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Digital Music Distribution via the Internet: Is It a Plantinum Idea or a One Hit Wonder

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DIGITAL MUSIC DISTRIBUTION VIA THE INTERNET: IS IT A "PLATINUM" IDEA OR A "ONE HIT WONDER?"

Roll over Beethoven and [email] Tchaikovsky the news.[1]

I. INTRODUCTION

The Internet: some, if not most, hail it as the most important economic, technological, and social revolution of the late twentieth century. Both the direct and corollary effects of the Internet have infiltrated all homes in our society, and the more the Internet changes, the more everyone must adapt to deal with the ramifications. Congress and the judiciary are certainly not immune to the sweeping changes that the Internet has prompted. Indeed, from the early days of the "user friendly" Internet,[2] many individuals and public interest groups have called for federal regulation to ensure that the public is afforded ample protection from the many "evils" lurking "online." Seasoned Internet users remember the Electronic Frontier Foundation's[3] "blue ribbon" campaign and the subsequent blackout campaign organized by The Coalition to Stop Net Censorship in 1996.[4] These and similar actions were symbolic of widespread opposition to the Communications Decency Act of 1996 ("CDA"), which was designed to protect minors from indecent online material.[5] In *Reno v. ACLU*,[6] the United States Supreme Court rejected the notion that certain portions of the CDA, which related to "indecent" communications, were unconstitutionally overbroad and vague, but ultimately found that the provisions effectively violated the First Amendment.[7]

The Internet is like any new technology. Often, lawmakers must clumsily grapple with its initial effects until enough time has passed to reveal a clear picture of its ultimate uses. However, the Internet is arguably unlike any technological predecessor in the magnitude and speed of both its proliferation and ver-

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1 CHUCK BERRY, *Roll Over Beethoven* (Chess Records 1956).

2 Roughly beginning with the emergence of the World Wide Web in 1992. *See* discussion *infra* Part II.B.

3 The Electronic Frontier Foundation has been established to help civilize the electronic frontier; to make it truly useful and beneficial not just to a technical elite, but to everyone; and to do this in a way which [sic] is in keeping with our society's highest traditions of the free and open flow of information and communication. . . .

Electronic Frontier Foundation, *Mission*, *at* http://www.eff.org/EFFdocs/about_eff.html (last visited Sept. 21, 2001) (on file with the *West Virginia Law Review*).

4 *See* ZDNet, *Blue Ribbons and Blackouts: The Online Community Protests Cyber-Censorship*, *at* http://www.zdnet.com/pcmag/special/reports/s960214b.htm (last visited Oct. 14, 2001) (on file with the *West Virginia Law Review*).

5 *See* Shamoil Shipchandler, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 CORNELL INT'L L.J. 435, 443 & nn.68-69 (2000).

6 521 U.S. 844 (1997).

7 *Id.* at 864.

satility.[8] An interesting fact to consider is that the Internet is not as new a phenomenon as many might believe. In fact, the Internet has a history dating back to 1958.[9] Indeed, well before consumers took to the Internet in mass – around 1995[10] – the Internet was used by many members of the educational and scientific communities on a daily basis. Given this fact, one can only wonder how many of these pioneering Internet users could have predicted the dynamic future of the then primitive system.

Interestingly, in a report published in September of 1995, the Information Infrastructure Task Force ("IITF")[11] seemed to do just that.[12] The IITF report stressed the importance of preserving a "framework for legitimate commerce" and ensuring "adequate protection for copyrighted works," stressing that unless actions were taken, "the vast communications network [would] not reach its full potential as a true, global marketplace."[13] One can only wonder what past, pending, and future litigation could have been avoided, or at least expedited, had clearly defined anticipatory legislation been promulgated in those comparatively primitive days of the Internet. This proposition, of course, assumes that it is jurisdictionally possible and popularly desirable to create such legislation and establish effective policing practices to ensure compliance.[14]

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8 As of August of 2001, an estimated 513.41 million people, worldwide, used the Internet, of which, an estimated 180.68 million users were located in Canada and the United States. NUA, *How Many Online?*, *at* http://www.nua.ie/surveys/how_many_online/ (last visited Oct. 10, 2001) (on file with the *West Virginia Law Review*).

9 Shipchandler, *supra* note 5, at 437 (discussing the history of the Internet).

10 *See* Barry M. Leiner et al., *A Brief History of the Internet*, *at* http://www.isoc.org/internet-history/brief.html (last revised Aug. 4, 2000) (on file with the *West Virginia Law Review*).

11 In February 1993, President Clinton formed the Information Infrastructure Task Force (IITF) to articulate and implement the Administration's vision for the National Information Infrastructure (NII). [At that time,] [t]he IITF [was] chaired by Secretary of Commerce Ronald H. Brown and consist[ed] of high-level representatives of the Federal agencies that play[ed] a role in advancing the development and application of information technologies. [T]he participating agencies [] [worked] with the private sector, public interest groups, Congress, and State and local governments to develop comprehensive telecommunications and information policies and programs that [would] promote the development of the NII and best meet the country's needs.

INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 1 (1995).

12 *See id.* at 16.

13 *Id.*

14 There is popular sentiment, expressed in numerous articles, that the nations of the world should not attempt to regulate the Internet in its present, relatively unstable, format. *See, e.g.*, Shipchandler, *supra* note 5 (discussing the various attempts to regulate the Internet and their shortcomings and ultimately advocating a "wait and see" approach).

Broadly speaking, one aspect of the Internet that has been the focus of recent litigation[15] and congressional attention is the protection of copyrighted musical works that have been made available as digital audio[16] files for distribution via the Internet – often without the permission or even the knowledge of the copyright owner. In recent years, the growth of digital music distribution via the Internet has grown substantially. This form of music distribution provides both legitimate music consumers[17] and music "pirates"[18] the opportunity to "download" music in digital format to their personal computers. Once located on one's personal computer, the files can be played back through attached speakers, saved to and played back through a digital audio player[19] – a popular device, which is available from a number of manufacturers[20] – or saved to a recordable ("CD-R")[21] or rewritable ("CD-RW")[22] compact disc. However, be-

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[15] Recent notable litigation, both decided and pending, involving Internet distribution of musical files includes A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001); UMG Recordings, Inc. v. MP3.Com, Inc., 2000 WL 1262568 (S.D.N.Y. 2000); RealNetworks, Inc. v. Streambox, Inc., 2000 WL 127311 (W.D. Wash. 2000); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624 (C.D. Cal. 1998), *aff'd*, 180 F.3d 1072 (9th Cir. 1999).

[16] Sound waves that have been digitized and stored in the computer. Common digital audio formats are music CDs, WAV, AIFF and MP3. Music CDs, which use the Red Book digital audio format, are played in CD players as well as CD-ROM readers. WAV, AIFF and MP3 files are played by a media player software application. The files can be stored on a hard disk or written onto a CD-ROM as well. Although also in digital form, MIDI music is not considered digital audio. MIDI files contain a coded version of the musical score, not the actual sound.

CMP TechWeb, *TechEncyclopedia*, *at* http://www.techweb.com/encyclopedia/defineterm?term=DIGITALAUDIO&exact=1 (last visited Oct. 29, 2001) (on file with the *West Virginia Law Review*).

[17] Purchasers of licensed music files and purchasers of music recorded on "traditional" media (e.g., vinyl records, compact discs, and cassette tapes).

[18] "Piracy" is defined as "[t]he unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law." BLACK'S LAW DICTIONARY 1169 (7th ed. 1999).

[19] Also known as an "MP3 player," a "digital audio player" is "[a] software utility or hardware device that plays audio files encoded in MPEG Audio Layer 3." CMP TechWeb, *TechEncyclopedia*, *at* http://www.techweb.com/encyclopedia/defineterm?term=MP3+player (last visited Oct. 29, 2001) (on file with the *West Virginia Law Review*). MP3 is the most popular digital audio format. *See infra* notes 88-92 and accompanying text.

[20] The most notable manufacturer of digital audio players is Diamond Multimedia Systems, Inc., which produces the Rio series. The company successfully defended a suit brought under the Audio Home Recording Act of 1992 ("AHRA"). *See* discussion *infra* Part III.A.

[21] (CD-Recordable) A recordable CD-ROM technology using a disc that can be written only once. The drive that writes the CD-R disc is often called a "one-off machine" and can also be used as a regular CD-ROM reader. CD-Rs create the equivalent of pits in the disc by altering the reflectivity of a

cause of certain gaps in current copyright law, for at least some recording artists, record labels, and music publishers, the distribution of digital music via the Internet has proven to be an "economic blunder" rather than the "technological wonder" that many devoted Internet enthusiasts claim it is. The challenge has been, and continues to be, the application of "pre-Internet" copyright principles – preserving "[t]he careful balance between protecting rights of 'owners' and ensuring public benefit by facilitating access to protected works"[23] – to a technology that seems to evolve on a daily basis. Herein lies a "Catch-22": how can a technology, possessing a rapidity of evolution unlike any our society has ever experienced, be regulated (should regulation ultimately be deemed necessary) by conventional legislation enacted by traditionally slow-moving processes? This practical problem could, ultimately, create or destroy entire Internet-based industries. However interesting and simultaneously mind-numbing such a consideration might be, it is clearly outside the scope of this Note. This thought is merely mentioned in passing to illustrate one critical point: as we stand today, in the very early days of the twenty-first century, we must quickly begin to reassess many of our long-standing economic and political philosophies, taking into consideration not only the swiftly moving tide of technology, but indeed the entire American societal ideology. In plain terms, the Internet needs – more accurately, demands – a "moving" body of regulatory law that can "turn on a dime." Without such guiding principles, the level of uncertainty with respect to

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dye layer. Different dyes can be used, including cyanine (green), pthalocyanine (yellow-gold) and metal-azo (blue).

CMP TechWeb, *TechEncyclopedia*, *at* http://www.techweb.com/encyclopedia/defineterm?term=CD-R (last visited Oct. 29, 2001) (on file with the *West Virginia Law Review*).

22 (CD-ReWritable) A rewritable CD-ROM technology. CD-RW drives can also be used to write CD-R discs, and they can read CD-ROMs. But, CD-RW disks have a lower reflectivity than CD-ROMs and CD-Rs, and newer MultiRead CD-ROM drives are required to read them. Initially known as CD-E (for CD-Erasable), a CD-RW disk can be rewritten a thousand times.

CD-RW disks can be used to master CD-ROMs, and the same software used for CD-R creation supports this application. However, unlike CD-Rs, in which the entire disc or an entire track is recorded at once, CD-RWs support UDF (Universal Disk Format), which is similar to the file system on a hard disk. Using variable packet writing, small numbers of files can be appended, and using fixed packet writing, files can be added and deleted. The fixed packet approach requires preformatting like a floppy disk, but takes considerably longer.

CMP TechWeb, *TechEncyclopedia*, *at* http://www.techweb.com/encyclopedia/defineterm?term=CD-RW (last visited Oct. 29, 2001) (on file with the *West Virginia Law Review*).

23 Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 111 (2001).

copyright law in cyberspace[24] that we are experiencing today will pale in comparison to the problems that we will face in the not-so-distant future.

In the quickly evolving area of Internet-based music distribution, the stakes are very high. However, unless clearly defined, easily understandable, and flexibly constructed boundaries are established, those companies, existing and forthcoming, that choose to operate on the Internet, will be guided – albeit not necessarily intentionally – by self-serving economic ambition rather than by well-established principles of traditional copyright law. Today, the law governing music distribution via the Internet is in a state of flux. In reality, it would be a stretch to say that there is even a handful of cases directly on point. To date, only two truly significant cases dealing with musical copyright law issues in cyberspace have been adjudicated in American courtrooms – neither of which have reached the United States Supreme Court.[25] In fact, *A & M Records, Inc. v. Napster, Inc.*,[26] arguably the most noteworthy copyright case in recent history, has not yet proceeded to trial.[27]

At the heart of both of these lawsuits is the problem that the individuals and companies who own the copyrights for the downloadable music are unable to protect their financial interests in their property. However, as some recording artists have publicly acknowledged, it can be argued that the free distribution of digital music via the Internet can provide the benefit of additional promotion and increased sales, rather than merely acting as a detriment to copyright holders.[28]

This Note addresses the development, current unstable legal environment, and predicted future trends of Internet-based music distribution. It has been written primarily as an examination of the effects that the Internet has had on the recording industry,[29] particularly with regard to the interference with the

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[24] The author uses the terms "Internet" and "cyberspace" interchangeably. Both refer generally to the World Wide Web, rather than the earlier "institutional" aspects of the Internet (e.g., Gopher, Archie, etc.).

[25] *See* A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624 (C.D. Cal. 1998), *aff'd*, 180 F.3d 1072 (9th Cir. 1999).

[26] 114 F. Supp. 2d 896.

[27] John Borland, *Record Industry Sues Napster Clones*, ZDNet News, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,5097762,00.html (Oct. 3, 2001) (on file with the *West Virginia Law Review*).

[28] CNN.com, *Napster Users Create Legal Gray Area for Employers*, *at* http://www.cnn.com/2000/TECH/computing/07/17/napster.liability.idg/index/html (July 17, 2000) (on file with the *West Virginia Law Review*).

[29] The recording industry is represented, generally, by the Recording Industry Association of America ("RIAA"). The mission statement of the RIAA reads,

> The Recording Industry Association of America is the trade group that

sale of traditionally recorded music.[30] In addition to a legal analysis of Internet music distribution, this Note attempts to provide perspectives from the recording industry, the business world, and the public-at-large.

Part II of this Note provides a quasi-technical background of "home recording," highlighting, in part, the transformation in American copyright law that its evolution has necessitated. Examination of this area begins in the "pre-personal computer" era and focuses on traditional "audio component-based"[31] home recording. Next, this same general analysis is applied to the Internet, briefly tracing the surprising impact that it has had on home recording and ultimately the recording industry. In an attempt to refrain from focusing excessive attention on the basic doctrines of traditional copyright law – an area not unworthy of discussion, but one that is not the primary focus of this Note – only those areas of the law that have direct relevance are mentioned.[32]

Part III addresses relevant litigation that has helped to shape this previously uncharted frontier of copyright law. This section illustrates the need for carefully crafted legislation to provide a map by which Internet-based companies can navigate the rough waters dividing the lawful use of copyrighted material from the illegal infringement of copyright owners' rights.

In Part IV, observations and commentary are provided from noteworthy individuals and organizations, as well as the author. A few of the author's predictions and suggestions for the future of this inherently problematic area of law are also proffered. The author's personal belief is that the Internet holds infinite possibilities for music distribution; however, for any legitimate and meaningful benefits to come to fruition, the law must be clarified and a workable business model must be agreed upon and adhered to by the recording industry and all Internet music distributors.[33] Of course, such a business model must

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> represents the U.S. recording industry. Our mission is to foster a business and legal climate that supports and promotes our members' creative and financial vitality. Our members are the record companies that comprise the most vibrant national music industry in the world. RIAA® members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

Recording Industry Association of America, *Who We Are*, *at* http://www.riaa.org/About-Who.cfm (last visited Oct. 29, 2001) (on file with the *West Virginia Law Review*).

30 E.g., records, compact discs, and cassette tapes.

31 For the purpose of this Note, "'audio component-based' home recording" refers to the act of copying prerecorded audio material using "traditional" home audio components (e.g., phonograph turntables, compact disc players, cassette tape recorder/players, digital audio tape recorder/players, etc).

32 The sheer magnitude of copyright law makes an exhaustive analysis of all potentially applicable legislation impracticable.

33 Here, the term "distributors" is used broadly to mean both Internet companies that actually provide digital audio files and those that merely facilitate transactions between individual users, like Napster, Inc. *See* discussion *infra* Part III.B.

be developed with the consumer in mind to ensure its commercial viability. Further, effective regulation must be implemented to ensure that copyright owners' rights are not infringed upon.

II. HOME MUSIC RECORDING AND ITS EFFECT ON THE DEVELOPMENT OF AMERICAN COPYRIGHT LAW

A. The Evolution of "Traditional" Home Music Recording and the Birth of The Audio Home Recording Act of 1992

> *Just take those old records off the shelf,*
> *I'll sit and [duplicate] them by myself.*[34]

In the "pre-digital era,"[35] the recording industry took a relatively liberal position with respect to protecting music from unauthorized duplication.[36] With the 1976 Copyright Act, Congress extended certain enumerated rights to copyright owners and, in doing so, gave those copyright owners a cause of action against those who infringe upon their rights.[37] Specifically, Congress granted to copyright owners,

> [t]he exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works,

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[34] BOB SEGER & THE SILVER BULLET BAND, *Old Time Rock and Roll*, *on* NINE TONIGHT (Capitol/EMI Records 1981).

[35] For the purposes of this Note, the "pre-digital era" refers generally to the years before 1982 – the year in which the compact disc emerged as the dominant medium for music reproduction. *See infra* notes 52-55 and accompanying text.

[36] Throughout this Note, the terms "duplication," "duplicate," "copy," and similar terms are used to connote their common meanings, rather than terms of art under any body of law.

[37] Benton J. Gaffney, Note, *Copyright Statutes That Regulate Technology: A Comparative Analysis of The Audio Home Recording Act and The Digital Millennium Copyright Act*, 75 WASH. L. REV. 611, 628 (2000).

> including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.[38]

These rights illustrate the attempt that Congress made to strike a balance between public and private interests, recognizing that "the public benefits from the creative activities of authors [] and that the copyright monopoly is a necessary condition to the full realization of such creative activities."[39] Moreover, Congress set limitations on the exclusive rights of copyright owners by limiting the duration of their rights[40] as well as limiting the scope of those rights with the affirmative defense doctrines of "fair use"[41] and "first sale."[42]

In addition to the protections created by copyright law, the physical limitations of older analog recording media[43] usually helped to provide more "practical" protection from extensive duplication.[44] Until Philips introduced the cassette tape in 1964,[45] the average consumer's access to recording equipment was somewhat limited. Therefore, the majority of illegally duplicated material was produced by a relatively few "large scale" producers, which were comparatively easy to locate and sue for copyright infringement.[46] With cassette tape

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38 17 U.S.C. § 106 (1994). Paragraph (6) was added in 1995, extending copyright owners' rights to include "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." *Id.* (Supp. V 1999).

39 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2001); Gaffney, *supra* note 37, at 613.

40 *See* 17 U.S.C. § 302 (Supp. V 1999).

41 The "fair use" doctrine creates defenses for the use of copyrighted works associated with certain purposes, including "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, [and] research," which would otherwise constitute infringement. 17 U.S.C. § 107 (1994).

42 The "first sale" doctrine permits the owner of a lawfully created "copy or phonorecord" to "sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a) (1994).

43 "Analog" has been defined as "(1) [a]nything which [sic] is similar to something else. (2) A form of audio signal or recording system in which the data stream consists of a continuously varying voltage, magnetic field, or groove modulation." J. GORDON HOLT, THE AUDIO GLOSSARY 8 (1990). For the purpose of this Note, "analog recording media" refers generally to magnetic audiotape in both "reel-to-reel" or "cassette" form as well as earlier "wire recorders."

44 The poor sound quality of early "wire recorders" and the bulk of "reel-to-reel" tape recorders, as well as the inconvenience of the tape itself, limited the number of individuals making home recordings to avid audiophiles and music aficionados.

45 Jones International, *Jones Telecommunications and Multimedia Encyclopedia, at* http://www.digitalcentury.com/encyclo/update/audiohd.html (last visited Oct. 30, 2001) (on file with the *West Virginia Law Review*). "Cassette tape" can be defined as "[a] removable case containing a length of magnetic tape and its supply and takeup spools." HOLT, *supra* note 43, at 24.

46 The number of individuals and companies that illegally duplicated and distributed music was relatively small when compared with the current number of worldwide Internet users who

recorders in most homes and automobiles from the mid 1970s through the 1980s, unauthorized duplication of vinyl records and cassette tapes became a more important issue. However, the nature of magnetic audiotape provided yet another intrinsic mechanical security device that protected against mass duplication: the degeneration of sound quality with multiple duplications.[47] In other words, the more duplications that an individual made from a cassette master,[48] the worse the subsequent copies sounded. Similarly, the more times a reproduction of a master was regenerated,[49] the lower the sound quality of subsequent reproductions. To put it plainly, the only way to be reasonably certain that a person had the best quality recording possible under the circumstances[50] was for him or her to purchase an original record[51] or cassette tape, directly or indirectly, from the manufacturer rather than obtain or create a home-recorded duplication.

In 1982, the compact disc ("CD")[52] emerged as the newest technology in musical reproduction[53] and soon became the industry standard, bringing consumers into the digital[54] age. Finally, a music listener could have a near-perfect recording of his or her favorite artist and utilize this superior[55] medium as a master-source when making home recordings. Although one could purchase or borrow a CD and make an unauthorized duplication to a cassette tape, duplications made from the cassette tape, rather than the master CD, were still subject

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download music files in their homes in a virtually undetectable manner. *See* David Balaban, Note, *Music in the Digital Millennium: The Effects of The Digital Millennium Copyright Act of 1998*, 7 UCLA ENT. L. REV. 311, 318 (2000).

47 Gaffney, *supra* note 37, at 616.

48 A "master" is "[a]n original recording, usually on tape, from which all subsequent copies are derived." HOLT, *supra* note 43, at 84.

49 Using a copy of a master to make another copy, which is then subsequently used to make additional copies.

50 Home recording using tape-to-tape or record-to-tape techniques never produces the level of sound quality that can be achieved in a "controlled" studio environment.

51 A "record" is "[a] grooved analog disc; an LP." HOLT, *supra* note 43, at 115.

52 A compact disc is "[a] 4-¾-inch-diameter laser optical disc for audio only." HOLT, *supra* note 43, at 30. "When the disc is recorded, a multitude of error-correcting data and system information (track information, markers, etc.) are also added to the disc along with the music. All this data must be downloaded, so the aluminum disc is etched with minuscule pits. The pits and the unpitted areas translate as data that represents the 1s and 0s." ANDREW YODER, HOME AUDIO 60-61 (1998).

53 ROBERT HARLEY, THE COMPLETE GUIDE TO HIGH-END AUDIO 255 (2d ed. 1998).

54 "Digital" is defined as "[t]he use of binary notation for expressing numerical quantities or values." HOLT, *supra* note 43, at 40.

55 Although touted by the Consumer Electronics Industry as a being superior to analog media (e.g., records and cassette tapes), most avid audiophiles firmly hold that compact discs lag behind phonographic records in a variety of respects – particularly "warmth" of audio quality. *See* HARLEY, *supra* note 53, at 255; YODER, *supra* note 52, at 65.

to a reduced sound quality. Therefore, unless all of the duplications were recorded directly from the original CD, the sound quality was unsatisfactory.[56] In the 1980s, consumer models of digital audiotape ("DAT")[57] recorders became available, giving individuals the ability to create digital reproductions of music directly from CDs and other digital sources.[58] Moreover, because DAT recordings are digital rather than analog, unlike cassette tape recordings, there is no signal degradation with each copy that is created. Because of this important attribute, a digital copy can be duplicated and the cycle can continue in a "serial"[59] fashion, normally with little or no audible signal loss.

The introduction of home DAT recorders that could produce "perfect" duplications of digital music spawned great concern in the recording industry, which led Congress to make several attempts in the 1980s to enact legislation that would require royalty payments and compulsory licensing to strengthen copyright protection. However, no such legislation made it past the subcommittee stage.[60] The unsuccessful attempts by Congress to pass effective legislation led to a chain of events, which subsequently paved the way to the Audio Home Recording Act of 1992 ("AHRA").[61]

In 1989, because no successful attempt at creating legislation had yet occurred, the International Recording Industry and the Consumer Electronics Industry decided to try to resolve the DAT dispute on their own initiative.[62] The

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[56] Although there are quantitatively measurable objective factors with which one can rate sound quality, the concept is largely subjective, especially among "casual" listeners. In other words a duplicate recording might be found to be satisfactory to a "casual" music listener and unsatisfactory to an audiophile or music enthusiast for the purpose of "critical" music listening.

[57] A "[f]ormat for storing up to two hours of 44.1kHz or 48kHz digital audio with 16-bit resolution on a small cassette tape." HARLEY, *supra* note 53, at 527.

[58] DAT has been the most popular digital recording format for semi-professional use, providing up to two hours of recording time on a small, moderately priced tape. Assuming the same quality of "analog-to-digital" converters, DAT has a sound quality identical to that of Compact Disc Recordable, but has the advantage of allowing the user to re-record on the media. HARLEY, *supra* note 53, at 298-99.

[59] The term "serial copying" means the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording. The term "digital reproduction of a digital musical recording" does not include a digital musical recording as distributed, by authority of the copyright owner, for ultimate sale to consumers.

17 U.S.C. § 1001(11) (1994).

[60] Gary S. Lutzker, Note, *DAT's All Folks: Cahn v. Sony and the Audio Home Recording Act of 1991 – Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 171-74 (1992) (discussing the bills that were introduced).

[61] Codified at 17 U.S.C. §§ 1001-1010 (1994 & Supp. V 1999).

[62] Elizabeth R. Gosse, Note, *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.: The RIAA Could Not Stop the Rio – MP3 Files and The Audio Home Recording Act*, 34 U.S.F. L. REV. 575, 579 (2000).

two parties, whose financial interests concerning the matter were inherently opposed,[63] reached an international concession known as the Athens Agreement, which required electronics companies to integrate a copyright protection mechanism into the design of all consumer DAT recorders: the Serial Copy Management System ("SCMS").[64] This mechanism, through a process of encoding original CDs with a security code, made multiple duplications from a copy of a CD impossible.[65] In 1990, popular songwriter, Samuel ("Sammy") Cahn and four music publishers filed a class action suit against Sony Corporation, a major manufacturer of consumer DAT player/recorders, and its subsidiaries for contributory copyright infringement,[66] seeking to bar DAT recording technology from the United States.[67] The case was ultimately settled in 1991 as a part of a broader agreement between the recording industry and consumer electronics manufacturers.[68] As a term of the settlement, Sony agreed to actively support the plaintiffs' efforts to enact legislation that would establish a system of royalty payments for copyright owners.[69]

The AHRA essentially codified the Athens Agreement and the *Sony* settlement.[70] One important aspect of the AHRA is that it set up a general fund into which all manufacturers, importers, and distributors of digital recording devices must pay a royalty.[71] The proceeds collected in the fund are then distributed back to copyright owners to offset their loss of revenue from lost sales of origi-

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63 It is obviously a financial objective of the International Recording Industry to maximize the rights of the copyright owners of recorded material, while it is a financial objective of the Consumer Electronics Industry to increase the sales of recording equipment (including DAT machines for home recording) for electronics manufacturers.

64 *Audio Home Recording Act of 1991: Hearing on H.R. 3204 Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong. 2 (1992); Gosse, *supra* note 62, at 579.

65 "Serial Copy Management System" ("SCMS") is described as a "system for preventing second-generation digital copies of copyrighted audio material. A digital recorder equipped SCMS will record digitally from another source, but that recording cannot then be used as a source for a second-generation recording." HARLEY, *supra* note 53, at 542.

66 *See* Cahn v. Sony Corp., 90 Civ. 4537 (S.D.N.Y. filed July 9, 1990).

67 Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC'Y U.S.A. 497, 500 (1998); Gosse, *supra* note 62, at 579.

68 Kurlantzick & Pennino, *supra* note 67, at 501.

69 *Id.*; Gosse, *supra* note 62, at 579.

70 Gosse, *supra* note 62, at 579.

71 *See* 17 U.S.C. § 1003(a) (1994) ("No person shall import into and distribute, or manufature and distribute, any digital audio recording device or digital audio recording medium unless such person records the notice specified by this section and subsequently deposits the statements of account and applicable royalty payments for such device or medium specified in section 1004.").

nal recordings.[72]

Since the AHRA was enacted in 1992, the Consumer Electronics Industry has seen many new digital innovations come and go. Probably the most significant was the component-based home compact disc recorder, which, by definition, falls under the AHRA provisions.[73] Indeed, one could reasonably imagine that the compact disc recorder would have presented the greatest challenges for lawmakers. After all, protecting the sales of compact discs was, and continues to be, a major concern of the recording industry. Curiously, however, the music-recording device that was destined to provide the most controversy came not in the form of a "traditional" audio component, but in the form of a personal computer coupled with an Internet connection. Interestingly, because of either congressional oversight[74] or sufficient pressure from the Consumer Electronics Manufacturers Association,[75] the AHRA exempts personal computers from coverage under its requirements.[76]

B. The Internet

You say you want a revolution . . . .[77]

In 1992, when the World Wide Web was in its infancy,[78] few people – save for some educators and "silicon valley" insiders – could likely predict that within a few years, the Internet would completely change the way that the world functioned, let alone the way that it viewed the doctrines of United States copy-

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[72] *See id.* § 1006 ("The royalty payments . . . shall . . . be distributed to any interested copyright party – whose musical work or sound recording [meets the enumerated requirements] and [] who has filed a claim under section 1007.").

[73] *See* 17 U.S.C. § 1001(3) (1994) ("A 'digital audio recording device' is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use . . . .").

[74] When the AHRA was passed in 1992, the "threat" of personal computers to the recording industry seemed remote based upon their comparatively primitive recording capabilities. David A. Hepler, Comment, *Dropping Slugs in the Celestial Jukebox: Congressional Enabling of Digital Music Privacy Short-Changes Copyright Holders*, 37 SAN DIEGO L. REV. 1165, 1178 (2000).

[75] *Id.* (citing Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624, 629 (C.D. Cal. 1998)).

[76] *Id.* at 1180. *See* discussion *infra* Part III.A.

[77] THE BEATLES, *Revolution*, *on* THE BEATLES (Capital Records 1968) (more popularly known as "The White Album").

[78] *See* Dave Kristula, *The History of the Internet*, *at* http://www.davesite.com/webstation/net-history.shtml (last modified Aug. 2001) (on file with the *West Virginia Law Review*).

right law. In recent years, one of the most popular uses of the Internet has been the downloading[79] of digital audio files for playback – with or without the permission of the copyright owner. The basic steps that are involved in this process generally[80] include (1) the "digitizing" of a music source on a personal computer, (2) the uploading of digital music files to a server, and (3) the selection and downloading of such files by another party. It was estimated that in 1999, more than 750 million musical tracks were downloaded without the permission of the respective copyright owners.[81] It was further estimated that this figure was expected to triple in 2000.[82] This rampant downloading of digital music files contributes to an estimated annual loss of $300 million that the American recording industry suffers because of piracy.[83]

Internet users can play downloaded digital audio files either directly through a computer equipped with a soundcard and speakers or through one of a number of hand-held playback devices, commonly known as "MP3 players," including the Rio, manufactured by Diamond Multimedia Systems, Inc.[84] Additionally, using third-party software, individuals can convert the digital music tracks to a format that can be decoded by a CD player and then store the converted files directly on a CD with a CD writer[85] or CD re-writer,[86] to create their own CD compilations.[87] Once saved on a CD, the music files can be played back through any portable, home, or car audio system equipped with a CD player.

Several downloadable file formats are currently available, but the most commonly used is MPEG[88]-1, Audio Layer 3, more commonly known as

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79 "To download means to receive information, typically a file, from another computer to yours via your modem . . . . The opposite term is upload, which means to send a file to another computer." A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 n.1 (9th Cir. 2001) (quoting United States v. Mohrbacher, 182 F.3d 1041, 1048 (9th Cir. 1999) (quoting ROBIN WILLIAMS, JARGON, AN INFORMAL DICTIONARY OF COMPUTER TERMS 170-71 (1993))).

80 This process differs with respect to Napster and other digital music file "facilitator" services, which do not "house" the actual digital audio files on their own servers, but rather provide a means by which users can locate and download music files directly from other users. *See* discussion *infra* Part III.B.

81 Balaban, *supra* note 46, at 311.

82 *Id.*

83 *Id.*

84 *See infra* note 99 and text accompanying note 101.

85 *See supra* note 21.

86 *See supra* note 22.

87 Liz Robinson, The Recording Academy® Entertainment Law Initiative 2000 Legal Writing Contest Winner, *The Global Response to Digital Music Piracy*, 7 UCLA ENT. L. REV. 357, 358 (2000).

88 "The Moving Picture Experts Group (MPEG) is a working group of [The International Organization for Standardization/International Electrotechnical Commission] in charge of the

"MP3."[89] MP3 is a method of audio compression that was developed in Germany in 1991 by the Fraunhofer Institute.[90]

> MP3 uses perceptual audio coding to compress CD-quality sound by a factor of [twelve], while providing almost the same fidelity. MP3 music files are played via software or a physical player that cables to the [personal computer] for transfer. MP3 has made it feasible to download quality audio from the [Internet] very quickly. . . .[91]

The MP3 format has become the most popular digital audio compression method, largely because it is a "standard, non-proprietary compression algorithm freely available for use by anyone, unlike various proprietary (and copyright-secure) competitor algorithms."[92]

III. NOTABLE LITIGATION

A. RIAA v. Diamond Multimedia Systems, Inc.

Long as she's got [an ISP[93]], the music will never stop.[94]

1. Background

In 1998, the United States District Court for the Central District of California had the opportunity to interpret the AHRA[95] for the first time in *Re-*

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development of international standards for compression, decompression, processing, and coded representation of moving pictures, audio and their combination." Moving Picture Experts Group, *Who We Are*, *at* http://www.cselt.it/mpeg/who_we_are.htm (last visited Oct. 31, 2001) (on file with the *West Virginia Law Review*).

89 Robinson, *supra* note 87, at 358.

90 CMP TechWeb, *TechEnclyclopedia*, *at* http://www.techweb.com/encyclopedia/defineterm?term=mp3 (last visited Feb. 23, 2001) (on file with the *West Virginia Law Review*).

91 *Id.*

92 Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1074 (9th Cir. 1999).

93 "ISP" stands for "Internet Service Provider," which is defined as "[a]n organization that provides access to the Internet." CMP TechWeb, *TechEncyclopedia*, *at* http://www.techweb.com/encyclopedia/defineterm?term=Internet+service+provider (last visited Jan. 24, 2001) (on file with the *West Virginia Law Review*).

94 BERRY, *supra* note 1.

95 *See* discussion *supra* Part II.A.

cording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.[96] In that landmark case, two trade organizations,[97] "representing the creators, manufacturers, and distributors of over ninety percent of all legitimate sound recordings,"[98] sought to enjoin Diamond Multimedia Systems, Inc. ("Diamond"),[99] the manufacturer of the Rio hand-held digital music player, from manufacturing and delivering its product, alleging that it violated the AHRA.[100]

> The Rio is a lightweight, hand-held device, capable of receiving, storing, and re-playing digital audio file [sic] stored on the hard drive of a personal computer. After the Rio receives a digital audio file, the Rio user can detach the Rio from the computer and play back the audio file separately through headphones while away from the computer.[101]

The Rio utilizes MP3, the most popular digital audio file format.[102] An interesting consideration is the fact that the Rio is able to use both legally created[103] and legally downloaded[104] audio files, as well as files that have been acquired in violation of copyright law, without the copyright owner's permission or, in most instances, even his or her knowledge.[105]

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96 29 F. Supp. 2d 624 (C.D. Cal. 1998) (referred to as "*Diamond I*" in text), *aff'd*, 180 F.3d 1072 (9th Cir. 1999) (referred to as "*Diamond II*" in text).

97 The Recording Industry Association of America, Inc. and the Alliance of Artists and Recording Companies. *Id.* at 625.

98 *Id.*

99 "Defendant is a leading manufacturer of computer products, specializing in products to improve multimedia, audio, graphics, video, and communications uses of personal computers. Defendant is currently manufacturing – and intends to distribute – a device it calls the Rio PMP 300 (the "Rio")." *Id.*

100 *Id.*

101 *Id.*

102 Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1073-74 (9th Cir. 1999).

103 An individual can create digital audio files from his or her own compact discs and download them to a Rio for playback.

104 > In contrast to piracy, the Internet also supports a burgeoning traffic in legitimate audio computer files. Independent and wholly Internet record labels routinely sell and provide free samples of their artists' work online, while many unsigned artists distribute their own material from their own websites. Some free samples are provided for marketing purposes or for simple exposure, while others are teasers intended to entice listeners to purchase either mail order recordings or recordings available for direct download (along with album cover art, lyrics, and artist biographies).

Diamond Multimedia Sys., Inc., 180 F.3d at 1074.

105 "By most accounts, the predominant use of MP3 is the trafficking in illicit audio re-

2. Procedural History

On October 9, 1998, the Recording Industry Association of America, Inc. ("RIAA") and the Alliance of Artists and Recording Companies (collectively, "plaintiffs") filed both a complaint and an "Ex Parte Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction" ("*Diamond I*").[106] The plaintiffs' complaint alleged a single cause of action for violation of the AHRA.[107] Diamond filed an opposition to the application for a temporary restraining order on October 13, 1998, to which the plaintiffs filed their reply on October 14, 1998.[108] On October 16, 1998, the United States District Court for the Central District of California heard oral arguments and granted the temporary restraining order, enjoining Diamond from manufacturing or distributing the Rio.[109] Later, the district court denied the plaintiffs' motion for a preliminary injunction and rescinded the temporary restraining order it had granted earlier, finding that the probability of the plaintiffs' success on the merits was "mixed"[110] because they had not shown an irreparable injury.[111] On appeal, the Ninth Circuit Court of Appeals affirmed the denial in favor of Diamond, agreeing with the lower court that the Rio was not subject to the provisions of the AHRA ("*Diamond II*").[112]

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cordings, presumably because MP3 files do not contain codes identifying whether the compressed audio material is copyright protected." *Id.*

106 *Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d at 625-26.

107 *Id.* at 626.

108 *Id.*

109 *Id.*

110 *Id.* at 632. The court stated,

> In summary, Plaintiffs' probability of success on the merits is mixed. Although Plaintiffs have established a probability that the Rio is a "digital audio recording device," Plaintiffs have not established a probability of success in establishing that the Rio, if assessed by the Secretary of Commerce, would fail to satisfy Section 1002(a)(3).

Id.

111 *Id.* at 633. The court further asserted,

> Assuming that the Rio is subject to the AHRA, and that Defendant ultimately pays any required royalties, the only potential "wrongful conduct" is Defendant's failure to encode SCMS information on recordings stored in the Rio. . . . [T]he Court is skeptical that the Secretary of Commerce would require Defendant to incorporate SCMS technology. Even if the Secretary did impose that requirement, Plaintiffs have failed to demonstrate a sufficient causal relationship between this "wrongful conduct" and their alleged injuries.

Id. at 632.

112 Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1081

3. Synopsis

Essentially, both *Diamond I* and *Diamond II* (collectively "*Diamond*") boiled down to a judicial interpretation of the AHRA – specifically whether Congress created an exemption in the AHRA, intentionally or otherwise, for personal computers. Interpreting the specific language of the AHRA, the Ninth Circuit Court of Appeals ultimately concluded in *Diamond II* that the Rio was not subject to regulation under the AHRA.[113] The court found that the player did not qualify as a "digital audio recording device"[114] because it merely downloads MP3 files from the hard drive of a computer, and a computer hard drive is neither a "digital musical recording"[115] nor a transmission of a "digital musical recording."[116] This interpretation differed from the district court's belief that the Rio probably did qualify as a digital audio recording device.[117] To qualify as a digital audio recording device, the Rio would have to be "'capable of making' a reproduction of a 'digital musical recording.'"[118] Indeed, the appellate court went so far as to state that although the lower court's conclusion – that Diamond's construction of 17 U.S.C. § 1001(5)(B)(ii)[119] would effectively eviscer-

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(9th Cir. 1999).

113 *See id.*

114 The AHRA defines "digital audio recording device" as

> any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a *digital audio copied recording* for private use . . . .

Id. at 1075 (quoting 17 U.S.C. § 1001(3) (1994)). The AHRA defines a "digital audio copied recording" as "a reproduction in a digital recording format of a *digital musical recording*, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission." *Id.* at 1075-76 (quoting 17 U.S.C. § 1001(1) (1994)).

115 The AHRA defines a "digital musical recording" as

> a material object –
>
> (i) in which are fixed, in a digital recording format, *only sounds, and material, statements, or instructions incidental to those fixed sounds*, if any, and
>
> (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Id. at 1076 (quoting 17 U.S.C. § 1001(5)(A) (1994)).

116 Gosse, *supra* note 62, at 586.

117 *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624, 632 (C.D. Cal. 1998), *aff'd*, 180 F.3d. 1072 (9th Cir. 1999).

118 *Id.* at 628.

119 A "digital musical recording" does not include a material object – in which

ate the AHRA and allow "[a]ny recording device [to] evade [] regulation simply by passing the music through a computer and ensuring that the MP3 file resided momentarily on the hard drive" – may be true, "the Act seems to have been expressly designed to create this loophole."[120]

Despite contrary holdings over whether the Rio qualified as a digital audio recording device, both courts agreed that it would be pointless to hold that Diamond had to incorporate SCMS into the design of the Rio simply to make the product compliant with the SCMS portion of the AHRA.[121] Quite logically, both courts recognized that such a requirement would ultimately accomplish nothing because the Rio would not be capable of "'act[ing] [] upon . . . copyright and generation status information' because the MP3 files on the computer's hard drive do not contain this information" and "[s]imilarly, [because] it [was] undisputed that the Rio does not permit downstream copying because the Rio itself has no digital output capability, and the removable flash memory cards cannot be copied by another Rio device."[122] Therefore, it would be "nonsensical to suggest that the Rio must 'sen[d] . . . copyright and generation status information.'"[123]

This case clearly illustrates the fact that with the Internet came the concurrent need for clearly written laws to protect copyright holders against copyright infringement. It can certainly be argued that the decision of the court – that the "hardware" element[124] of Internet music distribution does not offend the AHRA – has led some Internet music enthusiasts to assume that the same holds true, universally, for the "software" element.[125] In other words, *Diamond* could easily be the root of much of the confusion over the application of traditional copyright law to online music providers and facilitators like Napster, Inc.

> one or more *computer programs* are fixed, except that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material.

17 U.S.C. § 1001(5)(B)(ii) (1994) (emphasis added).

[120] *Diamond Multimedia Sys., Inc.*, 180 F.3d at 1078 (quoting *Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d at 630) (third alteration in original).

[121] The SCMS requirement section of the AHRA is codified at 17 U.S.C. § 1002 (1994).

[122] *Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d at 632. The Rio players had no output; therefore, a user could not use the Rio to make additional copies, save for using the "onboard" memory card. In other words, once audio files were downloaded from the computer hard drive to the Rio, they remained on the Rio until removed from the memory of the unit (or, if stored on a memory card, until the memory card was removed).

[123] *Id.*

[124] The Rio player, which provides the ability to play audio files downloaded from the Internet.

[125] The actual music files used for playback, whether created legally by a CD owner or downloaded from the Internet without permission from the copyright owner.

B. A & M Records, Inc. v. Napster, Inc.

Strangers in the night, exchanging [MP3s],
wondering in the night, what were the chances,
[they'd] be [committing copyright infringement] before the [Napster case] was through.[126]

or, perhaps more appropriately,
I fought the law and the law won.[127]

1. Background

The case that appears to be destined to live in infamy in the annals of both copyright law and "cyberlaw" is *A & M Records, Inc. v. Napster, Inc.*[128] This seminal case involved a previously unexplored factual situation: a defendant that did not actually copy or provide copyright protected materials to individuals, *per se*, but rather, acted as a facilitator in the act of downloading digital music files via the Internet. Thus, *Napster* can be distinguished from *Diamond*, in that rather than providing the "vehicle"[129] for the playback of digital music files, Napster, Inc. ("Napster"), provided[130] the "fuel."[131] *Napster* involved the interpretation of yet another copyright law: the Digital Millennium Copyright Act ("DMCA").[132] The DMCA was enacted in 1998 following inconsistent holdings in several cases in which copyright owners sued Internet service providers ("ISPs") on the theory of contributory infringement after their subscribers posted copyright protected material on the Internet.[133]

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[126] FRANK SINATRA, *Strangers in the Night*, *on* STRANGERS IN THE NIGHT (Reprise Records 1966).

[127] BOBBY FULLER, *I Fought the Law*, *on* SHAKEDOWN! THE TEXAS TAPES REVISITED (Del-Fi Records 1996).

[128] 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

[129] The device through which downloaded digital audio files may be played.

[130] More properly, facilitated the transaction between the Napster user who was searching for digital audio files and other Napster users who were providing such files at the time.

[131] Digital audio files to be played back either through a computer, a digital audio player, or, if saved to a CD, any audio system containing a CD player.

[132] Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.). Patrick L. Kenney, *The Napster Battle: Applying Copyright Laws in the Era of the Internet and Digital Music*, E-COMMERCE, June 2000, *available at* WL ECOMMERCE file (on file with the *West Virginia Law Review*).

[133] *See* Wendy M. Pollack, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2457 (2000). In other words, the ISPs were being sued, not because the ISPs, themselves, placed copyright protected material on their servers, but because their subscribers did so.

At all pertinent times, the defendant, Napster, was[134] a small, California-based Internet start-up company that made its proprietary MusicShare software freely available online.[135] The software essentially enabled Napster users to perform three functions: (1) search for MP3 files contained on Napster users' individual computer hard drives; (2) trade MP3 files "directly,"[136] without having to use a centralized server for storage; and (3) "chat" with other MP3 users while online.[137] True to the adage "necessity is the mother of invention," Napster grew out of a desire shared by its software creator and co-founder, then eighteen year old Shawn Fanning, and his friends for a system for locating and exchanging MP3 digital audio files.[138] After its inception in May of 1999, Napster enjoyed steady growth, reaching a reported fifty-eight million users by February of 2001, much to the chagrin of the recording industry.[139]

The Napster system utilized "peer-to-peer" file sharing, which essentially allowed two Napster users engaged in a file exchange "transaction" to "link" computers for the purposes of exchanging specific music files.[140] The fundamental steps involved in a Napster "transaction" can be illustrated as fol-

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134 At the time this Note was finalized, the continued viability of Napster, as a commercial entity, remained questionable. The company initially reported that its revamped membership service would be functional by the end of the Summer of 2001. However, by the Fall of 2001, the company's website claimed that its new service would be functional "early next year." Napster, *Update, at* http://www.napster.com/ (last visited Oct. 31, 2001) (on file with the *West Virginia Law Review*). Thus, having no reasonably reliable source to confirm whether the Napster subscription service would, in fact, ever be functional, the author felt it most appropriate to communicate in the past tense.

135 A & M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *3 (N.D. Cal. May 5, 2000), *stay granted*, No. 00-16401, No. 00-16403, 2000 U.S. App. LEXIS 18688 (9th Cir. July 28, 2000), *motion ruled upon*, No. C 99-05183 MHP, No. C 00-0074 MHP, 2000 U.S. Dist. LEXIS 20668 (N.D. Cal. Aug. 10, 2000), *injunction granted*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

136 Through "peer-to-peer" file sharing, "requests" for digital audio files were routed from audio file recipients to audio file providers through Napster-owned servers, but the music files were not actually housed on such servers, nor were the actual files routed through the server to the file recipient. Instead, the audio files traveled directly from the file provider to the file recipient. *See* Marshall Brain's HowStuffWorks, *How Napster Works, at* http://www.howstuffworks.com/napster.htm (last visited Oct. 31, 2001) (on file with the *West Virginia Law Review*).

137 *Id.*

138 *See* CNN.com, *Napster Timeline, at* http://www.cnn.com/SPECIALS/2001/napster/timeline.html (last visited Feb. 23, 2001) (on file with the *West Virginia Law Review*); Marshall Brain's HowStuffWorks, *supra* note 136.

139 *See* CNN.com, *supra* note 138 (indicating the growth of Napster as well as the time at which the Napster litigation commenced).

140 *See* Marshall Brain's HowStuffWorks, *supra* note 136.

lows: (1) User A would download the free Napster software utility from the Napster website to his or her computer;[141] (2) after installing the software, User A would designate a "directory" on his or her computer hard drive in which to archive those digital audio files that he or she would like to make available to other Napster users for downloading; (3) when User A desired to log in to the Napster system, the Napster software searched for an Internet connection, and if one was found, User A was logged in to the central server, the purpose of which was to maintain an index of all Napster users who were online at any particular time and to facilitate the linking of one user's computer to another; (4) once connected to the Napster system, if User A chose to search for a specific song or material by a particular artist or band, he or she could designate detailed search terms;[142] (5) the Napster software that was installed on User A's computer queried the Napster index server for matches to the search terms; (6) Napster built a list of locations containing the requested digital audio files, complete with "information about sound quality and connection speed, enabl[ing] [User A] to tailor [his or her] search[] to locate only those sound recording files that [were] of a selected audio quality or only those recordings that [could] be downloaded at the desired speed, or any combination of the above";[143] (7) after User A selected a particular file provider (User B), the download process began;[144] (8) once the file was downloaded[145] to User A's computer, he or she could play the file through his or her computer using either Napster's software or software from another provider.[146] More significant – and more detrimental to the recording industry – was the fact that with a compact disc writer or "burner"[147]

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[141] This was a one-time step, since the MusicShare software, once downloaded and installed, remained on the individual Napster user's computer hard drive.

[142] Napster users were able to search for particular song titles or songs by particular artists or bands.

[143] Complaint for Contributory and Vicarious Copyright Infringement, Violations of California Civil Code Section 980(a)(2), and Unfair Competition at 13-14, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), http://www.riaa.com/PDF/Napster_Complaint.pdf (last visited Oct. 31, 2001) (on file with the *West Virginia Law Review*) [hereinafter RIAA Complaint].

[144] As the RIAA Complaint aptly described the process,

> Napster create[d] an actual "link" to each responsive music file. Thus, all Napster users need[ed] to do [was] select the file they want[ed] and it automatically download[ed] [] *i.e.*, [it was] copied and saved [] to their individual [computer] hard drives. A user desiring a song [did] not have to do anything to contact the user offering the song other than click on the link provided by Napster. Napster facilitate[d] [the] entire transaction.

Id. at 14.

[145] Assuming there were no network problems or other interfering circumstances.

[146] *See* Marshall Brain's HowStuffWorks, *supra* note 136.

[147] A colloquial term for a device that records CD-Rs.

connected to his or her computer, a Napster user could use the digital audio files to create compact discs that contained those songs in a format that could be played back through any home or car audio system containing a CD player.

Alternatively, a Napster user could also locate MP3 files by using the "hotlist" function.[148]

> To use the "hotlist" function, the Napster user [would] create[] a list of other users' names from whom he ha[d] obtained MP3 files in the past. When logged onto Napster's servers, the system alert[ed] the user if any user on his list (a "hotlisted user") [was] also logged onto the system. If so, the user [could] access an index of all MP3 file names in a particular hotlisted user's library and request a file in the library by selecting the file name. The contents of the hotlisted user's MP3 file [sic] [were] not stored on the Napster system.[149]

According to the RIAA, because Napster "deliberately refus[ed] to maintain any information about its users in order to make copyright enforcement next to impossible, Napster [] created a virtual sanctuary where music piracy [could] and [did] flourish on a monumental scale."[150] In their complaint, the plaintiffs averred that "Napster ha[d] marketed itself to would-be music pirates by declaring that it deliberately [did] not keep any user information that might allow copyright owners to learn their identities."[151]

2. Procedural History

After observing what they determined to be copyright infringing activities on the part of Napster, several record labels, represented by the RIAA,[152] brought an action against Napster, alleging, essentially, that the company encouraged the illegal copying and distribution of copyrighted music on an immense scale.[153] Napster filed a motion for summary judgment, arguing that 17 U.S.C. § 512(a), the safe harbor provision of the DMCA,[154] protected it from

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148 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1012 (9th Cir. 2001).

149 *Id.*

150 RIAA Complaint, *supra* note 143, at 12.

151 *Id.* at 16.

152 Throughout this discussion, the terms "plaintiffs," "RIAA," and "recording companies" are used interchangeably to refer collectively to the recording companies, represented by the RIAA, that brought this action against Napster, Inc.

153 RIAA Complaint, *supra* note 143, at 2-3 (outlining the plaintiffs' allegations against Napster and the scope of Napster's actions); CNN.com, *supra* note 138.

154 *See infra* note 184.

liability.[155] After hearing arguments for and against Napster's motion for summary judgment, the United States District Court for the Northern District of California denied the motion, finding that since Napster did not "transmit, route, or provide connections for allegedly infringing material through its system," it did not qualify for safe harbor protection.[156] The court also found summary judgment to be improper because there were genuine issues of material fact with regard to a particular condition of the DMCA that would require Napster to implement a policy for the termination of users who were deemed "repeat infringers"[157] for the company to be able to enjoy safe harbor protection.[158]

On July 26, 2000,[159] the district court issued a preliminary injunction against Napster.[160] Two days later, the Ninth Circuit Court of Appeals granted Napster's "emergency motion" to stay the preliminary injunction, pending appeal.[161] The Ninth Circuit Court of Appeals heard arguments on October 2, 2000, released its original opinion on February 12, 2001, and released an amended opinion on April 3, 2001.[162] In its amended opinion, the appellate court affirmed in part the preliminary injunction issued by the district court, finding, *inter alia*, that the plaintiffs' exclusive rights under federal copyright law were violated and that Napster's users were not engaged in any "fair use"[163] of the

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155 A & M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *1-*2 (N.D. Cal. May 5, 2000), *stay granted*, No. 00-16401, No. 00-16403, 2000 U.S. App. LEXIS 18688 (9th Cir. July 28, 2000), *motion ruled upon*, No. C 99-05183 MHP, No. C 00-0074 MHP, 2000 U.S. Dist. LEXIS 20668 (N.D. Cal. Aug. 10, 2000), *injunction granted*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

156 *See id.* at *29-*30.

157 *See id.* at *26.

158 *See id.* at *30.

159 Although the district court opinion was dated "August 10, 2000," on July, 26, 2000, the court ordered Napster to comply with the preliminary injunction by midnight on July 28, 2000. However, on July 28, 2000, a Ninth Circuit panel stayed the preliminary injunction. *See* A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 927 n.32 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

160 *Id.* at 927 & n.32.

161 A&M Records, Inc. v. Napster, Inc., No. 00-16401, No. 00-16403, 2000 U.S. App. LEXIS 18688, at *1 (9th Cir. July 28, 2000) (decision without published opinion), *motion ruled upon*, No. C 99-05183 MHP, No. C 00-0074 MHP, 2000 U.S. Dist. LEXIS 20668 (N.D. Cal. Aug. 10, 2000), *injunction granted*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

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

163 Napster proffered several "fair use" affirmative defenses, as provided for at 17 U.S.C. § 107 (1994). *See* discussion *infra* Part III.B.3.

copyrighted materials.[164] The court also reversed in part and remanded the case, noting, "The mere existence of the Napster system, absent actual notice and Napster's demonstrated failure to remove the offending material, [was] insufficient to impose contributory liability."[165]

On remand, the district court modified its initial preliminary injunction, limiting Napster's duty to that which was physically possible within the capabilities of its then existing system.[166] At the writing of the final draft of this Note, the case had not yet proceeded to trial.[167]

3. Synopsis

In December of 1999, numerous record labels filed suit against Napster, "accusing the company of encouraging the illegal copying and distribution of copyright[ed] music on a massive scale."[168] More specifically, the plaintiff record companies alleged "contributory and vicarious federal copyright infringement and related state law violations"[169] as well as "statutory and common law unfair competition."[170] Prior to filing suit, the RIAA "randomly sampled thousands of the sound recordings [that] Napster made available on its service" and after finding that the "overwhelming majority, approximately [ninety percent],[171] infringed the rights of the RIAA's members," contacted Napster several times concerning the infringement.[172] Provoked by the fact that, despite this notification, Napster "continued its unlawful conduct unabated,"[173] the plaintiffs filed suit.

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164 *See Napster, Inc.*, 239 F.3d at 1011, 1019.

165 *Id.* at 1027 (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442-43 (1984)).

166 A&M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, MDL No. C 00-1369 MHP, 2001 U.S. Dist. LEXIS 2186 (N.D. Cal. Mar. 5, 2001).

167 John Borland, *supra* note 27.

168 CNN.com, *supra* note 138.

169 A & M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *1 (N.D. Cal. May 5, 2000), *stay granted*, No. 00-16401, No. 00-16403, 2000 U.S. App. LEXIS 18688 (9th Cir. July 28, 2000), *motion ruled upon*, No. C 99-05183 MHP, No. C 00-0074 MHP, 2000 U.S. Dist. LEXIS 20668 (N.D. Cal. Aug. 10, 2000), *injunction granted*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

170 RIAA Complaint, *supra* note 143, at 21.

171 The RIAA noted in its complaint that this figure did "not mean that the remaining [ten percent] were authorized or legitimate," but rather "[i]t simply mean[t] that those recordings did not appear to be owned by RIAA member record companies." *Id.* at 16.

172 *Id.*

173 *Id.*

For the purpose of this Note, the plaintiffs' allegations of contributory and vicarious copyright infringement under federal copyright law are of primary interest. Essentially, the plaintiffs' contributory infringement claim was based on the averment that Napster had willfully, intentionally, and purposefully

> engaged and continue[d] to engage in the business of knowingly and systematically inducing, causing, and materially contributing to the [] unauthorized reproductions [described in the plaintiffs' complaint] and/or distributions of [the copyrighted recordings described generally in the complaint] and thus to the infringement of [the] plaintiffs' copyrights and exclusive rights under copyright in [those copyrighted recordings] . . . . [I]n disregard of and indifference to the rights of [the] plaintiffs.[174]

The plaintiffs claimed that Napster's conduct was in violation of the Copyright Act – specifically, 17 U.S.C. §§ 106, 115, and 501.[175] The plaintiffs further claimed that "[a]s a direct and proximate result of the contributory infringements," they were "entitled to damages and Napster's profits pursuant to 17 U.S.C. § 504(b) for each infringement."[176] As an alternative argument, the plaintiffs also claimed that they were entitled to the "maximum statutory damages, pursuant to 17 U.S.C. § 504(c), in the amount of $100,000 with respect to each work infringed, or such other amounts as may be proper under 17 U.S.C. § 504(c)."[177] It was estimated that at the time the plaintiffs filed their complaint, such statutory damages would exceed $100,000,000.[178] Claiming that they had no adequate remedy at law and that without enjoinment and restraint ordered by the court, they would suffer "great and irreparable injury that [could not] fully be compensated or measured in money," the plaintiffs requested that the court grant them preliminary and permanent injunctions prohibiting further contributory infringements.[179]

The plaintiff record companies also averred,

> Napster had the right and ability to supervise and/or control the infringing conduct of its users by, without limitation, preventing or terminating a user's access to Napster's computer servers and/or by refusing to index and create links to infringing music files, but has failed to exercise such supervision and/or control .

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174 *Id.* at 17.

175 *Id.* at 18.

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

> . . . [I]n disregard of and indifference to the rights of [the] plaintiffs.[180]

The plaintiffs claimed that Napster's actions constituted vicarious infringement of their copyrights and exclusive rights under the same federal copyright law provisions enumerated in its contributory infringement claim against the defendant.[181] The applicable copyright law providing remedies, as well as the amounts claimed thereunder, were also identical to those specified in the plaintiffs' contributory infringement claim.[182]

On May 5, 2000, the United States District Court for the Northern District of California denied Napster's motion for summary judgment,[183] which the company had based upon the "safe harbor" provision of the DMCA contained at 17 U.S.C. § 512(a).[184] Judge Marilyn H. Patel ultimately denied Napster's motion because Napster did not "transmit, route, or provide connections" for the alleged infringing digital audio files through its system, and therefore, it did not meet the safe harbor requirements that are itemized in 17 U.S.C. § 512(a).[185] Analyzing the facts of the case in light of the legislative history of the § 512(a) safe harbor provisions,[186] the court found that because the material was transmitted from one Napster user to another through the Internet, rather than through the defendant's system, the company merely facilitated the initiation of connections.[187] Furthermore, the court found that summary judgment was inappropriate

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180 *Id.*

181 *See id.* at 18, 20.

182 *See id.*

183 A & M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *30 (N.D. Cal. May 5, 2000), *stay granted*, No. 00-16401, No. 00-16403, 2000 U.S. App. LEXIS 18688 (9th Cir. July 28, 2000), *motion ruled upon*, No. C 99-05183 MHP, No. C 00-0074 MHP, 2000 U.S. Dist. LEXIS 20668 (N.D. Cal. Aug. 10, 2000), *injunction granted*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

184 In 17 U.S.C. § 512(a), the DMCA limits the "liability of online service and Internet access providers for copyright infringements occurring online." *Id.* at *8-*9. "Subsection 512(a) exempts qualifying service providers from monetary liability for direct, vicarious, and contributory infringement and limits injunctive relief to the degree specified in subparagraph 512(j)(1)(B)." *Id.* at *8.

185 *Id.* at *25.

186 The court noted that the legislative history "demonstrate[d] that Congress intended the [§] 512(a) safe harbor to apply only to activities 'in which a service provider plays the role of a 'conduit' for the communications of others.'" *Id.* at *23-*24 (citing H.R. Rep. No. 105-551(II), 105th Cong., 2d Sess. (1998), 1998 WL 414916, at *130).

187 *See id.* at *22-*25. The Napster system created a "roadmap" of sorts, enabling one Napster user's computer to locate and connect to the computer of another Napster user for the purpose of retrieving music files *directly*. In other words, music files were not transmitted through the Napster system, but rather directly between Napster users, via the Internet. *See id.*;

because there were general issues of material fact concerning whether Napster complied with 17 U.S.C. § 512(i)(A) by reasonably implementing a policy for terminating "repeat infringers," as would have been required for the company to fall under § 512(a) protection.[188]

The next significant episode in the *Napster* saga came on July 26, 2000, when Judge Patel issued a preliminary injunction against Napster, pending the outcome of a full trial, as had been requested by the RIAA.[189] Two days later, Napster appealed Judge Patel's ruling to the Ninth Circuit Court of Appeals, at which time, the appellate court stayed the order, allowing Napster to continue operating pending further order of the Ninth Circuit.[190] In attempting to avoid the stay, the recording industry filed a response, "arguing that Napster's claim that the injunction would put it out of business [was] untrue and legally irrelevant."[191] The response seems to have nicely framed the position of the RIAA, stating that "[t]he law does not permit a company deliberately built on copyright infringement to complain that its business will be devastated if it is forced to stop trafficking in pirated music."[192]

On October 2, 2000, the Ninth Circuit Court of Appeals heard arguments in Napster's appeal from the preliminary injunction granted by the district court.[193] In an anxiously awaited opinion issued on February 12, 2001, the Ninth Circuit Court of Appeals affirmed in part, reversed in part, and remanded the case back to the United States District Court for the Northern District of California.[194] The court found that although the lower court's "preliminary injunc-

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Marshall Brain's HowStuffWorks, *supra* note 136.

188 *See Napster, Inc.*, 2000 U.S. Dist. LEXIS 6243 at *28.

189 A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001); Fox News.com, *Napster Attempts to Stall Court-Ordered Shutdown*, *at* http://www.foxnews.com/vtech/072600/napster.sml (July 27, 2000) (on file with the *West Virginia Law Review*). On July 26, 2000, Judge Patel issued the preliminary injunction against Napster. However, the opinion is dated August 10, 2000 and, as indicated in footnote 32 of the opinion, the preliminary injunction was stayed by the Ninth Circuit Court of Appeals on July 28, 2000. *Napster, Inc.*, 114 F. Supp. 2d at 927 & n.32.

190 A&M Records, Inc. v. Napster, Inc., No. 00-16401, No. 00-16403, 2000 U.S. App. LEXIS 18688, at *1 (9th Cir. July 28, 2000) (decision without published opinion), *motion ruled upon*, No. C 99-05183 MHP, No. C 00-0074 MHP, 2000 U.S. Dist. LEXIS 20668 (N.D. Cal. Aug. 10, 2000), *injunction granted*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

191 CNN.com, *Napster Wins Reprieve; Next Move Up To Recording Industry*, *at* http://www.cnn.com/2000/LAW/07/28/napster.stay.02/index.html (July 28, 2000) (on file with the *West Virginia Law Review*).

192 *Id.* (quoting plaintiffs' response).

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

194 *Id.* at 1029.

tion require[d] modification, [the RIAA had] substantially and primarily prevailed on appeal.[195] The court of appeals found "no error in the district court's determination that [the] plaintiffs [would] likely succeed in establishing that Napster users [did] not have a fair use defense."[196] The court also "affirm[ed] the district court's conclusion that [the] plaintiffs [had] demonstrated a likelihood of success on the merits of [their] contributory copyright infringement claim."[197] Moreover, the court found that "Napster's failure to police the system's 'premises,' combined with a showing that Napster financially benefit[ed] from the continu[ed] availability of infringing files on its system, [led] to the imposition of vicarious liability.[198] The court went on to rule against Napster on all of its asserted defenses.[199] However, the court reversed in part and remanded the case for modification of the preliminary injunction issued by the lower court.[200] The court specifically noted that

> contributory liability may potentially be imposed only to the extent that Napster: (1) receive[d] reasonable knowledge of specific infringing files with copyrighted musical compositions and sound recordings; (2) [knew] or should [have known] that such files [were] available on the Napster system; and (3) fail[ed] to act to prevent viral distribution of the works.[201]

In its opinion, the Ninth Circuit provided a detailed analysis of the Napster system, including, among other things, the steps involved in locating and downloading an MP3 file using Napster's peer-to-peer software, MusicShare.[202] After stating that the detailed analysis of the Napster system "architecture" was provided "to promote an understanding of the transmission mechanics," the court acknowledged that the "content" was the subject of its copyright infringement analysis.[203] Throughout its opinion, the Ninth Circuit skillfully articulated a detailed review of the proceedings at the district court level, affirming Judge Patel's findings on virtually all of the issues presented on appeal.[204] Although

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195 *Id.*

196 *Id.* at 1019.

197 *Id.* at 1022.

198 *Id.* at 1024.

199 *See id.* at 1024-27.

200 *Id.* at 1027, 1029.

201 *Id.* at 1027 (citing Religious Tech. Ctr. v. Netcom On-Line Communication Servs., 907 F. Supp. 1361, 1374-75 (N.D. Cal. 1995)).

202 *Id.* at 1011-12.

203 *Id.* at 1012-13.

204 *See Napster, Inc.*, 239 F.3d 1004 (reversing in part and remanding only for modification

the *Napster* appeal presented an analysis of many valuable and certainly noteworthy legal concepts, the discussion contained in this Note is limited to Napster's asserted statutory and affirmative defenses.

As to the charge that its users directly infringed the plaintiffs' rights, Napster asserted three "fair use"[205] affirmative defenses: "sampling," "space-shifting," and "permissive distribution of recordings by both new and established artists."[206] Napster further asserted two statutory and three affirmative defenses that it claimed would preclude the entry of the earlier-issued preliminary injunction: limitations imposed on copyright infringement actions for "noncommercial uses" contained in the AHRA at 17 U.S.C. § 1008;[207] the internet service provider "safe harbor" provision of the DMCA, located at 17 U.S.C. § 512;[208] and the affirmative defenses of "waiver," "implied license," and "copyright misuse."[209]

In its first "fair use" affirmative defense, Napster claimed that its users "download[ed] MP3 files to 'sample' the music in order to decide whether to purchase the recording."[210] The Ninth Circuit affirmed the district court's determination that sampling remained a commercial use despite the fact that some users might eventually purchase the music.[211] The court further noted that the plaintiffs had established that they would likely succeed in "proving that even authorized temporary downloading of individual songs for sampling purposes is commercial in nature."[212] The Ninth Circuit observed that when the plaintiff record companies made promotional downloadable music available through retail Internet sites, not only did they collect royalties for the song samples, but the samples were either merely portions of the full songs or full versions that would "time out" – exist for a short period of time – rather than remain perma-

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as to Napster's liability for contributory copyright infringement). In the interest of clearly ascertaining the underlying substantive legal principals involved in the *Napster* litigation, rather than becoming overly burdened with the procedural aspects of the case, this discussion has been written with limited references to the district court opinion, focusing instead on the Ninth Circuit's affirmation of the lower court's various holdings.

205 *See* 17 U.S.C. § 107 (1994) ("[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").

206 *Napster, Inc.*, 239 F.3d at 1014.

207 *Id.* at 1024.

208 *Id.* at 1025.

209 *Id.* at 1025-26.

210 *Id.* at 1018.

211 *Id.*

212 *Id.*

nently on the downloader's computer.[213]

Next, the court turned its attention to Napster's assertion that "space-shifting" was a fair use.[214] "Space-shifting occur[ed] when a Napster user download[ed] MP3 music files in order to listen to music [that] he already own[ed] on audio CD." [215] Regarding the applicability of the "space-shifting" defense, the court distinguished the facts of the instant case from the earlier *Diamond*[216] and *Sony Corp. of America v. Universal City Studios, Inc.*[217] cases, by making the observation that the methods of shifting in the earlier cases

> did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user. . . . Conversely . . . once a user list[ed] a copy of music he already own[ed] on the Napster system in order to access the music from another location, the song [became] "available to millions of other individuals," not just the original CD owner.[218]

The plaintiffs did not seek to enjoin Napster from the permissive reproduction of copyrighted works, which the company averred as its third "fair use" affirmative defense.[219] Nor did the plaintiffs challenge any other "noninfringing use of the Napster system, including: chat rooms, message boards and Napster's New Artist Program."[220]

The first statutory defense that Napster claimed for the preclusion of the preliminary injunction was based on § 1008 of the AHRA, which reads, in pertinent part,

> *No action may be brought under this title alleging infringement of copyright* based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio re-

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213 *Id.*

214 *See id.* at 1019.

215 *Id.* Although the court merely mentioned "audio CD[s]," it stands to reason that space-shifting would also encompass music that was owned by a Napster user in any another legitimately acquired medium.

216 Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 29 F. Supp. 2d 624 (C.D. Cal. 1998), *aff'd*, 180 F.3d 1072 (9th Cir. 1999). *See* discussion *supra* Part III.A.

217 464 U.S. 417 (1984).

218 *Napster, Inc.*, 239 F.3d at 1019 (citing UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349, 351-52 (S.D.N.Y. 2000) (finding space-shifting of MP3 files not a fair use even when previous ownership is demonstrated before a download is allowed)).

219 *Id.*

220 *Id.*

> cording medium, an analog recording device, or an analog recording medium, or *based on the noncommercial use by a consumer of such a device or medium* for making digital musical recordings or analog musical recordings.[221]

"Napster contend[ed] that MP3 file exchange [was] the type of 'noncommercial use' protected from infringement actions by [17 U.S.C. § 1008]."[222] In a rather logical progression, Napster next asserted that it could not be secondarily liable for its users' "nonactionable exchange of copyrighted musical recordings."[223] Citing its own holding from two years earlier in *Diamond*, the Ninth Circuit held that "under the plain meaning of the [AHRA]'s definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their 'primary purpose' is not to make digital audio copied recordings."[224] Furthermore, the court held that "notwithstanding Napster's claim that computers are 'digital recording devices,' computers do not make 'digital music recordings' as defined by the Audio Home Recording Act."[225]

The court next analyzed Napster's statutory defense based on the DMCA safe harbor for "internet service providers" contained at 17 U.S.C. § 512.[226] Napster had "failed to persuade [the district] court that subsection 512(d) shelter[ed] contributory infringers."[227] Rather than making a determination that Napster's potential liability for contributory and vicarious infringement would render the DMCA inapplicable *per se*, the court recognized that the "issue [would] be more fully developed at trial."[228] The court did, however, recognize that the plaintiffs had raised "serious questions regarding Napster's ability to obtain shelter under § 512" and that the "plaintiffs [had] also demonstrate[d] that the balance of hardships tip[ped] in their favor."[229]

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221 *Id.* at 1024 (quoting 17 U.S.C. § 1008 (1994)).

222 *Id.*

223 *Id.*

224 *Id.* (quoting Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078 (9th Cir. 1999)).

225 *Id.* (quoting Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1077 (9th Cir. 1999) (citing S. Rep. No. 102-294 (1992)) ("There are simply no grounds in either the plain language of the definition or in the legislative history for interpreting the term 'digital musical recording' to include songs fixed on computer hard drives.").

226 *Id.* at 1025.

227 *Id.*

228 *Id.*

229 *Id.* (citing Ninth Circuit precedent holding that "[a] party seeking a preliminary injunction . . . must show 'that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 874 (9th Cir. 1999); Micro Star v. Formgen, Inc, 154 F.3d 1107, 1109 (9th Cir.

The court next examined Napster's three affirmative defenses to the preliminary injunction: "waiver," "implied license," and "copyright misuse."[230] In asserting the affirmative defense of "waiver," Napster claimed that by "knowingly providing consumers with technology designed to copy and distribute MP3 files over the Internet,"[231] the "plaintiffs waived their entitlement to copyright protection because (a) they hastened the proliferation of MP3 files on the Internet,[232] and (b) they plan[ned] to enter the market for digital downloading themselves."[233] The Ninth Circuit agreed with the district court that the plaintiffs merely sought "partners for their commercial downloading ventures" and development of "music players for files [that] they planned to sell over the Internet."[234]

Next, in a rather terse summary, the Ninth Circuit affirmed the district court's holding that the plaintiffs did not grant Napster an "implied license" by "encouraging MP3 file exchange over the internet."[235] The court quoted the lower court's observation that "the RIAA gave [Napster] express notice that it objected to the availability of its members' copyrighted music on Napster."[236]

Turning its attention to Napster's third and final affirmative defense, the court found that the district court committed no error by its preliminary rejection of the defendant's allegation of "copyright misuse" by the plaintiffs.[237] More specifically, "Napster allege[d] that online distribution [was] not within the copyright monopoly" and that the plaintiffs had "colluded to 'use their copyrights to extend their control to online distributions.'"[238] The court found no evidence that the plaintiff record companies sought to control areas outside of their grant of monopoly, but rather that they sought to "control reproduction and distribution of their copyrighted works, [which are] exclusive rights of copyright holders."[239] Relying on *UMG Recordings, Inc. v. MP3.com, Inc.*,[240] the court

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1998)).

230 *Id.* at 1025-26.

231 *Id.* at 1026.

232 At the district court level, Napster had "submitted deposition excerpts related to the record company plaintiffs' business dealings with Internet and software companies that provide[d] ripping software, custom CDs, and players capable of playing unencrypted MP3 files." A & M Records, Inc. v. Napster, Inc. 114 F. Supp. 2d 896, 923 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

233 *Id.*

234 *Napster, Inc.*, 239 F.3d at 1026.

235 *Id.*

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.* at 1027 (citing 17 U.S.C. § 106 (1994)).

also noted that the fact that the copyrighted works were transmitted in MP3 format rather than audio CD format had no bearing on its analysis.[241]

Ultimately, the Ninth Circuit determined that the preliminary injunction issued by the district court was "overbroad because it place[d] on Napster the entire burden of ensuring that no 'copying, downloading, uploading, transmitting, or distributing' of plaintiffs' works occur[ed] on the system."[242] The Ninth Circuit found that the plaintiffs bore the burden of providing Napster with notice of copyrighted works and files that contained such copyrighted works that were available on the Napster system before Napster had the duty to disable access to such offending music files.[243] However, the court also noted that Napster must bear the burden of "policing the system within the limits of [its] system."[244] The court recognized that such policing would not be an "exact science" because the files that were made available via Napster were named by individual users, leaving room for inaccuracies.[245] The court also provided, "In crafting the injunction on remand, the district court should recognize that Napster's system does not currently appear to allow Napster access to users' MP3 files."[246]

Although the Ninth Circuit addressed several additional arguments proffered by Napster in its opinion, one is particularly noteworthy: the contention that "the district court should have imposed a monetary penalty by way of a compulsory royalty in place of an injunction."[247] Arguably, at first glance, this appears to be a reasonable assertion. However, as the Ninth Circuit aptly articulated, such a penalty would, in reality, provide an "easy out" for Napster.[248] "If such royalties were imposed, Napster would avoid penalties for any future violation of an injunction, statutory copyright damages and any possible criminal penalties for continuing infringement."[249] The court further observed that such a structure

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240 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

241 *Napster, Inc.*, 239 F.3d at 1027 (citing UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (finding that reproduction of audio CD into MP3 format does not "transform" the work)).

242 *Id.* at 1027 (quoting A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d. 869, 927 (N.D. Cal. 2000)).

243 *Id.*

244 *Id.*

245 *Id.* Since individual Napster users were able to personally name the files that they offered through the service, blatant inaccuracies were rampant on the system, whether intentional or by mistake.

246 *Id.*

247 *Id.* at 1028.

248 *Id.*

249 *Id.* at 1028-29.

> would also [have granted] Napster the luxury of either choosing to continue and pay royalties or shut down. On the other hand, the wronged parties would [have been] forced to do business with a company that profit[ed] from the wrongful use of intellectual properties. [The p]laintiffs would [have lost] the power to control their intellectual property: they could not [have made] a business decision *not* to license their property to Napster, and, in the event they planned to do business with Napster, compulsory royalties would [have taken] away the copyright holders' ability to negotiate the terms of any contractual arrangement.[250]

The author cannot help but wonder whether the court's reasoning for refusing Napster's request for a compulsory royalty scheme could have possibly been influenced, albeit on an intuitive level, by the unimpressive – if not laughable – claim by Napster that the injunction would cause "great public injury."[251] Regardless of any underlying motivation, the court did not agree that such an injunction would cause "great public injury."[252]

On remand, the United States District Court for the Northern District of California modified its original preliminary injunction in a manner consistent with the decision of the Ninth Circuit Court of Appeals.[253] In her order, Judge Marilyn H. Patel set out eleven provisions that served to immediately enjoin Napster.[254] In pertinent part, the order required the plaintiffs to provide Napster with notice of their copyrighted sound recordings

> by providing for each work:
> (A) the title of the work;
> (B) the name of the featured recording artist performing the work ("artist name");
> (C) the name(s) of one or more files available on the Napster system containing such work; and
> (D) a certification that [the] plaintiffs own or control the rights

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250 *Id.* at 1029.

251 *Id.* at 1028. Napster provided the court with Ninth Circuit precedent holding that "where *great public injury* would be worked by an injunction, the courts might . . . award damages or a continuing royalty instead of an injunction in such special circumstances." Abend v. MCA, Inc., 863 F.2d 1465, 1479 (9th Cir. 1988) (emphasis added) (quoting 3 Melville B. Nimmer, *Nimmer on Copyright* § 14.06[B] (1988)), *aff'd sub nom*, Stewart v. Abend, 495 U.S. 207 (1990).

252 *Napster, Inc.*, 239 F.3d at 1028.

253 *See* A&M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, MDL, No. C 00-1369 MHP, 2001 U.S. Dist. LEXIS 2186 (N.D. Cal. Mar. 5, 2001).

254 *Id.*

allegedly infringed.[255]

The court further declared that the plaintiffs had to make a substantial effort to identify the infringing files, as well as the names of the artists and the titles of the copyrighted recordings.[256]

Recognizing the variations in filenames on the Napster system, the court placed upon all parties the burden of ascertaining the true identity of copyrighted works and taking "appropriate action within the context of [the court's] [o]rder."[257] The district court acknowledged the likely difficulty that Napster would encounter in detecting the presence of the offending files on its system.[258] The court also recognized that Napster's task would be made easier by searching its system against lists provided by the plaintiffs, and consequently held that the searches conducted by Napster had to provide Napster with "reasonable knowledge of specific infringing files."[259] Undoubtedly, it must have been questionable whether the "reasonable knowledge" standard would provide the level of protection desired by the plaintiffs. However, this appears to have been an attempt by Judge Patel to deal with the equitable differences between the parties – providing the highest level of copyright protection possible, while taking into consideration the technical as well as practical restraints existent in the Napster system.

The court imposed upon Napster the duty to prevent infringing files from being included in its index[260] within three business days once Napster received reasonable notice of such files.[261] Further, Napster was required, within the same timeframe, to "affirmatively search the names of all files being made available by all users at the time those users log[ged] on (i.e., prior to the names of files being included in the Napster index) and prevent the downloading, uploading, transmitting or distributing of the noticed copyrighted sound recordings."[262]

The district court also essentially provided the plaintiffs with a "preemptive strike option," which gave the plaintiffs the ability to provide Napster, in advance of the release of a new musical recording, the artist's name, the title

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255 *Id.* at *4-*5.

256 *Id.* at *5.

257 *Id.*

258 *Id.* at *5-*6.

259 *Id.* at *6. It appears that the opinion only mandated action by Napster when the company could reasonably determine that a particular music file that had been designated by one of the plaintiffs corresponded to a music file that existed on the Napster system. *See id.*

260 "[T]hereby preventing access to the files corresponding to such names through the Napster system." *Id.* at *7.

261 *Id.* at *6-*7.

262 *Id.* at *7.

of the recording, and the release date, "for which, based upon a review of that artist's previous work, including but not limited to popularity and frequency of appearance on the Napster system, there [was] a substantial likelihood of infringement on the Napster system."[263] Here too, it appears that Judge Patel recognized the magnitude of the infringement but was careful to attempt to prevent overreaching on the part of the plaintiffs. Indeed, the opinion stated that "the burden [was] far less and the equities [were] more fair to require Napster to block the transmission of these works in advance of their release."[264] However, Judge Patel also clearly articulated, "To order otherwise would allow Napster users a free ride for the length of time [that] it would take [the] plaintiffs to identify a specific infringing file and Napster to screen the work."[265]

From a procedural standpoint, Napster was ordered to provide the court with a "Report of Compliance," which identified the steps that it had taken to comply with the court's order.[266] The district court also provided a "hearing provision," which allowed the parties to set matters for hearing before the court during the implementation of the preliminary injunction.[267] However, the court was careful to state that such disputes would not operate to stay the injunction or to afford relief from it.[268]

IV. OBSERVATIONS AND GENERAL CONSIDERATIONS WITH REGARD TO INTERNET-BASED MUSIC DISTRIBUTION

[The Internet] is here to stay, it will never die.
It was meant to be that way, though I don't know why.
I don't care what people say, [the Internet] is here to stay.[269]

It is an enormous understatement to say that sound reproduction technology has come a long way since 1877, when Thomas Edison uttered the words "Mary had a little lamb" into his then state-of-the art phonograph recorder.[270] Many of today's audio enthusiasts remember when the "8-Track" tape[271] format,

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263 *Id.* at *8.

264 *Id.*

265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.*

269 DANNY AND THE JUNIORS, *Rock and Roll Is Here To Stay*, *on* ROCKIN' WITH DANNY AND THE JUNIORS (Universal Special Markets 1998).

270 *See* Edison National Historic Site, *Experimental Recordings*, http://www.nps.gov/edis/experimentgenre.htm (last visited Oct. 31, 2001) (on file with the *West Virginia Law Review*).

271 "8-Track tape" can be defined as "[a]n obsolete audio cassette-tape format in which four

after a vigorously fought battle, ultimately succumbed to the cassette tape.[272] Several years later, the world saw a similar battle between the cassette tape and CD. However, almost twenty years after its inception, the CD has not yet claimed total domination over cassettes.[273] Nevertheless, as has been proven throughout history and across all industries, as a new technology evolves, generally, an older technology suffers and is ultimately replaced. Although the probability of a complete MP3 revolution that would replace all traditional recording media is questionable, the fact remains that Internet-based digital audio appears to be more than a passing fancy. Recognizing the potential in this emerging market, several established, as well as "start-up" consumer audio component companies, have recently released prototypes of Internet radio tuners[274] and MP3 players.[275]

Today, that great ubiquitous intangible creature known as the Internet stands poised to create music distribution opportunities based upon legitimate business models and revolutionize the way that music consumers complete their musical "transactions."[276] However, there also exists the possibility that the seemingly never-ending "Napster chronicles" will minimize the potential for this technology.

In a recent article, it was suggested that there are concerns in the corporate world about the legitimacy of peer-to-peer software applications.[277] According to the article, there are several fears among interested parties, including "concerns about protection of intellectual property."[278] The article, labeling Napster as the "poster child for [what is] considered in the popular mind to be a

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sets of stereo tracks were recorded side-by-side along a ¼-inch-wide tape. Switching of tracks was automatic." HOLT, *supra* note 43, at 48.

272 *See supra* note 45.

273 Both blank and prerecorded cassette tapes as well as recorder/player components still enjoy relatively steady sales, albeit at a diminished level.

274 Mike Klasco & Rob Baum, *Radio, Reinvigorated*, AUDIOVIDEO INTERNATIONAL, Jan. 2001, at 46. Currently, there are numerous Internet websites that provide live and archived streaming audio, which can be played through a computer that is connected to the Internet. With an Internet radio tuner, a consumer is able to integrate this technology directly into his or her home or car audio system.

275 Several companies have integrated MP3 capabilities into home and car audio components. *See Kenwood 2001: Stepping into the Future*, AUDIOVIDEO INTERNATIONAL, Jan. 2001, at 62.

276 Such "transactions" can include searching for music, purchasing traditional media formats (e.g., records, cassettes, and CDs), downloading digital audio files either from an Internet website or from an individual through a service like Napster, or playing "streaming" Internet radio broadcasts.

277 *See* Charles Cooper, *Napster Could Wind Up Putting the Kibosh on P2P*, ZDNet News, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2686317,00.html (Feb. 15, 2001) (on file with the *West Virginia Law Review*). The Napster system was based, essentially, on peer-to-peer technology. *See id*; discussion *supra* Part III.B.1.

278 Cooper, *supra* note 277.

renegade technology," emphasized that peer-to-peer technology developers will have to "grapple with the fallout of the 'Napster effect' and counter the notion that they are waving the flag of disrespect for the prerogatives – let alone the wishes – of the corporation."[279] Although the article addressed concerns over Napster in a different context,[280] the ramifications of Napster's "business" practices naturally extend to future developments in Internet-based music distribution. This author believes and suggests that the "Napster effect" has already tainted, and will continue to besmirch, the public image of the recording industry as well as Napster and its progeny.

The Napster litigation and its "trickle down" effects could suppress commercially viable future developments of legitimate business models for music distribution based on peer-to-peer technology. Unfortunately, if such suppression does arise, all parties involved could be denied benefits – from efficiencies in determining a company's optimal "marketing mix"[281] for record companies, to price reductions for consumers.[282]

It cannot be overemphasized that for the Internet to live up to its full potential as a valid distribution method, ground rules must be created and enforced – most likely through government interaction.[283] Just as the United States experienced a change in the landscape of property law with the western expansion of the nineteenth century, so too has the Internet altered the landscape of intel-

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279 *Id.*

280 The article was primarily oriented toward concerns over peer-to-peer applications in general, rather than their use in the music distribution context. *See id.*

281 "Marketing mix" is a term of art that refers to the coordination of the four primary elements of a company's marketing efforts: (1) the company's product and/or service offering, (2) the prices of such products and/or services, (3) the distribution of those products and/or services, and (4) the promotion of the products and/or services. It has been defined as "[a] combination of the four elements – product, pricing structure, distribution system, and promotional activities – that comprise a company's marketing program." WILLIAM J. STANTON ET AL., FUNDAMENTALS OF MARKETING 641 (9th ed. 1991).

282 The author suggests that by developing a legitimate electronic distribution system, recording companies could see decreases in costs exhibited in all four elements of their marketing mixes and consumers would ultimately reap the benefits of increased product offering and availability as well as reductions in retail prices – if the term "retail" can truly be applied to such non-traditional transactions.

283 The author argues that the very existence of Napster, itself, is an example of Adam Smith's "invisible hand" theory gone horribly awry; it seems to suggest that in new and untested "markets," without clearly defined regulations and effective enforcement, a disproportionately large number of humans – here, would-be music purchasers – will be motivated almost solely by self-interested behavior. The RIAA has introduced data that tends to support the view that such behavior translates into lost revenues for the recording industry, which ultimately could mean increased consumer prices for traditional media. *See* A & M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, No. C 00-0074 MHP, 2000 U.S. Dist. LEXIS 20668 (N.D. Cal. Aug. 10, 2000), *injunction granted*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

lectual property law. However, the Internet is not – or, at least, should not be regarded as – a "lawless frontier town" where "MP3 mavericks" are permitted to roam the "wide open range," "rustling" property from copyright owners who have legally "staked their claims."

A. *Opportunities for Artists*

His mama told him, "Some day you will be a man, and you will be the leader of a big old band.

Many people coming from miles around to [download and sample] your music when the sun goes down."[284]

One particularly promising aspect of Internet music distribution that some critics either overlook or simply discredit is the seemingly endless promotional potential for both new and established artists. The broad issue of the *Napster* case – the protection of copyrighted musical material in cyberspace – has spawned corollary lawsuits against Napster and similar companies by individual recording artists and groups.[285] However, some recording artists appear willing to sacrifice some level of control over their copyrighted material in exchange for the potential promotional benefits that free music distribution can provide.[286] Indeed, in the wake of the many vocal "anti-Napster" recording artists and groups, a divergent – some would say less vocal – "pro-Napster" group emerged, touting the company as a viable promotional vehicle.[287]

A recent study of more than 2200 online music fans, conducted by Jupiter Communications, appears to support the viewpoint that Napster and similar companies have, in fact, had a positive effect on music sales.[288] The study suggests that users of Napster and other music sharing services were forty-five percent more likely to increase their music purchasing than music enthusiasts that were not trading digital "bootlegs" online.[289] However, there is also evidence that supports a conflicting view. In connection with its case against Napster, the RIAA hired SoundScan, Inc. ("SoundScan") "to determine the effect of on-line file sharing made popular by MP3 and Napster on retail music sales."[290] In a

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284 CHUCK BERRY, *Johnny B. Goode, on* BERRY IS ON TOP (Chess Records 1959).

285 Kenney, *supra* note 132.

286 *See Up Front: THE LIST – Battle of the Bands*, BUS. WK., July 24, 2000 (providing a list of "pro-Napster" and "anti-Napster" recording artists and groups), *available at* 2000 WL 24484368 (on file with the *West Virginia Law Review*).

287 *See id.*

288 Fox News.com, *supra* note 189.

289 *Id.*

290 Report of Michael Fine [CEO of SoundScan, Inc.] at 1, A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000) (No. C 99-5183 MHP, No. C 00-0074 MHP), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir.

report that Napster unsuccessfully attempted to exclude from the RIAA's case,[291] Michael Fine, the Chief Executive Officer of SoundScan, stated that "[t]he data strongly suggest[ed] that on-line file sharing ha[d] resulted in a loss of album sales within the college markets."[292]

Of course one would be naïve to accept, wholesale, Napster's asserted "fair use" affirmative defense that its users "download[ed] MP3 files to 'sample' the music in order to decide whether to purchase the recording."[293] However, surprisingly, some regional retail record stores have acknowledged the benefits of online sampling. In an article appearing on the CNN.com website, one record store owner in Athens, Georgia credited Napster for a portion of his store's business.[294] The owner of the store stated, "[Napster] has helped us a lot. People have discovered things on Napster and then come in and special-ordered them or bought them right off the shelves."[295] Sampling is currently utilized, to a varying degree, as a service to many online music shoppers. Some online CD and cassette tape "E-tailers"[296] allow their customers to listen to a portion of a particular song or group of songs before completing their purchases.

The author believes that two groups of recording artists could benefit substantially from a controlled online sampling structure: emerging recording artists and "aging musicians."[297] Many emerging recording artists have credited their success, at least in part, to the mass public exposure that the Internet provides.[298] Similarly, aging musicians, who no longer remain in the minds of most music buyers could potentially see their popularity rejuvenated with the help of the Internet. Music enthusiasts often seem to reveal their nostalgic sides when

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Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001), http://www.riaa.org/PDF/fine.pdf (last visited Nov. 2, 2001) (on file with the *West Virginia Law Review*) [hereinafter Fine Report].

291 A & M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, C 00-0074 MHP, 2000 U.S. Dist. LEXIS 20668, at *13-*18 (N.D. Cal. Aug. 10, 2000) (admitting the report insofar as it was offered to show irreparable injury), *injunction granted*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001), *amended by* 239 F.3d 1004 (9th Cir. 2001).

292 Fine Report, *supra* note 290.

293 A&M Records, Inc. v. Napster, Inc., 239 F.3d at 1004, 1018 (9th Cir. 2001); *See* discussion, *supra* Part III.B.3.

294 *See* CNN.com, *College Students on Downloading Frenzy as Napster Returns to Court, at* http://www.cnn.com/2000/TECH/computing/10/02/napster.college/index.html (Oct. 2, 2000) (on file with the *West Virginia Law Review*).

295 *Id.*

296 "E-tailers" refers to retail businesses that sell their products through the Internet rather than, or in addition to, physical retail locations.

297 The author uses the term "aging musicians" to refer, generally, to musicians who no longer enjoy mass public demand – normally because of shifts in popular music tastes.

298 *See Up Front: THE LIST – Battle of the Bands*, *supra* note 286.

they hear a song from the past, frequently leading to musical purchases – indeed, record labels like K-Tel, Rhino, and Time-Life Music have successfully created niches for their "retro" product lines, which include popular genres ranging from "big band" to "disco." This proposition is clearly supported by a real world example. A co-founder of the folk rock group, The Byrds, which reached the height of its popularity in the mid-1960s, testified before a United States Senate panel in July 2000 that MP3.com offered him an "unheard-of, non-exclusive recording contract with a royalty rate of [fifty] percent of the gross sales," adding that he "was delighted by this youthful and uncommonly fair approach to the recording industry."[299] The artist went on to indicate that having his songs available on the Internet created a "renewed interest" in folk music.[300]

B. Opportunities for Record Companies

You know, the [record executive] rang my front door bell.
I let it ring for a long, long spell.
I went to the window,
I peeped through the blind,
And asked him to tell me what's on his mind.
He said,
"Money, honey.
Money, honey.
Money, honey, if you want to get along with me."[301]

At the time that the final draft of this Note was written, one of the major record companies had "stepped up to the plate" and formally embraced "song-swapping" over the Internet as a legitimate music distribution system.[302] On Tuesday, October 31, 2000, the entertainment conglomerate Bertelsmann AG signed a pact with Napster, in which the media company agreed to withdraw from the RIAA lawsuit against Napster.[303] The agreement marked the beginning

[299] CNN.com, *Internet Music Debate Plays Out on Capitol Hill: Online Executives, Rock Stars Testify Before Senate Judiciary Committee*, *at* http://www.cnn.com/2000/ALLPOLITICS/stories/07/11/napster.hearing/ (July 11, 2000) (on file with the *West Virginia Law Review*).

[300] *Id.*

[301] ELVIS PRESLEY, *Money Honey* (RCA 1956).

[302] "Song sharing system" is a more accurate characterization, as Bertelsmann AG and other record companies had already formed Internet sales divisions prior to the Bertelsmann-Napster alliance. *See* Andrew Dansby, *Napster Strikes Deal with Bertelsmann*, *at* http://www.rollingstone.com/news/newsarticle.asp?nid=12122 (Oct. 31, 2000) (on file with the *West Virginia Law Review*). These pre-existing Internet sales divisions were based on traditional business models rather than on "file sharing."

[303] Adam Pasick, *Record Giant Breaks Ranks, Signs Deal with Napster*, Fox News.com, *at* http://www.foxnews.com/scitech/103100/napster.sml (Oct. 31, 2000) (on file with the *West Virginia Law Review*).

of an alliance founded on the goal of furthering the development of Napster.[304] The terms of the agreement, which was arranged with BeCG, Bertelsmann's e-commerce group, included a loan to Napster to assist the fledgling company with the development of a secure trading system.[305]

At the time of the alliance announcement, Bertelsmann Chairman and Chief Executive Officer, Thomas Middlehoff stated, "Napster has pointed the way for a new direction for music distribution, and we believe it will form the basis of important and exciting new business models for the future of the music industry."[306] Mr. Middlehoff also urged other record companies to form similar alliances with Napster,[307] stating, "This is a call for the industry to wake up. It is not enough to fight file sharing in the courtroom."[308] Mr. Middlehoff further indicated that "the industry should reassess its objection to file sharing, given the business opportunity at stake and the [thirty eight] million users," stating, "They can't all be criminals."[309]

Details of the fee-based Napster system have been vague, however, one plan that was discussed called for new technology that would impose a time limit on downloaded recordings.[310] Under such a plan, non-member Napster users would be able to download time-limited music, while members could download permanent music files and possibly have access to premiums, such as "exclusive recordings from some artists or a chance to pay for a higher quality download [that would be] suitable for storing on their own compact disks [sic]."[311]

This proposed business model appears to have gained acceptance from the RIAA. Hilary Rosen, the president of the RIAA, commented that the Bertelsmann-Napster alliance should not be considered a breaking between the media giant and its fellow major record companies.[312] Ms. Rosen further indicated that the deal was consistent with the RIAA's ongoing position that record companies should be compensated for the exchange of music for which they hold the copyrights.[313] The Bertelsmann-Napster agreement demonstrates that

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304 Dansby, *supra* note 302.

305 *See id.*

306 *Id.*

307 *Id.*

308 Matt Richtel & David D. Kirkpatrick, *Napster to Charge Fee for Music Rights*, The New York Times on the Web, *at* http://www.nytimes.com/2000/11/01/technology/01MUSI.html (Nov. 1, 2000) (on file with the *West Virginia Law Review*).

309 *Id.*

310 *Id.*

311 *Id.*

312 *Id.*

313 *Id.*

even between opposing entities, compromise is always possible. Whether Napster will ultimately be able to implement its proposed subscription service remains to be seen.

C. *Opportunities for Consumers*

Well, I called my congressman and he said quote, "I'd like to help you son, but you're too young to vote."[314]

Although the primary argument among the more vocal members of the pro-Napster faction appears to be the unqualified belief that there exists an inherent fundamental right to share – more properly, steal – copyrighted music,[315] it seems that a far more practical justification could easily be made. Clearly, there is a group of legislators that believes in the value of music file sharing.[316] True believers in the legitimate benefits of Internet-based music file sharing could ride the coattails of outspoken pro-Napster legislators and argue for further clarification and modernization of traditional United States copyright law.[317] Although it is probable that such "concern" would be based more on self-interest[318] than on any deep-rooted political position, it could provide a legitimate means to a desired end.

By legitimizing digital music file sharing, consumers could benefit

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[314] EDDIE COCHRAN, *Summertime Blues*, *on* SOMETHIN' ELSE – THE FINE LOOKIN' HITS OF EDDIE COCHRAN (Razor & Tie Music 1998).

[315] Since the first rumblings of Napster moving to a fee-based system, there have been numerous articles published that contain personal comments by Napster users, which are clearly based upon nothing more than personal political viewpoints. Indeed, in the majority of the published viewpoints read by the author, the lack of sound legal reasoning is equaled only by the proponents' struggle to form coherent sentences. One recently published article included the following Napster user's viewpoint as it appeared on a Napster "bulletin board":

> These lawsuits are really stupid; it's [sic] a big waste of time. I mean, think about MP3 players (portables, etc.) and people with [CD] burners; they all use MP3s for music. . . . Does it really matter where they get them from [sic]? I mean what are the courts gonna [sic] do – shut down Napster? Then everyone moves onto [sic] another popular site/program just like it. It's not like the courts are going to shut down the Internet because a few record companies are pissed off.

Cecily Barnes & Rachel Konrad, *Napster Fans: Where's the Loyalty?*, ZDNet News, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2692415,00.html (Mar. 2, 2001) (on file with the *West Virginia Law Review*).

[316] *See* CNN.com, *supra* note 299.

[317] *See* Sam Costello, *U.S. Lawmaker Wants to Legalize MP3*, CNN.com, *at* http://www.cnn.com/2000/TECH/computing/09/29/mp3.legalize.idg/index.html (Sept. 29, 2000) (on file with the *West Virginia Law Review*).

[318] It is arguable that such a "concern" would be based solely on avoiding personal liability under copyright law.

greatly. A plan that had the approval of the recording industry could provide consumers with a lower-priced alternative to traditional recorded media. Further, such a plan could provide trickle-down effects, including increased availability of musical content. Record companies could essentially skip the costly step of "pressing" compact discs and distribute the music created by certain artists and groups directly from a master recording via the Internet, allowing consumers to create their own CDs. Such a dynamic change could conceivably decrease the cost of distribution by millions of dollars for a single release. However, always the staunch audiophile, the author suggests that under current conditions, such a system would be riddled with quality control problems. For instance, unless all consumers used equipment of the same caliber, different individuals could produce CDs having varying degrees of sound quality. Although this might be acceptable to some consumers, for many paying customers and certainly for the major recording companies – which are driven by such traditional business notions as quality control – such potential inequities would likely be considered unacceptable.

D. Can There Be a "Traditional Business Model" for Internet Music Distribution?

We'll have a time and we'll cut some rug, while we dig those tunes like they should be dug.[319]

There is considerable concern that the Internet will simply not support a traditional business model that utilizes licensed music. It is, indeed, a convincing argument that fee-based digital music providers will not achieve enormous success as long as free alternatives remain available. Thus, there are problems that will remain, regardless of Napster's future. One such problem is the fact that there are alternative services like Gnutella[320] that are "decentralized" and therefore much more difficult to target for litigation.[321] Another problem is created by the international structure of the Internet. Obtaining jurisdiction for services located outside the United States could prove to be complicated. One such offshore "file-swapping" service that has enjoyed recent growth is Israel-based iMesh.[322]

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[319] ASLEEP AT THE WHEEL, *House of Blue Lights*, *on* SWING TIME (Sony Music Special Products 1992).

[320] Gnutella is an alternative to Napster that is a "wholly decentralized collection of individual computers . . . ." Barnes & Konrad, *supra* note 315. As such, it enjoys a heightened level of security from lawsuits. *Id.*

[321] *Id.*

[322] "iMesh closely resembles Napster, with a central mechanism that helps link individuals who want to trade files. The company has said it believes it is safe from the [] kind of lawsuit that targeted Napster . . . ." *Id.*

To some, including the author, the concept of a completely free Internet market, absent any government controls – essentially following Adam Smith's "invisible hand" theory – is a radical, if not horrifying, thought.[323] However, when it comes to the Internet, there are some advocates of such a system. At the writing of this Note, it appears that most of the major labels in the recording industry are only willing to deal with Napster if it is able to develop a traditional business model.[324] When considering Napster – or similar music file sharing services – one must bear in mind that it is not the actual *music file* that is being provided by the service, but, rather, the *ability* to exchange such material over the Internet. Thus, Napster and other similar companies are truly "services." This point is important for several reasons, but, in the author's opinion, mainly because of the quality control issues that it creates. Because Napster does not offer "files," but rather "roadmaps" to file providers operating on the Napster system, there is absolutely no quality control over anything except for the service.[325] This often-overlooked fact could, conceivably, keep the remaining major record labels from forming alliances with Napster.

On the other hand, at least one record company appears to be warming to the idea that increased Internet exposure through Napster-like services can be quite beneficial to promoting its product offering. In 2000, Capital Records conducted a promotion with Aimster, another Internet-based audio file swapping service that follows a "private sharing" scheme, under which users are able to share music files with designated "buddies."[326] The promotion was conducted some time prior to the traditional CD release and allowed users to take advantage of premiums, video clips, and the ability to order the album.[327]

There is certainly more than one feasible business model for electronic music distribution. As for music file sharing services, in the absence of a traditional business model, the author advocates the establishment of a royalty fund,

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323 Although the author generally advocates limited governmental regulation in well-established business models, he regards the "E-commerce" model as too new to not be subjected to some level of governmental regulation.

324 *See* Graeme Wearden, *Record Labels Scoff at Napster's $1B Offer*, ZDNet News, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2688324,00.html (Feb. 21, 2001) (on file with the *West Virginia Law Review*). It should be noted that Napster did reach a settlement with individual songwriters and publishers. According to a recent news story, "Napster has agreed to pay $26 million to settle its ongoing legal disputes with music publishers and songwriters. That [does not] mean the lawsuit troubles as a whole will disappear – record labels are continuing with their own litigation, which still threatens Napster with even more substantial legal damages." John Borland, *Napster Signs Music Deal, Settles Lawsuit*, ZDNet News, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,5097347,00.html (Sept. 24, 2001) (on file with the *West Virginia Law Review*).

325 That is, the intangible act of matching the file provider with the file downloader.

326 Mary Huhn, *Will Napster Users Pay for Subscription Service?*, Fox News.com, *at* http://www.foxnews.com/scitech/110200/nypost_napster.sml (Nov. 2, 2000) (on file with the *West Virginia Law Review*).

327 *Id.*

similar in structure to the fund created under the AHRA for the sale of DAT and CD recorders. Under such a system, the fund would be subsidized by a portion of money collected by computer hardware and blank media manufacturers from the sale of sound cards, MP3 players, and CD recorders, as well as blank CDs. The author believes that the royalty fund should be carefully developed so that – to the degree possible – it is subsidized only by those individuals who are the most likely to engage in music file sharing. To collect royalty payments from the sale of all computers, whether or not they are configured with sound cards and CD recorders, would not be fair to those who might not plan to engage in music file sharing.[328]

The author further suggests that both ASCAP[329] and BMI[330] could play

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[328] If a computer is configured without a sound card, its owner or user will not be able to utilize MP3 technology. Should that individual wish to take advantage of Internet music distribution capabilities, he or she would pay into the fund at the time that he or she purchased the required hardware.

[329] ASCAP stands for "The American Society of Composers, Authors and Publishers."

> ASCAP is a membership association of more than 120,000 composers, songwriters, lyricists, and music publishers. ASCAP is a performing rights society that represents its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works. These royalties are paid to members based on surveys of performances of the works in our repertory that they wrote or published. . . . ASCAP is a clearinghouse for creators and users of music. ASCAP's customers, or licensees, encompass all those who want to perform copyrighted music publicly, such as radio and television broadcasters, cable programmers, live concert promoters, symphony orchestras, shopping malls, bars, and web sites. Under the U.S. Copyright Law, they must have the permission of the copyright owner to perform copyrighted music publicly. It would be virtually impossible for music creators to keep track of all the possible places their music is performed. It would be just as difficult for music customers to locate the numerous songwriters, composers and publishers of every work they want to perform. As a clearinghouse, ASCAP makes giving and obtaining permission to perform music simple for both the creators and users of music. ASCAP's service benefits the creators, the customers and, ultimately, the public. ASCAP also has international agreements with societies performing similar functions around the world. [ASCAP] license[s] the works of [its] members in the U.S., and they license the works of [ASCAP] members in their respective territories.

ASCAP.com, *About ASCAP: What Is ASCAP?*, http://www.ascap.com/about/whatis.html (last visited Oct. 14, 2001) (on file with the *West Virginia Law Review*).

[330] BMI stands for "Broadcast Music, Inc."

> BMI is an American performing rights organization that represents approximately 300,000 songwriters, composers and music publishers in all genres of music. The non-profit-making company, founded in 1940, collects license fees on behalf of those American creators it represents, as well as thousands of creators from around the world who chose BMI for representation in the United States. The license fees BMI collects for the "public performances" of its repertoire of approximately 4.5 million

a vital role in the planning and implementation of such a royalty scheme. Because both of these organizations have long histories of negotiating, implementing, and enforcing royalty payment plans for broadcast and publicly transmitted music, it seems only logical that they could provide the "missing link" for the creation of an effective business model for online music file sharing.[331] An alliance between ASCAP and/or BMI and Napster and similar services could provide the air of legitimacy that the recording industry desires.

E. Practical Problems That Must Be Overcome in Moving Toward a "Traditional Business Model"

> *Give [them] some [gritty]*[332] *music, [they] treat[] you nice.*
> *Feed [them] some hungry reggae, [they'll] love you twice.*
> *The [downloaders] don't seem to care tonight.*
> *As long as the [price] is right. . . .*
> *[Napster] – no static at all.*[333]
> (Yeah, right.)

If nothing else, Napster and its progeny might bring about a new cause of action in tort: "negligent infliction of 'woofer' and 'tweeter' distress." Unquestionably, there are measurable – in many cases, audibly perceptible – deficiencies in the sound quality of much of the free musical content that can currently be found on the Internet. The author prefers his "snap, crackle, and pop" served in a bowl with milk and sugar, not played through his speakers. Of course audio quality is subjective and different music downloaders often have disparate purposes in mind.[334] While the free Napster system was still opera-

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> compositions – including radio airplay, broadcast and cable television carriage, Internet and live and recorded performances by all other users of music – are [] distributed as royalties to the writers, composers and copyright holders it represents.

BMI.com, *BMI Backgrounder*, http://www.bmi.com/about/backgrounder.asp (last visited Oct. 14, 2001) (on file with the *West Virginia Law Review*).

331 Currently, ASCAP and BMI both offer Internet license plans for the *performance* of music over the Internet. *See* ASCAP.com, *Frequently Asked Questions About Internet Licensing, at* http://www.ascap.com/weblicense/webfaq.html (last visited Oct. 14, 2001) (on file with the *West Virginia Law Review*); BMI.com, *BMI Intros Breakthrough Digital Licensing Center: End to End Solution: Making the Market for Electronic Rights Online, at* http://www.bmi.com/news/200001/2000011294.asp (Jan. 12, 2000) (on file with the *West Virginia Law Review*).

332 "Gritty" is a term used in the Consumer Electronics Industry that refers generally to a signal that is distorted rather than clean. The term can be defined as "[a] course-grained texturing of reproduced sound. The continuum of energy seems to be comprised of discrete, sharp-cornered particles." HOLT, *supra* note 43, at 61.

333 STEELY DAN, *FM, on* A DECADE OF STEELY DAN (MCA Records 1985).

334 Some plan to merely listen to their music through headphones while working on their

tional, the author undertook an analysis of "test" content.[335] Based upon his analysis, the author speculates that most audiophiles would find the quality of the majority of the free Napster content to range from "less than adequate" to "appalling." This is, of course, not surprising when one considers that there was an absolute lack of quality control at the Napster level – indeed, such a lack of control was by design. Not to be accused of making an overly broad statement, the author was able to find several sample digital audio files that were more satisfactory. However, even when digitized and ultimately downloaded under "optimal" conditions, there exists the inherent, albeit arguably subtle, problem of signal degeneration. After all, MP3, by design, compresses the amount of audio information by a ratio of 12 to 1.[336] It is only natural that many of the subtle nuances that are carefully engineered into the final mix of any given song are lost while being digitized and/or downloaded from the Internet – presumably left floating in cyberspace somewhere between Yahoo! and eBay.

V. CONCLUSION

And now, the end is near;
And so I face [my] final [comment].
My friend, I'll say it clear,
I'll state my case, of which I'm certain. [337]

As mentioned earlier in this Note, the stakes are very high in Internet-based music distribution. The recording industry, although collectively named, is clearly composed of dissimilar groups. One need only consider the varied genres of American music to realize the oversimplification of this statement. Interestingly enough, Napster was able to achieve something rather incredible. The entire Napster drama unified seemingly distinct members of society, on both sides of the issue, in the fight for their respective causes.

Like it or not, it appears that the Internet, in one form or another, is destined to be an enduring part of our culture for as long as anyone can predict. With this in mind, it would seem unwise for record companies to simply refuse to develop workable business models for Internet distribution. The Napster-Bertelsmann agreement[338] illustrates the type of cooperation between the estab-

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computers (essentially a radio substitute) while others plan to create CDs for playback over home or car audio systems – a purpose requiring a heightened degree of sound quality.

335 Pursuant to 17 U.S.C. § 107, the author subjected selected digital audio files to several tests, including general audibility tests for absence of distortion and clarity of audible signal, and a "spectrum analysis" for determining frequency response. In conducting his research, the author utilized a computer-based commercial-grade audio analysis program.

336 *See supra* text accompanying note 91.

337 FRANK SINATRA, *My Way*, *on* SINATRA REPRISE: THE VERY GOOD YEARS (Reprise Records 1991).

338 *See* discussion, *supra* Part IV.B.

lished recording industry and the newly founded Internet music distribution companies that is essential for the development of the Internet as a legitimate music distribution alternative. Something to bear in mind is the fact that technology is a moving thing and capabilities that might not be possible today will likely be possible tomorrow. We cannot forget that with such new technology will come greater opportunity for protecting copyright owners' rights while simultaneously providing Internet users with expanding entertainment possibilities. The concept of such potential "practical" control methods seems reminiscent of the early days of DAT home recording and the implementation of the Serial Copy Management System.[339]

Perhaps both sides in the "Battle of Napster" could learn a lesson from the early days of home DAT recording and take it upon themselves to finally strike a harmonious agreement. Such an accord could prevent the "ill will" that continued litigation will undoubtedly create, not only among disagreeing musicians, but also among their admirers, who might begin to view their favorite singers and groups less as "musical artists" and more as "greedy capitalists" – perish the thought.

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[339] *See supra* notes 63-65 and accompanying text.

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