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## RIAA v. Diamond Multimedia Systems, Inc.: The Sale of the RIO Player Forces the Music Industry to Dance to a New Beat

Ted J. Barthel

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**RIAA V. DIAMOND MULTIMEDIA SYSTEMS, INC.:  
THE SALE OF THE RIO PLAYER FORCES THE  
MUSIC INDUSTRY TO DANCE TO A NEW  
BEAT**

INTRODUCTION

Advancements in technology have always remained elusive to the law's scrutiny. Understanding how to fairly apply traditional rules to new technology takes time as the impact, affect and use of emerging technology finds its niche in American society. Recent developments in digital technology pose such a problem to the copyright law. Where once a "tangible medium of expression," such as a phonorecord or compact disc, yielded itself to easy regulation, now only a digital signal—a binary stream of "1's" and "0's"—exists. In the case, *Recording Industry Association of America, Inc. and Alliance of Artists and Recording Companies, v. Diamond Multimedia Systems, Inc.*<sup>1</sup>, the Court tackled several complicated technical issues in order to determine whether Diamond Multimedia's Rio player engaged in serial copying, an activity regulated by the Audio Home Recording Act of 1992 (hereinafter, the "AHRA").

I. *THE PARTIES*

A. *The Recording Industry Association of America Inc. and the Alliance of Artists and Recording Companies.*

The Recording Industry Association of America (hereinafter the "RIAA") is a not-for-profit trade association formed in 1952.<sup>2</sup> The RIAA's members are record companies that own copyrights and

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1. 49 USPQ2d 1024 (C.D. Cal. 1998).

2. Plaintiff's Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction Pursuant to the Copyright Act; Memorandum of Points and Authorities in Support Thereof at p. 4:5-6, RIAA v. Diamond Multimedia Systems, Inc., 49 USPQ2d 1024 (C.D. Cal. 1998) (No. 98 8247 ABC (RZx)).

other exclusive rights to musical works embodied in digital or analog sound recordings that have been lawfully made and distributed in the United States.<sup>3</sup> Located in Washington D.C., the RIAA's mission is to foster a business and legal climate that supports and promotes its members' creative and financial vitality around the world.<sup>4</sup> In support of its mission, the RIAA works to protect intellectual property rights of artists worldwide. It conducts consumer, industry and technical research and monitors, reviews and influences state and federal laws, regulations and policies.<sup>5</sup> The RIAA's member companies together create, manufacture, or distribute over ninety percent of all legitimate sound recordings sold in the United States.<sup>6</sup>

The Alliance of Artists and Recording Companies (hereinafter, the "AARC") is a not-for-profit trade corporation organized under the laws of Pennsylvania.<sup>7</sup> Organized to represent the joint interests of the artist community and the recording industry, the AARC's membership includes over 1400 artists and 120 record companies.<sup>8</sup> Under the AHRA, AARC's members are entitled to certain royalty payments.<sup>9</sup>

### B. *Diamond Multimedia Systems, Inc.*

Diamond Multimedia Systems, Inc., ("Diamond") headquartered in San Jose, California is a leader in accelerating interactive

3. *Id.* at p. 4:6-9.

4. *About Us* (visited Mar. 6, 1999) <<http://www.riaa.com/about/aboutus.html>>.

5. *Id.*

6. Plaintiff's Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction at p. 4:9-11, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

7. *Id.* at p. 4:14.

8. Michael Robertson, *Dueling Press Releases Over Rio* (visited Oct. 17, 1998) <<http://www.mp3.com/news/112.html>>.

9. Plaintiff's Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction at p. 4:16, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

media.<sup>10</sup> Diamond develops advanced solutions for home, business and professional computer users, enabling them to design, deliver and display compelling new media content from their desktops and through the Internet.<sup>11</sup> A publicly traded company, with over 800 employees and sales of over \$470 million in the first nine months of 1998, much of Diamond's progress can be attributed to the quick identification of evolving customer needs, coupled with the company's ability to quickly bring affordable, high quality, high technology products to market ahead of competitors.<sup>12</sup> The company is "silicon agile," sourcing chips from a variety of semiconductor developers which allows Diamond to keep pace with the rapid advances in PC multimedia and connectivity technology.<sup>13</sup> The company is recognized for its superior engineering and Diamond's products maintain high brand-awareness and loyalty among both consumer and professional multimedia computer users and dealers.<sup>14</sup> Diamond's products are popular not only at retail but also among manufacturers of computer systems who choose to build their systems with Diamond's multimedia products.<sup>15</sup>

## II. PROCEDURAL HISTORY

On October 9, 1998, the RIAA filed a Complaint and an Ex Parte application for a Temporary Restraining Order ("TRO") and Order to Show Cause Regarding Preliminary Injunction.<sup>16</sup> The RIAA filed these motions in an attempt to prevent Diamond's

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10. *Diamond Multimedia Corporate Background*, (visited Mar. 6, 1999) <<http://www.diamondmm.com/company/public/background.html>>.

11. *Id.*

12. Defendant's Points and Authorities in Opposition to Temporary Restraining Order at ¶ 2, RIAA v. Diamond Multimedia Systems, Inc., 49 USPQ2d 1024 (C.D. Cal. 1998) (No. 98 8247 ABC (RZx)).

13. *Id.*

14. *Id.*

15. *Id.*

16. RIAA, 49 USPQ2d at 1026.

planned release of its new Rio player at the end of October 1998.<sup>17</sup>

On October 13, 1998, Diamond filed an Opposition to the Ex Parte Application for TRO.<sup>18</sup> On October 14, 1998, the RIAA filed their Reply.<sup>19</sup>

On October 16, 1998, the Court heard oral arguments and issued a ten day TRO enjoining Diamond from manufacturing or distributing the Rio player. The TRO was contingent on the RIAA posting a \$500,000 bond.<sup>20</sup> The bond was to be used to compensate Diamond for any damages resulting from the delay in the event that Diamond eventually prevailed in court.<sup>21</sup> The TRO was based on the judge's conclusion that the RIAA was likely to prevail on its assertion that the Rio player violated the AHRA.<sup>22</sup>

On October 20, 1998, Diamond Multimedia filed its Opposition to the application for a preliminary injunction. On October 22, 1998, the RIAA filed its reply.<sup>23</sup> The Court ruled on the RIAA's Motion for Preliminary Injunction on October 26, 1998.

### III. BACKGROUND BEHIND THE AUDIO HOME RECORDING ACT OF 1992.

The record industry and the technology manufacturing, distribution and import industries have been at odds over the practice of home taping of copyrighted works for more than a decade.<sup>24</sup> The introduction of digital audio recording technology in

17. Melissa J. Kozlowski, *Internet Music Device Fought by Recording Industry*, (visited Oct. 18, 1998) <<http://www.ljx.com/LJXfiles/riaa.html>>.

18. *RIAA*, 49 USPQ2d at 1026.

19. *Id.*

20. *Id.*

21. Michael Robertson, *Dueling Press Releases Over Rio* (visited Oct. 17, 1998) <<http://www.mp3.com/news/112.html>>.

22. Lydia Pelliccia, *RIAA Wins Restraining Order Against MP3 Recording Device* (visited Oct. 19, 1998) <<http://www.riaa.com/antipir/releases/rio.html>>.

23. *RIAA*, 49 USPQ2d at 1026.

24. 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, 725 (1995).

the United States consumer electronics market in the 1980's spawned even greater contention between these competing interests. Unlike analog recording devices where degradation occurs in the quality of sound when reproducing from an original to a copy, digital recording technology produces near perfect recorded reproductions of an original copyrighted music recording.<sup>25</sup> The introduction of digital audio tape ("DAT") recorders provided a higher grade of audio reproduction not previously enjoyed by the American consumer.

Unlike traditional (analog) recordings, digital recordings produce[d] perfect fidelity no matter how many times they [were] copied. One original—if taped by its buyer who in turn passed copies to three friends who in turn each made four copies for their own friends, and so on—could therefore supplant thousands of factory sales.<sup>26</sup>

The greater capability of digital sound reproduction is pronounced particularly in the case of serial copying—when further second generation copies are made from a first generation copy. Prior to the emergence of digital recording technology, analog recording practice inherently included a degradation of sound quality from the original to the copy. This degradation in sound quality became quite pronounced where additional "second generation" copies were made from the first generation copy.<sup>27</sup> Thus, digital audio recording devices permitted the unlimited

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25. Plaintiff's Reply Memorandum of Points and Authorities in Support of Order to Show Cause Re Preliminary Injunction at p. 3:13-24, *RIAA v. Diamond Multimedia Systems, Inc.*, 49 USPQ2d 1024 (C.D. Cal. 1998) (No. 98-8247 ABC (RZx)).

26. Plaintiff's Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction at p. 5:19-22, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)), citing M. & D. Nimmer, 2 *Nimmer On Copyright* § 8B.01 [A] (rev. 1996).

27. Plaintiff's Supplemental Declaration of Kenneth C. Pohlmann in Support of Preliminary Injunction at ¶ 3, *RIAA v. Diamond Multimedia Systems, Inc.*, 49 USPQ2d 1024 (C.D. Cal. 1998) (No. 98 8247 ABC (RZx)).

reproduction of potentially thousands of essentially perfect copies from a single prerecorded work.<sup>28</sup>

The recording industry was extremely concerned that the higher number of illegal “perfect” copies in circulation would lower consumer demand for commercially prerecorded products. “Such rampant unauthorized copying obviously and significantly injures sound recording copyright owners, as well as the artists, songwriters, and background musicians and vocalists, and music publishers who are paid by record companies based on sales of legitimate recordings.”<sup>29</sup> On the other hand, the electronics industry and consumer groups argued that restricting consumer access to state-of-the-art technology violated the consumer’s right to reproduce copyrighted material for personal use under copyright law’s fair use exceptions.<sup>30</sup>

Congress addressed these competing interests by enacting the Audio Home Recording Act. Originally titled “Digital Audio Recording Devices and Media,” this addition to the Copyright Act of 1976 was added to establish copyright structures for DAT technology.<sup>31</sup> The AHRA permitted the introduction of digital audio copying devices to the United States market by providing certain limited immunity to manufacturers and consumers balanced with certain requirements and restrictions.<sup>32</sup> The three main components of the AHRA reflect this compromise between consumers, copyright owners, and manufacturers.

28. Plaintiff’s Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction at p. 5:9-12, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

29. Plaintiff’s Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 3:20-24, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

30. 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, 725 (1995).

31. Robert A. Starrett, *Copying Music to CD: the Right, the Wrong, and the Law*, EMEDIA PROFESSIONAL, Vol. 11 No. 2 ISSN: 1090-946X, Feb. 1, 1998, available in 1998 WL 9595590.

32. Plaintiff’s Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction at p. 6:1, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

First, it makes home taping for noncommercial use permissible for both analog and digital material.<sup>33</sup> This protects the consumer against liability charges for copyright infringement of home copying. Second, to compensate the copyright owner from lost retail sales resulting from home copying, the AHRA provides a royalty payment system based upon sales of digital audio recording devices to be paid by the manufacturers and importers and distributed to music publishers, musical composers, producers, and featured and non-featured performers according to a formula.<sup>34</sup> The AHRA's royalty mechanism is an innovative "sound recording" fund that grants previously non-existent copyright protection to the record industry and performing artists.<sup>35</sup> Before enactment of the AHRA, the only party entitled to a lost royalty attributable to home taping was the copyright holder in the musical composition.<sup>36</sup> Any claim to a royalty by the sound recording copyright holder was purely contractual and therefore indirectly protected by copyright law.<sup>37</sup> The AHRA now allocates two-thirds of every dollar to the "sound recording" fund—two-thirds of a dollar more than the sound recording copyright holder was ever entitled to prior the AHRA.<sup>38</sup> Thus, the "sound recording" fund is allocated between two parties—the performing artists and the record industry—who split the royalty allotment 40%/60% respectively.<sup>39</sup>

Finally, the AHRA protects copyright owners from an economic loss resulting from an unlimited amount of permissible copies by mandating that manufacturers, importers and distributors include a "Serial Copy Management System" ("SCMS") in each digital audio

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33. Nancy A. Bloom, *Protecting Copyright Owners of Digital Music—No More Free Access to Cyber Tunes*, 45 J. COPYRIGHT SOC'Y 179, 191 (1997).

34. *Id.*

35. 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, 728 (1995).

36. *Id.*

37. *Id.* at 729.

38. *Id.*

39. *Id.*



device.<sup>40</sup> A SCMS allows unlimited first generation copies to be made from the original recording, but prevents recording a copy from a copy.<sup>41</sup> Hardware manufacturers are free to produce and sell digital recording devices and the purchasers of these devices cannot be sued for copyright infringement for making digital recordings of purchased music for non-commercial use, provided the devices are manufactured in compliance with the AHRA.<sup>42</sup>

#### IV. THE RIO PLAYER AND MPEG3 TECHNOLOGY

The Rio Player is a battery-operated, compact, portable music player that plays music files downloaded from the Internet or from CD's.<sup>43</sup> It is designed to store and play audio files transferred from a computer's hard drive.<sup>44</sup> What is new about this type of computer peripheral device is that a user can detach the Rio Player from the computer and play back the audio files separately through headphones while away from the computer.<sup>45</sup> The player is about the size of a deck of cards and has roughly the same weight.<sup>46</sup> It has no moving parts which makes it especially well suited to use during vigorous activity.<sup>47</sup>

The Rio uses new technology that has made storage and Internet distribution of audio files more efficient.<sup>48</sup> Motion Pictures Expert

40. Nancy A. Bloom, *Protecting Copyright Owners of Digital Music—No More Free Access to Cyber Tunes*, 45 J. COPYRIGHT SOC'Y 179, 191 (1997).

41. *Id.*

42. Robert A. Starrett, *Copying Music to CD: the Right, the Wrong, and the Law*, EMEDIA PROFESSIONAL Vol. 11 No. 2 ISSN: 1090-946X, Feb. 1, 1998, available in 1998 WL 9595590.

43. Chris St. John, *First Hands-On Review of New Rio Player* (visited Mar. 12, 1999) <<http://www.wearablegear.com/reviews/riorev.html>>.

44. Defendant's Opposition to Temporary Restraining Order at ¶ 3, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

45. *Id.*

46. Chris St. John, *First Hands-On Review of New Rio Player* (visited Mar. 12, 1999) <<http://www.wearablegear.com/reviews/riorev.html>>.

47. Defendant's Opposition to Temporary Restraining Order at ¶ 3, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

48. Specifically, the Rio Player contains the following components: (1) "flash" memory, (2) an MPEG decoder, (3) an output digital-to-analog

Group 1 Layer 3 or "MPEG 1 Layer 3" - called "MP3" for short - is an improved technology for compressing sound files.<sup>49</sup> MP3 audio files are 1/10<sup>th</sup> the size of traditional WAV audio files thereby allowing speedier transfer over the Internet and more efficient computer storage.<sup>50</sup> Thus, by means of MP3 technology, the Rio provides 30-35 minutes of CD-quality music in only 32 megabytes of re-useable "flash"<sup>51</sup> memory.<sup>52</sup> A 16 megabyte external memory card can increase playing time by 30 minutes.<sup>53</sup> In 1999, the Rio player sold for \$200 with the additional memory card costing another \$50.<sup>54</sup>

The MP3 audio file is embedded in the Rio solely by transfer from a personal computer.<sup>55</sup> The Rio user must initially transfer an audio file from another source, typically an audio CD or a file

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converter, (4) a micro controller for the buttons that control the Rio Player's functions, (5) a socket for a miniature circuit board (called a "card") that extends the flash memory, (6) a power supply, (7) a jack for headphones, (8) the headphones themselves, (9) a parallel port and cable for connection to the personal computer, and (10) the FPGA - a dedicated controller which steers data to the Rio Memory, as cited in Defendant's Opposition to Temporary Restraining Order at ¶ 4, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

49. *Id.* at ¶ 3.

50. *Id.*

51. Flash memory is a kind of computer storage-specifically, an EEPROM, or electronically erasable programmable read-only memory-which is contained on a semiconductor chip, or "card," that can be read and written by a computer's processor or by other hardware devices. See Microsoft Press Computer Dictionary at 198. Normally, EEPROM can be written and erased one byte at a time, but flash memory can only be erased in blocks. *Id.* Thus, after a flash memory card has been filled, it must be erased completely before anything more can be written to it. *Id.*

[as cited in Defendant's Opposition to Temporary Restraining Order at FN. 1, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx))].

52. Chris St. John, *First Hands-On Review of New Rio Player* (visited Mar. 12, 1999) <<http://www.wearablegear.com/reviews/riorev.html>>.

53. Defendant's Opposition to Temporary Restraining Order at ¶ 5, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

54. Chris St. John, *First Hands-On Review of New Rio Player* (visited Mar. 12, 1999) <<http://www.wearablegear.com/reviews/riorev.html>>.

55. Defendant's Opposition to Temporary Restraining Order at ¶ 4, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

downloaded from the Internet, to his personal computer's hard drive.<sup>56</sup> Software in the personal computer compresses and formats the audio files as needed for the Rio player and then the computer transfers the formatted files to the Rio by a cable.<sup>57</sup>

## V. *RIAA V. DIAMOND MULTIMEDIA SYSTEMS, INC.*

### A. *Preliminary Injunction Standard*

The RIAA asserted two arguments in its request for a preliminary injunction. First, the RIAA attempted to establish that the presumption of irreparable harm standard under the AHRA is identical to the preliminary injunction standard under traditional copyright law. "The AHRA is inextricably related to the rights provided under the Copyright Act."<sup>58</sup> The RIAA noted the fact that both the Copyright Act of 1976 and the AHRA carry a SCMS requirement for audio recording devices. The harm to be presumed from the mere distribution of noncompliant digital audio recording devices—which would permit unauthorized serial copying in violation of the AHRA—is precisely the same as the harm to the copyright owner that is presumed from unauthorized copying and distribution of works themselves: "a loss of control of distribution of its works."<sup>59</sup>

Interestingly, Diamond also believed that the Copyright Act and the AHRA shared the same standard for irreparable harm. Similar to the RIAA, Diamond believed that the copyright standard for preliminary injunction—when a plaintiff makes out a prima facie case of infringement, the plaintiff is entitled to a preliminary injunction without a detailed showing of irreparable harm—also

56. *Id.*

57. *Id.*

58. Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 18:20-21, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

59. *Id.* at p.19:5-9, citing *Cabinetware Inc. v. Sullivan*, 22 USPQ2d 1686, 1690 (E.D. Cal. 1991).

applied to the AHRA.<sup>60</sup> Diamond did this by citing *Chase-Riboud v. Dreamworks Inc.*, which was a copyright action entailing a situation where a presumption of irreparable injury arose.<sup>61</sup>

In addressing the relationship between the Copyright Act and the AHRA, the Court referred to the AHRA: “[n]o action may be brought under this title alleging infringement of copyright based on the manufacture. . . or importation of a digital audio recording device. . . .”<sup>62</sup> In light this statutory language, the Court stated if “the Rio is subject to the AHRA, then copyright infringement is impossible as a matter of law.”<sup>63</sup>

The RIAA also argued that traditional proof of irreparable harm was not required where a federal statute grants authority to enjoin violations. “The standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief.”<sup>64</sup> Additionally, § 1009(c)(1) of the AHRA states “the court may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain such violation[s]. . . .”<sup>65</sup> The RIAA contended that under this standard a showing of irreparable harm was unnecessary.<sup>66</sup>

The court denied the RIAA’s motion for preliminary injunction for two reasons. First, the court said that “the existence of an authorizing statute does not per se preclude consideration of

60. *RIAA v. Diamond Multimedia Systems, Inc.*, 49 USPQ2d at 1027 citing *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1335 n.9 (9<sup>th</sup> Cir. 1995).

61. 987 F. Supp. 1222, 1232 (C.D. Cal. 1997) as cited in Defendant's Opposition to Temporary Restraining Order at ¶ 9, *RIAA*, (No. 98-8247 ABC (RZx)).

62. 17 U.S.C. § 1008.

63. *RIAA*, 49 USPQ2d at 1027.

64. Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 19:22-25, *RIAA*, (No. 98 8247 ABC (RZx)), citing *Trailer Train Co. v. State Board of Equalization*, 698 F.2d 860, 869 (9<sup>th</sup> Cir. 1983).

65. 17 U.S.C. 1009(c)(1).

66. Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 20:3-5, *RIAA*, (No. 98-8247 ABC (RZx)).

traditional equitable factors, including irreparable harm.”<sup>67</sup> The court focused on one word in 1009(c)(1) which states that “the court *may* grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain such violation[s].”<sup>68</sup> The statute, however, does not use the word “must.” The RIAA interpreted the meaning of the word “may” to more closely resemble the word “must.” The court disagreed with the RIAA’s interpretation by applying a broad interpretation of the word “may” adding “[t]he court declines to depart from traditional equitable considerations in assessing the propriety of injunctive relief.”<sup>69</sup> In other words, the Court’s interpretation of “may” in § 1009 does not preclude or restrict the application of traditional forms of equitable relief.

### B. *The Rio Process*

The Rio process is the means by which a user manipulates his computer and the Rio device thereby enabling him to listen to music on the Rio player away from the computer. This process consists of two steps. In the first step, the Rio user places an audio compact disc (“CD”) in the CD-ROM drive of his computer. “Ripping” software is included in the Rio purchase.<sup>70</sup> This software “rips” a desired music track from the CD and places it on the computer hard drive in the form of an MP3 file. Ripping essentially entails three activities: 1) it rips a music track from the CD; 2) converts this music track into MP3 format; and 3) places a copy of this MP3 file on the computer’s hard drive.<sup>71</sup> The end

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67. *RIAA*, 49 USPQ2d at 1026 *citing* Miller v. National Labor Relations Board, 19 F.3d 449, 457-58 (9<sup>th</sup> Cir. 1994).

68. 17 U.S.C. § 1009(c)(1). (emphasis added)

69. Plaintiff’s Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 5:5-7, *RIAA*, (No. 98-8247 ABC (RZx)).

70. *Id.* at p. 5:3.

71. *Id.* at p. 5:2-8.

result of Step 1 is a first generation copy of the “ripped” CD track on the computer hard drive.<sup>72</sup>

The second step of the Rio process transfers the MP3 file from the computer to the Rio player. With a parallel port and cable connection from the Rio player to the computer, the user then employs Diamond’s PMP300 Manager software to place a copy of the hard drive-residing MP3 file into the Rio’s flash memory.<sup>73</sup> This creates a second generation copy of the “ripped” CD track in the Rio player.<sup>74</sup> The Rio user is now free to detach the Rio player from the computer and enjoy the music on the Rio player how, when, and where he so chooses. Thus, the AHRA issues raised in this dispute will be approached in conjunction with the Rio process. In other words, the legal issues will be addressed as they would evolve as if a user was performing Step 1 followed by Step 2 of the Rio process.

*1. Step 1 – CD to MP3 Format to Computer.*

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, statement, 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.<sup>75</sup>

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72. *Id.* Important to note is that Step 1 can also include a user downloading MP3 files from the Internet. This process also places a (first generation) copy of a CD track on the computer hard drive. Regardless of the origin, the end result of Step 1 is the same—a first generation of a CD track on the user’s computer hard drive.

73. Defendant’s Opposition to Temporary Restraining Order at ¶ 4, *RIAA*, (No. 98-8247 ABC (RZx)).

74. Plaintiff’s Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 10:6-10, *RIAA*, (No. 98-8247 ABC (RZx)).

75. 17 U.S.C. § 1001(5)(A).

A CD is probably the best example of a “digital musical recording.” Recall that Step 1 of the Rio process involved the ripping software taking a track from a digital musical recording and producing a digital reproduction of this musical recording on the computer hard drive. Thus, the first item of contention between the RIAA and Diamond was the proper identification of the digital audio reproduction on the computer hard drive.

Diamond focused on the “material object” language of § 1001(5)(A). According to Diamond, the AHRA “identifies a type of recording in part by the particular medium that carries the recording.”<sup>76</sup> A digital musical recording does not exist until the musical sounds are “fixed” in some material object, like a CD.<sup>77</sup> Furthermore, Diamond argued § 1001(5)(B)(ii) provides, that a “digital musical recording’ *does not* include a material object in which one or more computer programs are fixed.”<sup>78</sup> In other words, an MP3 file fixed on a hard drive containing other computer programs is simply not covered by the AHRA’s definition of “digital musical recording.” Because of this “computer exception” clause of the AHRA, Diamond believed that a computer hard drive cannot serve as the material object constituting a “digital musical recording” as defined by the Act.<sup>79</sup>

In response to Diamond’s position, the RIAA claimed the copy of a digital musical recording need not create another digital musical recording, the copy need only be a reproduction.<sup>80</sup> The RIAA supported this position with the AHRA’s definition of a “digital audio copied recording: “a reproduction in a digital recording format of a digital musical recording, whether that

76. Defendant’s Opposition to Temporary Restraining Order at ¶ 14, *RIAA*, (No. 98-8247 ABC (RZx)).

77. *Id.*

78. 17 U.S.C. § 1001(5)(B)(ii) (emphasis added).

79. Defendant’s Opposition to Temporary Restraining Order at ¶ 16, *RIAA*, (No. 98-8247 ABC (RZx)).

80. Plaintiff’s Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 11:7-8, *RIAA*, (No. 98- 8247 ABC (RZx)).

reproduction is made directly from another digital musical recording or indirectly from a transmission."<sup>81</sup>

Furthermore, the definition of "serial copying" also supported the RIAA's position.<sup>82</sup> The AHRA defines serial copying as "the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording."<sup>83</sup> Since the Rio process begins with a digital musical recording, a CD, and then creates a "digital reproduction of a digital musical recording" by making a copy of the CD track onto the computer hard drive, the RIAA conceded that an MP3 file on the computer hard drive is not a digital musical recording. However, the RIAA contended this was irrelevant. Under the AHRA, the first generation copy need not be a digital musical recording, it simply needs to be a "digital reproduction of a digital musical recording."<sup>84</sup>

Nowhere in the AHRA's definition of "serial copying" is it required that each and every copy in a chain of serial copies qualify as a "digital musical recording."<sup>85</sup> The purpose of the AHRA is to protect the original digital musical recording –typically a CD.<sup>86</sup> Since the MP3 files on the computer hard drive are digital reproductions of musical recordings, the material composition of the computer hard drive is not important. Rather, the nature of the duplication is what the AHRA is interested in protecting.

2. *Step 2 – MP3 File on Computer to MP3 File in Rio Player.*

Recall that in Step 2 a second generation copy of the original CD track was transferred from the computer hard drive into the Rio

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81. 17 U.S.C. § 1001(1).

82. Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 15:16-21, *RIAA*, (No. 98-8247 ABC (RZx)).

83. 17 U.S.C. § 1001(11).

84. Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 11:2-6, *RIAA*, (No. 98-8247 ABC (RZx)).

85. *Id.* at p. 11:9-11.

86. *Id.*



player's flash memory. The issue exposed in Step 2 is whether the Rio is a "digital audio recording device" within the meaning of the Act. The AHRA defines a "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. . . .<sup>87</sup>

Diamond contended the Rio could not be classified as a "digital audio recording device" because § 1001(3) requires the primary purpose of a "digital audio recording device" to be the production of a "digital audio copied recording."<sup>88</sup> 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."<sup>89</sup>

Since the RIAA conceded that the musical reproduction on the computer hard drive was not a digital musical recording, Diamond claimed that the Rio could not be considered a digital audio recording device.<sup>90</sup> According to Diamond, in order for the Rio to be a digital audio recording device within the meaning of the Act, the Rio must have the capability to duplicate an audio file directly from a digital musical recording source (i.e., a CD or Internet MP3 site).<sup>91</sup> Since the Rio player requires a computer to operate, this "direct source" component is lacking. Therefore, the Rio is not a digital audio recording device as defined by § 1001(1).

87. 17 U.S.C. § 1001(3).

88. Defendant's Opposition to Temporary Restraining Order at ¶ 13, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

89. 17 U.S.C. § 1001(1).

90. Defendant's Opposition to Temporary Restraining Order at ¶ 13, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

91. *Id.*

The RIAA argued that Diamond's assertion created a nonexistent "immediate source" requirement. "[T]here is no suggestion in the language of the statute or the legislative history that the immediate source of the copy in the Rio must be a digital musical recording.... To the contrary, the definition of 'digital audio copied recording' states that the reproduction may come 'directly from another digital musical recording or indirectly from a transmission.'"<sup>92</sup> Just as with the first generation copy of the digital musical recording, the second generation recording in the Rio player need not create a digital musical recording.<sup>93</sup> The second generation copy likewise only need be a reproduction.<sup>94</sup> Whether the first generation copy on the hard drive is a digital musical recording is irrelevant to the Act. What matters is that the second generation copy inside the Rio player is a reproduction of the CD.<sup>95</sup>

*C. § 1001(5)(B)(ii) - Computer Exception v. Primary Purpose Test.*

In addition to its "immediate source" argument, Diamond claimed that that the computer exception provision in the AHRA further immunized the Rio from the AHRA's authority. The AHRA states a "digital musical recording" does not include a material object:

in which 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

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92. Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 9:6-14, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

93. *Id.*

94. *Id.* at p. 10:12-13.

95. *Id.* at p. 10:9-13.

communication of the fixed sounds and incidental material.<sup>96</sup>

With the computer performing such an integral role in the Rio process, Diamond founded its support for this computer exception immunity in the legislative history of the AHRA.

Congress made a special exception to the Act for recordings that emanate from material objects on which computer programs are stored, such as a computer hard drive.<sup>97</sup>

[T]he AHRA deftly navigates the tension between the various competing interests by excluding computers and general purpose computer storage media (such as hard drives) from the statutory definition of "digital musical recording," 17 U.S.C. §1001(5)(B)(ii). This reflected a clear legislative intent to affect only the audio recording industry: In crafting this legislation, the committee intends to address the longstanding issue of audio recording, and only audio recording. . . . The committee has been careful to make clear that this legislation is limited to this issue and to avoid affecting other technologies or other interests even by implication.<sup>98</sup>

The computer exception to the AHRA represents a hard-fought and thoughtfully drafted compromise between the computer industry and the recording industry.<sup>99</sup>

Crucial to Diamond's position is the definition of digital musical recording in § 1001(5)(B)(ii). A "digital musical recording does not include a material object in which one or more *computer*

96. 17 U.S.C. § 1001(5)(B)(ii).

97. Defendant's Opposition to Temporary Restraining Order at ¶ 10, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

98. S. Rep. No. 102-294 at 131-32 (1992), available in 1992 WL 133198, as cited in Defendant's Opposition to Temporary Restraining Order at ¶ 12, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

99. *Id.*

*programs* are fixed.”<sup>100</sup> According to Diamond, “fixed” musical sounds on a computer hard drive are not digital musical recordings within the meaning of the AHRA.<sup>101</sup> So, when a MP3 file is downloaded onto the Rio from a computer hard drive, this does not constitute a digital musical reproduction under the AHRA because the hard drive does not qualify as a digital musical recording in the first place. “If the source being recorded is not a ‘digital musical recording’ as defined by the AHRA, the Act does not apply.”<sup>102</sup> An MP3 file fixed on a hard drive containing other computer programs is simply not covered by the Act’s definition of digital musical recording.<sup>103</sup>

The RIAA contended that § 1001(5)(B)(ii) is not a “hard drive” exception. Rather, § 1001(5)(B)(ii) was intended to exclude from the AHRA devices that have the primary purpose of copying computer programs.<sup>104</sup> For example, tape back-up programs are not covered by the AHRA even though audio tracks may be among the files backed up.<sup>105</sup> Since the Rio’s primary purpose is not to back-up computer programs, but to copy sound recordings, the Rio is not privy to the computer exception of the § 1001(5)(B)(ii). Similarly, an MP3 file residing on a hard drive is an audio file separate and distinct from the other computer programs that may reside on the hard drive.<sup>106</sup> Such a file is not immune from the AHRA because of § 1001(5)(B)(ii) exception.

Section 1001(5)(B)(ii) is a narrow exception for copies of computer programs.<sup>107</sup> The original purpose of § 1001(5)(B)(ii) was to clarify that the copying of CD-ROMs containing incidental

100. 17 U.S.C. § 1001(5)(B)(ii) (emphasis added).

101. Defendant’s Opposition to Temporary Restraining Order at ¶ 14, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

102. *Id.* at ¶ 15.

103. *Id.*

104. Plaintiff’s Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 12:5-6, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

105. Plaintiff’s Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 12:15-13:15, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

106. *Id.* at p. 15:1-5.

107. *Id.* at p. 12:15.

audio tracks was not intended to be addressed by the AHRA.<sup>108</sup> Correspondingly, § 1001(5)(B)(ii) does not apply to the Rio. An MP3 file is not a computer program and the Rio is not designed to copy computer programs.<sup>109</sup>

This distinction between the primary purpose test and the computer exception provision goes back to the definition of a digital musical recording.<sup>110</sup> In drafting the AHRA, Congress struggled to draw a line between 1) music CDs that contain incidental computer readable material and are covered under the AHRA and 2) CD-ROM disks that contain incidental audio tracks and are not covered by the AHRA.<sup>111</sup> It was important to the computer industry to make this distinction because it wanted to avoid giving AHRA immunity to the copying of their programs.<sup>112</sup> Congress therefore created the computer exception § 1001(5)(B)(ii).<sup>113</sup>

#### *D. Court Looks to Legislative History to Decide Computer Exception Debate.*

In reviewing the legislative history, the Court did not find Diamond's interpretation of the AHRA convincing. The Court agreed with the RIAA's interpretation that a digital audio recording device "must be a machine or device that has a recording function that is designed or marketed for the *primary purpose* of making a digital audio copied recording."<sup>114</sup> Moreover, the Court found no support for Diamond's "immediate source" requirement. "[N]othing in the legislative history even remotely suggests that

108. *Id.* at p. 12:5-7.

109. *Id.* at p. 15:1-5.

110. Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 12:16, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

111. *Id.* at p. 12:15-24.

112. *Id.* at p. 12:22-24.

113. *Id.* at p. 12:24-26.

114. *RIAA v. Diamond Multimedia Systems, Inc.*, 49 USPQ2d at 1029 (emphasis added).

lack of a completely independent recording function removes a device from the purview of the AHRA."<sup>115</sup> Thus, the court determined that the Rio player was a digital audio recording device within the meaning of the AHRA.

The Court agreed with the RIAA's distinction between the computer exception of § 1001(5)(B)(ii) and the primary purpose test of § 1001(3). In fact, "a personal computer whose recording function is designed and marketed primarily for the recording of data and computer programs . . . qualif[ies] as a 'digital audio recording device.'"<sup>116</sup> Since this language appeared in the context of the Senate's discussion of § 1001(3), the "primary purpose" test, and not under a discussion of the computer exception provision of § 1001(5)(B)(ii), the Court concluded that the RIAA's primary purpose interpretation of § 1001 was the more legitimate interpretation.

Finally, the Court stated that Diamond's construction of § 1001(5)(B)(ii) would "effectively eviscerate the AHRA."<sup>117</sup> Under Diamond's interpretation of the computer exception clause, "[a]ny recording device could evade AHRA regulation simply by passing the music through a computer and ensuring that the MP3 file resided momentarily on the hard drive."<sup>118</sup> The Court expressed its skepticism that Congress intended such a construction of § 1001(5)(B)(ii).<sup>119</sup> Rather, the Court found continued legislative history supporting the RIAA's position that § 1001(5)(B)(ii) "was only intended to avoid immunizing the illegal copying of computer programs."<sup>120</sup>

### *E. Serial Copy Management System.*

The RIAA contended that since the Rio player is a digital audio recording device, it must comply with the AHRA restrictions

115. *Id.* at 1030-31.

116. *Id.* at 1029 citing S. Rep. No. 102-294 at 52-53 (1992).

117. *RIAA v. Diamond Multimedia Systems, Inc.*, 49 USPQ2d at 1030.

118. *Id.*

119. *Id.*

120. *Id.*

imposed upon such devices. Specifically, the Rio player must prohibit unauthorized serial copying.<sup>121</sup> The AHRA defines “serial copying” as “the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording.”<sup>122</sup> Although the computer hard drive is not a digital audio recording device, the audio copy on the hard drive is a digital musical recording. Thus, the copies made in the Rio player are considered serial copies of this digital musical recording as defined by § 1001(11).<sup>123</sup>

The AHRA provides clear direction as to how digital audio recording devices, such as the Rio player, are to regulate serial copying. Section 1002 states:

No person shall import, manufacture, or distribute any digital audio recording 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.<sup>124</sup>

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121. Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 15:16-17, *RIAA v. Diamond Multimedia Systems Inc.*, (No. 98-8247 ABC (RZx)).

122. 17 U.S.C. § 1001(11).

123. Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 15 FN7, *RIAA v. Diamond Multimedia Systems Inc.*, (No. 98-8247 ABC (RZx)).

124. 17 U.S.C. § 1002(a).

By referring to the Senate Report, the RIAA illustrated how SCMS prevents serial copying.

The fundamental elements of SCMS are simple. SCMS will not restrict the copying of digital source material that has been encoded so as not to assert copyright protection over the sound recording and the underlying musical work. Where the digital source material has been encoded to assert such copyright protection, SCMS will not prevent the making of one or more first generation digital audio copied recordings. However, SCMS will prevent the making of second generation digital copies from such first generation digital copies. Thus, digital copies can be made directly from a commercially released compact disc or digital tape containing copyrighted material, but a second generation of digital copies cannot be made from the first generation copies.<sup>125</sup>

Hence, a digital audio recording device may make an unlimited number of copies from an original digital source but such a device is not allowed to make any copies from first generation copies.<sup>126</sup>

The RIAA claimed that the Rio player does nothing to regulate serial copying.<sup>127</sup> By implementing the Rio process to first make a copy of a music CD on the computer hard drive and then applying the Rio process to place a second, serial copy of the hard drive music copy onto the Rio player itself, the Rio user engages in serial copying. "This second generation copy in the Rio is precisely the type of serial copy that the AHRA requires devices to prohibit."<sup>128</sup>

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125. S. Rep. No. 102-294 at 64 (1992) as cited in Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at p. 16:10-16, *RIAA v. Diamond Multimedia Systems Inc.*, (No. 98-8247 ABC (RZx)).

126. Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction p. 16:17-18, *RIAA v. Diamond Multimedia Systems Inc.*, (No. 98-8247 ABC (RZx)).

127. *Id.* at p. 17:18.

128. *Id.* at p. 17:23-18:18.



In response to the RIAA's claim that the Rio player should be banned because it does not prohibit serial copying, Diamond purported a fair use defense. The intent of the AHRA was that home recording by consumers, for non-commercial use, would never constitute infringement.<sup>129</sup> Thus, the use of any device for the home recording of legally obtained original works is not an infringement.<sup>130</sup>

Traditional fair use defense was articulated in *Sony Corp. of America v. Universal City Studios*.<sup>131</sup> The *Sony* court stated that "the sale of copying equipment, like the sale of articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes."<sup>132</sup>

Correspondingly, Diamond asserted even though the Rio may be used in an infringing manner (i.e., playing MP3 files obtained from an illegal Internet MP3 pirate site), the Rio was designed for the authorized use of protected works.<sup>133</sup> Relying on *Sony*, Diamond stated that this fair use defense was justified because (1) the Rio is incapable of serial copying, (2) the Rio is not a long-term storage solution for recorded music, but a transitory storage and playback product, (3) the Rio lacks any digital audio output, and (4) it has substantial noninfringing uses.<sup>134</sup> Since the Rio has no digital output and cannot upload files to the Internet, the RIAA's concern that the Rio will encourage the unlawful copying of music is unfounded.<sup>135</sup> "Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable

129. Defendant's Opposition to Temporary Restraining Order at ¶ 19, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

130. *Id.*

131. 480 F. Supp. 429 (C.D. Cal. 1979).

132. *Id.* at 442.

133. Defendant's Opposition to Temporary Restraining Order at FN6, *RIAA v. Diamond Multimedia Systems, Inc.*, (No. 98-8247 ABC (RZx)).

134. *Id.* at ¶ 19.

135. *Id.* at ¶ 20.

of some non-infringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law."<sup>136</sup>

*F. The Court's Decision on the SCMS Question*

The Court determined that the Rio process entailed serial copying as defined by § 1001(11). The Court ruled, however, that "incorporating SCMS into the Rio appears to be an exercise in futility."<sup>137</sup> The Court assessed a Rio incorporating SCMS as "functionally equivalent to a Rio device without SCMS . . . ."<sup>138</sup>

Incorporating SCMS into the Rio. . . accomplishes nothing. The Rio could not "act [] upon . . . copyright and generation status information" because the MP3 files on the computer's hard drive do not contain this information. Similarly, it is undisputed that the Rio does not permit downstream copying because the Rio itself has no digital capability, and the removable flash memory cards cannot be copied by another Rio device. Therefore, it is nonsensical to suggest that the Rio must "sen[d] . . . copyright and generation status information."<sup>139</sup>

The Court denied the RIAA's Motion for Preliminary Injunction because the RIAA failed to demonstrate a sufficient causal relationship between Diamond's "wrongful conduct" and the RIAA's alleged injuries.<sup>140</sup> First the Court held that upon Diamond's payment of any required royalties, the only conduct on the part of Diamond that could be potentially construed as "wrongful" would be the failure to incorporate SCMS technology into the Rio.<sup>141</sup> Since the Court perceived a Rio incorporating

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136. *Id.* at FN.6 citing *Sony Corp. v. Universal City Studios, Inc.*, 480 F. Supp. at 468.

137. *RIAA v. Diamond Multimedia Systems, Inc.*, 49 USPQ2d at 1031.

138. *Id.*

139. *Id.*

140. *Id.* at 1032.

141. *Id.*

SCMS as “functionally equivalent” to a Rio without SCMS, the Court did not recognize the lack of SCMS as harmful.

Second, the Court determined that the absence of SCMS within the Rio would not “harm the [RIAA] and the public interest by dramatically stimulating the traffic in illegal MP3 files.”<sup>142</sup> Whether or not the Rio incorporated SCMS, a Rio user could still use the device to record illegally-posted MP3 files on the Internet.<sup>143</sup> Furthermore, any injury caused by the illegal use of the Rio would be compensated by the AHRA’s royalty provisions.<sup>144</sup>

Finally, the Court was sympathetic to the financial impact an injunction would have on Diamond Multimedia. The Court was convinced that an injunction would cause Diamond to suffer multi-million dollar losses.<sup>145</sup> Additionally, the Court held that since the Rio was capable of recording legitimate digital music, an injunction would deprive the public of a device with significant beneficial uses.<sup>146</sup>

## VI. IMPACT

The Court’s reasoning is problematic for two reasons. First, within the decision itself, the Court articulated the guidelines it would follow in interpreting the AHRA.

Because the Court has no precedent to guide its interpretation of the AHRA, the Court begins its analysis with the “familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the

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142. *RIAA v. Diamond Multimedia Systems, Inc.*, 49 USPQ2d at 1032.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

contrary, that language must ordinarily be regarded as conclusive."<sup>147</sup>

"Although the two-step process technically satisfies the definition of 'serial copying,' the AHRA does not directly prohibit serial copying."<sup>148</sup> This statement by the Court is confusing given the fact that § 1002(a) articulates three specific means by which a digital audio recording device can effectively implement copy controls. What is even more perplexing is the Court's use of the Senate Report to reconcile this incongruity. "[I]t is nonsensical to suggest that the Rio must 'sen[d] . . . copyright and generation status information."<sup>149</sup> The full citation reads as follows: "[d]evices that *receive* digital audio transmissions sent without copyright and generation status information shall indicate that copyright is asserted over the transmitted audio material and that the generation status is original."<sup>150</sup> A neutral interpretation of this Senate Report citation suggests that devices receiving audio transmissions without the proper copyright and generation status information must somehow compensate for the erroneously sent transmission by indicating that copyright is asserted over the material and that the generation status is original.

Thus, interpretation of the full Senate Report citation requires the Rio to comply with § 1002(a)(2) and incorporate a functional equivalent to the SCMS.

Tracing the Court's two-step approach for statutory interpretation, the Court conceded that the Rio satisfied the statutory definition of serial copying. It was the second step taken by the Court—the absence of "a clearly expressed legislative intention to the contrary"—that proves troublesome. By ignoring the first half of the Senate Report citation, the court was able to twist this statement and use it to support its position that the AHRA does not directly prohibit serial copying. In so doing, the

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147. *RIAA v. Diamond Multimedia Systems Inc.*, 49 USPQ2d at 1028 citing *Continental Cablevision, Inc. v. Poll*, 124 F.3d 1044, 1048 (8<sup>th</sup> Cir. 1997).

148. *RIAA v. Diamond Multimedia Systems, Inc.*, 49 USPQ2d at 1031.

149. *Id.* at 1031 citing S. Rep. No. 102-294 at 26 (1992).

150. *Id.* (emphasis added).

Court was able to equate a Rio without SCMS to a Rio with SCMS. Citation to the full Senate Report sentence would not have allowed the Court to accomplish such a deed.

Secondly, the Court's use of royalty payments as a remedy for damages caused by Rio's non-incorporation of SCMS causes concern. "[T]o the extent Plaintiffs are injured through an illicit use of the Rio, this is precisely the type of injury for which the royalty provisions were adopted."<sup>151</sup> Further inquiry into the legislative history would have indicated that a link between royalty payments and SCMS compliance is unsupported. In discussing the purposes behind the copy controls provision, the Senate Report states:

The prohibition on actions under section 1002 is not dependent upon compliance with other requirements under this chapter. Thus, for example, the protection granted by section 1002 applies to all digital audio recording devices and media regardless of whether applicable royalty payments have been made for a device or medium or whether a device includes SCMS.<sup>152</sup>

In other words, regardless of whether Diamond makes royalty payments on the Rio player, compliance with the SCMS provision is required. Thus, the Court's use of royalty payments as a remedy for not incorporating SCMS in the Rio is at odds with the legislative intent behind the AHRA.

In spite of the Court's incongruencies in statutory interpretation, its message is resounding. As with any analysis of statutory interpretation, the discussion always resorts to a matter of policy. The Court's ruling extends far beyond permitting the sale of the Rio player. The *Rio* decision is a clear message to the music industry: Digital music—music without a physical carrier—is the way of the future.

In a sense, the *Rio* decision is the best thing that could have happened to the recording industry. As is painstakingly clear from

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151. *RIAA v. Diamond Multimedia Systems, Inc.*, 49 USPQ2d at 1032.

152. S. Rep. No. 102-294 at 52 (1992).

the intricacies of the *Rio* case, the courts are ill-equipped to rule on the impact of emerging digital technologies on copyright law. It is the music industry as a whole that must take the initiative and grapple with the copyright issues associated with this new "carrierless" music phenomena. No longer can the recording industry look to the courts for protection of their centralized manufacturing and distribution systems.<sup>153</sup> Digital distribution of music will soon be as familiar as comfortably displayed compact discs resting on record store shelves.

In fact, the *Rio* decision has served as a "wake-up" call to the recording industry. In the aftermath of the *Rio* decision, the recording industry has already established the Secure Digital Music Initiative ("SDMI"). The SDMI is an open forum of recording industry representatives as well as companies involved in digital music.<sup>154</sup> Its purpose is to promote consumer access to quality recordings, ensure copyright protection for artists' work, and enable technology and music companies to build successful businesses.<sup>155</sup> The forum's initial meeting occurred on December 15, 1998.

Additionally, new technologies such as a2b<sup>156</sup> and Liquid Audio<sup>157</sup> are already postured to replace the MP3 format. Not only

153. Jon Pareles, *With a Click, a New Era of Music Dawns*, N.Y. Times, Nov. 15, 1998 § 2 (Art and Leisure), at 22.

154. *SDMI* (visited Mar. 26, 1999) <<http://www.riaa.com/tech/sdmimis.html>>.

155. *Id.*

156. *About the Player* (Mar. 26, 1999) <[http://www.a2bmusic.com/player\\_how2.asp](http://www.a2bmusic.com/player_how2.asp)>. The AT&T a2b music player is a new CD-quality audio product for the PC. In contrast to the CD player on a typical PC, which plays music from CDs inserted into the CD-ROM unit, the a2b music player manages and plays compressed and encrypted a2b music files stored on the disk. This product offers new technology to the music industry, opening the user's horizons to downloadable music from the a2b music Store World Wide Web site music page thereby enabling the user to turn his PC into a true music server. The key to enabling timely downloading and efficient storage of music on a PC is AT&T's audio compression technology, which reduces the size of an audio file without sacrificing sound quality. AT&T's encryption technology is utilized to ensure the security of a music download. Finally, AT&T's PolicyMaker trust system provides a unique digital identification and licensing management to protect not only the a2b user but also the recording artists.

do these technologies provide better sound quality than MP3, they also provide encryption schemes to protect authentic music copies. Such continual emergence of ever-more capable technology is the norm in the digital music arena. With this in mind, Judge Collins' *Rio* decision is perhaps best lauded for its call to the music industry itself "to create technology to regulate technology."

*Ted J. Barthel*

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157. *Products* (Mar. 26, 1999) <<http://www.liquidaudio.com/products.html>>. Liquid Audio's product family provides a complete end-to-end solution for secure music delivery over the Internet. Liquid Audio uses Dolby Digital encoding, resulting in the highest quality audio for streaming and downloading of CD-quality music on the Net. Liquid Audio employs "multi-layer security" which provides data on who owns the music and who bought the music. Liquid Audio's watermarking process can trace the origin of music even if it is recorded to analog media, such as a cassette. Bootleggers beware! Liquid Audio's encryption uses Data Security technology which ties specific music to an individual. Consumers are issued a Music Passport, allowing them to purchase a Liquid Track which licenses them to play back music on their computer and record it once to a recordable CD. Copies of Liquid Tracks cannot be distributed.