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RIAA v. Diamond Multimedia Systems: The Recording Industry Attempts to Slow the MP3 Revolution, Taking Aim at the Jogger Friendly Diamond Rio

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RIAA v Diamond Multimedia Systems:

**The Recording Industry Attempts to Slow the MP3 Revolution -
Taking Aim at the Jogger Friendly Diamond Rio**

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I. INTRODUCTION: THE DIGITAL MUSIC FORMAT

{1}The music industry may never be the same again. In recent years, the recording industry has faced an onslaught of advances resulting from digital technology. (1) The record industry has battled the manufacturing and import industries over digital home recording since the 1980's. Digital technology initially manifested itself with the compact disc ("CD") and the digital audio tape ("DAT") in the early 1980's and generated greater tensions between the recording, electronics, and computer industries. (2)

{2}The technology the CD introduced gives the maximum clarity in music reproduction. Unlike analog recordings, digital recordings do not diminish in sound quality with repeated playing. (3) Until recently, neither the CD nor any other digital music format was widely reproduced digitally by consumers. The DAT made an attempt to capture the analog cassette market and was met with stringent legal challenges before its introduction in the late 1980's. (4) The DAT format failed in its attempt to capture a broad cross section of the consumer market. (5) CD writing devices, however, have recently been introduced into the market and are gaining popularity. (6) The Recording Industry Association of America ("RIAA") responded in a trepidatious tone to Philip's release of an affordable CD-writable CD recorder. (7)

{3}In 1998, there were almost 850 million CDs sold. (8) Although illegal copying of music has been a problem for years, the problem now has the potential of reaching epidemic proportions with the introduction of a new music format, the MPEG [Moving Picture Experts Group] Audio Layer 3, better known as MP3. (9) The record industry already asserts it loses \$300 million annually to traditional forms of music piracy. (10) Industry critics dispute these assertions and claim that a person partaking in something for free is not an indication that he would necessarily purchase that same item were it not available for free. (11) The free music invasion is in full swing and it is being fueled by the nexus of the Internet and advancing computer technology. This technology is effortlessly outpacing the law. (12)

{4}The development of MP3 technology has awakened the music industry to the potential of online services

to enable, and possibly to promote, infringing uses of copyrighted music. The MP3 format is an algorithm for compressing digital music into files which are manageable in size, yet near CD-quality in sound. (13) Currently, MP3 is the compression standard of choice although others, such as AT&T's a2b Music and Liquid Audio, are scrambling to become the new standard by introducing new formats. (14) The AT&T format, however, is a closed format, containing copyright control measures, unlike the open format of MP3 which has no technical copyright control measures embedded. (15) MP3 also differs because its encoding is performed free of charge, whereas, others charge a fee. MP3 is the perfect instrument for piracy because of its open format, unlike AT&T's and Liquid Audio compression formats. The MP3 format compresses music from the normal format, to one-twelfth its original size, making it suitable for use on personal computers and on the Internet. (16) The format is similar in utility to a "Zip" file format, which society has become accustomed to for storing files on the hard drives of personal computers. (17) MP3 files can be downloaded to any hard drive. MP3 files are utilized through computers or directly from the Internet. For example, the website, "http://www.MP3.com", actually allows little known and usually unsigned bands to post and sell their music to consumers visiting the site. (18) Since MP3 became so popular with consumers, more established artists have begun to use the Internet and MP3 primarily as advertisement to generate interest in upcoming albums and concert tours. Music Industry companies such as Capital and Essential Records have released full-length recordings in MP3 format. (19)

II. THE AUDIO HOME RECORDING ACT: A GIFT FROM THE RIAA

A. When Every Copy is A Perfect Copy

{5}The new capability of unlimited, near-perfect, digital reproduction of music gives rise to an even greater threat to the music industry than analog reproduction. Since digital copies can be made without diminishing the quality of the recording, the copy could also be copied giving the same sound quality as the original. The possibility of near-perfect, multi-generation reproduction (*i.e.* "serial copying") of music poses a problem to the record industry never considered before digital copying became available in the 1980's with the DAT. (20) The record industry recognized that without any diminution in the quality of serial copies, unlike analog copies, digital "serial copying" could and would "soon surpass the \$ 300 million that is allegedly lost annually to other more traditional forms of piracy". (21) Unlike in the past, the digital media allows the possibility of mass reproduction of music in quality nearly indistinguishable from the original. The music industry went to war with the electronics industry upon introduction of the various forms of digital recording devices and media. The electronics industry insists the consumer has the right to make copies of copyrighted material for personal use, under the Fair Use Doctrine. (22)

B. The Compromise: Adding fuel to the MP3 Fire

{6}In 1991, Congress tried to balance the issues concerning the recording and electronics industries by amending the 1976 Copyright Act. (23) MP3 technology, undeveloped in 1992, when the AHRA was enacted, was likely intended to be flexible enough to be applied to emerging technologies. (24) Congress essentially left the negotiating of key issues of the Audio Home Recording Act ("AHRA" or "the Act") to the interested parties (the recording and electronics industries, with the computer industry as a minor player). The final form of the AHRA permitted the introduction of digital copying and digital copying devices to the United States market.

{7}The Act placed restrictions on consumers and certain requirements on manufactures before granting immunity to consumers. The Act 1) establishes a royalty system for digital recording devices and media, which compensates the recording industry for lost retail sales (25); 2) requires an anti-copying digital device in all digital recording equipment in the United States, preventing the unlimited copying of digital devices, which eliminates the threat of "serial copying"(26); 3) establishes non-commercial, home audio taping

(digital or analog) as permissible, eliminating both manufacturer contributory infringement liability as well as direct infringement liability of the consumer. (27).

{8}The AHRA was the product of negotiation and compromise on the part of the recording industry and the electronics industry. Coalitions of these industries met in Greece in July 1989 and reached an agreement on the "SCMS" for digital audio recordings. (28) Prior to the AHRA, traditional copyright law did not extend protection or compensation to performing artists, manufacturers, and distributors. Under the Act, the copyright holder receives one-third of the fund and the sound recording copyright holder, the performing artist and the record industry, receives the remaining two-thirds of the fund. The performing artist and record industry divide this two-thirds portion forty and sixty percent respectively. (29) The exemption allowing digital music to be copied, granted by the AHRA, is revoked if the recording device is not manufactured in accordance with the Serial Copy Management System ("SCMS"). In addition to the SCMS, the Digital Millennium Copyright Act of 1997 assigns pecuniary and penal liability to anyone circumventing or selling products that circumvent the SCMS technology. (30)

III. DIAMOND PUSHES THE MP3 ENVELOPE WITH THE REVOLUTIONARY RIO

A. The Market Friendly, Portable MP3

{9}In 1998, Diamond Industries introduced plans to manufacture and distribute a music player utilizing a new technological format. The format combined MP3 compression technology and flash memory. Since the introduction of the Rio PMP 300 by Diamond Multimedia, the MP3 debate has further escalated. The Rio is a portable MP3 player. It can be likened to the portable cassette players made famous by the Sony Walkman. However, the Rio is the size of a cassette tape. It weighs less than three ounces and can store up to one hundred twenty minutes of music on a thirty-two megabyte flash memory card. (31) In 1998, when the Rio 300 was initially scheduled for distribution, it retailed for about \$200. (32) The players allow MP3 use by downloading MP3 formatted music into the flash memory of the player. Prior to the release of the Rio and other MP3 players, the only medium for listening to MP3 files was through the computer. (33)

{10}The Rio's success was virtually guaranteed from the outset of its release. The reason this format excels where other new formats of portable and digital music fails is that the market is already set for the Rio to take off. Once music is downloaded using the Rio Manager software as a music file onto a hard drive from the Internet, DAT, or from a CD through the Rio Manager software it can then be downloaded easily into the Rio. (34) The Rio cannot receive the music files without the computer downloading them through the Rio Manager software. The Rio's only means of exporting music is through its analog headphone jacks.

{11}The market is flooded with music in the MP3 format. The consumer already has the hardware for the format, thus, he does not have to worry about investing in a digital format that never will catch on. (35) Purchasers will not have to discard their CD collections, as they did their LP collections. (36) The Rio is not a substitute for the CD format. The Rio specifically works with a CD collection, as well as with any music downloaded from the Internet. Lastly, the technology and the overall design concept of the Rio far outpaces that of the portable CD music players predominant today. (37) With its smaller size, lack of moving parts, and essentially skip free format, the Rio is placed in a rather opportune position as a soon-to-be favorite among joggers and people previously favoring other forms of portable music.

{12}The threat to the music industry is not really the Rio and its portable format. (38) The Rio and the other MP3 players entering the market are unlikely to seriously enhance music piracy in and of itself. Rather, the popularity of gadgets like the Rio will bring the MP3 format into the mainstream. Placing this technology in pop culture will eventually lead to cookbook, do-it-yourself copying and storing for playback methods on other media platforms. There are several home and car CD/MP3 players entering the market presently. (39)

The proliferation of legal MP3 players has played a role in the exponentially increased market for pirated music. Music piracy has entered the mainstream. (40).

{13}In 1996, digital music piracy was limited only to a small group of music pirates. (41) The Rio MP3 player is just one threat to the recording industry. The Rio is merely a precursor to the myriad of possibilities that the MP3 format creates. Other possibilities include the Napster and Napster clones, which disburse MP3 formatted music to the far reaches of the Internet. (42) My.mp3.com, another MP3 "dot-com" that allowed subscribers access to any CD from the Internet, brought a screeching Internet traffic jam. (43)

{14}The software industry remedied their situation by placing an extremely high price tag on its software to compensate for the expected piracy. Music consumers, unlike software consumers, will likely be unwilling to pay such lofty prices for a non-utilitarian endeavor. Consumers pay largely inflated prices for computer software primarily because of their functional aspect. The music industry's current royalty system on recording media, combined with a technical one-time only recording mechanism embedded onto digital music, is coming under scrutiny. (44) The Recording Industry Association of America, Inc. ("RIAA"), the music industry's collective voice, is now re-thinking the wisdom of the system enumerated in the AHRA. (45) Nowhere is this more apparent than in *Recording Industry Association of America, Inc. and Alliance of Artists and Recording Companies v. Diamond Multimedia Systems, Inc.* (46) The U.S. Court of Appeals for the Ninth Circuit examined how this new technology fits into the current AHRA structure, since the AHRA was primarily enacted to protect digital music from "serial copying". (47)

IV. RIAA v. DIAMOND MULTIMEDIA EXAMINES THE WISDOM OF THE AHRA

A. Policing Piracy, Protecting Copyright: The RIAA

{15}The RIAA is the trade group of the recording industry which includes recording companies and copyright owners of music made and distributed in the United States. (48) The recording industry's mission is to further the business and legal objectives of industry members. (49) The RIAA also sets the policies of intellectual property rights of music artists and the copyright holders as well as participating actively in lobbying efforts. (50) The RIAA represents over ninety percent of the recording industry. (51) Teaming with the music industry, the RIAA has undertaken aggressive efforts in shutting down the illegal sites that promulgate the illegal downloading of copyrighted music in the MP3 format. (52) RIAA has a full-time staff to police the Internet for this purpose. (53) Through hundreds of warnings and continuous lawsuits, the RIAA has shut down more than 250 sites in 1997. (54) Shutting down a few hundred sites, while admirable, does not begin to dissuade Internet pirates and uploaders. Because of the sophistication at which the average pirate operates, even more intense policing is needed. Although this aggressive form of policing cannot stop the uploading of music on rogue sites, it may prove effective enough to make access to illegal music inconvenient to the average downloader, thus preventing the MP3 format from penetrating the mainstream market. (55)

B. "Silicon Agile" Enough to Avoid the AHRA: Diamond Multimedia

{16}The other major party in the suit is Diamond Multimedia Systems, Inc. ("Diamond") the manufacturer of the Rio. Diamond specializes in developing systems to enhance computer performance for business and professional computer users. They also provide multimedia components to computer manufacturers. (56) The company is described as "silicon agile" because of its ability to identify consumer needs and bring high technology products to market at a reasonable cost to the customer. Further diversifying the audio product line, Diamond entered into a joint venture with Nike to launch the sell of a digital audio player under the Nike brand name. (57) In order to remain competitive, Diamond outsources chips from several semiconductor manufacturers, thus enabling them to keep up with the rapidly developing technology of the

C. The Trial: Diamond embraces the Computer Industry Created, AHRA Exception

{17}RIAA sued Diamond for contributory infringement in October, of 1998. They requested a temporary restraining order and preliminary injunction to prevent the release of the Rio player in the first week of November 1998, alleging the Rio violates the AHRA. (59) The suit was based on Rio's failure to incorporate SCMS, which allows a digital recording device to obtain, send, and act on information about the generational status of the music file it is reading. (60) The RIAA also sought to receive royalty payments from Diamond as the manufacturer and distributor of the Rio. (61) In theory, SCMS blocks serial recording, but the open MP3 format does not recognize, nor does it convey generational information about the digital music it receives and plays. (62) RIAA's attempt to do this was also based on the AHRA, which demands payment for digital recording devices. (63)

{18}The motions for the preliminary injunction were denied in the United States District Court for the Central District of California. (64) Although the court found that RIAA had a balanced likelihood of success on the merits, the balance of the hardships did not tip in the RIAA's favor. (65) The appellate court stated that, even if RIAA could show that Diamond violated the AHRA by failing to incorporate the SCMS system in their Rio players, they probably would not be able to establish a causal relationship between that failure and the harm that RIAA alleged would occur. (66) The court further analyzed, in great detail, whether the Rio is actually a device covered by the AHRA. (67) The Act fails to prohibit digital serial copying of copyrighted music, but instead, it places serial recording restrictions only on certain types of recording devices. (68) The relevant portion of the Act reads, "no person shall import, manufacture, or distribute any "digital audio recording device [that] does not conform to the Serial Copy Management System" or a system functionally similar. (69) The Rio would have to be classified as a "digital audio recording device" to fall within the purview of the Act. (70) A digital audio recording device is defined in the Act as:

[A]ny 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 (71)

{19}Diamond argued that their device could not be included in the purview of the Act because it did not fall within the clear language of the definition of a digital audio recording device. (72) The court of appeals also discussed the definitions of digital audio copied recording and digital musical recording. (73) The court found that the end result of the definitions promulgated by the Act means that a digital audio recording device "must be able to reproduce, either `directly' or `from a transmission,' a `digital music recording.'" (74)

{20}From this series of definitions, Diamond contended that Rio was not able to record directly from a digital musical recording, therefore, the Rio is not a digital audio recording device. (75) The court, in its discussion of the material object requirement of a digital music recording, explained the nature of the computer hard drive. (76) The computer hard drive, while capable of recording music and material statements or instructions incidental to those sounds, is coincidental to its primary function. (77) For example, the hard drive most often stores several different types of programs, not necessarily related to digital music, according to the needs of the user. Almost all computer hard drives invariably contain a word processor, spreadsheet, scheduler (daily planner/address book), Internet browser, photograph viewer and editor, and e-mail managing program, none which are "incidental to any sound files that may be stored on the hard drive. " (78) The digital audio recording device must be able to make a digital audio copied recording to fall within the SCMS and royalty requirements of the AHRA. (79) The exemption to computer hard drives under this definition of a digital music recording allowed Diamond to contend, and the court of appeals to certify, that the Rio was not a "digital audio recording device. " (80)

D. Clear Statutory Language, While Unfathomable to the District Court, is still Clear, says the Court of Appeals

{21}The district court inappropriately rejected Diamond's argument after erroneously consulting the legislative history. The trial court found the statutory language to be clear, and therefore, it was unnecessary to call upon the legislative history. (81) The court of appeals agreed with Diamond, but nevertheless consulted the legislative history, and resolved the Act's intent was actually consistent. The Senate Report made it clear that computer hard drives were not to be classified as digital audio recording devices, since the hard drives contained computer programs and data bases not associated with the music that was also fixed on the hard drive. (82) The definition of a material object was further clarified in the Senate Report as being "intended to cover those objects commonly understood to embody sound recordings and their underlying works." (83) This class of objects was further illustrated with examples such as "recorded compact discs, digital audio tapes, audio cassettes, long-playing albums, digital compact cassettes, and mini-discs." (84) The court of appeals determined that the plain, unambiguous language of the Act, as well as the legislative history, supported the proposition that computer hard drives are exempt from the definition of a digital musical recording. (85)

{22}Giving equal treatment to RIAA's claim that the legislative history suggests that the Rio does not fall within the digital music recording exemption, the Court of Appeals finds that the House Report did address the added definition of a "digital musical recording" as "reflecting exemptions for talking books and computer programs." (86) The House Report also clarified that the "digital musical recording" exception contains "an express exclusion of computer programs in the definition." (87) Therefore, computer hard drives, as well as computer software is exempt from the purview of the Act.

{23}The court of appeals reiterated the point that the language of the Act was clear and that it did not support limiting the exemption to computer programs as RIAA insists was its original intent. (88) Analyzing the Act's plain language, the court concluded that a computer was not a material object, but rather a literary work. (89) A literary work is a work covering such things as "words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books. . . tapes, disks, or cards, in which they are embodied." (90) Through their examination of the plain language of the Act the court of appeals established, contrary to RIAA's argument, that the exemption could not be interpreted to include computer programs because they are literary works, not material objects. (91) The exemption covers the computer hard drives upon which computer programs are stored, not exclusively the computer programs. (92) This categorical exclusion of computers seemed unfathomable to the district court, as it noted this interpretation " `would effectively eviscerate the [Act]' because `any recording device could evade [] regulation simply by passing the music through a computer and ensuring that the MP3 file resided momentarily on the hard drive.' " (93)

{24}Although a computer hard drive could come into the purview of the Act, the computer would have to be designed and marketed with the primary purpose of recording digital music. This is an unlikely scenario, as enumerated in the legislative history, considering the multiple capabilities of computers and the variety of different software programs. (94) Thus, the legislative history makes clear that Congress appreciates that computers can record digital musical recordings. The implications of home taping and piracy concerns were clearly acknowledged by Congress when enacting the AHRA. The Act "is consistent with [its own] plain language - computers are not digital audio recording devices." (95) Diamond actually produced an affidavit during oral argument showing the negotiations and compromises that took place during the drafting of the Act. (96) The compromise essentially was between the recording industry, electronics industry, and the computer industry. The computer industry established that it would attempt to block the Act's passage in the House and Senate without the computer exception. (97)

{25}The finding that the Rio is not a digital audio recording device makes irrelevant the question of whether

the Rio violates the Act by not employing the SCMS, which interacts with the information concerning the copyright and generational status of digital music. (98) Furthermore, complying with SCMS would be a fruitless endeavor because the MP3 format is an open format making compliance worthless, at this juncture for the RIAA. The format carries no encoding data which contains the copyright and generational information of the digital music it compresses. Consequently, the Rio would not be able to recognize whether the music downloaded to it were a first or fifth generation copy of digital recorded music.

{26}The Act allows digital music to be laundered by way of the computer and MP3 format. (99) The court of appeals again refers to the legislative history to reveal the level of understanding the legislators had of the implications before enacting the AHRA. (100) In describing the SCMS, the House was clearly informed that digital music without "copyright and/or generation status" could be recorded by SCMS compliant devices and the device would merely mark the digital copy as "original generation status." (101) This original status will allow an unlimited number of copies to be made. The court concluded its analysis by stating, "the Rio without SCMS inherently allows less copying than "SCMS" permits." (102) This is due to the Rio's inability to allow further copying, as it does not download or transmit its stored files to other devices.

{27}The court gave cursory treatment to the prospect that the Rio could reproduce a digital music recording from a transmission, rather than directly reproducing a digital music recording. (103) The Act provides that a transmission is a communication to the public following traditional copyright law. (104) It appears that the Rio may receive a transmission, but Diamond disputed that indirect reproduction of a transmission was covered by the Act. (105) The definition of digital audio recording device is one capable of making "a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording directly or indirectly from a transmission." (106) Diamond asserted that the adverb "indirectly" modifies the recording of the underlying "digital music recording," rather than the recording "from the transmission." (107) The court stated that following RIAA's interpretation would limit the protections of the Act to cover only indirect recording of transmissions, omitting direct recordings of transmissions. (108) The court agreed with Diamond's statutory interpretation but chose to delve into the legislative history because of the apparent ambiguity.

{28}RIAA's contention failed upon examination of the "statutory language and common sense." (109) To further contradict RIAA's position, the court cited the legislative history stating, "a digital audio recording made from a commercially released [CD] or audio cassette, or from a radio broadcast of a commercially released [CD] or audio cassette would be a "digital audio copied recording." (110) This intimates that the legislators did not intend, as RIAA did, that the transmission must be indirect to fall within the scope of the Act.

V. SONY ANALOGY

{29}The recording of copyrighted music is somewhat analogous to the recording of home movies. The U.S. Supreme Court found recording home movies permissible as long as it is done for noncommercial use. In *Sony Corp. of Am. v. Universal City Studios, Inc*, Universal Studios sought an injunction to keep Sony from selling its Betamax video tape recorders. (111) Universal Studios and Walt Disney jointly sued Sony, the manufacturer of the Sony Betamax video cassette format. The suit alleged contributory copyright infringement of Sony's Betamax video recorders. Universal argued that taping of copyrighted television shows amounted to copyright infringement. In 1979, the United States District Court for the Central District of California ruled in favor of Sony. (112) The United States Court of Appeals for the Ninth Circuit subsequently overturned the trial court in 1981, ruling that time-shifting was a copyright infringement and found Sony to be a contributory infringer. (113)

{30}However, in the opinion of the U.S. Supreme Court, "the sale of copying equipment, like the sale of

other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes." (114) The Court went on to state that it did not matter what the ratio of infringers to non-infringers might be in the future, as long as the "capability" of substantial noninfringing usage existed, an injunction "seek[ing] to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law." (115)

{31} In overruling the court of appeals, the Supreme Court stated that any substantial potential for legitimate use would invalidate claims of the threat of illegal use. The Court further held that the sale of home VCRs to the general public did not constitute contributory infringement of copyrights because the plaintiffs failed to show that time-shifting of programs would cause any significant harm to the value of the copyrights. (116) While this would seem to bode well for the recording industry because it accounts for the hundreds of millions of dollars lost annually, these harmful effects haven't been localized. Since the industry suffered these losses prior to the advent of digital recording technology, it would be difficult to argue that a significant amount of music piracy occurs via the MP3 format.

{32} Reconciling *Sony* and *Diamond* is useful only for its historical significance, because of the subsequent passage of the AHRA. These amendments to the copyright statutes change the rules for digital audio recording in such a way that the question or comparison was not really addressed in *Diamond*. (117) The Supreme Court in *Sony*, technically, did not take a stand on the legality of home audio taping. Faced with the prospect of creating common law, separate from already existing statutory provisions, the Court avoided inserting the hand of judicial activism in *Sony*. (118)

{33} In one respect, the opinion from the Supreme Court in *Sony* is substantially analogous to *Diamond*. Both opinions involve the concept of time-shifting. The Court in *Sony* ruled that time shifting was fair use of the copyrighted programming. There are a few important aspects of each case that diverge. In the instance of the VCR's time-shifting of free commercial programming, the programming was offered freely. Alternatively, in relation to the MP3 formatted Rio players, the copyrighted music is usually not free, but for sale. (119) Also, the music industry has already begun to feel the negative effect that this new method of storing and playing music brings. (120) In *Sony*, there was no more than an inference that the general population would copy movies illegally, and the copied material would be of substantially lower quality than the one it was copied from. In *Diamond II*, the fear of digital media being copied serially poses much more of a dilemma for the recording industry. In *Sony* serial copying was not of concern, although unfortunately the tribulations of the recording industry have started to generate similar issues in the form of digital movie piracy. (121)

{34} The Court in *Sony* essentially answered the obvious question: Will we use copyright law to regulate the prospect of illegal use? The Court was not impressed with the prospect that the illegal use could exceed the legal use of the VCR. (122) In *Diamond* it was apparent that the illegal use could exceed the legal use of time-shifting of digital music. (123) These are concerns eliminated by the AHRA, as the amendments of the Copyright Act of 1992 specifically dealt with the issue of digital "serial copying." (124) The exception to the Copyright Act made copying legal without examination. This exception appeared to give the Act a fair use look and feel, but in actuality did not. The fair use doctrine limits a copyright owner's exclusive rights to reproduction. (125) The Court determined, in *Sony*, that not only was the actual fair use permissible but the number of people actually copying the program legally was not a factor to be considered. (126) The Court merely required that there were actually fair uses to which the system applied.

VI. ANALYSIS: THE FUTURE

A. Where To Turn: Binding Arbitration Rather Than Waiting For Congressional Action

{35}The 1976 Copyright Act was drafted to be adaptive so that it could "be applied to future innovations, [but] technology has a habit of outstripping even the most flexible statutes." (127) In cases such as *Diamond*, at first glance, one may feel new legislation is the only answer to the present uncertainty facing the copyright laws. Courts, as in *Diamond*, will continue to analyze the law's underlying purpose through the legislative history, but when the language is clear and wholesale exemptions are given, there is little room for judicial interpretation in accordance with technological advancement.

{36}The speed at which technology advances seem to force adaptation of the law. (128) The need for new solutions is clear but these solutions do not necessarily need to flow from Capitol Hill. Within two months of the *Diamond* decision, RIAA and Diamond entered into an agreement to end all litigation. (129) The Diamond Rio now employs the "SCMS", although its utility has yet to be realized. (130) Diamond also agreed to concede that future versions of the Rio will incorporate Secure Digital Music Initiative ("SDMI") guidelines, a cooperatively-developed security system to prevent piracy or mass copying. (131) This type of cooperation should be employed more often in order to reduce judicial intervention. The AHRA has a little-discussed arbitration provision that allows "any interested copyright party [to] mutually agree to binding arbitration" prior to the entrance of a device into the U.S. market. (132) Binding arbitration is usually more flexible in resolving disputes between parties than a tribunal. If the interested parties are unwilling to enter this arbitration system, Congress should step in, amending the AHRA to impose harsher penalties when organizations and companies are willing to seek judicial intervention rather than the more favored and more flexible arbitration.

{37}As this decision was handed down, it seemed that the music industry would not be able to handle such a ruling. However, resolutions and protective methods in the music industry can be employed to deter and to severely quell music piracy via computer hard drives. A White Paper, drafted by the President's Commission on Intellectual Property, which examined the national infrastructure of Intellectual Property and Information, acknowledged that sometimes only an explanation of the law was required, while in other cases, the current rights of the copyright holder constituted the spirit of copyright law but not the letter. (133) Binding arbitration is a model solution to inter-industry copyright conflicts involving digital music. Without a strong carrot and an even stronger stick, opposing sides will rarely agree to compromise and arbitration. (134)

B. The New Technological Policing System: Will Industries Give SDMI an Honest Chance

{38}SDMI is a coalition of members of the recording industry led by RIAA. Its mission is to secure technological methods to quell the illegal proliferation of copyrighted music. SDMI published its first technological specification in July, 1999. The watermark will allow compliant devices to play copies of CDs and digital music files, whether distributed in protected or unprotected format. The goal is to create a bridge for digital recording and playback devices as SDMI releases new music in SDMI-compliant formats. (135) The technological standards of SDMI are just getting off the ground, but there are concerns about its effectiveness. (136) Digital watermarks have failed in the past because of the degradation of the quality of the music files that translate into degradation in the quality of the audible music produced by the files. Artists are also wary of the digital watermark, fearing it will degrade the quality of their music. (137)

{39}Another issue to consider is whether the hardware and software producers will cooperate with the music industry. (138) Although the SDMI is a coalition of all groups interested in copyright issues and music, it sometimes is more appropriately characterized as a high intensity "free for all." (139) A uniform copyright enforcement initiative may not be possible because of the organizations' willingness to hold up the process with hopes of holding off the judicial system or perhaps a string of victories on one side, which would give

an industry enough confidence to enter the U.S. Supreme Court. Although the *Sony* decision yielded unforeseen financial benefits, there is no guarantee that a Supreme Court standoff here will leave each side to profit.

{40}Diamond, apparently the clear winner here, chose to negotiate with the RIAA. The wisdom in this decision is that Diamond likely realizes that the MP3 windfall will not last forever, especially if it is allowed to continue totally unregulated. A possible preview of this inevitability is the recent RIAA victories against my.mp3.com and Napster.com. Both these companies are MP3 format dependent and have pushed Copyright Law to its outer fringes relying on the newly enacted DMCA and Fair Use defenses. (140) These two cases, while based on different areas of the Copyright Act still effectively communicate the point, the open source "wild, wild west" atmosphere of MP3 formatted music will be reigned in, whether through judicial, legislative or arbitration means.

VI. CONCLUSION

{41}Essentially, the main purpose of the Audio Home Recording Act of 1992 was to allow personal use benefits to consumers of digital audio recordings while eliminating the ambiguity within the Copyright Act of 1976. The Act ensures "the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use" through the exemptions provided by the Act. (141) The Act now appears flawed because of a single exemption afforded the computer industry. After blossoming into a major crisis for the RIAA, the manufacturing, computer, and recording industries are making slow progress in solving their own problems. While technology moves with the speed of a hare and Congress maintains its tortoise-like pace in enacting applicable laws, especially those laws involving technology, the judiciary will become bogged down with injunction requests and infringement claims. The need for binding arbitration would become glaringly attractive to all sides if Congress would just provide a little positive reinforcement.

ENDNOTES

[*]Mr. Webb earned B.S. and M.S. degrees in Chemistry from North Carolina Agricultural & Technical State University in 1992 and 1995 respectively. Before beginning law school at the University of Richmond in 1998 he worked as an Analytical Chemist for Abbott Laboratories, Hospital Products Division. As a student at the University of Richmond he has served as a member of the John Marshall American Inn of Court (Richmond Area Chapter), the *Richmond Journal of Global Law and Business*, Vice President of the Black Law Students Association, the Law School Honor Court Grievance Committee, and as a student member of the American Intellectual Property Law Association. He will earn a Juris Doctor in May 2001. He is the 2000-2001 Solicitations Editor of the *Richmond Journal of Law & Technology* and presently works as the legal intern for General Electric Financial Assurance Holdings Company, Inc. in the office of Corporate Counsel. The author would like to thank Professor Deborah Tussey for her critical reads and direction of this piece and to especially thank his mentor Dr. Lynda M. Jordan, for all the lessons after the biochemistry was done.

[1] . See Lawrence J. Glusman, *It's My Copy, Right? Music Industry Power to Control Growing Resale Markets in Used Digital Audio Recordings*, 1995 WIS. L. REV. 709, 710 (1995) (highlighting the three major forms of digital audio technology until now: the digital audio tape, digital compact cassette, and mini disc music formats).

[2] . See *id.* at 715 .

[3] . See *id.* at 709.

[4] . See generally Todd Page, *Digital Audio Tape Machines: New Technology or Further Erosion of Copyright Protection?*, 77 KY . L. J. 441 (1989). Blocking the introduction of the digital audio tape in the United States market, the Recording Industry of America followed judicial remedies while also investing major resources in Congressional lobbying for an amendment to the Copyright Act of 1976. The recording industry saw the DAT and the possible introduction of any other digital recording device as a strong threat to the industry.

[5] . Although no empirical data has been collected to prove the demise and utter failure of the DAT, in its effort to capture the market share held by the mini-cassette, one merely needs only to visit a local music store and compare the number of DAT's to the number of mini-cassettes being sold. Although the DAT did gain access to U.S. markets, its failure may have been due, in large part, due to its inability to clearly and decisively distinguish itself from the mini-cassette. Although, half the size of the mini-cassette the DAT was indistinguishable in most ways. One still must wind the tape of a DAT to get to the next song just as cassette. The DAT quality deteriorated after several plays, just as the cassette does. The quality of the music on DAT is much better than the quality of an analog cassette, but CDs were already well established in the consumer market, providing digital quality without the problem of wear. There was simply no good reason to spend the amount of money for a DAT player/recorder and DATs when the DAT would not last any longer than would the cassette.

[6] . See generally Robert A. Starrett, *Copying music to CD: the right, the wrong, and the law*, EMEDIA PROF'L , Feb. 1, 1998. Unhappy with the amount of royalties that are returned to the music industry under the AHRA and the implications of more widely available audio CD recording, the RIAA has criticized Philips' plans to introduce a CD-Rewritable (CD-RW) home audio recorder. The device was designed entirely in compliance with the AHRA, returning a royalty to music copyright holders on each recorder and disc sold and implementing the Serial Copy Management System (SCMS) on each disc recorded, which switches "on" a copy-protected bit on a burned CD copy that prevents users from copying the subsequent copy. Philips has in fact gone even farther than the AHRA requires and included a CD fingerprint system that identifies the particular machine on which each digital recording is made).

[7] . See *id.* The RIAA argues that the home CD-RW drives raise fresh concerns not addressed in the AHRA. The RIAA predicts that home recorders, like the forthcoming Philips model, is going to aggravate an already heavily pirated industry by expediting CD piracy. The RIAA's concern was peaked in early 1998 when Philips lowered its CD-RW's to the affordable \$774 from its previous price of more than more than \$1500.

[8] . See Laura A. Lorek, *Digital Music Rush Leaves Copyright Laws Behind*, SUN-SENTINEL, (Oct. 31, 1999), available at 1999 WL 20290892.

[9] . See generally Fraunhofer IIS, *MPEG Audio Layer-3*, at <http://www.iis.fhg.de/amm/techinf/layer3/index.html> (last visited July 21, 2000) (providing history, specifications, and coding information on the MPEG Audio Layer 3 ("MP3") format; see also *infra* note 13 and accompanying text).

[10] . See *Recording Industry Association of America v. Diamond Multimedia Sys., Inc.*, 29 F. Supp.2d 624 (C.D. Cal. 1998) (hereinafter "Diamond I"), *aff'd*, 180 F.3d 1072 (9th Cir. 1999) (hereinafter "Diamond II").

[11] . See *Diamond II*, 180 F.3d at 1074 n.1 (citing 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,

506 (1998)). Further noted is the fact that the record industry already, to some degree, raises their prices to partially offset the losses incurred through piracy and home recording.

[12] . *See id.*

[13] . *See The MPEG Standard*, at <http://www.crs4.it/~luigi/MPEG/mpeggeneral-1.html> (last visited July 21, 2000). MPEG (Moving Pictures Experts Group) is a group of people who meet under ISO (the International Standards Organization) to generate standards for digital video (sequences of images in time) and audio compression. They define a compressed bit stream, which implicitly defines a decompressor. The compression algorithms, however, are up to the individual manufacturers, and that is where proprietary advantage is obtained. MPEG core technology includes many different patents from different companies and individuals worldwide but the MPEG committee only sets the technical standards without dealing with patents and intellectual property issues.

[14] . *See AT&T, AT&T launches a2b music trial to deliver songs on the Internet* (Nov. 3, 1997), at <http://www.att.com/press/1197/971103.ala.html>. Asserting its influence, AT&T offered a previously unreleased live version of a song from the album "Villains" by RCA/BMG recording artists, The Verve Pipe in November 1999. AT&T Corp. is the world's largest communication's network and a world leader in long distance data transport and wireless communications (over 90 million consumers).

[15] . *See id.* (promoting the new platform's attributes, which combine compression and encryption technologies from AT&T Labs to promote and deliver CD-quality music quickly and securely over the Internet). The platform enables faster downloads of CD-quality music, and more flexible licensing options, than other proposed solutions. AT&T plans to incorporate microbilling capabilities in future stages of the trial to investigate ways that the Internet can be used efficiently for an emerging electronic commerce application, the selling of soft goods -- content that can be distributed digitally, such as a single song.

[16] . *See Diamond II*, 180 F.3d at 1074.

[17] . *See generally Winzip: The Archive Utility for Windows*, at <http://www.winzip.com/aboutzip.htm> (visited July 21, 2000) (Explaining the compression function used while archiving digital files. Zip files are frequently used in downloading files from ftp (file transfer protocol)cites allowing considerably faster download times while maximizing disk space. The files are compressed until when they are not being used and when needed they are decompressed).

[18] . *Diamond II*, 180 F.3d at 1075; Richard P. Klau, *Recording Industry Sings the Blues As Consumers Gain More Means To Make Their Own Kind of Music*, STUDENT LAWYER, Mar. 1999.

[19] . *See Michael Robertson, Flurry of Artists Back MP3* (Nov. 24, 1998), at <http://www.mp3.com/news/133.html>.

[20] . Defined in the AHRA, "serial copying," is "the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording." 17 U.S.C. § 1001(11) (1999).

[21] . *See Diamond II*, 180 F.3d at 1074. *Contra Diamond II*, 180 F.3d at 1074, fn1.

[22] . The doctrine of "fair use" is an equitable rule of reason, judicially applied for years before being codified:

"Notwithstanding the provisions of sections 106 and 106A, the 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. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;"

"(2) the nature of the copyrighted work;"

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole "; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work."

17 U.S.C. § 107 (1999).

[23] . *See* 17 U.S.C. § 101-914 (1999).

[24] . The AHRA was largely enacted to regulate DAT technology which was introduced in 1986. Although MP3 technology was undeveloped and unforeseen in 1992, the AHRA was enacted with the intent to allow technology (the SCMS system) to be flexible enough to be applied to emerging technologies. *See* H. REP. NO . 102-873(II), at 2 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3600, 3601; S. R EP. N O. 102-294, at 37 (1992); *see also* Robert A. Starrett, *Copying music to CD: the right, the wrong, and the law*, Emedia Prof., February 1, 1998, vol. 11, i. 2, can be viewed on <http://www.emediapro.net/EM1998/starrett2.html>.

[25] . Obligation to make royalty payments.

"(a) Prohibition on importation and manufacture. No person shall import into and distribute, or manufacture 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.

(b) Filing of notice. The importer or manufacturer of any digital audio recording device or digital audio recording medium, within a product category or utilizing a technology with respect to which such manufacturer or importer has not previously filed a notice under this subsection, shall file with the Register of Copyrights a notice with respect to such device or medium, in such form and content as the Register shall prescribe by regulation.

(c) Filing of quarterly and annual statements of account.

(1) Generally. Any importer or manufacturer that distributes any digital audio recording device or digital audio recording medium that it manufactured or imported shall file with the Register of Copyrights, in such form and content as the Register shall prescribe by regulation, such quarterly and annual statements of account with respect to such distribution as the Register shall prescribe by regulation.

(2) Certification, verification, and confidentiality. Each such statement shall be certified as accurate by an authorized officer or principal of the importer or manufacturer. The Register shall issue regulations to provide for the verification and audit of such statements and to protect the confidentiality of the information contained in such statements. Such regulations shall provide for the disclosure, in

confidence, of such statements to interested copyright parties.

(3) Royalty payments. Each such statement shall be accompanied by the royalty payments specified in section 1004."

17 U.S.C. § 1003 (1999); *see supra* note 63.

[26] . This section of the AHRA defines the "Incorporation of copying controls" to be employed by digital audio recording devices.

(a) Prohibition on importation, manufacture, and distribution. No person shall import, manufacture, or distribute any digital audio recording device or digital audio interface device that does not conform to--

(1) the Serial Copy Management System;

(2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system's method of serial copying regulation and devices using the Serial Copy Management System; or

(3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

(b) Development of verification procedure. The Secretary of Commerce shall establish a procedure to verify, upon the petition of an interested party, that a system meets the standards set forth in subsection (a)(2).

(c) Prohibition on circumvention of the system. No person shall import, manufacture, or distribute any device, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implements, in whole or in part, a system described in subsection (a).

(d) Encoding of information on digital musical recordings.

(1) Prohibition on encoding inaccurate information. No person shall encode a digital musical recording of a sound recording with inaccurate information relating to the category code, copyright status, or generation status of the source material for the recording.

(2) Encoding of copyright status not required. Nothing in this chapter [17 U.S.C. §§ 1001 et seq.] requires any person engaged in the importation or manufacture of digital musical recordings to encode any such digital musical recording with respect to its copyright status.

(e) Information accompanying transmissions in digital format. Any person who transmits or otherwise communicates to the public any sound recording in digital format is not required under this chapter [17 U.S.C. §§ 1001 et seq.] to transmit or otherwise communicate the information relating to the copyright status of the sound recording. Any such person who does transmit or otherwise communicate such copyright status information shall transmit or communicate such information accurately."

17 U.S.C. 1002; *see infra* note 63; *see supra* note 20.

[27] . Prohibition on certain infringement actions :

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 recording 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.

17 U.S.C. § 1008 (1999); *see infra* note 63; *see* Nancy A. Bloom, *Protecting Copyright Owners of Digital Music--No More Free Access to Cyber Tunes*, 45 J. COPYRIGHT SOC'Y 179, 191 (1997).

[28] . *See* H. REP. NO . 102-873(I), at 9-10 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3578, 3579-80; (Illustrating in the extensive series of negotiations occurring between several interested industries to create a more concrete law on copyright protection in the wake of the Copyright Act of 1976 and the *Sony* decision. *Universal City Studios, Inc. v Sony Corp*, 659 F.2d 963 (9th Cir. 1981), *rev'd*. 464 U.S. 417 (1984)); *see generally supra* note 26.

[29] . Christine C. Carlisle, *The Audio Home Recording Act of 1992*, 1 J. INTELL. PROP. L. 335, n. 21 (1994).

[30] . *See* Pub. L. No. 105-304 (1998), 112 Stat. 2860 (1998). (This provision implemented Article 12 of the 1996 World Intellectual Property Organization Copyright Treaty, adopted Dec. 20, 1996, S. Treaty Doc. No. 105017, 36 I.L.M 65).

[31] . *See S 3 Incorporated: Rio300* <http://www.riohome.com/default.asp?lang=eng&group=Products&menu=Rio300&submenu=> (visited Sept. 1, 2000).

[32] . *See* Jan Ozer, *First Looks: Diamond Rio PMP300 Portable Music Player*, PC Magazine Online (Dec. 11, 1998), at <http://www.zdnet.com/pcmag/firstlooks/9812/f981211a.html>.

[33] . *Diamond II*, 180 F.3d 1072, 1074 (9th Cir. 1999).

[34] . *Id.* at 1075.

[35] . *See* Barak D. Jolish, *Scuttling the Music Pirate: Protecting Recordings in the Age of the Internet* 17 ENT & SPORTS LAW. 9, 10 (1999).

[36] . *Id.*

[37] . *Id.*

[38] . *See* mp3.com, hardware (visited Sep. 11, 2000) <<http://hardware.mp3.com/hardware/>> (Sony's VAIO Music Clip and has 64MB (two hours with upgrades to 128MB, 4 hours of music); <http://hardware.mp3.com/hardware/individual/portable/3097.html>, The Rave MP 2300 by Sensory Science attempts to challenge the Rio and all other MP3 players by providing several hours of music overcoming the most prominent portable MP3 issue.

[39] . *See Rio Players: Rio Receiver*, at <http://www.riohome.com> (visited Sept. 1, 2000) (The Rio Receiver is just one of the systems entering the market).

[40] . With the overwhelming success of Napster.com and my.mp3.com music piracy has an unlimited potential to empower music pirates the opportunity to built music collections limited only by the size of the

computer hard drive (where even this is no limit because of the ease of writing MP3 files onto CD's; see *infra* note 137.

[41] . See Teddy C. Kim, *Taming the Electronic Frontier*, 80 MINN . L. REV . 1255, 1282 n.43 (1996) .

[42] . See *infra*. n.137.

[43] . *Id.*

[44] . See AHRA, 17 U.S.C. §§ 1003-1007 (1999).

[45] . See *id.*

[46] . *Diamond II*, 180 F.3d 1072 (9th Cir. 1999).

[47] . See *supra* note 20.

[48] . See RIAA: *About Us*, at <http://riaa.com/About-Who.cfm> (last visited June 10, 2000).

[49] . See *id.*

[50] . See RIAA: *Protecting The Music*, at <http://riaa.com/Protect-Campaign-1.cfm> (last visited June 10, 2000) (Championing their own efforts in fighting music piracy of music whether on "the Internet, in illegal CD factories, distribution centers, and on the street."

[51] . *Diamond II*, 180 F.3d at 1074.

[52] . See Janelle Brown, *Heat Turned Up on Digital Music Pirates*, at <http://www.wired.com/news/culture/0,1284,10234,00.html> (Feb. 12, 1998). Music publishers ASCAP and BMI also aggressively pursue online music pirates.

[53] . See RIAA: *Protecting The Music What We're Doing*, at <http://riaa.com/Protect-Campaign-5.cfm> (last visited June 10, 2000).

[54] . See RIAA: *Protecting The Music What Is Piracy*, at <http://riaa.com/Protect-Campaign-1.cfm> (last visited June 10, 2000).

[55] . See Teddy C. Kim, *Taming the Electronic Frontier*, 80 M INN. L. R ev . 1255, 1279 (1996) (noting that "[t]echnological protections may not deter an MIT computer engineer, but they do deter the largest and most dangerous source of illegal copying, the average user.")

[56] . Diamond specializes in innovative graphics software, Internet connectivity suites, memory, soundcards, networking, modems, professional audio, tv tuners, and other electronic appliances. Diamond targets many of its innovative products at the Desktop PC and the Mobile PC manufacturer level. Diamond Multimedia has been dubbed an Internet appliance company, with it's commitment to creating products and partnerships that help build the digital home. With a continuous stream of products and through strategic partnerships, such as with Nike and strong financial assets with an extensive technology portfolio the company continues to grow in spite of a flooded portable mp3 player market. Diamond appears to be a trailblazer, positioned to capitalize on high growth opportunities in the rapidly converging Internet and consumer device markets. See *Diamond: Company*, at http://www.diamondmm.com/companyabout_S3.htm (last visited June 10, 2000); see also *ZD net Company Finder*, at <http://www.zdnet.com/companyfinder/filters/detail/0,9991,566,00.html> (last visited June 10, 2000).

[57] . See ZD net Company Finder, at <http://www.zdnet.com/companyfinder/filters/detail/0,9991,566,00.html> (visited June 10, 2000).

[58] . Ted J. Barthel, *RIAA V. Diamond Multimedia Systems, Inc.: the Sale of the Rio Player Forces the Music Industry to Dance to a New Beat*, 9 DEPAULLCA J. ART & ENTL. & POL'Y 279, 281 (1999).

[59] . See *Blame it on Rio*, WIRED NEWS (Oct. 9, 1998), at <http://www.wired.com/news/culture/0,1284,15535,00.html> . (Announcing the first trial that put the AHRA to task, the RIAA announced the imminent death of the recording industry's digital distribution market infrastructure if the new Rio wasn't prevented from reaching the consuming public).

[60] . *Diamond II*, 180 F.3d 1072, 1075 (9th Cir. 1999) (citing 17 U.C.S. §1002(a)(2) (1999)); *see supra* note 26.

[61] . *Diamond II*, 180 F.3d at 1075 (citing 17 U.C.S. §1003 (1999)); *see generally supra* note 66; *see infra* note 71.

[62] . *Diamond I*, 29 F. Supp.2d 624, 632 (C.D. Cal. 1998).

[63] . *Id.* at 626; *see also* 17 U.C.S. §1003 (1999).

[64] . *See supra* note 61.

[65] . *Diamond I*, 29 F. Supp.2d at 632.

[66] . *Diamond I*, 29 F. Supp.2d at 632 (citing *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1324-25 (9th Cir. 1994) (where "for purposes of preliminary injunction, the irreparable injury `must be caused by the alleged wrongful conduct."))

[67] . *Diamond II*, 180 F.3d 1072, 1075 (9th Cir. 1999).

[68] . *Id.*; *see supra* note 20.

[69] . 17 U.S.C. § 1002(a)(1), (2) (1999).

[70] . *Diamond II*, 180 F.3d at 1075 (Discussing the initial question in the case of whether the Rio falls within the ambit of the Act and highlighting the fact that the Act only restricts specific digital recording devices).

[71] . 17 U.S.C. § 1001(3)(1999).

[72] . *Diamond I*, 29 F.Supp.2d 624, 628 (C.D. Cal. 1998).

[73] . *Diamond II*, 180 F.3d at 1075-1076 (citing 17 U.S.C. § 1001(1), (3) and (5)(A) (1999)) (Strengthening the Court's finding that the plain language of the statute is sufficient for a determination of whether the Diamond Rio was a "digital recording device." The court provided the explicit definitions of the technical terms used in the act); *see also infra* note 72.

[74] . *Diamond II*, 180 F.3d at 1076; 17 U.S.C. §1001(1) (1999) "A `digital audio copied recording' is 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"; A "digital musical recording" is defined 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.

17 U.S.C. § 1001(5)(A) (1999).

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

[76] . *Id.*

[77] . *Id.*

[78] . *Id.*

[79] . *See supra* notes 26, 72.

[80] . *Diamond II*, 180 F.3d at 1076; *see* 17 U.S.C. § 1001 (5)(A)(B) (1999) for definition of digital musical recording and *supra* note 72.

[81] . *Id.* (citing *Diamond I*, 29 F. Supp.2d 624, 629 (C.D. Cal. 1998)). *See also* *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (stating where statutory command is straightforward, 'there is no reason to resort to legislative history' (quoting *United States v. Gonzales*, 520 U.S. 1, 6 (1997))).

[82] . S. REP. NO. 102-294, at 49 (1992), reprinted at 1992 WL 133198 at 118-19.

[83] . *Id.* at 36.

[84] . *Id.* at n.36.

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

[86] . *See Diamond II*, 180 F.3d at 1076 (citing H. REP. NO. 102-873(I), at 13 (1992), reprinted in 1992 U.S.C.C.A.N. 3578, 3583).

[87] . *Id.* at 1076 (citing H. REP. NO. 102-873(I), at 17 (1992), reprinted in 1992 U.S.C.C.A.N. 3578, 3587).

[88] . *Id.* at 1077.

[89] . *Id.* at 1077 (citing *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d. Cir. 1983)) ("[A] computer program... is a 'literary work.'")

[90] . *Id.* at 1077 (citing *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d. Cir. 1983)).

[91] . *Diamond II*, 180 F.3d 1072, 1078 (9th Cir. 1999).

[92] . *Id.*

[93] . *Id.* (citing *Diamond I*, 29 F. Supp.2d 624, 630 (C.D. Cal. 1998)).

[94] . *See id.* (citing S. REP. NO. 102-294, at 47,48 (1992)), (*stating* "the typical personal computer would not fall within the definition of 'digital audio recording device,'""); *see also Diamond II*, 180 F.3d at 1078 (citing S. REP. NO. 102-294, at 48 (1992)) (because a personal computer's "recording function is designed and marketed primarily for the recording of data and computer programs" . . . "[I]f the 'primary purpose' of the recording function is to make objects other than digital audio copied recordings, then the machine or device is not a 'digital audio recording device,' even if the machine or device is technically capable of making such recordings.").

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

[96] . *Id.* at note 6.

[97] . *Id.*

[98] . *Id.* at 1079 (citing 17 U.S.C. § 1002(a)(2) (1999)); *see supra* note 26.

[99] . *See id.* at 1079.

[100] . *Id.*

[101] . *Id.* (citing technical Reference Document for the Audio Home Recording Act of 1992, H.R. REP. NO. 102-780(I) at 32, 43 (1992)). (Emphasis added).

[102] . *Id.* at 1079.

[103] . *Diamond II*, 180 F. 3d at 1079 (citing 17 U.S.C. § 1001(1) (1999)).

[104] . *Id.* at 1080 (citing 17 U.S.C. § 1002(e) (1999) (placing restrictions upon "any person who transmits or otherwise communicates to the public any sound recording in digital format")); *see also id.* at 1080 (citing 17 U.S.C. § 101 (1999)).

[105] . *Id.* at 1080.

[106] . *See supra* note 69.

[107] . *Diamond II*, 180 F.3d at 1080 (citing 17 U.S.C. § 1002 (a)(1), (2) (1999)).

[108] . *Id.* at 1080.

[109] . *Id.*

[110] . *Id.* at 1081 (citing S. REP. NO. 102-294, at 47,48 (1992)).

[111] . *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("Sony III.")

[112] . *See Universal City Studios v. Sony Corp. of Am.*, 429 F. Supp. 407 (1977) ("Sony I.")

[113] . *See Universal City Studios v. Sony Corp. of Am.*, 659 F.2d 963 (C.A. Cal., 1981) ("Sony II") (The court found that off-the-air copying of telecasts of copyrighted audiovisual materials (time-shifting) by owners of videotape recorders in their own homes for private noncommercial use did not constitute fair use). *But see Sony III*, 464 U.S. 417 (1984) (citing U.S. CONST. art. I, § 8). The Supreme Court reigns in some of the monopoly rights that copyright owners may think they are afforded restating the purpose of copyright and

the limited purposes for which it can be used by stating that the privileges, through monopoly, authorized by Congress are neither unlimited nor primarily designed to provide a special private benefit; rather limited grant is a means by which an important purpose may be achieved and is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow public access to the products of their genius after the limited period of exclusive control has expired. The Court further stressed that reproductions of copyrighted work are not within exclusive domain of copyright owners; some are in the public domain.

[114] . *Sony III*, 464 U.S. at 442.

[115] . *Id.* at 444.

[116] . *Id.* at 456.

[117] . *See Diamond II*, 180 F.3d 1072, 1079 (9th Cir. 1999) ((stating that the Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive.) (citing *Sony III*, 464 U.S. 417, 455, (1984) (holding that "time-shifting" of copyrighted television shows with VCR's constitutes fair use under the Copyright Act, and thus is not an infringement)). The statement merely shows the paradigm of the noncommercial uses and the AHRA's use as it is consistent with the Fair use afforded home copying of VCR tapping).

[118] . *See Sony III*, 464 U.S. at 430 n.11.

[119] . *See* MP3.Community News, *MP3.com Uploads 250,000th Song* (Dec. 10, 1999).

<http://www.mp3.com/news/475.html>. (Although there is an abundance of free music available for download on the Internet the vast majority of it with any significant market appeal is the music available at a cost on legal web sites such as MP3.com. Pirate sites diverge, not distinguishing free and non-free copyrighted and unauthorized music.)

[120] . *Diamond II* 180 F.3d 1072, 1074 (9th Cir. 1999).

[121] . *See* Declan McCullagh *DVD Wars: Defense Rallies*, WIRED NEWS, (Mar. 7, 2000), at <http://www.wired.com/news/digiwood/0,1412,34779,00.html>. (Announcing the arrival of digital movie piracy through the DVD media. One of the first cases, in what promises to be an ongoing battle for the MPAA (Motion Picture Association of America) Is Universal City Studios, Inc.; Paramount Pictures Corporation; Metro-Goldwyn-Mayer Studios Inc.; Tristar Pictures, Inc.; Columbia Pictures Industries, Inc.; Time Warner Entertainment Co., L.P.; Disney Enterprises, Inc.; and Twentieth Century Fox Film Corporation, v. Jeramee Hughes, United States District Court District of Connecticut; see *supra* note 20.

[122] . *See Sony III* 464 U.S. at 444.

[123] . *See Diamond I*, 29 F.Supp.2d 624, 633 (C.D. Cal 1998).

[124] . *Id.* at 627.

[125] . *See supra* note 22.

[126] . *See Sony III*, 464 U.S. at 450.

[127] . *Intellectual Property and the National Information Infrastructure*, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, 225 (Nov. 15, 1995), available at

[128] . See Timothy L. Skelton, Comment, *Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative*, 35 SAN DIEGO L. REV. 219, 313 (1998).

[129] . See Chris Oakes, *RIAA, Diamond Sweep Away Suit*, WIRED NEWS, Aug. 4, 1999, at <http://www.wired.com/news/politics/0,1283,21089,00.html>. (Settling on conditions that would incorporate SDMI (Secure Digital Music Initiative) into later generations of the Diamond Rio. However, the SDMI is largely dependant on complicated, untested technology that may not work in real-world situations. Also, licensing of the intellectual property rights of the SDMI devices may prove too expensive to implement).

[130] . See James Lardner, *The Record Industry Gives Peace a Chance*, U.S. NEWS & WORLD REP., Sept. 20, 1999, at 48.

[131] . See *id.*

[132] . See 17 U.S.C. § 1010(a) (2000).

[133] . *Supra* note 127.

[134] . See generally H.R. REP. NO. 102-873(I) (1992) (discussing in the background, the inability or unwillingness of the manufacturing industry to reach an agreement with the recording industry on technical copyright safety implementation for the DAT).

[135] . See RIAA: *SDMI Publishes Open Standard for Portable Devices: Joint Industry Initiative Accelerates Access to Digital Music* (July 13, 1999), at http://www.riaa.com/PR_Story.cfm?id=61.html.

[136] . See Christopher Jones, *SDMI: Shape Up or Ship Out*, WIRED NEWS (Apr. 28, 2000), at <http://www.wired.com/news/politics/0,1283,35966,00.html> . (A coalition of hardware, software, security, and record companies make up SDMI. Working together on a standard system of regulating copyrighted music, frequently stalls due to the inability of the industries to work well together. One example of these impasses: last year year, for instance, the hardware and pc manufacturers, resisted some of the security measures proposed, such as banning all MP3 files from SDMI-compliant devices).

[137] . See Sara Robinson, *Technology; Recording Industry Escalates Crackdown on Digital Piracy*, N.Y. TIMES, Oct. 4, 1999, at C5.

[138] . See generally Barak D. Jolish, *Scuttling the Music Pirate: Protecting Recordings in the Age of the Internet*, 17 SPG ENT. & SPORTS LAW. 9, 10 (1999) (discussing the music industry's strategy to combat piracy).

[139] . See *supra* note 131.

[140] . See generally *A & M Records, Inc, v. Napster, Inc.*, 54 U.S.P.Q.2d (N.D. Cal. May 5, 2000) (Napster tries to invoke a DMCA safe harbor exemption from contributory and vicarious federal copyright infringement after the recording industry filed suit because of Napster's facilitation transferring MP3 files from one online user to another freely. Napster's motion for summary judgment failed and Judge Patel held that Napster does not meet the requirements for the safe harbor exemption of subsection 512(a) in the DMCA); See also *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp.2d 349, 350 (S.D. N.Y. 2000) (Partial summary judgment for UMG Records' copyrights was granted holding MP3.com infringed UMG's copyrights. MP3.com employed a "fair use" defense and was denied as a matter of law. MP3.com copied digital recordings through it's "my.mp3.com" portal, onto its computer servers replaying the recordings for its

subscribers, at will, upon online purchase or proof of ownership of the CD.

[141] . *Diamond II*, 180 F.3d at 1079 (citing S. REP. NO. 102-294, at 30 (1992)).

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<http://www.riaa.com/> Recording Industry Association of America

<http://www.a2bmusic.com/> A T & T's a2b Music

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<http://www.essentialrecords.com/> Essential Records

<http://cleo.murdoch.edu.au/teach/online/deliv-pol/copyright.html> Murdoch Online: Copyright and digital copying

<http://www.virtualrecordings.com/> Virtual Recordings

<http://www.altculture.com/> **ALT.CULTURE**: an encyclopedia of modern culture.

http://www.mitsuicdr-store.com/SCMS_nh.html MITSU-CDR Store.

<http://familypc.zdnet.com/hardware/other/267e/> ZD Net: Family PC- discussion of Diamond Rio PMP 300

<http://www.Napster.com/> Napster

<http://www.macobserver.com/columns/flipside/2000/20000725.shtml> The Mac Observer - Music & Piracy, Who's Right, Who Should Win

<http://maccave1.freeyellow.com/IP.html> Why The MP3 Lawsuits Threaten A Lot More Than Music Piracy; By Charles W. Moore

<http://www.arb-forum.com/> National Arbitration Forum

<http://www.adr.org/> American Arbitration Association

<http://www.soundbyting.com/> SOUNDBYTING | A Campaign to Protect Music on the Internet Education; includes a kit for university and college administrators as well as a web site.

<http://www.cni.org/Hforums/cni-copyright/1995-01/0120.html> Coalition for Networked Information To Advance and Intellectual Productivity: Discussion- Contributory infringement or vicarious liability?

<http://www.wvjolt.wvu.edu/> Yee Fen Lim, The Application of the Doctrines of Contributory Infringement and Vicarious Liability to Internet Service Providers, 3 W. Va. J. L. & Tech. 2 (March 15, 1999)
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<http://www.computeruser.com/newstoday/99/03/12/news6.html> Computer User Daily News: Secure Digital Music Initiative

<http://www.ascap.com/> The American Society of Composers, Authors and Publishers

<http://www.clari.net/brad/copymyths.html> 10 Big Myths about copyright explained

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http://www.music.indiana.edu/music_resources/copy.html Worldwide Internet Music Resources: Copyright

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<http://www.groton.k12.ct.us/mts/pt2a.htm> CIM | Copyright Resources on the Internet

<http://www.ipmall.fplc.edu/ipcorner/path/iprs9625.htm> FPLC - IP RESEARCH TOOLS PATHFINDER
EVAL - COPYRIGHT PROTECTION ON THE INTERNET: A MUSICIAN'S GUIDE

<http://www.nmpa.org/nmpa/expression.html> The Engine of Free Expression: Copyright on the Internet