

Digital Pirates or Fair Users?

Online file distribution in the wake of A&M Records, Inc. v. Napster, Inc.

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I. The Ongoing Copyright Controversy, Digitally Remastered

Even before the enactment of the Statute of Anne in 1710, governments have struggled to strike a balance between the rights of the creators or “authors” of creative works to recoup their costs and make a profit and the rights of the general public to enjoy, to learn from, and otherwise to benefit from those creations.¹ Because authors invest time and effort into creating these works, they should have the right to profit from their investments under natural justice principles.² In exchange for securing the authors’ rights, however, the general public should receive compensation in the form of the reasonable, or “fair”, benefit of the use of the works.³ Indeed, the United States Constitution, empowers Congress to enact copyright laws to promote the progress of useful arts by securing to authors the exclusive rights to their creative works for limited times. With each revision to United States copyright law, the scope and length of copyright protection broadened, but with these revisions came the court-made doctrine of “fair use” and its subsequent recognition as part of the Copyright Act of 1976. Even with the subsequent adherence to the terms of the Berne Convention, Congress and the courts had struck a balance between the rights of creators and the interests of the general public. Authors still had exclusive rights, but members of the public could fairly copy those works to some degree, such as for the pure personal use of the work by one who already purchased a copy of the work. However, the forward march of replication technology and the emergence of the Internet and peer-to-peer (“P2P”) file-sharing technologies threaten this balance as copies of original creative works spread around the world with increasing quality without direct economic benefit to the authors. Moreover, the impracticality of filing lawsuits against individuals who directly infringe on copyrights bows to the practicality of filing lawsuits against providers of file-sharing media.

¹ Robert A. Gorman & Jane C. Ginsburg, Copyright 1 (Lexis Law Publishing 5th ed. 1999) (1981).

² Id.

³ Id. at 14.

Recently, the United States Court of Appeals for the Ninth Circuit struck a blow to P2P with its ruling in A&M Records, Inc. v. Napster, Inc.⁴ However, an analysis of the technologies involved and the related areas of copyright law supports the viability of online file distribution.

II. An Overview of Online File Distribution Technology

Computer networks exist for the basic purpose of information sharing. This sharing involves the exchange of digital files the content of which has grown increasingly compelling as data compression and replication technologies evolve. Moreover, networking and file sharing technologies have evolved to the point of allowing an end user at home on a personal computer to distribute data globally. When such distribution involves copyrighted content and occurs without the permission of the copyright holders, these copyright holders often want their attorneys to put an end to the practice. However, given the sheer numbers of people empowered by technological advances to copy and distribute widely the material, the practicality of suing the providers of this innovative technology quickly overshadows the impracticality of suing the millions of users of such technology.⁵ Whether or not the copyright holders can prevail in some form of infringement action depends on the characteristics of the technology in question.

A. Usenet

From its inception in 1979, Usenet has served as a medium of information exchange between people in different communities through the use of electronic “newsgroups”. Usenet has no central organization; rather, Usenet operates as a network of machines which exchange messages, or “articles,” labeled with the name (or names) of a newsgroup.⁶ Usenet users may read or send messages from or to these newsgroups, and those who post articles have no way to

⁴ 2001 U.S. App. LEXIS 1941.

⁵ But see Lee Gomes, Recording Industry targets Gnutella file sharing (May 4, 2001) <<http://www.msnbc.com/news/568653.asp?cp1=1>> (“Anyone with a court subpoena can trace an IP number to a specific person, by name, since the information is stored by Internet-service providers.”).

⁶ Zen and the Art of the Internet (visited May 4, 2001) <http://www.cs.indiana.edu/docproject/zen/zen-1.0_6.html>.

know who reads those messages.⁷ These articles technically only contain text. However, through encoding technologies such as uuencode, a Usenet poster can encode a binary file, which contains machine-readable data such as software, music, or video, into a plain-text format for inclusion or “attachment” in a Usenet post. Those who read the article may then decode the text back into the same machine-readable format of the original binary file.

While Usenet provides a simple yet powerful means for online file distribution, it suffers from two main limitations in this capacity. The machines or sites which comprise the network need not “carry,” or store and make available, the postings of every newsgroup, and different sites archive different quantities of articles from each newsgroup.⁸ The latter limitation proves troublesome for postings of larger files, which the poster must break into several parts first for compression purposes and again to conform to restrictions on article length imposed by Usenet software and etiquette. If a site does not receive or archive one of the parts created in the compression process, or even a part created in the posting process of one of those compressed parts, the recipient cannot successfully decode or decompress the file. Thus, not only does a prospective downloader need to have access to a site that carries a binary newsgroup containing the desired file, the site needs to carry the complete file long enough for the downloader to get a copy of each split part of each compressed part of the original file. Although some Usenet sites provide premium newsgroup access⁹ on a subscription basis, Internet users who do not want to pay for Usenet access on top of what they pay for Internet access must rely on Usenet server access, if any, provided by their own Internet access providers.

⁷ American Libraries Ass'n v. Pataki, 969 F.Supp. 160, 166 (S.D.N.Y. 1997).

⁸ See, e.g., Controlling access to your server (visited May 4, 2001) <<http://developer.netscape.com/docs/manuals/collabra/admin/access.htm>> (documentation for Netscape’s Collabra news server software).

⁹ Premium features include a wider variety of binary groups or longer archive times for articles. See, e.g. Jeremy Nixon, Usenet Service Providers (April 22, 2001) <<http://exit109.com/~jeremy/news/providers/providers.html>>.

B. World Wide Web

Though first conceived as a solution for information management for research projects¹⁰, the World Wide Web (the “Web”) has evolved to become for the layperson almost synonymous with the Internet. With the proliferation of free web-hosting services¹¹, and free Web-based file-hosting services¹², anyone with a little knowledge of HTML can put together a website to distribute large files of copyrighted material without the consent of the copyright holder. After a site containing copyrighted material becomes published, a prospective downloader may find such sites through search engines or lists of top sites, depending on the amount of promotion performed by a site’s creator. However, copyright holders have access to these same methods as well as, in some cases, digital watermarking technology.¹³ Some copyright holders react by sending “cease and desist” letters to operators of “pirate sites,” which exist solely to distribute copyrighted materials such as full-length songs or commercial software.¹⁴ Some copyright holders even send such letters to “fan sites” that use copyrighted material merely to profess admiration for and generate discussion of, say, a favorite television show.¹⁵ Although the Web provides a powerful and easy-to-use medium for distributing files, those same strengths make it difficult for websites to provide unauthorized access to copyrighted materials for very long.

C. Internet Relay Chat (IRC) and the mIRC Fileserver feature

Internet Relay Chat (“IRC”) consists of a number of networks (also called “nets”), each consisting of servers, channels, and users. Each server relays information to and from other servers on the same net to provide real-time online chat to thousands of users worldwide on a

¹⁰ A Little History of the World Wide Web (visited May 4, 2001) <<http://www.w3.org/History.html>>.

¹¹ See, e.g., Yahoo! Geocities – Your Home on the Web® (visited May 4, 2001) <<http://www.geocities.com/home>>.

¹² See, e.g., Myspace. Data Storage, collaboration and management (visited May 4, 2001) <http://www.myspace.com/nd_home.asp> (provider of free online storage of files for sharing and collaboration).

¹³ See, e.g., Digimarc Corporation: The Leading Developer of Watermarking Technologies (visited May 4, 2001) <<http://www.digimarc.com/>>.

¹⁴ See, e.g., Anti-Piracy (visited May 4, 2001) <http://www.siiia.net/piracy/policy/int_notify.asp>.

¹⁵ See, e.g., Evergreen Terrace | The Net (visited May 4, 2001) <<http://www.nohomers.net/info/net/fox.shtml>>.

variety of topics, designated by the names of the various channels. To connect to IRC, an Internet user would need to download and install IRC client software, which allows the user to connect to an IRC server.¹⁶ mIRC, a popular Windows-based IRC client,¹⁷ contains a “Fileserver” function which combines the Direct Client Connection (DCC) protocol¹⁸ with aspects of File Transfer Protocol (FTP) to allow mIRC users to share files with other people on IRC¹⁹. Although IRC itself has a client-server nature, DCC thus provides peer-to-peer access for file sharing among IRC users. IRC users running a mIRC Fileserver have a much more transient nature than a website because the IRC users eventually log off of IRC while a website stays live whether or not the author turns his personal computer off.²⁰ However, a copyright holder can obtain the IP address of an IRC user with relative ease²¹ and can theoretically use that information to trace the user back to his Internet access provider²², who may have logs which show who used that particular IP address at that time of day.

D. Hotline Connect

Hotline Connect, a free software suite by Hotline Communications Ltd., allows Internet users to run their own file-sharing servers using their personal computers. Users can connect to a Hotline Server with Hotline Client software. Hotline Servers have other features, such as a chat room, message boards, instant messaging, which allow for community building.²³ To attract users, those running Hotline Servers have the option of registering with online directories called

¹⁶ See generally Dey Alexander, Nattering on the Net – Slide list (visited May 4, 2001) <<http://its.monash.edu.au/web/slideshows/wgchat/>> (slides from a presentation on Internet Relay Chat).

¹⁷ Dey Alexander, Nattering on the Net – slide “mIRC – A Quick Overview” (visited May 4, 2001) <<http://its.monash.edu.au/web/slideshows/wgchat/slide13-0.html>>.

¹⁸ DCC commands (visited May 4, 2001) <<http://www.chemi.muni.cz/~jverner/Irc/DCC%20commands.htm>>.

¹⁹ Frequently Asked Questions about mIRC – Section 6 (visited May 4, 2001) <<http://www.mirc.com/faq6.html>>.

²⁰ If hosted on the author’s computer, the website will not remain accessible when the author turns off his computer.

²¹ IRC and Chatrooms (visited May 4, 2001) <<http://www.all-nettools.com/privacy/irc.htm>>.

²² See, e.g., Anthony Baratta, [thelist] Fwd: Finding out who owns particular IP addresses (Jan. 8, 2001) <<http://lists.evolt.org/archive/Week-of-Mon-20010108/147563.html>> (a forum posting providing an example of how to trace a block of IP addresses back to the online service provider who owns it).

²³ What is Hotline Connect? (visited May 4, 2001) <http://bigredh.com/hotline3/whatisit/what_is_hotline.html>.

“trackers,”²⁴ though they also have the option to restrict access only to a select circle of friends.²⁵ Hotline Servers provide activity logs, which display each user’s IP address and what files they upload or download. The operator of a Hotline Server also has the ability to kick off or alternatively to ban a user.²⁶ The Hotline Server also provides the option to display a customizable agreement that client-side users must agree to before they can continue connecting to the server.²⁷ Although Hotline Communications does not appear to advertise or advocate such a use of its software on its website, Hotline Connect provides a powerful medium for the distribution of copyrighted materials.

E. Peer-to-Peer Technology

“Peer-to-peer” in the context of unauthorized distribution of copyrighted materials refers to technology that allows people to share files located on their personal computers directly with other Internet users. In this sense, the term actually encompasses technologies such as Napster, which uses centralized servers to initiate peer-to-peer connections. Though true peer-to-peer does not use dedicated centralized servers²⁸, the technologies referred to here all leverage the decentralized resources of individual computers in peer-to-peer fashion.²⁹ Although dozens of peer-to-peer technologies exist, each with a number of infringing uses and users, three mainstream peer-to-peer applications stand out as stable, efficient, and popular enough to warrant analysis here.

²⁴ How does it work? (visited May 4, 2001) <http://bigredh.com/hotline3/whatisit/how_work.html>.

²⁵ Hotline Connect Server (visited May 4, 2001) <http://bigredh.com/hotline3/whatisit/server/server_main.html>.

²⁶ Hotline Connect – Server Administration (Oct. 4, 2001) <http://www.bigredh.com/hotline3/support/HLServer_Admin.pdf>.

²⁷ Hotline Connect – Server Configuration (Oct. 4, 2001) <http://www.bigredh.com/hotline3/support/HLServer_Config.pdf>.

²⁸ Webopedia Definition and Links – peer-to-peer architecture (visited May 4, 2001) <http://webopedia.internet.com/TERM/p/peer_to_peer_architecture.html>.

²⁹ Clay Shirky, OpenP2P.com: What Is P2P ... And What Isn't (Nov. 24, 2000) <<http://www.openp2p.com/pub/a/p2p/2000/11/24/shirky1-whatisp2p.html>>.

1. ICQ

ICQ, a popular³⁰ technology now owned by America Online, allows users to connect directly³¹ to other ICQ users to initiate, among other things, file transfers. ICQ users register at a server, part of a broad network of servers, to receive a Universal Internet Number (UIN) that identifies a particular user to the rest of the network. Users can compile a list of other users that they consider friends. The ICQ network then notifies users when those friends log on. The network enables the ICQ client software to initiate direct connections to any other user simply by knowing that user's UIN.³² After establishing a connection, either party can send files directly to the other through a menu option.³³ ICQ users thus control to whom they transfer files, and the files never reside on the ICQ network itself. With some effort however, a copyright holder on ICQ connected to a distributor of copyrighted material can detect that user's IP address.³⁴

2. Napster

Similar in its architecture to ICQ, Napster provides software that allows users to initiate downloads of audio files in the MPEG-3 format from any other user on the same Napster server who has the desired audio files shared on the network. Users must first create a username with which to connect to Napster servers. Napster users then search the Napster servers for users who have the desired files. After finding someone who has the desired file, the user simply selects the file for download, which opens a direct connection to the computer with the file. The Napster client software, however, allows the host of the file to identify the downloader (by

³⁰ ICQ boasts over one hundred million users, with over one billion user hours a month. ICQ Inc. – 100 Million Users (visited May 4, 2001) <<http://web.icq.com>>.

³¹ See Nobuaki Takahashi, How does ICQ work ?! (Sept. 30, 1999) <<http://www.kaynet.ecc.u-tokyo.ac.jp/~taka/comtool/icq/>> (showing how ICQ initiates direct peer-to-peer connections using TCP).

³² ICQ Inc. – (I SEEK YOU) – What is it? (visited May 4, 2001) <<http://www.icq.com/products/whatisicq.html>>.

³³ ICQ Inc. – The Advanced ICQ Tour – Events Menu (visited May 4, 2001) <<http://www.icq.com/icqtour/advanced/events.html#filetransfer>>.

³⁴ ICQ Inc. – Security and Privacy Tutorial (visited May 4, 2001) <<http://www.icq.com/features/security/security-tutorial.html>>.

username only) and gives the host the ability to cancel or abort the sending of the file.³⁵ The actual file or audio data never passes through Napster's servers. The servers store only basic information about the file to allow for the searches. Napster, however, also keeps track of basic information about its users, including their IP addresses. Napster also subjects its users to specific usage terms.³⁶ Though legal action forced Napster to employ filtering technology to prevent users from downloading copyrighted material through its system³⁷, users have found ways to download such material despite the filters.³⁸ The convenience that Napster provides, however, has led to "piggyback" services, such as software to allow exchange of other types of files over Napster's service,³⁹ thus providing a powerful medium for file distribution.

3. The Gnutella Protocol

The Gnutella protocol provides a platform for true peer-to-peer interaction, linking users together with other users with no centralized server to track usage within the system. Client software that uses Gnutella⁴⁰ consists of a search function and a file serving function.⁴¹ Search queries travel through the Gnutella network until a computer with the desired file responds, at which point a file download may begin.⁴² Copyright holders can, however trace Gnutella users

³⁵ [Napster | Help with Napster for Windows | Manual | Transfer](http://www.napster.com/help/win/manual/transfer.html) (visited May 4, 2001) <<http://www.napster.com/help/win/manual/transfer.html>>.

³⁶ Some music artists compiled lists of users who allegedly distributed copyrighted music using Napster. Although subsequently banned in accordance with Napster's copyright policy ([Napster | Infringement Notice](http://infringe.napster.com/) (visited May 4, 2001) <<http://infringe.napster.com/>>), these users found ways around the ban. David E. Weekly, <d.w.o> code: [Unbooting Yourself From Napster](http://david.weekly.org/code/napster-metallica.php3) (visited May 4, 2001) <<http://david.weekly.org/code/napster-metallica.php3>>.

³⁷ [Napster](http://www.napster.com/) (visited May 5, 2001) <<http://www.napster.com/>>.

³⁸ See [Tim Wilson, MP3 Translator – TimWilson.org](http://www.mp3translator.com/) (visited May 4, 2001) <<http://www.mp3translator.com/>> (software for scrambling and descrambling song names to bypass Napster's filters). See also Sue Zeidler, [Napster cracks down on pig Latin](http://www.zdnet.com/zdnn/stories/news/0,4586,2696476,00.html) (March 14, 2001) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2696476,00.html>> (Napster pressures file-sharing firm Aimster to remove Pig Encoder Software from its website).

³⁹ See, e.g., [Unwrapper](http://www.unwrapper.com/) (visited May 4, 2001) <<http://www.unwrapper.com/>> (providers of Wrapster, software which disguises any file with an MP3 header for distribution via Napster).

⁴⁰ Bearshare (<http://www.bearshare.com/>), LimeWire (<http://www.limewire.com/>), and ToadNode (<http://www.toadnode.com/>) all provide free Gnutella client software.

⁴¹ [What is Gnutella?](http://www.gnutellanews.com/information/what_is_gnutella.shtml) (visited May 4, 2001) <http://www.gnutellanews.com/information/what_is_gnutella.shtml>.

⁴² [Toadnode – FAQ page 1](http://www.toadnode.com/FAQs.asp) (visited May 4, 2001) <<http://www.toadnode.com/FAQs.asp>>.

back to their Internet access providers⁴³ because a Gnutella user's IP address necessarily becomes exposed to others on the Gnutella network.⁴⁴

4. Aimster

Aimster, by AbovePeer, Inc., provides a P2P file-sharing system that integrates with America Online's Instant Messenger software⁴⁵ and works in such a way as to allow file access only to those in a user's "buddy list".⁴⁶ Aimster's file-sharing system does not use IP addresses.⁴⁷ Recently, Aimster filed a lawsuit seeking declaratory judgment against the recording industry as to the legality of its method of file sharing.⁴⁸

III. Pertinent Statutory and Case Law

Online file distribution implicates several statutes and relevant judicial decisions. Specifically, the Copyright Act and the Digital Millennium Copyright Act (DCMA) of 1998 provide statutory authority while cases such as Sony Corp. of America v. Universal City Studios, Inc.⁴⁹ have guided the application of statutory law. The recent decision of the U.S. Ninth Circuit Court of Appeals in A&M Records, Inc. v. Napster, Inc.,⁵⁰ however, represents a fundamental shift in the way courts may apply these statutes.

A. Copyright Act

Title 17 of the United States Code, otherwise known as the Copyright Act, provides copyright protection for "original works of authorship fixed in any tangible medium of

⁴³ Gomes, *supra*, note 5.

⁴⁴ Kevin Featherly, Piggybacking Aimster Soon May Jump On Napster, Gnutella (Dec. 19, 2000) <<http://www.newsbytes.com/news/00/159596.html>>

⁴⁵ Kevin Featherly, AOL Thus Far Neutral On 'Gnutella Browser' Aimster (Aug. 11, 2000) <<http://www.newsbytes.com/pubNews/00/153532.html>> (note that Aimster is not actually a "Gnutella browser").

⁴⁶ See generally Aimster What Is Aimster? (visited May 4, 2001) <<http://www.aimster.com/whatis.phtml>> (provides a step-by-step explanation of the file-sharing process over several pages/URLs).

⁴⁷ Featherly, *supra*, note 42.

⁴⁸ See, e.g., Hane C. Lee, RIAA Says It's Disappointed at Aimster Suit (May 3, 2001) <<http://biz.yahoo.com/st/010503/24216.html>>.

⁴⁹ 464 U.S. 417 (1984).

⁵⁰ 239 F.3d 1004 (9th Cir. 2001).

expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or through...a device” and includes literary, musical, dramatic, pantomime, choreographic, pictorial, graphic, sculptural, and architectural works, as well as motion pictures and sound recordings.⁵¹ Under the Copyright Act, copyright owners have with respect to their copyrighted works the exclusive rights to reproduce, create derivative works, distribute copies, perform publicly (certain works), to display (certain works), and to perform sound recordings by digital transmission.⁵² Thus, any violation of these rights or the importation of copies of works constitutes infringement for which the copyright owner may institute an action in court.⁵³ Not all unauthorized copying, however, constitutes infringement because of “fair use”, originally a court-created doctrine.⁵⁴ Codified in the 1976 Act, this doctrine treats any “fair use” of a copyrighted work (including through reproduction) for purposes such as criticism, comment, news reporting, or education as a non-infringing use. In determining whether a use qualifies as “fair”, the codified version requires courts to consider the purpose and character of the use, the nature of the copyrighted work, the portion of the work copied, and the effect of the use on the potential market for or value of the work.⁵⁵

The Audio Home Recording Act (AHRA) of 1992 amended the Copyright Act to provide, among other things, protection from liability for manufacturers of digital audio recording devices or media and protection for consumers for their noncommercial use of such devices to make analog or digital musical recordings.⁵⁶ However, courts have since determined that the AHRA does not cover songs fixed on a computer’s hard drive.⁵⁷

⁵¹ 17 U.S.C. § 102 (2001).

⁵² 17 U.S.C. § 106 (2001).

⁵³ 17 U.S.C. § 501 (2001).

⁵⁴ See, e.g., Williams & Wilkins Co. v. United States, 487 F2d 1345, 1350 (Ct. Cl. 1973).

⁵⁵ 17 U.S.C. § 107 (2001).

⁵⁶ 17 U.S.C. § 1008 (2001).

⁵⁷ See A&M Records, Inc., supra, at 1024-25.

B. The Digital Millennium Copyright Act (DMCA) of 1998

The Digital Millennium Copyright Act (DMCA) amended the Copyright Act specifically to implement the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty⁵⁸, as well as to address other significant copyright issues.⁵⁹ Most importantly, the DMCA limits the liability of an online service provider (“OSP”) in providing a “mere conduit” for the communications of others.⁶⁰ These limitations fall into four categories of OSP conduct: (a) transitory communications, (b) system caching, (c) storage of information on systems or networks at direction of users, and (d) information location tools.⁶¹ For those providing transitory communications, the DMCA defines a “service provider” as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” For those qualifying under (b), (c), or (d), “service provider” includes the entity defined for (a) as well as “a provider of online services or network access, or the operator of [such] facilities [].”⁶² An OSP that does not qualify for one category of limited liability may still qualify for another.⁶³ Each category has different criteria for determining liability.⁶⁴

C. Case Law

Two cases in particular deserve analysis with respect to file distribution technology.

⁵⁸ These aspects do not fall under the scope of this paper, though they may cover some of the copyrighted material distributed through the technologies discussed here (e.g. movies copied from DVD-ROMs using DeCSS). See Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294 (S.D.N.Y. 2000).

⁵⁹ The Digital Millennium Copyright Act of 1998 – U.S. Copyright Office Summary (December 15, 1998) <<http://lcweb.loc.gov/copyright/legislation/dmca.pdf>>.

⁶⁰ Gorman, supra note 1, at 766.

⁶¹ The Digital Millennium Copyright Act of 1998 – U.S. Copyright Office Summary, supra.

⁶² 17 U.S.C. § 512(k)(1) (2001).

⁶³ 17 U.S.C. § 512(n) (2001).

⁶⁴ See generally 17 U.S.C. § 512 (2001).

1. Sony Corp. of America v. Universal City Studios, Inc.

This United States Supreme Court case dealt with the secondary liability⁶⁵ of Sony as manufacturers of the Betamax videotape recorder, as well as the application of the fair use doctrine to the users of the VCR. In declining to impose contributory liability on Sony, the Court applied the “staple article of commerce” doctrine of patent law to rule that the sale of equipment capable of substantial noninfringing uses does not constitute contributory infringement.⁶⁶ Furthermore, the Court held that a finding of contributory⁶⁷ liability requires more than constructive knowledge of infringing activity. More importantly, both the majority and dissenting opinions agreed that the doctrine should apply to the extent that a significant portion of a product’s use consists of noninfringing uses.⁶⁸

The Court’s finding of fair use hinged on the existence of a significant likelihood that substantial numbers of copyright holders who license their works for broadcast would not object to the time-shifting enabled by the VCR, and on the likelihood that no more than minimal harm would result on the potential market for the copyrighted works.⁶⁹ The Court, applying an “equitable rule of reason” analysis, found the four statutory factors to favor VCR users because, among other things, time-shifting for private home use constitutes a noncommercial, nonprofit activity, despite the unauthorized reproduction of the entire work.⁷⁰ Moreover, evidence of harm played a key factor in the Court’s determination on the effect time-shifting would have on the

⁶⁵ Secondary liability (i.e. contributory or vicarious liability), while not formally recognized by the Copyright Act, can still apply to copyright infringement cases. *Id.* at 434-35.

⁶⁶ *Sony*, *supra* note 46 at 442.

⁶⁷ Justice Stevens seems to refer to “vicarious” and “contributory” infringement interchangeably. *Id.* at 439. However, subsequent cases in lower courts distinguish between the two types of secondary liability, and even go so far as to rule that the “staple article of commerce” doctrine from the *Sony* case does not apply to vicarious liability (even though the Court makes no such express limitation). *See, e.g., A&M Records, supra*, at 1022-23.

⁶⁸ *Sony, supra*, at 491 (5-4 decision) (Blackmun, J., dissenting).

⁶⁹ *Id.* at 442-456.

⁷⁰ *Id.* at 448.

potential market for or value of the copyrighted works.⁷¹

2. **A&M Records, Inc. v. Napster, Inc.**

The Court of Appeals for the Ninth Circuit approached the fair use and secondary liability issues in A&M Records differently from the Supreme Court's approach in Sony. The Ninth Circuit determined that Napster's users generally do not engage in fair use, and those engaged in "sampling"⁷² and "space-shifting"⁷³ also did not engage in fair use. In its general fair use analysis, the court's analysis implied that the general use of Napster not only involved copyrighted works, but that Napster users would normally have to buy what they download from Napster.⁷⁴ Furthermore, the Ninth Circuit upheld Judge Patel's conclusions that Napster use reduces audio CD sales and raises barriers to the plaintiffs' entry into the digital download market.⁷⁵ With regards to sampling, not only did the court determine that sampling constituted a commercial use, but the court also found a substantial likelihood of harm because "the more music that sampling users download, the less likely they are to eventually purchase" that music and "Napster has adverse effects on the developing digital download market"^{76,77} In its determination that space-shifting did not constitute fair use, the court refused to apply the "shifting analysis" of Sony because Napster technology simultaneously involved the distribution of copyrighted material to the general public. The court also made no mention of the "equitable rule of reason" used by the Sony Court to determine the fairness of an alleged infringer's use.

⁷¹ See Sony, *supra*, at 453 nn. 36-39.

⁷² "Sampling" here refers to a Napster user's download of MP3 files to determine whether to buy, e.g., a music artist's CD. See A&M Records, *supra*, at 1018.

⁷³ "Space-shifting" refers to a Napster user's download of MP3 files of songs that he already owns a legal copy of in another medium, such as on a compact disc. See Id. at 1019.

⁷⁴ See Id. at 1015 ("(2) 'Napster users get for free something they would ordinarily have to buy'" implies an assumption that the general use of Napster necessarily involves unauthorized infringing activity).

⁷⁵ Id. at 1014-19.

⁷⁶ Even though Napster created a popular and convenient distribution mechanism for digital downloads and the recording industry tried to extend its copyright monopoly to destroy it completely, the Ninth Circuit thought *Napster* had adverse effects on the development of the digital download market.

⁷⁷ A&M Records, *supra*, at 1018.

Moreover, the Ninth Circuit found Napster liable for contributory and vicarious infringement of the plaintiff record companies' copyrighted works. Limiting Sony based on Napster's actual knowledge of the existence of specific infringing material on its system, the court determined that sufficient knowledge existed, when combined with the demonstrated infringing use of the Napster system and Napster's material contribution to the infringing activity, to impose contributory liability.⁷⁸ In also finding Napster vicariously liable, the Ninth Circuit ruled that the "staple article of commerce" analysis of Sony did not apply to vicarious liability. Accordingly, the court found vicarious liability because Napster has the right and ability to supervise its users' conduct and the court felt that the plaintiffs would likely succeed in establishing that Napster has a direct financial interest in the infringing activity.⁷⁹

The court in A&M Records also determined that, while the DMCA's safe harbor provision could apply to Napster, the record companies raised enough questions as to whether Napster would qualify under the provision and that the balance of hardships relating to the issuance of an injunction tipped in favor of the record companies. Thus, the DMCA's effect on the liability of those who provide novel means for file distribution remains unclear. Note, however, that with regards to secondary liability, the DMCA would protect such defendants from monetary damages as well as limit the types of injunctions afforded to the record companies.⁸⁰

IV. Applying the Law

Although the copyright holder of the infringed work would first need to prove direct infringement by a user of one of the aforementioned technologies to find the provider of the technology in question secondarily liable for copyright infringement,⁸¹ we can assume for

⁷⁸ A&M Records, *supra*, at 1020-22.

⁷⁹ *Id.* at 1022-24.

⁸⁰ 17 U.S.C. § 512.

⁸¹ A&M Records, *supra*, at 1013 n.2.

purposes of analysis that infringing uses for each exist. Thus, barring a finding of fair use, the copyright holder could then try to prove contributory or vicarious liability. Contributory liability arises when one with knowledge of infringing activity induces, causes or materially contributes to the infringing conduct of another.⁸² Vicarious liability exists when the defendant possesses the right and ability to supervise the infringing conduct and has an obvious and direct financial interest in the exploitation of copyrighted materials; vicarious liability does not require knowledge of the infringing conduct.⁸³ Although the Ninth Circuit refused to apply the “stable article of commerce” defense from the Sony case to determine vicarious liability, the Supreme Court did not expressly limit the defense only to cases of contributory liability.⁸⁴ Moreover, the DMCA could limit the remedies available to the copyright holder under certain circumstances.

A. Usenet

Because many developers contributed to the creation of the technology behind Usenet, and because of the nature of Usenet as a decentralized general-purpose information-sharing tool, a plaintiff would not likely succeed in finding the technology developers liable for the infringing actions of Usenet users. The amount of control available to operators of Usenet sites, however, to restrict user access and to determine both the groups to carry and the length of time to archive the messages could support a finding of secondary liability. One fact favoring a finding of vicarious liability lies in the advertising of “uncensored access” by certain sites which offer premium newsgroup access. Combined with accessibility to newsgroups where infringement occurs, a court may conclude that the operator of such a site has a direct financial interest in the infringing activities. Moreover, the ability of a Usenet site operator to impose access restrictions by user and by group and to cancel articles containing infringing material (effectively, to censor)

⁸² A&M Records, *supra*, at 1019.

⁸³ 1-12 Nimmer on Copyright § 12.04 (2000).

⁸⁴ See generally Sony, *supra*.

originating from its site, when combined with terms in the user agreement reserving the right to remove postings, would establish the right and ability to supervise infringing activity. Applying the holding of A&M Records in this manner, courts can find such Usenet site operators vicariously liable for copyright infringement. However, if the court applies the “stable article of commerce” defense or balances the equities with public policy, the court will likely find in favor of the operator. Under the Sony defense, Usenet site operators sell an article of commerce widely used for legitimate, unobjectionable purposes—namely free uncensored speech. Moreover, the chilling effect on the availability of uncensored Usenet access for the legitimate exercise of free speech far outweighs the rights of copyright holders. Furthermore, Usenet site operators would likely qualify as service providers under the DMCA, which would limit the available remedies. While the copyright holders likely could not shut down these Usenet sites, they most likely would succeed in denying site access for particular subscribers known to engage in infringing activities on that site. Thus, the copyright holder would still have the burden to police the newsgroups and trace the origins of articles containing infringing material, as well as the inconvenience of having to bring suit against several infringing individuals.

B. World Wide Web

Like Usenet, the World Wide Web exists primarily as a decentralized means of sharing information. Moreover, the DMCA provides safeguards for providers of web hosting services to shield them from the infringing acts of their users. Those who actually operate pirate websites commit direct infringement, both in copying protected works and in distributing them. However, bringing action against pirate website operators requires a great deal of diligence on the part of copyright holders to discover the infringing uses and then to contact the party providing the web hosting service. In the case of pirate websites hosted on personal computers, copyright holders

would instead need to contact the websites' Internet access providers. Such action could prove troublesome, however, when a site operates in a country with lax copyright laws.

C. IRC

IRC originally had a centralized structure but has since become as decentralized as Usenet or the Web.⁸⁵ Bringing suit against those who created the technology would prove as troublesome as with Usenet, given the different parties, lack of control, and the substantial noninfringing uses. Moreover, providers of IRC networks do not maintain the requisite ability or right to control the activity on those networks. Channel operators, who have the ability and software-ordained right to supervise the infringing activity by controlling access to their discussion channels, derive no financial interest in any infringing activities.⁸⁶ Copyright holders would likely only succeed against direct infringers. Therefore, copyright holders must again go through the effort of tracing infringing IRC users back to their Internet access providers to have the chance to locate infringers.

D. Hotline Connect

The nature of Hotline Connect raises a number of significant issues because of its unique features. Hotline Communications' licensing agreement explicitly reserves the right to terminate a user's license if the user uses Hotline Connect to infringe the intellectual property rights of any person.⁸⁷ Such a reservation implies the right to control access. However, Hotline has no ability to block the use of its software beyond terminating its licensing agreement with an infringing user. Thus, a court would not likely find vicarious liability. Moreover, the substantial

⁸⁵ Dey Alexander, Nattering on the Net – slide “IRC Networks” (visited May 4, 2001) <<http://its.monash.edu.au/web/slideshows/wgchat/slide7-0.html>>.

⁸⁶ Arguably, they would only have a financial interest if they engage in infringement themselves, which would make them direct infringers.

⁸⁷ Hotline Communications Ltd. (“Hotline”) End-User Web Site and Software Terms and Conditions of Use (visited May 4, 2001) <<http://bigredh.com/hotline3/legal.html>>.

noninfringing uses of building private online communities and sharing noninfringing files would likely make the Sony defense available against a finding of contributory infringement. With regard to those users who do infringe, a copyright holder must find a Hotline Server that not only allows unrestricted downloading of copyrighted materials, but that also lacks a user agreement which would prevent the copyright holder from pursuing the infringer by virtue of acceptance of the agreement. Most Hotline Servers require users to accept a user agreement, and several of these agreements contain an abundant amount of “legalese.”⁸⁸ Although unlikely, each Hotline Server operator also has the potential to qualify as a service provider under the DMCA, depending on the facts such as those specific to who made the infringing materials available and the criteria for access. However, the fact that infringing materials become available on a Hotline Server itself can make tracking down a direct infringer simple, as Hotline Server operators tend to announce their servers on “trackers” and on other Hotline Servers.⁸⁹ Moreover, some of these advertisements name specific titles of copyrighted works distributed by the operator through the server, thereby reducing the need for the copyright holder to view the server contents personally.

E. Peer-to-Peer

Although the Ninth Circuit determined that Napster could not avoid liability for the infringing acts of its users, other P2P systems could still escape a finding of secondary liability. While Napster only allows the exchange of MP3 files, ICQ, Gnutella, and other P2P systems allow the exchange of any type of file, thus making the “stable article of commerce” defense more viable. Moreover, ICQ’s primary purpose as a chat/instant messaging system only bolsters this defense. Although ICQ’s has the right and ability to revoke user accounts⁹⁰, copyright

⁸⁸ However, some servers attempt to shield themselves by “requiring”, e.g., that users not connect from Earth.

⁸⁹ To connect to a Hotline Server, the user must know the host name or corresponding IP address.

⁹⁰ ICQ Inc. – The ICQ Terms of Service – ICQ License Agreement (Jan. 19, 2001) <<http://www.icq.com/legal/end-user-license.html>>.

holders would likely have difficulty in showing that ICQ has a direct financial interest in the infringing activities, again because of ICQ's primary function. Aimster also retains the ability to prevent people from using its software, and has express policies for copyright holders to prevent infringers from using Aimster's service pursuant to the DMCA.⁹¹ The fact that Aimster piggybacks on an instant messaging service would support a finding of substantial noninfringing use. Moreover, the fact that Aimster users only share files with people they "know"⁹² could support a finding that Aimster users engage in fair use. Aimster's upcoming lawsuit against the Recording Industry Association of America (RIAA) will garner much interest as a result. If the RIAA attempts its own legal action against Aimster, the courts could have stronger support for a finding of copyright misuse, as Aimster theoretically could argue that the RIAA has attempted to use its copyrights to restrain the legitimate development of the market for digital file distribution.

Unlike ICQ and Aimster, Gnutella has no centralized system, so copyright holders would have trouble shutting down the technology. The Gnutella protocol itself, like other P2P technology⁹³, has an immense potential for non-infringing uses. Moreover, the developers of Gnutella clients only enable their users to connect to the Gnutella network—they have no power to change the protocol or shut down the network, nor the ability to prevent users from accessing the network. The design of the Gnutella protocol, however, does allow copyright holders to track down Gnutella users engaged in direct infringement.⁹⁴

V. Suggestions for a Balanced Future

Copyright holders cannot realistically go after every individual who infringes on their copyrights. Moreover, online file distribution will not likely go away anytime soon. Contrary

⁹¹ Aimster Copyright Notice (visited May 4, 2001) <<http://www.aimster.com/copyright.phtml>>.

⁹² Aimster users share files only with those on their buddy lists, as opposed to the general public.

⁹³ See The Intel@ Philanthropic Peer-to-Peer Program (visited May 4, 2001) <<http://www.intel.com/cure/index.htm>> (an example of how P2P technology allows for the creation of a "virtual supercomputer" for cancer research).

⁹⁴ Gomes, supra, note 5.

to the opinion of the Ninth Circuit, however, not all Napster users want to freeload. A study by Jupiter Communications found Napster users more likely to increase music buying than non-users.⁹⁵ Those that have not increased music buying may have concerns about allegations by the U.S. Federal Trade Commission and, more recently, by the European Commission that the music industry has engaged in price-fixing of music compact discs.⁹⁶ Instead of trying to improve its public image, the music industry has attacked one of the most convenient methods of sampling music.⁹⁷ Basic business principles dictate that a business gains more customers over its competitors when it provides superior benefits for customers.⁹⁸ Thus, the music industry (and the movie industry, for that matter) could provide some superior benefits to its customers through one or a combination of lower prices, better quality,⁹⁹ more special features¹⁰⁰, or improved convenience.¹⁰¹ The music industry could also follow Bertelsmann's lead and actually help to develop Napster¹⁰² and P2P into a medium that would serve their interests and still make customers happy enough to pay money.¹⁰³ As for the future of file distribution on the legal front, Aimster's suit against the RIAA could well determine the direction of P2P as an industry. However, the power of sharing one's knowledge with the general public simply by launching a software application will continue to fuel development in online file-sharing technology.

⁹⁵ Lisa Bowman, Study: Napster boosts CD Sales (July 21, 2000)

<<http://www.zdnet.com/zdnn/stories/news/0,4586,2605961,00.html>>.

⁹⁶ Deborah Hargreaves, Brussels to probe CD pricing (Last modified January 26, 2001)

<<http://news.ft.com/ft/gx.cgi/ftc?pagename=View&c=Article&cid=FT3HA7NYEIC&tagid=ZZZU2IUKJ0C>>.

⁹⁷ After all, once a buyer has removed a music CD from its packaging, he can exchange it only for the same product. See, e.g., Returns Help (visited May 4, 2001) <http://www.towerrecords.com/help/returns_help.asp> (Tower Records spells out its retail store return policy).

⁹⁸ See, e.g., David Besanko et al., Economics of Strategy 99 (2nd ed. 2000).

⁹⁹ In other words, eliminate the argument that CDs contain only one or two good songs.

¹⁰⁰ Some CDs have "enhanced" features, such as music videos, available by putting the music CD in a computer.

¹⁰¹ The music industry could eliminate the space-shifting argument to some extent by providing MP3 files on the CD as a standard feature.

¹⁰² Assuming the record labels have not already supported Napster! See Benjamin Edwards, The Napster Theory (Sept. 1, 2000) <<http://www.users.bigpond.net.au/humour/napster.htm>> (humorous yet somewhat well-reasoned theory as to why the record labels may have created Napster themselves and the benefits derived).

¹⁰³ Studies suggest that Napster users would pay for a Napster subscription. See, e.g., Napster Users Majority on Campus (May 15, 2000) <<http://www.wired.com/news/culture/0,1284,36354,00.html>>.