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Copyright Cases in the Courts: Napster, MP3 Digital Music, and DVD Motion Picture Encryption Technology

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Summary

Two U.S. district courts are hearing on-going litigation of interest to those who follow the development of online music delivery. In *UMG Recordings, Inc. v. MP3.Com, Inc.,* a U.S. district court found that defendant MP3.com infringed copyrights of plaintiff recording companies. In *A & M Records, Inc. v. Napster, Inc.,* the court found that plaintiff recording companies have established a *prima facie* case of copyright infringement by Napster users, and that Napster, the popular music sharing Internet program, is likely to be found to be engaged in contributory and vicarious copyright infringement. The court granted the plaintiffs an injunction requiring that Napster stop facilitating online copyright infringement. The injunction was stayed pending appeal to the Ninth Circuit Court of Appeals. The circuit court affirmed the district court's findings regarding direct, contributory, and vicarious copyright infringement. It affirmed the appropriateness of the issuance of a preliminary injunction. But it held that the injunction was overbroad because it placed the entire burden of preventing infringement on Napster. It remanded the case to the district court with directions to redraft the terms of the preliminary injunction consistent with its directive.

In *Universal City Studios v. Reimerdes,* the court applied the Digital Millennium Copyright Act's provisions governing anticircumvention of copyright protection systems to stop the proliferation and dissemination on the Internet of a young hacker's computer code to decrypt digitally encrypted motion pictures on digital versatile discs.

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Introduction

In 1998, in the Digital Millennium Copyright Act (DMCA),[1] Congress amended the copyright law to protect the rights of copyright holders in the digital era. The activities and the technology encompassed by the law, and the law itself, are being applied and interpreted by the courts.

Two U.S. district courts are hearing on-going litigation of interest to those who follow the development online music delivery. In *UMG Recordings, Inc. v. MP3.Com, Inc.,* a U.S. district court found that defendant MP3.com infringed copyrights of plaintiff recording companies. In *A & M Records, Inc. v. Napster, Inc.,* the court found that plaintiff recording companies have established a *prima facie* case of copyright infringement by Napster users, and that Napster, the popular music sharing Internet program, is likely to be found to be engaged in contributory and vicarious copyright infringement. The court granted the plaintiffs an injunction requiring that Napster stop facilitating online copyright infringement. The injunction was stayed pending appeal to the Ninth Circuit Court of Appeals. The circuit court affirmed the district court's findings regarding direct, contributory, and vicarious copyright infringement. It affirmed the appropriateness of issuance of a preliminary injunction. But it held that the injunction was overbroad because it placed the entire burden of preventing infringement on Napster. It remanded the case to the district court with directions to redraft the terms of the preliminary injunction consistent with its directive.

In *Universal City Studios v. Reimerdes,* the court applied the DMCA's provisions governing anticircumvention of copyright protection systems to stop the proliferation and dissemination on the Internet of a young hacker's computer code to decrypt digitally encrypted motion pictures on digital versatile discs.

Together, these cases represent the dramatic impact of new technology on historic principles of copyright law. They are examined below.

MP3 Digital Music

Background. Historically, federal copyright protection did not extend to sound recordings. They were first granted protection in 1971 by the Sound

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[1]P.L. 105-304 (Oct. 28, 1998).

Recording Act (SRA).[2] This law was concerned with the prevention of phonorecord piracy facilitated by advances in duplication technology. Sound recording copyright owners did not receive all of the rights conferred upon traditional copyright holders. They were granted reproduction, distribution, and adaptation rights, *not* performance rights.[3] 17 U.S.C. § 106. This limited copyright protection was incorporated into the 1976 Copyright Act.

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (DPRA).[4] This law created a new exclusive right to perform copyrighted sound recordings publicly by means of digital audio transmissions. Like the SRA, the DPRA was technology-driven. Its goal was to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions without hampering the arrival of new technologies and without imposing new and unreasonable burdens on radio and television broadcasters' traditional analog transmissions.[5]

The DPRA reflected compromises among the private sector interests most directly affected by it: recording companies, performers, composers and lyricists, music publishers, and digital cable subscription music services. The new performance right essentially impacted only subscription, i.e., fee-based, or interactive transmissions of sound recordings and musical works. No other works were affected. Interactive services include "pay-per-listen," "audio-on-demand," and "celestial jukebox services," whether provided online or otherwise, and regardless of whether there is a charge for the service.[6]

Many kinds of digital audio transmissions of sound recordings are exempt from the exclusive public performance right: traditional radio and television broadcasts (including future digital broadcasts); background music services that transmit to businesses; so-called "storecasting," that is, internal transmissions by a business on or around its own premises; initial nonsubscription transmissions; initial retransmissions of a network feed to its affiliates; and so-called "on-hold music" transmissions via telephone to a caller waiting for a response.[7]

The 105th Congress saw enactment of the DMCA, which made extensive amendments to copyright law at Title 17 of the U.S. Code. Title II is entitled "Online Copyright Infringement Liability Limitation." It added 17 U.S.C. § 512, which creates limitations on the liability of covered service providers for copyright infringement when engaging in certain types of activities: namely, transitory

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[2]P.L. 92-140 (Oct. 15, 1971).

[3]H.Rept. 104-274, 104th Cong., 1st Sess. 11 (1995) to accompany the Digital Performance in Sound Recordings Act.

[4] P.L. 104-39 (Nov. 1, 1995).

[5]S.Rept. 104-128, 104th Cong., 1st Sess. 15 (1995).

[6]CRS Rep. 95-969, "Public Performance Right in Digital Audio Transmission of Sound Recordings," by Dorothy Schrader (Feb. 28, 1996).

[7]17 U.S.C. § 114(d).

communications, system caching, storage of information on systems or networks at the direction of users, and linking users with information location tools. This title of the DMCA is intended to preserve incentives for service providers and copyright owners to cooperate to detect and identify copyright infringements that take place in the digital networked environment; and, to provide greater certainty for service providers concerning liability for infringements that may occur in the course of their activities.[8]

The public performance right in digital audio transmission of sound recordings is relatively new. The immunity from copyright infringement for service providers established under the Digital Millennium Copyright Act is even more recent. These provisions play a large role in the courts' recent consideration of copyright infringement liability allegations against MP3.com and Napster.

The MP3 controversy. MP3 – which is the popular term to describe technology known as Moving Picture Experts Group (MPEG) 1 Audio Layer 3 – has been referred to by at least one court as "the revolutionary new method of music distribution made possible by digital recording and the Internet."[9]

Prior to the introduction of digital audio recording, individuals wanting to copy a sound recording were limited to analog technology. Successive copying by analog techniques resulted in increased degradation of sound quality. Hence, copyright infringement by unauthorized duplication of cassettes and CD's was frustrated by the inability of a copier to replicate music with high quality sound. The introduction of digital audio recording to consumer electronics during the 1980's facilitated high quality mass copying. Music "pirates" are able to use digital technology to make and distribute near perfect but infringing copies of commercially prepared recordings.

Prior to the advent of MP3 technology, however, the Internet was not a feasible vehicle for music distribution because the average music computer file was too big:

> [T]he digital information on a single compact disc of music required hundreds of computer floppy discs to store, and downloading even a single song from the Internet took hours. However, various compression algorithms (which make an audio file "smaller" by limiting the audio bandwidth) now allow digital audio files to be transferred more quickly and stored more efficiently. ... "MP3" is the most popular digital audio compression algorithm in use on the Internet, and the compression it provides makes an audio file "smaller" by a factor of twelve to one without significantly reducing sound quality. MP3's popularity is due in large part to the fact that it is a standard, non-proprietary compression algorithm freely available for use by anyone, unlike various proprietary (and copyright-secure) competitor algorithms. Coupled with the use of cable modems, compression

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[8]H.Rept. 105-796, 105th Cong., 2d Sess. 72 (1998).

[9]Recording Industry Assoc. of Amer. v. Diamond Multimedia Systems, 180 F.3d 1072, 1073 (9th Cir. 1999).

> algorithms like MP3 may soon allow an hour of music to be downloaded from the Internet to a personal computer in just a few minutes.[10]

MP3 web sites proliferate on the Internet in a variety of formats. The issue before the courts is *not* the legality of the technology, but whether and the extent to which it is used to facilitate music piracy.

Performing artists such as Dr. Dre, the rock band Metallica, and music industry associations have publicized the economic harm they perceive from music piracy and its magnitude.[11] Metallica presented the digital music-sharing service Napster with 300,000 examples of copyright infringement. Unauthorized music downloading appears to be especially predominate among large groups of young, computer-literate users such as college and high school students. Some MP3 music consumers express resentment over the notion of being denied access to, or charged for, downloadable music from the Internet. They argue, among other things, that music-sharing technology is simply too far advanced to contain through copyright infringement litigation; and, that shutting down any given web site will only spawn more music delivery services with more sophisticated technology. Indeed, news accounts point to development of new, underground file sharing tools such as Gnutella and Freenet.[12]

Ultimately, digital music delivery options represent yet another clash between technology and traditional copyright law principles governing sound recordings. Some commentators suggest that it is the business model of music distribution, not copyright law, that must adapt:

> The labels may succeed in squelching Napster (which has already lost a major court battle) and Gnutella, an even more insidious file-sharing client. But right now, in some suburban bedroom or urban dorm room, a kid is probably hunched over her keyboard, working on a newer, faster, slicker piece of file-sharing software. And there's probably another kid ... working on a better compression format. Ultimately, it will be technology and economics, not lawyers or megabands, that will call the tune in the music business.[13]

Recent decisions by two U.S. district courts, however, indicate that the unauthorized use of MP3 technology to download music from the Internet may constitute copyright infringement, and the music industry and the courts will act to stop it. The interaction of law and technology may indeed lead to important developments in the manner in which music — and other intellectual property — is distributed over the Internet.

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[10]*Id.* at 1073-74.

[11]Christopher Stern, *Record Firms Say Napster Hurts Sales,* THE WASHINGTON POST, June 13, 2000 at E1.

[12]*See* Patti Hartigan, *Music Industry Can't Outwit Outlaws,* BOSTON GLOBE, May 31, 2000, at A1; Ben Sack, *Student caught in crossfire over Napster,* WINSTON CHURCHILL HIGH SCHOOL OBSERVER, May 23, 2000 at A3.

[13]Karl Taro Greenfield, *The Digital Reckoning; Listen up. The music industry is being "kidnapstered," and it's fighting mad,* TIME MAGAZINE, May 22, 2000 at 56.

UMG Recordings, Inc. v. MP3.Com, Inc. In *UMG Recordings, Inc. v. MP3.Com, Inc.,*[14] the U.S. District Court for the Southern District of New York granted a partial summary judgment finding that defendant MP3.com infringed the copyrights of plaintiff recording companies. Applying basic principles of copyright law, the court found infringement and rejected the defendant's argument that its use of the plaintiffs' recordings came within the "fair use" exception to the copyright holders' exclusive rights. 17 U.S.C. § § 106, 107.

The defendant, MP3.com, operates a service called "My.MP3.com," which was advertised as permitting subscribers "to store, customize and listen to the recordings contained on their CDs from any place where they have an Internet connection."[15] The defendant purchased thousands of CDs in which the plaintiffs held copyrights, and without authorization, copied the recordings onto its computer server. Subscribers, upon initial proof of ownership of the CD, could then access it via the Internet from any computer anywhere. Subscribers would prove ownership of any given CD by either inserting it into the computer's CD-Rom drive, or through purchase from one of the defendant's online retailers.

MP3.com argued that its service was the functional equivalent of "space shifting," or storing the subscriber's CD, and was analogous to the "time shifting" permitted by the U.S. Supreme Court in *Sony Corp. of America v. Universal City Studios.*[16] But the court disagreed, finding a presumptive case of copyright infringement because MP3.com was in fact utilizing its unauthorized copy of the CD for the subscriber. Nor did the court find any basis to support the defendant's assertion that its use of the plaintiffs' recordings constituted "fair use." Finally, the court rejected the defendant's claim that it was providing a useful service to consumers that would otherwise be provided by pirates. The court concluded that the defendant's "consumer protection" argument "amounts to nothing more than a bald claim that defendant should be able to misappropriate plaintiffs' property simply because there is a consumer demand for it."[17]

MP3.com was reported to have entered into a settlement with several plaintiffs in the lawsuit against it.[18] Nonetheless, on September 6, 2000, in an order addressing

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[14]92 F. Supp.2d 346 (S.D.N.Y. 2000).

[15]*Id.* at 350.

[16]464 U.S. 417 (1984)(Owners of copyrights on television programs brought copyright infringement action against manufacturers of home videotape recorders. The Supreme Court held that manufacturers of home videotape recorders demonstrated that substantial numbers of copyright holders who licensed their works for broadcast on free television would not object to having their broadcasts time shifted by private viewers. Further, the owners of copyrights on television programs failed to demonstrate that time shifting would cause any harm to the potential market for, or the value of, their copyrighted works. Therefore, because home VCRs were capable of substantial noninfringing uses, the manufacturers' sale of such equipment did not constitute contributory infringement of respondents' copyrights.)

[17]92 F. Supp.2d at 352.

[18]Associated Press, *MP3 Settlement May Aid Digital Music Web Site,* ST. LOUIS POST-
(continued...)

statutory damages, the court ruled that MP3.com had willfully infringed the plaintiffs' copyright, but had acted responsibly to mitigate damages after the court's April, 2000 ruling.[19] From a range of damages proffered by the parties of $500 to $150,000 per infringed CD, the court determined that an appropriate measure of damages is $25,000 per CD, with an approximate total of damages (based on MP3.com's estimates) of $118,000,000.

A & M Records, Inc. v. Napster. In a case of wide reaching public attention, the U.S. District Court for the Northern District of California is considering the claims of plaintiff record companies who are suing Napster alleging contributory and vicarious federal copyright infringement.

Napster, Inc. is a popular service which makes its MusicShare software freely available for Internet users to download. Utilizing the software enables users to share MP3 music files with others logged on to the Napster system. Napster allows users to exchange MP3 files stored on their own computer hard-drives directly and without payment. Napster has other functions as well, such as permitting users to play a downloaded song or participate in a chat room, and promoting independent artists through its "New Artists Program."

The district court has issued two substantive decisions to date: one denying Napster's motion for summary judgment on the ground that it was exempt from copyright infringement liability under the DMCA;[20] and another finding that the recording companies have established a *prima facie* case of copyright infringement and are likely to succeed on their claims, that the exchange of files by Napster users is not "fair use," and that plaintiffs are entitled to injunctive relief.[21] Although, the court issued a preliminary injunction requiring Napster to shut down by July 28, 2000 or prevent further copyright infringement, the Ninth Circuit Court of Appeals issued an order on the same day staying the district court's injunction pending appeal.[22]

On February 12, 2001, the Ninth Circuit issued its ruling, holding for the plaintiff recording companies.[23] The Court of Appeals upheld the district court's conclusions respecting the plaintiffs' likelihood of prevailing on the issues, namely, that Napster *users* engage in direct copyright infringement and that Napster *itself* engages in contributory and/or vicarious copyright infringement. The court affirmed the issuance of the preliminary injunction, but directed the district court to narrow the scope of the injunction to limit the burden on Napster to prevent copyright infringement. Rather

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[18](...continued)
DISPATCH, June 10, 2000 at 8.

[19]UMG Recordings, Inc. v. MP3.com, Inc., 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000)(Unofficial version.)

[20]A&M Records, Inc. v. Napster, Inc., 2000 WL 573136 (N.D.Ca. May 5, 2000).

[21]A&M Records, Inc. v. Napster, Inc., 2000 WL 1182476 (N.D.Ca. August 10, 2000).

[22]A&M Records, Inc. v. Napster, Inc., 2000 WL 1055915 (9th Cir. July 28, 2000)(No published opinion.)

[23]A&M Records, Inc. v. Napster, Inc, 2001 WL 115033 (9th Cir. Feb. 12, 2001).

than placing the entire burden of preventing copyright infringement on Napster, the recording companies must meet their burden of providing notice of infringing content. The Court of Appeals affirmed the district court in part, reversed in part, and remanded the case back to district court. Hence, a newly crafted injunction by the district court will in all likelihood end the public's music sharing of copyrighted songs through Napster's traditional software format.

Napster's motion for summary judgment. In the order denying Napster's motion for summary judgment, the U.S. district court addressed a complicated question arising under the Digital Millennium Copyright Act. Acknowledging the issue to be one of first impression, the court held that Napster's business activities do *not* clearly fall within the safe harbor provision of the DMCA, 17 U.S.C. § 512(a), so as to insulate it from liability for damages for copyright infringement.

Napster argued that its service comes within the recently enacted safe harbor provision of the DMCA , 17 U.S.C. § 512. Subsection (a) protects various types of service provider "passive conduit" activity from liability. Specifically, a service provider is not liable for copyright infringement "by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material" if:

> (1) the transmission of the material was initiated by or at the direction 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.[24]

In its motion for summary judgment Napster argued that it satisfies the statutory definition of "service provider."[25] Because the MP3 file resides on the Host user's hard drive and is transmitted through the Internet to the recipient's browser and hard drive, Napster argued that it meets the passive conduit criteria of § 512(a) generally, and the specific criteria of subsection (a)(1)-(5).

But the court rejected Napster's argument. It held that § 512(a) does *not* protect the transmission of MP3 files because Napster neither transmits, routes, nor provides connections through a system or network controlled by it. Instead, it found that

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[24]17 U.S.C. § 512(a)(1)-(5).

[25]*Id.* at § 512(k).

Napster "enables" or "facilitates" the *initiation* of connections, but the connections do not pass through the system within the meaning of § 512(a).

The U.S. district court's finding of copyright infringement. In a lengthy opinion, the court explained why it finds that Napster's users are engaging in copyright infringement; why the "fair use" defense to infringement is inapplicable; and, why Napster is likely to be found to be contributorily or vicariously liable for copyright infringement.

The court found a *prima facie* case of direct infringement by Napster users because "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 plaintiffs."[26]

It rejected Napster's fair use defense on a variety of grounds, finding that users did not meet any of the statutory parameters establishing fair use:[27]

- *Purpose and character of use.* While acknowledging that users downloading from Napster are not engaging in "paradigmatic commercial activity," neither are they engaged in personal use in the "traditional sense," *i.e.,* copying occurring within the household which does not confer any financial benefits on the user. The court concluded that the vast scale of Napster use among anonymous individuals does not constitute "personal use." Most important, however, Napster users receive for free something that they would otherwise purchase, which may adversely affect the potential market for the copyrighted work.

- *Nature of the work.* The court found that the sound recordings constitute entertainment, not educational material.

- *Amount and substantiality of the portion used in relation to the whole.* The court found it to be "undisputed" that the copying of MP3 music files involves copying the entirety of the work, which is inconsistent with fair use.

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[26]2000 WL 1182467, *12 (N.D.CAL.)

[27]17 U.S.C. § 107, entitled "Limitation on exclusive rights: Fair Use" provides, in relevant part:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

- *The effect of the use upon the potential market for the copyrighted work.* The record companies produced evidence demonstrating that Napster use reduces CD sales among college students and raises barriers to the companies' entry into the market for digital downloading of music.

The court also decisively rejected "sampling" and "space shifting" of music as *potential* fair uses of the Napster service. Copyright owners earn royalties from streamed song samples on retail web sites like Amazon.com. Even if music sampling by Napster users *did* lead to enhanced CD sales, unauthorized downloading deprives music publishers of royalties for individual songs and would not constitute fair use.

And, while the practice of "time shifting" of television programming was upheld by the U.S. Supreme Court in *Sony Corp. of American, supra,* the district court had no trouble distinguishing consumers' use of Napster from their usage of VCR's to tape TV:

> [W]hile "time shifting [TV broadcasts] merely enables a viewer to see ... a work which he ha[s] been invited to witness in its entirety free of charge," plaintiffs in this action almost always charge for their music – even if it is downloaded song-by-song.[28]

Contributory copyright infringement involves inducing, causing, or materially contributing to the infringing conduct of another. Liability for vicarious copyright infringement may arise when a party has the right and ability to supervise the infringing activity and has a direct financial interest in the activity.

Sony also holds that a copyright holder cannot extend his monopoly to products capable of noninfringing uses. But the court was unwilling to accept Napster's assertion that its music space shifting, its message boards, its chat rooms, and its program to introduce and promote new music artists are valid and fair uses which render its service capable of "substantial noninfringing uses." It rejected the assertion that Napster provides noninfringing uses sufficient to overcome its role in contributory copyright infringement:

> Napster, Inc.'s facilitation of unauthorized file-sharing smacks of the contributory infringement in these cases, rather than the legitimate conduct of the VCR manufacturers. Given defendant's control over the service, as opposed to mere manufacturing or selling, the existence of a potentially unobjectionable use like space-shifting does not defeat plaintiffs' claims.[29]

And, although Napster did not obtain a direct financial benefit from the infringing activity, the court noted that "benefit" does not require earned revenue, so long as the defendant has "economic incentives for tolerating unlawful behavior." Napster's business plan to "monetize" its user base in the future supplied sufficient economic incentive to support liability for vicarious infringement.

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[28]2000 WL 1182467, *13 (quoting from *Sony, supra.*)

[29]*Id.* at *17.

Finally, Napster argued that granting an injunction would be an over broad remedy, imposing a prior restraint on free speech in violation of the First Amendment. Napster's electronic directory, which does not contain copyrighted material, is entitled to First Amendment protection. Because it contends that its infringing and noninfringing services are inseparable, Napster argued the injunction would have the effect of shutting it down. Again, the court rejected the assertion, for two reasons. First, the court observed that free speech concerns are protected by and coextensive with the fair use doctrine. The recording companies were not attempting to enjoin any fair uses of the Napster service. Second, if Napster services are inseparable, as it contends, the inseparability is its doing, and its legitimate function cannot be used to support infringement.

The Ninth Circuit Court of Appeals decision.[30] The Court of Appeals found that the lower court record supported its findings with respect to direct, contributory, and vicarious copyright infringement. It rejected Napster's defenses against direct infringement allegations, namely, fair use, sampling, and space-shifting.

With respect to copyright infringement, the Court of Appeals approved the district court's finding that "Napster has *actual* knowledge that *specific* infringing material is available using its system, [and] that it could block access to the system by suppliers of the infringing material, and that if failed to remove the material."[31] However, the court wished to make a clearer distinction between the "architecture" of the Napster system and Napster's "conduct" in relation to the operational capacity of the system than the district court did.[32]

Specifically, applying the *Sony* decision, *supra,* the Court of Appeals opined that the district court did not give enough weight to Napster's argument that its software is capable of "substantial noninfringing uses" as well as infringing ones. The district court improperly confined the use analysis to current uses and ignored the system's capabilities. As a result it gave undue weight to the proportion of current infringing uses as compared to current and future noninfringing use:

> We agree that 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.[33]

The Court of Appeals found a vicarious infringement liability arising from Napster's ability to supervise users and prevent infringing music exchanges. But the

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[30]A&M Records, Inc. v. Napster, Inc, 2001 WL 115033 (9th Cir. Feb. 12, 2001).

[31]*Id.* at *15.

[32]*Id.* at *13.

[33]*Id.* at *15. (Citations omitted.)

district court failed to recognize the "architectural" limitations on its ability to "control and patrol" its users. Napster does not read the content of the Hosts' indexed files other than to check that they are in the proper MP3 format. As a practical matter, Napster, its users, *and* the record companies have equal access to the infringing material in the Napster system. Therefore, in its remand directive to the district court, the court explained:

> The preliminary injunction which we stayed is overbroad because it places on Napster the entire burden of ensuring that "no copying, downloading, uploading, transmitting, or distributing" of plaintiffs' works occur on the system. As we stated, we place the burden on plaintiffs to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content. Napster, however, also bears the burden of policing the system within the limits of the system.[34]

The Court of Appeals considered two additional statutes which Napster asserted insulated it from liability for contributory and vicarious copyright infringement: the Audio Home Recording Act (AHRA), 17 U.S.C. § 1008, and the DMCA, 17 U.S.C. § 512.

The AHRA immunizes certain manufacturers and users of digital audio recording devices from liability for copyright infringement. Again affirming the lower court, the Ninth Circuit found the AHRA to be irrelevant to Napster because it does not cover the downloading of MP3 files to computer hard drives.[35] But it was not willing to goes as far as the district court in rejecting any possible safe harbor from copyright infringement for Internet service providers under the DMCA. While the district court had rejected the notion of a safe harbor under 17 U.S.C. § 512, the appeals court held that the statute was not inapplicable per se. The court recognized that Napster would be permitted to develop its argument that it qualifies for immunity as an Internet service provider more fully at trial. Leaving the question open, however, did not alter the equities supporting the district court's issuance of the preliminary injunction.

Encryption and DVD Motion Pictures

In yet another clash between technology, the Internet, and the Copyright Act, the U.S. District Court for the Southern District of New York considered whether the public dissemination of the computer code called DeCSS to descramble encryption of DVD motion pictures may be prohibited.

Universal Studios, Inc. v. Reimerdes.[36] In this case, brought before the U.S. District Court for the Southern District of New York, eight major motion picture studios brought suit against computer hackers who developed and disseminated a

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[34] *Id.* at *22.

[35] The U.S. Copyright Office filed an *amicus curiae* brief in the case arguing the 17 U.S.C. § 1008 does *not* excuse Napster from infringement liability. It is available online at [http://www.loc.gov/copyright/docs/napsteramicus.pdf].

[36] 2000 WL 1160678 (S.D.N.Y. Aug. 17, 2000).

computer program to override and defeat the plaintiffs' encryption system. The studios distribute motion pictures for home use on digital versatile discs (DVD s) and protect them from being copied using an encryption system called the Content Scramble System (CSS). The encrypted DVDs may only be viewed – not copied – on players and computer drives equipped with the licensed decryption technology.

In September 1999, a fifteen year old Norwegian, Jon Johansen, and two other individuals reverse engineered a licensed DVD player and discovered the CSS encryption algorithm and keys. Based on this information, they created DeCSS, a program capable of decrypting or "ripping" encrypted DVDs. Mr. Johansen posted the DeCSS code on his Internet web site.

Although Mr. Johansen was subject to charges filed in Norway, he is not a defendant in the studios' suit. Defendants include Eric Corley, described as "a leader of the computer hacker community,"[37] and his company, 2600 Enterprises, which publishes a magazine called "2600: The Hacker Quarterly." Defendants posted the DeCSS code on the 2600.com web site. The studios filed suit under the DMCA to enjoin the defendants from posting DeCSS and to prevent them from electronically "linking" their site to others that post it. The defendants responded with self-described "electronic civil disobedience," *i.e.,* they *increased* their efforts to link their web site to others to continue to make DeCSS available.[38]

The defendants argued that their postings do not violate the DMCA, and that its anticircumvention of encryption provisions, as applied to computer programs and their code, violate the First Amendment.

Anticircumvention provisions of the DMCA . The DMCA added a new chapter 12 to the Copyright Act entitled, "Copyright Protection and Management Systems." 17 U.S.C. § 1201 provides, in relevant part:

> (a)(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that–
>
> (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
>
> (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title [17 U.S.C.A. § 1 et seq.]; or
>
> (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

In this case, the plaintiffs alleged, and the court agreed, that the defendants had indeed violated the DMCA by posting DeCSS to the public and making it available for download. The court reviewed the development of CSS – a means to control

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[37] *Id.* at *5.

[38] *Id* at *2.

access to the plaintiff's copyrighted work – and determined that DeCSS is "clearly a means of circumventing" it. Although DeCSS creators explained that the program was *not* developed to pirate copyrighted movies but to further development of a DVD player that would run under a Linux, as opposed to a Windows, operating system.

The court concluded that CSS is a technological means that effectively controls access to the plaintiffs' DVD motion pictures; that the only function of DeCSS is to circumvent CSS; and that defendants did offer and provide DeCSS by posting it on their web site. The defendants subjective intent, *i.e.,* whether they posted the code in order to infringe, or encourage others to infringe copyright does not matter under 17 U.S.C. § 1201.

Nor did the activity come within any of § 1201's statutory exceptions for reverse engineering, [39] good faith encryption research,[40] or, security testing,[41]

Fair use. The court found that the defendants raised a "significant" point in the assertion that access control measures like CSS may prevent lawful as well as unlawful uses of copyrighted material. For example, it could thwart the ability of a film studies professor to prepare a CD-ROM containing two different scenes from movies to illustrate a lecture on cinematography. But the defendants were not being sued for copyright infringement, to which fair use is a defense. They were sued for violating the anticircumvention provision of the DMCA, which, by express congressional intent, precludes the fair use defense:

> The fact that Congress elected to leave technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so is a matter for Congress unless Congress' decision contravenes the Constitution[.][42]

The First Amendment. With that said, the court went on to consider whether the DMCA's anticircumvention provisions, as applied to prevent the public dissemination of DeCSS, violate the First Amendment. The court acknowledged that defendants accurately assert that computer code, to the extent it is used to express ideas, may be "protected speech," but went on to analyze both its function and the level of protection afforded in the case before it.

As its starting point, the court posed the question whether the DMCA, as applied to restrict dissemination of DeCSS and other computer code used to circumvent access control measures, is a "content based" restriction on speech or "content neutral" regulation. The former is subject to a strict judicial scrutiny standard to review the legitimacy of governmental regulation, while the latter is subject to a lesser or "intermediate level." The court concluded that even though the substance of the

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[39] 17 U.S.C. § 1201(f).

[40] 17 U.S.C. § 1201(g).

[41] 17 U.S.C. § 1201(j).

[42] 2000 WL 1160678 at *19.

computer code may be expressive, DeCSS has a functional, non-speech aspect: it enables recipients to circumvent the CSS system.

Society's increasing dependence upon technological means of controlling access to digital files and systems, and its importance in the digital world led the court to elevate the functional aspect of the DeCSS computer program and to hold that the anticircumvention provision of the DMCA is a valid, content neutral regulation in furtherance of important governmental interests:

> Here, dissemination itself carries very substantial risk of imminent harm because the mechanism is so unusual by which dissemination of means of circumventing access controls to copyrighted works threatens to produce virtually unstoppable infringement of copyright.[43]

Injunctive relief. The same urgency which compelled the court to elevate the computer program's functionality over its characterization as expressive speech supported the court's issuance of broad injunctive relief against the posting of DeCSS. It viewed the interest served by prohibiting the enabling of piracy – and thereby protecting the monopoly granted copyright owners – as being of constitutional dimension. Hence, it enjoined others from posting DeCSS by linking web sites. It acknowledged that the extension of the prohibition to Internet hyperlinks could have a possible chilling effect or be viewed as too broad and issued the following caveat:

> Accordingly, there may be no injunction against, nor liability for, linking to a site containing circumvention technology, the offering of which is unlawful under the DMCA, absent clear and convincing evidence that those responsible for the link (a) know at the relevant time that the offending material is on the linked-to site, (b) know that it is circumvention technology that may not lawfully be offered, and (c) create or maintain the link for the purpose of disseminating that technology. [44]

Finding monetary damages to be inadequate, and proof of actual damages to be difficult if not impossible, the court granted a permanent injunction against the posting of DeCSS. It addressed the defendants' argument that an injunction would be futile because DeCSS is already all over the Internet. To deny relief would be to encourage others to replicate unlawful conduct to create a "futility defense." But the court was more troubled by the magnitude of destruction of intellectual property rights posed by the Internet:

> These defendants would harm plaintiffs every day on which they post DeCSS on their heavily trafficked web site and link to other sites that post it because someone who does not have DeCSS thereby might obtain it. ...[T]his decision will serve notice on others that "the strong right arm of equity" may be brought to bear against them absent a change in their conduct and thus contribute to a climate of appropriate respect for intellectual property rights in an age in which the excitement of ready access to untold quantities of information has blurred in some

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[43] *Id.* at *26.

[44] *Id.* at * 32. (Footnotes omitted.)

minds the fact that taking what is not yours and not freely offered to you is stealing.[45]

[45] *Id.* at *35.