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REVENGE OF THE RECORD INDUSTRY ASSOCIATION OF AMERICA: THE RISE AND FALL OF NAPSTER*

VICKIE L. FEEMAN, WILLIAM S. COATS, HEATHER D. RAFTER, AND JOHN G. GIVEN**

I. INTRODUCTION

It is rare that intellectual property lawyers have the opportunity to be the focus of intense media attention, but A&M Records, Inc. v. Napster, Inc.,1 is a unique case that has caught the attention of the general public. The media concentration on the *Napster* case is not surprising, considering that Napster had 90,000,000 registered users, which is a significant percentage of the world's internet community.2 Amazingly, one hundred users were connected to Napster every second, and those users shared ten thousand music files every second.3 Indeed, at any moment over eight million infringing files were available to Napster users, including nearly all of the most popular rock and pop tunes of all time.4

* For information regarding the Record Industry Association of America (“RIAA”), see http://www.RIAA.org.

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1. 239 F.3d 1004 (9th Cir. 2001) (“Napster II”).
2. See A&M Records v. Napster, Inc., 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000) (indicating that at one point defendant estimated that Napster was growing by more than 200 percent per month) (“Napster I”), aff’d, 239 F.3d 1004 (9th Cir. 2001).
3. See id. (noting Napster’s popularity without marketing).
In contrast, the most successful record of 2000 sold less than ten million copies. The most popular movie in 2001, *Shrek*, was seen by approximately twenty million movie goers, and all television networks together will have only 48.15 million viewers a week. The most watched television show of all time, the final episode of *M*A*S*H* in 1983, had only fifty million viewers. With popularity like that, there is little wonder that Napster received the full attention of the Record Industry Association of America ("RIAA"). The record industry is a thirty-seven billion dollars industry worldwide, with approximately sixteen billion dollars in U.S. sales. The record industry saw the technological changes represented by Napster as a serious threat to its financial health. If people could get their music for free over Napster, the record labels were concerned that there would be no need for consumers to buy records. In addition, many artists were concerned that they would lose their royalty streams from their recordings and their publishing rights.


8. “Total worldwide sales in the year 2000 were approximately $37 billion and U.S. sales were approximately 15.8 billion. 2.5 billion CD's were sold worldwide.” RIAA, RIAA Yearend Market Report (2001).

9. See Plaintiffs’ Notice of Motion and Motion for Summary Judgment, supra note 4, at 5 (describing co-founder Shawn Fanning’s opinion that purpose of Napster is to “bypass the record industry entirely,” make record stores obsolete, and “brin[g] about the death of the CD”).

10. See id. (explaining Napster’s other co-founder, Parker’s description of its goals). The purpose of Napster is to “usurp the record industry as we know it today, woo[ing] the [record] industry before we try to undermine it, and transport[ing] music unhindered by cumbersome copyright schemes.” Id. (quoting Parker Depo. 160:1-162:14).

11. See Napster I, 114 F. Supp. 2d 896, 908 (N.D. Cal. 2000), aff’d, 239 F.3d 1004 (9th Cir. 2001) (noting that artists depend financially upon selling their records because they earn royalties). With Napster, the artists do not get a royalty when a Napster user downloads or uploads one of their songs. See id; see also Benny Evangelista, Bay Area Firms Turn Up Volume With MP3s: Some Bay Area firms hope to make CD's a thing of the past by selling pirate-proof Web music, S.F. CHRON., Jan. 11, 1999, at C1. available at http://www.sfgate.com/cgi-bin/article.cgi?file=/Chronicle/archive/1999/01/11/BU44668.DTL (last visited Dec. 27, 2001) (noting RIAA’s view that “the distribution of those songs, especially music by artists under contract to the major record labels, violates copyright laws and reduces their sales revenues”).

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result, the music industry brought copyright claims against Napster to determine Napster's fate.\(^\text{12}\)

II. THE CHANGING FACE OF MUSIC ONLINE

Traditionally, the sale of music to consumers has been dominated by a small group of large record labels that sell directly to national retailers or through sizeable distributors to a vast array of local retailers. Approximately eighty percent of the popular music industry is controlled by the record companies known as the Big Five: BMG Entertainment, Sony Music, Warner Music Group, EMI Recorded Music and Universal Music Group.\(^\text{13}\) Those companies are members of the RIAA, which has lead the struggle against Napster.\(^\text{14}\)

Digital distribution of music over the Internet could drastically alter the dominant role of large record labels. In 1993, a group of college friends founded Internet Underground Music Archive ("IUMA"), the first high fidelity site on the World Wide Web, now defunct.\(^\text{15}\) The underlying idea of IUMA was to use web technology to provide artists a cheap and easy way to distribute their music.\(^\text{16}\) Unlike traditional avenues of distribution, the Internet offers a low-cost method to upload music files and instantly disseminate them worldwide.\(^\text{17}\) Any artist could create his or her own site on IUMA by simply paying a nominal subscription fee.\(^\text{18}\) The site enabled artists to sell albums and other merchandise online.\(^\text{19}\) However,

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\(^{12}\) See Napster I, 114 F. Supp. 2d at 900 (indicating plaintiff's cause of action against Napster).

\(^{13}\) See Evangelista, supra note 11, at C1 (stating Big Five record labels "already worry that MP3s are just the tip of an iceberg that could sink their record-distribution structure"). But see CNNMoney, Warner, EMI Harmonize, Jan. 24, 2000, at http://money.cnn.com/2000/01/24/worldbiz/eminew (last visited Apr. 1, 2000) (indicating that in January 2000, Big Five became four when EMI and Warner initiated merger).

\(^{14}\) See Evangelista, supra note 11, at C1 (noting MP3 music demonstrates how easy it is for songs to be sold over Internet directly from artist to consumer, bypassing traditional middlemen like retail stores, CD-makers, music distributors, wholesalers or even record companies).

\(^{15}\) See Joan Anderman, Wired for Sound, BOSTON GLOBE, Aug. 21, 1998, at D1 (noting IUMA included 1,600 bands and thirty independent record labels).

\(^{16}\) See id. (explaining idea of technology providing simple and inexpensive alternative to corporate promotion and distribution was brand new but growing phenomenon).

\(^{17}\) See id. (listing major record labels, radio, music press and MTV as traditional avenues).

\(^{18}\) See About IUMA: History, at http://www.iuma.com/About (last visited Feb. 23, 2002) (providing brief history of IUMA). Please note that on the date this page was last visited, IUMA was providing its services to artists for free. See id.

\(^{19}\) See id. (noting that IUMA also allowed bands to interact with fans online).
IUMA has suffered the fate of many pioneers, being bought out by EMusic\textsuperscript{20}, and ultimately closed down.\textsuperscript{21} EMusic was in turn bought by Vivendi Universal.\textsuperscript{22}

Today there are dozens of other online storefronts, including www.musicboulevard.com, www.amazon.com, www.mp3.com, www.towerrecords.com and www.cdnow.com.\textsuperscript{23} Similar to IUMA, these sites offer numerous advantages to users, including the ability to hear music samples, obtain information about the artist and order music easily.\textsuperscript{24} These advantages guarantee that online music distribution will continue to grow. For example, in 1996, U.S. online sales of prerecorded music totaled fourteen million dollars; by 1998, that figure had grown to eighty-eight million dollars.\textsuperscript{25} It is estimated that sales of prerecorded music online will reach nearly $1.4 billion, or at least eight percent of all U.S. music sales in the future.\textsuperscript{26}

Currently there are over 80,000 music sites on the Internet.\textsuperscript{27} Not every music site, however, is dedicated to the sale of prerecorded music online. Some are fan sites, others are devoted to internet radio broadcasting or "webcasting," and still others are de-


\textsuperscript{22} See James Evans, EMusic Bought by Universal for $24.6 Million, Apr. 9, 2001 http://www.pcworld.com/news/article/0,aid,46704,00.asp (detailing sale of Emusic for $24.6 million).


\textsuperscript{25} See JUPITER COMMUNICATIONS, 2 MUSIC INDUSTRY AND THE INTERNET: USAGE, RETAIL AND DIGITAL DISTRIBUTION PROJECTIONS 5 (1988) [hereinafter JUPITER REPORT].

\textsuperscript{26} See id.

\textsuperscript{27} See Paul Keegan, Making Beautiful Music on the Net, UPSIDE TODAY, July 21, 1998, at 84 (noting music industry executives admit Internet could help expand industry globally).
voted to peer-to-peer file sharing technologies that enable widespread swapping of music files over the Internet. 28

A. Streaming And Digital Downloading Technologies Make Online Distribution Of Music Possible

The Web offers a variety of technologies for disseminating music and video online. 29 One type of technology is "streaming media," which is the live distribution of music or video online in which no permanent copy is created on the downloader’s system. 30 The quality of this music is lower than the quality of a CD. Many web sites selling music online offer audio streaming technology that provides the opportunity to preview clips from an artist in real time. 31 Another type of technology, digital distribution, is the downloading of a complete audio content file, which may have the sound quality of a CD. 32 Once downloaded, the files can be retained by the customer and played on demand. 33

B. MP3 Compression Technology Makes Online Distribution Of Music Quicker And More Feasible

There are several competing formats struggling to become the standard for the digital downloading of music. These formats include a2b, realaudio, liquidaudio and MP3. Of these formats, MP3 has gained the most popularity among consumers and has caused the greatest uproar in traditional music circles. MP3 stands for Mo-

28. See id. (noting urgency of major record labels to cut down on privacy and ensure copyright protection).
29. For a discussion of different technologies, see infra notes 34-51 and accompanying text.
30. See HIGH-TECH DICTIONARY, at http://www.computeruser.com/resources/dictionary/noframes/nf.definition.html?bG9va3VwPTQ5Nzk (last visited Feb. 23, 2002) (defining streaming as "playing audio or video immediately as it is downloaded from the Internet, rather than storing it in a file on the receiving computer first").
32. Digital distribution is a phrase coined in the JUPITER REPORT, supra note 26, and is not the only term defining the downloading of music from the Internet onto a computer hard drive. Nonetheless, use of the terms "streaming media" and "digital downloading" is a good way to differentiate between the two. Sites that allow digital distribution of audio content, at least of individual songs, include http://www.emusic.com and http://www.mp3.com. For the federal law requiring compulsory license for making and distributing phonotcards, see 17 U.S.C. § 115 (2001).
33. See JUPITER REPORT, supra note 26.
tion Picture Experts Group ("MPEG") one layer three, which is a method of compressing audio files into digital format that takes up only one-tenth of the computer memory used by previous technologies.\(^3^4\) As an example, where it used to take ten hours to download a record album in wav file format, an MP3 user can download the same amount of music in ten minutes.\(^3^5\) MP3, as with other similar formats, also permits the downloading of near perfect digital copies of music, with very little deterioration in quality.\(^3^6\)

Further, not only can users download existing songs over the Internet using MP3 technology, they can also forward songs quickly to other people.\(^3^7\) Users load a CD into their computer and using an MP3 translation program, "rip" the wave files off the CD, convert them to the MP3 format, and send the song over a standard internet connection to someone else or to a website.\(^3^8\) This entire process takes about twenty minutes, depending upon the user's connection speed. Sending the same uncompressed song would take more than three hours.\(^3^9\) Software for playing these "ripped" audio files are available free of charge on the Internet.\(^4^0\) MP3's

\(^3^4\) See Ron Harris, New Technology Could Change Music Industry, Consumer Habits, Dec. 12, 1998, at http://www.onlineathens.com/1998/121298/1212a33mp.html (last visited Dec. 27, 2001) (indicating that MP3 can change how consumers purchase and listen to music); see also Michael Robertson, Top 10 Things Everyone Should Know About MP3, July 23, 1998, at http://www.mp3.com/news/070.html (last visited Dec. 27, 2001) (stating facts regarding MP3 including: "1) MP3 is not illegal, it is simply an audio compression format . . . 2) MP3 is the standard for high quality music and will soon be on every PC . . . 3) MP3 gives artists and labels freedom to market and sell their music anyway they wish . . . 4) Hundreds of companies are building businesses around MP3. . . . 5) Thousands of artists are distributing content in MP3 today . . . 6) MP3 is the most cost effective and easy way for artists to explore online music . . . . 7) MP3 can be as secure as any current audio format . . . 8) The music industry is not losing billions to MP3 . . . 9) Artists and labels can make money employing MP3 technology on the net . . . . 10) MP3 users should respect copyrights").

\(^3^5\) See Harris, supra note 34 ("What MP3 can do in one hour, it takes 20 hours for an earlier technology, WAV.").

\(^3^6\) See High-Tech Dictionary, at http://www.computeruser.com/resources/dictionary/noframes/nf.definition.html?bG9va3VwPTc5ODU (last visited Feb. 23, 2002) (defining MP3 as technology that "creates sound files a tenth the size of standard CD music files with very little loss of sound quality.").

\(^3^7\) See Napster II, 239 F.3d 1004, 1011 (9th Cir. 2001) (indicating how Napster aids transmission of MP3 files between users).

\(^3^8\) See id. (explaining process of how users transfer songs on Internet).

\(^3^9\) See id. (noting downloading process described above might be violation of copyright laws, but is nonetheless common practice among MP3 users).

capability to quickly and inexpensively distribute near-perfect compressed copies of music threatens the established music industry because it increases the risk of music piracy.

C. Peer-To-Peer File Sharing Technology Fosters Widespread Distribution Of Pirated Music Over The Internet

In 1999, a small start-up company in California launched an MP3 file-sharing system known as Napster, which substantially increased the risk of music piracy over the Internet.\(^\text{41}\) Using a process now commonly referred to as "peer-to-peer" file sharing, Napster enabled users to make MP3 files stored on their computers available for copying by other users.\(^\text{42}\) It further enabled users to search each other's computers for such music files and to transfer exact copies of those files.\(^\text{43}\) Napster thus made it easy to find pirated music on the Internet, simplifying what had been a laborious and time consuming task.\(^\text{44}\)

At its peak, Napster had over ninety million registered users.\(^\text{45}\) Approximately one hundred of those users attempted to connect to the system every second, and each second about ten thousand music files were shared using Napster.\(^\text{46}\) The site became so popular that a number of colleges banned students from using Napster through the colleges' servers because those servers were being overloaded by the students' prolific file swapping.\(^\text{47}\)

\(^{41}\) See Napster I, 114 F. Supp. 2d 896, 901 (N.D. Cal. 2000) (describing Napster's business), aff'd, 239 F.3d 1004 (9th Cir. 2001).

\(^{42}\) See Napster II, 239 F.3d at 1011 (explaining how Napster facilitates transmission of MP3 files between its users).

\(^{43}\) See id. (indicating how users utilized Napster).

\(^{44}\) See id. ("These functions are made possible by Napster's MusicShare software, available free of charge from Napster's internet site, and Napster's network servers and server side software.").


\(^{46}\) See Napster I, 114 F. Supp. 2d at 902 (indicating popularity of Napster).

The RIAA commissioned a study that found that 87% of Napster users were involved in some form of copyright infringement. Napster's CEO responded that over 95% of all downloaded files are soon erased, which weakened any argument that Napster was being used to make permanent copies of recordings that might displace conventional CD sales. Whether or not Napster harmed CD sales was hotly disputed; a study by SoundScan indicated that it may harm CD sales. A survey by the Normal Lear Center, however, found that Napster had not harmed CD sales.

III. WHY NAPSTER PLAYS THE BLUES

In 1999, the RIAA filed a complaint against Napster alleging that Napster facilitated the exchange of pirated music in MP3 files and was therefore a contributory copyright infringer or vicariously liable for copyright infringement. Napster, however, maintained it was protected by the Digital Millennium Copyright Act ("DMCA")

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48. See Napster I, 114 F. Supp. 2d at 903 (citing study performed by Dr. Ingram Olkin showing eighty-seven percent of files sampled belonged to or were administered by plaintiffs); see also Jonathan Cohen, Editorial, RIAA Seeks Injunction Against Napster, BILLBOARD DAILY MUSIC NEWS, June 13, 2000, at http://www.billboard-online.com/daily/2000/0613_05.asp.

49. See Record Industry Seeks Napster Injunction, REUTERS, June 13, 2000, at http://www.zdnet.com/zdnn/stories/news/0,4586,2586820,00.html (last visited Dec. 27, 2001) (arguing that Napster did not damage music industry) [herinafter Record Industry Seeks Napster Injunction]. Napster's CEO Hank Berry, in a prepared statement, said that "[p]eople are sharing over Napster, not selling.... Napster is doing no harm to the record industry. By their own numbers, record sales are up, and file sharing has proven to be a great promotional tool." Id.

50. See Borland, supra note 45 and accompanying text; see also Borland & Konrad, supra note 47 (finding that record purchases decreased four percent in stores near universities).


1. **The District Court Rejects Napster's DMCA Defense**

Judge Patel rejected Napster's DMCA defense in an opinion issued on May 5, 2000. In determining that Napster did not qualify for the "online service provider" ("ISP") safe harbor provision of section 512(a), the district court focused on whether MP3 files were actually transmitted, routed or connected "through" Napster's server. Finding that the Napster server acts to establish a connection directly between the requesting and host user computers, the court concluded that the connection, transmission and routing goes between parts of the Napster system and not through the Napster server. Napster was not "transmitting, routing or providing connections for, material through a system or network controlled or operated by [Napster]" within the meaning of section 512(a), and therefore could not seek shelter under that provision from the RIAA's claims of copyright infringement.

The district court noted that allowing Napster protection under section 512(a) would run contrary to the legislative intent and history of the section. The section 512(a) safe harbor should only apply when the service provider is acting as a conduit for the communications of others. Because Napster "undisputedly per-

53. The DMCA includes a provision, which expressly limits the liability of "online service providers" ("ISP"). See Digital Millenium Copyright Act, 17 U.S.C. § 512 (2001). If an ISP follows the procedures set forth in the DMCA, it has no liability for transmitting, routing or providing Internet connections for infringing materials; temporarily storing infringing materials; storing infringing materials at the direction of a user; or connecting users to infringing materials through locator or search tools. See 17 U.S.C. § 512(a)-(d). Those safe harbors limit the ISP's liability for direct, vicarious or contributory infringement under existing principles of copyright law. They do not affect any other defense that an ISP may have against copyright infringement. See 17 U.S.C. § 512(l). The DMCA also limits ISP liability for good faith disabling of access to, or removal of, allegedly infringing materials from the Internet. See 17 U.S.C. § 512(g).


55. See id. at *20 (citing 17 U.S.C. § 512(a) 2000).

56. See id. at *22 (denying protection under § 512(a)).

57. Id. at *21-23. On appeal, the Ninth Circuit did not adopt this position, and instead held that the issue must be more fully developed at trial because there are "serious questions" about whether Napster qualifies as an ISP as well as other questions regarding how the facts of this case affect application of 17 U.S.C. § 512. See Napster II, 239 F.3d 1004, 1025 (9th Cir. 2001).


forms some information location functions," the court concluded that some functions, such as Napster's search engine and index, might qualify for protection under section 512(d). Thus, while the district court was unwilling to grant Napster safe harbor as a conduit through which MP3 files are transmitted, it has allowed room for possible limited protection under the statute as information location tools.

2. *The District Court Enjoins Napster Based On Likelihood Of Contributory Infringement*

Following Judge Patel's order, the RIAA sought a preliminary injunction on June 12, 2000, to prevent Napster from facilitating "music piracy" by its transmission and/or distribution of copyrighted musical works. In an interesting and ironic turn of events, MP3.com CEO Michael Robertson submitted a declaration supporting the motion, alleging that Napster had not been authorized by MP3.com to distribute the music of its artists. David Boies, special counsel for the government in its Microsoft antitrust case, was hired by Napster in a futile effort to improve its situation. It was to no avail: Judge Patel held that Napster was likely to be found to be a contributory infringer and issued an injunction against Napster on July 26, 2000. The Ninth Circuit stayed that injunction pending appeal on July 28, 2000, in an order issued by Judges Kozinski and Silverman.

60. See id. at *18-19. Section 512(d) of the DMCA provides a safe harbor for service providers "referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including directory, index, reference, pointer or hypertext link . . . ." 17 U.S.C. § 512(d) (2001). The eligibility requirements for subsection 512(d) are more stringent than the eligibility requirements for subsection 512(a). Compare 17 U.S.C. § 512(a) with 17 U.S.C. § 512(d).

61. See Napster, 2000 U.S. Dist. LEXIS 6243, at *18-19 n. 6. For an entire discussion of Napster's possible protection under § 512(d), see id. at *14-19.

62. See Record Industry Seeks Napster Injunction, supra note 49 (discussing groups' argument that studies showed Napster decreased CD sales).


65. See Napster II, 239 F.3d 1004, 1011 (9th Cir. 2001) (noting that complaint alleged Napster was contributory and vicarious copyright infringer). The Ninth Circuit granted plaintiff's motion of preliminary injunction. See id.

66. See id. (noting entry of temporary stay).
The Ninth Circuit Nips Napster

The Ninth Circuit released its widely anticipated decision on February 12, 2001, agreeing with the district court that Napster could be held liable for its users' infringement, yet concluding that the injunction entered by that court was overbroad. The Ninth Circuit also rejected all of Napster's defenses to copyright infringement, including fair use and statutory safe harbors.

a. Napster's Third-Party Liability For Copyright Infringement

(1) Contributory Infringement

A third party is liable for contributing to the infringement of another when it knows of the direct infringement and materially contributes to that infringement. Because Napster provided the site and facilities that enabled its users' direct infringement, there was little doubt that Napster materially contributed to that infringement. The Ninth Circuit's analysis, therefore, focused on whether Napster had knowledge of that infringement.

Napster argued that its technology had a substantial noninfringing use, and that under the Supreme Court's decision in *Sony Corp. v. Universal City Studios, Inc.*, it could not be held liable for contributory infringement. The Ninth Circuit agreed that the Napster technology was capable of commercially significant noninfringing uses, because while the current level of noninfringing uses was small, the capabilities of the Napster architecture could lead to substantial noninfringing uses in the future. The district court, by contrast, examined only the current uses of the Napster system to determine whether the technology had a substantial noninfringing use.

67. See id. at 1020, 1024-25 (affirming in part, reversing in part, and remanding).

68. See id. (finding "[t]he district court did not err; Napster, by its conduct, knowingly encourages and assists the infringement of plaintiff's copyrights").

69. See id. at 1019; see also Fonovisa v. Cherry Auction, 76 F.3d 259, 264 (9th Cir. 1996) (holding provider of site liable for known contributory copyright infringement activity); Gershwin Pub'l'g Corp. v. Columbia Artists Mgmt., 443 F.2d 1159, 1162-63 (2d Cir. 1971) (furthering how one is liable for infringement because promoter knew artists were performing copyrighted material).

70. See *Napster II*, 239 F.3d 1022.

71. *See id.* at 1020-22 (depicting court's analysis of knowledge requirement).


73. *See Napster II*, 239 F.3d at 1020 (finding court disagreeing with Napster's argument that *Sony* protects them from contributory liability).

74. *See id.* at 1020-21 (criticizing district court for only looking at current uses of Napster system).
use, which the Ninth Circuit found erroneous. The Ninth Circuit, therefore, refused to "impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights." 

Furthermore, the court determined that Napster had actual and constructive knowledge of its users' infringement, due to plaintiffs' identification of infringing files listed on the service and Napster's own recognition that its users were engaged in trading pirated music. Sony notwithstanding, Napster could be held liable on the basis of this actual knowledge because of its failure to block access to its system by suppliers of infringing materials and its failure to remove infringing materials.

There is an important distinction between this liability based on "Napster's conduct in relation to the operational capacity of the system" and potential liability based on "the architecture of the Napster system" (which would be more analogous to the VCR in Sony). In contrast to Sony, Napster had the ability to prevent, or at least to limit, known infringement. The Sony defense of substantial non-infringing use therefore has limited application to a computer system operator because of the ongoing conduct and involvement of the operator.

(2) Vicarious Infringement

A third party is liable for vicarious infringement when "the defendant has the right and ability to supervise the infringing activity

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75. See id. (stating district court placed too much weight on current use and too little weight on possible future uses).
76. Id. (citing Sony, 464 U.S. at 436).
77. See id. at 1020-22 (affirming district court's finding that Napster had actual knowledge of infringing material on its system).
78. See Napster II, 239 F.3d at 1021.
79. See id. at 1020.
80. See id. at 1022 (noting it could block suppliers' access to system that provides infringing material).
81. See id. at 1021. The court stated:
If a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement. Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. 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.
and also has a direct financial interest in such activities." 82 In Napster, the Ninth Circuit determined that Napster was liable for vicarious infringement. 83

Napster had a direct financial interest in its users’ infringement because “[f]inancial benefit exists where the availability of infringing material acts as a draw for customers.” 84 Napster’s future revenue was directly dependent upon an increase in users, and Napster’s increasing user base was due to the availability of infringing material. 85 Thus, Napster derived a financial benefit from the availability of infringing material and therefore had a direct financial interest in the infringement. 86

The court also found that Napster had the right and ability to supervise its users. 87 Napster retained the right, under its agreement with users, to terminate service if its users should violate applicable law or for any reason, within Napster’s sole discretion. 88 To escape vicarious liability, Napster was obligated to exercise its reserved right to the fullest extent possible. 89

Unlike the district court, the Ninth Circuit recognized that the design of the Napster system provided only a limited ability to supervise. 90 Napster could not read the content of the MP3 files indexed on its servers and could not prevent every one of the plaintiffs’ copyrighted works from being exchanged over its ser-

82. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996) (citing test set forth in Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

83. See Napster II, 239 F.3d at 1024. The court noted that the Sony substantial noninfringing use defense does not apply to vicarious infringement. See id. This statement by the court is one of Napster’s chief complaints in its pending motion for rehearing and rehearing en banc. See generally Petition of Appellant Napster, Inc. for Rehearing and Rehearing En Banc, A&M Records, Inc. v. Napster, Inc., (9th Cir. Feb. 23, 2001) (No. 00-16401, 00-16403).

84. Napster II, 239 F.3d at 1023 (internal quotes omitted) (quoting Fonovisa, 76 F.3d at 263-64).

85. See id. (noting with rise in quality of works, user base increases).

86. See id. (concluding district court was correct in determining Napster financially benefited from availability of works on system).

87. See id. Napster retained the right to control access to its system through its reservation of rights policy. See id. This policy was posted through its website. See id.

88. See id. at 1023-24 (describing express reservation of rights policy).

89. See Napster II, 239 F.3d at 1023-24.

90. See id. The Court noted: “The district court . . . failed to recognize that the boundaries of the premises that Napster ‘controls and patrols’ are limited . . . . Put differently, Napster’s reserved ‘right and ability’ to police is cabined by the system’s current architecture.” Id.
vice.\textsuperscript{91} Napster did, however, have the ability to examine the file names indexed on its servers (the same ability its users had), and must therefore have used this ability to locate infringing materials.\textsuperscript{92}

b. Scope Of The Injunction

The Ninth Circuit stated that a preliminary injunction against Napster "[was] not only warranted but required."\textsuperscript{93} In light of its rulings on the scope of Napster's contributory and vicarious liability, the Ninth Circuit concluded that the district court's injunction was overly broad and must be modified.\textsuperscript{94} Under the district court's injunction, Napster was given the entire burden to prevent infringement of any of the plaintiffs' works.\textsuperscript{95} The Ninth Circuit held that plaintiffs should have the burden of providing notice to Napster of copyrighted works available on its system (which would trigger a finding of contributory infringement if access was not then blocked).\textsuperscript{96} Napster should then bear the burden of disabling access to identified works, as well as policing the system to the extent feasible within the limits of the system.\textsuperscript{97} The Ninth Circuit remanded the case to the district court with instructions to rework the injunction such that: the plaintiffs bear the burden of providing actual notice to Napster of copyrighted works available over the system; and Napster bear the burden of patrolling the system for copyrighted works using its file name search feature.\textsuperscript{98}

c. Napster's defenses to liability

Napster raised several defenses to ultimate liability.\textsuperscript{99} Fair use and the Audio Home Recording Act ("AHRA") are defenses to the

\begin{itemize}
\item \textsuperscript{91} See id. at 1024 (stating some files are user-named and may not exactly match copyrighted material, for example, songs could be incorrectly spelled).
\item \textsuperscript{92} See id. (stating Napster, users and plaintiffs have equal access to infringing material).
\item \textsuperscript{93} Id. at 1027 (district court correctly recognized preliminary injunction against Napster was required).
\item \textsuperscript{94} See Napster II, 239 F.3d at 1027 (stating without notice of specific infringing files, Napster could not be found contributorily liable).
\item \textsuperscript{95} See id. at 1027 (placing burden on plaintiffs to provide notice).
\item \textsuperscript{96} See id. (stating duty of Napster to police system content arises after plaintiffs give notice of copyrighted works on system).
\item \textsuperscript{97} See id. (finding policing of files difficult because files are user named).
\item \textsuperscript{98} See id. at 1027-28 (noting district court should know on remand that Napster cannot access users' MP3 files through Napster system).
\item \textsuperscript{99} See Napster II, 239 F.3d at 1014.
\end{itemize}
direct liability of the users. Without direct infringement by its users, Napster would have no liability. The other defenses would prevent holding Napster liable for its users' infringement.

(1) Fair use

Napster contended that its users engaged in fair use of copyrighted material. Section 107 of the Copyright Act sets out four factors that courts are to examine in determining whether a use is fair: the purpose and character of the use, the nature of the copyrighted work, the portion of the copyrighted work used, and the effect of the use on the market for the copyrighted work.

For the first factor—the purpose and character of the use—the Ninth Circuit examined whether the use was transformative and whether it was commercial. If a use transforms the work, it is more likely to be a fair use; if it is commercial, it is less likely to be a fair use. The court found that downloading music in MP3 format was simply retransmitting the work in a new medium, and thus nontransformative. As for whether the use was commercial, the court found that “repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies,” or, in the words of the district court, “Napster users g[ot] for free something they would ordinarily have to buy.” Accordingly, the Ninth Circuit held that downloading music in MP3 format constituted commercial use. The first factor, the purpose and character of the use, therefore, weighed against a finding of fair use.

100. See id. at 1014, 1024-25 (describing factors used to determine fair use; requirements of AHRA).
101. See id. (listing Napster’s alleged fair uses).
103. See Napster II, 239 F.3d at 1015 (noting transformative use adds more purpose or character).
104. See id. (stating commercial use does not bar finding of fair use).
105. See id. (“Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium.”).
106. Id.
107. Id. (quoting Napster I, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000), aff’d, 239 F.3d 1004 (9th Cir. 2001)).
108. See Napster II, 239 F.3d at 1015 (“In the record before us, commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies.”).
109. See id. (holding that downloading of music is nontransformative, and repeated and exploitative copying of copyrighted work is considered commercial use).
The court spent little time examining the second fair use factor - the nature of the use - and the third factor - the portion of the copyrighted work used.\(^{110}\) In addressing both factors, the Ninth Circuit adopted the district court's findings that the copyrighted works were creative in nature, as well as the finding that Napster users use the full copyrighted work.\(^{111}\) The findings of both the nature of the use, and the portion used factors weighed against fair use.\(^{112}\) The court, however, specifically noted in the portion used analysis, that just because the full work was used did not preclude an ultimate finding of fair use.\(^{113}\)

The final factor was the effect of the use on the market for the copyrighted work.\(^{114}\) The district court concluded, based on expert testimony, that the use of Napster had a harmful effect in that it reduced CD sales among college students and that it raised barriers to plaintiffs' entry into the digital downloading market.\(^{115}\) The Ninth Circuit found that the district court's analysis of this issue was not in error, and thus that this final factor also went against fair use.\(^{116}\) Despite all four general fair use factors going against Napster, the court also examined two uses that Napster contended were fair - sampling and space-shifting.\(^{117}\) Napster argued that sampling is simply the downloading of a song in order for users to decide whether to purchase a recording.\(^{118}\) Space-shifting is the downloading of a song the user already owns so he can play it in a

110. See id. at 1016 (agreeing with district court on views of nature of use and portion of work used).

111. See id. (stating that "plaintiff's copyrighted musical compositions and sound recordings are creative in nature" and fair use is determined even when "protected work is copied in its entirety").

112. See id. (noting copying of whole work "militates against a finding of fair use").

113. See Napster II, 239 F.3d at 1016. "We note, however, that under certain circumstances, a court will conclude that a use is fair even when the protected work is copied in its entirety." Id.

114. See id. at 1016-17 ("[T]he importance of this [fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.").

115. See id. (stating that Napster harmed market in two different ways).

116. See id. at 1017 (noting that effects on emerging market can be considered harm). The "lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works." Id.

117. See id. at 1017-18 (discussing that identified uses of sampling and space-shifting were never considered fair uses by district court).

118. See Napster II, 239 F.3d at 1018 (arguing that sampling is not commercial use, and it does not adversely affect market for copyrighted music, and should be considered fair use).
different location, such as an office. The court found neither of these uses were fair uses under section 107.

The court found sampling to be a commercial use and therefore less likely to be a fair use. The court made this determination by comparing existing authorized samples with Napster downloads. Existing samples are highly regulated by the recording industry and are merely partial or temporary copies of the overall work. Sampling via Napster, on the other hand, consists of downloading a "full, free and permanent copy of the recording." The court, therefore, concluded that sampling was commercial in nature. Napster claimed that sampling had a positive effect on the market, leading to an increase in recording sales. The court stated that, even if true, such an effect would not help Napster.

As for space-shifting, Napster drew parallels with Sony and Recording Industry Ass’n v. Diamond Multimedia Systems, Inc. The court distinguished those cases on the grounds that the "shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user." Because use of Napster for space-shifting files

119. See id. at 1019 (stating court already held space-shifting to be fair use in other cases).
120. See id. (distinguishing other cases because shifting methods exposed material only to original user).
121. See id. at 1018 (finding that district court did not err in holding sampling not fair use).
122. See id. (describing copies available on Napster).
123. See Napster II, 239 F.3d at 1018 (explaining that record companies give song samples, consisting of only thirty-to-sixty seconds of free music).
124. Id.
125. See id. (affirming district court’s determination as to commercial purpose and character of sampling).
126. See id. (defending that market for audio CD’s and market for online distribution are adversely affected by Napster’s service).
127. See id. (stating that "increased sales of copyrighted material attributable to unauthorized use should not deprive the copyright holder of the right to license the material.").
129. See generally 180 F.3d 1072 (9th Cir. 2000) (deciding that manufacture and distribution of digital audio recording device was not subject to restrictions of the Audio Home Recording Act of 1992).
130. Napster II, 239 F.3d at 1019.
necessarily exposed those files to millions of users, it was not a fair use.\textsuperscript{131}

(2) Audio Home Recording Act ("AHRA") Defense

Napster claimed that because its users were engaged in the noncommercial use of a digital audio recording device to make digital music recordings, in accordance with section 1008 of the AHRA,\textsuperscript{132} then they could not be held liable for infringement.\textsuperscript{133} The Ninth Circuit rejected this defense.\textsuperscript{134} The court held, consistent with \textit{Diamond}, that computers and their hard drives are not digital audio recording devices under the AHRA "because their 'primary purpose' is not to make digital audio copied recordings."\textsuperscript{135} In addition, based on the legislative history of the AHRA, the court found that songs fixed on computer hard drives are not digital music recordings.\textsuperscript{136}

4. Napster's Next Tango

On March 5, 2001, the district court entered a modified – and highly detailed – preliminary injunction.\textsuperscript{137} Under this injunction, the recording industry bears the burden of notifying Napster of in-

\textsuperscript{131} See \textit{id.} (discussing that in order to access music files on Napster, user must list song and share it with other Napster users).

\textsuperscript{132} See 17 U.S.C. § 1008 (1999). "No action may be brought under this title alleging infringement of copyright . . . based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings." \textit{Id}

\textsuperscript{133} See \textit{Napster II}, 239 F.3d at 1024 (alleging that Napster's users engaged in actions protected by § 1008 of the AHRA of 1992).

\textsuperscript{134} See \textit{id.} (stating that AHRA does not cover downloading of MP3 files to computer hard drives).

\textsuperscript{135} \textit{Id.}; see also Recording Indus. Ass'n v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078 (9th Cir. 2000) (stating that computer hard drives do not reproduce files from digital music recording).

\textsuperscript{136} See \textit{Napster II}, 239 F.3d at 1024-25 (stating "computers do not make 'digital music recordings' as defined by the [AHRA]"). Napster also claimed that its activities were protected under DMCA. See \textit{id.} at 1025. In contrast to the district court, the Ninth Circuit did not reject this defense entirely, but rather concluded that the issue must be more fully developed at trial, because there are "serious questions" about whether Napster qualifies as an internet service provider as well as other questions regarding how the facts of this case affect the application of § 512. See \textit{id}. The Ninth Circuit additionally concluded that there was no evidence supporting Napster's other defenses of waiver, implied license and misuse. See \textit{id}. at 1026-27.

fringing materials available on the system, and Napster bears the burden of policing its system.\textsuperscript{138}

On March 7, 2001, the producers of the Grammy Awards filed an action against Napster, alleging that it was allowing its users to trade music files from the show, including rap star Eminem’s duet with Elton John.\textsuperscript{139} Shortly thereafter, Emusic likewise filed a copyright infringement suit against Napster.\textsuperscript{140}

In July, after a series of hearings, Judge Patel ordered that Napster’s screening of infringing material must be 100% effective.\textsuperscript{141} This ruling effectively closed Napster. The Ninth Circuit has stayed that order pending full briefing of the issues, but Napster remains shut down.\textsuperscript{142} On August 7, the plaintiffs moved for summary judgment on the ground that Napster was liable for copyright infringement and that such infringement was willful. “Plaintiffs’ motion was stayed on February 22, 2002, because the court found that questions remained on ownership of the copyrights at issue and whether certain of the plaintiffs’ joint ventures for online licensing of music are antitrust violations or establish copyright misuse.”\textsuperscript{143}

IV. Revenge is Bittersweet

Although the music industry has thus far triumphed in its battle against Napster, the war against Internet file swapping has just begun, and many predict that the millions of dollars spent to combat Napster will be for naught. Napster’s legal woes have apparently not dampened the spirits of the peer-to-peer file sharing community, as more systems continually emerge, many of which are faster and more sophisticated than Napster.\textsuperscript{144} Some of the first to

\textsuperscript{138} See id. (describing burden as shared).
\textsuperscript{142} See id. (stating that after hearing, Napster said it would comply with Judge Patel’s order and that service would remain down until further notice).
\textsuperscript{143} For the text of the unpublished decision, see http://pub.bna.com/ptcj/001369.pdf. The two joint ventures are MusicNet and Pressplay.
\textsuperscript{144} See Dawn C. Chmielewski, Bootleg bonanza, MERCURY NEWS, Sept. 6, 2001, (discussing that many new, improved services, are much easier to use than Nap-
emerge included Gnutella, Aimster, Wrapster, OpenNap, CuteMX and BearShare. More recently, Dutch company FastTrack has developed and licensed a peer-to-peer technology that is being used to power a host of applications, including MusicCity's Morpheus, KaZaA and Gorkster. All of the FastTrack applications share the same network, and thus the wealth of materials available to users of those services is staggering. The FastTrack applications also speed up delivery time by simultaneously downloading pieces of a file from several sources.

Another newcomer, AudioGalaxy, offers near CD-quality sampling rates for its music downloads, up to 256 kilobits per second, which is double the rate found on most file-swapping services. In contrast to most other services, AudioGalaxy also classifies its available music according to genre (including obscure genres like cow punk and organic house), which makes it easier for users to discover new music. One of the newest kids on the downloading scene, Bitbop.com, is not a peer-to-peer service, because it only enables users to record from internet radio stations. A user simply enters the name of a favorite artist and the Bitbop Tuner will tune into the radio station that is most likely to play songs by that artist. When the station plays a song by the selected artist, it is ripped from the radio stream and recorded onto the users' hard


146. See Chmielewski, supra note 144 (stating that FastTrack's new services offer easier service, along with more selection compared to Napster).

147. See id. (comparing capabilities of various fast track applications).

148. See id. ("The intelligent download feature simultaneously pulls pieces of the file from several sources to speed the transfer and to ensure that the file arrives intact.")

149. See id. (noting AudioGalaxy does not come with its own media player).

150. See id. (explaining that users can sample several songs within preferred genre or search entire "Galaxy" according to music style).


152. See id. (noting Bitbop's database contains thousands of Internet radio stations).
In contrast to the peer-to-peer services, music recorded with Bitbop can only be played on the computer it was downloaded to; it cannot be redistributed, copied to a portable player, or played on other machines.

With their interconnectivity, increased speed, and improved quality, the new generation of peer-to-peer file swapping technologies potentially pose an even graver risk to the music industry than Napster. In contrast to Napster, they also threaten other copyright holders as many of the newest and most powerful peer-to-peer services, including the FastTrack technology, and are not limited to sharing MP3 files, but rather facilitate sharing text and video files, as well as computer software. These systems are less centralized and more difficult to police. Unlike Napster, most of the systems do not store a list of available content on a central server, and thus might arguably have no ability to control or police users’ activities.

Rather than suing their way through the Internet, content providers may find their money better used developing technological methods to protect online content, such as watermarking and encryption technologies. Several new companies are offering technologies specifically designed to prevent illegal copying of MP3 files. One example, Audio Explosion, sells copyright-protected MP3-formatted songs for use with digital players such as the Rio.

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153. See id. (noting approximately 100,000 users have downloaded Bitbop Tuner between March 16, 2001 and May 7, 2001).
154. See id. ("Song files Bitbop finds are locked to the user's hard drive unlike Napster - which allows its users to freely 'share' song files with thousands of strangers.").
155. See Chmielewski, supra note 144 ("Anything that can be converted to bits can be downloaded through KaZaA, Morpheus, and Gorkster: movies, books, music videos and pictures.").
157. See Chmielewski, supra note 144 (noting that files on iMesh are transferred without central server acting as traffic cop).
158. See Mike Snider, Tech tools fight entertainment piracy, USA TODAY, June 15, 2001, (discussing that most effective way to prevent digital copyright problems is with tools blocking or tracking infringing uses), at http://www.usatoday.com/life/cyber/tech/review/2001-03-06-copyright2.htm (last visited Dec. 27, 2001).
159. See id. (stating "[w]ether future entertainment content such as music or video rests on a PC hard drive, comes on a disc or gets beamed to the home via satellite, technologies are being introduced to safeguard the goods").
on the Internet through intelligent search software is also available. Still, technological measures can be cracked. In this age of sophisticated home computers and savvy hackers, even complex copy protection schemes can be circumvented.

Changes to copyright law may also be of assistance to the RIAA in dealing with illegal file swapping. Senator Fritz Hollings, a Democrat from South Carolina and chairman of Senate Commerce committee, has proposed the Security Systems Standards and Certification Act ("SSSCA"). The SSSCA would make it a "civil offense to create or sell any kind of computer equipment [or consumer electronic device] that 'does not include and utilize certified security technologies' approved by the federal government." The SSSCA also creates new federal crimes, punishable by up to five years in prison and fines of up to $500,000 for anyone who sells or distributes copyrighted material with security technologies disabled or has a computer that disables copy protection.

V. CONCLUSION

Despite the RIAA's preliminary success in shutting down Napster, online distribution of music is certain to continue to grow in popularity. It is equally clear that there will be continued efforts to use the Internet to widely — and illegally — disseminate copyrighted works. This new distribution medium will require a creative mix of technological and legal solutions to balance the copyright holder's interest in protecting copyrighted works against the public's interest in accessing such works.

161. See Chris Oakes, Stamping Out Pirated Tunes, WIRED NEWS REPORT, Jan. 29, 2000, (discussing that one company, Copyright Control Services, tracks, documents, and shuts down Internet sites and communication channels containing illegal files), at http://www.wired.com/news/mp3/0,1285,33940,00.html (last visited Dec. 27, 2001). Once a site containing illegal content is located, it can be easily shut down by contacting the local ISP. See id. ISP's have a legal obligation under the copyright law to keep their services free of infringing materials. See id.; see also Digital Millennium Copyright Act, Pub. L. No. 105-304, § 512, 112 Stat. 2860, 2877-86 (1998). If an ISP fails to act, then the ISP may find itself liable for contributory copyright infringement. See § 512, 112 Stat. at 2877-86.


163. Id. (explaining that Senator Hollings will introduce Security Systems Standards and Certification Act, covering digital content, including music, video, and e-books).

164. See id. (addressing that Act represents new copy protection from piracy by creating new federal felonies for anyone found distributing copyrighted material).