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RIAA v. Napster: The Struggle to Protect Copyrights in the Internet Age

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RIAA V. NAPSTER: THE STRUGGLE TO PROTECT COPYRIGHTS IN THE INTERNET AGE

INTRODUCTION

Copyrighted works are so fundamental to the nation's well-being that they are given explicit protection in Article I, Section 8 of the Constitution.[1] Over the years, copyright law and technology have been embroiled in constant battle. Consequently, Congress must constantly find a balance between encouraging creators of original work while aiding in the development of technologies to distribute those works.[2] Currently, the battle between technology and copyright law is taking place over the "Information Superhighway," or Internet.[3] While the Internet has expanded rapidly in the past few years, the law has been slow to preserve the protection of copyrighted works passing through the Internet.[4] The latest area to feel the effects of this struggle is the music industry.[5]

Prior to 1998, the Copyright Act of 1976[6] ("the Act") protected music by granting an automatic property right to "original works of authorship fixed in any tangible medium of expression."[7] One of the most significant changes in the music industry was the development

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1. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."). *See generally* Jonathan D. Hart et al., *Web Publishing Law: A Primer* (June 2000), *available at* Westlaw, JLR database (providing an overview of the effect of the Internet on copyright, trademark, and other literary property law).

2. *See* Wendy M. Pollack, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2452-54 (2000).

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

4. *Id.*

5. *See generally* Charles L. Simmons, Jr., *Digital Distribution of Entertainment Content . . . The Battle Lines Are Drawn*, 33 MD. B.J. 31 (2000) (chronicling copyright disputes over provision of digital music).

6. 17 U.S.C. § 101 (1994).

7. *Id.* § 102; *see also* Pollack, *supra* note 2, at 2453 (referencing 17 U.S.C. § 102 (1994)).

of technology to digitize music onto compact discs.[8] Congress enacted the Audio Home Recording Act of 1992 (AHRA)[9] in response to the recording industry's fears that digital recording technology could be exploited by the home consumer.[10] With the advent of transferring digital audio files through the Internet, Congress enacted another piece of legislation, the Digital Millennium Copyright Act of 1998[11] (DMCA), in order to extend copyright protection to works transmitted digitally over the Internet.[12]

On December 6, 1999, the Recording Industry Association of America (RIAA) filed suit against Napster, Inc. (Napster), alleging contributory and vicarious federal copyright infringement and related state law violations.[13] Napster, a small start-up Internet company, freely gives its MusicShare software to its subscribers so that they can download MP3 music files from other subscribers on the Napster system.[14] Napster allows the transfer of MP3 files by its subscribers over the Internet without payment, and claims that it "takes the frustration out of locating servers with MP3 files."[15] Napster argued that its business activities fell within a safe harbor exception to

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8. *See* Lisa M. Needham, *A Day In the Life of the Digital Music Wars:* The RIAA v. Diamond Multimedia, 26 WM. MITCHELL L. REV. 1135, 1144-45 (2000).

9. 17 U.S.C. §§ 1001-1010 (Supp. IV 1999).

10. Gosse, *supra* note 3, at 578.

11. 17 U.S.C. § 512 (1998).

12. *Id.*; *see also* David Balaban, *Music in the Digital Millennium: The Effects of the Digital Millennium Copyright Act of 1998*, 7 UCLA ENT. L. REV. 311 (2000).

13. RIAA v. Napster, Inc., No. C 99-05183 MHP, 2000 WL 573136, at *1 (N.D. Cal. May 12, 2000). RIAA sued on behalf of the plaintiff record companies which consisted of the following: A&M Records, Inc.; Geffen Records, Inc.; Interscope Records; Sony Music Entertainment, Inc.; MCA Records; Atlantic Recording Corporation; Island Records, Inc.; Motown Record Company, L.P.; Capitol Records, Inc.; La Face Records; BMG Music d/b/a the RCA Records Label; Universal Records, Inc.; Elektra Entertainment Group, Inc.; Arista Records, Inc.; Sire Records Group, Inc.; Virgin Records America, Inc.; and Warner Bros. Records, Inc. *Id.*;*see also* Recording Industry Association of America, *at* http://www.riaa.com (last visited Nov. 4, 2000) (providing information on companies it represents as well as information on the lawsuit including briefs for both sides).

14. *Napster Not Entitled to Summary Adjudication That It Satisfied DMCA Safe Harbor for Service Providers*, 17 COMPUTER LAW. 26 (July 2000).

15. *Id.*; *see also* RIAA v. Napster, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000). Napster, Inc., does not collect revenues; it charges no fee for its service. *Id.* Napster is not a non-profit organization, however; "[i]t plans to delay the maximization of revenues while it attracts a large user base. The value of the system grows as the quantity and quality of available music increases." *Id.* (citations omitted).

section 512 of the DMCA, which "exempts qualifying service providers from monetary liability for direct, vicarious, and contributory infringement and limits injunctive relief."[16] In addition, Napster asserted the affirmative defenses of fair use and substantial non-infringing use.[17] The district court did not agree and found for the plaintiffs, enjoining Napster from operating its service.[18] The Ninth Circuit Court of Appeals granted Napster a last minute reprieve from the district court's injunctive order until it could hear the case.[19] The Ninth Circuit affirmed the lower court's ruling that Napster infringed RIAA's copyrighted material.[20] However, the court remanded the case to the district court to modify the preliminary injunction in accordance with its ruling.[21]

This Comment discusses the history of copyright law as applied to digitally recorded music and the Internet. Specifically, this work discusses how the district and circuit courts applied copyright law in the Napster case.[22]

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16. *Napster*, 2000 WL 573136, at *3; *see* 17 U.S.C. § 512(a).

17. 114 F. Supp. 2d at 912.

18. RIAA v. Napster, No. C 99-5183 MHP, C 00-0074 MHP, 2000 WL 1009483, at *8 (N.D. Cal. July 26, 2000).

19. *See Fed Court Sets October Trial Date for Napster Case*, REUTERS, Aug. 29, 2000; Sue Zeidler, *Tech Giants Weigh in on Napster Controversy*, REUTERS, Aug. 28, 2000.

20. RIAA v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

21. *Id.* at 1029.

22. *See infra* Parts I-VII.

I. HISTORICAL DEVELOPMENTS

The basis of copyright law in the United States is Article I, Section 8, Clause 8 of the United States Constitution.[23] Although the Constitution grants Congress the power to bestow limited exclusive rights to creators of intellectual property, Congress must maintain a balance between public and private interests.[24] The need for this balance is based on the theory that distribution of creative works is encouraged by the exclusive rights that accompany copyright protection.[25]

Congress codified the balance between private and public interests in the Copyright Act of 1976 ("the Act").[26] The Act grants authors of original works "certain exclusive rights, including the right to: reproduce such works; to prepare derivative works; to distribute copies . . . to perform or display the works publicly; and to perform sound recordings publicly by means of a digital audio transmission."[27] The Act also sets out the limitations to those exclusive rights, including duration, subject matter, scope, and causes of action.[28]

Most musical works involve multiple copyrights, including both the musical composition and the recording, which is a physical embodiment of a performance of the composition.[29] Individuals are directly liable for copyright infringement when they copy material protected by a valid copyright; however, the burden is on the copyright holder to prove the infringement.[30]

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23. U.S. CONST. art. I, § 8, cl. 8; *see also* Rebecca J. Hill, *Pirates of the 21st Century: The Threat and Promise of Digital Audio Technology on the Internet*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 311, 321 (2000).

24. Hill, *supra* note 23, at 321.

25. *Id.*

26. 17 U.S.C. § 101 (1994); *see* Hill, *supra* note 23, at 322.

27. Hill, *supra* note 23, at 322.

28. 17 U.S.C. §§ 101-102 (1994).

29. William Sloan Coats et al., *Streaming Into the Future: Music and Video Online*, 20 LOY. L.A. ENT. L. REV. 285, 292 (2000).

30. Ariel Berschadsky, RIAA v. Napster*: A Window Onto the Future of Copyright Law in the Internet Age*, 18 J. MARSHALL J. COMPUTER & INFO. L. 755, 764 (2000).

There are two defenses to direct copyright infringement: the common law fair use doctrine and the Audio Home Recording Act of 1992 (AHRA).[31] Under the fair use doctrine, a defendant will not be liable if they can show that:

> [The] use was reasonable based on: (1) the purpose and character of the use (i.e., the more commercial it is, the less fair); (2) the nature of the copyrighted work (i.e., the more creative it is and the less informational, the less fair); (3) the amount and substantiality of the portion used; and (4) the effect of unrestricted and widespread conduct of the sort engaged in by the defendant on the plaintiff's potential market for the work.[32]

The AHRA better defines the fair use doctrine, outlining that no lawsuit can be brought "alleging infringement of copyright based on the . . . noncommercial use by a consumer of [a digital audio recording] device or medium for making digital or analog musical recordings."[33]

The pivotal case concerning the fair use doctrine is *Sony Corp. of America v. Universal City Studios, Inc.*[34] Plaintiffs, Universal City Studios and Walt Disney Company, alleged that defendant Sony Corporation, the manufacturer of the Betamax videotape recorder, was liable for contributory copyright infringement and that home taping of copyrighted television programs violated Universal's and Disney's copyrights on these programs.[35] Sony argued the fair use

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31. *Id.*
32. *Id.*
33. Berschadsky, *supra* note 30, at 765 (quoting 17 U.S.C. § 1008 (2000)) (alteration in original).
34. 464 U.S. 417 (1984).
35. *Id.* at 420-21.

doctrine as an affirmative defense, and the Supreme Court agreed, holding that home taping for private usage was fair use and did not infringe plaintiffs' copyrights.[36]

Following the Court's decision in *Sony* and the development of new digital recording techniques, artists feared that the ability to capture virtually perfect copies of their recordings would harm sales of legitimate recordings.[37] In response to these concerns, Congress enacted the AHRA.[38]

The AHRA has three main parts.[39] The first part states that no infringement action may be brought if use of the digital or analog recording or device is for noncommercial use.[40] The second part requires manufacturers and distributors of digital audio recording devices to give a percentage of the transfer cost to a royalty fund that is then distributed to copyright owners in order to offset their loss of revenue.[41] Last, the AHRA requires that each digital recording device carry the Serial Copy Management System, which prevents digital copies being made from the original digital copy.[42]

The AHRA never addressed the coming expansion of the Internet and this limitation became evident in the pivotal case of *RIAA v. Diamond Multimedia Systems*.[43] The basis for the lawsuit was Diamond Multimedia's Rio, a portable MP3 player.[44] MP3 compression technology significantly decreases the size of computer music files, which are then downloaded off the Internet and transported with the Rio portable player.[45] RIAA sued Diamond for copyright infringement under several sections of the AHRA and

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36. *Id.* at 454-56.
37. Pollack, *supra* note 2, at 2459-62.
38. 17 U.S.C. §§ 1001-1010 (1992); Pollack, *supra* note 2, at 2461.
39. Pollack, *supra* note 2, at 2461.
40. 17 U.S.C. § 1008 (1992).
41. *Id.* §§ 1003-1006.
42. *Id.* § 1002.
43. 180 F.3d 1072 (9th Cir. 1999). *See generally* Needham, *supra* note 8 (recognizing that Congress did not foresee the eruption of digital music transmission when it passed the AHRA in 1992).
44. *Diamond Multimedia*, 180 F.3d at 1073.
45. *Id.* at 1073-74.

sought to enjoin the manufacture and distribution of the Rio player.[46] The court refused to grant the injunction, stating that computer hard drives, to which the MP3 files were downloaded, were not primarily limited to making digital audio recordings and thus were not "digital audio recording devices" under the AHRA.[47] Furthermore, the court noted that the Rio player was for noncommercial, personal use and fell under the noninfringement provision of the AHRA.[48] The court confirmed a huge omission in the AHRA: if the files from portable MP3 players such as the Rio first pass through a computer hard drive, they are legal.[49]

In October 1998, Congress enacted the Digital Millennium Copyright Act (DMCA), which increased copyright protection for material online but also limited liability for Internet service providers found vicariously liable for copyright infringement.[50] Currently, the DMCA is the only law pertaining to Internet copyright infringement.[51] However, instead of protecting the copyright holder's interests, the DMCA merely protects service providers from liability when its users infringe copyright protected works.[52] The DMCA only protects the copyright holder "when the service provider is an active or knowing participant in the transmission of illegally pirated works."[53] These new copyrighted laws, as well as the old laws, were

46. *Id.* at 1073.
47. *Id.* at 1078.
48. *Id.* at 1079.
49. Needham, *supra* note 8, at 1159.
50. 17 U.S.C. § 512 (1998).
51. Kristine J. Hoffman, Comment, *Fair Use or Fair Game? The Internet, MP3 and Copyright Law*, 11 ALB. L.J. SCI. & TECH. 153, 169 (2000).
52. *Id.*
53. *Id.*

seriously tested in the first major Internet music copyright infringement case.[54]

II. PUBLIC OPINION

Few people waited for the courts to rule before expressing their opinions on the Napster controversy.[55] Napster and similar outfits are usually viewed as either novel ways to share files or, conversely, as simple means to steal files.[56]

The groups supporting Napster are copyright law professors;[57] a physicians' association;[58] and musical artists as diverse as Chuck D (of Public Enemy),[59] Limp Bizkit,[60] Radiohead,[61] Marianne Faithful,[62] and the Offspring.[63]

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54. *See infra* Parts II-VII.

55. Catherine Greenman, *Taking Sides in the Napster War; With Copyright Law at Issue, Sites Battle for the Ears and Minds of Music Lovers*, N.Y. TIMES, Aug. 31, 2000, at G1.

56. *Id.* (listing different websites for each side: MP3-Sharing sites: www.napster.com, www.scour.com, www.gnutella.wego.com, and www.macster.com; Pro-Napster sites: www.napsterfreedom.com, www.savenapster.net, and www.members.linkopp.com/napster, http://www.napster.com, http://www.napster.com; Anti-Napster sites: www.hand-2-mouth.com/cuckooegg, www.stopnapster.com; and other sites: www.fairtunes.com, www.freelisten.com, and www.boycottmetallica.org).

57. Ron Harris, *Groups Support Napster File-Sharing*, AP NEWSWIRES, Aug. 26, 2000 (reporting that eighteen law school professors, from schools such as New York University, Georgetown, and Boston College, filed amicus briefs to the court stating that it was "impractical for any file-sharing service to operate within the constraints imposed" by the district court ruling, and that "[o]nly when the technology is not capable of legitimate uses does it make sense to outlaw it"); *see also* Alex Pham, *Technology & Innovation; Third of US Colleges Block Out Napster*, BOSTON GLOBE, Aug. 31, 2000, at C6.

58. *See* Harris, *supra* note 57 (stating that the Association of American Physicians and Surgeons argued that the shutdown of Napster could lead to dire consequences for medical web sites); *see also* Hiawatha Bray, *Technology & Innovation / Upgrade; Thievery's Friends*, BOSTON GLOBE, Aug. 31, 2000, at C1 (reporting that the Eagle Forum, a conservative organization that helped block passage of the Equal Rights Amendment, joined the Association of American Physicians and Surgeons in writing an amicus brief supporting Napster).

59. James Harding, *The Digital Revolution is Reshaping Hearth and Home*, FIN. TIMES (London), Sept. 11, 2000, at 2.

60. John Gibeaut, *Facing the Music: You Say You Want a Revolution? Well, the Napster Case and Others Herald the Beginning of a Technological Rebellion that May Alter Traditional Concepts of Copyright Law*, A.B.A. J., Oct. 2000, at 104 (noting that Napster sponsored a free Limp Bizkit summer tour).

61. Christopher John Farley, *Radiohead: Reinventing Rock*, TIME, Oct. 9, 2000, at 105 (quoting lead singer Thom Yorke upon learning that Radiohead's new compact disc *Kid A* was leaked to

Artists supporting the RIAA include Aimee Mann, Alanis Morissette, Lou Reed, and Scott Stapp (lead singer/lyricist of Creed).[64] Also, the United States Copyright Office and the United States Justice Department filed briefs siding with the recording industry.[65]

Other companies expressed their concern that the injunction against Napster took things too far.[66] Companies such as Intel, 3Com,

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Napster: "[t]he cool thing about Napster is that it encourages bootlegging, it encourages enthusiasm for music in a way that the music industry has long forgotten to do").

62. *Support Artists Who Support Napster*, Napster.com, *at* http://www.napster.com/Speakout/artists.html (last visited Sept. 17, 2000).

63. Tamara Conniff, *Pro-Napster Rock Band Offers Its CD Free on Net*, CHI. SUN-TIMES, Sept. 19, 2000, at 37 (noting that the band the Offspring, who are on the Sony label, are outspoken in defending Napster and plan to offer its entire new album for free downloading via the Internet). *But see Offspring Nix Plan to Offer Free Download of New LP*, SonicNet.com, *at* www.sonicnet.com/news/digital (last visited Oct. 16, 2000) (noting that, after planning to sue each other, the band the Offspring and its label, Sony Music, came to an agreement where the Offspring would not offer its new release for free download over the Internet, but will offer a free MP3 download of its new single).

64. *The Napster Lawsuit: General Digital Music Questions*, RIAA.com, *at* http://www.riaa.com/Napster.cfm (last visited Sept. 17, 2000). Other artists opposing Napster include Art Alexakis of Everclear, who stated that "it's taking money out of my kid's mouth . . . It's inherently wrong. It's stealing." *Id.* Matt Johnson of The The argues "[m]any artists have spent their lives honing their craft and now some anonymous person in a little dark room with a computer somewhere is able to collate that lifetime's work and pass it around the world for free." *Id.* Alanis Morrissette contends, "[t]he artists [sic] should be the person who's ultimately in a position to decide when, where, and how something should be shared with whomever they choose to share it with." *Id.* Lou Reed states, "[a]rtists, like anyone else, should be paid for their work." *Id.* Aimee Mann comments, "I don't have a big giant record deal . . . A *Newsweek* article said 'It's the kids versus the suits.' Well it's not really that—it's kids versus the damn musicians, the people you supposedly like, whose music you listen to." *Id.*; *see also* Jeff Wise, *Adult Entertainment Industry Looks to File-Sharing*, CNN.com, *at* http://cnn.com/2000/TECH/08/23/nearly.free.sex.idg/index.html (last visited Aug. 23, 2000) (noting that the adult film industry has two different views: (1) file-sharing eventually will lead to computer users downloading entire features and infringing on their copyrights; and (2) the file sharing will increase interest in the product and help sales).

65. Sue Zeidler, *Federal Government Files Brief in Napster Case*, REUTERS, Sept. 9, 2000 (reporting that the agencies believed Napster's defense defied federal copyright law).

66. *See generally* Benny Evangelista, *Bigger Battle Brewing: Napster-RIAA Court Case Becoming Goliath vs. Goliath*, S.F. CHRON., Sept. 18, 2000, at C1.

and Microsoft viewed the Napster controversy as more than a battle over what music can be downloaded over the Internet, but rather a battle over the "future development and sale of consumer devices and technologies."[67] Consumer electronics giants Microsoft, Hewlett-Packard, IBM, 3Com, and Nintendo, represented by a trade group, filed a friend-of-the-court brief asking that the Napster injunction be thrown out.[68] Furthermore, the Consumer Electronics Association (CEA), a trade group representing over 600 technology and consumer electronics firms, also decried the injunction.[69] Some believe the *Napster* case may be characterized as the sequel to the *Sony* case.[70] The CEA brief argued that Judge Patel, from the district court, misapplied the *Sony* case when she ruled against Napster.[71] According to the brief, the ruling "'has expanded copyright in a way that unreasonably threatens the manufacture and supply of digital technology equipment and software and hampers development and use of new Internet architectures.'"[72]

However, for every group supporting Napster, there is another group opposing the company.[73] For example, the Business Software Alliance (BSA) also filed an amicus brief arguing that the preliminary injunction be upheld.[74] The BSA was formed by CEA members Microsoft and Apple in order to fight software piracy.[75] The BSA understands that "'peer-to-peer technology is inherently a promising and positive technological development and should not be condemned . . . however, the courts have the authority . . . to enjoin illegal uses of this or any other technology that undermine the

67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* Ironically, Sony is essentially an adversary against itself in that Sony Electronics, a CEA member, is for Napster, while Sony Music Entertainment, Inc., is one of the major record labels suing Napster under the RIAA. *Id.*
72. Evangelista, *supra* note 66, at C1 (summarizing EA arguments).
73. *See id.*
74. *Id.*
75. *Id.*

statutory and constitutional protections afforded to copyright holders.'"[76]

III. *RIAA V. NAPSTER*: THE DISTRICT COURT DECISION

On December 6, 1999, RIAA filed suit alleging contributory and vicarious federal copyright infringement and similar state law violations by Napster.[77] Furthermore, RIAA alleged that Napster users engaged in the complete reproduction and distribution of copyrighted works, constituting direct infringement.[78] Napster is a small Internet start-up based in San Mateo, California, that provides free MusicShare[79] software for its Internet users to download.[80] After downloading the software, users can share MP3 files with other people on the Napster system.[81]

Downloading files on the Napster system involves the following procedures: the user downloads the MusicShare software in order to gain access to the files on Napster's system; the MusicShare software

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76. *Id.*

77. RIAA v. Napster, Inc., No. C 99-05183 MHP, 2000 WL 573136, at *1 (N.D. Cal. May 12, 2000).

78. *See* RIAA v. Napster, 114 F. Supp. 2d 896 (N.D. Cal. 2000); *see also* Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1371 (N.D. Cal. 1995) (noting that secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party).

79. Jeremy U. Blackowicz, *Legal Update:* RIAA v. Napster: *Defining Copyright for the Twenty-First Century?*, 7 B.U. J. SCI. & TECH. L. 182, 184 (2001) (noting that the software Napster utilizes relies on "peer-to-peer" architecture which "decentralizes the information sharing process and allows each user to both supply and access information rather than rely on the traditional method of using large centralized information servers to supply the requested files").

80. *Napster*, 2000 WL 573136, at *1. *See generally* Napster Website, *at* http://www.napster.com (last visited Nov. 4, 2000) (showing how to download MusicShare software and how to use Napster's system).

81. *Napster*, 2000 WL 573136, at *1.

connects the user to Napster's system and one of about 150 servers in operation; the software reads the MP3 files the user supplies to the system and adds the list to a Napster directory; the user enters which song he wants to locate and the Napster system searches the directory for the files; and when the user decides which song to hear he clicks on the name of the file and the Napster server connects the user and host users to enable the download.[82]

A. Motion for Summary Judgment

On May 5, 2000, Napster moved for summary judgment, arguing that its system was protected by subsection 512(a) of the DMCA.[83] Napster was eligible for exemption from liability if five conditions were satisfied:[84]

> (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
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> (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
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> (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;
>
> (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than the anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such

82. *Id.*
83. *Id.* at *3.
84. *Id.*

> anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
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> (5) the material is transmitted through the system or network without modification of its content.[85]

Napster argued that it met the definition of "service provider" in the section 512(a) safe harbor exception.[86] First, Napster argued that it met the definition of service provider by enabling users' hard drives to connect and transfer MP3 files from the host's hard drive through the Napster browser and the Internet to the users' Napster browser and hard drive.[87] Second, Napster argued that it did not choose the communication points and the MP3 files to be downloaded.[88] And third, Napster argued that it never modified the content of the files.[89]

Napster claimed that because it met the "service provider" definition it only needed to satisfy the five remaining requirements to prevail.[90] In order to show compliance with the remaining requirements, Napster argued that only the user transmitted the files; files were downloaded automatically without interruption from Napster; Napster did not select who received the MP3 files; and the content was never modified during the download.[91]

RIAA argued that subsection 512(n) required the court to look at each of Napster's functions independently, and that not all of the

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85. 17 U.S.C. § 512(a) (1998).
86. *Napster*, 2000 WL 573136, at *3.
87. *Id.* at *1.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at *4.

functions are protected by the safe harbor exception.[92] Section 512(n) states:

> Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.[93]

RIAA argued that, under subsection 512(n), Napster's operations did not receive complete protection under section 512(a) and that it "consider[ed] the focus of the litigation to be Napster's function as an information location tool—eligible for protection, if at all, under the more rigorous subsection 512(d)."[94] RIAA contended that Napster's system is not a "passive conduit" under the language of subsection 512(a).[95] This interpretation would exempt Napster only under subsection 512(d), "which applies to service providers 'referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link.'"[96] This subsection has stricter requirements because of the active assistance to the user.[97]

Napster argued that 512(a) applied instead of 512(d), because the "location tools it provides are incidental to its core function of automatically transmitting, routing, or providing connections for the MP3 files users select."[98] Napster also argued that even if the court

92. *Napster*, 2001 WL 573136, at *4.
93. 17 U.S.C. § 512(n) (1998).
94. *Napster*, 2000 WL 573136, at *5.
95. *Id.*
96. *Id.* (citing 17 U.S.C. § 512(d)).
97. *Napster*, 2000 WL 573136, at *5.
98. *Id.*

decided that 512(d) controlled, the court should have found that other parts of Napster's service were protected under 512(a).[99]

The district court noted that Napster did perform some information location services and that the Napster server held a temporary list of files that the user wanted to share until that user logged off the Napster server.[100] Edward Kessler, Napster's Vice President of Engineering, admitted that Napster could function as an "information location tool" since the user could find a particular song or artist by searching Napster's index.[101] Napster also had a system that notified users when others with whom they might want to communicate had logged on to the system.[102] Napster argued, however, that the search function was incidental to the central function of its system—transmitting MP3 files—and that therefore 512(a) should have been applied by the court.[103]

The district court noted that Napster's best argument concerning subsection 512(d) was that according to 512(n), "a service provider could enjoy the 512(a) safe harbor even if its [Internet search functions] were also protected by (or failed to satisfy) subsection 512(d)."[104] Subsection 512(n) states: "[w]hether a service provider qualifies for the limitation on liability in any one of those subsections . . . shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection."[105] In other words, finding one part of the system not

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Napster*, 2000 WL 573136, at *5.
104. *Id.* at *6.
105. 17 U.S.C. § 512(n) (1998).

contained in the scope of subsection 512(a) would not preclude *other* parts of the system from meeting subsection 512(a) requirements.[106]

The district court held that because the parties disputed material issues concerning the operation of Napster's index, directory, and search engine, those functions were not peripheral to the alleged infringement and should have been analyzed separately under subsection 512(d).[107] Despite arguing that the search and index functions were incidental to the transferring of MP3 files, Napster advertised that its system allowed users to easily locate songs online without having to scroll through millions of unknown artists.[108] The district court noted that these statements were essentially an admission that the search and index functions were crucial to its marketability.[109]

The district court stated that the potential applicability of subsection 512(d) did not completely foreclose use of the 512(a) safe harbor as an affirmative defense. The district court turned its focus to Napster's eligibility for protection under 512(a), noting that if 512(a) applied to one of Napster's functions, it would not indicate that Napster had complete protection under the DMCA.[110]

RIAA argued that Napster's functions were not passive, and therefore, were ineligible for protection under 512(a).[111] The words "conduit" or "passive conduit" do not appear in the plain language of the statute and are only found in the legislative history of the DMCA; however, RIAA argued that use of the word "conduit" in the legislative history explains the meaning of the subsection 512(a) phrase "through a system."[112] Napster claimed that it never transmitted the MP3 files through its servers.[113]

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106. *Napster*, 2000 WL 573136, at *6.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Napster*, 2000 WL 573136, at *6.
113. *Id.* at *7.

Although the Internet is not considered a "system or network controlled or operated by or for the service provider," Napster argued that its overall system consisted of servers and MusicShare browsers on users' computers.[114] Napster also argued that its system included search engine functions on its users' computers.[115] RIAA argued that (1) the browsers were not on the Napster system, or (2) the Napster system included the browsers as well as the users' computers.[116]

The district court held that the MP3 files were not transmitted "'through' the system" within the scope of 512(a), noting that the legislative history shows that Congress intended the safe harbor exceptions to apply only to service providers acting as a "conduit" for the communications of others.[117] The court ruled that Napster could not be considered "a conduit for the connection itself, as opposed to the address information that makes the connection possible."[118] The Napster system started the connections, but the connections did not go through the system within the meaning of 512(a).[119] Since "Napster [did] not transmit, route, or provide connections through its system," it was not protected under the 512(a) safe harbor.[120]

Additionally, Napster was not eligible for summary adjudication because it failed to implement a policy to terminate the accounts of

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114. *Napster*, 2000 WL 573136, at *7; *see* 17 U.S.C. § 512(a) (1998).
115. *Napster*, 2000 WL 573136, at *7.
116. *Id.*
117. *Id.* at *8.
118. *Id.*
119. *Id.*
120. *Id. But see* Karl Taro Greenfeld, *Meet the Napster*, TIME, Oct. 2, 2000, at 62-63 (noting that Gnutella, a similar Internet music service, does not use a centralized server like Napster, and would be difficult to stop "because Gnutella files look like ordinary web traffic"); Richard Morochove, *Gnutella*, TORONTO STAR, Aug. 31, 2000 (stating that although Gnutella operates without a centralized server, it actually is more vulnerable than previously thought and RIAA need sue only a few well-chosen servers to effectively shut the service down).

repeat copyright infringers.[121] Furthermore, even if Napster satisfied the requirements of subsection 512(a), subsection 512(i) sets out additional criteria for any DMCA safe harbor.[122] Subsection 512(i) outlines:

> The limitations on liability established by this section shall apply to a service provider only if the service provider -
>
> (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and
>
> (B) accommodates and does not interfere with standard technical measures.[123]

RIAA argued that Napster did not meet these requirements for two reasons.[124] First, RIAA offered a deposition from Edward Kessler, Napster's Vice President of Engineering, that indicated Napster did not have this written policy to give notice to its users until February 7, 2000—two months after the filing of the lawsuit.[125] Second, Napster allowed repeat infringers to access the system and turned "a blind eye to the identity of its users . . . because their anonymity allow[ed] Napster to disclaim responsibility for copyright infringement."[126]

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121. *Napster*, 2000 WL 573136, at *8; *see also* 17 U.S.C. § 512(i)(A) (1998) (mandating "reasonable" implementation of such a policy).

122. *Napster*, 2000 WL 573136, at *8 (citing 17 U.S.C. § 512(i)).

123. 17 U.S.C. § 512(i). "Congress did not intend to require a service provider to 'investigate possible infringements, monitor its service or make difficult judgments as to whether conduct is or is not infringing,' but the notice requirement is designed to insure that flagrant or repeat infringers 'know that there is a realistic threat of losing [their] access.'" *Napster*, 2000 WL 573136, at *9 (quoting H.R. REP. 105-551(II) (1998)) (alteration in original).

124. *Napster*, 2000 WL 573136, at *9.

125. *Id.*

126. *Id.*

Napster claimed that subsection 512(i) does not specify when the policy had to be put into effect.[127] The district court did not agree, stating that Napster's argument, while accurate on its face, "defie[d] the logic of making formal notification to users or subscribers a prerequisite to exemption from monetary liability."[128] The court stated that even though Napster put this policy into effect after the start of the lawsuit, that fact should not have prevented the plaintiffs from seeking monetary relief for past infringements.[129] In addition, the court agreed with plaintiffs that Napster never implemented a policy to refuse access to repeat offenders.[130] The court stated that as long as Napster was formally aware of infringing activity, it should have blocked the infringer's access to the service; however, Napster did not block its infringing users.[131] For these two reasons, the court agreed that Napster's compliance policy was not timely or reasonable within the language of subsection 512(i)(A).[132] On July 26, 2000, Chief Judge Marilyn Patel enjoined Napster from "causing or assisting or enabling or facilitating or contributing to the copying, duplicating or otherwise other infringement upon all copyrighted songs, musical compositions or material in which plaintiffs hold a copyright."[133]

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127. *Id.*
128. *Id.*
129. *Id.*
130. *Napster*, 2000 WL 573136, at *9.
131. *Id.* Napster, upon information of infringing activity, formally blocked only a user's password; the court would have preferred blockage of an IP address to prevent simple evasion through another password. *See id.*
132. *Id.* (referring to 17 U.S.C. § 512(i)(A) requirement that there be a "reasonable" implementation of such a policy).
133. RIAA v. Napster, Inc., No. C 99-5183 MHP, C 00-0074 MHP, 2000 WL 1009483, at *8 (N.D. Cal. July 26, 2000).

B. Motion for Preliminary Injunction

On August 10, 2000, the Federal District Court for the Northern District of California ruled on RIAA's motion for preliminary injunction against Napster.[134] Chief Judge Patel held that: (1) RIAA made a prima facie case for direct infringement; (2) the uploading and downloading of music files by Napster users was not fair use; (3) RIAA demonstrated a likelihood of success on its claims of contributory and vicarious liability; and (4) RIAA was entitled to injunctive relief.[135]

1. Direct Infringement

In order to show "contributory or vicarious copyright infringement . . . a plaintiff must show direct infringement by a third party."[136] The court noted that "virtually all Napster users engage in the unauthorized downloading or uploading of copyrighted music."[137] Therefore, the court found that RIAA established a prima facie case of direct copyright infringement.[138]

2. Contributory Infringement

A contributory infringer is "'one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.'"[139] Actual knowledge of the infringement is not a requirement; courts find liability where defendants have "reason to know of the third party's direct infringement."[140] RIAA provided damaging evidence that Napster

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134. RIAA v. Napster, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

135. *Id.* at 900-01.

136. *Id.* at 911; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984).

137. *Napster*, 114 F. Supp. 2d at 911 (noting that more than seventy percent of the copyrighted files on Napster may belong to RIAA).

138. *Id.*

139. *Id.* at 918 (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

140. *Id.*

was aware of the infringing activity.[141] Also, RIAA provided Napster with direct notice that more than 12,000 of its copyrighted works were being infringed.[142]

Napster relied on dicta in a case from the same district court stating that if an Internet service provider "cannot reasonably verify a claim of infringement . . . the operator's lack of knowledge [is] reasonable and there will be no liability for contributory infringement."[143] The court dismissed this argument, stating that "Napster is not an Internet service provider that acts as a mere conduit for the transfer of files" but "offers search and directory functions specifically designed to allow users to locate music, the majority of which is copyrighted."[144] Because the evidence from RIAA was so damaging on the issue of knowledge of infringement, the court agreed that RIAA would have a likelihood of success on its contributory copyright infringement claims.[145]

3. Vicarious Copyright Infringement

Vicarious copyright infringement liability attaches when a defendant "'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.'"[146] The court found that Napster went out of its way to point out its

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141. *Id.* A document from Napster co-founder Sean Parker states that the company needs to remain ignorant of the users names because the users are trading pirated music. *Id.*

142. *Id.*

143. *Napster*, 114 F. Supp. 2d at 918-19 (quoting Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1374 (N.D. Cal. 1995)).

144. *Id.* at 919.

145. *Id.* at 920.

146. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996) (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

improved methods of blocking out infringing users.[147] This, in the court's opinion, was "tantamount to an admission that [Napster] can, and sometimes does, police its service."[148]

As to the issue of financial interest, the court found that RIAA showed there was a reasonable likelihood that Napster had a direct financial interest in the infringement.[149] The court noted that a finding of direct financial benefit does not require a showing of earned revenue as long as Napster would receive economic benefits from allowing the infringing activity.[150] Internal documents from Napster revealed that it received revenues correlating with increases in the number of Napster users.[151]

Napster argued that it does not ignore infringement as a matter of policy.[152] Furthermore, it stressed that its users were drawn to the service by its non-infringing uses.[153] The court dismissed this argument, as Napster failed to offer any factual evidence to support that claim.[154] Furthermore, the court dismissed the contention that users were drawn to the service for the non-infringing uses, as Napster also argued that the injunction on infringing uses would put it out of business.[155] The court noted that "[i]f many of [Napster's] commercially significant uses were non-infringing, an injunction limited to unlawful activity would not have such a dire impact."[156]

147. *Napster*, 114 F. Supp. 2d at 920.

148. *Id.* at 921. The court also noted that "a defendant need not exercise its supervisory powers to be deemed capable of doing so." *Id.*

149. *Id.*

150. *Id.; see also* Major Bob Music v. Stubbs, 851 F. Supp. 475 (S.D. Ga. 1994) (holding that a bar received direct financial benefits from the unauthorized performance of music).

151. *Napster*, 114 F. Supp. 2d at 921 (noting that the Napster service attracts more users with the lure of higher quality music for free).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 921-22.

156. *Id.* at 922 (noting that the "ability to download myriad popular music files without payment seems to constitute the glittering object that attracts Napster's financially-valuable user base").

Therefore, the court agreed that RIAA would likely succeed on a claim of vicarious infringement.[157]

4. Affirmative Defenses of Fair Use and Substantial Non-Infringing Use

Napster asserted the affirmative defense of fair use, which is outlined in section 107 of the Copyright Act.[158] Section 107 provides a non-exhaustive list of factors for determining whether activities comprise fair use.[159] These factors 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.[160]

In reviewing all the fair use factors, the court determined that Napster users were not fair users.[161]

Under the first factor, the district court looked to whether the use was for profit and also whether the use transformed the work.[162]

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157. *Napster*, 114 F. Supp. 2d at 922.
158. *Id.* at 912.
159. *Id.*
160. *Id.* (citing 17 U.S.C. § 107).
161. *Napster*, 114 F. Supp. 2d at 912-17.

According to the court, uploading and downloading MP3 files, while not usually considered a commercial activity, is not considered normal personal use.[163] The court found that the fact that Napster users receive the music for free, instead of purchasing the music by traditional means, suggested that there are distinct "economic advantages" in using Napster.[164] Therefore, there would be no fair use under the first factor.[165]

Under the second factor, the court found that the creative nature of copyrighted songs, musical compositions, and sound recordings militated against a finding of fair use.[166] There was no dispute that Napster users uploaded and downloaded entire pieces of music; therefore, the amount copied was quite substantial.[167]

However, "wholesale copying [of a copyrighted work] for private home use" does not contravene a finding of fair use unless the use "is likely to adversely affect the market for the copyrighted material."[168] Here, the court found that RIAA provided evidence that Napster harmed the market in two ways: (1) it reduced CD sales among college students, and (2) it prevented RIAA from exploiting the emerging digital music downloading market.[169] Accordingly, the

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162. *Id.* at 912; *see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); *see also* Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998) (holding that merely re-transmitting an original work over a different medium, e.g., a radio broadcast over a phone line, is not transformative); UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (holding that a transfer of an audio CD into the MP3 format is not transformative).

163. *Napster*, 114 F. Supp. 2d at 912.

164. *Id.*

165. *Id.*; *cf.* Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994) (finding no fair use because copying to save customers the expense of buying authorized versions is commercial in character); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir. 1994) (holding that for-profit organization making unauthorized copies of science journals and collecting them for business use was indirectly commercial in nature and not fair use).

166. *Napster*, 114 F. Supp. 2d at 913; *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985).

167. *Napster*, 114 F. Supp. 2d at 913.

168. *Id.*; *see also* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 449-50 (1983).

169. *Napster*, 114 F. Supp. 2d at 913.

court held that the fourth factor weighed against a finding of fair use.[170]

Furthermore, the court distinguished the Napster situation from that in *Sony*, stating that the Napster system provided only minimal non-infringing uses.[171] The court noted that here, unlike the time-shifting of free television broadcasts in *Sony*, Napster facilitated the distribution of infringing MP3 files by its users.[172] Napster also continued to control user access, instead of merely manufacturing and selling a product.[173] Therefore, considering the section 107 factors, the district court did not find fair use by Napster users.[174]

5. First Amendment Challenge

Napster argued that the proposed injunction constituted "prior restraint on its free speech, as well as that of its users and the unsigned artists that depend upon its service."[175] Napster based its argument on the fact that its directory of files contained no copyrighted works.[176] The court noted that "[a]lthough an overbroad injunction might implicate the First Amendment, free speech concerns 'are protected by and coextensive with the fair use

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170. *Id.*
171. *Id.*
172. *Id.*; *see also* Blackowicz, *supra* note 79, at 195.
173. *Id.*; *see also* Blackowicz, *supra* note 79, at 195.
174. *Napster*, 114 F. Supp. 2d at 913.
175. *Id.* at 922.
176. *Id.*; *see also* Princeton Cmty. Phone Book, Inc. v. Bate, 582 F.2d 706, 710-11 (3d Cir. 1978) (holding that directories are offered First Amendment protection).

doctrine.'"[177] However, in this case, the court found that RIAA did not seek to enjoin the fair uses of the Napster service.[178]

Napster argued that the difficulty in "separat[ing] the infringing and non-infringing aspects of its service" would essentially force it to remove all music from the directory, including music RIAA did not possess.[179] RIAA contended that, even with the requested injunction in place, there were still viable methods of limiting the Napster service to sharing authorized music files.[180]

Even assuming Napster would be unable to separate the infringing uses from the non-infringing uses, the court found Napster's First Amendment argument meritless.[181] "Courts will not sustain a First Amendment challenge where the defendant entraps itself in an 'all-or-nothing predicament.'"[182] Therefore, the court denied Napster's First Amendment challenge.[183]

6. District Court Ruling on Motion for Preliminary Injunction

The district court granted RIAA's motion for preliminary injunction, and enjoined Napster from "engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing [RIAA's] copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner."[184] However, the Ninth Circuit Court of Appeals, in a surprising decision, granted Napster a last minute

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177. *Napster*, 114 F. Supp. 2d at 922 (quoting Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 74 (2d Cir. 1999).

178. *Id.*

179. *Id.*

180. *Id.* (noting that Napster might use the following methods: (1) compilation of an authorized music database coupled with a software program that can detect only the authorized music on users' hard drives and allows those songs to be uploaded and downloaded; and (2) creation of a software program that prevents users from searching for file names not on the authorized list).

181. *Id.*

182. *Id.* at 922-23 (quoting Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1406 (9th Cir. 1997).

183. *Id.* (noting that even if Napster is technologically unable "to offer such functions as its directory without facilitating infringement, the court still must take action to protect plaintiffs' copyrights").

184. *Id.* at 927.

reprieve and allowed it to continue its service until the court could rule on the appeal.[185]

IV. POST-DISTRICT COURT RULING

A. Bertelsmann Forges a Deal With Napster

On October 31, 2000, Bertelsmann AG, one of the world's largest music conglomerates, announced a strategic alliance with Napster, strengthening the recording industry's hold on the Internet and suggesting the end of free access to music online.[186] Bertelsmann withdrew its lawsuit against Napster and set out to provide access to its music catalogue by July of 2001.[187] Bertelsmann and Napster invited Sony Music, Time Warner, EMI, and Universal Music (who also sued Napster) to join in the deal; however, none agreed at that time.[188] On June 5, 2001, however, Napster announced that it planned to license music from BMG Entertainment, EMI Recorded Music,

185. RIAA v. Napster, No. 00-16401, 00-16403, 2000 WL 1055915 (N.D. Cal. July 28, 2000); *see also* Zeidler, *supra* note 19.

186. Frank Gibney, Jr., *Napster Meister*, TIME, Nov. 13, 2000, at 58 (noting that under the agreement, Napster will create a system that compensates artists and their labels); P.J. Huffstutter, *Napster Alliance Not Effortless Composition*, L.A. TIMES, Nov. 13, 2000, at C1 (reporting that loan insiders estimate Napster sold the "tens of millions of dedicated users" to Bertelsmann for a slight sum, between twenty million and fifty million); David Teather, *Napster Wins New Friend: Bertelsmann Drops Legal Action Against Online Music Distributor*, GUARDIAN (London), Nov. 1, 2000, at 26.

187. William Glanz, *Music Deals Seen as Key to Survival for Napster*, WASH. TIMES, Feb. 14, 2001, at B9; Christopher Grimes & James Harding, *Napster Agrees Bertelsmann Deal*, FIN. TIMES (London), Nov. 1, 2000, at 1.

188. Andrew Cave, *'Best Things in Life Are Free,' But Napster is $5 a Month*, DAILY TEL. (London), Nov. 1, 2000, at 31; *see also* Benny Evangelista, *Napster's Fee Offer Falls on Deaf Ears*, S.F. CHRON., Feb. 22, 2001, at B1 (noting that Napster's attempt to buy off the remaining record companies with a billion dollar offer was collectively turned down).

and Warner Music Group as part of a premium subscription service.[189]

Napster users, who once downloaded MP3 files for free, would now pay a monthly flat-rate fee to use the service and would be able to download directly from Bertelsmann's own servers in an encrypted form that prevents mass copying.[190] However, many analysts wondered if the legions of Napster users would be willing to pay for what was once free.[191] Reaction from Napster users was swift and decidedly downbeat.[192]

One significant problem facing the new alliance between Napster and Bertelsmann is "how to develop a secure, workable business model for [I]nternet music delivery."[193] Even with Napster's large

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189. Brian Hiatt, *Napster Strikes Deal With Three Major Record Companies*, SonicNet.com, *at* http://www.sonicnet.com/news (June 5, 2001). Napster was to license music using MusicNet, a service developed by the three record companies to provide online access to their catalogs. *Id.* However, EMI and Warner both said that the deal was contingent upon the effectiveness of the copyright protection system. *Id.*

190. Andy Goldberg, *Napster in Historic Deal with Music Industry*, DAILY TEL. (London), Nov. 2, 2000, at 2.

191. Andrew Cave, *Music Industry Caught Napping Napster, the Company That Lets People Share CDs Over the Internet, Has Big Enemies But One New Friend*, DAILY TEL. (London), Nov. 4, 2000, at 33; Bob Keefe, *Napster Converting to Fee-based Music Site*, ATLANTA J. CONST., Nov. 1, 2000, at 1E; Robert Wright, *Will People Really Pay to Use Napster?*, TORONTO STAR, Nov. 9, 2000.

192. Jefferson Graham, *Napster's Bertelsmann Alliance Isn't Music to All Ears*, USA TODAY, Nov. 2, 2000, at 1A (quoting Jeff Margel, Napster user, "'I believe Napster's sole idea of the future was to be a part of the money-hungry record industry'"); Michael James, *BMG Parent's Napster Deal Angers Users; Alliance Would Redesign the Site as a Paid Service*, BALT. SUN, Nov. 6, 2000, at 1C (quoting Napster user Jon Baker as saying "'[i]t's not what I thought Napster was about . . . I thought the Internet was supposed to be a medium for free trade. I'm not going to pay to use Napster, I'll just go somewhere else and find the music'"); Jordan Raphael, *Napster Fans Mull Having to Pay For Online Music*, L.A. TIMES, Nov. 4, 2000, at F1 (quoting a Napster user: "'[T]his has gotta be the dumbest move Napster has made . . . You guys are selling out BIG TIME'"). *But see* Alan Goldstein, *Napster's New Gamble Could Be Pivotal in Web Commerce; Industry Wonders if Music Fans Will Buy into Fee for Service*, DALLAS MORNING NEWS, Nov. 2, 2000, at 1A (quoting another Napster user: "'I am so addicted to having Napster, not sure what I would do without it. I would pay the $4.95/[month] fee they are tossing back and forth.'") (alteration in original); Frances Katz, *Napster Pay-to-Play Deal Raises Plenty of Questions; Would 'Terms of Service' Stop the Sharing of Tunes Outside the Catalog of its Corporate Partner?*, ATLANTA J. CONST., Nov. 5, 2000, at 2Q (quoting from a Napster message board: "'Now Napster has found a way to stay in business, pay artists and labels for their efforts, and allow users to do what they have always done. For just $5 a month. This is the deal of the century.'").

193. Christopher Grimes & James Harding, *A Musical Outlaw Plays it Straight: Napster's Deal Has Not Solved the Industry's Problems*, FIN. TIMES (London), Nov. 2, 2000, at 29.

customer base, it remains unclear how to turn Napster into a profitable business.[194] Furthermore, Bertelsmann was only one of the plaintiffs, and thus the deal does not end Napster's legal troubles nor does it resolve the threat of copyright infringement from other online music services, such as Gnutella—whose users do not rely on a central directory of files and thus present a more complicated group of defendants to challenge.[195]

B. UMG Recordings, Inc. v. MP3.com, Inc.

Napster, as well as other Internet music companies, has kept a close watch for the outcome of another high-profile appeal, *UMG Recordings, Inc. v. MP3.com, Inc.*[196] All five of the major recording labels sued MP3.com for copyright infringement on the grounds that its service, "My.MP3.com," allowed users to download copyrighted material over the Internet.[197]

MP3.com allows customers to establish ownership of the music by placing a compact disc in the CD-ROM drive of their computer; MP3.com reads the compact disc and places it in a database and stores the files for access by the customers.[198] Customers using

194. *Id.* (noting that Shawn Fanning, Napster developer, acknowledges there are "'technological hurdles'" and that Hank Barry, the chief executive hired to develop the new service, was also unclear about how the new system would operate).

195. *The Napster Deal*, N.Y. TIMES, Nov. 2, 2000, at A30.

196. 92 F. Supp. 2d 349 (S.D.N.Y. 2000); *see* Amy Harmon, *MP3.com Loses Copyright Case*, NYTimes.com, *at* http://nytimes.com/2000/09/07/technology/07MUSI.html (visited Sept. 7, 2000).

197. *See UMG Recordings, Inc.*, 92 F. Supp. 2d at 350; *see also* MP3.com Website, *at* http://www.MP3.com (last visited Nov. 4, 2000) (providing information on the company and how to download and use its system).

198. *Modernizing Music's Market*, ST. LOUIS POST-DISPATCH, Sept. 8, 2000, at C14.

MP3.com's service can access their own compact discs with the aid of an Internet-ready computer.[199]

Of the five major record labels that initially filed the lawsuit, Universal was the only company that did not settle with MP3.com.[200] The settlement amounts were undisclosed but reportedly were for twenty million dollars each.[201] The court ruled that MP3.com was guilty of copyright infringement and implicitly held that MP3.com had stolen copyrighted music from the big record companies.[202]

On September 6, 2000, the district court ruled that MP3.com "willfully infringed the copyrights of the Universal Music Group . . . and ordered [the company] to pay damages [in the amount of $25,000 per compact disc] that could total $250 million."[203] Judge Jed Rakoff was concerned that Internet music services would attempt to circumvent current copyright laws on the basis that the technology was new and that the laws did not apply to them.[204] Judge Rakoff felt the large amount of damages would also help prevent future copyright infringement.[205]

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199. Rachel Scheier, *MP3 Copyright Fine to the Tune of 118M*, N.Y. DAILY NEWS, Sept. 7, 2000, at 36.

200. *See* Tim Jones, *Copyright Law Bares Its Teeth at Web; MP3.com Decision Represents a Stern Warning, Experts Say*, CHI. TRIB., Sept. 8, 2000, at N1.

201. *See* Scheier, *supra* note 199, at 36. *See generally* Joe Salkowski, *Lawsuits Bad Strategy in Online Music Wars*, CHI. TRIB., Sept. 8, 2000, at C8. The author characterized MP3 as getting away with a $20 million "bargain-bin special" with the four major record labels that settled out of court. *Id.* Furthermore, "[b]y handing over its Net business strategy to a team of lawyers, Universal . . . turned a minimum investment into a dot-com-style windfall." *Id.*

202. *UMG Recordings, Inc.*, 92 F. Supp. 2d at 352.

203. Stephanie Stoughton, *Online Site Gets Huge Fine for Music Use MP3.com Cited Over Infringement*, BOSTON GLOBE, Sept. 7, 2000, at A1. An attorney for MP3.com stated that a large damage award would be a "'death sentence'" for MP3. *Id.*

204. *Id.*

205. Chuck Philips, *Judge Orders MP3.com to Pay at Least $117 Million; Damage Award to Universal Music Group is Believed to Be a Record for a Copyright Infringement Case*, L.A. TIMES, Sept. 7, 2000, at C1. Judge Rakoff stated "'[t]he potential for huge profits in the rapidly expanding world of the Internet is the lure that tempted an otherwise generally responsible company like MP3.com to break the law, and that will also tempt others to do so if too low a level is set for the statutory damages in this case.'" *Id.*

Copyright law experts have intimated that Judge Rakoff's decision is a clear warning to Internet music services.[206] The ruling had an immediate effect on MP3.com's value as a company, with the value of the stock dropping from $5.88 per share to $2.00 per share.[207] Cary Sherman, General Counsel for RIAA, stated that this ruling "'should send a message that there are consequences when a business recklessly disregards the copyright law.'"[208] One of Napster's attorneys asserted that the *MP3* ruling "'is factually and legally distinct'" from the Napster case.[209]

On November 14, 2000, MP3.com agreed to pay Universal $53.4 million, ending the last of the major record label lawsuits against the online music site.[210] This agreement gave Universal the right to take a future equity share in MP3 and provided MP3 the right to provide its users with access to "Universal's entire catalogue of music."[211] The agreement also provided that MP3 pay Universal's attorney's fees, along with MP3's agreement not to file an appeal.[212]

C. Universal City Studios v. Reimerdes*: The Internet and DVDs*

In 1982, during the dispute between the motion picture industry and the makers of videocassette recorders, the movie studios were

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206. *See* Jones, *supra* note 200, at N1. Clint Francis, Northwestern University School of Law intellectual property law professor, said "'[i]t's pretty clear that this is sending a message to those engaged in this business that they need to proceed with considerable caution . . . There is a high risk that this will shut this kind of activity down. But will it stop it? No.'" *Id.*

207. *See* Harmon, *supra* note 196.

208. *Id.*

209. Jones, *supra* note 200, at N1.

210. Christopher Grimes, *MP3.com Will Pay Dollars 53M to Universal*, FIN. TIMES (London), Nov. 15, 2000, at 21; Christopher Stern, *MP3.com to Pay Universal $53 Million*, WASH. POST, Nov. 15, 2000, at E3.

211. *See* Stern, *supra* note 210, at E3.

212. Grimes, *supra* note 210, at 21.

concerned that the new technology threatened their industry.[213] Today, that same opinion surfaces in the entertainment industry's recent lawsuits against Internet music services like Napster and MP3, and also with industry lawsuits against software to decrypt DVDs.[214]

In a decision that mirrored the Napster case, a federal judge sided with the movie industry in its lawsuit to prevent DVDs from being copied via computers.[215] Eight Hollywood movie studios sued to prevent a website from linking computer users to software that descrambled DVD encryption software, allowing the DVDs to be copied.[216] U.S. District Court Judge Lewis A. Kaplan ruled that the link to the decryption code was a violation of federal copyright law.[217]

The dispute began when journalist Eric Corley published the code for DeCSS (which decodes the Content Scrambling System that protects DVDs) in a story written for *2600*, a hacker journal.[218] The Motion Picture Association of America (MPAA) claimed the link to the software was a violation of the "anticircumvention provisions" of the DMCA.[219] Initially, the court granted a preliminary injunction against Corley and forced him to remove the DeCSS code from the magazine's website.[220]

Motion picture companies argued that they spend millions of dollars on their films because of the assurances from copyright laws

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213. Adam Liptak, *Is Litigation the Best Way to Tame New Technology?*, N.Y. TIMES, Sept. 2, 2000, at B9. Jack Valenti stated that "'[t]he growing and dangerous intrusion of this new technology,' . . . threatens an entire industry's 'economic vitality and future security.'" *Id.*

214. *Id.*

215. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000); *Judge Backs Movie Industry in Suit Over Software for Copying DVDs*, CNN.com, *at* www.cnn.com/2000/LAW/08/17/dvdsoftwaretrial.ap/index.html (visited Oct. 18, 2000).

216. *Reimerdes*, 111 F. Supp. 2d at 303.

217. *Id.* at 345-46.

218. Deborah Durham-Vichr, *Focus on the DeCSS Trial*, CNN.com, *at* www.cnn.com/cnn/2000/TECH/computing/07/27/decss.trial.pl.idg/index.html (visited Oct. 17, 2000). Jon Johansen developed the decryption software as a teenager in order to view DVDs on a computer running a Linux operating system. *Id.* The software allows computer users to copy the film from DVDs onto their hard drives. *Id.* The MPAA also brought suit against Johansen in Norway. *Id.*

219. *Reimerdes*, 111 F. Supp. 2d at 316.

220. *Id.* at 312.

that they retain exclusive rights to sell these films to the general public.[221] The defendants argued that the copyright laws are too restrictive by blocking legitimate uses of digital technology and by violating their freedom of expression under the First Amendment.[222]

The court rejected the defendant's First Amendment argument.[223] Judge Kaplan stated that "computer code is not purely expressive any more than the assassination of a political figure is purely a political statement."[224] Representatives of the MPAA said the judge's ruling explicitly recognized the critical nature of copyright protection.[225] Attorneys for 2600.com expected the ruling and are already planning to appeal.[226]

V. *RIAA V. NAPSTER*: CIRCUIT COURT APPEAL

A. Hearing Before the United States Court of Appeals for the Ninth Circuit

On October 2, 2000, attorneys for both sides appeared before the United States Court of Appeals for the Ninth Circuit for oral arguments.[227] The judges showered Napster's attorneys with

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221. John Sullivan, *Judge Halts Program to Crack DVD Film Codes*, N.Y. TIMES, Aug. 18, 2000, at C1.

222. *Reimerdes*, 111 F. Supp. 2d at 319, 325-26.

223. *Id.* at 332-33 (holding that "the anti-trafficking provision of the DMCA as applied to the posting of computer code that circumvents measures that control access to copyrighted works in digital form is a valid exercise of Congress' authority").

224. *Id.* at 304.

225. *Id.*

226. Benny Evangelista, *DVD Hack Code Can't Be Posted*, S.F. CHRON., Aug. 18, 2000, at B1.

227. *See* Becky Barrow, *Fat Lady Holds Breath as Napster Returns to Court*, DAILY TEL. (London), Oct. 2, 2000, at 23; Mary Louise Schumacher, *The Napster Flap: The Legal Fight Resumes Today, but How Much is at Stake Depends on Whom You Ask*, MILWAUKEE J. SENTINEL, Oct. 2, 2000, at 1E; David Streitfeld, *Napster Attempts to Block Injunction; Music-Sharing Site Defended in Appeal*,

questions about whether the Napster software could be compared to people watching a borrowed movie on a videocassette recorder.[228]

Soon afterward, the judges grilled RIAA's attorneys about their argument that Napster exerts control over whether their users exchanged copyrighted music files.[229] The panel did not render a judgment after hearing all the arguments but refused to shut Napster down.[230] The ruling was expected for the following November.[231]

Napster argued that shutting its system down would "'forbid . . . the distribution of intellectual information'" and could be a First Amendment violation of freedom of speech.[232] Napster stated that the injunction would force the popular service to shut down completely.[233] Lawyers for RIAA argued that "'[Napster is] integrally involved in the distribution to millions of people of millions of recordings, the overwhelming number of which are copyrighted recordings and copyrighted musical compositions owned by [RIAA's] clients.'"[234]

The three judge panel, consisting of Judges Mary M. Schroeder, Robert R. Beezer, and Richard A. Paez, demonstrated through their questions that while they were concerned with protecting copyrighted material, they had no desire to suppress the new technology.[235] Judge Beezer was concerned with how Napster could keep track of "what

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WASH. POST, Oct. 3, 2000, at E1; Robin Washington, *Appeals Court Tunes in to Napster Battle Today*, BOSTON HERALD, Oct. 2, 2000, at 3.

228. P.J. Huffstutter, *Napster Buys Some Time as Judges Consider Appeal*, L.A. TIMES, Oct. 3, 2000, at C1.

229. *Id.*

230. Matt Richtel, *Napster Case: Hard Queries on Copyrights*, N.Y. TIMES, Oct. 3, 2000, at C1.

231. *Id.*

232. Brian Hiatt & Richard B. Simon, *Napster Argues Shutting Down Service Would Violate First Amendment*, SonicNet.com, *at* http://www.sonicnet.com/news/digital (visited Oct. 3, 2000) (noting that Napster lawyer David Boies argued that "[t]he First Amendment has never been interpreted to permit an injunction to prohibit the distribution of a directory system—that is, a service that goes to customers and says, 'Here are the people that are prepared to share these files.'").

233. *Id.*

234. *Id.* (alteration in original).

235. Benny Evangelista, *Napster's Opponents Pressed by Judges; Appeals Panel Takes Up Free Online Music Issue*, S.F. CHRON., Oct. 3, 2000, at A1 [hereinafter Evangelista, *Opponents Pressed*].

specific songs are offered by its users."[236] Lawyers for RIAA countered by arguing that they were not trying to close down the Internet or put an end to this particular technology, but rather, that they were only concerned with Napster's business model, which is "intended to 'create, implement, and supervise' a system that infringes copyrights on a wholesale basis."[237]

Lawyers for RIAA originally thought the presence of Judge Schroeder on the panel would work in their favor due to a 1996 case in which she ruled that "flea market operators were liable for cassette tapes containing pirated songs that were sold by swap meet vendors."[238] However, when RIAA attempted to analogize the two cases, Judge Schroeder disagreed and stated that the Napster case "'is really different,'" adding that "'[swap meet vendors] could control what was going on on the premises,'" and had a greater ability to monitor activity.[239]

Lawyers for Napster, beset with tough questions as well, appeared to gain points with the court when they compared the instant case with *Sony Corp. of America v. Universal City Studios*.[240] The central holding in that case was that Sony was not liable for contributory copyright infringement because the technology had other substantial,

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236. *Id.* (quoting Judge Beezer: "'How are they expected to have knowledge of what is coming over some kid's computer in Hackensack, New Jersey, to a user in Guam?'").

237. Richtel, *supra* note 230, at C1.

238. Evangelista, *Opponents Pressed*, *supra* note 235, at A1.

239. Richtel, *supra* note 230, at C1; *see also* Benny Evangelista, *EBay Immune from Suits over Pirated Music*, S.F. CHRON., Nov. 9, 2000, at B2 (reporting that a judge found EBay Inc. not liable for its users selling bootleg music over its website, reasoning that the Federal Communications Decency Act provides EBay "a high degree of legal immunity for illegal music or other contraband goods auctioned on the site").

240. Richtel, *supra* note 230, at C1; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

noninfringing uses beyond the primary use of videotaping copyrighted television programs.[241] When Judge Schroeder asked Napster lawyer David Boies "whether there [were other] non-infringing uses [Napster's software provides] if seventy to eighty percent of the service is used for infringement [,]" he enthusiastically replied "'[a]bsolutely.'"[242]

Lawyers from each side reported they were optimistic about the hearing, but stressed that the questions asked at the hearing did not suggest what the outcome would be and did not suggest what the judges thought about the issues.[243] Both sides indicated that the court's decision would "set a benchmark" for how business is conducted over the Internet.[244]

B. Ninth Circuit Decision

1. Fair Use

The circuit court first addressed the district court's finding that Napster's service was not fair use.[245] The circuit court looked at the district court's fair use analysis and agreed that Napster users were not fair users.[246] The circuit court noted that the district court judge "did not abuse her discretion in reaching the above fair use conclusions, nor were the findings of fact with respect to fair use considerations clearly erroneous."[247]

2. Contributory Infringement

Next, the circuit court addressed RIAA's claim that Napster is liable for contributory copyright infringement.[248] Traditionally, a

241. *See Sony*, 464 U.S. at 456.
242. Richtel, *supra* note 230, at C1.
243. *Id.*
244. Huffstutter, *supra* note 228, at C1.
245. *See* RIAA v. Napster, 239 F.3d 1004, 1014 (9th Cir. 2001).
246. *Id.* at 1014-15.
247. *Id.* at 1017.
248. *Id.* at 1019.

contributory infringer is one with knowledge of the infringing activity who "'induces, causes or materially contributes to the infringing conduct of another.'"[249] The circuit court agreed with the district court that Napster "knowingly encourages and assists the infringement of [RIAA's] copyrights."[250] Napster argued that regardless of its knowledge of the infringement, it was protected from contributory liability by the Supreme Court's ruling in *Sony*.[251] The circuit court disagreed, observing that Napster's actual knowledge of direct infringement limited the applicability of *Sony*.[252]

In *Sony*, the Supreme Court refused to hold the manufacturers of videotape recorders liable for contributory infringement because they did not have "constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material."[253] The circuit court here refused to impute the requisite knowledge onto Napster because the "equipment [was] capable of both infringing and 'substantial noninfringing uses.'"[254]

The circuit court, following *Sony*, found that the district court improperly limited its analysis to Napster's current uses and failed to take into account the system's future non-infringing capabilities.[255] Nonetheless, the court stated that, "[r]egardless of the number of Napster's infringing uses versus noninfringing uses, the . . . record . . . supported the district court's finding that [RIAA] would

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249. *Id.* (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

250. *Id.* at 1020.

251. *Id.*

252. *Id.*

253. Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 439 (1984).

254. *Napster*, 239 F.3d at 1020 (quoting *Sony*, 464 U.S. at 442).

255. *Id.* at 1020. "To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use." *Id.* at 1021.

likely prevail in establishing that Napster knew or had reason to know of its users' infringement of [RIAA's] copyrights."[256]

Furthermore, the court agreed with the district court's finding that "Napster materially contribut[ed] to the infringing activity."[257] Napster's system provides access and the ability for direct infringement; without Napster's support services, the court found that "'users could not find and download the music they want with the ease of which [Napster] boasts.'"[258]

3. Vicarious Copyright Infringement

In copyright law, vicarious liability, "an 'outgrowth' of respondeat superior," expands traditional notions of employee and employer relationships to cases where defendants derive financial benefits from the infringing activity and where defendants oversee the activity.[259] The circuit court noted that financial benefit is found when customers are attracted by ready access to infringing material.[260] The circuit court discovered plenty of record evidence indicating that "Napster's future revenue is directly dependent upon 'increases in userbase.'"[261] "More users register with the Napster system as the 'quality and quantity of available music increases.'"[262]

According to the district court, Napster's system could be supervised, and Napster policed its own system occasionally.[263] The circuit court agreed in part.[264] On its website, Napster "expressly

256. *Id.* "The record supports the district court's finding that Napster has *actual* knowledge that *specific* infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material." *Id.* at 1022.

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

258. *Id.* (quoting RIAA v. Napster, Inc., 114 F. Supp. 2d 896, 919-20 (N.D. Cal. 2000)).

259. *Id.* (quoting Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996)). The circuit court noted that Napster could not enlist *Sony* for assistance in defeating a vicarious liability claim as *Sony* was limited solely to contributory infringement claims. *Id.*

260. *Id.* at 1023 (quoting *Fonovisa*, 76 F.3d at 263-64).

261. *Id.* (quoting *Napster*, 114 F. Supp. 2d at 902).

262. *Id.* (quoting *Napster*, 114 F. Supp. 2d at 902).

263. *Napster*, 114 F. Supp. 2d at 920-21.

264. *Napster*, 239 F.3d at 1023.

reserves the 'right to refuse service and terminate accounts in [its] discretion, including, but not limited to, if Napster believes that user conduct violates applicable law . . . or for any reason in Napster's sole discretion, with or without cause.'"[265] To avoid vicarious liability, Napster must vigilantly prevent infringing activity.[266]

The circuit court acknowledged that "the district court correctly determined that Napster had the right and ability to police its system and failed to exercise that right to prevent the exchange of copyrighted material."[267] However, the circuit court found that Napster's ability to locate and prevent infringement was limited.[268] Napster does not examine each file to determine the contents; Napster merely verifies the file is in the correct format to be downloaded.[269]

Nevertheless, the court found that Napster had the capability to locate infringing material on its search engines and had the right to suspend users from the system.[270] "The file name indices, therefore, are within the 'premises' that Napster has the ability to police."[271] Therefore, the circuit court agreed that there was enough evidence in

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265. *Id.* (referencing Napster website); *see also* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996) (stating that a company's right and ability to supervise an infringing activity may give rise to vicarious liability); Religious Tech. Ctr. v. Netcom On-Line Communication Servs., 907 F. Supp. 1361, 1375-76 (N.D. Cal. 1995) (noting that evidence indicating that an electronic bulletin board service could suspend users' accounts raised a genuine issue of material fact regarding the ability to supervise).

266. *Napster*, 239 F.3d at 1023.

267. *Id.*

268. *Id. Contra Fonovisa*, 76 F.3d at 262-63 (finding that while the defendant could prevent infringers from occupying space, the defendant could also patrol the space as well); Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1328-29 (D. Mass. 1994) (indicating that a trade show operator could contractually remove exhibitors as well as police during the trade show to verify compliance with preexisting rules).

269. *Napster*, 239 F.3d at 1024.

270. *Id.*

271. *Id.*

the record indicating that RIAA would likely succeed on the merits on a claim of vicarious liability.[272] However, since Napster's policing ability was limited, the court reviewed the district court's injunction to address the implication of those limits.[273]

4. Asserted Defenses

a. Audio Home Recording Act

Napster argued that its customers' use of its system was noncommercial under section 1008 of the AHRA.[274] Under section 1008:

> 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 music recordings or analog musical recordings.[275]

Napster argued that the transfer of MP3 files was a noncommercial use protected by statute.[276] The circuit court, in alignment with the district court, found that the AHRA did not provide protection for the transfer "of MP3 files to computer hard drives."[277] The court outlined that first, the primary purpose of a computer hard drive did not include the transfer of MP3 files.[278] Furthermore, the court reasoned that despite "Napster's claim that computers are 'digital audio

272. *Id.*
273. *Id.*
274. *Napster*, 239 F.3d at 1024.
275. 17 U.S.C. § 1008 (1992).
276. *Napster*, 239 F.3d at 1024 (referencing 17 U.S.C. § 1008).
277. *Id.*
278. *Id.*; *see* RIAA v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078 (9th Cir. 1999).

recording devices,' computers do not make 'digital music recordings' as defined by the [AHRA]."[279]

b. Digital Millennium Copyright Act

Napster also asserted that its system fell under the safe harbor provision of section 512 of the DMCA.[280] Napster did not sufficiently "persuade [the district court] that subsection 512(d) shelters contributory infringers."[281] The circuit court, however, did not agree that "Napster's potential liability for contributory and vicarious infringement renders the [DMCA] inapplicable per se."[282] Up to this point, the court noted that the RIAA raised serious doubts as to whether Napster received protection under section 512, and showed "that the balance of hardships tip[ped] in their favor"; therefore, the circuit court concluded the district court had enough evidence to support its ruling.[283]

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279. *Napster*, 239 F.3d at 1024; *see also Diamond Multimedia*, 180 F.3d at 1077 ("There are simply no grounds in either the plain language of the definition or in the legislative history for interpreting the term 'digital musical recording' to include songs fixed on computer hard drives.").

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

281. *Id.*

282. *Id.*

283. *Id.* The circuit court noted that:

> Plaintiffs have raised and continue to raise significant questions under this statute, including: (1) whether Napster is an Internet service provider as defined by 17 U.S.C. § 512(d); (2) whether copyright owners must give a service provider "official" notice of infringing activity . . . on its system; and (3) whether Napster complies with § 512(i), which requires a service provider to timely establish a detailed copyright compliance policy.

Id.

5. Preliminary Injunction

The circuit court agreed that Napster's infringing activities required a preliminary injunction.[284] However, the court believed the injunction was too broad and needed alterations.[285] The court pointed out that:

> [C]ontributory liability may potentially be imposed only to the extent that Napster: (1) receives reasonable knowledge of specific infringing files with copyrighted musical compositions and sound recordings; (2) knows or should know that such files are available on the Napster system; and (3) fails to act to prevent viral distribution of the works.[286]

However, the court noted that Napster would incur liability if it was lax in policing its network for any potentially infringing files.[287] Napster, according to the court, had shown that it has the technology and capability to prevent infringement by its users.[288]

The circuit court found the district court's injunction overreaching "because it places on Napster the entire burden of ensuring that no 'copying, downloading, uploading, transmitting, or distributing' of [RIAA's] works occur on the system."[289] The court held that RIAA should have the burden of providing notice to Napster of any copyrighted works or files within the Napster system before Napster has any duty to prevent access to the infringing material.[290] However,

284. *Id.* at 1027.
285. *Napster*, 239 F.3d at 1027.
286. *Id.* "The mere existence of the Napster system, absent actual notice and Napster's demonstrated failure to remove the offending material, is insufficient to impose contributory liability." *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*

Napster had "the burden of policing the system within the limits of the system."[291]

6. First Amendment

Because the circuit court remanded the case to modify the preliminary injunction, the court addressed the First Amendment issue in order to prevent it reappearing on remand.[292] Napster contended that two particular free speech rights were violated by the injunction: "(1) its right to publish a 'directory' (here, the search engine) and (2) its users' right to exchange information."[293] The court noted that the fair use doctrine provides First Amendment protection in copyright law.[294] First Amendment protections were not afforded to Napster, however, as the circuit court determined that Napster users were not fair users and any unfair uses of copyrighted material were correctly enjoined.[295]

7. Ruling

The circuit court affirmed the decision of the district court in part, reversed in part, and remanded the case to the district court.[296] The circuit court stayed the initial preliminary injunction until modified

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291. *Napster*, 239 F.3d at 1027. The court noted that, in remanding the case to the district court, the lower court should take into account that "Napster's system does not currently appear to allow Napster access to users' MP3 files." *Id.*

292. *Id.* at 1027-28.

293. *Id.* at 1028.

294. *Id.*; *see also* Religious Tech. Ctr. v. Netcom On-Line Communication Servs., 923 F. Supp. 1231, 1258 (N.D. Cal. 1995) (noting that the Copyright Act "embodies a balance between the rights of copyright holders . . . and the protections of the First Amendment").

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

296. *Id.* at 1029.

by the district court to conform with the circuit court's opinion.[297] The circuit court partially remanded the case back to the district court in order to take care of settlement issues and to proceed with reducing the scope of the preliminary injunction.[298]

VI. RECENT DEVELOPMENTS

A. Reaction to the Circuit Court Ruling

Even though Napster was not permanently shut down, the music industry claimed victory.[299] Napster users and supporters bombarded the Napster system and other message services with their immediate disapproval.[300] Napster attorney David Boies told the press that "he would ask the entire circuit court to review the case" as well as petition the United States Supreme Court; however, the chance of success in either venue is doubtful.[301] RIAA attorneys "gloated" that "'[t]his decision pretty much writes Napster's epitaph. Its days as an

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297. *Id.*

298. *Id.*

299. Mike Snider, *Napster Ruling Angers Fans, Pleases Artists*, USA TODAY, Feb. 13, 2001, at 3D; *see also Napster Lawsuit Quotes: What People are Saying About the Napster Verdict*, AP NEWSWIRES, Feb. 13, 2001. Hilary Rosen, President and CEO of RIAA, stated that "[t]oday's decision represents a clear victory for the creative content community and the legitimate online marketplace." *Id.* The band Metallica said that "[a]ll we have ever asked is that artists be able to control how, when and in what form their creativity is distributed through these channels. This is something that Napster has continually refused to do. Now the court has made that decision for them." *Id.* Rusty Harmon, Manager of Hootie and the Blowfish, stated "[t]he ruling will help to ensure that songwriters will continue to have the opportunity to make a living practicing their craft." *Id.*

300. Snider, *supra* note 299, at 3D; *see also Napster Lawsuit Quotes*, *supra* note 299. Napster CEO Hank Barry told the press, "[w]e're fighting for this principle and we believe that the actions that the users are engaged in is not copyright infringement. While we believe this is legal, respecting the court decision otherwise, it is clearly not industry supported." *Id.* Gary Shapiro, President and CEO of the Consumer Electronics Association, stated that "[t]he 9th Circuit is the same Circuit that ruled in 1981 that the VCR was illegal before the ruling was overturned by the Supreme Court. If that decision had stood, we would have no VCR or movie rentals—to the detriment of Hollywood and American consumers." *Id.* Faisal Reza, a Napster user and student at the Massachusetts Institute of Technology, said "[w]e'll all find a way to get around it. People who want music will always be one step ahead of people trying to stop them." *Id.*

301. David Streitfeld & Christopher Stern, *Napster Must Halt Online Music Swaps; Appeals Court Ruling Likely Means End of Free Service*, WASH. POST, Feb. 13, 2001, at A1. Jeff Weingart, a copyright lawyer, indicated, "[t]his is a unanimous decision that upholds the lower court . . . In virtually all areas, the judges found the court hadn't abused its discretion. That's the standard of review." *Id.*

instrument of electronic shoplifting are over."[302] Analysts and industry experts expressed concern that the new ruling would effectively shut Napster down completely or severely limit the service, either of which could seriously damage Napster's agreement with Bertelsmann.[303]

B. District Court Injunction Ruling

On March 5, 2001, Judge Patel issued the revised version of the preliminary injunction to comply with the ruling set forth by the Ninth Circuit Court of Appeals.[304] The injunction prevents Napster from "copying, downloading, uploading, transmitting or distributing copyrighted sound recordings."[305] The order mandates that RIAA submit a list to Napster of its copyrighted sound recordings, in which it must provide the record title, the artist's name, the name of the files on Napster's system containing the work, and a certification that RIAA "own[s] or control[s] the rights allegedly infringed."[306]

Once songs are identified, Napster has three days to block access.[307] If RIAA does not feel Napster is removing the infringing files satisfactorily, RIAA retains the option to return to court.[308] Furthermore, within five days of the order, Napster must report the

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302. *Judge Orders Napster to Stop Allowing Customers to Swap Copyrighted Music*, PHILA. INQUIRER, Feb. 13, 2001 (quoting RIAA attorney Chuck Cooper).

303. Matt Richtel, *The Napster Decision: The Overview; Appellate Judges Back Limitations on Copying Music*, N.Y. TIMES, Feb. 13, 2001, at A1.

304. RIAA v. Napster, No. C 99-05183 MHP, C 00-1369 MHP, 2001 WL 227083 (N.D. Cal. Mar. 5, 2001).

305. *Id.* at *1.

306. *Id.*

307. *See* Janet Shprintz, *Napster Gets Orders*, DAILY VARIETY, Mar. 7, 2001, at 10.

308. *Napster*, 2001 WL 227083, at *2.

steps it has taken to comply.[309] Napster reported to the press that it would comply with the order but would continue its efforts to reach a settlement and convince the music labels to accept its offer of a subscription service.[310]

C. Napster's Compliance with the Order

In order to comply with Judge Patel's order, Napster initially used a system that blocked infringing files by song title.[311] However, Napster users easily bypassed this system by merely using misspelled song titles.[312] Napster commented that it would take time to refine the filtration system and RIAA initially seemed willing to allow Napster some breathing room.[313]

On March 27, 2001, RIAA filed a noncompliance report with the United States District Court in San Francisco.[314] RIAA claimed that all 675,000 songs the group wanted blocked were still available on Napster's system due to an "archaic filtering system."[315] Napster commented that it was attempting to obey the order but RIAA made it difficult by providing lists of songs that were both underinclusive and overinclusive.[316] RIAA asked the court to force Napster to install a more sophisticated screening system in order to comply with the preliminary injunction.[317]

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309. *Id.*

310. Shprintz, *supra* note 307, at 10.

311. Jefferson Graham, *Napster's Free Music Fading Away, Users Misname Files to Duck the Ban*, USA TODAY, Mar. 6, 2001, at 1D.

312. *Id.* (noting that Metallica's song "Unforgiven" was listed as either "The Unforgiven" or "Unforgivin").

313. *Id.* Napster CEO Hank Barry stated that "'[w]e're at the first step of a multistep process . . . [w]e decided to get started right away rather than wait for it to be perfect.'" *Id.* Howard King, attorney for Metallica, said that "'Napster has suddenly found religion . . . . They're trying to find a way to fix it. But if they haven't caged the monster in a week, then I'll be upset.'" *Id.*

314. Benny Evangelista, *Record Group Calls Napster Filter Archaic*, S.F. CHRON., Mar. 28, 2001, at C1.

315. *Id.*

316. *Id.* Napster argued RIAA disrupted the filtering process by not only providing inaccurate information about copyrighted material, but also requesting blockage of non-RIAA owned songs. *Id.*

317. *Id.*

On April 10, 2001, Judge Patel stated that Napster's attempts to block infringing music titles were "'disgraceful.'"[318] Attorneys for RIAA argued that Napster was not using sophisticated filtering systems that analyze sound.[319] Napster argued RIAA "wants to make compliance with the injunction so costly that it will put [Napster] out of business."[320] Patel stated that "'[m]aybe the system needs to be shut down . . . Think about it exponentially; if you had a thousand of these [files] out there yesterday, think of how many [will pop up in the future].'"[321] Judge Patel ordered RIAA and Napster to meet with a court-appointed technical expert to review filtering strategies.[322] As a result of that meeting, Napster licensed a new screening technology from Relatable called TRM, which creates a "unique audio fingerprint" which then allows specific songs to be screened on the Napster system.[323]

After increasing efforts to filter out copyrighted songs, Napster found itself blocking out too many songs.[324] Judge Patel, using guidelines from the United States Court of Appeals, gave Napster and its users more breathing room.[325] Judge Patel outlined that RIAA, and not Napster, is responsible for tracking the specific filenames for each

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318. Richard B. Simon, *Judge Calls Napster's Filtering Efforts 'Disgraceful'*, SonicNet.com, *at* http://www.sonicnet.com/news (Apr. 10, 2001) (noting that there were over two thousand versions of *Jailhouse Rock* found on Napster).

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. Brian Hiatt, *Napster Adopting New Filtering Methods*, SonicNet.com, *at* http://www.sonicnet.com/news (Apr. 20, 2001).

324. Brian Hiatt, *Napster Apologizes for Blocking Too Many Songs*, SonicNet.com, *at* http://www.sonicnet.com/news (Apr. 26, 2001).

325. Brian Hiatt, *Napster May Be Able to Relax Its Filtering System*, SonicNet.com, *at* http://www.sonicnet.com/news (Apr. 27, 2001).

song.[326] This "appear[ed] to give [Napster] a legal justification to loosen its filtering system."[327]

D. Reconsideration of the Order by the Circuit Court

Napster requested that the entire Ninth Circuit Court of Appeals review the ruling.[328] The Appeals court unanimously denied the request.[329] Napster was disappointed by the ruling, but realized at the outset that rehearing petitions were rarely granted.[330] RIAA Senior Vice President Cary Sherman applauded the decision, saying "'[t]his decision puts to rest any questions that Napster has raised regarding the earlier decision and affirms the rights of copyright holders on the Internet.'"[331]

E. Shutting Down Napster

In an odd twist of fate, Napster voluntarily shut down its service on July 2, 2001, due to problems implementing its new screening technology.[332] In an effort to have its new fingerprinting system run smoothly, Napster stopped all file transfers.[333] Even with a self-imposed shutdown, Napster was hit again with another court ruling,

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326. *Id.*

327. *Id.* (noting that "[u]nder the rules outlined in the memorandum, Napster is not obligated to block a file that identifies the singer of a Britney Spears track as 'BritneySpear' unless the music labels specifically identify it").

328. Brian Hiatt, *Appeals Court Ruling Means Napster Filters Stay Put*, SonicNet.com, *at* http://www.sonicnet.com/news (June 25, 2001) (noting that Napster has the option of appealing to the Supreme Court but has not decided whether to proceed or not).

329. *Id.*

330. *Id.*

331. *Id.*

332. Brian Hiatt, *Napster's Latest Bid to Stay Alive: Shutting Down*, SonicNet.com, *at* http://www.sonicnet.com/news (July 2, 2001).

333. Brian Hiatt, *No Telling When Napster Will Be Working Again*, SonicNet.com, *at* http://www.sonicnet.com/news (July 5, 2001). On its website, Napster indicated "'[our] goal is to start file transfers again as soon as possible, but we can't yet give a precise time . . . This is a brand-new technology, and we're still fine-tuning all the parts.'" *Id.* Bruce Kasrel, Senior Media and Entertainment Analyst for Forrester Research, expressed concern over the length of the shutdown, saying "'[c]learly the value of their brand is around their community . . . The longer they wait to turn on their [service], the smaller the community will get.'" *Id.*

forcing it to remain shut down "until it [could] prove that it's able to effectively block copyrighted songs."[334]

Napster, in a last-gasp effort to stay afloat while it perfected its subscription fee service, asked the appeals court to postpone the shutdown ordered by the district court.[335] Napster claimed that Judge Patel "overstepped her authority by demanding that Napster's filters be 100 percent effective."[336] Napster asked the Ninth Circuit to allow its service to remain active and also requested a hearing to appeal Judge Patel's decision.[337]

On July 18, the Ninth Circuit reversed Judge Patel's July 11 order that required that Napster's filtering system be one hundred percent effective.[338] In its order, the circuit court stayed Patel's order upon further examination by the court; however, the ruling did not foreclose an eventual affirmance of the order.[339] Although the ruling provided Napster with a small reprieve, it still required Napster to block copyrighted material.[340]

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334. Brian Hiatt, *Judge: Napster Must Stay Down Until Filters Are Perfected*, SonicNet.com, *at* http://www.sonicnet.com/news (July 11, 2001). RIAA applauded the ruling, stating "'Judge Patel's decision today . . . was inevitable, given [Napster's] failure to comply with the court's order for so long,'" Napster's "'inability to prevent copyright infringement from occurring on its system has only hampered the development of the marketplace in which it now hopes to compete.'" *Id.* (alterations in original).

335. Eric Schumacher-Rasmussen, *Napster Asks Appeals Court to Delay Shutdown Order*, SonicNet.com, *at* http://www.sonicnet.com/news (July 16, 2001).

336. *Id.* (reporting that Napster called Judge Patel's order "draconian").

337. *Id.* Napster argued that RIAA faces low risk of copyrighted material being exchanged without permission and that having to promise one hundred percent accuracy in file blocking would cause irreparable harm to Napster because its users will go to other services while Napster perfects its system. *Id.*

338. Andrew Dansby, *Court Flips Napster Ruling*, *at* http://www.rollingstone.com/news (July 18, 2001).

339. Brian Hiatt, *Napster Cleared For Takeoff (Again) After Shutdown Order Overturned*, SonicNet.com, *at* http://www.sonicnet.com/news (July 18, 2001).

340. *Id.*

F. The Future of Napster

With Napster effectively disabled by the courts and from its own technology problems, RIAA sought to settle the case.[341] Hilary Rosen, RIAA President, said that taking the case to trial is unnecessary because an injunction ordering Napster to block copyrighted material is in place.[342] Napster was encouraged by RIAA's comments.[343] Napster's operations are still down while it continues to develop a fee-based, "copyright-friendly" service; there is no indication when its service will resume.[344]

VII. SUGGESTIONS AND PROPOSALS

Courts are siding with the entertainment industry in controversies involving the Internet because contemporary copyright laws favor the record labels.[345] However, with the success of Internet music services such as Napster and Gnutella, the question becomes, why are the record companies refusing to acknowledge that they are fighting a losing battle?[346] Today, the recording industry is weighing many options on how to either join in with or deal with the problem of downloading its copyrighted musical works over the Internet, including providing its own service,[347] creating better encryption

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341. Brian Hiatt, *With Napster Weakened, RIAA Hopes to Settle Landmark Lawsuit*, SonicNet.com, *at* http://www.sonicnet.com/news (July 27, 2001).

342. *Id.*

343. *Id.*

344. *Id.*

345. *See* Benny Evangelista, *Will Napster Get Nailed? Firm's Peace Overtures Ignored by Recording Industry*, S.F. CHRON., Oct. 2, 2000, at D1. *See generally* Christopher Grimes & Christopher Parkes, *Life After Napster: Record Companies Want to Move from Fighting a Rear-Guard Action Against Online Music Sites to Using the Internet Themselves*, FIN. TIMES (London), Sept. 26, 2000, at 24; Bob Keefe, *Napster Verdict: Music Business Changed Forever; No Matter How Today's Court Battle Turns Out, Record Companies Are Making Peace With Net*, ATLANTA CONST., Oct. 2, 2000, at 1C.

346. David Plotnikoff, *Give It Up, Music Labels - Napster Has Won*, DALLAS MORNING NEWS, Oct. 5, 2000, at 2F (noting that there are twenty-eight million music fans exchanging music files over the Internet, and that record companies, by suing services like Napster, are potentially alienating twenty-eight million customers by labeling them as criminals).

347. *See* Grimes & Parkes, *supra* note 345, at 24; Keefe, *supra* note 345, at 1C.

technology,[348] licensing other Internet services,[349] and developing means to track its property over the Internet.[350]

A. The Recording Industry Attempts to Join the Internet Music Bandwagon

Record companies are no longer the all-controlling entities they once were.[351] Historically, artists had to go through the major labels, and in order to listen to music at home, listeners had to purchase music through those labels.[352] The advent of the Internet and successful music services such as Napster altered the landscape considerably; in the wake of voluminous litigation, every major label has taken steps to enter the growing field of Internet music providers.[353] The recording industry is discovering that it is not a simple task to start such endeavors.[354] After considering the right form of technology to use, the recording labels "must take into account recording artists, consumer electronics hardware makers, compression technology suppliers, [I]nternet portal operators and online retailers."[355] Furthermore, the labels must assure traditional

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348. *See* Hiawatha Bray, *Facing the Music: The Recording Industry Has Won Some Major Legal Battles Against Online Music Sites, But Does It Have the Will to Join the Trend Toward Music on the Internet Instead of Fighting It?*, BOSTON GLOBE, Sept. 17, 2000, at G1; James Harding, *Security and the Law*, FIN. TIMES (London), Sept. 11, 2000, at 13; Sabra Chartrand, *New Encryption System Would Protect Digital Music*, NYTimes.com, *at* http://www.nytimes.com/library/tech/00/07/biztech/articles/03pate.html (visited Sept. 7, 2000).

349. Keefe, *supra* note 345, at 1C.

350. John Borland, *Music Labels Mull Digital 'Bar Codes'*, CHI. SUN-TIMES, Oct. 13, 2000, at 64; *ID Code in Development for Digital Music*, TORONTO STAR, Oct. 13, 2000.

351. Keefe, *supra* note 345, at 1C.

352. *Id.*

353. Grimes & Parkes, *supra* note 345, at 24; Keefe, *supra* note 345, at 1C.

354. Grimes & Parkes, *supra* note 345, at 24.

355. *Id.* Two models for the service include (1) the downloading of songs for a monthly subscription fee, and (2) the "one-off basis," where the user would pay per song downloaded. *Id.* The problem with

brick-and-mortar retailers that these new services will not detract from their sales.[356]

B. Digital Music Encryption and Product Tracking

Another question to ask is, if Napster's success shows there is a viable market for downloading digital music, why have the major labels been reluctant to use a similar business model?[357] In the past, the recording industry feared doing business in such a manner; it believed Internet users would pay for the latest MP3 release from a top-selling artist and then share it with friends, and thousands of perfect, digital copies would be distributed—denying the record company and the artist any additional profit.[358]

This fear is starting to subside as the recording industry looks at new technology to prevent music piracy.[359] The major labels are "working together on the Secure Digital Music Initiative, [attempting] to establish an industry standard for the digital delivery of music which includes the technology to protect copyright."[360] One technological effort already explored is called digital watermarking, which inserts bits into the computer code of an MP3 file and enables the user to see if the mark was authentic.[361] Also, the industry is in the process of developing a system of digital barcodes to track the music file during its lifetime.[362] The product would have a "uniform system number" which would facilitate tracking the sales, usage, and

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these models is that the recording industry does not believe they can charge the Internet consumer the same rate as the CD rate. *Id.* However, analysts argue that this difference in cost could be balanced by an increase in the total amount of music purchased over the Internet. *Id.* Furthermore, the labels might utilize a restricted form of transferring files. *Id.* This analytical approach suggests that Napster might be used as a blueprint to demonstrate the best way to facilitate any new technology. *Id.*

356. *Id.*; Chartrand, *supra* note 348.

357. Bray, *supra* note 348, at G1.

358. *Id.*

359. *Id.*

360. Harding, *supra* note 348, at 13.

361. *Id.* (noting, however, that the "music company could find a digital way of checking the MP3 files on [a user's] hard drive . . . [b]ut that [would be] a time consuming business," and that the watermark would serve mainly as a deterrent).

362. *ID Code*, *supra* note 350.

royalty payments associated with a particular work.[363] Furthermore, three mathematicians at Brown University have patented an encryption code that they claim makes digital piracy almost impossible.[364] The system encodes each second of the data with an encryption key, meaning that a typical three minute song can have over 150 codes, and if someone took the time to break one of the codes he would only retrieve one second of music.[365] The encryption can be used for any information transferred over the Internet by devices including "computers, cellular phones, digital music players" and virtually any other device accessing Internet data.[366]

Similar efforts were attempted by the computer software industry in the 1980s; however, they were not a great success.[367] Two problems occurred in initial encryption efforts: (1) the copyright protection software made it impossible to reinstall operating programs after a system crash; and (2) the software was easy to decrypt.[368]

C. Licensing

During Senate hearings to discuss the Napster controversy, Senator Orrin Hatch sought to bring the two sides to some type of agreement

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363. *Id.*; *see also* Borland, *supra* note 350, at 64 (reporting that the "identification would be a digital equivalent of the common universal price code (UPC), or bar code, that marks products sold in stores").

364. Chartrand, *supra* note 348.

365. *Id.* Scott Crenshaw, the Chief Executive of NTRU Cryptosystems, the company that owns the patent, stated that "'[i]f someone orders music, then it can be encrypted specifically for that user . . . It will only download on that user's device. He can't share it with his friends without authorization because it simply won't play on his friend's device.'"). *Id.*

366. *Id.*

367. Bray, *supra* note 348, at G1.

368. *Id.*

such as "licens[ing] music through services like Napster."[369] The recording industry's behavior has been contradictory.[370] First, RIAA provided licensing agreements with major retail outlets such as Walmart, which is about to launch Walmart.com's Internet music download service, and other providers such as ClickRadio, that allows users to create their own "online radio stations."[371] However, RIAA refuses to accept offers from Napster to settle the case via licensing or similar agreement.[372]

Napster offered several different approaches to RIAA to settle their differences, including (1) providing downloads of music for a nominal monthly fee to generate millions per year for the recording industry (2) providing marketing and promotional support with Internet links to RIAA's member websites, and (3) even offering RIAA one billion dollars to drop the lawsuit.[373] Napster executives are frustrated by RIAA's refusal to listen to their proposals and have stated that "'[w]e've made serious presentations, none of which have been accepted, which makes me think that it's not about money, it's about control.'"[374] RIAA officials have not commented specifically on the proposed offers, however, RIAA President Hilary Rosen stated that with the preliminary injunction upheld by the appeals court "'[RIAA would] like to get the lawsuit settled.'"[375]

Many critics feel that RIAA's main motivation is to buy time in order to assess the new technology and determine how it can work for them.[376] According to Heath Terry, who analyzes Internet trends for Credit Suisse First Boston, the recording industry is wary of the new

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369. Clarence Page, *Take Note: Don't Fight Napster, Use It*, CHI. TRIB., Oct. 4, 2000, at N17.

370. Evangelista, *supra* note 345, at D1; Page, *supra* note 369, at 17.

371. Keefe, *supra* note 345, at 1C.

372. Evangelista, *supra* note 345, at D1; Page, *supra* note 369, at 17.

373. Benny Evangelista, *Napster's Fee Offer Falls on Deaf Ears; AOL Time Warner, Sony, Universal Not Interested*, S.F. CHRON., Feb. 22, 2001, at B1.

374. Evangelista, *supra* note 345, at D1 (quoting Hank Barry, Napster Chief Executive Officer).

375. *Id.* (noting that Rosen states, "'[w]hat we ultimately wish to come out of this process is an increased cooperation between innovation and industry so legitimate business models can make more music available online'").

376. Keefe, *supra* note 345, at 1C.

technology and wants to slow everything down until it can figure out how to use the technology to its advantage.[377] The main problem facing RIAA is that Napster's service works more successfully than those of the recording industry.[378] Furthermore, RIAA must contend with placating its musicians, meaning RIAA has to gather "'permissions and clearances and copyrights,'" which Napster has never done.[379]

CONCLUSION

The Napster litigation provides the perfect opportunity to outline the contours of existing copyright law as applied in the modern Internet age.[380] The framers of copyright law never contemplated the sheer volume of data that could be distributed over the Internet nor the unprecedented ease with which it could be accomplished.[381] Though past technological advances such as the videocassette recorder have withstood attacks from the entertainment industry, the ability to transfer and copy large amounts of intellectual property has been the distinguishing issue in the Napster case.[382]

Until now, the law has apparently favored RIAA, and the courts have rebuffed Napster's argument that it meets the definition of a service provider under the DMCA.[383] Following the Napster

377. *Id.*

378. *Id.* Doug Curry, RIAA spokesman, states, "'[i]t's a complicated process . . . It's much easier for someone to upload thousands of CDs and put them online for free as opposed to changing 60 years of a large industry's practices overnight.'" *Id.*

379. Bray, *supra* note 348, at G1 (quoting Cary Sherman, General Counsel, RIAA).

380. Berschadsky, *supra* note 30, at 789.

381. Pollack, *supra* note 2, at 2487; *see also* Gibeaut, *supra* note 60, at 39.

382. Gibeaut, *supra* note 60, at 39.

383. *See, e.g.*, RIAA v. Napster, No. C 99-05183 MHP, 2000 WL 573136 (N.D. Cal. May 12, 2000).

litigation, there appears to be some indication that courts are becoming less resistant to this burgeoning new technology.[384] Regardless of the appeals court ruling, the fluid rate of innovation in the digital recording industry will likely raise hurdles to judicial protection of recording labels.[385]

For RIAA to survive in the digital age, the industry must embrace rather than resist the Internet.[386] The recording industry would benefit from considering new business models as an attempt to reasonably adapt to the new technology, through perhaps unique avenues including licensing agreements, subscription services, or encryption devices.[387] By being amenable to change, the recording industry will likely not be destroyed by new technologies, but rather will enjoy the rewards of fostering greater creative expression and enhancing consumer distribution.[388]

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384. *See* Evangelista, *Opponents Pressed*, *supra* note 235, at A1.

385. Berschadsky, *supra* note 30, at 789.

386. *See generally Modernizing Music's Market*, *supra* note 198.

387. *See generally* Bray, *supra* note 348, at G1; Grimes & Parkes, *supra* note 345, at 24; Keefe, *supra* note 345, at 1C.

388. Pollack, *supra* note 2, at 2487-88.