Communications Lawyer
Publication of the Forum
on Communications Law
American Bar Association
Volume 19, Number 1, Spring 2001
THE JOURNAL OF MEDIA, INFORMATION AND COMMUNICATIONS LAW

"Rock 'n Roll Is Here to Stay": *Napster* and Online Music Distribution

JAMES M. BURGER

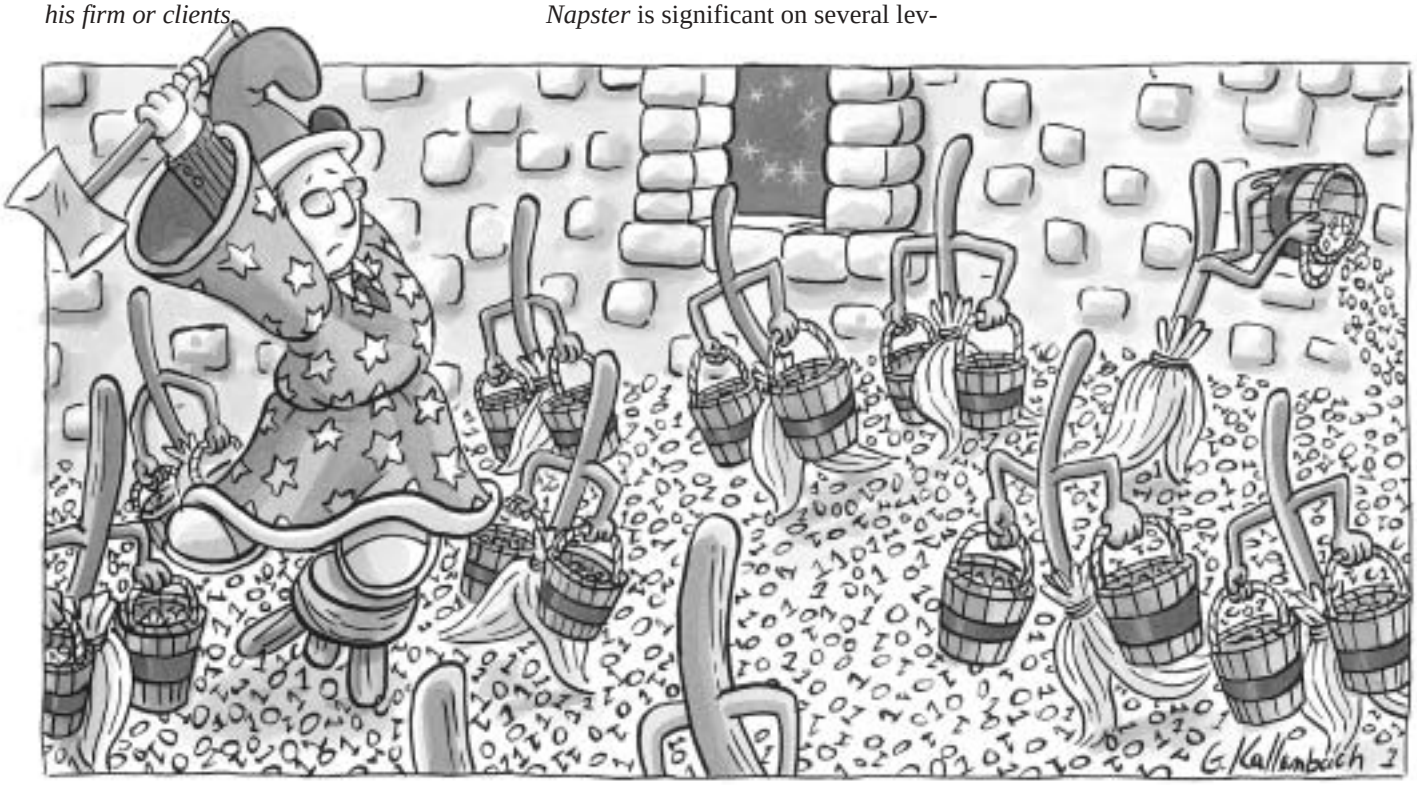
On February 12, 2001, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit issued its long-awaited opinion in the *Napster* case.[1] Three weeks later, Judge Marilyn Hall Patel of the federal district court of Northern California issued a preliminary injunction in accordance with the Ninth Circuit's mandate requiring the record labels to identify their copyrighted music and requiring Napster to block access to it.[2] Absent a last-minute stay from the Ninth Circuit,[3] it appears these decisions spell the end of the Napster service that some sixty-two million subscribers have come to know and love.

Napster is significant on several levels. First, how did technology, the music market, and copyright law develop to set the stage for Napster? Second, why did Napster suffer such a stunning defeat before the Ninth Circuit? Finally, what does this mean for the future of online music distribution?

James M. Burger (jburger@dlalaw.com) is a member in the Washington, D.C. office of Dow, Lohnes & Albertson. The views expressed are those of the author and do not necessarily represent those of his firm or clients.

Background: "I Hear a Symphony"

One of the fundamental rights of copyright owners is the ability to control the



IN THIS ISSUE

right to make copies of their works. History has shown that tension almost always exists between proponents of new technologies and the interests of existing copyright holders. On the one hand, new technologies often open up new markets and applications for existing works. On the other, such technologies, by their very nature, may lead to the use of such works in ways that were not contemplated, let alone legally authorized, by the works' owners. Despite predictions of doom, both the law and the marketplace historically have adapted to new technologies while still allowing content owners to prosper. Napster, at its most basic level, is the most recent in a long series of cases dealing with technological advances, involving in this case the Internet and, more specifically, peer-to-peer file sharing technology.[4]

The Internet was not the first technological advance affecting music sales and distribution to be seen as a threat to copyright owners. Many copyright holders objected to phonographs, compact discs, and other new technologies when they were first introduced to the marketplace.

Phonographs and Audio Cassettes

When the phonograph was initially commercialized, the sheet music industry predicted its own demise on the theory that no one would buy sheet music when records were available to play. But the law and the marketplace provided solutions and to this day publishers are able to profitably sell sheet music.[5] Consumer audio technology remained relatively stable until the early 1960s when the consumer electronics industry packaged audio tape into a cassette and mass-marketed home cassette recorders. The music industry cried the blues again, claiming each tape was a lost record sale.[6] Yet the record labels continued to prosper.

Compact Discs

Introduced in 1982, the next major audio technological advance was seen at first as a boon to the record labels, the consumer electronics industry, and consumers. The ten- to twelve-song vinyl album format conveniently fit on the 600-megabyte compact disc. Because the quality was higher than the old vinyl record, it was believed that consumers would be willing to pay more. What was not understood at the time, however, were the implications of distributing digital music on mass market media without any form of encryption or other copy protection technology. As a result, consumers were acquiring music in a form that would ultimately be easy for them to copy and distribute. This phenomenon has now, of course, led to the controversy in *Napster*.

DAT and the Audio Home Recording Act

It was not until a number of years after CDs were well on their way to replacing analog records that the music industry became concerned about the ease of copying digital music. What initially caused this reaction was the introduction in the late 1980s of the digital audio tape (DAT) recorder. DAT allowed consumers to make serial copies of digital music contained in CDs, i.e., every copy made could itself be copied bit-by-bit resulting in second generation tapes that were perfect copies of the original.[7] The potential for the proliferation of an unlimited number of perfect digital copies represented a nightmare for the recording industry.

Consumer electronics manufacturers and the record industry negotiated a legislative copy protection solution to address the problem of digital copying. The proposal required manufacturers of digital recording devices to recognize and obey certain copy control information (CCI) consisting of two bits located in the lead-in track of a CD.[8] The CCI bits were present to indicate the copy state of the material.[9] Thus, if the CD contained the two bits indicating "copy once," the recorder would be able to make a DAT copy but that copy would be marked "copy no more."[10] The proposed legislation would have required all digital recording devices to observe these copy control information rules.

The computer industry was strongly opposed to the proposed legislation.[11] First, as a matter of principle, the information technology industry was opposed to laws that would dictate how to build machines.[12] Second, IT engineers examined the two-bit system and determined that it would be easy to flip the bits and defeat the system. As a result of these objections, the legislation that resulted from this proposal, the Audio Home Recording Act (AHRA) of 1992, does not apply to computers or computer peripheral devices.[13]

Setting the Stage for Napster

In the 1990s, a number of technological advances and other factors set the stage for *Napster*. First, CDs, consisting of digital music, were replacing records.[14] In addition, the MP3 audio compression standard was adopted, making it possible to shrink the storage space and transmission time needed for digital music.[15] Finally, hard disk storage was becoming less expensive and storage capacity was growing.[16]

With the emergence of the World Wide Web, consumer electronics and software companies capitalized on these factors to provide new means for consumers to access and enjoy their music. Consumer electronics companies introduced rewritable CDs as well as new memory formats and portable audio players. In addition, online service providers developed software and user interfaces that made it possible to easily download or transfer music from CDs to computer hard drives or other portable devices. Online music sites also offered record labels the potential to distribute their content in secure formats. At the same time, the five major record labels, which control the distribution of some 83 percent of recorded music, largely refused to license their catalogs to online music companies or otherwise distribute substantial portions of their catalogs online. As a result, online music sites found it difficult to distribute music that consumers wanted to hear. Shawn Fanning filled this vacuum with the invention of Napster.[17]

Napster

The Napster system had important implications both from a technical standpoint, and from the standpoint of online music distribution. Rather than store music files on its own servers for users to download, which without the permission of the direct copyright holders would constitute a copyright violation, the Napster architecture relies on a database that stores and sorts the titles of music files made available on each connected user's hard drive. When the search engine finds the title, the user merely clicks on it and downloads the song directly from the other user's hard drive.[18] The simple Napster peer-to-peer service relies on users to pay for their own storage and connection costs, an approach that has paved the way for other peer-to-peer file sharing applications.

The Record Labels Respond: "Can't Get No Satisfaction"

During the last several years, the record industry has engaged in a number of efforts to combat unauthorized online music distribution. First, the Recording Industry Association of America (RIAA)[19] sued a portable device manufacturer under the AHRA. The RIAA also established a multi-industry forum to create copy protection standards. Finally, RIAA member companies initiated litigation against Napster and other website operators based on a variety of copyright claims, including contributory and vicarious copyright infringement.

The record labels filed the first lawsuit against Diamond Multimedia. Diamond created an MP3 portable device called the Rio that stored and played MP3 music files downloaded from a personal computer. The record labels contended that Diamond violated the AHRA because the Rio did not respond to the copy control bits mandated by the Act. Despite the declarations of the author (who participated in the legislative negotiations related to the AHRA) that the statutory definitions clearly excluded computers, the district court judge could not believe that Congress intended such a large loophole.[20] The Ninth Circuit, however, noted that when the meaning of a statute is clear, a court need not "resort to legislative history" to divine some other meaning. The court held that the AHRA simply did not apply to computers.[21]

As the *Diamond* case was unfolding, the recording industry convened a meeting of interested parties from many affected industries (including consumer electronics, computer, online music distributors, and wireless device manufacturers) to launch an effort called the Secured Digital Music Initiative. SDMI's stated goal was "to develop open technology specifications that protect the playing, storing, and distributing of digital music . . . ."[22] Despite having held monthly meetings for over two years, SDMI has yet to result in specifications leading to the introduction of a significant number of commercial products.

Finally, last summer the record labels filed suit against Napster alleging, among other things, that the popular file sharing service violated the plaintiffs' copyrights by permitting the wholesale duplication and distribution of copyrighted works via the Internet. The district court granted plaintiffs' motion for a preliminary injunction seeking to enjoin the operation of the service. The injunction entered by the district court would have prohibited Napster "from engaging in, or facilitating others in copying, downloading, uploading, transmitting or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner."[23] The Ninth Circuit temporarily stayed the preliminary injunction, pending resolution of Napster's appeal. After hearing the appeal, the Ninth Circuit held that an injunction was proper in this case, but that the injunction issued by the district court was overbroad.

The simple Napster peer-to-peer service relies on users to pay for their own storage and connection costs, paving the way for other file sharing applications.

A&M Records v. Napster, Inc.

The Ninth Circuit began its analysis by stating that Napster could not be secondarily liable for infringement in the absence of direct infringement by its users. The court went on to agree with the district court's determination that the plaintiffs had presented sufficient evidence of direct infringement by Napster users to support the entry of a preliminary injunction.[24] The court held that use of the Napster service by its users infringed at least two of the copyright holders' exclusive rights: the rights of reproduction and distribution. The court then considered Napster's affirmative defense based on the argument that its users were engaged in "fair use" of the copyrighted works.

Fair Use

Although copyright law generally reserves to the copyright holder the right to make or distribute copies, it provides an exception allowing a "fair use" of the work. Napster claimed that three specific uses by Napster users constituted a fair use: (1) sampling, where users make temporary copies of a musical work before deciding whether to purchase it; (2) space shifting, where users download a sound recording that they own on compact disc to their computer through Napster; and (3) distributing sound recordings by certain artists who have permitted such distribution. In analyzing a fair use claim, courts balance the four factors enumerated in the statute:[25] (1) the purpose and character of the use—a use that adds a different character to the original work is more likely to be considered a fair use than a use that merely replaces the original work, and a noncommercial use is more likely to be considered a fair use than a commercial use; (2) the nature of the copyrighted work—use of a fact-based work is more likely to be considered a fair use than the use of a creative work; (3) the amount and substantiality of the portion of the copyrighted work used in relation to the work as a whole; and (4) the effect of the use on the potential market for the copyrighted work or the value of the work. The district court applied the fair use analysis, concluding that each factor tended to lean against a finding of fair use. The appellate court considered each of the alleged fair uses identified by Napster and affirmed the lower court's ruling.

Sampling

Napster claimed that the district court erred in concluding that the sampling of downloaded music by Napster users was not a fair use. The Ninth Circuit rejected this claim and agreed with the district court. In particular, the court held that sampling is a commercial use even if some users eventually purchase the music. According to the court, the plaintiffs established that they are likely to prove that even authorized temporary downloading of songs for sampling purposes is commercial in nature. The record showed that the plaintiffs collect royalties for song samples available on retail websites. Moreover, free downloads provided by the record companies generally consist of either portions of full songs, or entire songs that exist down-

loaded on a computer only for a short period of time. In contrast, Napster users can download a full, free, and permanent copy of song recordings. According to the court, the record supported the district court's preliminary conclusions that the more users download music, the less likely they are to purchase the recordings on a CD. Moreover, even if sampling does not harm the CD market, the court agreed with the district court that the developing market of online distribution and digital downloading is adversely affected. Thus, even if sales increased in the established CD market, such an increase should not deprive the copyright owner of the right to develop alternate markets, such as the digital download market.

Space Shifting

Napster also asserted that users who download music through the Napster system in order to listen to music they already own on CD are engaging in a fair use under copyright law. Napster relied on the Ninth Circuit's decision involving the Diamond Rio portable MP3 player, as well as the U.S. Supreme Court decision in *Sony*.[26] The appellate court concluded, however, that the district court did not err when it refused to apply the analyses in those cases to the current circumstances. According to the court: "Both *Diamond* and *Sony* are inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space shifting of copyrighted material exposed the material only to the original user."[27]

Permissive Reproduction

Napster's final fair use claim was based on the argument that some artists have granted Napster permission to reproduce their copyrighted works. The Ninth Circuit stated that the plaintiffs did not seek to enjoin this or any other noninfringing use of the Napster system, and such uses were not challenged on appeal.

Napster's Secondary Liability

Having determined that fair use did not preclude the underlying activities of Napster's users from being characterized as copyright infringement, the appellate court went on to consider whether Napster could be found secondarily liable for the direct infringement by its users. In doing so, the Court analyzed Napster's actions under the contributory infringement and vicarious infringement doctrines of copyright law.

Contributory Infringement

According to the Ninth Circuit, if Napster has knowledge of infringing conduct by its users and "induces, causes or materially contributes" to such infringement, Napster could be held liable for contributory infringement. In addition, Napster would be deemed to possess the requisite knowledge if Napster either knew, or had reason to know, of the direct infringement by its users. While Napster argued that it was insulated from contributory liability under the Supreme Court's analysis in *Sony*, the Ninth Circuit disagreed. It concluded that based on the record it was apparent that Napster had both actual and constructive knowledge.

In the *Sony* case, the U.S. Supreme Court declined to impute the requisite level of knowledge of infringement to manufacturers and retailers of VCRs because VCRs are capable of both infringing and "substantial noninfringing uses." The Ninth Circuit, following *Sony*, refused to impute knowledge to Napster based solely on the fact that Napster's peer-to-peer file sharing technology is capable of being used for copyright infringement. The court then departed from the district court's ruling, which refused to recognize that the Napster system has the potential for substantial noninfringing uses. Instead, the court held that, regardless of the number of "infringing versus noninfringing uses, the evidentiary record here supported the district court's finding that plaintiffs would likely prevail in establishing that Napster knew or had reason to know of its users' infringement of plaintiffs' copyrights."[28] The court reasoned that "in an *online context*, evidence of *actual knowledge* of specific acts of infringement is required" to hold a computer system operator liable for contributory copyright infringement.[29] According to the court, if a computer system operator learns of specific infringing material available on its system, and fails to purge such materials, it contributes to the infringement. Absent specific information regarding infringing materials, however, it would be inappropriate to enjoin a computer system operator "merely because the structure of the system allows for the exchange of copyrighted material."[30]

Leaving the *Sony* analysis aside, the appellate court then found there was sufficient evidence for the district court to conclude that Napster had the requisite knowledge of its users' infringing activities. The court based this finding on Napster's *actual* knowledge of the specific infringing materials available on its system and evidence that, although Napster could have blocked access to the infringing material, it failed to do so. The Ninth Circuit also agreed with the district court's finding that Napster materially contributed to its users' direct infringement by providing "the site and facilities" for such infringement. As a result, the court determined that the plaintiffs had demonstrated a likelihood of success on the merits of the contributory copyright infringement claim.[31]

Vicarious Infringement

According to the Ninth Circuit, Napster could be held liable for vicarious infringement if Napster has the "right and ability to supervise" infringing conduct by its users and has a "direct financial interest" in such infringing activities. With respect to Napster's financial interest in the activities of its users, the appellate court found the record supported the district court's finding that Napster's future revenue is directly dependent on an increase in its user base, and that more users will use the Napster system as the quality and quantity of the available music increases. The court then considered the district court's finding that Napster had both the right and ability to supervise the conduct of its users. The court noted that Napster reserves the right to refuse service and to terminate accounts in its discretion, including if Napster believes that a user is violating applicable law. According to the court, to avoid a finding of vicarious liability, Napster must exercise this right to police its system to the fullest extent possible and cannot "turn a blind eye" to detectable acts of copyright infringement.

The Ninth Circuit concluded that the district court correctly determined that Napster has the right and ability to police its system and that it failed to exercise that right to prevent copyright infringement. The court stated, however, that the district court failed to recognize that Napster's policing rights are limited

by the system's current architecture. Specifically, Napster does not have the ability to "read" the content of users' files, other than to confirm that they are in the correct MP3 format. The court continued by stating that Napster has the ability to police the file name indices, even though the file names are created by users and not by Napster. Nevertheless, the Ninth Circuit found that the district court did not err in concluding that the plaintiffs established a likelihood of succeeding on the vicarious infringement claim.

Napster's Defenses

The Ninth Circuit next analyzed and rejected each of Napster's defenses. First, the court considered Napster's defense under the Audio Home Recording Act of 1992, which provides, in pertinent part:

> No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, . . . or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings . . . .[32]

The court dismissed Napster's argument that its users are engaging in a type of "noncommercial use" protected by the statute and that Napster cannot be secondarily liable for the nonactionable conduct of its users. Relying on its holding in the *Diamond* case, the Ninth Circuit reasoned that the statute does not apply to the downloading of MP3 files to computer hard drives.[33] Specifically, the court held that (1) computers are not "digital audio recording devices" within the meaning of the statute because their "primary purpose" is not to make digital audio copied recordings, and (2) computers do not make "digital music recordings" as that term is defined in the Act.[34]

The appellate court also rejected Napster's argument that it was shielded from liability under the safe harbor provisions of the Digital Millennium Copyright Act (DMCA) available to Internet service providers. While the district court had rejected this argument outright, the Ninth Circuit disagreed with the district court's ruling that the DMCA was inapplicable per se. Rather, the court recognized that this issue would be more fully developed at trial. Nonetheless, it ruled that the plaintiffs had raised sufficiently serious questions about the statute's applicability and that the plaintiffs had demonstrated that the balance of hardships tips in their favor.

Finally, the appellate court also upheld the district court's rulings rejecting Napster's arguments based on waiver, implied license, and copyright misuse.

Scope of Injunction

Having determined that the plaintiffs were likely to prevail on their claims of secondary liability, the Ninth Circuit agreed with the district court that a preliminary injunction was not only warranted but was required. The court, however, found the scope of the injunction issued by the district court overbroad. According to the court, the injunction originally entered by the district court placed on Napster the entire burden of ensuring that no "copying, downloading, uploading, transmitting, or distributing" of plaintiffs' works occur on the Napster system. The court ruled that the plaintiffs must bear the burden of notifying Napster of copyrighted works and files containing such works that are available on Napster's system before Napster has the obligation to disable access to the offending content.[35] The court further ruled that Napster should bear the burden of policing its service within the limits of its system. Accordingly, the Ninth Circuit remanded the matter to the district court to issue a modified injunction in accordance with its decision.

The appellate court also rejected Napster's contention that the district court should not have issued an injunction because it would cause "great public injury," but instead should have ordered Napster to pay plaintiffs a compulsory royalty for use of their copyrighted works. The court found no special circumstances in this case to warrant such a remedy and disagreed with Napster's assertion that an injunction would cause "great public injury." Congress limited the application of a compulsory copyright license to certain circumstances, none of which the court found to apply in this case. Moreover, the court observed that a compulsory royalty scheme would strip the plaintiffs of their power to control their intellectual property and their ability to negotiate the terms of a license agreement. Accordingly, the Ninth Circuit refused to impose a compulsory license scheme.

Analysis: "Roll Over Beethoven"

Although the Ninth Circuit's opinion in *Napster* resulted in a decision that is not particularly surprising in light of earlier interpretations of the fair use doctrine, it is noteworthy in several respects.

The court was unwilling to impute the requisite level of knowledge necessary for a finding of contributory infringement simply because of the potential uses of the peer-to-peer technology at issue in the case. But the court also was unwilling to permit Napster to commercially benefit from providing services using that technology when there was actual knowledge of infringement of the plaintiffs' copyrights. According to the court, it is important to distinguish between the "architecture of the Napster system and Napster's conduct in relation to the operational capacity of the system."[36] Thus, the decision appears to focus on the legality of the services provided by Napster rather than the underlying technology itself. This may provide comfort for companies engaged in developing technologies that may be used for any number of purposes.

The court's opinion, however, fails to clearly articulate the distinction between the services at issue and the underlying technology. As a result, it is uncertain how this standard relates to the *Sony* test of whether a product is capable of substantial noninfringing uses. The Ninth Circuit's reasoning appears to suggest that, "in an online context," the *Sony* test has less relevance, and courts should instead focus on evidence of actual knowledge by computer system operators of the infringing activities of their users. While this distinction may be sufficient in the immediate case, it seems likely that in future cases it may be more difficult to distinguish between the use of the service and the use of the technology.

In addition, the court failed to clearly articulate the distinction between vicarious and contributory liability for copyright infringement. Its decision imposes on Napster a duty to police its system to the "fullest extent" possible in order to escape liability for vicarious copyright infringement. At the same time, the court refused to decide whether the DMCA's safe harbor protections for online service providers would apply, instead noting that those issues would be more fully developed at trial. As a result, the decision creates uncertainty regard-

ing the duties of computer service providers to police their networks when they have actual or constructive knowledge of potentially infringing activities.[37]

As noted above, Napster intends to seek review of the panel's decision by the entire Ninth Circuit Court of Appeals. A rehearing by the full court is not ordinarily ordered, but may be appropriate if the case involves a question of exceptional importance. Napster timely filed a request for such a rehearing within fourteen days of the panel's decision.

Judge Patel's Second Injunction

On March 6, 2001, Judge Patel issued an injunction attempting to implement the Ninth Circuit's February 12 decision. The injunction appears somewhat broader, however, than the Ninth Circuit's mandate. In addition to requiring the labels to provide Napster with "reasonable notice of specific infringing files," the order contemplates that the record labels may simply supply lists "of their copyrighted sound recordings."[38] It requires both parties to use "reasonable measures" to identify variations of the filenames or of the spelling of titles or artists' names of identified works. In addition, record labels may identify copyrighted sound recordings before they are released, and Napster has the obligation to block those songs.

In providing notice of infringing files, the labels must supply the following information:

- The title of the work;
- The name of the featured recording artist performing the work;
- The name(s) of one or more files available on the Napster system containing such work; and
- A certification that the plaintiff owns or controls the rights allegedly infringed.

The labels are required to make "a substantial effort to identify the infringing files as well as the names of the artist and title of the copyrighted recording."[39]

The order goes on to say that "it would be difficult for plaintiffs to identify all infringing files on the Napster system given the transitory nature of its operations,"[40] and that "it may be easier for Napster to search the files available on its system at any particular time against lists of copyrighted recordings provided by plaintiffs."[41] Judge Patel claims that such a search would give Napster, as the Ninth Circuit required, "reasonable knowledge of specific infringing files."[42] The judge seems to be saying that record labels may simply give Napster all of their record titles and artists names. Thereafter, any time Napster sees such a file on its system, it has reasonable knowledge and must block it. Although the argument can be made that this is not quite what the Ninth Circuit ruled, it is most likely a distinction that will not make a difference.

Under the injunction, Napster has three days to block infringing files from its index once it "receives reasonable knowledge" of such files (either by the certified notice provided by the labels, the notice obtained from the list of copyrighted recordings supplied by the labels, or by reasonable efforts to identify variations in names). Following her recent injunction, Judge Patel held several hearings to determine whether Napster has complied with her order. She concluded that Napster's compliance was "disgraceful." She said that the service might need to be shut down. She then appointed a technical consultant to oversee Napster's compliance.[43]Absent a settlement or additional intervention by the Ninth Circuit, it would appear that Napster's days are numbered.

Conclusion: "The Day the Music Died"

In Disney's classic movie Fantasia, Mickey Mouse, as the Sorcerer's Apprentice, was faced with an out-of-control enchanted broom flooding his room with buckets of unwanted water. His solution was to take an axe to the broom. As a result, he was faced with thousands of uncontrollable little brooms deluging the room with thousands of buckets of water. To a certain degree the recording industry is in an analogous situation. The Ninth Circuit has handed the enchanted broom to the recording industry. Will it take the axe to Napster, scattering the sixty-two million users to perhaps unstoppable alternatives? Or will the music industry figure out how to lure those users to authorized alternatives?

The uncontrollable little brooms are the peer-to-peer file sharing software programs such as Gnutella[44] or OpenNap Network servers compatible with Napster client software operated by companies that are hard to reach through judicial process.[45] Such software does not rely on a central server that a traditional online service provider or Napster must have to provide its services. The Gnutella protocol connects users in an ad hoc fashion as if in a dynamic, loosely organized web of individual connections across the Internet. Those users make files available on their hard drive to anyone else in the web and use the standard hypertext transfer protocol to exchange files.[46] The drawback is that these systems slow down considerably when more users join the web, particularly users with dial-up modems, and such systems can ultimately slow to a halt. If a large portion of the existing Napster users were to migrate to Gnutella, the system would likely collapse. Given the publicity surrounding *Napster* and hacker motivations, it would not be surprising to see either Gnutella or similar programs improved, or alternative file sharing services offered.[47]

These peer-to-peer models make enforcement of music copyrights far more difficult than in the case of Napster. Because no one operates a central server, a single target cannot be identified and shut down.[48] Instead, the recording industry would be faced with a distasteful task—suing its customers.[49]

There is no legitimate service that offers the breadth of music Napster offered. There are many online music services that have compelling interfaces with easy to use and feature-rich software superior to Napster's service, e.g., RealNetworks[50] and Liquid Audio.[51] But neither site, nor any other authorized online service, offers access to all the music that users want. Bertelsmann AG, parent of BMG music, inked a deal with Napster in an effort to convert it to a legitimate service.[52] Bertelsmann, however, was unable to convince the other major record labels to join in that effort.

The record labels argued, and both the district court and the Ninth Circuit agreed, that Napster caused them irreparable harm because it "raises barriers to plaintiffs' entry into the market for the digital downloading of music."[53] The Ninth Circuit and Judge Patel have removed those barriers. Will the labels provide an alternative that will attract the bulk of those Napster users or will thousands of smaller "brooms" scatter one of the largest aggregations of music

customers ever seen? On April 3, 2001, the Senate Judiciary Committee held a hearing with the catchy title "Online Entertainment and Copyright Law: Coming Soon to a Digital Device near You." The day before the hearing, three labels—EMI, Warner Music and BMG—joined forces with RealNetworks to announce an online distribution arrangement called MusicNet. Committee Chairman Orrin Hatch asked the witnesses if he needed to hold weekly hearings. However, MusicNet's details were not disclosed at the hearing. Moreover, unless Universal Music and Sony Music join MusicNet, online music lovers will not be able to go to a single website to find their music. Stay tuned.

Endnotes

1. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

2. A&M Records, Inc. v. Napster, Inc., No. C 99–05183, 2001 U.S. Dist. LEXIS 2186 (N.D. Cal. Mar. 6, 2001).

3. Napster has requested a hearing en banc by the Ninth Circuit.

4. *See e.g.*, UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000); RealNetworks, Inc. v. Streambox, Inc., No. C99–2070P, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. Jan. 18, 2000); Universal City Studios, Inc. v. Riemerdes, 111 F. Supp. 2d 346 (S.D.N.Y. 2000).

5. In addition, authors receive a royalty from each record reproduced. 17 U.S.C. §115.

6. This claim was made despite the fact that many tapes were compilations of songs recorded from different albums and artists. This is the "playlist" phenomenon. *See* http://www.uplister.com. It seems people frequently prefer their own arrangement to that of the record label. *See* Apple's recent ad: Rip. Mix. Burn, *available at* http://www.apple.com/hardware/ads/ripmixburn.html. Cassettes were the first popular medium to permit consumers to create their own compilation of songs from records they owned.

7. Unlike digital recordings, the quality of each succeeding analog recording progressively deteriorates.

8 This is the permanently embossed part of the disk. The bits were not contained in the actual music file on the disc, making the copy control information more vulnerable to stripping. Indeed, a personal computer would never read or copy such bits unless the PC's CD player program contained special instructions that told the PC to look for the two bits.

9. The four copy states are: copy freely, copy once, copy no more, and copy never.

10. The compromise between the consumer electronics and the recording industries was "encoding rules." In this case the original CD could be copied as often as the consumer wished. But the system prevented, in theory, a copy of a copy, called a "serial copy."

11. At the time the author was chair of the Intellectual Property Committee of the Information Technology Industry Council.

12. The personal computer's power is its capability as a freely programmable device without artificial limits. The benefits of the PC's programmability have been, among others things, the thousands of application programs that improve productivity, save lives, and entertain users. The trade-off is the vulnerability of data (including music files) and of copy protection systems.

13. After negotiations over the law, the IT industry agreed not to oppose the legislation after the definition of the subject of the legislation, a "digital musical recording," was changed to exclude any files on a computer hard drive. §2002(5)(A) of the AHRA. *See* note 20 below.

14. Music on a CD consists of a sixteen-bit number representing a point in time on the analog musical waveform, which is sampled 44,100 times a second. These uncompressed files are called .wav files. Compression software (called a codec for compression/decompression software), such as MP3, is able to reduce the file size to as little as 10 percent of the original uncompressed file.

15. The Motion Picture Experts Group (MPEG) adopted the MP3 standard in 1992. The MPEG-2 digital video compression standard was adopted in 1994.

16. In 1985 a twenty-megabyte hard disk cost $1,995. Today a forty-five-gigabyte hard drive, 2,250 times larger, costs $160.

17. *See Napster's Shawn Fanning: The Teen Who Woke Up Web Music*, BUS. WK. ONLINE (Apr. 12, 2000), *at* http://www.businessweek.com/ebiz/0004/em0412.htm.

18. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011–13 (9th Cir. 2001).

19. The Recording Industry Association of America is the trade group that represents the U.S. recording industry. *See* www.riaa.com.

20. "Under that subsection [17 U.S.C. §1001(5)(B)(ii)] once a music file was fixed on a computer's hard drive as semi-permanent memory of any kind, it was no longer a digital musical recording covered by the Act. Accordingly, we advised CEMA members and the RIAA that we would not oppose the AHRA." Burger Decl. PP 10–11, Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624, 629 (C.D. Cal. 1998). The district court judge said that "[d]efendant's construction of Section (5)(B)(ii) would effectively eviscerate the AHRA. Any recording device could evade AHRA regulation simply by passing the music through a computer and ensuring that the MP3 file resided momentarily on the hard drive." *Id. at* 630. The judge cited legislative history she found would support interpretation of the statute to include music residing on the hard drive of a computer as covered by the AHRA's requirements.

21. Recording Indus. Ass'n of America v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1076 (9th Cir. 1999). The Ninth Circuit went on to say that the AHRA actually meant what it said—computers were excluded from the Act's coverage. Ironically, one of Napster's defenses was based on AHRA § 1008(17 U.S.C. §1008). *See* text at note 31.

22. *See* www.sdmi.org.

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

24. Judge Patel's initial decision is reported at 114 F. Supp. 2d 896 (N.D. Cal. 2000).

25. 17 U.S.C. § 107.

26. *Diamond Multimedia Sys.*, 180 F.3d at 1076; Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

27. A&M Records v. Napster, Inc., 239 F.3d 1004, 1119 (2001). The Ninth Circuit also cited the decision in *Mp3.com* for the proposition that space-shifting of MP3 files is not a fair use. However, that case only considered whether the space shifting made possible through the use of the My.mp3.com service constituted a "transformative" use, and not whether the space shifting in and of itself was a permissible fair use. *See* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000).

28. *Napster*, 239 F.3d at 1021.

29. *Id.*

30. *Id.*

31. *Id.* at 1022.

32. 17 U.S.C. §1008.

33. A&M Records v. Napster, Inc., 239 F.3d 1004, 1024 (2001); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078 (9th Cir. 1999).

34. *Napster*, 239 F.3d at 1024. The court said:

> the Audio Home Recording Act does not cover the downloading of MP3 files to computer hard drives. First, "[u]nder the plain meaning of the Act's definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their 'primary purpose' is not to make digital audio copied recordings." Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078 (9th Cir. 1999). Second, notwithstanding Napster's claim that computers are "digital audio recording devices," computers do not make "digital music recordings" as defined by the Audio Home Recording Act. Id. at 1077 (citing S. Rep. 102–294) ("There are simply no grounds in either the plain language of the definition or in the legislative history for interpreting the term 'digital musical recording' to include songs fixed on computer hard drives.").

35. In light of the fact that the plaintiffs have already provided Napster with a list of

thousands of infringing works, it is difficult to understand what additional notice the plaintiffs must now provide to Napster.

36. *Napster*, 239 F.3d at 1021.

37. This is not an academic question. The Motion Picture Association of America (MPAA) has been tracking Gnutella users (see text at note 46) who download digital movies without authorization. After determining the user's Internet service provider (ISP), the MPAA sends warning letters to those network service providers warning them of their users violation of the law. *See Broadband Fans Busted Over Gnutella*, CNET NEWS.COM, Apr. 17, 2001, *at* <http://news.cnet.com/news/0–1005–200–5641576.html?tag = prntfr>. The question of course, is whether the MPAA will file suit against an ISP that fails to take action against the allegedly offending user.

38. A&M Records, Inc. v. Napster, Inc., No. C 99–05183, 2001 U.S. Dist. LEXIS 2186, **6–7 (N.D. Cal. Mar. 6, 2001).

39. *Id.*

40. *Id.* at *6 n.2.

41. *Id.* at *6.

42. *Id.*

43. Ronna Abramson, *Napster's Sad Song Falls on Deaf Ears*, Apr. 10, 2001, STANDARD, *available at http://www.thestandard.com/article/0,1902,23606,00.html?nl = mg*.

44. *See, e.g.*, Gnutella, *available at* http://gnutella.wego.com/.

45. A utility called Napigator (http://www.napigator.com/) displays each Napster server and all available third party OpenNap servers. Clicking on the server name opens the Napster client software and allows file sharing just as if the user were on a Napster server. So far none of those third party servers is subject to a filtering requirement and it appears that all top 100 songs are available for download. *See* Brian McWilliams, *MusicCity Emerges as Top Napster Alternative*, Internetnews.com, Mar. 21, 2001, *at* http://www.internetnews.com/streaming-news/article/0,,8161_720231,00.html.

46. *See* http://www.cmptr.om/view.php?id = 536 for a more detailed explanation.

47. *See* Steven Chase, *Napster Clone May Set Up Off Shore*, TORONTO GLOBE & MAIL, Mar. 5, 2001, *available at* www.globeandmail.com and www.musiccity.com.

48. There may be other alternatives. It may be possible to encode CDs so that sounds may not be ripped. So far that has proved difficult to accomplish without interfering with the ability to play the CDs normally, although Macrovision has announced that it has such a system. *See* http://www.macrovision.com/press_rel_2_27_01.html.

49. The RIAA, though initially hesitant to sue individual users, has recently indicated that it may take enforcement action against "large scale uploaders, especially in university or corporate environments." Cary Sherman, Remarks at the Advanced Computer and Internet Law Institute (Mar. 8, 2001).

50. *See* www.realnetworks.com.

51. *See* www.liquidaudio.com.

52. *See Here It Comes to Save Napster*, www. cbsnews.com (Oct. 31, 2000) *at* http://www.cbsnews.com/now/story.

53. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1017 (9th Cir. 2001) (citing Judge Patel's decision at 114 F. Supp. 2d 896, 913 (N.D. Cal. 2000).