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Recent Developments in Copyright Case Law: Napster and MP3 Digital Music

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Summary

Two U.S. district courts recently issued opinions in on-going litigation of interest to those who follow the development of copyright law and digital 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.*, a U.S. district court denied defendant Napster's motion to be held exempt from contributory copyright infringement liability under the Digital Millennium Copyright Act. This report gives a brief summary of copyright law principles governing the digital transmission of sound recordings and examines the legal underpinnings for the courts' decisions. Continuing development of legal issues regarding digital music transmissions is likely to be addressed in future CRS reports.

Background. Historically, federal copyright protection did not extend to sound recordings. They were first granted protection in 1971 by the Sound Recording Act (SRA).[1] 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.[2] 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).[3] 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

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[1] P.L. 92-140, 85 Stat. 391 (1971).

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

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

hampering the arrival of new technologies and without imposing new and unreasonable burdens on radio and television broadcasters' traditional analog transmissions.[4]

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 on-line or otherwise, and regardless of whether there is a charge for the service.[5] 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.[6]

The 105th Congress saw enactment of the Digital Millennium Copyright Act (DMCA)[7] which made extensive amendments to copyright law at Title 17 of the U.S. Code. Title II of the DMCA 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 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]

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

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

[6] 17 U.S.C. § 114(d).

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

[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

(continued...)

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 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 website 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 Gnuttella and Freenet.[12]

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[9] (...continued)
Cir. 1999).

[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
(continued...)

Ultimately, however, 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 does, in some instances, constitute copyright infringement. The combination 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.

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 CD's from any place where they have an Internet connection."[15] The defendant purchased thousands of CD's 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 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,

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[12] (...continued)
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.

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

[15] *Id.* at 350.

[16] 464 U.S. 417 (1984)(Manufacturer of home videotape recorders was not liable to television broadcasters for contributory infringement because broadcasters did not demonstrate that time (continued...)

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 is reported to have entered into a settlement with several plaintiffs in the lawsuit against it.[18]

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 addressed a complicated question arising under the Digital Millennium Copyright Act. In *A & M Records, Inc. v. Napster, Inc.*,[19] plaintiff record companies are suing Napster alleging contributory and vicarious federal copyright infringement. Acknowledging the issue to be one of first impression, the court denied defendant Napster's motion for a summary judgment, finding 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, 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 and participate in a chat room.

Napster moved for summary judgement arguing 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;

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[16] (...continued)
shifting would cause any likelihood of harm to the market for and value of copyrighted works.)

[17] Note 13 *supra* at 352.

[18] Associated Press, *MP3 Settlement May Aid Digital Music Web Site,* ST. LOUIS POST-DISPATCH, June 10, 2000 at 8.

[19] No. C99-05183 MHP , 2000 U.S. Dist. LEXIS 6243 (May 5, 2000).

(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.[20]

In its motion for summary judgment Napster argued that it satisfies the statutory definition of "service provider."[21] 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).

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

The court did not decide other issues, which are likely to be raised as the case continues. One unresolved question is whether Napster might satisfy other safe harbor exemption provisions of § 512, although this is not likely. Napster can be assumed to have raised its strongest legal arguments for a finding of the § 512 exemption in its motion for summary judgment. Another is whether Napster adequately complied with the DMCA requirement that service providers implement a policy to notify and terminate subscribers who are repeat infringers.[22]

Nonetheless, the court's ruling on the motion is important. As in the *UMG Recordings, Inc. v. MP3.Com, Inc.* case, *supra,* the decision of the court denying the existence of grounds for the defendant's *exemption* from copyright infringement liability allows the plaintiffs' case to go forward. On July 26, 2000, the court granted the plaintiff recording companies a preliminary injunction requiring Napster to shut down by July 28, or prevent further copyright infringement. On the same day, however, the Ninth Circuit Court of Appeals issued an order staying the district court's injunction pending appeal. The Court of Appeals wants further consideration of Napster's contention that its users are not infringing copyrights because their use is protected by the immunity provision of the Audio Home Recording Act of 1992.[23] If Napster's users are not engaged in copyright infringement, Napster itself would not be contributorily or vicariously liable for infringement.[24]

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[20] 17 U.S.C. § 512(a)(1)-(5).

[21] *Id.* at § 512(k).

[22] *Id.* at § 512(i).

[23] 17 U.S.C. § 1008.

[24] *Ninth Circuit Stays Injunction in Napster Case Pending Appeal,* 60 BNA Patent, Trademark & Copyright Journal 278, No. 1485 (Aug. 4, 2000).