitations in the distribution of their programs, was purely incidental to the overriding concerns of promoting the digital distribution of copyrighted works and protecting them from piracy.[269]

In its ruling, the Court determined that the application of "content-neutral" limitations on the non-speech, functional aspects of a

[262] *Reimerdes*, 111 F. Supp. 2d at 323; *see also* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 441 (1984).
[263] *Reimerdes*, 111 F. Supp. 2d at 323.
[264] *See Sony*, 464 U.S. at 420; s*ee also Reimerdes*, 111 F. Supp. 2d at 323.
[265] *Reimerdes*, 111 F. Supp. 2d at 323.
[266] *Id.* at 323-24.
[267] *Id.* at 332. "[T]he Supreme Court has made clear that copyright protection itself is the 'engine of free expression'." *Id.* at 330.
[268] *Id.* at 330.
[269] *Id.* at 329.

computer program prevents the circumvention of technology without unduly restricting expressive activities.[270] The Court concluded that, whereas computer code is expressive, it also has a distinctly functional, non-speech aspect.[271] Moreover, it found that the functional aspects of the programmer's computer code do more than simply express the concepts of the computer programmer.[272] Therefore, by placing "content-neutral" limitations on the functional aspects of the computer program, the DMCA can prevent the circumvention of technology without unduly restricting the expressive aspects of the computer code.[273]

However, the Court emphasized that its holding concerning the First Amendment is narrow in its applicability. The Court stated that its holding

> is limited (1) to programs that circumvent access controls to copyrighted works in digital form in circumstances in which (2) there is no other practical means of preventing infringement through use of the programs, and (3) the regulation is motivated by a desire to prevent performance of the function for which the programs exist rather than any message they might convey.[274]

D. A&M Records, Inc. v. Napster, Inc.[275]

In December of 1999, a group of eighteen record labels and music publishers sought a preliminary injunction against Napster claiming that Napster's file-sharing services constitute both contributory and vicarious infringement of copyrights on a mass scale.[276] The plaintiffs introduced evidence that as much as 87% of the music files examined by their experts represent copyrighted material for which

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[270] *See Reimerdes*, 111 F. Supp. 2d at 329.
[271] *Id.* at 328-29.
[272] *Id.*
[273] *See id.* at 329.
[274] *Id.* at 333.
[275] *Napster I*, 114 F. Supp. 2d 896.
[276] *Id.* at 900.

the copyright owners are not compensated when distributed through Napster's file-sharing system.[277] Furthermore, internal documents stated that, by the end of 2000, Napster would have serviced approximately seventy-five million users.[278] Conversely, Napster asserted that it does not infringe any copyrighted material because Napster itself does not download or store any music on its own computers, but merely provides the mechanism through which its users can locate and download music.[279] Thus, Napster claimed immunity from liability as an information location tool qualified for limited liability under 512(d) of the DMCA.[280] Furthermore, Napster asserted that any incidental copyright infringement is fair use under § 107 of the Copyright Act of 1976.[281]

The District Court issued a preliminary injunction against Napster, finding that the plaintiffs had established a *prima facie* case of direct copyright infringement; that downloading and uploading of MP3 files by Napster users was not fair use; that plaintiffs had established a likelihood of success; and that plaintiffs were entitled to injunctive relief.[282] However, the Ninth Circuit temporarily stayed the preliminary injunction, pending modifications by the District Court.[283]

1. The Ninth Circuit: An Epilogue for Napster?

On review of the District Court's decision, the Ninth Circuit upheld the preliminary injunction granted by the District Court subject only to certain modifications.[284] For instance, the Ninth

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[277] *Id.* at 903.
[278] *Id.* at 902.
[279] *Id.*
[280] *Napster I*, 114 F. Supp. 2d at 919.
[281] "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2001).
[282] *Napster I*, 114 F. Supp. 2d at 926.
[283] *Napster II*, 239 F.3d 1004, 1029.
[284] *Id.* at 1027-28. The Ninth Circuit outright rejected Napster's arguments that the

Circuit found that the preliminary injunction was overbroad because it placed too much of a burden on Napster to ensure that "no 'copying, downloading, uploading, transmitting, or distributing' of plaintiffs' works occur on the system."[285] Instead, the Ninth Circuit placed the burden on the plaintiffs to provide notice to Napster of the copyrighted works available on the Napster system before conferring upon Napster the duty to police its service for infringing works.[286]

Specifically, the Court modified the preliminary injunction such that contributory liability can only be imposed upon Napster to the extent that it "(1) receives reasonable knowledge of specific infringing files with copyrighted musical compositions and sound recordings; (2) knows or should know that such files are available on the Napster system; and (3) fails to act to prevent viral distribution of the works."[287] In addition, "Napster may be vicariously liable when it fails to affirmatively use its ability to patrol its system [and] to preclude access to potentially infringing files listed in its search index."[288]

a. Napster Facilitates Infringing Uses of Copyrighted Music.

In its ruling, the Ninth Circuit agreed with the District Court that Napster does indeed violate two of the copyright holders' exclusive rights: the right of reproduction under 17 U.S.C. § 106(1) and the right of distribution under § 106(3).[289] It also rejected Napster's affirmative defense that it does not directly infringe plaintiffs' copyrights because its users are engaged in the fair use of copyrighted material.[290] Napster argued that such potential fair uses of its service include "space-shifting" music files, sampling of incomplete portions of music files, and the authorized distribution of

injunction was unconstitutional under the First Amendment as well as Napster's affirmative defenses of waiver, implied license, and copyright misuse.

[285] *Id.* at 1027.

[286] *See id.*

[287] *Id.*

[288] *Napster II*, 239 F.3d at 1027.

[289] *Id.* at 1014.

[290] *Id.* at 1016-17.

new and unsigned artists' works.[291] However, the Ninth Circuit upheld the District Court's determination that if the case were to go to trial, space-shifting, time-shifting, and sampling of incomplete portions of music files would not be likely to qualify for the affirmative defense of fair use.[292] It also rejected Napster's argument that it should be permitted to function for the part it plays in the permissive reproduction of independent or established artists' works because the plaintiffs did not seek to enjoin this activity.[293]

Napster tried to liken its services to the "space shifting" upheld in *Diamond Multimedia* and "time-shifting" as upheld in *Sony*.[294] However, the Ninth Circuit distinguished Napster's file-sharing services from both space-shifting and time-shifting, emphasizing that unlike the use of Napster's services, the uses upheld in *Diamond Multimedia* and in *Sony* do not include the displacement of sales through public dissemination of copyrighted materials to millions of persons free of charge.[295] Moreover, the Ninth Circuit determined that *Diamond Multimedia* and *Sony* upheld as fair use the copying of copyrighted works for personal use, but not copying for commercial use or for mass distribution to the general public.[296]

To a large extent, the Ninth Circuit's ruling followed from the proceeding in the District Court, where Judge Patel observed that space-shifting of music is not a substantial use of Napster's service.[297] According to the District Court, whereas the primary

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[291] *Napster I*, 114 F. Supp. 2d at 913; *see also* 17 U.S.C. § 107 (2001).

[292] *Napster II*, 239 F.3d at 1015, 1019. *See* 17 U.S.C. § 107 (enumerating the factors considered in determining fair use: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use upon the potential market for [the work] or [the] value of the copyrighted work.")

[293] *Napster II*, 239 F.3d at 1019.

[294] *Napster I*, 114 F. Supp. 2d at 915-16. *See Diamond II*, 180 F.3d 1072 (upholding the "space-shifting" of music off of computer hard drives for portable use in the Rio player); *see also* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (upholding the "time-shifting" of copyrighted material enabled by the introduction of the VCR as a new technology). "Time-shifting" is the copying of copyrighted material, such as television programming, for private non-commercial use at a later time.

[295] *Napster II*, 239 F.3d at 1019; *see also Napster I*, 114 F. Supp. 2d at 915-16.

[296] *Napster II*, 239 F.3d at 1019.

[297] *Napster I*, 114 F. Supp. 2d at 916.

purpose of the Rio player in *Diamond Multimedia* was to space-shift music files for portable use, Napster users access its service for the purpose of downloading unauthorized copies of copyrighted music and avoiding purchase costs.[298] In addition, the District Court noted that most Napster users do not access Napster for the purpose of space-shifting music for portable listening at different locations.[299] Similarly, the District Court distinguished Napster use from the fair use of time-shifting upheld in *Sony*, observing that VCRs facilitate the taping of material that the viewer has been invited to see entirely free of charge. In the view of the District Court, Napster facilitates the copying of music files for which the plaintiffs almost always charge for access.[300]

Napster also asserted the affirmative defense of fair use, claiming that its services are akin to visiting and sampling music at a free listening station at a record store and to other forms of online sampling.[301] However, the Ninth Circuit upheld the District Court's rejection of this defense on the grounds that sampling music through Napster is a commercial use that adversely affects the market for plaintiffs' copyrighted music.[302] The Ninth Circuit agreed with the District Court's distinction that unlike record stores, Napster transfers copies of music to its listeners without first requiring them to purchase the music.[303] Likewise, the Ninth Circuit found that unlike other forms of sampling over the Internet, which typically allow for only thirty-to-sixty-second samples of music, Napster provides access to entire songs.[304] In addition, the Ninth Circuit found that even in the unlikely event that Napster use does not adversely affect the market for the plaintiffs' copyrighted works, the

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[298] *Napster II*, 239 F.3d at 1019.

[299] *See Napster I*, 114 F. Supp. 2d at 904-05. Space-shifting of a user's own private music collection through Napster's service would require a user to log on to Napster from one computer, leave the location of that computer (while maintaining the computer's connection to Napster), travel to another computer at another location, and then download music files onto the second computer from the first.

[300] *Id.* at 913.

[301] *Id.*

[302] *Napster II*, 239 F.3d at 1018.

[303] *See id.*

[304] *Napster I*, 114 F. Supp. 2d at 913-14.

unauthorized spread of music by Napster should not deprive the copyright holders of the right to license the material.[305]

Overall, the Ninth Circuit agreed with the District Court's characterization of Napster's service as a commercial mechanism that infringes copyrighted material without transforming or adding value to the copyrighted work in any way.[306] The Ninth Circuit noted that the mere retransmission of an original copyrighted work through a new medium is unlikely to constitute fair use.[307] It also noted that commercial use does not require a showing of direct economic benefit, but may be demonstrated by the repeated and exploitative unauthorized copying of copyrighted works made in order to save an expense, such as the expense of purchasing authorized copies of musical works.[308]

b. Napster Is Subject to Contributory Liability.

In order to determine the likelihood of Napster being held liable as a contributory infringer at trial, the Ninth Circuit considered whether Napster had the requisite knowledge of the infringing activity and whether it induced, caused, or materially contributed to the infringing conduct of another.[309] After considering the record, the Ninth Circuit agreed with the District Court that Napster both knew of and materially contributed to the infringement of copyrighted music, but disagreed with the District Court's reasoning as to the knowledge requirement.[310] Rejecting the District Court's view that general knowledge of infringing conduct satisfies the knowledge

[305] *Id.*

[306] *Napster II*, 239 F.3d at 1015.

[307] *Id.* (*citing* Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998)) (finding the retransmission of a radio broadcast over a telephone line does not transform the original work and is not a fair use).

[308] *Id.*

[309] *See Napster I*, 114 F. Supp. 2d at 918 (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (noting that a contributory infringer is "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another").

[310] *Napster II*, 239 F.3d at 1020-22. The Ninth Circuit agreed with the District Court that Napster materially contributes to the infringement of copyrighted material because without its services Napster users could not easily find and download music.

requirement, the Ninth Circuit held that a defendant cannot be held to contributory liability unless it has specific knowledge of infringing conduct.[311]

In its defense, Napster argued that because its software is incapable of determining specific infringing uses, Napster could not know of any particular instances of infringement and does not satisfy the knowledge requirement of contributory liability.[312] Napster argued that this was true even though its employees may have generally been aware of Napster's potential for infringing uses.[313] Therefore, Napster argued that it cannot reasonably verify infringing uses on its online directory and should not have to police its service for infringing material.[314] The District Court rejected Napster's arguments stating that general knowledge that third parties performed copyrighted works satisfies the knowledge element of contributory infringement and that actual knowledge of specific acts of infringement is not required.[315] However, the Ninth Circuit did not agree with the District Court's determination and instead ruled that the standard for determining knowledge for the purpose of contributory liability hinges upon the defendant's specific knowledge, not only its general knowledge, of infringing uses.[316] Furthermore, the Ninth Circuit placed the burden upon the plaintiffs to provide the necessary documentation to the defendant showing that there is likely infringement.[317]

In its reasoning, the Ninth Circuit followed a logic similar to that in *Sony*, noting that although file-sharing is currently used primarily for the infringement of copyrighted works, in the future file-sharing

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311 *Id.* at 1021.

312 *Napster I*, 114 F. Supp. 2d at 918.

313 *Id.* Napster's software cannot read watermarks or any other information that might provide notice of copyrighted material.

314 *Id.*

315 *Id. See also* Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1163 (2d Cir. 1971).

316 *Napster II*, 239 F.3d at 1021 (citing Religious Tech. Ctr. v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361, at 1374-75 (N.D. Cal. 1995) (denying Netcom's motion for summary judgment of noninfringement and plaintiff's motion for judgment on the pleadings, finding that a disputed issue of fact existed as to whether the operator had sufficient knowledge of infringing activity).

317 *Id.*

may be capable of commercially significant non-infringing uses.[318] Since Napster may be capable of substantial non-infringing uses in the future, the Ninth Circuit refused to impute the requisite knowledge of infringing uses from the mere possibility or even the general knowledge that at present Napster's services have been and may be used to infringe plaintiffs' copyrights.[319] Thus, according to the Ninth Circuit, the District Court overemphasized the current infringing uses of Napster and devalued its possible non-infringing uses in the future.[320]

Having determined that a finding of contributory liability requires the specific knowledge of infringing uses, the Ninth Circuit moved on to the question of whether Napster had specific knowledge of infringing uses of its services. The Ninth Circuit found that Napster did have the requisite specific knowledge of infringing uses because the RIAA had provided Napster with a listing of more than 12,000 infringing files located on Napster's system.[321] Therefore, the Court upheld the determination that pending a trial, the plaintiffs would likely prevail in establishing that Napster had knowledge of infringing uses.[322]

c. Napster Is Subject to Vicarious Liability.

The Ninth Circuit agreed with the District Court that the plaintiffs would be likely to succeed at trial in holding Napster to vicarious liability.[323] It upheld the District Court's determination that Napster has a financial interest in the infringing uses of its service and, at the same time, has failed to exercise both its right and its ability to

[318] *Id. See Sony*, 464 U.S. at 447-48 (1984) (refusing to hold the manufacturer and retailers of video tape recorders liable for contributory infringement despite evidence that such machines could be and were used to infringe plaintiffs' copyrighted television shows).

[319] *Napster II*, 239 F.3d at 1021. *See also Sony*, 464 U.S. at 442. Following *Sony*, the Ninth Circuit declined to impute the requisite level of knowledge where the defendants made and sold equipment capable of both infringing and "significant noninfringing uses."

[320] *Napster II*, 239 F.3d at 1021.

[321] *Id.* at 1022.

[322] *Id.* at 1021.

[323] *See id.*

supervise the infringing activity.[324] Moreover, the Ninth Circuit found evidence of Napster's financial interest in the infringing activities from several reports submitted by the plaintiffs in the District Court, including the Teece Report, the Jay Report, and the Fine Report.[325] On the whole, the reports tie Napster's future revenue directly to its increase in its user base, which, in turn, grows with increases in the quantity and quality of music available through Napster's service.[326] Notwithstanding the reports, the Ninth Circuit upheld the District Court's review of Napster's own internal documents, which further revealed Napster's strategy of attaining a critical mass with plans to "monetize" its user base in the future.[327] Notably, some potential revenue sources for Napster include targeted email, advertising, commissions from links to commercial websites, the direct marketing of CD's, Napster products, and CD burners and rippers.[328] In addition, the very existence of such a large and easily monetized user base makes Napster a potentially attractive acquisition for larger, more established firms.

Having determined Napster's financial interest in the infringing uses of its services, the Ninth Circuit found that Napster did, in fact, have the right and ability to supervise the infringing activity on its site.[329] In actuality, Napster expressly reserved the right to supervise infringing activity through a disclaimer on its website.[330] Moreover,

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[324] *Id.* at 1023.

[325] *See Napster II*, 239 F.3d at 1016-17 (stating that "[p]laintiffs' expert, Dr. David J. Teece, studied several issues ("Teece Report"), including whether plaintiffs had suffered or were likely to suffer harm in their existing and planned businesses due to Napster use." The Teece Report showed that Napster raises the barriers to plaintiffs' entry into the market for the digital downloading of music. The Ninth Circuit then stated that the "[p]laintiffs' expert, Dr. E. Deborah Jay, conducted a survey (the "Jay Report") using a random sample of college and university students to track their reasons for using Napster and the impact Napster had on their music purchases." The report found evidence of lost sales attributable to college use. Furthermore, "plaintiffs also offered a study conducted by Michael Fine, Chief Executive Officer of Soundscan, (the "Fine Report") to determine the effect of online sharing of MP3 files in order to show irreparable harm. Fine found that online file-sharing had resulted in a loss of 'album' sales within college markets.").

[326] *Napster I*, 114 F. Supp. 2d at 902.

[327] *Id.*

[328] *Id.*

[329] *See Napster II*, 239 F.3d at 1022.

[330] *See id.* at 1023. On its website, Napster expressly reserved the "right to refuse service and terminate accounts in [its] discretion, including, but not limited to, if Napster

since a "right to police must be exercised to its fullest extent" to avoid vicarious liability, the Ninth Circuit upheld the District Court's finding that Napster failed to prevent the exchange of copyrighted material.[331] The Ninth Circuit also indicated that Napster may not have been able to avoid liability without a disclaimer simply by turning a "blind eye" to the infringement.[332]

However, in its decision, the Ninth Circuit lessened the burden upon Napster to police its service based upon the limits of the architecture of its software.[333] Notably, Napster's software is set up such that the information about the musical works distributed through its system is limited to the names of the music files, as input by its users, on the search indices.[334] Therefore, the Ninth Circuit determined that Napster must police only its search indices for infringing recordings.[335]

d. Napster May Qualify For Limited Liability Under the DMCA, But the AHRA Does Not Apply.

Interestingly, in the face of *Diamond Multimedia*, Napster tried to argue that MP3 files are covered by the AHRA.[336] Napster argued that the exchange of MP3 files through its service is the type of "noncommercial use" protected from infringement actions under the AHRA.[337] Napster asserted that it cannot be held secondarily liable for its users' non-actionable exchange of copyrighted musical recordings through its service.[338] Conversely, the Ninth Circuit agreed with the District Court that the AHRA does not apply to MP3 files transmitted between computer hard drives.[339] Following from

believes that user conduct violates applicable law . . . or for any reason in Napster's sole discretion, with or without cause."

331 *Id.*

332 *Id.*

333 *Id.* at 1023-24.

334 *Napster II*, 239 F.3d at 1024.

335 *Id.*

336 *See Diamond II*, 180 F.3d at 1078.

337 *Napster II*, 239 F.3d at 1023-24; *see also* 17 U.S.C. § 1008 (1996 & Supp. 2001).

338 *Napster II*, 239 F.3d at 1024.

339 *Id.*

Diamond Multimedia, the Ninth Circuit held that MP3 files transmitted through Napster's file-sharing service are not digital audio recordings, as defined by the AHRA, because their "'primary purpose' is not to make digital audio copies of recordings."[340]

However, the Ninth Circuit did not accept the District Court's overbroad assertions that § 512 of the DMCA will not ever limit the liability of contributory infringers.[341] Section 512(d) limits the liability of ISP's acting in the narrow capacity of providing hyperlinks, online directories, and search engines that link a user to unauthorized copies of sound recordings.[342] Notably, the District Court rejected Napster's argument that it should qualify for limited liability under § 512(d) of the DMCA.[343] Although the District Court found that the DMCA does provide for limited liability for contributory infringers under § 512(d)(1)(A), it does so only to the extent that a service provider does not have actual knowledge of infringement.[344] Since the District Court determined that Napster had actual knowledge of infringement, it refused to limit Napster's liability under § 512(d) of the DMCA.[345]

The Ninth Circuit rejected this position and recognized that although the balance of hardships may tip in favor of the plaintiffs, the question of limited liability under the DMCA would have to be more fully developed at trial.[346] Accordingly, the Ninth Circuit found that Napster raised several significant questions under the DMCA, including: "(1) whether Napster is an Internet service provider as defined by 17 U.S.C. § 512(d); (2) whether copyright owners must give a service provider 'official' notice of infringing activity in order for it to have knowledge or awareness of infringing activity on its system; and (3) whether Napster complies with §

[340] *Id. See Diamond II*, 180 F.3d at 1078.
[341] *Napster II*, 239 F.3d at 1025.
[342] *See* 17 U.S.C. § 512(d) (1996 & Supp. 2001).
[343] *Napster I*, 114 F. Supp. 2d at 919 n.24.
[344] *See id. See also* DMCA § 512(d)(C). The court did not address the question of whether Napster, a website, could even qualify as a service provider for purposes of the DMCA. Service providers typically provide users access to the Internet. Websites, on the other hand, provide locations for users to visit once on the Internet.
[345] *Napster I*, 114 F. Supp. 2d at 919.
[346] *Napster II*, 239 F. 3d at 1025.

512(i), which requires a service provider to timely establish a detailed copyright compliance policy."[347]

CONCLUSION: POLICY CONCERNING FILE-SHARING—STRIKING A BALANCE BETWEEN THE INCENTIVE TO CREATE AND THE PROMOTION OF NEW TECHNOLOGY

The advantages of file-sharing must be balanced with the need to provide artists with the incentive to create new works. Traditionally, musical artists have been held in high regard. In fact, history has developed a long list of musicians, from Mozart and Beethoven to the more recent Copland and even Madonna, all of whom have been rewarded for their efforts.[348] Such rewards have provided the incentive for musicians to create the works that have become staples in our society. Napster, however, has built its service entirely at the expense of musicians. In the present day, Napster takes monetary rewards away from artists for its own benefit. Napster has, with very little effort, usurped the works of a multitude of musicians and packaged them into one website for its own benefit. It robs artists of hard-earned royalties that they deserve for the effort they put into creating their music.

Realizing the inherent problems introduced by the change in the distribution of music from physical album sales toward digital transmission of music over the Internet, Congress has recently implemented both the DPRA and the DMCA. Although imperfect, these statutes go a long way toward the goal of compensating

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[347] *Id.*

[348] *See* THE LAROUSSE ENCYCLOPEDIA OF MUSIC (Geoffrey Hindley ed., 1996). It is interesting to note that Mozart, who enjoyed international fame beginning early in his career, died in poverty. *Id.* at 242. After provoking his own dismissal from his post in the court of Salzburg, Mozart attempted late in life to earn his living as a freelance composer and performer. *Id.* However, a general lack of copyright protection in Europe during the late 18th century made it difficult for Mozart to make a living solely as a freelance artist, contributing to his pauper status. *Id.* Thus, toward the end of his life Mozart, despite constant acclaim, was unable to profit from his immense talent. *Id.*

Beethoven, on the other hand, born more than fifty years after Mozart, appears to have been the first composer to attempt to live exclusively as a freelance artist from the beginning of his career. *Id.* at 264. Although Beethoven often found himself in financial difficulties, he was by no measure a poor man upon his death. *Id.*

musicians for the distribution of their works over the Internet. If a balance is to be struck whereby copyright owners are compensated for the digital distribution of their works, then the courts must follow the lead of Congress and protect copyright owners' interests. Should the courts uphold the interests of copyright owners along the lines of *Reimerdes* and *Napster*, then perhaps the music, publishing, film, and video industries can work toward discovering a reliable mechanism for the mass licensing of copyrighted works over the Internet.