INFRINGEMENT.COM: *RIAA V. NAPSTER* AND THE WAR AGAINST ONLINE MUSIC PIRACY

Timothy James Ryan

I. INTRODUCTION

As the Internet spreads into an increasing number of homes around the country, and broadband internet access facilitates higher transmission speeds, copyright holders are faced with a growing dilemma: how to protect their copyrighted works but still expose them, and even deliver them, to the consuming public via the Internet. One industry already suffering with this quandary is the music and recording industry.

In 1999, Napster, a small, San Mateo, California, based Internet start-up developed a file-sharing system that shook the roots of the current music distribution model.[1] The free software, which allows individual users to search and download compressed music files stored on other computers logged into the Napster network, created a virtual Armageddon for the recording industry.[2] Currently, there is no software-based anti-copying protection for digital music files, and users are taking advantage of this by copying millions of music files each day.[3] In the winter of 1999, the Recording Industry Association of America (RIAA) moved to stop this new file sharing system by filing suit in Federal District Court in San Francisco for copyright infringement, specifically charging Napster with contributory and vicarious liability.[4] Additionally, musical artists

---

1. *See* Karl Toro et al., Chris Taylor & David E. Thigpen, *Meet the Napster*, TIME, October 2, 2000, at 60; *see also* Steven Levy, *The Noisy War over Napster*, NEWSWEEK, June 5, 2000, at 46.

2. *See* Toro et al., *supra* note 1, at 60; *see also* Levy, *supra* note 1, at 46.

3. *See* Toro et al., *supra* note 1, at 60; *see also* Levy, *supra* note 1, at 46.

4. *See* Plaintiff's Complaint for Contributory and Vicarious Copyright Infringement, Violations of California Civil Code Section 980(a)(2), and Unfair Competition at 2, A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000) (No. C 99-05183), *available at* http://www.riaa.org/Legal.cfm [hereinafter Plaintiff's Complaint].

entered the fray by litigating and asking Napster to remove users who have copied their songs.[5]

The Napster model has created a new paradigm in the cyber-world: peer-to-peer networking.[6] Despite the recording industry's concerns, peer-to-peer networking (more commonly known as "P2P" by the computing industry) is not a new idea.[7] In the early development of what we now know as the Internet, the first computers linked together were based on a P2P model: each computer's resources could be freely accessed at any time by any other computer connected to the network.[8] As the Internet developed, the model shifted from P2P to a client-server model, sometimes referred to as "hub and spoke," where the desired resources were gathered on centralized computers, known as servers, which then distribute the information to requesting computers, known as the clients.[9] In this model, if a user desired to find a digitized song, she was forced to search the various Internet-based servers and search engines to try to find the desired file.[10] Because digital music files taken from CDs require massive amounts of storage space, files were not readily available. [11] This obstacle was overcome with the development of the MP3 audio compression standard.[12]

Entering the twenty-first century, the MP3 compression algorithm continues to be the de facto standard for digital audio compression.[13] Since music

---

5. *See Metallica Demands On-Line Service Dump Illegal Song Traders*, CHI.TRIB., May 4, 2000, at 16N.

6. Even though Napster is limited to music files, the implications for peer-to-peer file sharing go beyond the trading of music. For example, there are already Napster-like services for videos and full length feature films as well as designs for cross-stitch needlework patterns. *See* Adam Cohen et al., *A Crisis of Content*, TIME, Oct. 2, 2000, at 68.

7. *See* Louise Kehoe, *Peer-to-peer Networks Taking Off: AppleSoup Leads the Way with Content Swapping*, NAT'L POST, July 19, 2000, at C08; Expert Report of J.D. Tygar Pursuant to Federal Rule of Civil Procedure 26(a)(2)(B) at 27, A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000) (No. C 99-05183), *available at* http://www.napster.com/pressroom/legal.shtml [hereinafter Tygar Report].

8. *See* Kehoe, *supra* note 7, at C08; Tygar Report, *supra* note 7, at 27.

9. *See Ask Nettie: Peer Pressure*, *at* http://www.thestandard.com/article/display/0,1902,18165,00.html (last visited Jan. 21, 2001).

10. *See* Lisa Needham, *A Day in the Life of the Digital Music Wars: The RIAA v. Diamond Multimedia*, 26 WM. MITCHELL L. REV. 1135, 1143 (2000).

11. A three-minute song requires approximately thirty-three megabytes of storage space. *See* Don Steinberg, *Free Music: Put Your Quarters Away! This Jukebox Is on the House and It Holds 20,000 Tracks*, PC COMPUTING, Jan. 1999, at 240; *see also* Needham, *supra* note 10.

12. MP3 is an acronym for MPEG-1, layer 3. *See* Byron Hinson, *History*, *at* http://www.activewin.com/mp3/history.shtml (last visited Jan. 21, 2001); Lee, *MP3: History*, *at* http://www.scit.wlv.ac.uk/~c9811532/history.html (last visited Jan. 21, 2001); Theo Michael, *Everything You Ever Wanted to Know About MPEG Audio*, *at* http://www.duke.edu /~tlm7/mp3/ (last visited Jan. 21, 2001).

13. *See* Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 3, A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 869 (N.D. Cal. 2000) (No. 99-05183), *available at* http://www.napster.com/pressroom/legal.html [hereinafter Defendant's Opposition].

files can now be condensed to a fraction of their original size[14] and freely transmitted or stored on the Internet, musicians and recording labels are faced with an ever-growing library of their copyrighted works freely available on the Internet.[15] The flurry of pirating began when software designers created programs using the MP3 compression standard that allow computer users to "rip"[16] their CD collections to their computer hard drives and then to upload those files to computers and servers connected to the Internet. These computers would then make the files available to anyone who sought out and discovered the archive. Indicative of its growing popularity, the term "MP3" replaced "sex" as the most popular search term on the World Wide Web in 1999, according to a widely publicized report.[17]

Prior to the development of the Napster software, Internet users were forced to search the Internet for Web and FTP[18] sites that contained audio files compressed into the MP3 format, a very difficult task.[19] In order to find an MP3 file, the user obtained a list of websites with links to the desired files and then was required to visit the site to determine if the file existed or not.[20] Very often, the web link was either a ruse to lead people to advertising or lewd material, or was a so-called "dead" link, meaning that the file was offline or the site had been shut down.[21] If the user was lucky enough to locate the file, transmission speed was often very slow.[22] This frustrated nineteen-year-old Shawn Fanning, who set out to develop a way to share his library of MP3 files with his college friends.[23] Little did he know that he had begun a revolution that would pit music aficionados against the very establishment that gave them their beloved artform in the first place.

This Note will discuss the legal mêlée between the RIAA and Napster, outline the arguments for both sides, evaluate the outcome and assess the future of file sharing on the Internet. Section II discusses of the development of, and the

---

14. MP3 compression technology allows the compression of CD audio files by a factor of twelve with only an indiscernible amount of sound degeneration. *See* Hinson *supra* note 12, ¶ 3.

15. *See* Needham, *supra* note 10, at 1143.

16. "Ripping" is a colloquial term used to describe the copying and transformation of CD-based song files from their original form to the compressed MP3 format which can then be stored on the hard drive of any computer. *See* Michael Robertson, *Top Ten Things Everyone Should Know About MP3*, *at* http://www.mp3.com/news/070.html (last visited Jan. 21, 2001).

17. *See* Christopher Jones, *More Popular Than Sex*, *at* http://www.wired.com/news/mp3/0,1285,31834,00.html (Oct. 14, 1999).

18. FTP stands for File Transfer Protocol. FTP is a widely used information transfer medium on the web.

19. *See* Warren Cohen, *Napster Is Rocking the Music Industry*, U.S. NEWS & WORLD REP., Mar. 6, 2000, at 41.

20. *See* Ariel Berschadsky, *RIAA v. Napster: A Window onto the Future of Copyright Law in the Internet Age*, 18 J. MARSHALL J. COMPUTER & INFO. L. 755, 759 (2000).

21. *See id.*

22. *See id.*

23. *See* Cohen, *supra* note 19, at 41.

technology behind, the MP3 file format. Section III details the humble beginnings of Napster, and its development into a worldwide phenomenon. Section IV gives a brief overview of copyright law and the provisions that apply to the Napster suit. Section V details the legal arguments of both the RIAA and Napster, and the reasoning behind the outcome of the case. Section VI discusses the future of digital music online and Internet file sharing. Finally, Section VII gives a brief conclusion.

II. THE MP3 AUDIO FORMAT

MP3 is the shorthand form of MPEG-3,[24] which stands for Motion Picture Experts Group, layer 3.[25] MP3 is an audio compression standard that allows for the compression of digital audio files to 1/12 of their original file size without a noticeable loss of sound quality.[26] Compression is achieved by the systematic removal of sound waves outside of the human audible range.[27] In his expert report prepared for litigation in the Napster case, Berkley Professor J.D. Tygard concisely explained the compression technology as follows:

> Lossy compression [the type used in MP3 creation] takes the original source material and reduces it by eliminating some features in the original source. For example, the developers of a lossy digital audio compression scheme will develop a "psychoacoustic" model to estimate sound levels (called "noise levels") that are believed to be imperceptible by human listeners as distinct sounds. These noise levels are dependant on the total sound picture. For example, many people can easily hear a distant cricket in a quiet meadow. Place the listener and cricket next to an active airport runway and the cricket may no longer be perceivable as a sound when airplanes are taking off and landing. The sound of the cricket is said to be "masked" by the sound of the airplane. By exploiting these types of psychoacoustic properties lossy compression can ignore certain portions of the signal from the source material when storing data. This allows for significant reductions in storage requirements. When the signal is decompressed, it will not be a perfect copy of the original digital source. However, if the compression scheme is well designed, a human observer should perceive the expanded signal as being quite similar to the original source material.[28]

The technology underlying MP3 was originally developed as an open source standard.[29] This meant that no one person or group claimed ownership over

---

24. *See* Eric Berger, *The Legal Problems of the MP3*, 18 TEMP. ENVTL. L. & TECH. J. 1, 2 (1999).
25. *See id.*
26. *See id.*
27. *See* Tygar Report, *supra* note 7, at 11–12.
28. *Id.*
29. *See* Needham, *supra* note 10, at 1145; Robertson, *supra* note 16. Some writers have criticized the use of the term 'open source' with the MP3 standard as the term

the technology or its original source code.[30] This led to MP3 becoming the de facto standard for audio compression technology today.[31] The open source nature of the MP3 file format allowed for the rapid and unhindered development of software designed to play, compress, repair, decompress, and modify audio files in the MP3 format.[32] Furthermore, copyright protections were never written into the format and any attempt to add them in the future would be hindered by the current widespread acceptance of the MP3 format.[33]

Anyone with a computer, a CD-Rom drive, and a few audio CDs has the potential to create their own MP3 collection. Free software available on the Internet can be easily downloaded and used to create MP3s from the user's CD collection or from discs borrowed from friends.[34] Once the files are compressed and stored on the hard drive, they can be played back in any number of available MP3 players.[35] The smaller size of the MP3 files allows for a full hour of music to be stored in only sixty-four megabytes of memory.[36] The small size of the files also allows users to transfer them to portable music players for mobile listening.[37] Several companies already market MP3 players and the legality of the MP3 player has already been unsuccessfully challenged by the RIAA.[38] With this compression format in place as the standard for music compression and playback, it became only a matter of time before someone designed a mechanism for efficient distribution of these unsecured files.

---

is used to refer to software as opposed to technological standards like MP3. *See Letters to the Pink*, SAN FRANCISCO CHRON., SUNDAY DATEBOOK, Aug. 22, 1999, at 10 (posting a letter to the editor criticizing the use of the term 'open source' in relation to the MP3 compression standard).

30. *See* Robertson, *supra* note 16, ¶ 2.

31. *See id*; Alan Zeichick, *MP3 Explained*, RED HERRING, Nov. 13, 2000, at 156.

32. *See* Zeichick, *supra* note 31, at 158.

33. *See id.*

34. *See* Heather D. Rafter et al., *Streaming into the Future: Music and Video on the Internet*, 547 PLI/PAT 605, 615 (1999).

35. The number of freely available MP3 players and utilities is mind-boggling. For a list of readily available players, see MP3.com, *Software*, *available at* http://software.mp3.com/software/featured/windows/players/?cp=hw_main (last visited Apr. 22, 2001) (listing approximately 200 separate programs playing and encoding MP3s).

36. *See* Michael, *supra* note 12, ¶ 3. Current MP3 players with internal six gigabyte hard drives can store up to 150 CD's worth of digital music. *See* Jim Krane, *Archos Takes Tune Storage to a New Level*, CHI. TRIB., Oct. 8, 2001, at 6.

37. *See* Tygar Report, *supra* note 7, at 13.

38. *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1076 (9th Cir. 1999). In that case, the Ninth Circuit held that the Rio player was not a "digital audio recording device," as statutorily defined by the Audio Home Recording Act, because it did not directly reproduce recordings from transmissions. *Id.* The transmissions first went through the hard drive of the computer and therefore they were indirect. *See id.*

III. NAPSTER'S HISTORY

The spring of 1999 found an obscure Northeastern University freshman, Shawn Fanning, obsessed with an idea.[39] Fanning[40] decided, along with two friends, Sean Parker and Jordan Ritter, to craft a computer program that allowed them to share music files between their computers.[41] The resulting software was dubbed "Napster" after its creator's childhood nickname.[42] The idea was so simple as to be brilliant; the program allows individuals to interact directly, removing the middleman in the search for MP3 audio files.[43] Its function is equally as brilliant; once the software is loaded, it searches the hard drive of the computer and creates an index of the names of MP3 files that the user has stored on her computer, along with various other file attributes such as size, length, and sample rate.[44] This index is then transferred to a server that stores the names along with the Internet network address of the host computer where the files exist.[45] None of the music files are transferred to the server, only the list of files.[46] To find a desired music file, any user logged into the software is able to search the database of filenames stored on the server computer.[47] If the user wants a copy of a certain file, she merely selects the file to be downloaded and begins the operation.[48] No files are stored on the Napster servers; the exchange of files is purely user-to-user.[49]

Fanning spent days writing code, fueled by determination, and going without sleep or food.[50] His laptop computer became so intertwined with him that he would take it wherever he went, working out the basics of his new program.[51] The idea consumed him to the point that he decided, on a whim, to work on the program instead of returning to Northeastern to finish his freshman year.[52] Amidst a barrage of criticism from his parents, Fanning continued, unfettered, to develop this 'killer app' under the roof of his uncle's business, a computer gaming company in Hull, Massachusetts.[53]

After developing the software, Fanning was low on money.[54] He needed funds for equipment that would allow for high-speed transmission.[55] Shawn's

---

39. *See generally* Levy, *supra* note 1, at 49 (giving a well written account of Fanning's rise from obscurity).
40. Fanning's nickname is "Napster," referring to his shaggy, unkempt hairstyle. *See* Cohen, *supra* note 19, at 41.
41. *See* Levy, *supra* note 1, at 46.
42. *See id.*
43. *See* Berschadsky, *supra* note 20, at 759.
44. *See How Napster Nabs Tunes*, NEWSWEEK, June 5, 2000, at 48 graphic.
45. *See* Levy, *supra* note 1, at 48.
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*
51. *See* Toro et al., *supra* note 1.
52. *See id.*
53. *See id.*
54. *See* Levy, *supra* note 1, at 50.

uncle, John Fanning, suggested he develop the software further and form a business.[56] In the fall of 1999, Fanning incorporated Napster and presented his creation to the world.[57] The product was the file-sharing phenomenon that has turned the once peaceful world of music into a tempest of unrest and created a new paradigm in music distribution. The public instantly took to the new software; the Napster user base doubled every five to six weeks,[58] driven by the frustration of inflated compact disc prices and the inability to sample music prior to purchase.[59] Soon, the company had an investor, an interim CEO and a new home in Silicon Valley.[60] At this point the difference between phenomenal success and ultimate failure became whether Napster could survive the barrage of litigation arising under copyright law.

IV. BASICS OF COPYRIGHT LAW IN THE INTERNET ERA

Copyright law was created in the late Middle Ages in reaction to the invention and use of the printing press.[61] The goal of copyright protection is to balance the interests of the creator in receiving just compensation while allowing proper access to society at large.[62] As the Supreme Court has said, "the ultimate aim is...to stimulate artistic creativity for the public good."[63] Copyright protection was cemented into American jurisprudential culture by the Constitution, which provided that "Congress shall have power...[t]o promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[64] Based on this clause, Congress enacted both the copyright and patent statutes[65] and codified them in §§ 101-1100 of the United States Code, Title 17.[66]

Federal Copyright law entitles the copyright holder to certain rights and privileges, such as distribution, derivative works, performance, licensing and display.[67] Section 107 of the Copyright Act allows for limited "fair" uses of the

---

55. *See id.*
56. *See id.*
57. *See id.*
58. *See id.*
59. *See* Michael Geist, *IcraveTV and the New Rules of Internet Broadcasting*, 23 U. ARK. LITTLE ROCK L. REV. 223, 239 (2000).
60. *See* Levy, *supra* note 1, at 50.
61. *See* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE, 321–324 (1997).
62. *See* Kevin Davis, *Fair Use on the Internet: A Fine Line Between Fair and Foul*, 34 U.S.F. L. REV. 129, 132 (1999).
63. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984).
64. U.S. CONST. art. I, § 8, cl. 8.
65. *See* Stephanie L. Brauner, *High-Tech Boxing Match: A Discussion of Copyright Theory Underlying the Heated Battle Between the RIAA and MP3ers*, 4 VA. J.L. & TECH. 5, ¶ 9 (1999), *available at* http://vjolt.student.virginia.edu/graphics/vol4/home_art5.html.
66. *See* 17 U.S.C. §§ 101–1100 (2000).
67. *See* Brauner, *supra* note 65.

copyrighted articles for such things as criticism, comment, news reporting, teaching, scholarship and research.[68] In 1993, the Information Infrastructure Task Force (IITF) was created to evaluate issues relating to the Internet.[69] A subgroup of the IITF, the "Group on Intellectual Property Rights" (the Group) focused on copyright law and how it was affected or was going to be affected by the Internet.[70] In 1995, the Group published a report entitled *The Report of the Working Group on Intellectual Property Rights*, which is often referred to as the "White Paper."[71] The White Paper makes suggestion on how current case law can be applied to the Internet, as well as recommendations for changes to the copyright statutes.[72] The White Paper's purpose was to address problems which may arise when copyright law and the Internet intersect.[73]

A. Infringement

In order to protect copyright holders' creations, as well as to give them an incentive to create, the Copyright Act gives the owner of the copyright the ability to sue infringers of the copyright for damages.[74] In its simplest form, a plaintiff needs to prove only two elements in order to succeed in an infringement suit: ownership of the copyright at issue and copying by the defendant.[75] Notably absent from this requirement is the element of damage or harm to the plaintiff.[76] In this case, it was conceded that the plaintiff, RIAA, could prove ownership of the copyrights of nearly ninety percent of the music available on the Napster service.[77] As to the proof of copying, no one denied the fact that the Napster service allows countless anonymous users to search, find and copy the plaintiffs' copyrighted works. The question became how the plaintiff could hold Napster liable even though Napster takes no part in the actual "copying" itself.

B. Direct Liability

One can be held liable for direct infringement of a copyright when he has copied material protected by a valid copyright.[78] The burden is on the copyright

---

68. *See id.*

69. *See id.* at n.24.

70. *See id.*

71. *See id.* The "White Paper" can be found at http://www.uspto.gov/web/offices/com/doc/ipnii/.

72. *See* Brauner, *supra* note 65, ¶ 9. For further discussion of the White Paper, see James M. Jordan III, *Copyrights in an Electronic Age*, 2 J. TECH. L. & POL'Y 2 (1996), *available at* http://journal.law.ufl.edu/~techlaw/2/jordan.html, and Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19 (1996), *available at* http://www.msen.com/~litman/revising.htm.

73. *See* Jordan, *supra* note 72, ¶ 10.

74. *See* 17 U.S.C. § 504 (2000).

75. *See* DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (2000).

76. *See id.*

77. *See* Plaintiff's Complaint, *supra* note 4, ¶ 55.

78. *See* Donna M. Pampert et al., *Overview of Internet Legal and Regulatory Issues*, 544 PLI/PAT 179, 223 (1998).

owner to prove the infringement, though she does not need to prove intent or knowledge of the infringement.[79] Napster raised two defenses to the RIAA's claim of infringement: the doctrine of Fair Use and the Audio Home Recording Act of 1992.[80]

C. Fair Use

Fair Use allows a defendant to circumvent liability if he can show that the use in question was reasonable based on several factors outlined in § 107 of the copyright statute.[81] The statute reads:

> [I]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> the nature of the copyrighted work;
>
> the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> the effect of the use on the potential market for or value of the copyrighted work....[82]

All of these factors are to be considered, with the fourth factor given the most probative weight.[83]

The seminal case of fair use is *Sony Corp. of America v. Universal City Studios, Inc.*[84] In *Sony*, the court was presented with the question of whether the public sale of an video tape recorder with the ability to copy copyrighted television broadcasts violated the broadcasters' rights conferred by the Copyright Act.[85] The plaintiffs, owners of copyrights on some television programs broadcast on the public airwaves, brought suit against the Sony Corporation alleging that Sony's Video Tape Recorders' (VTRs) ability to replicate their copyrighted television shows was a violation of their copyrights.[86] The Supreme Court reversed the appellate court decision entitling the copyright owners to relief, stating that to affirm would "enlarge the scope of [the copyright owners'] statutory monopolies to encompass control over an article of commerce that is not the subject of

---

79. *See* Jennifer E. Markiewicz, *Seeking Shelter from the MP3 Storm: How Far Does the Digital Millenium Copyright Act Online Service Provider Liability Limitation Reach?*, 7 COMMLAW CONSPECTUS 423, 427 (1999).

80. *See* 17 U.S.C. §§ 1001–1010 (2000); NIMMER, *supra* note 75, § 13.05.

81. *See* 17 U.S.C. § 107 (2000).

82. *Id.*

83. *See* Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923, 935 (N.D. Cal. 1996).

84. 464 U.S. 417 (1984).

85. *See id.* at 420.

86. *See id.*

copyright protection."[87] Additional discussion of the *Sony* decision and the application of the Fair Use doctrine to Napster is contained *infra* in Section V.B.1.

D. Audio Home Recording Act of 1992

The Fair Use doctrine was further supplemented by Congress' 1992 passage of legislation entitled the "Audio Home Recording Act" (AHRA), which is found in §§ 1001 through 1010 of Title 17.[88] The AHRA gives liability protection to consumers from suits brought "alleging infringement of copyright based on the...noncommercial use by a consumer of [a digital audio recording device or medium] for making digital...or analog musical recordings."[89] The AHRA solves several problems relating to the practice of home cassette tape copying by consumers.[90]

Unfortunately for the RIAA, Napster did nothing active in the form of directly copying their works, thus making a suit on direct infringement unavailable.[91] Therefore, they sought liability on other grounds: contributory and vicarious liability.

E. Contributory and Vicarious Copyright Infringement

Contributory infringement[92] "stems from the notion that one who directly contributes to another's infringement should be held accountable."[93] To be found contributorily liable, the plaintiff must show that the infringer has knowledge, constructive or actual, of the infringing activities of others and materially contributes to the infringing actions.[94] The RIAA argued that just as swap meet operators were found liable for providing the site and facilities for the sale of infringing copies of musical recordings,[95] so too should Napster be held liable for

---

87. *Id.* at 421.

88. 17 U.S.C.A. §§ 1001–1010 (2000).

89. *Id.* § 1008.

90. *See* JOHN W. HAZARD, JR., COPYRIGHT LAW IN BUSINESS AND PRACTICE § 8.03 n.269 (Rev. ed. 1999).

91. Since Napster does not store the MP3 files but merely links users together who can freely trade them, they are not liable for direct infringement. *See* Jeremy U. Blackowicz, Comment, *RIAA v. Napster: Defining Copyright for the Twenty-First Century?*, 7 B.U. J. SCI. & TECH. L. 182, 185 (2001).

92. *See generally* Romualdo P. Eclavea, Annotation, *Liability as "Vicarious" or "Contributory" Infringer Under Federal Copyright Act*, 14 A.L.R. FED. 825 (1973) (discussing the circumstances under which liability for copyright infringement may be imposed upon those who are not direct or primary participants in the infringement).

93. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996).

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

95. *See Fonovisa*, 76 F.3d at 264 (holding swap meet operators liable for sale of infringing musical recordings through their facilities).

providing the mechanism through which its users share the plaintiff's copyrighted musical recordings.[96]

Vicarious copyright infringement allows one to be held liable for copyright infringement where the vicarious infringer has the right or ability to supervise the direct infringer and directly financially benefits from such activities while having no actual knowledge of the infringement or intent to infringe.[97] The right or ability to supervise may be proven through a showing of promotion, ability to terminate users, and controlled access.[98]

V. RIAA VS. NAPSTER

On December 6, 1999, A&M Records, along with seventeen other record companies, filed suit in United States District Court in San Francisco, California, against Napster alleging, among other things, contributory and vicarious liability.[99] The RIAA argued that since Napster offers the same music that it offers, albeit at a much lower price, free, the market for music packaged as a tangible good would disappear.[100] The RIAA reasons:

> Plaintiffs and their recording artists are compensated for their creative efforts and monetary investments largely from the sale of phonorecords to the public and from license fees from the reproduction, distribution, digital performance, or other exploitation of such phonorecords. Absent such compensation, profits and motivation are siphoned away from the artists and the record companies that record, manufacture, promote, and distribute those works. The pool of resources available for finding and promoting new artists shrinks, and sound quality and recording integrity are diluted and corrupted. The ultimate result is that the public's access to a wide variety of high-quality musical recordings is sharply curtailed.[101]

The record industry claimed copyright ownership of an estimated ninety percent of the works that were available via the Napster service and accordingly sought damages of $100,000 for each copyright-protected song that is exchanged via the service.[102] Clearly, a successful suit for damages by the RIAA would put the Napster service out of business.[103]

---

96. *See* Plaintiffs' Joint Motion for Preliminary Injunction at 6, A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 869 (N.D. Cal. 2000) (No. 99-5183) (citing *Fonovisa*, 76 F.3d at 264), *available at* http://www.riaa.org/ Legal.cfm.

97. *See* Eclavea, *supra* note 92, at 4(A).

98. *See Fonovisa*, 76 F.3d at 262.

99. *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000).

100. *See* Plaintiff's Complaint, *supra* note 4, at 2.

101. *Id.* ¶ 30.

102. *See* Don Clark, *Recording Industry Group Sues Napster, Alleging Copyright Infringement on Net*, WALL ST. J., Dec. 9, 1999, at B18.

103. *See id.* (stating that the total damages could exceed $100 million).

A. The RIAA's Arguments

During litigation, the RIAA made several arguments. First, the industry argued that Napster was vicariously liable for every infringing download by any Napster user at any time.[104] Next, they argued that Napster was contributorily infringing on their copyrights by providing the service that facilitated the unhindered and wholesale copying of millions of their copyrighted songs.[105] Finally, the RIAA argued that Napster has violated certain provisions of California's Civil Code and included a separate charge for unfair competition.[106]

1. Vicarious Infringement

The Copyright Act does not expressly impose liability on anyone other than the direct infringers, but courts have recognized that in certain circumstances, contributory liability and/or vicarious liability may be imposed.[107] The landmark case for vicarious infringement is *Shapiro, Bernstein & Co. v. H.L. Green Co.*[108] In *Shapiro*, the defendants were owners of retail stores within which were located record departments operated under a licensing agreement by a separate company.[109] Under the licensing agreement, the defendants received a percentage of the gross sales as its full compensation as licensor.[110] The licensee phonograph departments were engaged in the sale of infringing copies of the plaintiffs' copyrighted works.[111] In applying the idea of *respondeat superior* to a copyright infringement setting, the court reasoned that:

> [w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired—the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.[112]

The court then drew a distinction between two specific types of cases. First, the court stated that in the case of a landlord-tenant relationship, where the tenant pays a fixed rent and the landlord has no knowledge of the infringement by the tenant

---

104. *See* Plaintiff's Complaint, *supra* note 4, ¶ 57.

105. *See id.* ¶ 67.

106. *See id.* ¶¶ 75–86. The latter two allegations of violations of the California Civil Code as well as the unfair competition allegation are beyond the scope of this Note and will not be discussed.

107. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984) (explaining that "vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying circumstances in which it is just to hold one individually accountable for the actions of another").

108. 316 F.2d 304 (2d Cir. 1963).

109. *See id* at 306.

110. *See id.*

111. *See id.* at 305.

112. *Id.* at 307 (citations omitted).

nor exercises any supervision over him, the landlord should not be held liable for his tenant's wrongs.[113] The landlord-tenant example was contrasted with the dance hall proprietor, who benefits from the increased customers and income due to the infringing acts of the band or orchestra.[114] On this basis, the court held that the defendants were liable for vicarious infringement of the plaintiff's copyrights due to the direct infringing activity of the defendant's licensees.[115]

In order to establish a prima facie case for vicarious infringement, the plaintiff must satisfy several factors. First, the plaintiff must prove direct infringement by a third party.[116] Therefore, before the RIAA could assert vicarious infringement, they had to prove that Napster's users were directly infringing. In her decision to grant the RIAA's motion for preliminary injunction,[117] District Court Judge Marilyn Hall Patel held that the Plaintiffs had established a prima facie case of direct infringement by the users of the Napster service.[118]

Following a showing of direct infringement, vicarious liability is established, even in the absence of an employment relationship, where the defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."[119] In this case, the plaintiffs alleged that Napster had the ability to supervise the use of its millions of subscribers.[120] The truth of Napster's supervisory ability was disputed, but Napster found itself in a catch-22: Napster needed to claim ignorance of the fact that their users were trading illegal copies of music, yet insisted on demonstrating to the court its ability to respond to complaints about infringing users by blocking their access.[121] This, the court found, was an assertion "tantamount to an admission that [Napster] can, and sometimes does, police its service" and therefore ultimately determined that Napster had the ability to supervise the activity.[122]

Next, the District Court discussed Napster's "direct financial interest" in the infringing activity of its users.[123] The RIAA argued that direct financial benefit

---

113. *See id.*
114. *See id.*
115. *See id.* at 308.
116. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434 (1984).
117. *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 901 (N.D. Cal 2000).
118. *See id.* at 911 (stating that "virtually all Napster users engage in the unauthorized downloading or uploading of copyrighted music; as much as eighty-seven percent of the files available on Napster may be copyrighted, and more than seventy percent may be owned or administered by the plaintiffs").
119. *See* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996).
120. *See A&M Records, Inc.*, 114 F. Supp. 2d at 920.
121. *See id.*
122. *Id.* at 921 (citing Religious Tech. Ctr. v. Netcom On-Line Communication Servs., 907 F. Supp. 1361, 1376 (N.D. Cal. 1995) ("concluding that evidence that Internet access provider acted to suspend subscriber's accounts and could delete specific postings raised genuine issue of material fact about vicarious liability")).
123. *Id.*

does not specifically require earned revenue.[124] As long as the defendant has "economic incentives for tolerating unlawful behavior," the RIAA reasoned, they could be found to have a financial interest.[125] To bolster the argument, the RIAA asserted non-governing cases such as *Major Bob Music v. Stubbs*,[126] in which a bar was found to derive direct financial benefit from infringing music performances on its premises.[127] Instead of directly deriving financial benefit from the infringing activity of its users, the court reasoned that Napster intended to create a wide user base and then reap the profits by introducing a revenue-generating system at a later date.[128] In other words, the court reasoned that Napster was attempting to create a critical mass of music consumers and then quietly insert some type of revenue generation scheme (such as a subscription fee) to reap the monetary benefits as the largest supplier of MP3 audio files.[129] The court drew the analogy between Napster and the swap meet operators of *Fonovisa, Inc. v. Cherry Auction, Inc.*,[130] asserting that just as revenues flow from customers drawn by the availability of cheap music, so too was Napster deriving a direct benefit from the millions of Napster users drawn to the allure of music *a gratis*.[131] For these reasons, the court found that the plaintiffs had shown a reasonable likelihood for success and enjoined Napster from providing the service.[132]

2. Contributory Infringement

Under the contributory form of liability, if Napster could be classified as "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another," then the RIAA could succeed in permanently shutting down the service.[133] Judge Patel pointed out that the courts do not require actual knowledge, but rather a defendant may incur contributory liability if they have reason to know of the third party's direct infringement.[134] Contributory liability stems from tort law notions that "one who directly contributes to another's infringement should be held accountable."[135] Like vicarious liability, to be subject to liability for contributory infringement, the plaintiff must first establish some type of direct infringement.[136] The participation

124. *See id.*
125. *Id.*
126. 851 F. Supp. 475 (S.D. Ga. 1994).
127. The court remarked that "an enterprise is considered to be 'profit-making' even if it never yields a profit." *A&M Records, Inc.*, 114 F. Supp. 2d at 921 (quoting *Major Bob Music*, 851 F. Supp. at 480).
128. *See id.*
129. *See id.*
130. 76 F.3d 259 (9th Cir. 1996).
131. *See A&M Records, Inc.*, 114 F. Supp. 2d at 921.
132. *See id.* at 922, 927.
133. *See id.* at 918 (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).
134. *See id.*
135. *Fonovisa*, 76 F.3d at 264.
136. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434 (1984).

by the defendant is not required to be "substantial."[137] If the subject of the copyright is not a physical product, then "the extent of control exercised by the defendant over the third party's means of infringement" will become a factor.[138] In these instances, the greater degree of control exercised by the defendant lends more credence to a finding of contributory infringement.

An example of contributory infringement can be found in *Fonovisa, Inc. v. Cherry Auction, Inc.*[139] At issue in *Fonovisa* was the sale of infringing copies of musical recordings by third-party vendors present at Cherry Auction's swap meet.[140] The Ninth Circuit Court of Appeals found that since Cherry Auction provided the site and means necessary for the sale of the infringing works, the plaintiff had proved contributory infringement.[141] When applied to the Napster case, *Fonovisa* stands for the proposition that Napster possibly had contributorily infringed the RIAA's copyrights by "[m]erely providing the means for infringement...."[142]

B. Napster's Defenses

While Napster faced a strong argument for vicarious or contributory infringement liability, it was not without legal defenses. One of these defenses was the doctrine of Fair Use, based on the 1984 United States Supreme Court decision in *Sony Corp. of America v. Universal City Studios, Inc.*[143]

1. Fair Use Under Sony Corp. of America v. Universal City Studios, Inc.[144]

In 1984, the Supreme Court issued an opinion which, at the time, was thought to signal the end of the motion picture and television industries.[145] In the early 1980s, the Sony Corporation began production and sale of Betamax Video Tape Recorders (VTRs), the predecessor of what is commonly known today as the Video Cassette Recorder, or "VCR".[146] As soon as the VTRs were available to the consuming public, two producers of television shows sued Sony, alleging that consumers were using the machines to record the plaintiffs' copyrighted shows and that this infringed their copyrights.[147] The Court held that the use of the Betamax machines for recording and later viewing of the plaintiffs' shows

---

137. *See id.*
138. Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 984 (9th Cir. 1999).
139. 76 F.3d 259 (9th Cir. 1996).
140. *See id.* at 260.
141. *See id.* at 264.
142. *Id.* (citations omitted).
143. 464 U.S. 417 (1984).
144. *Id.*
145. *See* Linda Greenhouse, *Television Taping at Home Is Upheld by Supreme Court*, N. Y. TIMES, Jan. 18, 1984, at A1.
146. *See Sony*, 464 U.S. at 420.
147. *See id.*

(deemed "time-shifting" by the Court) was an authorized "fair" use and therefore they denied the plaintiff's requests for an injunction prohibiting the production of the VTRs.[148]

The reasoning behind the Supreme Court's decision was multifaceted. First, the Court rejected the argument proposed by the studios that under the 1911 Supreme Court decision in *Kalem Co. v. Harper Bros.*,[149] Sony was liable for providing the "means" to accomplish the infringement. In *Kalem Co.*, the Court held that the producer of an unauthorized motion picture dramatization of the book *Ben Hur* was liable for his sale of the motion picture to wholesalers who arranged for the commercial showing of the film.[150] The studios had argued that *Kalem* stood for the proposition that merely providing the method or means by which their copyrighted programs are copied subjects Sony to liability.[151] The Court rejected this argument, stating that it "rest[ed] on a gross generalization that cannot withstand scrutiny."[152] While the defendant in *Kalem Co.* provided the work itself, Sony did not provide the users with the plaintiffs' works; the plaintiffs did.[153] The Court identified that Sony merely provided an instrument which had the ability to reproduce the plaintiffs' copyrighted shows, as well as uncopyrighted ones, and those which are copyrighted, but whose owners did not object to the copying.[154] Therefore, since the range of use of the product was much broader than its infringing use, the Court reasoned that *Kalem Co.* was distinguishable since the use of the work in *Kalem Co.* was limited to infringement and nothing else.[155]

Next, the Court identified and addressed the issue of the "staple article of commerce doctrine."[156] When an infringement suit implicating contributory infringement is predicated on the sale of an article of commerce, the public's interest in access to the article is implicated.[157] The doctrine states that courts must strike a balance between the copyright holder's right to protection and the rights of others to freely engage in "substantially unrelated areas of commerce."[158] Accordingly, so long as the VTR was capable of "substantial non-infringing uses," then Sony would not be liable for infringement.[159] On that basis, the Court explored what reasons the district court had found to support its determination that Sony was not liable for contributory infringement on the basis of Fair Use.[160] The

148. *See id* at 456.
149. 222 U.S. 55 (1911).
150. *See Sony*, 464 U.S. at 435.
151. *See id.* at 436.
152. *Id.*
153. *See id.*
154. *See id.*
155. *See id.* at 437.
156. *Id.* at 440–442. The "staple article of commerce doctrine" was adopted by the Court from patent law. *See* 35 U.S.C. § 271 (2001).
157. *See Sony*, 464 U.S. at 440.
158. *Id.* at 442.
159. *Id.*
160. *See id.* at 442–456.

Court identified two uses for the VTRs, specifically "authorized time shifting"[161] and "unauthorized time shifting."[162] With regard to authorized time shifting, the Court stated that the findings of the District Court were clear: many of the non-plaintiff copyright holders were in favor of the VTR's capabilities because it would expand the viewing audience.[163] In addition, the Court agreed with the District Court's reasoning that to enjoin the production of the VTR merely on the basis that it may be used by some to make illegal copies of the plaintiff's copyrighted works was not enough to stop the production and sale of the VTR.[164] With regard to unauthorized time shifting, the Court found that while, on its face, the copying of the plaintiffs' copyrighted programs was an infringement, the Copyright Act is rife with exceptions, one of which is fair use.[165]

When attempting to apply the fair use exception, the court is to look to four separate criteria to determine whether the use should be considered "fair"; the character and purpose of the use, including an inquiry into whether the use is of a commercial nature or is for nonprofit educational uses; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.[166] The Court addressed these issues in order, primarily characterizing time shifting as a noncommercial use; home users utilized the VTR to record programs they missed to then replay at a later time.[167] Next, the Court considered the nature of the copyrighted work (in this case, an audiovisual work) and stated that time shifting merely enabled the viewer to see the work which the viewer "had been invited to witness in its entirety free of charge...."[168] Because the viewer had been invited to see the program for free at the prior time, the fact that the users were copying the work in its entirety did not have the ordinary effect of militating against a finding of fair use.[169] Lastly, the Court looked to the effect of the use on the potential market for or value of the copyrighted work.[170] The Court cited the fact that at trial the plaintiffs had

161. The term "time shifting" as used by the Court in *Sony* refers to the act of recording a program at one time and then viewing the program at a later time. *See id.* at 423. Authorized time shifting would be the copying of programs with the consent of the program's copyright holder. *See id.* Unauthorized time shifting is the opposite situation in which the copyright owner does not wish its program to be taped. *See id.*

162. *Id.* at 443.

163. *See id.*

164. *See id.* at 444. The Court solidified its position by quoting the District Court's ruling stating, "[w]hatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law." *Id.* at 444 (quoting Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 468 (C.D. Cal 1979)).

165. *See id.* at 447.

166. *See id.* at 450 n.30; *see also* 17 U.S.C. § 107 (2001).

167. *See Sony*, 464 U.S. at 449.

168. *Id.*

169. *See id.* at 449–450.

170. *See id.* at 450.

admitted several times that time shifting would not result in a great deal of harm to them, and that they had failed to carry their burden of showing financial or commercial harm.[171] On the basis of the foregoing analysis, the Court found that the production and sale of the Betamax recorder was not an infringement of the plaintiffs' copyrights.[172]

On its face, the *Sony* case seems easily distinguishable from Napster's. In *Sony*, the plaintiffs represented only a fraction of the total copyright holders of television producers.[173] In contrast, the plaintiffs (represented by the RIAA) hold more than ninety percent of the copyrights on the music available via the Napster service.[174] In *Sony*, the defendants elicited testimony from representatives of various sports organizations who did not object to recording their televised events for home use.[175] It appeared that the RIAA could easily distinguish *Sony* as binding on the court, but the specific facts of the case are not what aided Napster in the battle.

In discussing its reasons for denying the plaintiff's request for an injunction, the Court in *Sony* referred to the judicial reluctance to expand copyright protections without the explicit guidance of Congress.[176] The Court elucidated this guideline announcing, "[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials."[177] The *Sony* Court continued, quoting Justice Stewart's exposition regarding the correct approach to ambiguities in the law:

---

171. *See id.* at 451. The District Court's findings pounded home the fact that the Plaintiffs had failed to carry their burden as to showing past or potential future harm, stating the ruling in several different forms: "Harm from time-shifting is speculative and, at best, minimal." Universal City Studios, Inc, v. Sony Corp. of Am., 480 F. Supp. 429, 467 (C.D. Cal. 1979). "The audience benefits from the time-shifting capability have already been discussed. It is not implausible that benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts." *Id.* "No likelihood of harm was shown at trial, and plaintiffs admitted that there had been no actual harm to date." *Id.* at 468–469. "Testimony at trial suggested that Betamax may require adjustments in marketing strategy, but it did not establish even a likelihood of harm." *Id.* at 469. "Television production by plaintiffs today is more profitable than it has ever been, and, in five weeks of trial, there was no concrete evidence to suggest that Betamax will change the studios' financial picture." *Id.*

172. *See Sony*, 464 U.S. at 456.

173. *See id.* at 443.

174. *See* Plaintiff's Complaint, *supra* note 4, ¶ 55.

175. *See Sony*, 464 U.S. at 424. This testimony included that of the famed Fred Rogers of *Mister Rogers Neighborhood*, who stated that it was a "real service to families to be able to record children's programs and to show them at appropriate times." *Id.* at 445. Apparently, Mr. Rogers enjoyed changing his shoes, changing into his favorite sweater vest and settling in to watch the shows he missed during the day which he taped conveniently on his Betamax.

176. *See id.* at 431.

177. *Id.*

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, *music*, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors." *When technological change has rendered its literal arms ambiguous, the Copyright Act must be construed in light of this basic purpose.*[178]

Therefore, Napster, relying on a judicial restraint argument, asserted that instead of dealing a judicial deathblow to the file sharing service, the court should defer to the legislature for the creation of appropriate law.[179]

2. The Digital Millennium Copyright Act's Internet Service Provider Liability Limitations: A Statutory Shelter

Napster's next argument had its roots in legislation created in the wake of the technological developments that popularized the World Wide Web.[180] In 1998, Congress passed legislation designed to deal with the question of Internet service provider liability.[181] The new law, codified as 17 U.S.C. § 512 and titled "Limitations on Liability Relating to Material Online," is commonly known as the Digital Millennium Copyright Act of 1998, or DMCA.[182]

With the continuing expansion of the Internet, Congress realized that the Internet's growth would be hampered unless copyright law was changed.[183] Internet service providers were faced with a rapidly expanding amount of material to police for copyright infringement.[184] In response, Congress passed the Online Copyright Infringement Liability Limitation Act, incorporated as Title II of the DMCA.[185] The limitation of liability of service providers ensures that the

178. *Id.* at 431–432 (quoting Twentieth Century Music v. Aiken, 422 U.S. 151, 156 (1975) (citations omitted) (emphasis added)).

179. *See* Defendant's Opposition, *supra* note 13, at 1–2.

180. Signed into law in 1998, the Digital Millenium Copyright Act addresses many copyright related issues pertaining to the internet. *See* U.S. Copyright Office, Digital Millennium Copyright Act Summary, *available at* http://lcweb.loc.gov/copyright/legislation/dmca.pdf (Dec. 1998).

181. *See* 17 U.S.C. § 512 (2000).

182. *Id.*

183. *See* Berschadsky, *supra* note 20, at 767.

184. *See id.*

185. *See id.*

expansion of services on the Internet will not be unduly hampered by copyright litigation.[186]

Title II of the DMCA[187] allows protection for "transitory digital network communications."[188] The service provider is entitled to protection from monetary, injunctive, and equitable relief if certain conditions are met.[189] Furthermore, Title II considers four separate situations in which a service provider can find shelter under the liability shield: an entity can be considered an ISP if it acts as a conduit (Transitory Digital Network Communications[190]); temporarily stores information on its servers (System Caching[191]); allows users to store their information on its servers (information residing on systems or networks at direction of users[192]); or if the entity provides links to information available online (information location tools[193]).[194]

In order to be classified as an ISP under the first category, Transitory Digital Network Communications (conduit), the entity must satisfy several criteria.[195] The statute specifically states:

> (1) the transmission of the material was initiated by or at the discretion of a person other than the service provider; (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person; (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and (5) the material is transmitted through the system or network without modification of its content.[196]

---

186. *See id.* (quoting David Nimmer: "By limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand").

187. 17 U.S.C.A. § 512 (2000).

188. *Id.* § 512(a).

189. *See id.* The only penalty that can be imposed on an ISP is a narrow injunction or court order to block access to the infringing individual or individuals. *See* Berschadsky, *supra* note 20, at 767.

190. 17 U.S.C.A. § 512(a) (2000).

191. *Id.* § 512(b).

192. *Id.* § 512(c).

193. *Id.* § 512(d).

194. *See* Berschadsky, *supra* note 20, at 768.

195. *See id.*

196. 17 U.S.C.A. § 512(a)(1)–(5) (2000).

The next option for DMCA protection is to fall under the ISP classification for system caching. System caching is the process of storing material on servers to provide quick and easy access to the users.[197] Information is stored on the ISP's system briefly in order to provide access to users subsequent to the one who sought access to the information previously.[198] In order to qualify as an ISP under the system caching provisions, the ISP must subject their users to the same conditions of access as the originating site would have imposed.[199]

The third form of ISP classification is the user storage provision.[200] Limited liability is granted to an ISP which stores infringing information on its system at the request of a third party, so long as the ISP meets certain criteria.[201] The ISP must not have actual knowledge or awareness that the material is infringing.[202] If the ISP obtains knowledge or awareness that the material is infringing and acts expeditiously to remove, or disable access to, the infringing material, it will be given protected status.[203] The ISP must not directly receive a financial benefit attributable to the infringing activity.[204] Finally, if the ISP is notified of the infringing activity or information, it must respond expeditiously to remove or disable access to the relevant material.[205]

The last ISP classification, information location tools, is crucial to the operation of the Internet.[206] For this reason, an ISP limited liability provision was enacted to promote the creation of Internet directories, indexes, references, pointers, or hypertext links.[207] In order to avoid liability under this section, the entity must have no actual knowledge of infringement at the other online location, nor have awareness of facts and circumstances from which infringing activity in that location is apparent.[208] Upon obtaining knowledge or awareness of such infringement, the ISP must act expeditiously to remove or disable access to the infringing material.[209] The ISP cannot gain a direct financial benefit from the infringing activity and if the copyright owner notifies the entity of infringement, the entity must act expeditiously to remove or disable access to the material that is claimed to be infringing.[210]

---

197. *See* Berschadsky, *supra* note 20, at 768.
198. *See id.*
199. These conditions can include, but are not limited to, fees and passwords. *See* Berschadsky, *supra* note 20, at 768–69; *see also* 17 U.S.C.A. § 512(b)(1)–(2) (2000).
200. *See* 17 U.S.C.A. § 512(c) (2001).
201. *See* Berschadsky, *supra* note 20, at 769.
202. *See* 17 U.S.C.A. § 512(c)(1)(A)(ii) (2001).
203. *See id.* § 512(c)(1)(A)(iii).
204. *See id.* § 512(c)(1)(B).
205. *See id.* § 512(c)(1)(C).
206. *See* NIMMER, *supra* note 75, § 12B.05(A)(1); Berschardsky, *supra* note 20, at 769.
207. *See* Jeffrey P. Cunard et al., *Internet Law*, 581 PLI/PAT 853, 870 (1999).
208. *See* 17 U.S.C.A. § 512(d)(1)(A)–(B) (2001).
209. *See id.* § 512(d)(1)(C).
210. *See id.* § 512(d)(2)–(3).

Applying the statutory framework as set forth above, Napster did not qualify for either the system caching or user storage provisions because the service neither temporarily nor permanently stores user material on its servers. Some commentators have argued that Napster should be considered protected under the conduit provision because Congress was ambiguous in its definition of "material" in the statute.[211] The RIAA argued that Napster should be considered an information location tool.[212] Under this classification, Napster had to prove that it did not have actual knowledge or awareness of the infringing activity taking place through the service.[213] This was an obviously untenable proposition.

VI. THE FUTURE OF COPYRIGHT ON THE INTERNET

Since the creation of the MP3 compression standard, the RIAA has been "tracking and threatening pirates who, in turn, develop ever more sophisticated skill for evading this detection."[214] The RIAA's success in obtaining an injunction against Napster, effectively shutting the service down, may be the first step in a pilgrimage of copyright enforcement actions, responding to the overwhelming number of Napster clones that have begun to appear.[215] These systems are being created with increasing frequency to fill the void left in the wake of Napster.[216] Moreover, it seems, these programs continue to undergo a legally inspired metamorphosis in an attempt to escape the clutches of American copyright law.[217] Much in the way additional heads sprang forth as Hercules battled with the Lernaean Hydra, removing its heads with his sword, the virtual destruction of Napster has inspired the creation of countless imitations and innovations based upon the file sharing phenomenon Shawn Fanning created with the Napster software.[218]

---

211. *See* Berschardsky, *supra* note 20, at 776 (arguing that Napster is protected under § 512(a) because the service only routes the information to allow the computers to connect independent of the Napster system).

212. *See* Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant Napster, Inc.'s Motion for Summary Adjudication on the Applicability of the 17 U.S.C. § 512(a) Safe Harbor Affirmative Defense at 10, (N.D. Cal. 2000) (No. C99-5183), *available at* http://www.riaa.org/PDF/Napster_Plaintiff_Brief.pdf.

213. *See* 17 U.S.C.A. § 512(d)(1) (2000).

214. Barak D. Jolish, *Scuttling the Music Pirate: Protecting Recordings in the Age of the Internet*, ENT. & SPORTS LAW., Spring 1999, at 9, 10.

215. One example is WinMX, which incorporates the Napster client-server and peer-to-peer hybrid format but gives the user the option of connecting to multiple servers. *See* WinMX—The Best Way to Share Your Media, *available at* http://www.winmx.com (last visited Apr. 22, 2001). Other examples include Gnutella (wego.gnutella.com) and iMesh (www.imesh.com). *See* Downloads—Cnet.com, *available at* http://download.cnet.com/downloads/0,10151,0-3291790-106-0-1-0,00.html?tag=stbc.gp (last visited Apr. 22, 2001).

216. *See* Berschardsky, *supra* note 20, at 782.

217. *See id.*

218. *See* Greg Francis, *Napster's Legacy Lives on in New Sites*, KOREA HERALD, Mar. 30, 2001, at 1. Another commentator has made the analogy of the post-Napster file sharing phenomenon to cockroaches stating, "[k]ill one, and another pops up to scurry

At the time of publication of this Note, more than seventy different versions of file sharing services and software were freely available to download and install from the Internet.[219] Among the most popular are the Gnutella network,[220] FastTrack[221] and OpenNap.[222] Each of these services are a spin-off of the Napster file-sharing idea in one way or another, but vary the way the files are shared in order to circumvent the legal liability that caused Napster's downfall.[223] Additionally, these file sharing services have gone well beyond the capabilities of Napster; they offer the ability to share not only music files, but video, text, and software, making them all the more efficient, effective, and more dangerous to copyright holders.[224]

---

across the kitchen floor." *Bulletin Board—Technology—Software*, HOUS. CHRON., June 22, 2001, at 4.

219. *See Zeropaid.com—The File Sharing Portal, at* http://www.zeropaid.com (last visited Mar. 1, 2002) (listing over seventy different services and software which can be downloaded and installed to effectuate the downloading and sharing of users' files).

220. *See Gnutelliums*, http://www.gnutelliums.com (last visited Mar. 1, 2002).

221. FastTrack is the underlying software which allows users of the Grokster, KaZaA, and Morpheus software to interact and share files with one another. *See FastTrack—P2P Technology, at* http://www.fasttrack.nu (last visited Mar. 1, 2002).

222. *See OpenNap: Open Source Napster Server, at* http://opennap.sourceforge.net (last visited Mar. 1, 2002); *Napigator, at* http:// www.napigator.com (last visited Mar. 1, 2002) (listing servers currently running the OpenNap protocol). OpenNap is based on the same architecture as Napster (i.e. allowing users to share files stored on the individual machines by searching indexes stored on the server). However OpenNap allows for the sharing of more than MP3 files. *See id.*

223. *See* Dwight Silverman, *Napster Ruling Won't Kill the Music as Other Programs Spring up*, HOUS. CHRON., Feb. 13, 2001. In addition to the file sharing services discussed *infra*, Silverman identifies a few other services which were developed after the fall of Napster: CuteMX, IMesh, and Freenet. *See id.* CuteMX is similar to Napster, except that it attempts to filter out copyrighted files. *See id.* IMesh, developed by an Israeli company, is similar to the Napster architecture, but it does not limit sharing to MP3 files; almost anything can be shared via their network. *See id.* Freenet, the nickname for Free Network Project, is a brother of the Gnutella network as it requires no central servers; all connections are made purely peer-to-peer. *See id.*; *see also* Sacha Cohen & Michael Tedeschi, *Alternatives to Napster Aren't Easy*, WASH. POST, Feb. 23, 2001, at E13. The extent to which software writers are willing to go to succeed in their mission is boundless: the developer of OpenNap announced that he would move his operation to an unused anti-aircraft platform floating off the British coast, which was declared an independent state thirty years before by an eccentric war veteran, in order to escape liability. *See* Sebastian Mallaby, *Taming the Wild Web*, WASH. POST, Mar. 12, 2001, at A17.

224. *See* Editorial, *Fighting a Losing Battle*, DAILY FREE PRESS (BOSTON U.), Jan. 18, 2002; *see also infra* text accompanying notes 225–37; Damien A. Riehl, Note, *Peer-to-Peer Distribution Systems: Will Napster, Gnutella, and Freenet Create a Copyright Nirvana or Gehenna?*, 27 WM. MITCHELL L. REV. 1761 (2001) (containing a discussion of the structures of several peer-to-peer file sharing software programs as well as the legal implications of their architecture). The Motion Picture Association of America has begun its legal attacks against file sharing, specifically since it has found a number of pirated movies being shared via the Gnutella Network, sending legal notices to ISPs with users found to be infringing on their copyrights. *See* Lee Gomes, *Entertainment Firms Target Gnutella*, WALL ST. J., May 4, 2001, at B6.

The Gnutella network attempts to circumvent liability by removing any type of centralization from its network.[225] It can be said that the Gnutella network is a "true" peer-to-peer environment, because the system eschews a centralized server in favor of direct communications between all users on the system.[226] Once the user has loaded the Gnutella software, a message is sent out to a computer which is already connected to the network.[227] The sending computer informs the receiving computer that it is ready to share files and the receiving computer then informs several other computers, which in turn inform several more each; the numbers of computers which can be searched grows exponentially.[228] When a search is sent, it percolates through the connected machines until the file is found, whereupon the two machines are connected directly and the transfer is made.[229] Gnutella's lack of centralized servers and control over the network removes the legal targets on which the RIAA relied on in eliminating Napster.[230]

FastTrack, developed by a company in the Netherlands,[231] and the most recent target of the RIAA's legal strike team,[232] has its roots in the pure peer-to-peer idea of the Gnutella Network, but provides for faster searching and multiple-source downloads, two features not available in the original Gnutella network.[233] Users with powerful computers serve as distributors of searches, instead of each machine receiving, processing and forwarding searches onto other machines,

---

225. *See* Tamara Milagros-Woeckner, *Karma or Golden Opportunity?: A New Business Model for the Music Industry Launching into Cyberspace*, 30 SW. U. L. REV. 295, 309 (2001); Ryan C. Edwards, Note, *Who Said Nothing in this World Is Free?* A&M Records, Inc. v. Napster, Inc.*: Problems Presented, Solutions Explored, and Answers Posed*, 89 KY. L.J. 835, 839 (2001).

226. *See* Edwards, *supra* note 225, at 839. A good way to think about the structure of the Gnutella network is by comparing it to the structure of Tinker Toys, the popular construction set of the 70s and 80s. Each user's computer acts as a hub which is connected to a few more hubs which each in turn are connected then to other hubs and so on, increasing exponentially. The number of hubs reachable from one user's computer is only limited by the number of users actually connected to the Gnutella network.

227. *See id.*

228. *See id.*

229. *See id.*

230. *See* Milagros-Woeckner, *supra* note 225, at 309. However, Ms. Milagros-Woeckner notes that while there are millions of Gnutella users, forty percent of the total content supplied to the network is provided by one percent of the users. *See id.* at 309–10. Therefore, she argues, if RIAA wished to inhibit the sharing of files through the Gnutella network, they would need only to litigate against a finite number of users (approximately 300) in order to knock out almost half of the files provided to the network. *See id.* at 310. She points out, however, that while the RIAA may remove some forty percent of the infringing files from the network, surely others would rally to fill the void left by those users stopped by the RIAA's legal actions. *See id.*

231. *See FastTrack—P2P Technology*, *at* http://www.fasttrack.nu (last visited Mar. 3, 2002).

232. *See* Joseph Gallivan, *RIAA at War Again*, N.Y. POST, Oct. 4, 2001, at 38.

233. *See* Thomas E. Weber, *The Beat Goes on: Alternative Services Improve on Napster*, WALL ST. J., July 16, 2001, at B1.

which slows the Gnutella network.[234] The "supernode" construction of the FastTrack network also makes the FastTrack networks (Grokster, KaZaA, and Morpheus) harder to track down and sue.[235]

OpenNap utilizes the same architecture as Napster, with a central server containing the lists of users' files, but attempts to avoid liability by freely offering the server software so anyone can run their own server with the proper equipment and ability.[236] In conjunction with the original Napster software, and using Napigator, a freely available program, users can connect to currently running OpenNap servers and obtain the same unrestricted searching capabilities offered by Napster before the injunction.[237]

VII. CONCLUSION

Judge Marilyn Patel decided that Napster had violated the rights of the copyright holders, and therefore she granted the injunction which led to the eventual shut down of Napster.[238] Currently, Napster is attempting to reorganize to provide a music distribution system in conjunction with several music producers.[239] Additionally, Napster has begun its own legal crusade, attempting to prove that the recording companies have violated antitrust provisions in creating their own online music services.[240] Prior to the decision granting the recording companies injunctive relief, some critics opined that even if the RIAA was successful in removing Napster from the file-sharing scene, they would still be faced with open-source programs that perform the same function as Napster, but are virtually impossible to shut down due to lack of centralized servers and independent incorporation.[241] It is not clear whether these programs have the ability or functionality to assume the role that Napster so aptly played in the file-sharing extravaganza, but they have the potential.

Is it possible the proverbial 'cat' is out of the bag?[242] Is file sharing here to stay no matter what the RIAA or the courts have to say about it? Could Rap

234. *See* Jefferson Graham, *As Napster Shuts, Others Carry the Tune*, USA TODAY, July 12, 2001, at D3.

235. *See id.*

236. *See OpenNap Reference Manual*, *at* http://opennap.sourceforge.net/manual.html, (last visited Mar. 1, 2002).

237. *See* James M. Burger, *"Rock 'n Roll is Here to Stay": Napster and Online Communication Distribution*, 19-SPG COMM. LAW. 1, at 36 n.45.

238. *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000).

239. *See Napster Inc.: Music-Swapping Service is Testing New Pay Version*, WALL ST. J., Jan. 10, 2002, at B11. The once free music sharing service plans are charging an estimated five to ten dollar charge to use the new, copyright-friendly, RIAA approved service. *See id.*

240. *See Judge Rules Napster May Question Validity of Music Copyrights*, WALL ST. J., Feb. 25, 2002, at B2.

241. *See* Levy, *supra* note 1, at 46; Peter Rojas, *Intellectual Property, Protecting It Will Be Increasingly Difficult*, RED HERRING, Dec. 4, 2000, at 110.

242. One commentator has suggested, alternatively, that the "toothpaste's out of the tube," rather than the "cat" being out of the "bag." Todd Pack, *Record Labels Band*

Artist Chuck-D be on point when he said that trying to stop file sharing over the Internet was like "trying to control the rain?"[243] Clearly, people became accustomed to the convenience of free music available via the Internet: at its peak, Napster had eighty million registered users who downloaded as many as three billion songs per month.[244] Furthermore, the history of the struggle indicates that as soon as the recording companies find a way to eliminate one tool of file sharing, programmers quickly take up arms to create the next vehicle in which to supply the masses with free music. The RIAA may have won the battle against Napster, but the war against online music piracy is far from finished.

Together but They May Be too Late as Napster Clones Let Users Download Songs for Free, ORLANDO SENTINEL, July 15, 2001, at H1.

243. *See* Cohen et al., *supra* note 6, at 68.

244. *See* Jefferson Graham, *A Slimmed-down Napster Gets Back Online; Trial-Run is Heavy on Little Known Artists*, USA TODAY, Jan. 10, 2002, at D1.