

2000

UPDATE: RIAA v. Diamond Multimedia Systems - Napster and MP3.com

Jayne A. Pemberton A. Pemberton
University of Richmond

Follow this and additional works at: <http://scholarship.richmond.edu/jolt>

 Part of the [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Jayne A. Pemberton A. Pemberton, *UPDATE: RIAA v. Diamond Multimedia Systems - Napster and MP3.com*, 7 Rich. J.L. & Tech 6 (2000).

Available at: <http://scholarship.richmond.edu/jolt/vol7/iss1/8>

This Notes & Comments is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in Richmond Journal of Law and Technology by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.



Volume VII, Issue 1,

Fall 2000

UPDATE:

RIAA v. Diamond Multimedia Systems

Napster and MP3.com

by Jayne A. Pemberton[*]

Cite As: Jayne A. Pemberton, note, *UPDATE: RIAA v. Diamond Multimedia Systems - Napster and MP3.com*, 7 RICH. J.L. & TECH. 6 (Fall 2000) at <http://www.richmond.edu/jolt/v7i1/note3.html>.

TABLE OF CONTENTS

I. INTRODUCTION

II. NAPSTER

A. Napster's Motion for Summary Adjudication

B. The Music Industry's Prayer for Preliminary Injunctive Relief

III. MP3.COM

A. The Recording Industry's Motion for Partial Summary Judgement

B. The District Court Calculates Damages

IV. IMPACT ON RIAA V. DIAMOND MULTIMEDIA

V. IS THERE A VIABLE SOLUTION?

I. INTRODUCTION

{1}After the Recording Industry Association of America's ("RIAA") attack on the Diamond Rio proved unsuccessful, the music industry turned its attention to the companies enabling reproduction of copyrighted music. (1) Two important cases appeared after the United States Court of Appeals for the Ninth Circuit held that Diamond Rio was not infringing on copyrights. These cases, *A&M Records, Inc. et al. v. Napster, Inc.* (2) and *UMG, Inc., et. al. v. MP3.com, Inc.*, will shape computer technology's effect on American copyright law. (3)

{2}This update will discuss these two cases and give brief overviews of the courts' findings and conclusions. These findings will be compared to the ruling in *Diamond*, and any possible impacts on that decision will be highlighted. In closing, this update will explore some possible theories of resolving this very real conflict between the music industry and the free dissemination of copyrighted materials over the Internet.

II. NAPSTER

{3}On December 6, 1999, A&M Records, Inc., joined by several other recording companies brought suit against Napster, Inc. for contributory and vicarious federal copyright infringement under the Digital Millennium Copyright Act ("DMCA"). (4) Napster provides software that allows its members to trade and share music files on the Internet. (5) Although Napster started as a program to facilitate the exchange of music between its designer and his college roommate, it has grown into a company used by millions. (6) Although Napster currently does not receive funds for its services, company projections indicate they have plans for expanding the amount of music available and profiting from targeted e-mail, advertising, and marketing of CDs and Napster products. (7)

A. Napster's Motion for Summary Adjudication

{4}Napster quickly took the offensive and moved for summary adjudication in their dispute with the music industry. (8) The court explored the process followed by Napster users. The process begins by downloading Napster's MusicShare software. This software allows a user to automatically connect to one of Napster's numerous servers every time he logs on. Next, the software reads the names of MP3 files on the user's hard drive that the user chooses to make available and adds them to its directory of files available to Napster consumers. The user can also receive files from this directory by performing a search, locating a file of interest and downloading the file. (9) In addition, Napster allows users to play the downloaded music and provides a chatroom in which users can interact.

{5}The court looked to Section 512 of the DMCA, which governs the liability of Internet access providers and online services for copyright infringement. (10) Napster argued that their activities did not constitute copyright infringement under the DMCA. (11) They claimed safe harbor as a "service provider" under Section 512(a), which limits liability of Internet services that transmit, route, or provide connections for material that travels or is temporarily stored in the service when the following five conditions are met: (12)

- (1) An individual, other than the service provider, initiated or directed the transmission of the material at issue;
- (2) The Internet service provider did not select the material being transferred, routed, or stored, but instead the process is completed automatically;
- (3) Another person, not the service provider, selects the recipient of the material;
- (4) The material housed on the server is not available to individuals other than the named recipient, nor is it available to the intended recipient for an unreasonably long period of time; and
- (5) The Internet service provider does not alter or modify the material's content. [\(13\)](#)

{6} Napster argued they were not infringing copyrighted music, but were simply providing a forum in which users could share music. Napster supported their argument for safe harbor by emphasizing that it never initiates the transfer of music over the Internet; transfers are always initiated by its users. [\(14\)](#) Next, Napster noted that the transmission of music files through their service occurs automatically and that they do not alter, or modify files. Napster also argued that they do not choose the recipients of the transferred files. Finally, the Internet company stressed that at no time during the transfer process are files copied. For these reasons, Napster contended they were protected from copyright infringement liability under section 512(a). [\(15\)](#)

{7} The plaintiffs disagreed with Napster's depiction of their Internet service, and believed that Napster was not protected by the DMCA's safe harbor provision. The plaintiffs instead viewed Napster as a facilitator of Internet copyright infringement. The plaintiffs supported their argument by claiming each of Napster's functions must be assessed independently under section 512(n) before safe harbor can be properly determined. [\(16\)](#) The music industry believed that certain aspects of Napster's service functioned as locator tools, and thus outside the scope of section 512(a) safe harbor, a provision intended to only protect service providers. [\(17\)](#) These locator tools, such as a search engine, index, directory, and links, had to meet the more stringent safe harbor requirements of section 512(d). [\(18\)](#)

{8} The music industry offered an alternative argument against the application of the section 512(a) safe harbor provision to Napster's services. The plaintiffs stressed that section 512(a) was inapplicable because the infringing material at issue was transmitted directly between users and never through Napster, thus concluding that the defendant played an indirect role. [\(19\)](#)

{9} Finally, the music industry argued that Napster failed to comply with section 512(i) of the DMCA which requires that a service provider adopt, implement, and inform users of its policy to terminate services for all repeat copyright infringers. [\(20\)](#) The plaintiffs noted that although Napster's plan was in effect as early as October 1999, it was not made known to users until February 7, 2000, after the onset of litigation. [\(21\)](#) Additionally, the plaintiffs argued that although Napster may have provided an infringement policy, there was not an adequate plan of enforcement to ensure compliance. For these reasons, the music industry concluded that Napster was not provided safe harbor under section 512(a). [\(22\)](#)

{10} In its analysis, the court looked first to the plaintiffs' claim that the section 512(a) safe harbor did not apply to all of Napster's functions, but instead that section 512(n) was applicable. [\(23\)](#) Napster argued that even if some aspects of its service could be classified as locator tools under section 512(n), these aspects were not fundamental to its main function as a service provider. The court agreed with the plaintiffs' contention that some aspects of Napster's service were locator functions. [\(24\)](#) They found evidence for this contention in Napster's own advertisements centering on Napster's ability to find and locate millions of songs. [\(25\)](#) Therefore, the court held that section 512(a) did not provide safe harbor for all of Napster's functions. [\(26\)](#)

{11} Next the court turned its attention to the question of whether some of Napster's functions were in fact protected under section 512(a). The plaintiffs argued that the copyrighted information did not pass directly through Napster, therefore Napster should not receive protection. Napster argued that providing the connections for its customers entitles it to safe harbor. The court reasoned that although Napster provided the

connections, these connections passed through the Internet and not through its own system as required under section 512(a). The court concluded: "Because Napster does not transmit, route, or provide connections through its system, it has failed to demonstrate that it qualifies for 512(a) safe harbor. The court thus declined to grant summary adjudication in its favor. (27).

{12}On the final point addressed, Napster's copyright compliance policy, the court also ruled summary adjudication inappropriate. The court indicated that Napster failed to demonstrate an adequate policy for terminating repeat copyright infringers. (28). The court concluded that the plaintiff successfully presented material issues of fact regarding Napster's operations and refused to grant summary adjudication.

B. The Music Industry's Prayer for Preliminary Injunctive Relief

{13}In August of this year, the music industry moved for a preliminary injunction in order to prevent Napster from transmitting copyrighted music without express permission of the owner of the copyright. (29). Napster argued that it was protected under an expanded version of the fair use doctrine established in *Sony Corp. of America v. Universal City Studios, Inc.* (30). Alternatively, Napster claimed that the plaintiffs failed to provide evidence of probable success on their contributory and vicarious infringement claims. Finally, the defendant argued that the services it provided did not injure copyright holders, but instead promoted the music industry through increased exposure. (31).

{14}The court first explored the fair use doctrine, as set out in section 107 of the Copyright Act and explored by the United States Supreme Court in *Sony*. (32). In *Sony*, the Supreme Court stated, "[a]ny individual may reproduce a copyrighted work for a 'fair use;' the copyright holder does not possess the exclusive right to such a case." (33). The *Napster* court looked to the four factors outlined in *Sony* to determine whether the fair use doctrine exonerated Napster from liability for copyright infringement.

{15}First, the court asked whether Napster's use of copyrighted materials was commercial in nature. (34). Although the downloading of music files on the Internet was not a truly commercial use, it could not be classified as personal either. The court held that due to the magnitude and anonymous nature of Napster's clientele, the service could not be classified as personal. (35). Next, the court turned its attention to the nature of the copyrighted work. They concluded that the material being traded was for entertainment purposes and was creative in nature, thus reducing Napster's chances for protection under the fair use doctrine. The court then looked to the amount of copyrighted material used, which was undisputed because the downloading of MP3 files entails copying music in its entirety. Finally, the court explored Napster's impact on the potential market value of the copyrighted music and found it diminished the music industry's sales. (36).

{16}The district court concluded that it was inappropriate to afford protection to Napster under the fair use doctrine. (37). Napster then argued that it had several other uses, such as space-shifting, sampling, and authorized distribution of new artists' work, that should be afforded protection. The court again declined protection and noted that these additional uses were not fundamental to Napster's operations. (38).

{17}The court then proceeded to the issue of contributory copyright infringement. As a threshold matter, the court noted that Napster's users were directly infringing on copyrighted materials. (39). In order for Napster to be found contributorily liable, the plaintiff had to demonstrate that Napster had either actual or constructive knowledge of the third party's direct infringement. The court concluded that the plaintiffs supported their contention with enough evidence to allow for a finding of contributory copyright infringement. (40).

{18}Finally, the district court explored the issue of vicarious copyright infringement. In order to be found vicariously liable, a defendant must supervise and have a direct financial interest in the infringing activity. (41). The court stated that Napster did play a supervisory role because of its ability to police its users, if it chose to do so. The court then looked to Napster's financial interest in the trading and transferring of the

copyrighted music and found that although the company currently generated no revenue, there was evidence of plans to increase revenues by building the user base. (42) The defendant offered several defenses, all of which the court found to be inadequate. These defenses included claims that the music industry was violating Napster's First Amendment right to free speech, that the industry was restricting the distribution of new artists' music, and that the plaintiffs waived their copyrights when they made music available in MP3 form over the Internet. In a final attempt to persuade the court not to grant the plaintiff's preliminary injunction, the defendant claimed that the hardship on their company would be unbearable. (43) In response to this contention, the court stated: "Although even a narrow injunction may so fully eviscerate Napster, Inc. as to destroy its user base or make its service technologically infeasible, the business interests of an infringer do not trump a rights holder's entitlement to copyright protection." (44)

{19}The music industry was granted their injunction and it appeared that if Napster was going to be temporarily out of business. As Napster users across the country frantically tried to download their favorite music in the days proceeding the start of the scheduled shutdown, the United States Court of Appeals for the Ninth Circuit stepped in and granted a stay. On October 2, 2000, this case went before a three-judge panel of the circuit court for a hearing upon which the nation is still awaiting a decision. (45)

III. MP3.COM

{20}MP3.com was launched in January 2000, to provide users with a variety of CDs to download at their convenience. (46) In order to make this service possible, MP3.com bought thousands of copyrighted CDs to provide to their users free of charge. The users could then download the available music by either providing proof of existing ownership, a process known as "Beam-It", or by agreeing to purchase the CD at issue, a process known as "Instant Listening." (47) Proof of ownership was demonstrated by an individual placing his copy of the CD in his computer's CD-Rom where it could then be verified by the server. (48)

A. The Recording Industry's Motion for Partial Summary Judgement

{21}In defense of the plaintiffs' motion, MP3.com claimed protection under the fair use doctrine of the Copyright Act. (49) Similar to the exploration in *Napster*, the court looked to the four elements of the act. First, the court concluded that the services provided by MP3.com were commercial because the defendant could make a profit through an expanding client base. (50) Next, the court found the copyrighted material at issue was clearly creative in nature, thus further decreasing the defendant's hopes of protection under the fair use doctrine. The court then explored whether a substantial portion of the copyrighted material at issue was provided to users and concluded that it was. The CDs in their entirety were being copied, therefore the defendant could not receive fair use protection in regard to them. Finally, the court found that the defendant failed to present an influential argument concerning any potential positive effect its products made on the music market, and the court concluded that the fair use doctrine did not grant protection. (51)

{22}The defendant attempted to argue that it provided a service to the music industry by providing consumers with CDs that would otherwise be pirated. In response to this claim, the court stated: "Stripped of its essence, defendant's 'consumer protection' argument amounts to nothing more than a bald claim that defendant should be able to misappropriate plaintiff's property simply because there is a consumer demand for it. This hardly appeals to the conscience of equity." (52) Additionally, MP3.com brought various other defenses before the court, including copyright abuse, estoppel, unclean hands, and abandonment, all of which were quickly dismissed. (53) In conclusion, the court granted the plaintiff's motion for partial summary judgement and held that the defendants committed copyright infringement.

B. The District Court Calculates Damages

{23} The district court reviewed the history and evidence surrounding MP3.com in order to calculate damages for copyright infringement. (54) The court concluded that the defendant willingly and consciously provided copyrighted music to its users. Additionally, the defendant's infringing actions were potentially harmful to the plaintiffs and to music industry sales. Although the defendant was clearly in violation of the Copyright Act, the court looked to mitigating circumstances before imposing damages. For example, the court considered the defendant's good behavior since the court's initial ruling in May. (55) In the end, the court concluded that the assigned damages must send a message to similar Internet companies engaged in providing copyrighted materials. In furtherance of this reasoning, the court stated:

Some of the evidence in this case strongly suggests that some companies operating in the area of the Internet may have the misconception that, because their technology is somewhat novel, they are somehow immune from the ordinary applications of laws of the United States including copyright law. They need to understand that the law's domain knows no such limits. (56)

The court concluded that damages of \$25,000 per CD on approximately 4,700 CDs would send an adequate warning to others. (57)

IV. IMPACT ON RIAA V. DIAMOND MULTIMEDIA

{24} The recent developments in the dispute between the music industry and MP3-based services do not appear to affect greatly the ruling set out by the appeals court in *RIAA v. Diamond Multimedia*. The fundamental difference between *Diamond* and the more recent *MP3.com* and *Napster* cases is that the Rio player being offered by Diamond was a piece of equipment capable of clearly legal uses, not merely a facilitator for copyright infringement. (58)

{25} Although Napster attempted to draw a close connection to Diamond's space-shifting and fair use doctrine arguments, the federal district court declined to accept their reasoning and felt that these defenses were inapplicable to Napster's services. (59) In its recent hearing before the circuit court, Napster once again claimed that legal uses outweighed any potential illegal uses of the service. (60) In addition to trying to align itself with Diamond's successful argument, Napster is attempting to distance itself from MP3.com, by claiming that they lacked commercial intent and that they never made copies of copyrighted music, but merely provided a forum for exchange. (61)

{26} Napster takes the position that they are simply providing a community sharing system for music lovers and although there are millions of users, the purpose of the service is non-commercial. (62) Counsel for RIAA finds this proposition ludicrous and questions how a company that serves as a facilitator for the transfer of copyrighted music to millions could classify its purpose as personal in nature. (63)

V. IS THERE A VIABLE SOLUTION?

{27} Some believe that the changes taking place in the music industry should be embraced, not suppressed, and that copyright laws have outlived their usefulness. (64) Advocates of Internet music providers, such as Napster and MP3.com, feel that these services will benefit artists and bring democracy to an industry traditionally dominated by few. (65) Supporters of the recording industry view these services as criminal organizations created to facilitate the theft of copyrighted materials. (66) Additionally, they feel that free trading of copyrighted music on the Internet could destroy the industry by eliminating profits. (67) The government has cast its vote in favor of the recording industry. Lawyers for the U.S. Copyright Office recently expressed support for the district court's ruling in *Napster*. (68)

{28} The recording industry must utilize technology if it is going to continue to protect artists' work through

the current copyright system. Technology will continue to evolve and soon untraceable software will become commonplace. (69) Copyright laws, however sophisticated, will be useless against undetectable violations. One potential answer is the use of digital watermarks and encryption technologies to prevent infringement. (70) Another option is the creation of programs for tracking pirated music on the Internet. (71)

{29}The only viable long-term solution is to combat technology with technology. Not only music, but all forms of electronic media, including movies and books, must be protected from copyright infringement. (72) Simply because the infringement is taking place in new and somewhat uncharted territory does not justify violating established fundamental principals of American copyright law. Perhaps the presiding judge in the *UMG Recordings, Inc., et. al. v. MP3.com, Inc.*, said it best: "Defendant's copyright infringement was clear, and the mere fact that it was clothed in the exotic webbing of the Internet does not disguise its illegality." (73)

ENDNOTES

[*]Jayne Pemberton is a native Texan who received both her B.A. and M.A. from Baylor University. Upon completion of her Master's degree, Ms. Pemberton spent three years teaching English in the Japanese public school system. She will receive her Juris Doctor from the University of Richmond Law School in May 2001. Ms. Pemberton is the current Notes and Comments Editor of the *Richmond Journal of Law and Technology*, President of the International Law Student Association, Secretary of the Law and Technology Association, and represented the University of Richmond in the Judge John R. Brown National Admiralty Moot Court Competition. She is currently working part-time at the Richmond-based litigation firm of Schaffer & Cabell.

[1]. *See* Recording Industry Association of America v. Diamond Multimedia Sys., Inc. (hereinafter "RIAA"), 180 F.3d 1072 (9th Cir. 1999) (holding that the Rio player was not a "digital audio recording device," as statutorily defined by the Audio Home Recording Act ("AHRA"), because it did not directly reproduce recordings from transmissions. The transmissions first went through computer hard drives, thus making them indirect.); *see also* 17 U.S.C. § 1001(3) (1994).

[2]. *See* A& M Records, Inc. v. Napster, Inc., No. C99-05183 MHP, 2000 WL 573136 (N.D. Cal. May 12, 2000) (denying Napster's motion for summary adjudication); A& M Records, Inc. et. al. v. Napster, Inc. (hereinafter "*Napster*"), Nos. C 99-5183 MHP, C00-0074 MHP, 2000 WL 118267 (N.D. Cal. Aug. 10, 2000) (granting A&M's motion for preliminary injunction).

[3]. *See* UMG Recordings, Inc. v. MP3.com, Inc., No. 00 Civ. 472 (JSR), 2000 WL 710056 (S.D.N.Y. June 1, 2000) (order denying defendant's motion for interlocutory appeal); UMG Recordings, Inc. v. MP3.com, Inc., No. 00 Civ. 472(JSR), 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000) (unofficial ruling).

[4]. *See Napster*, 2000 WL 118267. Note that related state claims were also brought, and for the purpose of this update, only the federal claims will be explored. The state claims were California Civil Code section 980(a)(2). Several other companies brought suit with A&M. These companies included Geffen Records, Inc.; Interscope Records; Sony Music Entertainment, Inc.; MCA Records, Inc.; Atlantic Recording Corporation; Island Records, Inc.; Motown Records Company L.P.; Capitol Records; La Face Records; BMG Music d/b/a The RCA Record Label; Universal Records Inc.; Elektra Entertainment Group Inc.; Arista Records, Inc.; Sire Records Group, Inc.; Polygram Records, Inc.; and Warner Bros. Records Inc. *See generally* Current Development, *Napster not Entitled to Summary Adjudication that it Satisfied DMCA Safe Harbor for Service Providers*, 7 COMPUTER L. J. 26 (2000); Rebecca J. Hill, Comment, *Pirates of the 21st Century: The Threat and Promise of Digital Audio Technology on the Internet*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 311, 326 (2000).

[5]. *See Napster*, 2000 WL118267.

[6]. *See id.* at *6. Note that Napster's internal corporate documents predict that its service will be used by 75 million by the end of this year. *See also* Dennis Michael, *Win or Lose, Napster has Changed the Internet*, at <http://www.cnn.com/2000/SHOWBIZ/Music/10/02/napster/index.html> (Oct. 2, 2000) (providing background on Napster's creator, Shawn Fanning).

[7]. *See Napster*, 2000 WL 118267, at *6.

[8]. *See Napster*, 2000 WL 573136.

[9]. *See id.* at *3.

[10]. *Id.* *See* 17 U.S.C. § 512 (1994). *See also* Current Development, *Napster not Entitled to Summary Adjudication that it Satisfied DMCA Safe Harbor for Service Providers*, 7 COMPUTER LAW 26 (2000); *see generally* Lothar Determann, *Basic Copyright Law and the Internet*, 612 PLI/PAT. 347, 359 (2000).

[11]. *See Napster*, 2000 WL 573136, at *3. *See also* 17 U.S.C. § 512(k)(1)(A). This section of the statute defines a service provider as "an entity offering the transmission, routing, or providing of communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material being sent or received."

[12]. *See id.*

[13]. 17 U.S.C. § 512(a) (1994). *See Napster*, 2000 WL 573136, at *3.

[14]. *See id.* at *4.

[15]. *See id.*

[16]. *See id.*; 17 U.S.C. § 512(n) (1994). This section explores the construction of the DMCA. Section 512(n) states:

Subsections (a), (b), (c), and (d) describe separate and distinct functions for applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

17 U.S.C. § 512(n) (1994).

[17]. *See* 17 U.S.C. § 512(k)(1)(A) (1994).

[18]. *Napster*, 2000 WL 573136, at *4; 17 U.S.C. § 512(d) (1994). This section explores information location tools. It provides the following:

A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider - (1)(A) does not have actual knowledge that the material or activity is infringing; (B) in the absence of such actual knowledge, is not aware of facts or circumstances

from which infringing activity is apparent; or (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

17 U.S.C. § 512(d) (1994).

[19]. *See Napster*, 2000 WL 573136, at *4.

[20]. *Id. See* 17 U.S.C. § 512(i) (1994). This section of the DMCA sets out the elements necessary for a service provider to be granted safe harbor. The necessary elements follow:

(1) Accommodation of technology. - - The limitations on liability established by this section shall apply to a service provider only if the service provider - - (A) has adopted the reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and (B) accommodates and does not interfere with standard technical measures. (2) Definition. - - As used in this subsection, the term "standard technical measures" means technical measure that are used by copyright owners to identify or protect copyrighted works and - - (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs on the service providers or substantial burdens on their systems or networks.

17 U.S.C. § 512(i) (1994).

[21]. *See Napster*, Nos. C 99-5183 MHP, C 00-0074 MHP, 2000 WL 573136 (N.D. Cal. Aug. 10, 2000), at *2.

[22]. *See id.* at *4.

[23]. *See id.* at *5.

[24]. *See id.*

[25]. *See id.* at *6.

[26]. *See id.*

[27]. *Id.* at *8.

[28]. *See id.*

[29]. *See Napster*, 2000 WL 1182467.

[30]. See *id.* Defendant relied on *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), in support of its fair use doctrine argument.

[31]. See *id.*

[32]. 17 U.S.C. § 107 (1994). This section of the Copyright Act sets the forth four elements to be explored in determining the applicability of the fair use doctrine. These elements are:

- (1) the purpose and the 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.

17 U.S.C. § 107 (1994).

[33]. *Napster*, 2000 WL 573136, at *12 (quoting *Sony*, 464 U.S. 417, 434).

[34]. See *id.* at *15; 17 U.S.C. § 107 (1994).

[35]. See *id.*

[36]. See *id.*

[37]. See *id.*

[38]. See *id.* at *16.

[39]. See *id.* at *19.

[40]. See *id.*

[41]. See *id.* at *21.

[42]. See *id.* at *22.

[43]. See *id.* at *25.

[44]. *Id.*

[45]. See Michael, *supra* note 6.

[46]. See *UMG Recordings, Inc. v. MP3.com, Inc.* (hereinafter "*MP3.com*"), 92 F. Supp.2d 349, 350 (S.D.N.Y. 2000).

[47]. See Charles L. Simmonds, Jr., Feature, *Digital Distribution of Entertainment Content...The Battle Lines are Drawn*, 33 MD. B.J. 31, 35 (2000).

[48]. See *MP3.com*, 92 F. Supp.2d 349-350.

[49]. See *id.* See also 17 U.S.C. § 107 (1995). For fair use factors see *supra* note 32.

[50]. See *MP3.com*, 92 F. Supp.2d 349, 351.

[51]. *See id.* at 352.

[52]. *Id.*

[53]. *Id.* at 353

[54]. *See MP3.com*, No. 00 Civ. 472 (JSR), 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000).

[55]. *See id.* at *5.

[56]. *Id.* at *6.

[57]. *Id.*

[58]. *See RIAA*, 180 F.3d 1072 (9th Cir. 1999) (discussing the many uses of the Rio, both legal and illegal. The court concluded that the legal uses outweighed the potential illegal uses. *Sony Corp. of America v. Universal City Studios, Inc.* was explored in the court's decision and the Rio player was compared to the VCR.) *See also Sony*, 464 U.S. 417 (1984).

[59]. *See Napster*, Nos. C 99-5183 MHP, C 00-0074 MHP, 2000 WL 118267 (N.D. Cal. Aug. 10, 2000), at *16.

[60]. *See* Erica D. Rowell, *Napster Seeks Relief*, at <http://abcnews.go.com/sections/tech/DailyNews/napster001002a.html> (Oct. 2, 2000).

[61]. *See* Sue Zeidler, *Napster Waits in the Wings*, at <http://more.abcnews.go.com/sections/tech/dailynews/napster000908.html>. (Sept. 8, 2000). *See generally* Judith M. Saffer, *Using Music on the Internet - Doing it Right*, 611 PLI/Pat 381, 390 (2000).

[62]. *See id.*

[63]. *See* Associated Press, *Strike Two - Federal Government Sides Against Napster* (Sept. 9, 2000), available at <http://abcnews.go.com/sections/tech/DailyNews/napster000909.html>.

[64]. *See* Wendy M. Pollack, *Tuning in: the Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2447 (2000).

[65]. *See* Heather D. Rafter, et. al., *Streaming into the Future: Music and Video Online*, 611 PLI/PAT. 395, 397 (2000).

[66]. *See* Rowell, *supra* note 60.

[67]. *See* Rafter, *supra* note 65, at 397. *See also* Hill, *supra* note 4, at 330.

[68]. *See supra* note 63.

[69]. *See* Michael, *supra* note 6.

[70]. *See* Rafter, *supra* note 65, at 418. *See generally* Pollack, *supra* note 64, at 2485.

[71]. *See* Rafter, *supra* note 65, at 418.

[72]. *See* Bob Pimm, *Riding the Bullet to the Ebook Revolution*, 18 ENT. & SPORTS L. 1,19 (2000) (noting the

example of Steven Kings' recent novel, *Riding the Bullet*, that was available exclusively online. Although the novel was encrypted using a relatively low-tech system, it was successfully hacked and made available for free through unauthorized websites).

[73]. *UMG Recording, Inc. v. MP3.com, Inc.*, No. 00 Civ. 472 (JSR), 2000 WL 710056 (S.D.N.Y. June 1, 2000), at *1 (Judge Rakoff presiding).

Copyright 1999 Richmond Journal of Law & Technology