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PANEL TWO: Which Legal Rules Control?: Evaluating Arguments

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BEYOND NAPSTER: DEBATING THE FUTURE OF
COPYRIGHT ON THE INTERNET

PANEL TWO: WHICH LEGAL RULES CONTROL?:
EVALUATING ARGUMENTS

Washington, D.C.

Thursday, November 16, 2000

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* * * * *

PROCEEDINGS

PROFESSOR FARLEY: Well, we have taken the road to Napster and here we are. Of course, we do actually need to directly discuss Napster the case and I think we have an opportunity now to get into the details of the decision in Napster. I hope we will also be able to discuss what might happen in the appeal, which is now before the Ninth Circuit Court of Appeals. So, I would like to begin, again, by asking a broad question and you can take any piece of it that you would like, or again even address something related to the question that I ask. I will again go down the line and give you all some time to make a comment and then we will have some other questions and an opportunity to respond to each other. Panelists can certainly pose questions and we will leave some time, again, for the audience to ask their questions, as well.

So, not surprisingly, the question that I would like to ask you to address is: what do you think about the legal standards that Judge Patel applied in her ruling in Napster? Could you please comment specifically on the *Sony* standard that we heard a little about this morning. Also, please feel free to comment on the applicability of the Audio Home Recording Act or the Safe Harbor Provisions of the DMCA. Ray Patterson, may we begin with you?

PROFESSOR PATTERSON: I want to take a little different form that was suggested by our moderator. The interesting thing about the very good panel discussion this morning was that no one bothered to mention the copyright clause. The reason I find that interesting is that the copyright clause is a limitation on, as well as a grant of, congressional power. When we talk about extending copyright protection to a completely new technology it would be appropriate to examine the constitutional limitations on Congress' copyright power, that is, the copyright clause.

I should note that the panel's lack of attention to the copyright clause is not unusual. Congress, too, seems to ignore the copyright clause. I have not read all the committee reports on the DMCA, but I venture to guess that none of them examined the copyright clause. My inference is based on the fact when Congress undertook the revision of the 1909 Copyright Act in the 1950's it commissioned a series of studies on copyright. There were some thirty-five studies, but the only study that dealt with the Copyright Clause was Study No. 3, "The Meaning of 'Writings' in the Copyright Clause of the

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Constitution.” There was no discussion of more important points, the meaning of the ‘exclusive right’ and the significance of the fact that Congress is empowered to grant copyright to promote the progress of learning. On the first point, history clearly shows that the framers understood the term ‘exclusive right’ to mean that Congress can grant to authors the exclusive right to print and publish his or her writings. On the second point, history shows that the term ‘Progress of Science’ was meant to prevent copyright from being used as a device of censorship.¹

We can be confident of these points because we can identify precisely the source of the language the framers used for the copyright clause. That source was the first English copyright statute, the Statute of Anne.² Compare the language of the title of that statute with the copyright clause: “An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned.”³ The core ideas: learning, authors, writings and limited time are the same in both the Constitution and the Statute of Anne.

An analysis of the Copyright Clause reveals a surprising fact. One of the basic purposes of copyright is to protect and enlarge the public domain. Thus, the limitation of copyright to the writings of an author means that copyright cannot be used to protect works in the public domain; the limited times provision means that all copyrighted works will go into the public domain.

I am not prepared to say that Congress cannot extend copyright protection to new forms of communication. I am prepared to say that in doing so, Congress is constitutionally bound to protect the three policies in the Copyright Clause: (1) the promotion of learning, because that’s what the clause says; (2) the protection of the public domain, because copyright is available only for original writings, only for a limited time; and (3) the right of public access. That’s because the exclusive right that Congress can grant to copyright holders is the exclusive right to publish or to make public.

All of this is relevant because the invention of the computer is analogous to the invention of the printing press in the fifteenth century. The process of development that proceeded from the invention of the printing press is essential; similar to what is going on today. That process is to define the copyright monopoly to protect

1. See L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC’Y 365 (2000).

2. 8 Anne, c. 19 (1710).

3. U.S. CONST. art. I, § 8, cl. 8.

the public interest as well as private property interest.

In this process, we have very important lessons to learn from the Copyright Clause in light of history. One of the surprising things to me is that copyright is the only legal concept that I know of that gets more primitive as it is developed. By primitive, I mean, it concentrates a disproportionate amount of the power in the rights holders, as does the DMCA. This was true of the early copyright, the stationer's copyright, in England, which was the predecessor of the statutory copyright.⁴ Parliament in 1709, when it enacted the Statute of Anne, created a very sophisticated copyright allocating rights to the public as well as to the author and to the copyright holder. We need to return to history to learn how best to prevent protection for Napster from destroying the constitutional copyright policies.

PROFESSOR FARLEY: Thank you. Brian Mudge.

MR. MUDGE: Yes. I think the *Napster*⁵ case has really helped focus folks on looking at how the intellectual property laws that we have already enacted should, and whether they should, apply in cyberspace. Perhaps one thing that I would hope folks keep in mind as they are looking at this question and laws examining how it should be analyzed, is to understand and keep in mind the fundamental purpose of copyright laws, and of the intellectual property in general, which is to, at least certainly in terms of the copyright laws, promote creation and give an incentive for people to produce creative works. This is a fundamental purpose of the copyright laws. It is why it appears from the very beginning of this country in our laws and in our history. We hear a lot about whether it should apply and how it should apply to new technology. But I think if we keep in mind the basic premise underlying copyright law, it will help guide the discussion and how the issues should be fleshed out.

One of the things to keep in mind, as we think about the various aspects of the laws and decisions that we'll be debating, the *Sony*⁶ decision, the Audio Home Recording Act and the like, is to understand that those decisions were made in a different time. The *Sony* decision, now almost twenty years ago, came in a regime where the vast ability to have interchange of information and file-sharing wasn't even contemplated, certainly not by Congress or the court at that point in time. Certainly it doesn't appear that the Audio Home

4. See L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

5. See *A & M Records, Inc. v. Napster, Inc.*, 2000 WL 573136, at 1 (N.D. Cal. May 12, 2000).

6. See *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417 (1984) (finding that the use of video tape recorders for "time-shifting" constitutes fair use).

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Recording Act⁷ which was created by Congress was contemplated to accommodate the widespread capability of universal file-sharing that has been made available through the technology that Napster and others have created.

We need to keep in mind the fundamental purposes of copyright law, the differences that technology and the widespread ability to have information that simply were not present or contemplated at the time some of these other laws and decisions were made. We can certainly talk later about the details of some of those issues. I just want to open with those comments, generally.

PROFESSOR FARLEY: Thank you. Laurence Pulgram.

MR. PULGRAM: I am not to be confused with the partisan who sat in this seat at the last part of the session. I have represented Napster. Although I agree very much with Professor Patterson's opening comments about the purpose of the copyright laws, *Sony* is the original case in which the Supreme Court confronted the conflict between new technologies and rights holders interests. The Court made it very clear that in those circumstances, all that the right holder owns is a limited monopoly, in the particular creative works. Furthermore, limited monopoly does not extend to the means of distribution or copying of those works, if there is, as part of that technology a mere capability of substantial non-infringing uses. The recording industry or any other copyright holder does not have the right to monopolize distribution facilities. This is not a grant that the copyright statute affords.

So, we immediately proceed to the question of whether or not Napster is, quote, "capable of substantial non-infringing uses," To read that term literally requires it to be read liberally. Capable does not mean present use. Capable means now or in the future. It means a realistic possibility. Substantial does not mean predominant. It does not mean majority. It does not set a percentage threshold. It means of some commercial or social significance. It has to mean that because a copyright holder does not have the right to deprive a person of any technology that one can substantially use for a non-infringing purpose.

Is Napster capable of substantial non-infringement uses? Well, we could try to estimate exactly where this industry is going to go. Presently, it is impossible to tell from any MP3 file whether it's authorized or unauthorized. There is no copyright label on that file. In the future, there may very well be indications whether it is some sort of security, marking or otherwise. Certainly the recording industry

7. See Audio Home Recording Act of 1992, 102 Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as amended at 17 U.S.C. 1001 et seq.).

could put that on the files. It may be possible, in the future, for Napster to identify what is an unauthorized file or not. But right now, we know that there are over 20,000 artists who have authorized the distribution of their materials over Napster. We know that there are hundreds of artists who have generally authorized the trading of their concert recordings, including, for example, Metallica, which asked Napster to block only studio recordings and not live-concert recordings. Put yourself in Napster's situation, the recording industry would say: Napster, block all of those Metallica Sandman recordings, just read the file name, it says Metallica Sandman, well, Napster doesn't know whether that's a live recording that Metallica has authorized to be traded or a studio recording. But it's not. You can't tell from the file names. And on this record, the judge didn't even try to determine whether Napster could, in fact, distinguish an authorized from an unauthorized file. She concluded that Napster had to, regardless of whether it could make that determination, stop allowing the circulation through its system of all unauthorized files at least all that the recording industry claims it has rights in.

The result of that is, Napster had to shut down. It had to shut down even though there clearly are thousands, even millions, of authorized uses of Napster occurring every single day. We would submit that if there are millions of authorized uses occurring every day—if there are 20,000-plus artists and if there are free exchanges of live recordings, all of those are authorized substantial uses of Napster.

Sony should be read to protect the consumer's rights and the public interest—I'm even going to quote *Sony* for one second—"the copyright law, like the patent statute makes reward to the owner a secondary consideration . . . The sole interest of the United States, and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. It is said that reward to the author or artist serves to reduce release to the public of the products of his creative genius."⁸ The proper interpretation here, requires that Napster be allowed to continue its substantial non-infringing uses. I'm sure we'll get far down into the specifics before we finish this panel.

PROFESSOR FARLEY: Thank you. Next, Jeffrey Knowles.

MR. KNOWLES: Thank you. First, let me also declare my colors at the outset for those of you who do not know me. I represent songwriters, composers, and music publishers in the Napster litigation.

8. 464 U.S. at 429 (quoting *United States v. Paramount Pictures*, 334 U.S. 131 (1948)).

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But let me also jump to the specifics, in particular, the *Sony* case. When Laurence says that we can go immediately to the question of whether Napster is capable of substantial non-infringing uses, I would say: not so fast.

The test under *Sony* of substantial non-infringing uses was the product of a particular set of facts that actually is quite rare. In fact, there has been only one reported decision that has sustained a defense based on substantial non-infringing use because it just doesn't come up that often.

I recall the situation where a manufacturer of an item was sued for contributing to copyright infringement. The manufacturer injected the product into the marketplace and then had no further contact with the product, when users, some of whom were accused of direct infringement, were using that product. The court said that this particular situation called for a departure from the traditional contributory copyright infringement analysis.

In the traditional situation, you have a copyright infringer who is in contact with the contributing copyright infringer. The classic cases discussed in the *Sony* decision were the dance hall cases where a dance hall or a bar would bring in performers or recordings that were infringing. They knew they were infringing and would remain in contact with them. The key element was the right to supervise and have some degree of control over the conduct of the infringing users, the direct users.

That didn't exist in the *Sony* case. In *Sony*, there was a product that was out in the marketplace. The product had infringing as well as non-infringing uses. Therefore, the court analogized the situation to patent law, and balanced the interest of the public with respect to the non-infringing uses, against the interest of the copyright holder to not have their copyrights infringed.

The point of departure, in other words, for the substantial non-infringing use test, was that you didn't have this ongoing relationship between the infringer—the direct infringer and the party accused of contributory copyright infringement. The key to the analysis was the right and ability to supervise the conduct of the direct infringing users.

Essentially the *Sony* court was presented with this up or down choice. Napster would suggest, and I can hear Laurence over there thinking this now. Hey, we have that up or down choice here: this is about the technology, either the technology's going to die or it's not. That simply isn't accurate. Napster absolutely has the ability to supervise its users. It will be interesting to see how the Bertelsmann deal shakes out, because I suspect that the way that will play out is that Napster will impose some

sort of supervisory role, that is, it will do some filtering or it will do some tracking, in order to make sure that the artists and the copyright holders get paid. We will find that Napster has the ability to do this filtering. Of course, that is much of the debate in the litigation right now. We have submitted evidence to Judge Patel that Napster does have this ability, in fact, it's quite simple. What you do is what Napster does with the new artist program. What Napster does with the new artist program is, it says, new artist do you want to be on our system? If you do, check this box that says you authorize us to distribute your music. They could do that with established artists-with copyright holders. They could say, check the box. Only those things that where the box has been checked, get distributed on the system. It's really not that difficult.

So, even though this case presents a number of fascinating issues, it really isn't about the technology. The technology will survive. Everyone believes that peer-to-peer technology file-sharing is a good thing, as a general proposition, but just like every media outlet for years has been required to get clearances before they can distribute protected content, Napster should do the same.

Coming back to the primary point, in some ways, the *Sony* analysis is off track at the beginning. You really never get to the substantial non-infringing use question because of this right and ability to supervise. Napster has that ability. It is not an all-or-nothing proposition, as it was in the *Sony* case, and so, it's just down to vicarious liability. If they have the right and ability to supervise, and they get a direct financial benefit, which we're seeing from the BMG deal- there is vicarious copyright infringement. So, I apologize for descending into the trenches, but as a foot soldier, that's my job.

PROFESSOR FARLEY: Thank you. Peter Jaszi.

PROFESSOR JASZI: Thanks. Disclosure time. I was involved in a couple of the amicus briefs that were filed in the Ninth Circuit in support of Napster. I'll make a different kind of disclosure then, which is that I wake up worrying about these things, but not for quite the same reasons that those who are directly involved in the litigation do. My concern is that of an academic who worries about the possible downstream consequences of the way Napster is going to be resolved—consequences that are particular to the Napster situation itself, or even limited to file-sharing technology, but which are potentially far more general.

So what I want to share with you is a copyright traditionalist's nightmare about what the fallout from all of this could be. I'm going to try in the course of describing my nightmare to develop a nautical

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metaphor that may or may not, be successful.

The nightmare is that in the days and weeks to come, the other plaintiffs in the Napster case sign on to one or another version of the Bertelsmann deal, the appeal is withdrawn and there is never a Ninth Circuit (let alone a Supreme Court) decision. As a result, Judge Patel's opinion joins the ever-growing flotilla of ghost ships manned by ghastly skeleton crews that already clog copyright law's lanes of navigation.

The concern is a real one for me, because since 1984 many of us have been steered, in a variety of ways, by the beacon of the *Sony* decision. In general, I'm afraid that sometimes we—and here I speak of copyright traditionalists—have been complacent or even thoughtless in our reliance on certain premises of copyright law: the importance of the public domain, the sanctity of the idea-expression distinction, and so forth. Likewise, we've tended to accept the *Sony* vision of fair use as given, rather than recognizing that, from time to time, it's necessary to argue for the continued importance and validity of such fundamental principles.

Sony has functioned as a kind of beacon in several different ways. As to an issue which hasn't been raised so far, but which I hope we'll arrive at in the discussion period to follow, *Sony* has served as a sort of representation of the notion that personal use of copyrighted works has or ought to have special legal status.

But it's the other aspect of *Sony* as a beacon that I want to discuss now. This—and it's already been mentioned—is the notion that *Sony* states an important truth about the appropriate relationship between copyright law on the one hand and evolving information technology on the other: that copyright law ought not to operate as an unnecessary impediment to that evolution.

The point has been made—and I think it's a very important one—that for a variety of reasons we haven't had many opportunities to see in action this aspect of the *Sony* test, which looks to the criterion of whether or not a technology is “capable of substantial non-infringing uses.” But now, in Napster, and in particular with Judge Patel's decision, we are faced with a very specific and very limiting interpretation of this aspect of *Sony*.

There are two dimensions to any analysis of this aspect of *Sony*, both of which require further discussion. One is this issue of what we mean when we say a technology *capable* of a substantial non-infringing use. Here, I think, Judge Patel's opinion is probably most problematic. Whatever we mean by capability, the term suggests a standard which has some dynamic quality, rather than one that is applied to and only to a static snapshot of the situation as the court finds it at the time of

decision. This however, seems to have been Judge Patel's method of decision.

On the issue of what constitutes *substantiality*, I think, there is greater difficulty and, perhaps more at stake. What proportion, assuming that it cannot be the predominant part, of all the uses of which a multipurpose consumer technology is capable must be non-infringing in order to qualify as substantial? All of us copyright lawyers know what can be done with the term substantiality. It isn't exactly a fixed concept in our field and it's one that we obviously apply differently in different situations.

This said, it is interesting to return to the facts of the *Sony* decision and the analysis that the Supreme Court provides of the trial court findings as to the uses then being made of the VCR technology. If we do so, we see that although we tend today to treat the court's determination that unauthorized time-shifting by users of the technology constituted fair use as crucial to the court's decision, there also was another, sufficient, alternative rationale for the conclusion that the VCR had substantial non-infringing uses.

The alternative was the finding that *authorized* time-shifting activities, a category the existence of which was evidenced by the testimony of no less a person than Mr. Rogers himself, were in and of themselves a sufficient use to constitute a substantial use for purposes of the application of the standard.

If I'm reading the opinion correctly, the Supreme Court seems to come down very strongly on the notion that even a minority use of an information technology may be "substantial" for purposes of the assessment of contributory or vicarious liability. I very much hope that we don't see a premature resolution of the Napster case that denies us the chance to see how appellate courts will deal with this dimension of the *Sony* standard as applied to the Napster facts.

PROFESSOR FARELEY: Thank you. Timothy Casey.

MR. CASEY: Thank you. Since it's confession time, I'll join in. I guess, the first thing is that I had the fortune, I guess, or perhaps misfortune-I haven't quite figured out which one it is yet-to have been intimately involved in the negotiations that ultimately resulted in DMCA and, in fact, was the person who came up with such phrases as "facts or circumstances from which infringing activity is readily apparent," and other words like that.

There's good reasons why those were the phrases that ended up being developed. If you want to know more about it, I'll do my one

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plug for my book, which goes into the DMCA⁹ in great detail, called the *ISP Liability Survival Guide*. The reason it's called that is because I represented WorldCom at the time, or MCI-WorldCom. We were trying to structure copyright law and the application of copyright in a digital context in a way in which we thought would be fair to the people who were operating the networks. That becomes important in the context of Napster because it isn't exactly clear where they fall in.

Now, one of the things that Judge Patel, I think, did and did correctly in her opinion, was that she drew the line at the time the action was filed. She looked at whether or not the DMCA actually applied at that point in time. According to her, you know, there's a basic eligibility requirement under the DMCA. There's two factors. One, you have to have a repeat infringer policy, and, two, you have to comply with industry-adopted standards for protecting copyrights. There aren't any industry-adopted standards at this point for protecting copyrights. So that condition doesn't really have to be met.

But the repeat infringer condition was not met at the time that the action was filed. I know that for a fact because I was contacted by one of the attorneys after the action was filed and asked what should they do. At that point I sent them a preprint draft of a chapter from the book, and shortly thereafter, Napster put up its repeat infringer policy. So that didn't occur before, you know, the action was filed, and there was quite a bit of argument in the case, about whether or not the DMCA actually required that you comply with the policy at the time that you were accused of the infringement or you just had to have a repeat infringer policy up at some point in time.

I think Judge Patel got that right, as well, in that she said, no, it doesn't make any sense to have an eligibility requirement that doesn't have to be complied with until after you've been accused of infringement. Therefore, for the most part the DMCA doesn't really apply because, at the time of the action being filed, which is the period that we're really looking at, it wasn't being complied with. If it wasn't being complied with, then you weren't able to take advantage of its safe harbor provisions.

But, assuming for the sake of argument, that, say, continuing infringements are an issue, they now have a repeat infringer policy. They are, as far as you can tell, largely complying with many of the other provisions, so the question then becomes, well, are they considered an ISP and/or an online service provider, as it's used in the

9. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

DMCA?

There's really two tests for whether or not you're considered an OSP. One is very limited and is intended to try to figure out who comes under the sort of mere conduit conditions that are set forth in the DMCA. That is found at 5.12(k)1.a. and requires that you have to transmit, or route, or provide connections for material through a system or network that's controlled or operated by or for the OSP. Judge Patel looked at that and said, well, gee, I don't think that they're transmitting because it isn't—they don't actually transmit the information. I don't think they're routing, but the parties didn't argue to me what routing was, so I don't really understand it, so I'm not going to deal with that. I don't think they're providing connections, but maybe they are, because they do allow the sort of, you know, users to contact one another, and so, there's the possibility that they come under that provision. But then she said they're not doing this through a system or network that's controlled or operated by them because, she says, they use the Internet and, gee, the Internet's not operated by them. I think that's one place where she got it wrong.

The DMCA was not intended to carve out anyone's use of the Internet and then say that the network, itself doesn't apply. I mean anybody who uses the Internet for anything is not operating the Internet. But, clearly, the Internet is being operated on their behalf. They connect their equipment to it, then they then make use of the Internet and so, that is what was, at least when we were negotiating it, what we intended—that that would be a networked system that was operated. They provide certain components to it and when they put those components in the network, then that becomes part of the network. So, that part of it wasn't right.

Now, the other thing that's interesting is that there's been a lot of talk about *Sony* and fair use, but that is something that the DMCA doesn't do. It doesn't take away a defendant's right to assert any other defense that the defendant might have. It is only a safe-harbor rule that allows you, if you comply with all the conditions that are set forth in it, to limit your liability. You can either limit your liability by having almost outright immunity if you meet the one 512(k)1.a standard, or you have to meet the notice-and-takedown requirements that are set forth in the remaining portion of Title 2, whether you're a hosting provider, or you're providing links, or you're a service engine, or an index, or any of the other things that Napster has argued that it does.

But all that means is if you can meet those eligibility requirements, then the worst that you're subject to is a form of injunctive relief, which, of course, was largely what was being sought. You still have all the other

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defenses available to you. They could argue fair use, they could argue the Audio Home Recording Act, they could argue anything else that they wanted to argue. They did argue the AHRA and I think, you know, largely, that's not a very strong argument. I think the Diamond multimedia case sets out fairly well through what was intended to be covered by the AHRA and it—and it doesn't look as though it applies to services or networks.

Sony, however, is really where everything comes up. I think, if Napster's got a good argument, it is the *Sony* case for a number of reasons. Whether or not they can meet all the thresholds about whether they've got a direct relationship with the infringers, whether or not it's really a noncommercial use, whether or not they have knowledge, whether or not they have the right and ability to supervise, is all going to have to be sorted out.

I think I agree with Laurence in that they don't really have knowledge. I mean, that was one of the arguments that the ISPs made when they were saying, look, you can't apply copyright strict liability regime to an ISP because even if they knew about some things, it isn't possible for them to know about everything and you really don't want them snooping around trying to figure out everything that's going on.

Likewise, just because somebody sends a photograph with a red ball on a table, you don't know who owns the copyright to it, you don't know if it is copyrighted, you wouldn't know how to contact the people to figure out whether it was copyrighted or not. Same way, if there's a Metallica song that's on there. You don't know if Metallica authorized it. You wouldn't necessarily know whether or not Metallica even had the rights to their own recording. They may have sold those rights to somebody else. So you don't know, in most cases, whether or not there's an infringement that's actually occurring just because you happen to see a name for it. But there are other facts or circumstances which might, you know, come into play. And so, those things have to be considered.

The real issue is going to get down to whether or not it's substantial and whether or not the *Sony* decision really applies to services and networks or if the decision only applies to devices. I think that's going to be, perhaps, the most interesting part. *Sony* really was talking about the sale of a device and I think they are on target. But that doesn't mean that *Sony* can't be stretched to apply to a service or a network as well.

The substantiality test is one that hasn't been really played out well—at least in the copyright context. It certainly has been played out in the patent context, because for contributory infringement under patent

law, the substantial non-infringing use is also a test. In that case, we tend to have a very, very low threshold-meaning that if you have a device that infringes somebody's patent and you attempt to argue that, gee, it also makes a great paperweight-that is not a substantial use. If it is being used for the purpose in which it also infringes, yet it can be used in ways in which it doesn't infringe, then that probably meets the substantiality test. So, in this case, I would say, yeah, they probably do meet it, because there are other uses, whether they're only one and a half percent of the uses or not, they do exist and whether or not that's substantial isn't necessarily a percentage of the total infringements that occur.

PROFESSOR FARLEY: Thank you. Now I would like to open it up to give you the opportunity to respond to each other's points. I just want to bring up some of the points that were made that possibly could use some response.

First, a number of people have said, both this morning and on this panel, that, in particular, the Audio Home Recording Act was intended for a particular technology. There were other similar statements made about the *Sony* standard, that it was a twenty-year-old case that responded to a specific technology. Well, in copyright law, aren't we always responding to yesterday's technology? So, to what extent should these standards be stretched to accommodate these new disputes, or must we instead proceed with other legislation?

Specifically, I would like to call attention to the point about *Sony* and what role *Sony* plays here. First, the point was made that *Sony* really does not even apply here because of the ongoing relationship Napster has with its users due to its ability to supervise that use. I would like to hear what the panel thinks about whether the Bertelsmann settlement bears on that factual question.

I would also like to raise the point about whether there ought to be a recognized legal status for personal use. If not through *Sony*, then what? Possibly, you might want to comment on the Boucher bill, or whether there should be other new legislation that would cure that problem.

PROFESSOR PATTERSON: Let me make some observations about the personal use.

PROFESSOR FARLEY: Okay.

PROFESSOR PATTERSON: I personally think that *Sony* can be understood only as a personal-use case. What has happened is that the fair-use doctrine, which originally was only for competing authors, has been corrupted into a doctrine whereby you can claim that an individual, by making a copy, a single copy, is infringing the copyright.

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The lobbyists in the '76 act, achieved this goal in a very subtle way. They divided the act of publication into two rights; the right to reproduce in copies and the right to distribute copies. Now, the significance of that point is that from the beginning copyright was equated with a published work. By dividing the act of publication into two rights, the lobbyists were really preparing for what I call the "pay per use" paradigm, you know, if an individual makes an individual copy, that's infringement he gets approval of the copyright holder. This is played out in the course pack problem. But I think we need to recognize how these results were achieved, because that does away, automatically, with personal use as a separate category.

The second step they did was to do away with publication as a condition for copyrighting. As I say, from the beginning, publication had always been a condition for copyright, with one minor exception, in the 1909 Act.

The third thing they did, was to obscure the fact that the fair-use doctrine is a means of enlarging the copyright monopoly rather than narrowing it. This is demonstrate by the classroom guidelines. If you copy 1,000 words, that is a fair use. If you copy 1,050 words you are infringing. It's simply an example of the old proposition that a divined right is a limited right.

The fourth step they made in the fair-use doctrine was in factor four: to include potential effect on the potential market. Well, the problem there is that that says the copyright holder has control not only of the primary market but also of the secondary market. And this, I think, is basically contrary to copyright law. So, I think one of the remedies for this is to give personal use a recognized status in the law of copyright.

MR. MUDGE: Let me just add a couple of comments on the applicability of the *Sony* case and the AHRA. I think these points were touched on.

One of the differences we see with the Napster case is that Napster is not merely about distributing a technology, but is about an ongoing relationship, an ongoing service that is provided, using that technology. If you were to try to put Napster into a hole that would fit the *Sony* case, it would be that Napster would be distributing the software, which would allow people to engage in peer-to-peer file-sharing, but they would not have the indexing service and the service which allows people to actually find copyrighted music using the Napster service.

So, Napster is really doing something with the ongoing service, the ongoing relationship they have with the users, which goes beyond what was presented to the court in *Sony*. Another point picking up on the personal use aspect is that one can argue whether or not there should

be some ability to make copies for one's personal use. You can argue that from the *Sony* case, you can argue that from the Audio Home Recording Act, you could probably argue that from other premises using the fair use doctrine.

However, it's one thing to say that one makes a copy for one's own personal use and it's a far different point to say that one has a regime which allows file-sharing or copying-sharing of works among a few close friends or, perhaps in Napster's case, 20 million of one's closest friends. If you look at it in that light, I don't think that the personal use issue really is something that saves Napster from whatever else the copyright law might say about its activities. In some sense, when you look at the very, very wide ability to disseminate files among a large percentage of folks, it really begins to look more like a distribution service and not merely a personal copying service.

MR. PULGRAM: There are so many issues to address. I want to start with this supposed disqualification of Napster from *Sony* immunity due to the purported "continuing relationship." This was the term that *Sony* used. I would also like to address the issue about whether or not law changes and words change, as technology changes. *Sony* had no continuing relationship with the user of the *Betamax*. It sold a *Betamax*, you took it home, you did with it what you wanted. Now, let's say that *Sony* had had a *Betamax* cleaning service that came with the *Betamax*. You bought it, the people came to your house and there was a continuing relationship where *Sony* came to your house once a week or month and clean your *Betamax* and went back to *Sony*. Would this have changed the result in *Sony* because there was a continuing relationship? Of course not. The proposition that *Sony* stands for is that the distributor of the product or service is unable to control whether or not you make an infringing or non-infringing use of the product. That's why *Sony* was off the hook. It has nothing to do with a continuing relationship—which is, when you think about it, the ultimate the issue. It has to do with ability to control. Now, Jeff would like to phrase it in terms of ability to supervise. In order to download a file through Napster, you've got to be linked up to Napster. Napster can supervise what you're doing. Surely it can keep you from committing infringing uses. Well, not if it doesn't know from the file names or from your use of it for that matter, assuming there is any personal use affeerors. But not from, if it can't tell from the file names whether you're committing, whether you have authority to download that file or not. Napster is no different from *Sony* in that it cannot control the use and distinguish whether you're making an infringing or non-infringing use.

Whether it is characterized as a product, or as a service, or as a

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device, or a network, doesn't really matter. Look, AOL can supervise its users, so can a search engine, and every time that you link up to some location that has an infringing material on it, that's something that any search engine could supervise. That doesn't make it incapable of substantial non-infringing uses or not eligible for that defense. I really think that one is a place where the law clearly is going to move, as we recognize that any Internet service is going to include continuing relationships between the provider and the consumer.

I believe that the substantiality issue is very much interrelated with the capability issue here. I think it's important to look at the issue this way: Right now, the recording industry will tell you that they control something like 90% of the music sold in the United States. They promote it, they hype it, it sells and, therefore, 90% of what people own at their houses, today, is copyrighted by the RIAA's members.

Now, this would lead me to not be surprised that a substantial large percentage of the materials immediately available through the Napster service were their copyrighted materials because that's what's out there. But as Napster allows artists other ways to get to customers, the amount that will be distributed or that could be distributed from entities other than the recording industry will increase; and if we framed the debate based on what the present percentage is that the recording industry controls, we will bootstrap the possibility of substantial non-infringing uses. In other words, the very capability of substantial non-infringing use here is that this system will allow enhanced distribution of authorized materials, authorized for exchange through Napster. If we look at it from a current-time perspective, or a percentage-today perspective, we're going to ensure that the dominant controlling distribution mechanisms will engage in and possess a monopoly over the new technologies.

I'll let somebody else talk, but there are a lot of other issues, obviously, including the DMCA, which I'll go at with you at lunch.

PROFESSOR FARLEY: Thank you.

MR. KNOWLES: Let me talk, for a moment, just about the personal-use issue. Napster provides a terrific example of where the personal versus commercial starts to break down and, to a great extent, it's been mentioned here.

You have a personal user who has downloaded a song and then, in most cases, is making that song available to millions of other users. That person then becomes, essentially, a mass distributor of that product. In that situation, it's kind of hard to think of it as personal use in the traditional sense that you make a copy at home where it's yours and you use it by yourself.

So, Napster is, in fact, a terrific example of breaking down the distinction between personal and commercial. Given that the whole enterprise is driven by commercial motivations, it is more appropriately viewed as a commercial operation—a commercial act, in substance. Let me take up the cudgel on Laurence's analysis of *Sony*. I think maybe we at least agree that that the debating ground is, first, the relationship between the party accused of contributing to infringement and the party who is accused of directly infringing. So, if that relationship is such of a certain type, then the contributing infringer should be held responsible regardless of whether or not their product or service. If that party has a certain relationship to the direct infringer, they are held liable, regardless of the substantial non-infringing use test. That's really what the court in *Sony* is saying. Those circumstances where you have that kind of relationship doesn't require us to jump over to patent law on this exotic concept that really is not typically used in copyright law. The reason we're having to use it here, in *Sony*, is that you've got this device out there and no one has any control over it or relationship to it other than the direct infringer. So, if it's got substantial non-infringing uses, we have to balance the public interest against the interest of the copyright holder. In this situation, you don't have to do that because Napster, undoubtedly, has the ability to control usage. They can do it—they choose not to. That's what Patel is saying, they can do it—they choose not to. But I think that's subject to change.

MR. PULGRAM: She didn't say that. She specifically assumed that it would be technologically infeasible for Napster to comply with this injunction without shutting down. She had a reply declaration, which presented the evidence that you spoke of, but she never concluded that Napster could, in fact, limit usage to non-infringing ones and continue to operate.

MR. MUDGE: That's a place where we just disagree, but that's the fact fight. If we're debating the relationship between Napster and its users, then that's what we should talk about, and I think on the facts, it comes out that Napster can filter this unauthorized material if it chooses to, but it doesn't.

Now, let me make one last point. There's been some discussion about the knowledge element of the test here and what level of knowledge one must have, and that can be an interesting question. It is an issue hotly debated in this case, but it's much less persuasive to say that Napster doesn't have the knowledge requisite when Napster was constructed and designed for the purpose of sharing copyrighted material.

That is, essentially, its aim, and one can debate whether that's a good

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thing or a bad thing from a social normative standpoint, but certainly it's hard to say that Napster doesn't have knowledge that there's a lot of copyrighted material being traded without authorization and almost certainly infringing when it designed the system for that purpose.

Ultimately, I think the case will be decided less on substantial non-infringement uses, because this balancing really isn't necessary, than it will be on the sort of factual nitty-gritty questions of whether Napster has the capabilities to filter and to supervise and to prevent distribution of unauthorized material.

Whether that happens at this stage or whether it happens later, I think it will turn out that Napster does have that ability and, therefore, must comply with the same laws that all media content providers do.

PROFESSOR FARLEY: I want to leave a moment for Peter Jaszi and Timothy Casey to comment, but I just want to introduce a question from the audience that seems relevant at this point, which is: "Can U.S. law declare MP3.com/Napster-type businesses exempt from copyright laws given constraints under TRIPS¹⁰, et cetera?"

PROFESSOR JASZI: You mean declare them exempt—the Boucher legislation.

MR. CASEY: I would be surprised if we were able to do that, given the inter-workings between GATT and TRIPS because it would require sort of a wholesale modification of what copyright laws actually apply to.

The only reason the DMCA works effectively is because the DMCA doesn't carve out copyright law—it simply limits the damages that are available. The only way you could effectively do it, would be to do a similar sort of thing: attempt to limit the damages that are available. Otherwise, you run into an international treaty issue in terms of whether or not we're applying adequate respect for copyright laws for anyone else coming in. It wouldn't just apply to people in the U.S., it would apply to anybody in any other country whose a signatory to these various treaties coming into the United States attempting to get protection. If we denied them that protection, then we'd have problems with the treaty—so, no.

PROFESSOR JASZI: I have a slightly different answer, although I don't have a conclusion. I think in any TRIPS Article 13 analysis that might ultimately be performed on such legislation, the outcome would be strongly influenced by whether the exemption is fairly understood as

10. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments—Results of the Uruguay Round, vol. 31 (1994), 33 I.L.M. 1197 (1994), available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (last visited Apr. 27, 2001).

an interpretation or application of an existing doctrine, such as fair use, which is arguably privileged under Article 13, or whether it is considered, instead, as a novel and unprecedented carve-out. In the latter case, the Article 13 problems would be considerably more profound.

I also wanted to make just two points in response to your earlier questions, Christine. One was about differences between the AHRA and *Sony*. I think that there may be arguments for reading the AHRA narrowly, given that it was a working out of what was, in effect, a very complicated industry-specific compromise as to a very particular technological problem.

By contrast, I think it's much harder to read what the *Sony* majority says about the appropriate relationship between copyright and technology in a way that limits its application to the VCR, or for that matter, in a way that limits its application to hardware rather than software.

I'd also offer one comment about the significance of a technology vendor's ability to control and supervise in a *Sony* analysis. I think that when the *Sony* majority talks about disengagement of the VCR manufacturers from the activities of their users, it isn't really addressing the issue of potential control or supervision. It is speaking, instead, to the question of the VCR maker's actual involvement, if any, in the allegedly infringing activities of its consumers. The conclusion that there wasn't help, of course, and is important to the final result.

I don't know whether in 1984, or in 2001, it would be possible to build a VCR that would record some material and not record other material. Clearly, however, that wasn't a question that interested the Supreme Court in *Sony*. Instead, it concluded that it was appropriate to apply the "capable of substantial non-infringing uses" test because there was no direct involvement on the part of the manufacturer in the activities of the technology users. Subsequent decisions that refuse to apply *Sony* tend to do so on the ground that such direct involvement *was* present. It seems to me that this analysis, which looks not to potential control or supervision but actual direct involvement, is the one that should be undertaken in this case.

PROFESSOR FARLEY: Thank you. I regret that I must cut it off here. I do hope that these conversations will continue during lunch, which I will direct you to now. Thank you very much.

(WHEREUPON, A LUNCHEON RECESS WAS TAKEN).

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