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Copyright Use and Excuse on the Internet

Jane C. Ginsburg*

1998 ended with voluminous copyright legislation, pompously titled the “Digital Millennium Copyright Act” [hereafter “DMCA”], and intended to equip the copyright law to meet the challenges of online digital exploitation of works of authorship. 1999 and 2000 have brought some of the ensuing confrontations between copyright owners and Internet entrepreneurs to the courts. The evolving caselaw affords an initial opportunity to assess whether the copyright law as abundantly amended can indeed respond to digital networks, or whether the rapid development of the Internet inevitably outstrips Congress’ and the courts’ attempts to keep pace.

In titling this Article “Copyright Use and Excuse on the Internet,” I am inquiring into the evolving allocation of power between copyright owners and copyright-using Internet entrepreneurs. While the DMCA may have appeared to weight the balance toward copyright owners,¹ many of the current challenges do not directly implicate the DMCA. Moreover, to the extent that the cases call for interpretation of the DMCA, the results so far have been mixed, albeit at last count somewhat more favorable to copyright owners. Finally, whatever the results in a given case, significant questions remain about the practical enforceability of the DMCA’s provisions regarding circumvention of technological protections, and removal or alteration of copyright management information.

I will address recent Internet-related controversies concerning the following topics: technological protection measures and copyright management information;²

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1. See, e.g., Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L. J. 519 (1999); Jonathan Band & Taro Issihiki, *The New Anti-Circumvention Provisions in the Copyright Act: A Flawed First Step*, 3 CYBER. LAW. 2 (1999).

2. See *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp.2d 211 (S.D.N.Y. 2000) (preliminary injunction ordered January 20, 2000 against websites posting “De-CSS” software to neutralize DVD access-controls), 111 F. Supp.2d 294 (S.D.N.Y. 2000) (permanent injunction awarded); *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, (W.D. Wash. Jan. 18, 2000) (preliminary injunction entered against device converting streamed audio signal from an uncopyable format into a signal that may be copied). *Kelly v. Arriba Soft Corp.*, 77 F. Supp.2d 1116 (C.D. Cal. 1999) (no violations of copyright management information).

fair use and linking³; “private” copying online services⁴; and choice of law issues posed by foreign websites accessible in the U.S.⁵

II. DMCA ISSUES: CIRCUMVENTION OF ACCESS CONTROLS

Two courts so far have construed the §1201⁶ provisions prohibiting the distribution of devices primarily designed to circumvent access controls. One controversy, *RealNetworks v. Streambox*, concerned the commercial distribution of a product designed to convert streaming-only RealAudio music files into files that defendant’s customers could download and retain. The other case, *Universal City Studios v. Reimerdes*, was initiated by members of the Motion Picture Association of America against the operators of websites that had posted the “hack” to defeat the encryption on DVDs.

In *RealNetworks v. Streambox*, the Western District of Washington preliminarily enjoined distribution of “Streambox VCR” on the ground that the device violated both §1201(a)’s prohibition on the circumvention of access controls, and §1201(b)’s prohibition on circumvention of copy controls implemented by the RealAudio server. RealNetworks employed an authorization mechanism through which a RealAudio server recognizes a RealPlayer, and having recognized it, sends the Player the requested work in streaming format. The court called this authentication measure the “secret handshake.” The “secret handshake” is an access control measure within the definition of §1201(a)(3)(B) because it “requires the application of information, or a process or treatment, with the authority of the copyright owner, to gain access to the work,” here, to tell the Real server to communicate the work to the RealPlayer so that users may listen to the music. Copyright owners who make their works available through RealNetworks designate whether they wish the works to be delivered as streaming only, so that recipients cannot copy the work, or as a downloadable stream. The “Copy Switch” on the Real server indicates whether the work may or may not be copied. Most copyright owners choose not to permit copying. The RealPlayer reads the information on the server; if the Copy Switch is turned off, the RealPlayer will deliver the work in streaming only format.

Streambox reverse engineered the RealPlayer software to ascertain the code that produces the “secret handshake,” and then incorporated the code into its “VCR”

3. See *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d 1453 (C.D. Cal. 2000); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp.2d 1290 (D. Utah 1999); *Universal City Studios*, 82 F. Supp.2d 211 (amending complaint to include claims against websites for linking to sites containing circumvention software).

4. *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp.2d 349 (S.D.N.Y. 2000); *A & M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9th Cir., Feb 12, 2001).

5. *Twentieth Century Fox Film Corp. v. iCraveTV*, No 00-121 (W.D. Pa. filed Jan. 20, 2000); *National Football League v. TV Radio Now Corp. d/b/a iCraveTV*, No. 00-120 (W.D. Pa. filed Jan. 20, 2000) (Case settled Jan. 28, 2000. iCraveTV agreed to discontinue broadcasts unless Canadian law is clarified to permit them. See Bloomberg News, *Broadcasters pull the plug on iCraveTV*, CNET NEWS.COM at <http://news.cnet.com/news/0-1004-200-1559907.html>(Feb. 28, 2000).

6. See 17 U.S.C. § 1201(a)(2).

product so that when a Streambox VCR contacts a RealNetworks server, the server will think it is communicating with a RealPlayer, and will give the VCR access to the works on the server. Unlike the RealPlayer, however, the VCR will ignore the Copy Switch, and therefore will make copies whether or not the copyright owner has instructed the server to permit copying. Thus, by emulating the “secret handshake,” the VCR circumvents an access protection in violation of §1201(a)(2), and by avoiding the Copy Switch, the VCR circumvents an anti copying measure in violation of §1201(b), the court held.

Streambox invoked the §1201(c)(3) “no mandate” provision to resist the finding of a §1201(b) violation. Streambox claimed that §1201(c)(3) explicitly dispenses producers of devices (including software) from any requirement to “respond” to a technological measure. In other words, if a technological measure will not prevent access or copying unless another device works with it, there is no obligation to conform that device to the technological measure even though the technological measure will then be ineffective. Thus, if the technological measure is a door that will not lock until another device pushes it shut, §1201(c)(3) makes clear that device designers are not obliged to produce a door-shutter. By contrast, if the technological measure is a door that is already locked, no further device is needed to trigger its protective function. Instead, a device is needed to open the door. And, if one designs a skeleton key to open the door without permission, one has violated §1201(a)(2). In *RealNetworks*, the court found that the “secret handshake” corresponded to the locked door and authorized key. Streambox argued, however, that because the effectiveness of the Copy Switch depended on being read by a RealPlayer, and could simply be ignored by another device, it was like an open door that required a device to close it. Therefore, asserted Streambox, the Copy Switch ran afoul of §1203(c)(3), and was not protected against circumvention.

The court rejected this contention for two reasons. First, by “ignoring” the Copy Switch, the VCR “bypassed” or “avoided” it, in violation of §1201(b). Second, even if the Copy Switch required the cooperation of another device in order to close out the possibility of making copies, the VCR would not have been able to “ignore” the Copy Switch, had the VCR not first circumvented the access control by faking the “secret handshake.” To pursue the door metaphor, the VCR would not have been able to ignore the instructions to close the Copy Switch door, had the VCR not first used a skeleton key to open the “secret handshake” door. The court emphasized that §1201(c)(3) applies only “so long as such part or component, *or the product in which such part of component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1)*” (emphasis supplied). Since the VCR already violated §1201(a)(2) by emulating the “secret handshake,” Streambox’ argument as to the proper characterization of the Copy Switch was irrelevant.

Streambox next argued that the manufacture and distribution of the VCR should be excused under *Sony v. Universal City Studios*⁷ since Streambox’ customers could use the VCR to make “fair use copies.” The court rejected the “fair use”

7. 464 U.S. 417 (1984).

characterization of “private” copies made using the VCR. The court stressed that §1201 had superceded the *Sony* “merely capable of non infringing use”⁸ standard for contributory infringement by manufacturers of devices used to make private copies. Even under the *Sony* analysis, observed the court, Streambox’ device could not qualify. The *Sony* court sustained the “fair use” nature of private analog copies made to time shift television programs that the public had been invited to watch for free.⁹ Moreover, many copyright owners expressed no objection to time shifting. By contrast, emphasized the *RealNetworks* court, copyright owners had made clear their objection to copying by keeping the Copy Switch turned off. The court might also have noted that the “time shifting” justification does not apply to on demand real time delivery of the copyrighted work; time shifting accommodates user convenience when the consumer cannot view the work during its broadcast time. With on demand real time delivery, there is no broadcast time; the user requests the work when she is ready to hear it. Finally, it is worth observing that, while the *RealNetworks* court rejected Streambox’ fair use arguments on the merits, the court did not dismiss fair use defenses as inapplicable to anti circumvention claims.¹⁰

The court’s discussion of the relationship of the DMCA anti circumvention provisions to private copying is significant. In the court’s view, a copyright owner’s imposition of technological measures precludes a private copying fair use defense (at least for retention copies). This seems correct, since, as the court observed, the justifications for the defense no longer apply. But, in addition to fair use, a more specific section of the Copyright Act authorizes private copying of audio recordings. It is worth considering the relationship of this provision to §1201. Section 1008 of the Act, implemented as part of the Audio Home Recording Act of 1992, bars copyright infringement actions for “noncommercial use by a consumer of a [digital audio recording] device or medium for making digital musical recordings.” The short answer in the *RealNetworks* context is that RealNetworks sued Streambox not for contributory copyright infringement, but for violation of the anti circumvention provisions of the Copyright Act. Thus, even if §1008 barred a copyright infringement claim against Streambox,¹¹ an anti circumvention claim remains available.¹²

8. *Id.* at 442.

9. *Id.* at 443, 446.

10. *Cf.* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp.2d 294 (S.D.N.Y. 2000) discussed *infra* notes 13-35 and accompanying text.

11. It is not clear that Streambox VCR would, in any event, qualify as a “digital audio recording device.” See *RIAA v. Diamond Multimedia*, 180 F.3d 1072, 1079 (9th Cir. 1999) (MP3 playback device that plays music recorded onto a memory card from a computer hard drive held not a “digital audio recording device”).

12. Section 1201 may not trump §1008 as to *use* of a circumvention device to make private copies of audio recordings. While §1201(a) prohibits the act of circumventing an access control, §1201(b) does not prohibit the act of circumventing an anti copy control. Thus, if a consumer, having somehow acquired a circumvention device, were to use it to make a digital audio private recording, it appears that neither §1201(b) nor §106(1) would be violated unless private copying to acquire copies, as opposed to make a convenience copy of a work of which one already owns a copy, was not “non commercial use.” See discussion *infra* notes 110-113 and accompanying text.

RealNetworks brought another §1201(b) claim against the Streambox “Ripper,” a product that converted

RealNetworks presented a rather straightforward controversy between two Internet entrepreneurs. *RealNetworks* had designed its business model to accommodate copyright owners' concerns, by making music available to end-users on demand in real time, but in a format that did not permit users to copy and retain the music files. The other entrepreneur, *Streambox*, determined to give consumers the copying facility that *RealNetworks* denied them, and sought to do this not by reaching an agreement with the copyright owners, but by altering the feed from *RealNetworks*' servers. Had *Streambox* persisted in its conduct, both copyright owners and copyright-respectful intermediaries would have been compromised. The award of a preliminary injunction thus bridled some entrepreneurial ingenuity on the Web, an outcome that, in this instance, may favor the development of legitimate copyright commerce on the Internet.

A more Wild West scenario, by contrast, may be playing out in the case of the "DVD hack." In this case, the originator of the code used to decrypt DVDs was a Norwegian teenager who developed the code, called DeCSS, ostensibly in order to be able to play DVDs on a computer equipped with a Linux operating system.¹³ DVDs are encoded to run on DVD drives on computers equipped with Windows operating systems. The decrypted DVDs can run on any operating system, hence the general appeal of the decryption code. The code, originally posted from Norway, soon found its way to many U.S. websites, some of which expressed strongly negative views of copyright owners, and encouraged downloaders to copy and share the contents of the decrypted DVDs.¹⁴ Several members of The Motion Picture Association of America sought a preliminary injunction against three website operators, including Eric Corley, a/k/a Emmanuel Goldstein, publisher of the webpage "2600.com, the Hacker Quarterly." Although a preliminary injunction was granted,¹⁵ and defendants removed the code from their sites, many more websites (some perhaps directly incited by the defendants, others indirectly, acting in sympathy with the defendants' plight) took up the code, and, in what its publisher called an act of "electronic civil disobedience," 2600.com linked to these

RealAudio downloaded files to other formats, including MP3. Starting from the premise that Ripper worked on legitimate copies of RealAudio files, the court addressed Real Network's claim that Ripper was a circumvention device that made it possible to create derivative works, by converting RealAudio files, which cannot be altered, to formats that can. The court held that *RealNetworks* had not at the preliminary injunction stage presented sufficient evidence as to the technological protection against the making of derivative works, or as to the objections of copyright owners to the making of derivative works.

13. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294 at 311. The court, however, discredited the teenager's professed motive of Linux-compatibility: "Mr. Johansen is a very talented young man and a member of a well known hacker group who viewed 'cracking' CSS as an end in itself and a means of demonstrating his talent and who fully expected that the use of DeCSS would not be confined to Linux machines." *Id.* at 320.

14. *OpenDVD.org*, at <http://www.opendvd.org> (last visited Mar. 14, 2001); *The Ultimate DeCSS Resource Site*, at <http://www.pzcommunications.com/decss/links.htm> (last visited Mar. 14, 2001) (listing all known links relevant to the DeCSS utility including sites which post the code); *The Great International DVD Source Code Distribution Contest*, at <http://dvd.zgp.org> (last visited Mar. 14, 2001); *Electronic Frontier Foundation*, at <http://www.eff.org> (last visited Mar. 14, 2001).

15. See 82 F. Supp.2d 211 (S.D.N.Y. 2000).

sites.¹⁶ The court later granted a permanent injunction against both posting and linking by 2600.com. As a practical matter, it is unclear whether any legal remedy can be effective in this situation. Indeed, the studios may have won a legal battle, but lost (or at least suffered a significant setback in) the public relations war, since their pursuit of website operators may have cast them as greedy Goliaths out to crush the happy hacking Davids. Nonetheless, it is worth examining *Universal City Studios v. Reimerdes*, for the legal issues it poses.

First, a fuller exposition of the facts. The plaintiffs were eight major motion picture studios who release movies initially for theatrical distribution, and then later in “home video” formats, including DVD. Plaintiffs employ the Content Scramble System (CSS), an access control system that renders the DVD unviewable unless played on a DVD player or drive containing the decryption key to access the DVD’s content. DVD sales exceed one million units per week.

DeCSS is a software utility that allows users to break the CSS protection system, thus making it possible to access, copy, and distribute the contents of DVD movies without permission, particularly with the aid of compression programs, such as DivX, that significantly reduce the download time.¹⁷ The court found that, after October 1999, when DeCSS first was distributed online, decrypted DVDs compressed with DivX became available over the web for unauthorized downloading.¹⁸

The court found that the plaintiff motion picture studios had made out a prima facie case of violation of the §1201(a)(2) prohibition on the dissemination of devices primarily designed to circumvent access controls. The decryption code was a “product,” “device” or “component” that was “primarily designed for the purpose of circumventing” access controls. Even if the reason for which the code was originally devised was allegedly “Linux compatibility,” the court stressed that this compatibility was achieved by circumvention, and thus came within the scope of the statutory prohibition. The court also expressed considerable skepticism regarding the Linux argument; it observed that the DeCSS program makes it possible to play DVDs whatever the operating system.¹⁹

The court turned next to the exceptions set forth in the DMCA to the prohibition on distribution of devices designed to circumvent access controls.²⁰ The most

16. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d at 312.

17. See *id.* at 313-314.

18. See *id.* at 315.

19. See also *supra*, note 13.

20. At the preliminary injunction stage, one defendant sought shelter under the ISP liability limitation provisions of the DMCA, 17 U.S.C. § 512(c). The court rejected this contention for two reasons. First, the defendant offered no proof that it was a service provider as defined in the ISP liability section. (In fact, that defendant could not have been a service provider as defined because defendant posted the content itself, it did not merely host someone else’s posting.) Second, that provision limits liability only for copyright infringement, and a violation of §1201(a)(2) is technically not copyright infringement, it is a distinct violation. The court might also have noted that the defendant had knowledge of the content and purpose of the posted material and therefore, even had plaintiffs claimed copyright infringement, and even had the defendant been deemed a service provider, the defendant would not have qualified for the liability limitation. See *id.* § 512(c)(1)(A).

likely of these appeared to be §1201(f)'s authorization of circumvention to permit reverse engineering in order to create interoperable computer programs, since DeCSS had allegedly been created in order to permit DVDs to play on Linux-operated drives. The court nonetheless held that defendants did not qualify for the §1201(f) exemption. First, the court observed that the defendant website operators had not themselves reverse engineered CSS, nor did they create the "interoperable" DeCSS program; these defendants were simply disseminating the code devised by the Norwegian teenager, Jon Johansen. Section 1201(f) has nothing to do with those who disseminate downstream the fruits of another's reverse engineering; §1201(f) is for the benefit of the reverse engineer herself, provided she otherwise qualifies for the exemption.

Even had defendants originated DeCSS, the court continued, the reverse engineering still would fail to meet §1201(f) criteria: since DeCSS also runs under Windows, Linux compatibility was not its "sole purpose," as required by the DMCA. More importantly, the legislative history made clear that the reverse engineering exception was added to permit circumvention of access controls on computer programs in order to promote the creation of new computer programs, not to promote circumvention of access controls on motion pictures. The court stressed that the computer code written to circumvent an access protection was meant to be an intermediate step toward writing a new computer program that would be interoperable with the circumvented program (or with other programs). The statutory objective was to permit writing and disseminating the new program or the product incorporating the new program, not to disseminate the circumvention program that made it possible to acquire the information necessary to write the new program.²¹

Finally, the court might also have observed that defendants' invocation of the reverse engineering exception seems peculiar for another reason: If §1201(f) is properly applied, the program that results from the reverse engineering does not itself circumvent access controls, and downstream distributors therefore should suffer no exposure under §1201(a)(2).

The court rejected two other DMCA exemptions, encryption research under 1201(g), and security testing under § 1201(j). Neither of these exemptions are licenses to hack, and defendants failed to meet the provisions' stringent good faith requirements.

The court also dismissed defendants' invocation of the fair use defense, finding that fair use is a defense to copyright infringement, not to circumvention of access controls. The court reviewed the text and legislative history to the DMCA, and

21. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d at 320 and n. 30. Arguably, the limitation of §1201(f) to the dissemination of the end-results disfavors production of the best compatible programs or products, because those who would attempt to create these programs or products will not have access to the hack that unlocks the information necessary to producing the end results. Proponents of the free software movement would advocate making generally available any elements that lead to the creation of these programs, including the predicate hack. This contention, notwithstanding its apparent appeal to some programmers, seems to me rather dog-wagging. I thank Eben Moglen for explaining the hacker argument.

concluded that Congress intentionally declined to incorporate a fair use defense to anti circumvention violations. Although the anti circumvention provision of the DMCA states: “Nothing in this section shall affect rights, remedies, limitations, or defenses applicable to copyright infringement, including fair use, under this title,”²² this reservation is arguably irrelevant, since the statute makes access circumvention a violation distinct from copyright infringement.²³ Moreover, stressed the court, Congress recognized the contention, voiced by a range of constituencies concerned with the legislation, that technological controls on access to copyrighted works might erode fair use by preventing access even for uses that would be deemed “fair” if only access might be gained. And it struck a balance among the competing interests.²⁴

Elements of that balance include Congress’ direction to the Librarian of Congress to conduct a rulemaking to determine whether noninfringing users of works “are likely to be adversely affected by the prohibition” on circumvention of access controls, and, accordingly, to publish classes of works to exempt from the prohibition,²⁵ and the provision for a variety of exceptions to the access right explicitly set out in §§1201(d)-(j). Under the court’s reading, either the work is protected against circumvention of access controls for any purpose other than those set forth in the specific exemptions, or the use is exempted by those provisions; indeterminate defenses, such as the highly contextual fair use privilege, do not fit in this scheme. If the statute lacks the user-friendly nuance of the fair use doctrine, contended the court, Congress intended that result:

[t]he policy concerns raised by defendants were considered by Congress. Having considered them, Congress crafted a statute that, so far as the applicability of the fair use defense to Section 1201(a) claims is concerned, is crystal clear. In such circumstances, courts may not undo what Congress has so plainly done by “construing” the words of the statute to accomplish a result that Congress rejected.²⁶

Is it so “plain” that Congress has left no room for a fair use defense to an access code anti circumvention violation? The syntax of §1201(c) permits an argument that the phrase “including fair use,” as set off in commas, modifies not “defenses applicable to copyright infringement,” but “limitations...under this title.” Section 1201 is under Title 17, even if it is not, technically, a provision addressed to copyright infringement.²⁷ If fair use is a general limitation on rights set out in Title

22. *Id.* §1201(c)(1).

23. *See id.* § 1203 (authorizing civil action and stating remedies for violation of anti circumvention provisions); accord, *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp.2d 211 (S.D.N.Y. 2000) (dismissing fair use defense on the ground that fair use does not apply to violations of § 1201(a)); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 729 (2000) (“[T]he WIPO Treaties Act adds a wholly separate tort of unauthorized circumvention, to which the fair use defense is inapplicable.”).

24. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d at 322 and n.162.

25. *See* 17 U.S.C. § 1201(a)(1)(C)(D).

26. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d at 324.

27. I am grateful to Professor Jessica Litman for drawing my attention to §1201(c)(1)’s syntax and its consequences, and for prompting the analysis that follows.

17, including, for example, the (technically) extra-copyright right to fix performances of musical works set out in § 1101,²⁸ then § 1201(c) preserves fair use as to anti-circumvention as well. This argument works if one concludes that fair use is not merely a statutory rule expressed in § 107 of the Copyright Act, but that it is a general judge-made rule applicable to rights within the penumbra of copyright, as well as to other intellectual property rights, including trademarks.²⁹ Congress codified copyright fair use in § 107, but Congress disavowed any intent to “freeze” this judge-made doctrine, “especially during a period of rapid technological change.”³⁰ By the same token, one might contend, Congress did not intend to limit the development of fair use to rights formally within the Copyright Act (as opposed to Title 17 in general, or even other statutory intellectual property rights). Because fair use is a “general equitable defense,”³¹ one might conclude that courts may – given an appropriate fact situation – apply it to §1201(a) by articulating additional, and highly contextual, limitations on the prohibition on circumvention of access controls. The DeCSS controversy, however, given the court’s findings concerning the defendant’s general disrespect for legal rules and property rights³² did not present a sympathetic case for interpolating a fair use limitation.

Finally, the court rejected defendants’ invocation of the First Amendment. Although the court recognized that computer code can be expressive, it stressed that DeCSS “has a distinctly functional, non-speech aspect in addition to reflecting the thoughts of the programmers.”³³ While Congress may not prohibit speech based on the content of the message, it may in furtherance of an important governmental objective regulate non-speech functionality, even if that regulation impinges on the program’s expressive aspects. The important objective at issue was the assurance of meaningful copyright protection as an incentive to continued creation and dissemination of works. The characteristics of the digital world, especially its fostering of instantaneous copying and dissemination, enhance the likelihood that circumvention programs will lead to massive copying: “dissemination of means of circumventing access controls to copyrighted works threatens to produce virtually unstoppable infringement of copyright.”³⁴ Because

28. For example, where § 1101 applies to communication to the public of the sounds of an unauthorized recording of a musical performance, and contains no explicit fair use or educational performance exceptions, one could imagine a reasonable fair use argument on behalf of a music professor who plays a bootleg recording of Maria Callas in an opera appreciation course.

29. Courts have entertained “nominative fair use” defenses to trademark infringement, and may be developing broader concepts of non-statutory but lawful unauthorized use of trademarks. *See, e.g.,* *New Kids on the Block v. News Am. Publ’g*, 971 F. 2d 302 (9th Cir. 1992). In addition, one scholar has argued for extending the fair use doctrine to patent law. *See* Maureen O’Rourke, *Toward a Doctrine of Patent Fair Use*, 100 COLUM. L. REV. 1177 (2000).

30. *See* H.R. REP. NO. 94-1476 (1976).

31. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

32. *See* *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2 at 308-309, 312-313 (citing 2600.com articles on “how to steal an Internet domain name, access other people’s e-mail, intercept cellular phone calls, and break into the computer systems at Costco stores and Federal Express”).

33. *Id.* at 329.

34. *Id.* at 332.

the legislation targets the program's functional, rather than expressive, aspects, and "there is no other practical means of preventing infringement through use of the programs,"³⁵ §1201(a) survives constitutional scrutiny, the court held.

II. LINKING AND LIABILITY

Although plaintiffs initially brought the §1201(a) claim against three websites that had posted DeCSS, the studios subsequently amended the complaint to seek relief against 2600.com's linking to non-party sites that were still carrying DeCSS. The linking claim carries significant, and troublesome, implications. From the copyright owners' point of view, obtaining an injunction against a few website operators yields at best a Pyrrhic victory, if the infringing (or circumventing) content can simply be transferred to other sites, whose locations can be pinpointed by means of links. From a wider perspective, however, injunctions against links may be overbroad, sweeping in not only bad actors who seek to facilitate circumvention or infringement, but also those who seek to call attention to the debate concerning the condemned content. At the same time, even if an injunction sweeps too broadly, it may nonetheless prove fruitless, as a proliferation of links and mirror sites may elude effective pursuit.

In its decision awarding a permanent injunction, the *Reimerdes* court determined that the provision of links to sites that automatically download the code was the functional equivalent of delivering the code itself, and thus came within the §1201(a)(2) prohibition on "trafficking" in circumvention devices. The court found no meaningful difference with respect to links to sites whose sole content is the code, and that give users the option of downloading, rather than automatically sending it. The court stressed defendant's knowledge of the destination and purpose of these links: before posting the links, 2600.com had verified that the sites in fact were posting DeCSS, and had then drawn 2600.com's users' attention to the availability of DeCSS through these links. The court acknowledged that the "trafficking" characterization could become problematic if the links were to sites that not only contained DeCSS, but also other content, such as a news report covering the controversy. But, the court noted, links of that kind were not at issue in this case.

The court's distinction between sites (and, implicitly, pinpointed pages), whose sole purpose is to disseminate DeCSS, and sites that include the code as part of a broader discussion focuses on the purpose of the site, rather than on the purpose of the linker. In *Reimerdes*, in any event, the court found that purpose was clear, to foster dissemination of DeCSS through other means once it could no longer directly offer the code itself. But what if a non-party to the original action pinpoints DeCSS on other sites, albeit for purposes other than to encourage downloading? For example, the webpage for my Spring 2000 Copyright course³⁶

35. *Id.* at 333.

36. *DVD decryption litigation*, at http://www.law.columbia.edu/course_00S_L6341_001/circumv.shtml (last visited Mar. 14, 2001).

contains links to a variety of documents in the *Universal City Studios v. Reimerdes* case, including to the plaintiffs' complaint and legal memoranda, to the court's preliminary injunction opinion, and to several websites that discuss the case. Some of these discussion sites are quite hostile, and include links to other sites that carry the DeCSS code, or that invite webservers to revenge themselves on greedy copyright owners by downloading, mirroring, and further disseminating DeCSS. Have these links made me a "trafficker" in circumvention devices? Or suppose one of my links sends students and other users to a site from which they may download decrypted, compressed motion pictures? I include that link not to encourage piracy of *The Matrix* (one of the films the *Reimerdes* court found had been posted on unauthorized websites), but to demonstrate how easy it has become to obtain unauthorized copies of decrypted DVDs. (The latter link does not in fact appear on my website.) Have I become contributorily liable for copyright infringement for facilitating my students' access to infringing copies?

Lest this inquiry seem fanciful, consider the following decision concerning contributory copyright infringement by means of pointing to sites carrying the challenged content. In *Intellectual Reserve v. Utah Lighthouse Ministry*,³⁷ Defendant Utah Lighthouse Ministry [ULM], an organization critical of certain Mormon Church teachings, posted without permission on the ULM website approximately seventeen pages from plaintiff's 160-page Church Handbook of Instructions. Plaintiffs sought a temporary restraining order and preliminary injunction. The TRO was granted, and ULM took down the material.

Subsequently, the defendants posted a notice on their web site informing visitors that the Handbook was available online at three other web sites and listing those web site addresses. The notice stated "Church Handbook of Instructions is back online!" It further posted e-mails that encouraged users to visit those web sites, to print copies of the material, and to send the material to others, including to the media. Moreover, in response to an e-mail from a websurfer who had had difficulty accessing one of the other web sites, defendants provided further instructions on how to access them. The court noted that one of the web sites to which defendants directed browsers stated "Please mirror these files...It will be a LOT quicker for you to download the compressed version...Needless to say, we need a LOT of mirror sites, as absolutely soon as possible."

Since the defendants no longer posted the allegedly infringing content themselves, but pointed users to other sites from which the users could directly view the content, the court confronted the question whether ULM could be held contributorily liable for copyright infringement. ULM apparently did not direct or encourage the other sites to post the pages from the Church Handbook. Because there is no secondary liability without primary infringing conduct, the first issue was whether reading the church documents online (even assuming users did not download and retain copies) was itself infringing. Citing the doctrine of RAM copying enunciated in *MAI Systems v. Peak Computer*,³⁸ the court held that the

37. 75 F. Supp.2d 1290 (D. Utah 1999).

38. 991 F.2d 511 (9th Cir. 1993).

temporary entry into the memories of visitors' computers – the act that permitted the documents to be read online – constituted the primary infringement. The court did not consider whether the fair use doctrine might have excused a prima facie primary infringement.

Applying the standard for contributory infringement,³⁹ the court held that ULM supplied users with the means (the URLs of the websites posting the material) to commit the primary infringement, and, by inciting users to enter those addresses to get to sites where the content could be found, knew that users would employ those means to commit the infringements (to read online).

If this result seems frightening, it is probably because the court gave no consideration to the fair use (and First Amendment) concerns underlying the dispute. If the primary conduct should not have been deemed infringing, then pointing users to sites where the documents could be read could not have given rise to liability either. Listing URLs, or, going the next step, linking, presents a harder case when the primary conduct is infringing. Arguably, the link is merely a reference, like a footnote, and no one (one hopes) would contend that a footnote identifying where an allegedly infringing work may be found makes its author contributorily liable for copyright infringement.⁴⁰ But the analogy may be too facile. Few readers are likely in fact to pursue the footnoted reference, and fewer still to make copies of the referenced work. A link not only vastly facilitates following up the reference, but also facilitates copying. Without entering into the debate whether reading online is or should be prima facie copyright infringement,⁴¹ one can acknowledge that once the document is posted, any websurfer may not only read it, but also copy and further disseminate it (assuming a technological protection does not limit downstream copying). Perhaps this is only a difference in degree, since a conventional footnote could at least in theory initiate the same chain of events. Nonetheless, the enormously enhanced volume of the activity that a link permits could well convert an activity that in modest dimensions seems clearly a fair use into one that plausibly could compromise the market for the copied work.⁴² The Supreme Court has emphasized that the test for a deleterious effect on the potential market for a work focuses on whether the activity at issue, “if it should become widespread” would harm the potential market.⁴³ The ability of digital media to promote widespread linking to and downloading from unauthorized copies arguably leads the activity afoul of fair use.

39. See, e.g., *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971).

40. See, e.g., Carl S. Kaplan, *Copyright Decision Threatens Freedom to Link*, CYBER L.J., Dec. 10, 1999 at ¶ 22, at <http://channel.nytimes.com/1999/12/10/technology/10law.html> (quoting Professor Jessica Litman, drawing footnote analogy). But see David Goldberg & Robert J. Bernstein, *Copyright and the Web: An Emerging Double Standard*, N.Y.L.J., Jan. 21, 2000, at 3 (criticizing footnote analogy).

41. See, e.g., Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994).

42. See 17 U.S.C. § 107(4).

43. See, e.g., *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 451 (1984).

That said, this argument may prove too much. The argument considers the *possibility* that linking may enhance unlawful copying, without fairly taking into account the likelihood that the copying will in fact occur.⁴⁴ The argument also fails to address the purpose for which the link was supplied: was the linker encouraging downloading, or instead is the link informational or for purposes of criticism? After all, if an electronic newspaper covering a copyright infringement case linked to a defendant's site, it might be facilitating unlawful copying, but it is also documenting the debate.

Let us return to my course webpage. Under *Utah Lighthouse*, would I be liable for a contributory circumvention violation? I am supplying a means to send my students and others who access my course page to sites from which they may download DeCSS. I may anticipate that some number of those I send will avail themselves of that opportunity (and will consequently decrypt, and perhaps pirate, DVDs). On the other hand, unlike ULM, I was not a party to the original lawsuit; I did not originate an infringing posting, and then arguably effect an "end run" around the prohibition of my posting to send my surfers to sites where they could obtain what I could no longer give them.⁴⁵ Moreover, my purpose in including the links was to call attention to the debate over the DVD hack, not to incite surfers to download the code. Under the standard announced in the Supreme Court's decision in *Sony v. Universal City Studios*,⁴⁶ I am not a contributory infringer if I distribute a staple article of commerce which, despite its potential to be used for infringing purposes, is commonly used for, indeed is merely capable of, substantial non infringing uses. Under that standard, since my links are capable of being used for the non-infringing purpose of eliciting discussion about DVD controls, I would not be liable.

The "merely capable" standard does not, however, apply if I am not distributing a staple article of commerce, but am distributing something tailored to my customers' infringing purposes.⁴⁷ Since my links are not general search tools such as thesauri,⁴⁸ but were written specifically to pinpoint particular sites, it is not clear that a court would analogize my links to a staple article of commerce. On the other hand, if I could show that my announced purpose of stimulating debate was not a mere pretext for encouraging unauthorized circumvention, but that most of my webpage users are following the links for purposes consistent with the educational purposes for which I posted them, then I ought not to be held a contributory infringer. If this conclusion is reassuring to those who value free speech and fair

44. For a fuller development of this objection, see Jessica Litman, *The Demonization of Piracy*, at <http://www.law.wayne.edu/litman/papers/demon.pdf> (last visited Mar. 17, 2001).

45. See *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp.2d 1290, 1295 (D. Utah 1999) (ULM's posting of links permits defendants to achieve objective of original posting of content).

46. *Sony*, 464 U.S. at 442.

47. See, e.g., *A&M Records, Inc. v. Abdallah*, 948 F. Supp. 1449 (C.D. Cal. 1996).

48. Cf. 17 U.S.C. § 512(d) (limitation of liability for service providers whose "information location tools" can lead to sites carrying infringing content).

use, it remains troubling to the extent that, however noble the motivation for posting links to infringing or circumventing sites, the links do furnish a means for the unscrupulous (or for the militant converts to the “information wants to be free” credo) to circumvent or infringe copyrighted works.

If distinctions based on the purpose of the link or of the site will not work in practice, and if links and unauthorized sites will proliferate in any event, is it fruitless to enjoin even those links, – such as those at issue in *Utah Lighthouse* and *Reimerdes* – posted for the purpose of eluding a prior order to take down infringing or circumventing content? The *Reimerdes* defendants contended that injunctive relief would be futile, akin to locking the barn door after the horse has fled. The court rejected this contention for two reasons. First, acknowledging the practical futility argument will simply encourage more aggressive use of the Internet to undermine the value of copyrighted works, the court warned. Second, whatever the conduct of non-parties, the defendants have themselves caused irreparable harm, and are within the court’s remedial power. It would be perverse, the court observed, to withhold relief against defendants on the ground that they have made it impossible, or at least very difficult, to obtain meaningful enforcement on a broader scale. Rather than conceding its powerlessness, the court proclaimed

the likelihood is that this decision will serve notice on others that “the strong right arm of equity” may be brought to bear against them absent a change in their conduct and thus contribute to a climate of appropriate respect for intellectual property rights in an age in which the excitement of ready access to untold quantities of information has blurred in some minds the fact that taking what is not yours and not freely offered to you is stealing.⁴⁹

Whether the court’s hopeful pronouncement proves true may well depend at least in part on how far the “blurring” has progressed beyond the hacker community to the general Internet-using population. This is an issue to which we shall return in the context of the *Napster* controversy, addressed later in this Article.

A. ANOTHER SEARCH TOOL CONTROVERSY

Another recent search tool controversy, *Kelly v. Arriba Soft*,⁵⁰ involved a search engine designed to identify and gather images posted on webpages. The defendant did not seek the permission of the copyright owners of the images that appeared on defendant’s index. Rather, the defendant, and the court, seem to have drawn inspiration from the advertising campaign of the New York City Yellow Pages: “If it’s out there, it’s in here,” modified to: “If it’s out there, it can be in my web index.” In this case, however, the “it” was not merely a reference to the homepage where the information, here images, could be found, but reduced-size copies of the images themselves. Plaintiff’s claims alleged both copyright infringement, and

49. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d at 345 (S.D.N.Y. 2000).

50. 77 F. Supp. 1116 (C.D. Cal. 1999).

violation of the DMCA §1202 prohibition on the removal of copyright management information.

Plaintiff Kelly was a photographer specializing in the “California gold rush country.” One of his two websites sponsored “virtual tours” of the “gold rush country,” promoting plaintiff’s book on the topic; the other marketed corporate retreats in “gold rush country.” Defendant Arriba Soft (now operating as “Ditto.com”) devised a “visual search engine” for the Internet. Unlike other Internet search engines, defendant’s lists of web sites displayed images, rather than text. In response to users’ queries, the search engine would display a list of reduced “thumbnail size” pictures from the indexed sites. The user could then click onto any thumbnail image in order to see the “image attributes window,” which enlarged the image to its full size, described its dimensions, and listed the originating web site’s address. The user could click onto the address to link to the originating web site to obtain the terms and conditions for the photograph’s use.⁵¹

The search engine operated from a database of around two million thumbnail images that were automatically retrieved by its “crawler,” which indiscriminately searched the web for images to convert into “thumbnail sized” versions for inclusion in the index. The retrieved images were stored briefly in full on defendant’s server, but were deleted once the thumbnail image was made. After the images were gathered, defendant’s employees screened images for relevant and appropriate content. In addition, defendant’s web site included a notice to users on a separate page labeled “Copyright,” that images shown may be subject to use restrictions, and instructing users to check with the originating web sites before copying or using the images.

In January 1999, thirty-five of plaintiff’s images were indexed by defendant’s crawler and added to its database, ultimately making the images available in “thumbnail form” to defendant’s users. Plaintiff sent defendant a notice of copyright infringement in January 1999. Defendant removed the images from its database; technical problems nonetheless caused the images to reappear several times thereafter. Plaintiff initiated suit in April.

Although the court found a prima facie violation, the court also held that under the circumstances, the unauthorized reproduction of plaintiff’s images constituted fair use. In addition, the court held that defendant did not violate the DMCA by displaying plaintiff’s images without their copyright management information. Both of the holdings are disturbing. The court’s fair use analysis distorts the judge-made doctrine of “transformative use”; its analysis of §1202, if faithful to the text, illustrates the practical weakness of that provision.

As to the first factor, the court found defendant’s use to be commercial, but reasoned that the use was of a “more incidental and less exploitative nature than

51. Defendant modified the operation of its search engine between the time of the alleged infringement and the time the case was adjudicated. Initially, the full-sized image was not technically located on defendant’s web site, but was displayed by opening a link to the plaintiff’s webpage. None of the other webpage content (such as terms and conditions of use) appeared, however. In the later version of defendant’s search engine, when the user clicks on the thumbnail sketch, the full-size image appears, as does the originating webpage in full.

more traditional types of ‘commercial use.’”⁵² The court distinguished between the web site itself, which defendant operated for commercial purposes, and the search engine, which the court deemed commercial only in its connection to the website, that is, that the index’ primary purpose was to facilitate thorough results for its users. (The court did not, however, consider whether the thoroughness of the results may have enhanced the appeal of defendant’s website to advertisers.) The court distinguished a hypothetical clearly commercial use of plaintiff’s images to advertise defendant’s website from the “unusual and less serious” “indiscriminate” use of plaintiff’s images, along with all other images, in defendant’s “comprehensive thumbnail index.”⁵³

Most significantly to the court, the defendant’s use was transformative because it was very “different” from the plaintiff’s intended use: while plaintiff created his photographs for artistic or “aesthetic” purposes, defendant reproduced and displayed the photographs for “functional” purposes of identifying their existence and location. The purpose here was to organize and provide access to images on the Internet. The court acknowledged that the version of defendant’s index used during the period at issue in this case permitted users to view and potentially download full-size images without contacting the plaintiff’s web page. As a result, the index was “less clearly connected to the engine’s purpose of finding and organizing Internet content for users.”⁵⁴ Nonetheless, the court found that the transformative purpose of a “new enterprise” outweighed the “imperfect means of achieving that purpose” in an evolving technology⁵⁵: “Defendant’s purposes were and are inherently transformative, even if its realization of those purposes was at times imperfect.”⁵⁶

As for the remaining fair use factors, the court found that the nature of the copyrighted work weighed in plaintiff’s favor, as did, “slightly,” the amount and substantiality of the portion used. Although the thumbnail images on the index reproduced and displayed plaintiff’s photographs in full, their size was greatly reduced, and, at least in the later version of the index, the thumbnails could not be enlarged. The nature of the use, indexing images, required reproduction of the full image; partial reproductions would not capture the full indexed content. With respect to the earlier version of the index, however, the court found that displaying a full-sized version of the image without returning the viewer to plaintiff’s web site was more problematic because it was not necessary to the main purposes of defendant’s search engine (as identified above – “to catalogue and improve access to images on the Internet.”)

Finally, the court held that defendant’s index did not compromise the potential market for or value of plaintiff’s works. Significantly, the court identified the relevant market as “Plaintiff’s Web sites as a whole,”⁵⁷ rather than the separate

52. *Kelly*, 77 F. Supp.2d at 1119.

53. *Id.* at 1119 and n.5.

54. *Id.* at 1119.

55. *Id.*

56. *Id.* at 1121.

57. *Id.* at 1120.

photographs. The court found the images were used to promote plaintiff's products sold on the sites, and to attract users to other advertisements on those sites. The court acknowledged that it was possible that some users might copy images from defendant's site, and further, that "deep-linking" allowed users to by-pass the advertisements on plaintiff's site, but held that plaintiff did not present any evidence of harm or adverse impact from these practices.

The court's fair use discussion appears to be guided by exceptional solicitude for new Internet enterprises. As David Goldberg and Robert Bernstein have pointed out, a hard copy image repository does not enjoy a fair use privilege to reproduce and disseminate the copyrighted images that it catalogues.⁵⁸ There is nothing "transformative" about taking an image, and reproducing it in full as is. The image is not incorporated into a new work that builds or comments on the nature or qualities of the copied work.⁵⁹ That the image is conveyed through digital rather than analog means is not itself transformative; "transformative" use addresses the message, not the medium. Here there was no message, other than reiteration of plaintiff's works. The court's bedazzlement by the Internet is also apparent from the remarkable tolerance it expressed for the "imperfect" way (i.e., by means of excessive copying) in which defendant achieved its so-called transformative objective. It seems unlikely that a "new enterprise" in the hard copy world would enjoy a privilege to copy too much during the initial stages of its business simply because the business was a start-up that proposed a useful product.

The court's analysis of the fourth factor is similarly problematic. By identifying plaintiff's works as its websites as a whole, rather than as the individual photographs, the court was able to ignore the economic impact on plaintiff's ability to license rights in the photographs independently of the websites in which they appeared. But when a copyrighted work comprises several components, each of them works of authorship, the appropriate analysis of the impact on the *potential* market for the work considers the potential market for the components, taken separately, as well as for the work as a whole.⁶⁰

For all the shortcomings of the court's analysis, the result might have been justified on more conventional fair use terms. The purpose of defendant's index, while commercial and not transformative with respect to the images, was

58. See Goldberg & Bernstein, *supra* note 40.

59. Cf. Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381 (6th Cir. 1996); American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994), *further amended* 1995 (photocopying chapters from books for inclusion in course packs, or articles from journals for researchers files is not transformative). In Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984) the Supreme Court acknowledged that taking an entire work for its intrinsic purpose (there to record a televised motion picture for subsequent viewing) was not fatal to the fair use claim, when the use was non commercial, and the public had been invited to view the films for free on broadcast television. Here, plaintiff's use was commercial, and the public's invitation to view the images on plaintiff's website was accompanied by terms and conditions that defendant did not reproduce with the images.

60. See, e.g., *American Geophysical*, 60 F.3d 913 (each article within a journal should be considered a separate work); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (potential market for licensing "first serial" rights to book).

nonetheless a useful one, perhaps akin to the “research” uses cited in the preamble to the fair use section as examples of the kinds of uses that typically may be found non infringing (if they meet the statutory criteria). The resolution of the case should have turned on a sustained analysis of the fourth factor: impact on the potential market for the photographs. The initial version of the index offered users the opportunity to enlarge and copy plaintiff’s images, without contacting plaintiff’s website. This version does seem to substitute for plaintiff’s market for the images, and should not have been held excused. By contrast, the later version of the index delivered only “thumbnail” size images, sufficient to convey the content, but unable to be enlarged. For enlargements and further copies, the later version of the index sent users back to the plaintiff’s website. This version seems considerably less in tension with plaintiff’s licensing of the images...except to an image bank. So the question would depend on licensing practices in the industry with respect to uses of defendant’s kind.⁶¹ If defendant’s use is informative without usurping, indeed, if it facilitates transactions with the plaintiff by automatically sending users from the thumbnail to plaintiff’s website, then fair use might properly be found.

Defendant’s incorporation of thumbnails of plaintiff’s images presented another problem: the thumbnails did not include the copyright management information that appeared in the text of plaintiff’s web site because defendant’s “crawler” retrieved only the plaintiff’s images. Plaintiff therefore alleged a violation of §1202(b), which prohibits the removal of copyright management information in certain circumstances. Defendant attempted to compensate for the non-inclusion of copyright management information by providing a separate “copyright” page for users to click open, on which defendant warned users about potential copyright restrictions.

The court held that plaintiff failed to establish a violation of §1202(b)(1) because plaintiff had not embedded the copyright management information in the images themselves, but had included it elsewhere on his webpages. As a result, the court determined that defendant’s copying of the images did not remove any copyright management information from plaintiff’s works. (This holding is arguably inconsistent with the court’s earlier determination that plaintiff’s “works” were the webpages, not the separate photographs.) In addition, the court held that defendant did not intentionally omit copyright management information. The court further found that the defendant did not violate the §1201(b)(3) prohibition on distribution of copies of works knowing that copyright management information has been removed. Although defendant displayed plaintiff’s images out of the context of their web sites, in thumbnail (and, initially, in full-sized) versions, without their copyright management information, the court stressed defendant’s provision of the name of the originating web site, a link for getting there, and a notice about potential copyright infringement. As a result, ruled the court, defendant did not have “reasonable grounds to know” that it could cause users to

61. Cf. *American Geophysical*, 60 F.3d 913 (photocopy licenses granted by Copyright Clearance Center).

infringe the copyrights. Moreover, the court found that plaintiff's images are vulnerable to user infringement by virtue of their location on the web, and that defendant did not heighten plaintiff's vulnerability.

The court's last observation may be the key to its resolution not only of the copyright management information issue, but also of the fair use question: Anything that a copyright owner puts out on the Internet is fair game (at least if it is not accompanied by a technological protection measure). This is unfortunate not only for copyright owners, and for the development of legitimate business on the web, but also, ultimately for users, once the euphoria of "free" access to "free information" has subsided. With respect to the court's analysis of §1202(b), the statute itself may be more problematic than the court's treatment of it. The court did misconstrue the statute in holding that defendant did not remove copyright management information from plaintiff's works when the information was located on another part of plaintiff's webpage. Section 1202 does not require that the information be embedded in the photographs; the definition of copyright management information covers information "conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form..."⁶² The appearance of the information on the webpage should have sufficed to meet the "in connection with" standard. But even if the court wrongly interpreted §1202 as to this issue, the result nonetheless seems consonant with the statute. Under §1202(b), the wrongful act is not simply removing the information, or distributing or publicly performing the work without the information.⁶³ The statute also requires that those who distribute or perform the work have known that the information was removed without the copyright owner's authorization, *and* that those who remove the information, or who distribute or perform works whose information has been removed, do so "knowing, or...having reasonable grounds to know that it will induce, enable, facilitate, or conceal an infringement of any right under this title." Defendant may have intentionally removed the information, by deliberately separating the images from the information on plaintiff's webpage, and defendant therefore would have known that the images it communicated lacked the information. Nonetheless, it would be difficult to prove that defendant knew or had reasonable grounds to know that its acts would promote copyright infringement, particularly when the later version of defendant's index sent users from the thumbnails back to plaintiff's own webpage, on which the information did appear.

This analysis illustrates the relative weakness of §1202's protection of copyright management information: even intentional removal is not unlawful if the copyright owner cannot show that the removal would encourage or facilitate copyright infringement. In many cases, removal of the information would not promote infringement – although it could make licensing more onerous – because users are not entitled to infer lack of copyright coverage from the absence of copyright

62. 17 U.S.C. §1202(c).

63. Curiously, §1202(b)(3) does not address publicly displaying a work whose copyright management information has been removed.

management information.⁶⁴ Section 1202 therefore may require a rather high threshold of bad faith before a violation is established. On the facts of *Kelly v. Arriba Soft*, the weakness of §1202 seems less troublesome, because users did encounter plaintiff's copyright management information, at least in the later version of the index, which sent users directly to plaintiff's webpage. But if copyright management information-less copies circulate without the link to their proprietor's information, then the goals of a copyright management information system – to facilitate licensing and legitimate use – will be frustrated, despite the absence of a violation of §1202.

B. MORE ON FAIR USE AND COPYING FROM THE INTERNET

Another recent decision to consider copying from websites expressed far less tolerance for unlicensed postings. In *Los Angeles Times v. Free Republic*,⁶⁵ the Central District of California rejected the fair use defense of the Free Republic regarding copying and posting articles from the L.A. Times and Washington Post to its website. Plaintiffs asserted that the copying was non transformative, and harmed the actual and potential markets for their websites, both by diverting readers from viewing plaintiffs' advertising-supported pages, and by making available for free the text of less current articles otherwise available only through plaintiffs' fee-based archive pages. The Free Republic claimed that the posting of full text articles copied verbatim was necessary to its critical purpose of inviting commentary by its readers concerning the alleged political bias of the reporting in the copied articles. Although the Free Republic did not itself comment on the copied articles, it claimed that its solicitation of readership response met the "transformative" purpose favored by the fair use doctrine.

The court rejected the "transformative" characterization of defendant's copying. Defendants simply made the articles available to a different audience; audience-shifting is not transformative, even if the new audience is invited to read the articles with a particularly critical eye. Moreover, even if the readers' critical comments might have retroactively transformed defendant's postings, not all the postings attracted comments, and those that did drew comments on the topics, not on the reporting itself. The court observed that it was not necessary to copy entire articles in order to comment on their subject matter; that could be achieved by posting summaries of the articles.

The court also emphasized that in a networked environment, there is less need to copy, because would-be commentators can link to the documents they seek to criticize. The Free Republic objected that linking can be cumbersome, or no longer free, once the targeted article has been archived. The court was not persuaded:

[t]hat [there is a charge] does not make linking plaintiffs' websites to the Free Republic site "impractical." It merely requires that Free Republic visitors pay a

64. Cf. 17 U.S.C. § 401(a) (notice of copyright is optional).

65. 54 U.S.P.Q.2d 1453 (C.D. Cal. 2000)

fee for viewing plaintiff's articles just as other members of the public do... The fact that linking...is not as easy or convenient for Free Republic users as full text posting does not render the practice a fair use.⁶⁶

Regarding the fourth fair use factor, harm to potential markets for the work, the court found that visits to the Free Republic site substituted for visits to plaintiffs'. Defendants claimed that, although their site received millions of "hits" each month, the impact of their postings was *de minimis*, and that plaintiffs could not prove that the Free Republic site resulted in revenue lost to plaintiffs. The court emphasized that their copyrights gave plaintiffs "the 'right to control' access to the articles, and defendants' activities affect a market plaintiffs currently seek to exploit."⁶⁷ Moreover, were defendants' practice of full text copying to become widespread,⁶⁸ the market impact would be substantial. It is worth noting that the court recognized that markets created by new forms of copying remain within the copyright owners' "right to control," even when the copyright owners' own exploitation of those markets may not be fully developed, and even when the defendants' incursion, taken in isolation, may seem modest.

Finally, the court rejected defendants' first amendment defense. The court stressed that the fair use doctrine accommodates first amendment concerns, and that, in view of the availability of linking, and the possibility of summarizing plaintiffs' articles, defendants had not shown a need to post full text copies.

Together, *Free Republic* and *Kelly v. Arriba Soft* propose conflicting directions for Internet-specific fair use. *Kelly* indicates that web availability may make a work more vulnerable to fair use copying, while *Free Republic* suggests that web availability makes a work less subject to fair copying, because other websites may simply link to the plaintiff's site. The recent decision in *Ticketmaster v. Tickets.Com*⁶⁹ supports the *Free Republic* contention, since the *Ticketmaster* court held it was not copyright infringement to "deep link" to another's website in order to pinpoint a document without paging through all the prior screens. As a result, future Free Republics may link directly to the article whose reportorial bias they seek to expose through readership commentary. As we will see in the next section, the Southern District of New York has echoed *Free Republic's* analyses of the nature of transformative use and of market harm on the Internet.

66. *Id.* at 1463.

67. *Id.* at 1470.

68. *See Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

69. 54 U.S.P.Q.2d 1344 (C.D. Cal. 2000).

III. PRIVATE COPYING VIA COMMERCIAL INTERNET SERVICES⁷⁰

Two recent decisions, *UMG Recordings v. MP3.com*,⁷¹ and *A&M Records v. Napster*,⁷² address the liability of online commercial services that promote or facilitate the “private” copying of sound recordings. The results so far suggest the ill-advisedness of Internet business plans that omit to compensate or secure permission from authors, performing artists and other copyright owners for the online delivery of their music. In both cases, it is important to distinguish between the technology of online music delivery in general, and the activities of these defendant businesses in particular.

In the litigation against MP3.com, copyright owners targeted “My.MP3.com,” a service that offers its subscribers a virtual library of music that the subscriber uploads from the subscriber’s computer. From the subscriber’s perspective, it is like having a celestial jukebox of her own recordings (or of recordings she has borrowed and uploaded) to which she can listen, through audio streaming, any time and any place from which she has an Internet connection. In fact, My.MP3.com does not maintain separate music files for each subscriber, but instead keeps an overall database of 80,000 recordings that it has ripped. Moreover, the subscriber does not in fact upload the music to My.MP3.com, but uploads the information from the CD concerning the number of tracks the CD contains, and the length of each track.⁷³ This information supplies a “fingerprint” identifying the subscriber’s CD; My.MP3.com then cross-references the fingerprint information from the subscriber to the fingerprint information in its database, to identify the subscriber’s holdings. With respect to the audio streaming, My.MP3.com has acquired performance licenses from the copyright owners of the musical compositions contained in the sound recordings; however, the producers of the sound recordings have not granted My.MP3.com performance licenses. Moreover, My.MP3.com did not obtain licenses from copyright owners of the musical compositions or of the sound recordings to reproduce the works into the database.

In theory, the My.MP3.com system is premised on its subscribers’ legitimate acquisition of physical copies of the sound recordings. In fact, My.MP3.com will also store in the subscriber’s “library” (or, more accurately, put on the subscriber’s list of works that may be communicated from the My.MP3.com database) copies of

70. I am most grateful to Professor Jessica Litman for explaining the technology and discussing the legal issues with me. Errors that persist are mine, and I do not claim that Professor Litman would agree with my analysis.

71. *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp.2d 349 (S.D.N.Y. 2000). See also *MPL Communications, Inc. v. MP3.com*, No. 00 Civ. 1979 (S.D.N.Y. filed Mar. 17, 2000) (suit by music publishers alleging violation of reproduction and distribution rights). The parties subsequently settled, see, National Music Publishers’ Association Press Release, Oct. 20, 2000, *Music Publishers and MP3.com Reach Landmark Agreement*, at <http://www.nmpa.org/pr/mp3agree.html> (last visited Mar. 17, 2001).

72. *A & M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9th Cir. Feb. 12, 2001).

73. My.MP3.com also offers a service with cooperating record stores: when the subscriber purchases the CD, the store transmits CD-identifying information to My.MP3.com, so that the customer may access the song via the Internet, without having to “upload” it from her computer.

entire CDs that the subscriber has downloaded from sites carrying ripped copies of CDs, because the My.MP3.com database cannot tell the difference between fingerprint information uploaded from a physical CD, and fingerprint information uploaded from a ripped copy of the CD. By the same token, however, My.MP3.com will not enter into the subscriber's "library" copies of individual ripped songs, as single songs do not communicate the necessary fingerprint information. Thus, although the My.MP3.com enterprise may encounter some "leakage" by cross-referencing from unlawfully acquired copies of CDs, it appears that most of the subscribers' "uploads" derive from legitimate sources.

By contrast, Napster deals in individual song files. The provenance of these is likely to be more suspect than the My.MP3.com CDs, but Napster from the outset took no precautions whatsoever concerning the origin of the copies of the works that its subscribers may acquire and further communicate. Napster crosslinks MP3 files on its subscribers' hard drives: it distributes a software package that includes a searchable directory function, a chat function, a real time file transfer protocol function, and a player function that enables subscribers to listen in real time to music stored on other subscribers' hard drives (as well as to acquire a copy for their hard drives). A Napster subscriber lists on the directory the files he is willing to "share" with other subscribers (the listing specifies not only the composer, title and artist, but also the audio quality level of the recording, and the speed of the subscriber's modem connection). The directory does not distinguish between purchased MP3 files (for example, those downloaded from a site such as eMusic.com), or MP3 files that the subscriber has created by ripping the contents of the subscriber's own CDs, and files acquired by downloading songs ripped from CDs from other sources. Subscribers use the searchable directory to find other subscribers currently online who have listed recorded selections the requesting subscriber seeks; the requesting subscriber clicks on the desired directory entries to acquire copies of the songs. This transaction proceeds directly between the subscribers. Napster enables the transactors to "meet," but does not itself conclude the transaction. Despite characterizations of Napster as a music file "swapping" service,⁷⁴ the subscriber from whom the requester has obtained a copy does not in fact give up her copy; files are not "traded," they are copied. Thus, any copy residing on a Napster subscriber's hard drive has the capacity to turn into as many additional copies as there are Napster subscribers.

Because the My.MP3.com and Napster services facilitate the making of "private" copies, the lawsuits posed the questions whether either service is directly or contributorily liable for copyright infringement, or if the services' or the subscribers' conduct is excused by either the §1008 bar on copyright infringement

74. See, e.g., Dick Kelsey, *RIAA Submits Revised Napster Injunction*, NEWSBYTES, at <http://www.newsbytes.com/news/01/162058.html> (Feb. 15, 2001) (describing Napster as a "file swapping service"); Brad King, *Napster Faces Shutdown*, WIRED, at <http://www.wired.com/news/politics/0,1283,41752,00.html> (Feb. 12, 2001) (describing Napster as a "file trading application"); *Napster's Day in Court, Threat of Damages Could Cripple Service*, CNET, at <http://news.cnet.com/news/0-1005-201-4774158-0.html> (Feb. 12, 2001) (describing Napster as "The popular music file-swapping service").

actions “based on the noncommercial use by a consumer of a [digital audio recording] device for making digital musical recordings,” or by the fair use doctrine, or, in the case of Napster, by § 512 of the Online Service Provider Liability Limitation Act.

A. MY.MP3.COM

MP3.com’s creation of a database of 80,000 ripped recordings furnished the basis of its direct liability for copyright infringement. Section 1008 does not shelter My.MP3.com’s ripping of CDs, because My.MP3.com is not a “consumer.”⁷⁵ But, perhaps if My.MP3.com’s customers could themselves lawfully send their CDs to My.MP3.com, then My.MP3.com’s copying might be excused as the functional equivalent of each user creating a separate library of files. On the other hand, even if a consumer might enjoy a “place shifting” privilege to copy her CDs to post on her own website (whose access she restricted to herself),⁷⁶ it does not necessarily follow that the privilege shields a third party who goes into the business of creating the personalized digital library and supplying access to it. For example, courts have stated that educational institutions and professors may enjoy a fair use privilege to photocopy from protected works for purposes of teaching, but they have nonetheless held that it is not fair use for an off-campus, for profit, photocopy shop to prepare course packs at the professors’ behest, without the copyright owner’s authorization.⁷⁷ Because My.MP3.com carries advertising, and may begin charging subscription fees, it is clearly a commercial intermediary.⁷⁸

In its decision awarding summary judgment to the record producers, the Southern District of New York proved quite inhospitable to MP3.com Inc.’s contention that creating a database of ripped CDs to enable subscribers to access their collections was a “transformative ‘space shift’”: “this is simply another way of saying that the unauthorized copies are being transmitted in another medium – an insufficient basis for any legitimate claim of transformation.”⁷⁹

With respect to the market harm fair use factor, the *MP3.com* court, like the *Free Republic* court, emphasized that “a further market that directly derives from reproduction of the plaintiff’s copyrighted works”⁸⁰ remains within the copyright owner’s control. Indeed, where *Free Republic* underlined defendants’ incursion on

75. Moreover, a general-purpose computer is not a “digital audio recording device,” and the hard drive is not a “digital audio recording medium” under § 1008. See discussion *infra* regarding Napster’s § 1008 defense.

76. Cf. *RIAA v. Diamond Multimedia*, 180 F.3d 1072, 1079 (9th Cir. 1999) (recognizing “space shifting” privilege to transfer music on the consumer’s hard drive to a portable digital video player; the court did not inquire into the provenance of the music on the hard drive). See discussion *infra*.

77. See *Princeton Univ. Press v. Michigan Document Servs. Inc.*, 99 F.3d 1381 (6th Cir. 1996); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991). I thank Prof. Jessica Litman for this observation.

78. My.MP3.com’s “Terms and Conditions” do not preclude this possibility. *My.MP3.com Terms and Conditions* at <http://www.mp3.com/my/terms/index.html> (last visited Mar. 17, 2001).

79. *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp.2d 349, 351 (S.D.N.Y. 2000).

80. *Id.* at 352.

new markets that the copyright owner was already exploiting, *MP3.com* stressed plaintiff's right to control:

even if the copyright holder had not yet entered the new market in issue, for a copyright holder's 'exclusive' rights, derived from the Constitution and the Copyright Act, include the right, within broad limits, to curb development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable.⁸¹

MP3.com might have hit upon the clever business idea of enhancing consumer convenience, but that did not mean the enhancement should be free of copyright owner charges or control.

Copyright, however, is not designed to afford consumer protection or convenience, but, rather, to protect the copyright holders' property interests....Stripped to its essence, defendant's "consumer protection" argument amounts to nothing more than a bald claim that defendant should be able to misappropriate plaintiffs' property simply because there is a consumer demand for it.⁸²

The *MP3.com* decision is consistent with the Second Circuit's 1998 ruling in *Infinity Broadcasting v. Kirkwood*,⁸³ in which the court rejected a fair use defense to the retransmission of radio broadcasts over phone lines. That case involved non-transformative audience shifting, because defendant made plaintiff's broadcasts available, without alteration, to distant listeners. The *Infinity* court ruled that the copyright entitled its holder to control who could access its transmissions; defendant's activities disrupted that control and enabled defendant to replace plaintiff in distant markets. *MP3.com*, like *Free Republic*, is a further rejection of what one might call "redistributive" fair use, an aspiring doctrine that would excuse the broad unpaid distribution of works on the dual grounds that copyright must not rein in the progress of new technologies of communication, and that the public is enriched by greater exposure to works that it enjoys.⁸⁴ Rather, according to these courts, when technology opens up new markets and wider audiences it is not fair use to bring the work to more people by means of unlicensed copying or unauthorized public performance.

But, one may object, the My.MP3.com service did not purport to bring the recorded music to *more* people, only (in theory) to those people who had already purchased the CDs. Nonetheless, in order to make the work available to the same audience in different places, My.MP3.com was not in fact streaming its subscribers' own copies, it created a massive database; this substantial and systematic copying condemned its activities. Copying in order to create a single

81. *Id.*

82. *Id.*

83. 150 F.3d 104 (2d Cir. 1998).

84. See, e.g., John Perry Barlow, *The Next Economy of Ideas: Will Copyright Survive the Napster Bomb? Nope, But Creativity Will*, WIREd, at <http://www.wired.com/wired/archive/8.10/download.html> (Oct. 2000)(celebrating the end of copyright and the arrival of "dotcommunism"). See also, Eben Moglen, *Anarchism Triumphant, Free Software and the Death of Copyright*, FIRST MONDAY (August 1999), at <http://old.law.columbia.edu/publications/anarchism.html>.

library corresponding to its subscribers' combined collections may have made sense from a business point of view, as a single library avoids duplication across collections, and thus saves space on the server. The consolidated library may also have facilitated faster delivery to subscribers than would searching individual files.⁸⁵ But creating a faster, cheaper operation by means of copying does not enjoy a strong claim to fair use, particularly when the more streamlined operation gives it an advantage over competitors who lose time and incur transactions costs by seeking copyright licenses.⁸⁶

Because My.MP3.com was making its library available to any member of the public who subscribed to the service, it was also publicly performing the musical compositions and sound recordings. With respect to public performance, MP3.com Inc. had acquired performance licenses from the copyright owners of the musical compositions contained in the sound recordings. Thus, My.MP3.com's audio streaming of the musical compositions to subscribers from "their" digital libraries would come under the ASCAP and BMI licenses. The performing rights societies do not, however, license the *reproduction* of the musical compositions into the My.MP3.com database. The music publishers control reproduction rights in the musical compositions; they did not license My.MP3.com, and, indeed, they were plaintiffs in one of the copyright infringement suits against My.MP3.com.⁸⁷ (The record producers licensed neither reproduction nor performance rights in the sound recordings.)

As to the claim the music publishers ultimately settled, one might inquire, for the sake of the analysis, whether statutory provisions authorizing the creation of ephemeral recordings incidental to licensed public performances of the musical compositions would have legitimated the creation of the database. But the terms of §112(a) do not fit My.MP3.com's activities. The exemption permits the making of "no more than one copy or phonorecord of a particular transmission program embodying the performance..."⁸⁸ This exception was primarily designed to permit radio and television stations to prerecord their broadcast programming. In the case of My.MP3.com, there is no "transmission program." There is a general database of recordings, but My.MP3.com engages in no "programming"; the customer constitutes "her library" and selects the CDs she wants to hear. The further conditions on the ephemeral recordings exemption are similarly ill-adapted to My.MP3.com. The phonorecord is to be "used solely for the transmitting organization's own transmissions within its local service area," and the

85. Or than running programs to cross-reference and purge duplicates from online delivery services that store and stream back subscribers' own collections, but that, unlike My.MP3.com, do not themselves copy to create a database. *See, e.g.*, services cited *infra* n. 95.

86. *See Michigan Document, supra* note 77 (off-campus copy shop that saves itself the time and effort of obtaining copyright permissions competes unfairly with copy shops that do seek permission).

87. *MPL Communications, Inc. v. MP3.com*, No. 00 Civ. 1979 (S.D.N.Y. filed Mar. 17, 2000). The parties subsequently settled, *see*, National Music Publishers' Association Press Release, Oct. 20, 2000, *Music Publishers and MP3.com Reach Landmark Agreement*, at <http://www.nmpa.org/pr/mp3agree.html> (last visited Mar. 17, 2001).

88. 17 U.S.C. §112(a)(1).

phonorecord is to be “destroyed within six months from the date the transmission program was first transmitted to the public.”⁸⁹ But an Internet service like MP3.com has no “local service area”; a customer can access “her” library from anywhere in the world from which she has Internet access. Moreover, even if the My.MP3.com database qualified as a “transmission program,” My.MP3.com did not propose to delete it within six months.

With respect to the public performance by transmission of the sound recordings, the record producers did not pursue a performance right claim. Nonetheless, for completeness of analysis, I note that no ephemeral recordings exemption applies to excuse the reproductions of the sound recordings in the My.MP3.com database unless the performances of the sound recordings are lawful. Because My.MP3.com offers an audio on demand service, it does not qualify for a compulsory sound recordings performance rights license under §114(d)(2).⁹⁰ In the absence of a negotiated license, therefore, My.MP3.com would be violating the digital performance right in the sound recordings, unless a fair use defense prevails. My.MP3.com may not bootstrap its performance of the sound recordings to its licensed performance of the musical compositions; the performance right in the song is distinct from the performance right in the sound recording. When no compulsory license applies, each right must be licensed.⁹¹

MP3.com subsequently settled with four of the five record labels. The case proceeded to an assessment of statutory damages with respect to Universal, the remaining defendant. Characterizing the infringement as “willful” under § 504 of the Copyright Act, the District Court set the damages at \$25,000 per CD, but declined to rule on how many of the 80,000 copied CDs’ copyrights were owned by

89. *Id.* §112(a)(1)(B)(C). The statute also requires that “no further copies or phonorecords are reproduced from” the phonorecord of the transmission program. *Id.* §112(a)(1)(A). But in audio streaming the songs to its customers, My.MP3.com is making RAM copies.

90. Under §114(d)(2), subscription digital audio transmission services and “eligible nonsubscription transmissions” (e.g. non-interactive webcasts that conform to the “sound recording performance complement” and other statutory limitations) may obtain statutory licenses of the digital performance right in sound recordings. Transmissions that are “part of an interactive service” are explicitly excluded from the scope of the compulsory license; negotiated licenses must be obtained. An “interactive service” is defined at §114(j)(7). The §112(e) statutory license to make an ephemeral phonorecord recording is dependent on the availability of a statutory license to perform the sound recording by means of a digital transmission.

91. *See* 17 U.S.C. §114(d)(3)(C) (to perform recorded music publicly by means of interactive digital transmission, the interactive service must acquire not only a performance license in the sound recordings, but also in the musical compositions).

There is a further question whether My.MP3.com, by streaming the recorded performances of the musical compositions is also reproducing and distributing copies of these works to the subscriber. My.MP3.com’s streaming is not intended to permit retention of copies, but production and distribution of RAM copies is nonetheless occurring. It is not clear whether those copies would be actionable if the rest of the transaction is lawful. § 115(d) excludes from the definition of “digital phonorecord delivery” “a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.” A service like MyMP3.com would be disqualified because the service, albeit “real-time” is interactive. In addition, in the course of the delivery, RAM and cache copies are being made.

Universal.⁹² MP3.com had contested Universal's ownership, claiming that Universal had improperly registered the sound recordings as works made for hire. Resolution of that contentious issue⁹³ was avoided when Universal ultimately settled with MP3.com.

MP3.com, it should be stressed, did not involve "place shifting," of the kind apparently endorsed as a fair use in *RIAA v. Diamond Multimedia*,⁹⁴ in which end users themselves effected the copying from their computers onto the place-shifting device, there the "Diamond Rio" portable MP3 player. The *MP3.com* court therefore did not need to confront the question whether end-user copying and storage would have infringed. By the same token, the court did not need to address what one might call the "Rio in cyberspace": the question did not arise whether an Internet service that offered individual-access celestial storage lockers for end-users to stock themselves would be an infringer.⁹⁵ A service that neither initiates the copying, nor makes the uploaded files available to anyone other than the subscriber, could nonetheless at least in theory be liable as a primary infringer on the bases that the file the subscriber sent to the server results in a copy made by the service, and/or that sending the file back to the subscriber when she wishes to access it from afar effects a "distribution" of a copy.⁹⁶ Nonetheless, the level of service-initiated activity posited here is far less than in *MP3.com*, and more closely resembles that involved in the Rio case. The storage box service's acts may be sufficiently attenuated and auxiliary to those of the user that any liability on the part of the service for infringing the reproduction right should depend on whether the end user is an infringer.⁹⁷ This is, essentially, a contributory infringement analysis: the service is facilitating end-user conduct, but if that conduct is not infringing, then neither is the service's contribution to it. If "place-shifting," as narrowly circumscribed here is fair use, then celestial storage locker services should escape liability for infringing the reproduction right.⁹⁸ We will return to the

92. See *UMG Recordings Inc v. MP3.com*, 2000 U.S. Dist. LEXIS 13293 (S.D.N.Y. Sept. 6, 2000). See also 109 F. Supp. 2d 223 (declining to calculate damages on a "per song" rather than "per CD" basis).

93. In late 1999 § 101 was amended to include "sound recordings" on the list of commissioned works capable of being deemed works for hire. On Oct. 27, 2000, President Clinton signed legislation repealing the amendment. Congress specified that its repeal did not in any way determine whether a sound recording might nonetheless be deemed a work made for hire. See Pub. L. No. 106-379, H.R. 5107, 61 P.T.C.J. 4-5 (Nov. 3, 2000).

94. *Supra*, note 76.

95. See, e.g., www.myplay.com; www.streamload.com; www.freedrive.com; www.idrive.com.

96. See, e.g., *Playboy Ents. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), *Playboy Ents. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997); *Marobie-Fla. v. NAFED*, 983 F.Supp. 1167 (N.D. Ill. 1997).

97. By contrast, if the service consolidates its subscribers' uploads and eliminates duplicates, so that it is streaming one file to all the subscribers who uploaded it, the service would probably require licenses for the public performance of the musical compositions and for the interactive performance of the sound recordings. In this case, the service's act resembles that of a traditional broadcaster: it is irrelevant to the public performance right in the musical composition that radio listeners may already own copies of the recorded musical composition and therefore could listen to their copies at home or on portable players.

98. Note, however, that the argument presumes a legitimate source of the uploaded copy (or at

place-shifting argument in the context of the discussion of the Napster controversy.

B. NAPSTER

In contrast to *MP3.com*, there is no basis for a primary infringement claim against Napster. Napster does not store files on its servers.⁹⁹ Nor does Napster itself effect the distribution of copies from one subscriber's hard drive to another. Rather, the claim against Napster raises Napster's derivative liability for the primary infringements of its users. One basis of liability is contributory infringement: Is Napster inciting its subscribers to make unlawful copies of musical compositions and of sound recordings, or at least knowingly facilitating that copying?¹⁰⁰ Another basis is vicarious liability: Does Napster have the right to supervise and control its subscribers' activities, and does it derive a direct financial benefit from those activities?¹⁰¹ Because Napster's liability would stem from primary infringements committed by its subscribers, it is necessary to determine whether the fair use doctrine would excuse end-users' prima facie infringing acts of copying and making works available from their hard disks. A related issue is whether §1008 of the 1992 Audio Home Recording Act applies to bar an action for facilitating the making of private copies from other subscribers' collections.

Beginning with prima facie infringement, it is clear that Napster subscribers are making copies; this engages the reproduction right. Napster subscribers are also making copies available to others for further copying; this effects a digital distribution of copies. To understand why that is the case, imagine the following scenario: Napster subscriber Jack Ripper has copied onto his hard drive "Greed is Awesome," the latest hit song from the immensely popular group 3 Dead Rats. 3 Dead Rats, and its label, Death Jam Records,¹⁰² have not authorized the distribution of the group's recordings through MP3 sites. Jack Ripper now makes his copy available to other Napster subscribers by listing it on the Napster directory; one hundred thousand subscribers who are online at the same time as Jack consult the directory and click on Jack's entry in order to copy "Greed is Awesome" from Jack's hard drive onto theirs. Ignoring for the moment the question of whether

least reasonable ignorance on the part of service as to the source of the copy). A service that, like My.MP3.com, stores full albums, rather than individual songs, is more likely to store copies made from a lawfully acquired original, because individual songs make up most unauthorized MP3 files. By contrast, a service that welcomes individual MP3 files, might be vulnerable to a charge of willful blindness as to those copies' source. *But see*, *RIAA v. Diamond Multimedia*, 180 F.3d 1072, 1079 (9th Cir. 1999), *supra* note 76, in which the Court did not inquire into the source of the copies "place-shifted" onto Rio players.

99. *See* Jennifer Sullivan, *RIAA Suing Upstart*, WIRE NEWS, at <http://www.wired.com/news/business/0,1367,32559,00.html> (Nov. 15, 1999); *Napster Copyright Policy*, at <http://www.napster.com/terms> (last visited Mar. 17, 2001).

100. *See, e.g.*, *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971).

101. *See, e.g.* *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996); *Shapiro Bernstein and Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963) (setting forth standard for vicarious liability).

102. To my knowledge, the song, the group, and its record label are completely fictitious.

Jack's initial copying (whatever its source) is infringing, is Jack Ripper a primary infringer if he simply opens his hard drive for others to copy? Were Jack Ripper making the music available over a website, he would most likely be held to be "distributing" copies.¹⁰³ Making the files available to users of a program that delves into the disseminator's hard drive does not seem analytically different: in both cases, users end up with copies, as intended by the person who made the work available. Had Napster facilitated true "trading," in which the "sharing" subscriber deleted her copy after one subscriber made a copy, then this activity might have been analogized to first sale doctrine-protected lending, in which a single hard copy changes hands. The "first sale" limitation on the distribution right,¹⁰⁴ however, does not entitle the lawful possessor of a hard copy to duplicate it. The limitation therefore does not apply to either distribution via a website or distribution via Napster, because the website operator or the subscriber from whom the copy originates is not giving up her copy to another user; she is keeping her copy, while making it possible for all other webservers or Napster subscribers currently on line to make copies as well.

The District Court found that Napster subscribers' prima facie activities were not excused by the fair use doctrine, and that Napster knowingly facilitated those acts. The court also rejected Napster's assertion that under the Supreme Court's *Sony* decision¹⁰⁵ Napster allowed sufficient non infringing uses that any infringing applications could be disregarded. The Court showed equal inhospitableness to Napster's invocation of § 1008 of the Audio Home Recording Act, and to the "safe harbor" provisions of the Online Service Provider Liability Limitation Act.¹⁰⁶ On July 26, 2000, the court entered an order, stayed two days later by the Ninth Circuit, preliminarily enjoining Napster from facilitating end-user copyright infringement through use of the file transfer proprietary software and directory.¹⁰⁷ The Ninth Circuit heard argument on October 2, 2000. On February 12, 2001 it announced a decision upholding in almost all respects the district court's doctrinal analysis, but remanding to modify the scope of the injunction.

The Ninth Circuit's decision may be most notable for the apparent banality of its fair use discussion. At first blush, the court simply applied a very straightforward fair use analysis, leaving little quarter for doctrinal innovation. In fact, by declining to embrace a variety of new approaches to digital "private" copying, the court announced a clarion reaffirmation of the application of traditional copyright

103. See, e.g., *Playboy Enters. v. Webworld*, 991 F. Supp. 453 (N.D. Tex. 1997); *Playboy Enters. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032 (S.D.N.Y.1996) (making available on a website for others to download constitutes distribution of copies).

104. 17 U.S.C. § 109(a). Note, however, that commercial rental or lending of phonorecords is prohibited under § 109(b).

105. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

106. 17 U.S.C. § 512. The District Court opinion is reported at 114 F.Supp. 2d 896 (N.D. Cal. 2000).

107. *A & M Records, Inc. v. Napster, Inc.*, No. C 99-5183-MHP (N.D. Cal. July, 2000) (transcript from hearing granting preliminary injunction, July 26, 2000), available at <http://www.riaa.com/PDF/NapsterPatel.pdf>; *prelim. inj. stayed* by No. 00-16401, 2000 U.S. App. LEXIS 18688 (9th Cir. July 28, 2000).

precepts to the Internet. This does not mean that the court was insensitive to the claims of new technology. On the contrary, the Ninth Circuit departed from the District Court's reasoning regarding the scope of the burden the entrepreneur of a new copyright-exploitative technology should bear to avoid infringement. The Ninth Circuit also took pains to distinguish file sharing technology in general from Napster in particular. Only the latter, the court stressed, was under scrutiny and subject to sanction.

It is worth examining the court's opinion in some detail, in order to highlight its implications for digital distribution of copyrighted works. On fair use, the court focused on the first and fourth factors: nature and purpose of the use, and impact of the use upon the potential market for the work.¹⁰⁸ Like the Second Circuit in *Infinity Broadcasting*,¹⁰⁹ and the Southern District of New York in *MP3.com*, the court found nothing "transformative" in simply retransmitting the work in a different medium. More importantly, the Ninth Circuit also upheld the characterization of the end-user activities as "commercial." The District court had found the activities commercial because: "Napster users get for free something they would ordinarily have to buy."¹¹⁰ This remark recalls the Supreme Court's reminder that "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."¹¹¹

But, one might object, getting the copyrighted work for nothing is not the same as *exploiting* the work; "exploiting" implies commercialization, or at least further distribution, and the fair use inquiry into the "commercial" character of the use properly should address only whether the use is exploitative. Nonetheless, if "exploitation" suggests further distribution, then that characterization is amply satisfied, as Napster users do not merely download for themselves, they lavishly "share" with others. The Ninth Circuit, in any event, did not limit its concept of "commercial" to uses involving further dissemination; the court's references to the "repeated and exploitative" character of Napster copying indicate that systematic avoidance of purchasing copies is also "commercial."¹¹² On the other hand, the court's conjunction of "repeated and exploitative" suggests that sporadic copying for personal enjoyment might yet be considered "non commercial." Echoes of the distinction between permissible sporadic and impermissible "repeated and exploitative" copying may be found elsewhere in the copyright law. For example, the provision on reproductions by libraries entitles libraries to make "isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same

108. See 17 U.S.C. § 107(1)(4).

109. *Supra*, note 83.

110. 114 F.Supp.2d at 912. Cf. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 496 (1984) (Blackmun, J., dissenting) (copying for personal enjoyment is no more non commercial than is shoplifting).

111. *Harper & Row Inc. v. Nation Ents.*, 471 U.S. 539, 562 (1985).

112. See 239 F. 3d at 1015, *citing* *Sega Enters. Ltd. v. MAPHIA*, 857 F.Supp. 679, 687 (N.D.Cal. 1994) (use is commercial when users download video games "to avoid having to buy video game cartridges").

material on separate occasions,” but excludes “systematic reproduction or distribution.”¹¹³ The scale and intensity of Napster copying falls so much on the side of “systematic reproduction [and] distribution,” that to call it “non commercial” would drain the label of meaningful content. In any event, even were one to consider, as the Ninth Circuit did not, that personal enjoyment copying can never be exploitative or “commercial,” it certainly can compete with the copyright owner’s market for the work.

With respect to that factor, the Ninth Circuit, like the District Court, focused on two markets, the traditional market for sale of hardcopy CDs, and the evolving market for online music distribution. The appellate court declined to disturb the District Court’s evidentiary findings that Napster use had a deleterious impact on sales of CDs, notably around college campuses where Napster use is particularly intensive. More importantly, however, the Ninth Circuit recognized the independence and the significance of the new form of exploitation. Essentially, it is irrelevant that Napster may not harm traditional modes of exploitation: “lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works.”¹¹⁴

The Ninth Circuit’s attention to the impact of Napster on emerging technologies of distribution of works of authorship aligns that court with others, notably *MP3.com* and *Free Republic*, who have understood that new markets matter, especially in digital media. Some might find the appellate court too deferential to copyright owner determinations of how best to exploit those markets. The court’s discussion of Napster’s invocation of sampling as an exculpatory non infringing use illustrates this deference.

Napster had asserted that subscribers used the service to listen to a song as a first step toward deciding to buy the CD. This “sampling,” claimed Napster, enhanced CD sales. The District Court disagreed that “sampling” in fact promoted purchases of CDs. More importantly, that court found that Napster’s uncontrolled free “samples” were “commercial” and competed with plaintiffs’ own exploitation of a market for sampling, as well as undermined the digital download market.¹¹⁵ The Ninth Circuit upheld these determinations. At first blush, the analysis of the market for sampling might appear vulnerable to charges of circular reasoning: any market the copyright owner could conceivably be exploiting is one that others may not enter without permission or payment.¹¹⁶ In fact, Napster’s “sampling” implicates two new markets, both of which the plaintiffs had entered or were endeavoring to

113. See 17 U.S.C. § 108(g).

114. 239 F.3d at 1017, citing *L.A. Times v. Free Republic*, *supra* note 65 and *UMG Recordings v. MP3.com*, *supra* note 71. Cf. *WTO Dispute Resolution Panel Decision*, WT/DS160/R, ¶¶ 6.172-173 at http://www.wto.org/english/tratop_e/dispu_e/1234da.doc (June 15, 2000) (analyzing second step of TRIPs article 13 “three-step test”: lack of harm to one mode of exploitation of a work irrelevant to question whether exception under scrutiny “conflicts with [another] normal exploitation of the work.”).

115. 114 F.Supp.2d at 913-15.

116. See, e.g., the dissent of Judge Jacobs to the Second Circuit’s decision in *American Geophysical*, *supra* note 59, 60 F.3d at 932, charging majority with circular reasoning for finding that markets that copyright owners now may effectively license are no longer as subject to the fair use defense as they may have been when copyright enforcement would have been too burdensome.

exploit: one for partial and temporary downloads (“samples,” properly understood), the other for digital delivery of permanent copies of the entire song. As to the first new market, copyright owners had already entered that market, licensing promotional downloads for which Internet retailers pay royalties, although end users generally do not.

More significantly, “sampling,” as practiced by the copyright owners, is designed to be just that, a taste of the music, not a fully digested four-course repast. Hence the practice of licensing “thirty-to-sixty second samples or...full songs programmed to ‘time out,’ that is, exist only for a short time on the downloader’s computer.”¹¹⁷ Napster “samples,” however, are “full, free and permanent”¹¹⁸ copies. Because Napster “samples” are “full, free and permanent,” they also compete with the copyright owner’s digital download market. Thus, it is irrelevant that the “samples” may not harm, and might even have a positive impact on, the hardcopy CD market; the copyright owner enjoys “the right to develop identified alternative markets, here the digital download market.”¹¹⁹ The court’s qualification of the phrase “alternative markets” with the description “identified” may be intended to limit the scope of the inquiry into the impact of defendant’s use upon prospective new markets to those that copyright owners have in fact taken some steps to exploit.¹²⁰ Where there are identified new markets, any “favor” the infringer may have done the copyright owner by increasing sales in one market cannot offset the usurpation of the new market.¹²¹

The Ninth Circuit disposed rapidly of Napster’s two other alleged substantial non infringing uses. Napster had relied heavily on the Ninth Circuit’s *Diamond Multimedia*¹²² decision concerning portable MP3 players, urging that the ruling be understood to bless any kind of personal time- or space-shifting. The appellate court branded its prior decision “inapposite,” stressing the difference between space-shifting material so that “only...the original user” was “exposed” to its new location, and listing a work on the Napster system so that it becomes “available to millions of other individuals.”¹²³ Unlike My.MP3.com, or celestial storage locker services, Napster is not helping its subscriber access “her” collection, and only “her” collection, from places other than the one in which her CDs are physically located. Napster is helping the subscriber make songs on her CD available so that millions of *other people* can access those songs (as well as so that she can access millions of other people’s song collections). A Napster subscriber need not designate all the songs on her hard drive for “sharing,” but she cannot “space shift” a song – in other words, access the song from another computer – without listing

117. *Napster*, 239 F.3d at 1018, quoting 114 F.Supp.2d at 913-14.

118. *Id.*

119. *Id.*, citing *L.A. Times v. Free Republic*, 54 U.S.P.Q.2d 1453, 1469-71.

120. *Cf. NBA v. Motorola*, 105 F.3d 841 (2d Cir. 1997) (misappropriation claim: inquiry into unfair competition limited to potential markets that plaintiff has taken “demonstrable steps” to exploit).

121. *Napster*, 239 F.3d at 1018 (example of film that incorporates and publicizes a previously unknown song, “the boon to the song does not make the film’s simple copying fair”).

122. *Supra*, note 76.

123. *Napster*, 239 F.3d at 1019.

the work on the Napster directory, whence it becomes available to all Napster subscribers. The court correctly recognized that the Napster system obliterates any distinction between (personal) “space shifting” and (public) “distribution of copies.” Moreover, other, less cumbersome,¹²⁴ technologies are lawfully available to assist the user who wishes to enjoy digital music files without having physically to take them with her.

The Ninth Circuit also affirmed the District Court’s dismissal of the other alleged non infringing uses, such as chat rooms and the New Artist program, on the ground that plaintiffs had not sought to enjoin these uses, and that the uses could be separated from Napster’s primary infringement-facilitating activities.¹²⁵

Turning to secondary liability, the Ninth Circuit departed somewhat from the District Court’s decision. The appellate court’s opinion tacitly acknowledges the concern expressed in many *amicus* briefs that copyright not stifle the advance of technology. While not all these briefs asserted the lawfulness of Napster’s particular operation of peer-to-peer file sharing technology, all concurred that “P2P” offers a valuable means of communication whose dissemination should not be jeopardized by copyright enforcement.¹²⁶ Thus, the Ninth Circuit cautioned, “We are compelled to make a clear distinction between the architecture of the Napster system and Napster’s conduct in relation to the operational capacity of the system.”¹²⁷

The difference in the courts’ approach centered on interpretation of the Supreme Court’s decision in *Sony Corp. of America v. Universal City Studios*,¹²⁸ the “Betamax” case. The Supreme Court had declined to hold Sony contributorily liable for customers’ use of the video tape recorder (VTR) to violate the reproduction right. The Supreme Court had found the VTR “capable of substantial non infringing use” because customers employed the VTR for the fair use of

124. See services cited, *supra*, note 95. The “space shifting” contention lacked credibility as a practical matter as well: a Napster user who wished to access her home files from work, for example, would be obliged to leave her home computer on and connected to the Internet throughout the workday. This scenario presumes, among other things, that the subscriber’s Internet access service would not disconnect the home access in the event of prolonged inactivity (for example during the user’s commuting time from home to work). The Napster subscriber might engage in a more attenuated form of “space shifting” if, instead of attempting remote access to the files on her hard drive, she accessed songs already lawfully in her collection that she can find on other Napster users’ hard drives (and refrained from accessing songs not already in her collection). This, in effect, would make Napster a highly distributed variant of My.MP3.com. The absence of a centralized database of songs copied by Napster, however, would not exculpate this variant, because each participant would still be making his/her collection available to the public. Moreover, a ruling that this My.MP3.com-esque use of Napster constituted a “significant non infringing use” sufficient to exculpate all of Napster would require turning a blind eye to the acts of those who use Napster not merely to access their own collections remotely, but to augment their collections.

125. *Napster*, 239 F.3d at 1019, *citing* 114 F.Supp.2d at 917. The District Court had also rejected the New Artist Program as pretextual, as defendants did not initiate the program till after suit was filed. 114 F.Supp.2d at 904.

126. See six *amicus* briefs posted to Napster website, at <http://www.Napster.com/pressroom/legal.html> (last visited Mar. 17, 2001).

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

128. 464 U.S. 417 (1984).

“time-shifting” “free broadcast” television programs (the court excluded cable and pay television, as well as retention copies from its analysis).¹²⁹ The District Court, having found that Napster’s alleged non infringing uses were either infringing or trivial (or pretextual), and having found that Napster knew that its users were copying and distributing music files without authorization, held that Napster had failed to demonstrate that it was capable of commercially significant non infringing uses.¹³⁰ To the Ninth Circuit, the District Court had “improperly confined its analysis [of non infringing uses] to current uses, ignoring the system’s capabilities....Consequently, the district court placed undue weight on the proportion of current infringing use as compared to current and future noninfringing use.”¹³¹ The Ninth Circuit similarly warned that it would “not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs’ copyrights.”¹³²

These statements may comfort those concerned about conflicts between copyright and new technology, to the extent that the court has clarified that deployment of a technology that the exploiter knows *can* be used to infringe does not of itself satisfy the knowledge element for liability for contributory infringement. The court appears even more technology-tolerant in asserting that a proper “Betamax” analysis must take account of non infringing uses to which the technology can in the future be put. That could even suggest that Napster in its current incarnation might escape liability so long as it is susceptible of future non infringing applications. Suppose, for example, that I devise and distribute a program I call “Prankster.” It works like Napster, but unlike Napster, it permits “sharing” not only of MP3 files, but of any kind of file, including text and images. While many MP3 files may well be suspect, as most music and sound recording copyright owners have not yet authorized distribution of their works in unprotected MP3 format, many text and image files are created to circulate freely. Although my program currently appeals most to music “sharers” (this would be especially true following issuance of an injunction against Napster), I anticipate an increased volume of text and image-sharing as well. As to these files, we are positing that Prankster facilitates non infringing use. Under the Ninth Circuit’s analysis, my knowledge that Prankster proves popular among music sharers is not enough to engage my contributory liability. The prospect of contributory infringement is further reduced by Prankster’s capacity for substantial authorized “sharing” of text and image files. Thus, It is unlikely that a court will order me to shut down the Prankster service.

But, these are the prospects only in the abstract. Contributory liability will not lie “merely because the structure of the system allows for the exchange of copyrighted material.”¹³³ “Structure,” however, is one thing; specific use of the

129. *Id.* at 442-43.

130. 914 F.Supp.2d at 916-18.

131. *Napster*, 239 F.3d at 1022.

132. *Id.* at 1020 – 21.

133. *Id.* at 1021.

structure is another. Having disagreed with the district court's structural analysis, the Ninth Circuit nonetheless upheld its determination that contributory liability existed, because "Napster had *actual* knowledge that *specific* infringing material is available using its system..."¹³⁴ The Ninth Circuit endorsed the analysis in *Religious Technology Center v. Netcom On-Line Communication Services*,¹³⁵ in which the Northern District of California held that an online service provider's contributory liability depended on demonstration that the service had actual knowledge of specific infringing acts. *Netcom* further stated that if, once notified of the alleged infringements, the service failed to purge the infringing material from the system, the service could be held contributorily liable.

The Ninth Circuit's contributory infringement analysis, then, points toward further generalization of the "notice and take down" approach implicit in *Netcom*, and implemented by Congress with respect to service provider liability in the DMCA.¹³⁶ Returning to "Prankster," this means that I will not be liable for merely creating and disseminating the system, despite its music-"sharing" proclivities, but if a music or sound recording copyright owner identifies unauthorized files, I must disable them, or face contributory liability should the end-use prove infringing. This puts the burden on the copyright owner to police and notify, and on me to respond. The more notices I receive, the more vulnerable my system becomes, unless I can devise a means to sequester the legitimate uses from the infringing ones (or I take a license for the latter, should a license be offered). This may mean, as a practical matter with respect to online digital media, that the *Sony* doctrine will not be available to bootstrap infringing uses to non infringing ones. For the Ninth Circuit, substantial non infringing uses, including future ones, save the exploiter of the technology only in the absence of knowledge of specific infringements. Once that knowledge is conveyed, the burden is on the technology-provider to exclude the specific infringement. The more specific infringements are notified, and especially if they are notified in large volume on a continuous basis,¹³⁷ the more the obligation to exclude begins to look like a de facto duty to redesign the system to forestall those infringements in the first place.¹³⁸

134. *Id.* at 1022 (emphasis in original).

135. 907 F.Supp. 1361 (N.D. Cal. 1995).

136. *See* 17 U.S.C. § 512.

137. *See e.g.*, John Borland, *Napster's Zero Hour Approaching on Filters*, NET NEWS.COM, at <http://www.news.cnet.com/news/0-1005-200-5081628.html> (March 9, 2001).

138. Thus, at bottom, the difference between the Ninth Circuit and the District Court may be more in attitude than in impact. The District Court expressed some annoyance at Napster's proclaimed inability to redesign its system to exclude infringements. In its oral order awarding the preliminary injunction, the court chided:

though it may be technologically difficult, when you create a program that had the very purpose that defendant is capable of exercising supervisory powers over its service. And I have to add here that Napster espouses that it had, and then you – you know it's sort of like, you know, becoming an orphan because – by your own hand and then throwing yourself on the mercy of the court because you're an orphan. It's rather hard to hear that sound of throwing themselves on the mercy of the court because this technology just isn't going to allow them to do or control the infringement.

A & M Records, Inc. v. Napster, Inc., No. C 99-5183-MHP (N.D. Cal. July, 2000) (transcript from

There is an important difference between the *Napster* technology and the Sony videotape recorder. Videotape recorders are a free-standing technology; as the District Court in *Napster* recognized, once a machine was sold, its producer could no longer follow up how consumers employed it.¹³⁹ As a result, the determination of contributory infringement entailed an all-or-nothing outcome: if the manufacturers were held liable, then no machine could be distributed, despite its capacity for non infringing uses; if no liability, then the machine can be distributed, despite its capacity for infringing uses. Splitting the difference by limiting distribution of the machine to a class of non infringers was not a possibility. Whether as a matter of judicial political instinct, or of technology policy considerations, when the choice is all or nothing, those who end up with nothing are not likely to be the producers and consumers of a vastly popular new device that is susceptible of legitimate applications. With *Napster*, by contrast, the difference could be split; the online technology makes possible the confinement of the service to a class of non infringers.¹⁴⁰ The user class will be restricted to non-infringers because, with the implementation of notice and take down, only authorized files will remain available for "sharing." Once "all or nothing" is no longer the only response the technology allows, the legal rule should show similar flexibility.

That leaves open the question what the analysis should be if a system's "architecture" did not permit separation of infringing and non-infringing uses or users. According to the Ninth Circuit, that could mean that there is no contributory infringement. But it seems troublesome to rule that one who deliberately builds an online system in a way that confounds the distinction should escape liability. The copyright owner may have the burden of discovering and notifying about infringement, but is the potential contributory infringer entitled to make that burden insuperable?¹⁴¹ This concern may, however, prove unfounded, at least if some software developers and entrepreneurs continue to prove as resourceful in finding infringements as others are in facilitating or concealing them.¹⁴²

The District Court had also held *Napster* vicariously liable for end-user infringement, finding that *Napster* derived a direct financial benefit from its ever-

hearing granting preliminary injunction, July 26, 2000) at *81, available at <http://www.riaa.com/PDF/NapsterPatel.pdf>. The court's sardonic comparison of *Napster* to the self-made orphan underscores the court's view that a defendant who exploits the Internet's capacity to promote indiscriminate "sharing," should not be heard to object, when ordered to limit the promiscuousness of those exchanges, that the technology it unleashed does not permit a more modest form of interchange. The Ninth Circuit's analysis eschews parenticide, but still requires *Napster* to devise a means to control the infringement.

139. 114 F.Supp.2d at 916-917.

140. I thank Prof. Maureen O'Rourke for these observations.

141. For example, the developers of Freenet claim that infringements will be untraceable. See e.g., Ian Clarke, *My views on Censorship and Copyright*, at <http://www.freenet.sourceforge.net/index.php?page=philosophy> (last visited Mar.21, 2001).

142. See e.g., Michael Learnmouth, *The Oline Enforcer*, THE STANDARD (Feb.16,2001) at <http://www.thestandard.com/article/display/0,1151,22315,00.html.mail>

increasing user base, and that it had the power to supervise and control end-user activity.¹⁴³ The Ninth Circuit agreed with the lower court's assessment of the first element, but departed slightly from the second. Napster's service policy reserves the right to terminate subscribers for copyright violations. The Ninth Circuit stated that the District Court had overestimated Napster's ability to determine whether end users were infringing: "Napster's reserved 'right and ability' to police is cabined by the system's current architecture . . . [which] does not 'read' the content of indexed files..."¹⁴⁴ This might suggest that if the technology provider builds the system so as to ensure that its ability to identify infringing material, and therefore to police it, is highly limited, it will not be vicariously liable. As a practical matter, however, for the system to work, the user must be able to identify the material; if the user can identify it, then so can the system-deviser. To avoid vicarious liability, then, the technology-provider who reserves the right to police must in fact do so. This might counsel non-reservation of the right, but there are other reasons, within and without copyright, to reserve and to exercise the right to exclude subscribers who violate the law. Within copyright, for example, disclaiming a right to control might subject the provider to liability for contributory infringement by virtue of "willful blindness." Without copyright, for example, disclaiming a right to control might subject the provider to claims of breach of the service contract if the provider responded to an infringement notice by taking down the subscriber's posting.

If, in light of the contributory infringement discussion, it appeared that copyright owners incurred the burden of identifying and notifying of infringements, it now appears that some of that burden bounces back, when the defendant also faces vicarious liability. This may mean that non commercial sites, for example, those organized by teenagers who lack the for-profit aspirations of many "dot-coms," might not assume a burden to police, because the "direct financial benefit" standard would not be met. If, however, running the system allows its participants, including those who run the system, to engage in massive free copying, a court might find a financial benefit, just as the Ninth Circuit found "repeated and exploitative" personal use copying to be "commercial" under the fair use factors.

Napster asserted further defenses to secondary liability, that the 1992 Audio Home Recording Act barred an infringement action, and that the Online Service Provider Liability Limitation Act provisions of the DMCA extended a "safe harbor" to Napster's activities. With respect to the first defense, the Ninth Circuit relied on its earlier interpretation of § 1008 of the AHRA in *Diamond Multimedia* that computers are too multi-purpose to qualify as "digital audio recording devices." Moreover, the court held, songs fixed on computer hard drives cannot qualify as "digital music recordings." With respect to the online service provider defense, the court left open the question whether § 512 shields secondary infringers. Rather, it stated that a full trial was needed to resolve issues including whether Napster was an "information location tool" service provider under § 512(d); whether Napster would not be deemed "aware" of infringing activity absent

143. 114 F.Supp.2d at 920-22.

144. *Napster*, 239 F.3d at 1025.

“official” notice, as prescribed in § 512; and whether Napster had timely established a compliance policy under § 512(i). Because plaintiffs had “raise[d] serious questions regarding Napster’s ability to obtain shelter under § 512,” and the balance of hardships favored plaintiffs, injunctive relief was appropriate.¹⁴⁵

Finally, in specifying the scope of an injunction that it characterized as “not only warranted but required,”¹⁴⁶ the Ninth Circuit reiterated that plaintiffs incurred the burden of notifying Napster of infringements, before Napster has a duty to disable access, but that Napster also has a “burden of policing the system within the limits of the system.”¹⁴⁷ In the preliminary injunction issued March 5, the district court required the plaintiffs to notify Napster of specific infringing files, but also, consistent with the Ninth Circuit’s determination that the burden of purging infringements is “shared between the parties,” imposed two proactive obligations on Napster. First, the court observed that “given the transitory nature of [Napster’s] operation,” Napster could more easily search its files than could plaintiffs; the court therefore ordered Napster “to search the files available on its system at any particular time against lists of copyrighted recordings provided by

145. *Id.* at 1025. The Northern District of California had ruled that Napster could not qualify for the § 512(a) access provider exemption because of the key role of the Internet in subscriber transactions. A “service provider” is largely exempted from liability for providing “transitory digital network communications” “by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider...” if the service provider did not initiate the transmission, if it routed or provided the connections automatically, and if it did not select the recipients of the material. While Napster does not interfere in its subscribers’ choices, and thus may seem sufficiently removed from their interchanges, Napster did not correspond to the factual predicate for the exemption: even if Napster might be a “service provider,” it does not “control” or “operate” a “system or network.” Napster works by having its subscribers control or operate the file exchange program that Napster distributes; the inter-subscriber connections occur over the Internet, not “through a system or network controlled or operated by or for the service provider.” 17 U.S.C. § 512(a).

The District Court also held that Napster failed to meet the statutory requirement that it adopt and “reasonably implement” a copyright compliance policy under § 512(i). Napster did not post any such policy until after the record producers initiated suit. Nor, the court held, did it reasonably implement a policy for terminating repeat infringers. 114 F. Supp.2d at 918

The District court did not address Napster’s claim that it is a provider of “information location tools” shielded from damages liability under §512(d). This provision addresses “infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory...” 17 U.S.C. § 512(d). Napster supplies a directory that enables online users to link to one another; each online location (user hard drive) may contain infringing material (unauthorized copies and phonorecords of recorded music). But the liability limitation applies only if the location tool service provider does not know that the “online location” contains infringing material, or is not “aware of facts or circumstances from which infringing activity is apparent,” and if it, upon notification, disables access to the material. Even if infringement were not “apparent” from the directory listings, once Napster receives notice from the copyright owners, it faces full liability if, upon proper notification, it does not respond” expeditiously to remove, or disable access to” the hard drives containing unauthorized copies. *Id.* Appropriate response to “takedown” notices may well lead to the same result as that imposed by an injunction in this case. One significant difference between liability for contributory infringement and compliance with § 512, is that the latter precludes an award of damages, while the remedial scheme for the former includes both injunctive relief and damages.

146. *Napster* 239 F.3d at 1027.

147. *Id.*

plaintiffs.”¹⁴⁸ Second, the court permitted plaintiffs to submit to Napster in advance of the recordings’ release the artist name, recording title and release date of sound recordings that were likely to be infringed on the Napster system. The court ordered Napster to block access to those recordings “beginning with the first infringing file ... As Napster presently has the capability ... to store information about and subsequently screen for a particular recording, the burden is far less and the equities are more fair to require Napster to block the transmission of these works in advance of their release. To order otherwise would allow Napster users a free ride for the length of time it would take plaintiffs to identify a specific infringing file and Napster to screen the work.”¹⁴⁹

Although it obtained a modification in the scope of the injunction, Napster had endeavored to escape injunctive relief altogether, in favor of a compulsory royalty, on the ground that “great public injury would be worked by an injunction.” This contention seems to have tried the Ninth Circuit’s patience to excess; it rejoined:

We are at a total loss to find any ‘special circumstances’ simply because this case requires us to apply well-established doctrines of copyright law to a new technology. Neither do we agree with Napster that an injunction would cause ‘great public injury.’ ... Imposing a compulsory royalty schedule... [would force plaintiffs] to do business with a company that profits from the wrongful use of intellectual properties. Plaintiffs would lose the power to control their intellectual property: they could not make a business decision *not* to license their property to Napster, and, in the event they planned to do business with Napster, compulsory royalties would take away the copyright holders’ ability to negotiate the terms of any contractual agreement.¹⁵⁰

Did the Ninth Circuit show excessive deference to plaintiffs’ potential business plans? Napster supporters might contend that it was plaintiffs’ inability or unwillingness to espouse a business plan for Internet music delivery that fostered services like Napster in the first place.¹⁵¹ Even assuming that some copyright owners have, to put it gently, lacked alacrity in developing digital delivery offerings, the “use it or lose it” premise that underlies this critique is fundamentally pernicious. Copyright confers “exclusive rights” over the acts of reproduction, adaptation, distribution, public performance and public display.¹⁵² These rights are “subject to” the fair use doctrine and other statutory exceptions.¹⁵³ But the rights

148. *A&M Records, Inc. v. Napster, Inc.*, No.99-05183, 2001 U.S. Dist. LEXIS 2186, *6 (N.D. Cal. March 5, 2001) (order granting preliminary injunction).

149. *Id.* at *8

150. *Napster*, 239 F.3d at 1028.

151. See, e.g., Eben Moglen et. al., *Victory or Defeat? Did The Record Industry’s Court Triumph Insure a Future Full of Profits – Or Seal Its Doom?*, SALON, ¶¶ 2-5 at http://www.salon.com/tech/feature/2001/02/12/napster_reactions/index.html (Feb. 12, 2001); *Hill Takes Notice of Napster Legal Fray*, WASHINGTON POST ONLINE (Feb. 16, 2001) at <http://www.washingtonpost.com/wp-dyn/articles/A125211-2001Feb15.html> (last visited Feb. 19, 2001) (citing Senator Hatch’s caution that Congress may choose to impose a compulsory license if record companies do not soon authorize online music delivery).

152. 17 U.S.C. § 106.

153. *Id.*

under copyright would no longer be “exclusive” were the exceptions to evolve into a doctrine that any publicly desirable means of reproduction, adaptation, distribution, public performance or public display that the copyright owner has neglected or declined to carry out herself (directly or through licensing), then becomes “fair” game for others to exploit. Similarly, a system in which compulsory royalties supplant injunctive relief is no longer a regime of “exclusive rights.” As the Ninth Circuit understood, copyright vests authors not merely with an entitlement to payment for copying and other exploitations; it grants them control over whether and how the work shall be exploited.¹⁵⁴ Both economic and moral concerns underlie this control. The exercise of control entails the ability to set one’s own price. Equally significantly, it empowers authors and copyright owners to select their licensees; licensees who must vie for the grant are likely not only to bid up the price, but also to offer assurances of quality maintenance. Finally, it enables authors to determine what kinds of exploitations fit their vision for the work. A work whose copyright has not expired is not a public resource freely available to the best exploiter or to anyone else who desires a copy. Assertions that copyright should yield when the author is reticent, or when a third party has done the author a “favor” by increasing the popularity of the work, misconceive the purpose of copyright, which is not merely to promote dissemination, but to achieve that goal “by securing for limited Times to Authors...the exclusive Right to their...Writings...”¹⁵⁵ The Constitution has provided for a system in which authors’ determination how to exploit their works promotes the “Progress of Science.”¹⁵⁶

That said, the political pressure of 50 million Napster users now clamoring for free music is likely to have legislative consequences unless sound recordings copyright owners hasten the availability, at high convenience and low cost, of digitally distributed music.¹⁵⁷ For many observers, and perhaps some lawmakers as well, new technology cases urge adoption of a special rule: “If everybody’s doing it, it must be fair use.”¹⁵⁸ In the case of Napster, the argument would echo the old advertisement: “50 million users can’t be wrong.” As a matter of traditional copyright doctrine, fair use does not compel, and should not counsel, socializing the fruits of new modes of copyright exploitation. For the moment, the courts have held with tradition; it remains to see whether they continue to be the arena for resolving copyright and new technology disputes. Some might relish the developing irony: copyright owners leery of the ability of the 1976 Act to address

154. See, e.g., *Harper & Row Inc. v. Nation Ents.*, 471 U.S. 539 (1985) (control over distribution right entitles author to determine whether, how, and by whom work will be published); *Castle Rock Ent. v. Carol Pubs.*, 150 F.3d 132 (2d Cir. 1998) (copyright entitles author to determine whether or not to authorize the creation of certain kinds of derivative works).

155. U.S. Const. Art. I § 8, cl. 8.

156. *Id.*

157. See *Hill Takes Notice of Napster Legal Fray*, WASHINGTON POST ONLINE (Feb. 16, 2001), at <http://www.washingtonpost.com/wp-dyn/articles/A125211-2001Feb15.html>.

158. See Jane Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC’Y U.S.A. 1, 18 (1997).

problems of digital distribution, pushed Congress to create technology-targeting amendments in the DMCA. Since that legislation's passage, however, most of the digital copyright cases have called for application of pre-DMCA copyright provisions. These, at least so far, have proven sufficiently robust in their application to new problems of technology and copyright that right holders might well resist further legislative action.

IV. INTERNATIONAL CHOICE OF LAW

The Internet harbors many choice of law issues. Because content on an unrestricted-access website hosted by a server located in one country can be retrieved by users located in any country with Internet access, questions arise as to the law(s) applicable to any infringements that may result from the hosting or communication of the content.¹⁵⁹ The recent controversy provoked by the Canadian website iCraveTV¹⁶⁰ illustrates the problem. iCraveTV converted into streaming video format the broadcast signals from Canadian programs, and from U.S. television programming received across the border, and made the programming available via its website. iCraveTV claimed that its capture, conversion, and redistribution of the U.S. programming was lawful under Canadian law concerning secondary transmissions of broadcast performances.¹⁶¹ In theory, iCraveTV restricted access to its website to Canadian users; accordingly, asserted iCraveTV, only Canadian law should apply to the controversy. In fact, the screening method employed was easily circumvented: iCraveTV requested proof of the websurfer's residence by requesting the surfer's telephone area code; only respondents giving Canadian area codes would be granted access to the site. It was not difficult to identify and supply a Canadian area code, particularly when iCraveTV's own Toronto area code was posted on the site. Moreover, once a surfer had gained initial access to the site, iCraveTV did not require entry of a Canadian area code for subsequent access. As a result, iCraveTV's transmissions were accessible throughout the U.S.

The producers brought suit in the Western District of Pennsylvania, where iCraveTV's President and its International Sales Manager resided. With respect to the Canadian business entities, the court found general personal jurisdiction over the non-resident defendants on the basis of their continuous and systematic contacts with Pennsylvania.¹⁶² Among the contacts the court identified were: sales of

159. For further discussion of this issue in general, see, e.g., Jane Ginsburg, *The Cyberian Captivity of Copyright: Authors, Users and Copyright on the Internet*, 15 SANTA CLARA COMPUTER & HIGH TECH. L.J. 347 (1999).

160. *Twentieth Century Fox Film Corp. v. iCraveTV*, 53 U.S.P.Q2d 1831 (W.D. Pa 2000) (preliminary injunction granted February 8, 2000).

161. See Complaint at ¶ 48, *Twentieth Century Fox Film Corp. v. iCraveTV*, No 00-121 (W.D. Pa. filed Jan. 20, 2000), available at http://www.mpa.org/Press/iCrave_complaint.htm (last visited Mar. 17, 2001).

162. The court applied Fed.R.Civ.P. 4(e), and the Pennsylvania long-arm statute, 42 Pa.C.S.A. §5322(b) (Purdons 1981), which permits Pennsylvania courts to exercise personal jurisdiction over out of state defendants to the full extent permitted by the Constitutional due process clause. *Pennzoil Prods.*

advertising out of a Pittsburgh office, employment of an agent in Pittsburgh to work in that office, and domain name registration for iCraveTV.com in the U.S., with technical and billing contacts listed in Pennsylvania. The court further found that defendants' activities in Pennsylvania were "integrally a part of the activities giving rise to the cause of action asserted."¹⁶³ Finally, the court noted that defendants had streamed plaintiffs' programming to U.S. citizens throughout the U.S. overall, and had attempted to sell advertising throughout the U.S. through agents in New York and Pennsylvania.

On choice of law, the court found sufficient points of attachment with the U.S. to apply the U.S. Copyright Act to defendants' activities. The court found that the alleged infringement occurred in the United States when U.S. citizens "received and viewed defendants' streaming of the copyrighted materials,"¹⁶⁴ without plaintiffs' authorization, even though the streaming began in Canada. The receipt of the transmissions in the U.S. constituted public performances under U.S. copyright law. Moreover, the transmissions to the U.S. accounted for a substantial portion of iCraveTV's total business. For example, on January 17, 2000, an iCraveTV employee reported that log books monitoring traffic showed that approximately 45% of iCraveTV's traffic was from U.S.-based users; a January 25, 2000 report from a "private ad serving system" counted 1.6 million impressions from U.S. visitors (second only to Canadian visitors); "Real Video" logs of Internet addresses showed "substantial numbers of persons in the U.S. received the streaming of programming."¹⁶⁵ The court ordered iCraveTV to cease retransmitting U.S. television programming. Following initiation of a suit in Canada alleging that iCraveTV's retransmissions were not permitted under Canadian law either, iCraveTV and the producers settled, and iCraveTV has ceased retransmitting U.S. television programming.¹⁶⁶

The choice of law approach followed by the U.S. court, and urged by the producers, privileged territorial contacts with the U.S.: U.S. law applied to transmissions received on U.S. territory, regardless of their legitimacy in the country of origin of the transmission. On the facts of the case, the territorial connection was far from slight or fortuitous: U.S. viewers made up close to half of iCraveTV's audience, and the large number of U.S. viewers attracted advertisers. And much of the programming retransmitted by iCraveTV originated in the U.S. A harder case might have been presented had the U.S. nexus been weaker.

Arguably, a territorialist approach disfavors, or at least encumbers, Internet

Co. v. Colelli & Assocs., 149 F.3d 197, 200 (3d Cir. 1998).

163. Twentieth Century Fox Film Corp. v. iCraveTV, 53 U.S.P.Q2d 1831 (W.D. Pa 2000) (adopting Plaintiffs' Proposed Findings of Fact and Conclusions of Law with Respect to Issuance of Preliminary Injunction at ¶ 13, available at [http://www.mpaa.org/ Press/iCrave_findings.htm](http://www.mpaa.org/Press/iCrave_findings.htm) (last visited Mar. 17, 2001).

164. *Id.* at ¶ 8.

165. *Id.* at ¶ 21. iCraveTV used a "RealVideo" server to stream the programming.

166. See <http://www.iCraveTV.com>—clicking on "Watch TV" now reads "Yes, the rumours are true. Our television rebroadcasting service is offline." See also John Borland, *iCraveTV.com exec discusses his start-up's short life*, CNET NEWS.COM, at <http://news.cnet.com/news/0-1004-200-1560999.html> (Feb. 29, 2000).

commerce. Where the territory whose law is applied, however, has so many contacts with the defendant's enterprise as to appear the true target of the off-shore defendant's acts (as plaintiffs argued was the case with iCraveTV), the call for seamless Internet commerce through application solely of the law of the point of departure loses some appeal. In the absence of targeting, a choice of law approach that looks only to the law of the country of origin of the communication does have the considerable merit of simplifying Internet transactions. Nonetheless, it poses some problems. First, if the country of origin is a "copyright haven," i.e. a country with substandard copyright laws, then one may fear that the point of origin approach will spark a "race to the bottom" for Internet entrepreneurs. Second, when there are significant substantive variations between different countries' copyright laws (even among members of the Berne Union), the point of origin approach has the effect of extruding the country of origin's copyright policy choices, to the detriment of copyright policies in the other countries of receipt. Suppose, for example, that Canada has enacted a very liberal cable and satellite retransmission policy, because it wishes to stimulate investment in bringing television programming to remote areas in the far North.¹⁶⁷ Canadians and other copyright owners who exploit the Canadian market may in effect be subsidizing access to programming in Nunavut. That is a political and social policy choice open to Canadians. It does not follow that entrepreneurs may or should set up shop in Canada, claim the benefit of the Nunavut retransmission rates, and then disseminate the programming not only to Nunavut but also, and especially, to the U.S. – in competition with U.S. licensees of the programming who are paying full price (or at least a higher statutory retransmission rate) for their licenses.¹⁶⁸

Ideally, a choice of law rule that designated the law of a single country to govern the ensemble of Internet copyright transactions would considerably simplify the legal landscape, and thus promote Internet commerce. In the realm of negotiated licensing, this result may be achieved by contractual choice of law.¹⁶⁹ In the context of infringement claims, however, so long as significant substantive differences persist in national copyright laws, a choice of law rule that designates a single applicable law risks vesting legislative competence in laws that are either relatively underprotective or, for that matter, relatively overprotective (depending on the choice of forum and its choice of law rules) compared with the laws of other affected countries.

167. Barbara L. Waite, *Communications and Copyright in Canada and the U.S.: A Survey of Current Law and Proposals for Change*, 1 *TRANSNAT'L LAW* 121, 155 (1988).

168. For a fuller discussion of the domestic policy implications of choice of law rules favoring the law of a single country over the laws of the countries of receipt, see Graeme Austin, *Domestic Law and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 *COLUM.-VLA J. L. & THE ARTS* 1(1999).

169. At least where the author can grant worldwide rights, and the grantee is not bound by agreements with analogous entities (such as performance rights societies) in other countries to limit licensing to its local territory, leaving the other territories to its co-contractants.

CONCLUSION

The Internet copyright cases examined here call not only for interpretation of the provisions of the recent Digital Millennium Copyright Act, but also for application of principles developed in pre-DMCA cases involving digital media and digital networks. What may make the current controversies different is the intensity of their impact on end-users. While the defendants in the current cases are generally, albeit not exclusively, commercial intermediaries, many of the practices here at issue pose the prospect of mass uncompensated copying by the public. Hence the feeling of desperation and even moral outrage that one senses pervades many of the copyright owners' actions.¹⁷⁰ From the user perspective, digital media offer unparalleled opportunities to access and enjoy copyrighted works; copyright owners' endeavors to staunch the free (as in unpaid) flow of works are misguided attempts to stop the inexorable forward march of technology for the sake of preserving mastodonic business models of distribution.¹⁷¹ Certainly the Internet will compel adoption of new business models, and the sooner copyright owners adapt, the better. The tools the DMCA and copyright caselaw give copyright owners to confront copyright use on the Internet should be employed to promote broad distribution of works of authorship at reasonable, and variable, prices. If copyright owners instead wield these tools to enhance control without facilitating dissemination, we can expect to see courts expand the zones of excused uses, whether or not the excuses are doctrinally persuasive.¹⁷² Copyright owners cannot, and should not, control every Internet use, but neither should every use prompt an excuse, lest we undermine the ability of copyright owners, and especially of individual creators, to make a living from their creativity.q

170. See, e.g., Eric Boehlert, *Artists to Napster: Drop Dead!* SALON (Mar. 24, 2000), at http://www.salon.com/ent/feature/2000/03/24/napster_artists/index.html

171. See Chris Oakes, *Pundits ask who owns Music?*, WIRED NEWS (Feb. 26, 2000), at <http://www.wired.com/news/business/0,1367,34605-2,00.html> Scott Rosenberg, *The Napster Files*, SALON (Feb. 4, 2000), at http://www.salon.com/tech/col/rose/2000/02/04/napster_swap

172. See, e.g., *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).