THE EVOLUTION OF COPYRIGHT: NAPSTER AND THE CHALLENGES OF THE DIGITAL AGE

By

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The Napster case has created a frenzy of controversy and confusion. The Peer to Peer technology developed by Napster creator Shawn Fanning, has forced the courts, the legislature, corporations, and individuals to reconsider the use of the Internet. Peer to peer networks create new challenges for the application of copyright law. However, these challenges are not that different from those which copyright law has evolved to accommodate in the past.

Copyright law is intended to balance the interests of the creators and the public to promote the progress of science and useful arts. The premise behind copyright protection is to ensure that people continue creating, and that the public continues to enjoy those creations, through the mechanism of rewarding the creators with a temporary monopoly over their works. This balance of interests is fundamental to the interpretation of copyright law by the United States Congress and the Courts.

This thesis focuses on the application and interpretation of copyright law through a case study of the law in the United States, in particular the Napster case. Although it now appears that the Internet can be subject to some form of regulation with the aid of technological innovation to enforce the regulation, the Courts in the Napster case have misinterpreted the previous judicial consideration attributed to copyright law. In essence, the fundamental principle
of the balancing of interests has been lost. We are now left with an unequal balance in favor of large media conglomerates.

It can be argued that the media conglomerates have used Napster as an example of their power to control the technology of peer to peer networking as a model of distribution. Napster demonstrates that peer to peer is an effective way of sharing information with an extremely large amount of people. This has the music industry scared, resulting in their legal battle to shut down the Napster technology.

The claims of copyright misuse raise awareness of the need for regulation and a reassessment of copyright application in a digital age. There is a need for regulation. However, any attempts at further application of law and regulation to the Internet concerning copyright protection should consider the intent of the constitutional founders of the United States -- copyright law is intended to protect the interests of both the artists, and the public.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABSTRACT</td>
<td>ii</td>
</tr>
<tr>
<td>ACKNOWLEDGEMENTS</td>
<td>v</td>
</tr>
<tr>
<td>CHAPTER I -- INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>CHAPTER II -- TO PROMOTE THE PROGRESS OF SCIENCE AND USEFUL ARTS: THE EVOLUTION OF COPYRIGHT LAW</td>
<td>5</td>
</tr>
<tr>
<td>I. HISTORY</td>
<td>5</td>
</tr>
<tr>
<td>II. THE EVOLUTION OF COPYRIGHT LAW</td>
<td>9</td>
</tr>
<tr>
<td>III. THE P2P TECHNOLOGY</td>
<td>10</td>
</tr>
<tr>
<td>CHAPTER III -- COPYRIGHT LAW AND THE DIGITAL WORLD: NAPSTER AS AN EXAMPLE OF THE CHALLENGES OF APPLYING TRADITIONAL DOCTRINE</td>
<td>17</td>
</tr>
<tr>
<td>I. THE NAPSTER CASE - INTRODUCTION</td>
<td>17</td>
</tr>
<tr>
<td>II. THE NAPSTER CASE - BACKGROUND</td>
<td>18</td>
</tr>
<tr>
<td>III. INTERPRETATION OF COPYRIGHT LAW</td>
<td>22</td>
</tr>
<tr>
<td>IV. THE UNITED STATES COURT OF APPEALS</td>
<td>59</td>
</tr>
<tr>
<td>CHAPTER IV -- THE BALANCE OF INTERESTS: CONTROL OF TECHNOLOGY IN A DIGITAL WORLD</td>
<td>62</td>
</tr>
<tr>
<td>I. COPYRIGHT MISUSE</td>
<td>62</td>
</tr>
<tr>
<td>II. COMMERCIALIZATION</td>
<td>68</td>
</tr>
<tr>
<td>III. THE MUSIC INDUSTRY</td>
<td>74</td>
</tr>
<tr>
<td>CHAPTER V -- REGULATION: RESTORING THE BALANCE OF COMPETING INTERESTS</td>
<td>83</td>
</tr>
<tr>
<td>I. REGULATION</td>
<td>84</td>
</tr>
<tr>
<td>II. INTERNET REGULATION</td>
<td>92</td>
</tr>
<tr>
<td>III. THE EVOLUTION OF TECHNOLOGY</td>
<td>96</td>
</tr>
<tr>
<td>IV. CONCLUSION</td>
<td>99</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>101</td>
</tr>
</tbody>
</table>
I would like to acknowledge Professors Wes Pue and Ruth Buchanan for providing me with their insight and guidance. Their comments and enthusiasm was instrumental in the development of the content of this thesis. Special thanks to my family and friends, who provided me with immeasurable support and understanding throughout the entire process of writing this thesis, especially Nicole, Karim, Andrea, Monica, Jill and Doruk.
The Napster case provides an example of the application of copyright law to the Internet. Since the widespread use of the Internet began, the idea of application of law has been a point of contention. In particular, the protection of copyright has caused a lot of concerns about application and enforcement. The inherent characteristic of information transfer and replication threatens the protection of ideas and expressions. The advance of technology associated with Internet applications further complicated the application of copyright law to the realm of Cyberspace. The Peer to Peer (P2P) technology developed by Napster creator Shawn Fanning has created a sense of urgency surrounding the issue of Internet regulation.

The Napster judgement, A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 200), aff'd in part and rev'd in part, 239 F. 3d 1004 (9th Cir. 2001), successfully applied traditional copyright law of the United States to the Internet. The application of copyright doctrine, alongside the continued technological growth and development of the Internet, has enabled the application of law and the policing of copyright infringing file trading. However, despite the application of copyright to P2P, there is question about the interpretation of that law,
particularly questions surrounding the implications of its application with respect to the intent of copyright law and as envisioned by the United States constitution.

This thesis will argue that although copyright doctrine is being applied to Cyberspace, the original intent of copyright protection has been lost in the process. Copyright law in the United States is evolving. This thesis will focus on the law in the United States. This is primarily for the simple fact that the United States holds a strategic place in the development of the Internet, and the application of law to Cyberspace. The catalyst for the evolution of copyright is technological innovation. An examination of this evolution will show that copyright law has gone beyond the intent of its enactment. Through examination of the application of copyright law to P2P, in particular the interpretation of law by the court in the Napster case, this thesis will show that copyright protection has exceeded the original intent of United States copyright legislation.

By examining the issues raised in the Napster case it will be shown that copyright law has been successfully applied to Peer to Peer (P2P) technology, however the regulation and application of the law has created an imbalance of interests in favour of the large media conglomerate which hinders the public interest factor of copyright protection. The examination of the issues raised by Napster will demonstrate the evolution of copyright doctrine, in particular, by the attempt to apply the common law and statutory enactment's to meet the rapidly changing needs resulting from technological innovation and growth.
First this thesis will discuss the historical intent of copyright protection as intended by the inclusion of an intellectual property provision in the United States constitution.

Second, the Napster case will be examined in detail to demonstrate the evolving doctrine of copyright law. In particular the jurisprudence and legislative attempts of Congress will be discussed in relation to the attempt to meet the changing needs that technological innovation places on the application of copyright law.

Third, the concept of copyright misuse which is based on antitrust law, will be used to demonstrate the resulting imbalance of interests that has occurred from the application and enforcement of copyright law to the Internet. This has ultimately led to a constraint on the access to technology. Such a constraint hinders the public interest, which was intended to be an integral part of the balance which copyright law was enacted to protect.

Fourth, the issue of regulation will be explored. Clearly, there is a need for some kind of regulation to protect copyright interests in Cyberspace. However, the balance of interests that was envisioned by the constitutional provision protecting intellectual property rights needs to be achieved. There is a delicate balance of power that should be maintained to stimulate continued creative efforts and expressions of individuals. This is what copyright is intended to protect. The
current application and interpretation of copyright and the actions of Congress have led to the disruption of this balance. The application of copyright law to the digital realm calls for a new type of regulation, one that will mirror the original philosophy underpinning copyright protection.
I. HISTORY OF COPYRIGHT

The United States constitution contains a provision that explicitly protects Intellectual Property rights, vesting power in the federal government "[t]o promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries." 1

The introductory phrase "[t]o promote the progress of science and useful arts...", is the main explanation of the purpose of copyright. 2 The primary purpose of copyright is not to reward the author, but rather to secure "the general benefits derived by the public from the labors of authors." As interpreted in Mazer v. Stein 3, the purpose is

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way

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1 U.S. Const., art. I, § 8 cl. 8.
to advance public welfare through the talents of authors and inventors in "Science and useful Arts".

The grant to individual authors of the limited monopoly of copyright is founded on the dual premise that the public benefits from the creative activities of authors, and that copyright monopoly is a necessary condition for the full realization of such creative activities. Implicit in this rationale is the assumption that in the absence of such public benefit, the grant of a copyright monopoly to individuals would be unjustified. This reasoning is in line with the pervading public policy against according private economic monopolies in the absence of overriding countervailing considerations.4

The copyright system grants a limited, temporary monopoly to a specific individual. Copyright law embodies four democratic safeguards.5 A guarantee that all works will enter the public domain once the copyright term is expired. A collection of the purposes that consumers could consider "fair use", such as limited copying for education or research. The principle that after the "first sale" of a copyrighted item, the buyer could do whatever he or she wants with the item, except distribute unauthorized copies for profit. And the idea that copyright protects specific expressions of ideas, not the ideas themselves.

Copyright protection can be viewed as a bargain between the public and the creators. The creators get a limited monopoly for a short period of time, and the

4 Nimmer, supra note 1, at §1.03[A]
public gain access to those protected works and free use of the facts, data, and ideas within them. The protection of copyright stems from the concern that without the guarantee of a way to profit from creative work, too few people would actually embark on creative endeavors. However, creativity also depends on the use, criticism, supplementation, and consideration of previous works. Therefore, creators should enjoy a monopoly right just long enough to provide an incentive for more creation, but after the expiry of the term of the monopoly the work should be part of the "public domain", as common property.\(^6\)

The intent behind the first legislation dealing with copyright in the U.S. was to protect these creative interests, while balancing the idea of the public good, or the public interest. James Madison introduced the copyright and patent clause to the Constitution. Madison argued that copyright was one of those few acts of government in which the "public good fully coincides with the claims of individuals." The intent behind the inclusion of copyright in the Constitution was framed in terms of progress and learning, as well as literacy and the need for an informed citizenry.\(^7\)

"When President George Washington declared his support for the Copyright Act of 1790, he proclaimed that copyright would enrich political culture by "convincing those who are entrusted with public administration that every valuable end of government is best answered by the enlightened confidence of the public; and by teaching the people themselves to know and value their own rights; to discern and provide against invasions of them; to distinguish

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\(^6\) Vaidhavanathan, ibid.
\(^7\) Vaidhyanathan, ibid.
between oppression and the necessary exercise of lawful authority."

In consideration of the intent of the constitutional enactment, the Supreme Court has stated:

"The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."  

It is the task of Congress, as assigned by the Constitution, to define the scope of the limited monopoly that should be granted to authors or inventors in order to give the public appropriate access to their product. This task involves balancing the interests of the creators in the control and exploitation of their works, and the competing public interest of free flow of ideas, information, and commerce.

This balance was examined by the Judiciary Committee of the House of Representatives. In a report accompanying the revision of the Copyright Act in 1909 it stated:

"The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings...but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings..."

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9 Sony, at 429.
10 Sony, at 229.
11 H.R. Rep., No. 222, 60th Cong., 2d Sess., at 7 (1909)
The report then went on to provide Congress with some direction with respect to what must be considered when a copyright law is enacted.

"In enacting a copyright law Congress must consider...two questions: First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly."\(^{12}\)

The maintenance of this balance is key to providing copyright protection which is in the spirit of the Constitutional enactment protection "the progress of Science and useful Arts".\(^{13}\)

II. THE EVOLUTION OF COPYRIGHT LAW

Over the years copyright law has evolved through both case law and legislation. The need for copyright to evolve as a result of technology is not a new issue. The need for copyright protection stems from technological innovation.\(^{14}\) With the invention of the printing press we were first faced with the need to protect works as a result of the new technology allowing the more efficient and accessible reproduction of works.

\(^{12}\) H.R. Rep., ibid, at 7.
\(^{13}\) U.S. Cont. art. 1, supra, note 1.
\(^{14}\) For example, the development and marketing of player pianos and perforated rolls of music preceded the enactment of the Copyright Act of 1909; innovations in copying techniques gave rise to the statutory exemption for library copying embodied in §108 of the 1976 revision of copyright law; the development of the technology that made it possible to retransmit television programs by cable or by microwave systems, prompted the enactment of the complex provisions found in 17 U.S.C. § 111(d)(2)(b) and §111 (d)(5) (1982ed), see Sony, supra, note 8, at 430.
"Copyright protection became necessary with the invention of the printing press and had its early beginnings in the British censorship laws. The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other. Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammeled dissemination of ideas."\(^\text{15}\)

With this in mind, current technological advancements require that Copyright law be extended to the digital realm of the Internet. The law applied in the Napster case is evidence of the continuing evolution of common law and legislation to ensure copyright protection in light of new and challenging technological phenomena. However, as with the technological innovation of the past, the delicate balance between the copyright holder and the public must be maintained. The Napster decision illustrates, in my view that an imbalance of interests, in favour of the copyright holder has emerged.

III. THE P2P TECHNOLOGY

To understand the need for the application of copyright law to new media and the implications of such application, it is important to understand where the technological innovation came from and how P2P technology works. Generally, the interconnected quality of a P2P network allows speedy, high volume, sharing of files. These characteristics pose a challenge for copyright law in terms of both application and enforcement.

\(^{15}\) Sony, supra, note 8, at FN 12.
a) MP3

Technologies like Napster can be traced back to 1987, when the Moving Picture Experts Group set a standard file format for the storage of audio recordings in a digital format. This format is called MPEG-3, more commonly known today as MP3 files, which are created by "ripping". Ripping software provides the means to copy a compact disk (CD) directly onto a computer's hard drive. This process compresses the audio information on the CD into the MP3 format. An MP3 compressed format allows for easy and rapid transfer of the file from one computer to another through e-mail, file transfer protocol (FTP), and particularly P2P networks.

b) P2P

The Napster code is based on a P2P model. Napster is not the sole P2P model, there are many models, some more pure than others. The more pure the P2P model, the more difficult to control in terms of locating the infringer for the purpose of enforcement. In General, P2P technologies allow individual computer users to open their hard drives directly to one another, allowing others to search for and swap files between computers without recourse to more traditional Web databases and servers. The purity of the P2P network is related to how direct the connection between the computers sharing information is. Both Napster and
Gnutella will be described to illustrate the evolution of P2P technologies, and highlight the difficulties the technology has raised for application of law.

i. NAPSTER

*Background*

The Napster code was conceived and written by a 19-year-old named Shawn Fanning. Spawning from a discussion among his friends about the difficulty in finding MP3 files on the Internet, Fanning was hit with the idea of a P2P network that would eliminate the tedious search online to find large libraries of music. He dropped out of college and dedicated all of his time to the development of the Napster code. By combining the features of existing programs, which include instant messaging of Internet Relay Chat, the file sharing functions of Microsoft Windows and the advanced searching and filtering capabilities of various search engines he developed the Napster code.

*The Napster Technology*

Through the use of Napster's MusicShare software, users can make their MP3 files which are stored on their personal hard drives available to be searched and downloaded by other Napster users; and a Napster user can search and download files from other Napster users via the Internet. Napster provides
technical support for the indexing and searching of MP3 files through use of a central server. Also available to Napster users, through the Napster central server are chat rooms, where members can meet to discuss common interests and information about its service and special new artists program.

All that is needed to gain access to the Napster service, is to download the free MusicShare software onto a computer. When first using Napster, the user is required to provide a user name and password. It is also optional to provide information related to age, sex, and location. The user then has the option of selecting what files and directories to share with other Napster users. Napster users can select what directories and files to make available to the Napster community, a user may also select not to share any files or provide access to their hard drive to any other users. The MusicShare software searches the users library and verifies that the available files are properly formatted, if the files meet the necessary format requirements the names of those MP3 files are uploaded from the user's computer to the central Napster server. The actual content of the files remains on the user's computer, the only data that the Napster central server contains are the file names and names of the users. The users names and the names of their files become part of a collective directory which can then be searched by anyone using the Napster system. The collective directory is fluid, it tracks users who are connected in real time, displaying only file names which are immediately accessible.
A Napster user can locate MP3 files in two ways. The first is through the Napster search function. To search for a MP3 file available from other users currently connected to the Napster service, the user enters either the name of a song or an artist as the object of the search. This request is then transmitted to a Napster server, which compares the request to the collective directory listing. The Napster server then compiles a list of currently available MP3 files, which correspond with the search request, and transmits the list to the requesting user. The Napster server does not search the content of the file, it only performs a text search of the file names and index. The second search mechanism of the Napster system is through its hotlist function. A Napster user can select other users and add them to their "hotlist". When logged onto the Napster system, the user can see if those individuals on their hotlist are also logged onto the system. If the hotlist user is online, their particular library can be accessed, searched and downloaded from. Again, the Napster server only stores the names of the files, the contents of the hotlisted user's MP3 library are not stored on the Napster system.

To transfer a file, the Napster user clicks on the desired file and chooses to "download". The Napster server software obtains the Internet address of the requesting user and the Internet address of the user with the available files (the host user). The Napster server then communicate to hot users Internet address to the requesting user. The requesting user's computer uses this information to establish a connection with the host user and downloads a copy of the contents.
of the MP3 files from one computer to the other over the Internet. The downloaded file can then be accessed and listened to through the use of the Napster software play function, or through other software. The file can also be transferred onto an audio CD if the user has access to the equipment which is designed for that purpose, commonly referred to as a "burner". The quality of the sound recording is only slightly diminished as a result of the transferring between audio to digital to MP3 format.

ii. Gnutella

Background

Justin Frankel adopted the P2P technology of Gnutella from the Napster code. Frankel also wrote the original Winamp MP3 player under his company Nullsoft. Nullsoft was then taken over by America OnLine (AOL). While working at AOL, Frankel recognized Napster's success and briefly turned his mind to P2P technologies. He and a few fellow programmers created the original version of Gnutella, changing the Napster P2P code by removing the need for a central server. Soon after the initial development of Gnutella, AOL shut down the project, but by that time the Gnutella code was already spreading freely on the Internet. After the shut down of the Gnutella project by AOL, Gene Kan took over the development of the project. Kan developed a Unix version of the program,
and also created the first Gnutella portal, where developers could share information and individuals could download the software.

The Gnutella Technology

Gnutella is also a P2P technology, based on the Napster code. What makes Gnutella noteworthy for this discussion is the fact that Gnutella is a pure P2P network. The basic idea behind Gnutella is the same as Napster, to facilitate the trading and sharing of information among users through access to each user's hard drive. What makes the Gnutella service different is the fact that it does not use a central server.

The Gnutella software can be downloaded from the Internet for free. The software then provides the user with the means to search for files. Gnutella differs from Napster in how files are searched and located. When using Gnutella to locate a file, the user asks the network if a file exists through the software's search options. The request is then sent out to all the computers on the network. Each computer then seriates its internal drives and answers yes or no to the search request. When the desired file is found, the user then connects directly with the computer that contains the desired file. Thus, unlike Napster, the Gnutella software allows the searching and downloading of files without the use of a central server. This difference is very important with respect to the issue of locating and policing a P2P network.
III

COPYRIGHT LAW AND THE DIGITAL WORLD:
NAPSTER AS AN EXAMPLE OF THE CHALLENGES OF APPLYING
TRADITIONAL DOCTRINE

I. THE NAPSTER CASE - INTRODUCTION

The Napster case raises various issues dealing with the extension of law to P2P networks. I will illustrate that the application of law in the Napster case is the result of an ongoing evolution of copyright law, in both the common law and legislated law, towards a result that is inconsistent with the "balance" of individual rights and public rights intended by the U.S. founding fathers. Napster specifically deals with contributory infringement, vicarious copyright infringement, the defenses of fair use and substantial non-infringing use, the application of the Audio Home Recording Act, and the Digital Millennium Copyright Act. Each of these aspects of copyright law's application to P2P technologies will be discussed. While the law can be applied to the Internet, in my view, the regulation of the Internet through the application of law should be reconsidered.
II. THE NAPSTER CASE - BACKGROUND

a) the RIAA

The RIAA\textsuperscript{16} is accusing Napster of contributory and vicarious infringement of their copyrights. The joint motion for a preliminary injunction by the RIAA and the represented record companies\textsuperscript{17} can be framed by the following statement:

"Hundreds of thousands of copyrighted works owned by plaintiffs are being infringed - reproduced and distributed - every day by users of defendant Napster's system - infringements that Napster actively enables and encourages, and from which it directly benefits."\textsuperscript{18}

The RIAA claimed that Napster was created with the intent of facilitating unlawful copying of MP3 files.\textsuperscript{19} The RIAA also found, based on statistical analysis, that "every single Napster user sampled was engaged in some copyright infringement while using the Napster service."\textsuperscript{20} The economic value gained by the Napster service is found in its quantity of users. "Those millions of users are critical to

\textsuperscript{16} Mission Statement of the Recording Industry Association of America:
"The Recording Industry Association of America is the trade group that represents the U.S. recording industry. Our mission is to foster a business and legal climate that supports and promotes our members' creative and financial vitality. Our members are the record companies that comprise the most vibrant national music industry in the world. RIAA ® members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. In support of our mission, we work to protect intellectual property rights worldwide and the First Amendment rights of artists; conduct consumer, industry and technical research; and monitor and review -- state and federal laws, regulations and policies...." <http://www.riaa.com>


\textsuperscript{18} United States District Court, Northern District of California - San Francisco Division, Case No. C-99-5183 MHP, Notice of Joint Motion and Joint Motion of Plaintiffs for Preliminary Injunction; Memorandum of Points and Authorities, July 26, 2000 at 1.
Napster -- they form the backbone of Napster's business and translate directly into current economic value. They already have attracted many millions of dollars in investment to Napster.\textsuperscript{21} The plaintiffs claim that they are suffering from irreparable harm as a result of Napster's enormous popularity. The RIAA further claimed that Napster is attempting to usurp the plaintiff's ability to enter the online music market by giving away the plaintiff's property. Surveys conducted by the plaintiffs showed "that significant numbers of Napster users report buying fewer CDs as a result of their downloading the music for free on Napster."\textsuperscript{22} Also noted to be of importance by the RIAA and the plaintiff record companies is "a devaluing of music, as Napster teaches a generation of music consumers that artists and copyright owners do not deserve to be paid for their work, and that creative efforts are free for the taking."\textsuperscript{23}

b) Napster

The Napster response highlighted a number questions regarding how this technological advance should be treated by the law. The impact of the Napster code and P2P technologies are commented on, stating "Napster's one-to-one file sharing and Internet directory service has ignited a revolution. By enabling individual Internet users to access and share data, Napster empowers individuals rather than centralized institutions to distribute information...the whole Internet

\textsuperscript{19} Notice of Joint Motion of Plaintiffs, \textit{Ibid}, at 2.
\textsuperscript{20} Notice of Joint Motion of Plaintiffs, \textit{Ibid}, at 3.
\textsuperscript{21} Notice of Joint Motion of Plaintiffs, \textit{Ibid}, at 3.
\textsuperscript{22} Notice of Joint Motion of Plaintiffs, \textit{Ibid}, at 4. See Jay Report pp.3, 15-20
could be re-architected by Napster-like technology."^{24} This statement highlights some of the wider implications of the Napster case which will be explored in more detail in the following chapters.

Napster raised the issue that to be liable for either contributory or vicarious liability of copyright infringement, there must be primary infringers.^{25} For the plaintiffs to obtain injunctive relief, direct infringement must be shown.^{26} Napster argued that the Audio Home Recording Act, had been judicially interpreted to include the right of a consumer to create personal MP3 files. In the Diamond^{27} case, which will be discussed in more detail below, it was determined that "the purpose of [the] Act is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use...protects all noncommercial copying by consumers of digital and analog musical recordings."^{28} Napster also looked at the legislative history of the Audio Home Recording Act to determine the intent of congress and notes comments made by Senator DeConcini who stated "As new and improved technologies become available, such clarification in the law become more important."^{29} Napster also noted that the volume of copying has no bearing on the intent of the AHRA to protect users and allow copying and sharing for noncommercial users. "There is nothing in the language of the AHRA, or any precedent under it,  

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^{23} Notice of Joint Motion of Plaintiffs, Ibid, at 5.  
^{24} United States District Court, Northern District of California: San Francisco Division, Opposition of Defendant Napster, Inc. to Plaintiffs Motion for Preliminary Injunction, July 26,2000, at 1.  
^{25} Opposition of Defendant Napster, ibid, at 1.  
^{26} Opposition of Defendant Napster, ibid, at 5.  
^{27} RIAA v. Diamond Multimedia Sys., Inc.,(1999), 180 F. 3d 1072 (9th Cir.).  
^{28} Opposition of Defendant Napster, supra, note 24, at 5.
suggesting that consumers' noncommercial copying is permissible if only a few consumers do it.\textsuperscript{30}

Napster used the United States Supreme Court decision of \textit{Sony}\textsuperscript{31} to provide a defence to the claims of the RIAA and record company plaintiffs. Under the \textit{Sony} decision, "as long as a technology is capable of substantial non-infringing uses, a provider making a technology available cannot be liable for copyright infringement, even where it may have encouraged infringing uses and the technology may in fact have been used for infringing activity."\textsuperscript{32} Napster claimed that under the \textit{Sony} doctrine, "it is enough to show a single potential non-infringing use of social or commercial importance."\textsuperscript{33} Napster users can use Napster's software and services in ways that fall under the definition of "fair use"\textsuperscript{34}. Napster claimed that the basic fact that users of the Napster service are engaged in noncommercial activities "weighs strongly in favour of finding their

\begin{itemize}
\item \textsuperscript{29} Opposition of Defendant Napster, ibid, at 6.
\item \textsuperscript{30} Opposition of Defendant Napster, ibid, at 8.
\item \textsuperscript{31} \textit{Sony}, supra, note 8, addressed the sale of a video cassette recording device which was capable of recording copyright protected material. The U.S. Supreme Court held that there was no infringement by offering the device for sale because the product is widely used for legitimate, unobjectionable purposes.
\item \textsuperscript{32} Opposition of Defendant Napster, supra, note 24, at 8.
\item \textsuperscript{33} Opposition of Defendant Napster, ibid, at 9.
\item \textsuperscript{34} In the case of \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. 576 (1994) the court laid out the factors to be considered when determining fair use. These factors include:
\begin{enumerate}
\item the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose;
\item the nature of the copyrighted work;
\item the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
\item the effect of the use upon the potential market for or value of the copyrighted work.
\end{enumerate}
\end{itemize}
Examples of ways Napster can be used to constitute a fair use include space shifting and sampling.

III. INTERPRETATION OF COPYRIGHT LAW

The issues raised in the Napster case provide a framework to demonstrate the interpretation of copyright law with respect to new technologies. While it will be shown that copyright law is applicable to the Internet, I will argue that caution should be exercised in applying the law. Further, it is my position that the intent of copyright protection has been lost and misinterpreted in the Napster case and the subsequent action by the United States Congress.

The issues raised in Napster pertain to injunctive relief. This is important because the decision is not conclusive, however it is illustrative of the direction that the courts are taking when applying copyright doctrine to the Internet.

a) Primary Infringement

Napster raises the issue that to be liable for either contributory or vicarious liability of copyright infringement, there must be primary infringers. Napster argues that its users are not infringing copyright, that "noncommercial sharing of

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35 Opposition of Defendant Napster, supra, note 24 at 11.
36 Space shifting is the transfer of the content of a CD into MP3 format. It has been held in Diamond that space shifting of works already owned constitutes a fair use, calling it a "paradigmatic noncommercial use".
37 Sampling is simply the ability of a user to listen to a song through the use of Napster services prior to purchasing, or to aid in determining whether to purchase the CD, hence to "sample" the work.
music among individuals is common, legal, and accepted.”

For the plaintiffs to obtain injunctive relief, they must show that Napster users, by creating and sharing MP3 files, have engaged in direct infringement of the plaintiffs' copyright. This is an important factor, as without the direct infringer there can be no related liability. Direct liability by Napster users has wider implications for all individuals who use P2P technology for trading and sharing information. Thus, the decision that Napster users are directly liable for infringement can affect many Internet users.

The owner of a copyright has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

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38 Opposition of Defendant Napster, supra, note 24, at 1.
39 Opposition of Defendant Napster, ibid, at 5.
40 17 U.S.C. §106
When claiming infringement, there are two fundamental elements to the Plaintiffs case. There must be ownership of the copyright by the plaintiff and copying by the defendant.

Ownership breaks down into the following parts: (1) originality in the author; (2) copyrightability of the subject matter; (3) citizenship status of the author, such as to permit a claim of copyright; (4) compliance with applicable statutory formalities; and (5) if the plaintiff is not the author, a transfer of the rights or other relationship between the author and the plaintiff so as to constitute the plaintiff the valid copyright claimant.41

There is no doubt that the RIAA and other represented parties are the owners of copyright, as well it cannot be argued that Napster users are not copying the copyright protected works. However, it is questionable if this copying is actually infringing upon the plaintiff's copyrights.

With respect to the element of copying, there are two separate components which underlie proof of copying. First, there is the question of fact as to whether the defendant in creating its work, used the plaintiff's material as a model, template, or even inspiration. The second component is whether such copying is actionable, i.e. if the defendant's work is substantially similar to the plaintiffs work.42

41 Nimmer, supra, note 2, at ss13.01[A].
42 Nimmer, ibid, at §13.01[B]
The RIAA claims that there is no question as to the direct infringement of Napster users. Napster on the other hand claims that through the application of the defence of fair use, there is no direct copyright infringement by its users.

b) Fair Use

Napster relied heavily on the defence of fair use. An important factor to keep in mind is that Napster argued the defence of fair use on behalf of it users, the alleged direct infringers. There can be no third-party liability where the alleged direct infringers are engaged in fair use. The application of fair use by the court in Napster is evidence of the imbalance that has been created through the interpretation and re-interpretation of this defence. In particular, the challenge of applying law to technological innovation like P2P networks has created problems with the interpretation and subsequent application of the law. The intent of the constitutional foundation of copyright protection has been eroded and narrowed its application.

A fundamental factor of consideration is the fact that Napster facilitates the transfer and sharing of an extremely high volume. If the issue only occurred on a more individual level, i.e. friend A sending friend B a file, there would be no reason to write this thesis because the fair use doctrine would apply. However, the magnitude of the volume of sharing and transfers that takes place creates an issue, not drastically unlike any other issue that copyright law has had to adjust
to in the past, but new in the sense that it occurs at high speeds at an exponentially growing volume, and across borders, making it almost undetectable and impossible to enforce at an individual level. These inherent factors stemming from the characteristics of the Internet are what create difficulty in the expansion of traditional doctrine to the digital realm. The interpretation of the fair use doctrine in Napster demonstrates this difficulty.

i. Background

The defence of fair use was a common law defence, intended to allow the courts to avoid the application of copyright law in a way that would create an imbalance of rights. The fair use defence allows "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." The Copyright Act of 1976 expressed statutory recognition of the defence of fair use.

§ 107 Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --

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44 17 U.S.C. § 107
45 17 U.S.C. § 106 and 106A address the exclusive rights in copyrighted works, and the rights of certain authors to attribution and integrity, respectively.
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The legislative intent behind the enactment of the fair use provision was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." The House Report accompanying that amendment stated that the fair use doctrine is an "equitable rule of reason", and as such there is no real definition of the concept, thus each case raising the question of fair use must be decided on its own facts.

The Copyright Act lists a number of factors to be considered when assessing whether a particular use of a copyright protected work should be considered to be a fair use. Section 107 does not define fair use, it does not provide a rule that can be applied in the determination of whether a particular use is "fair". The reasons behind the provision of factors, rather than a strict rule or definition, are related to the need to maintain flexibility in the application of copyright law to particular situations. The factors contained in Section 107 are an example of

what should be considered when determining fair use, the factors listed are preceded by the words "shall include", and the use of the term "including" is defined in §101 as "illustrative and not limitative".48 These factors are not exhaustive.49 In *Campbell v. Acuff-Rose Music, Inc.*50 the court reiterates the factors to be considered as stated in §107 and further explains that these factors are "to be explored, and the results weighed together, in light of the purposes of copyright".51 With respect to the factor of "purpose and character of use", Napster submits that the "non-commercial nature of Napster's users' activities weighs strongly in favor of a finding their use is fair."52

ii. Interpretation

The fair use provision has been interpreted by the court to include "space shifting" and "sampling". Space shifting is the transfer of the content of a CD into MP3 format. Sampling, is the ability of a user to listen to a song through the use of Napster services prior to purchasing, or to aid in determining whether to purchase the CD, hence to "sample" the work. The Ninth Circuit has held that space shifting or works already owned constitutes a fair use, as such use is "paradigmatic noncommercial personal use".53

48 Nimmer, at § 13.05[A]. 17 U.S.C. §101 states that the terms "including" and "such as" are illustrative and limitative.
49 *Castle Rock Enter. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998)
50 *Campbell*, supra, note 34.
51 *Campbell*, ibid, at 578.
52 Opposition of Defendant Napster, supra, note 24, at 11.
The court rejected Napster's argument that its users are engaging in fair use on the basis that it is noncommercial personal use. Beezer J, for the 9th Circuit Court of Appeal stated that "direct economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use." The court relied on Worldwide Church of God v. Philadelphia Church of God, where it was held that a church that copied religious text for its members "unquestionably profit[ed]" from the unauthorized "distribution and use of [the text] without having to account to the copyright holder." The Napster court further stated that "commercial use is demonstrated by showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies."

There is evidence that the conclusion of the 9th circuit court is questionable. The P2P service for many users is a method to explore and gain access to new genres and niches of music. On this basis it does perform a "sampling" service, where users can listen, explore, and then determine whether they would like to purchase the CD. In defence, Napster argued that the increase in copying to MP3 format is a sign of the displacement of the use of the audio cassette for the same purposes. Napster also found in its surveys that those who space shift by

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53 Diamond, supra, note 27, at 1079.
55 Worldwide Church of God v. Philadelphia Church of God, 222 F. 3d 1110, 1118 (9th Cir. 2000)
56 Napster, supra, note 54, at para 24.
using Napster buy as much or more music than previously.\textsuperscript{57} With respect to the use of Napster for sample songs, Napster claimed that such a use is analogous to visiting a listening station or borrowing a CD from a friend, to decide whether to purchase. There is evidence that this does in fact occur, "[o]ver 84 % of Napster users report downloading music files to see if they want to buy the work."\textsuperscript{58}

c) The Sony Doctrine

A key judicial interpretation of copyright law and its application to new technology is \textit{Sony Corp. of America v. Universal Studios}.\textsuperscript{59} The \textit{Sony} case is instrumental to my discussion of the protection of copyright in a digital age. \textit{Sony} dealt with many of the same issues which the Napster case did. It provides a good example of the extension of copyright principles to a new technology, which at the onset seems to be a major impediment to the protection of copyrights, but in turn develops a new area of commerce as well as the ability of the public to enjoy the copyright protected works.

The \textit{Sony} Court explicitly interpreted copyright law to maintain the delicate balance between the monopoly right that copyright grants to the holder, and the intent of that protection to be in the public interest. This line of reasoning should have also been a fundamental consideration in the Napster case. \textit{Sony} is the

\textsuperscript{57} Opposition of Defendant Napster, supra, note 24, at 12.
\textsuperscript{58} Opposition of Defendant Napster, ibid, at 13.
first major judicial decision addressing the challenges which technology places on the law. At its most simplistic, the Supreme Court of the United States in *Sony* held that the sale of home videotape recorders do not constitute contributory infringement of television program copyrights.

In *Sony*, Universal Studios brought action against Sony Corporation alleging that some individuals had used the Betamax video tape recorder to record some of its copyrighted works which had been exhibited on commercially sponsored television. Universal Studios contended that these individuals had infringed their copyright. Furthermore, Universal Studios maintained that Sony Corp. was liable for copyright infringement allegedly committed by Betamax consumers because of the marketing of the Betamax. There was no relief sought against any of the Betamax consumers, instead damages and equitable accounting of profits from Sony Corp., as well as an injunction against the manufacture and marketing of the Betamax was sought.

After reviewing the law on contributory and vicarious infringement of copyright, the Supreme Court in *Sony*, looked to Patent law for an analogy and extended the "staple article of commerce doctrine" to copyright law, and defined "fair use". The Patent Act expressly defines the concept of infringement and the concept of contributory infringement. With respect to contributory infringement, it is confined to the knowledge of a sale of a component especially made for use in connection with a product that might be used in connection with other patents.

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59 *Sony*, supra, note 8.
The Act also expressly provides that the sale of a "staple article or commodity of commerce suitable for substantial noninfringing use" is not contributory infringement.\textsuperscript{60}

The staple article of commerce doctrine directs that when there is a charge of contributory infringement based entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, it may be in the public interest to have access to that article of commerce. A finding of contributory infringement would give the patentee effective control over the sale of that item, effectively holding that the disputed article is within the monopoly granted to the patentee.\textsuperscript{61}

Thus, contributory infringement cases dealing with patents have always been cautiously approached by the court to ensure that the patentee does not extend his or her monopoly beyond the limits of the rights granted by the patent.\textsuperscript{62}

With respect to the application of the article of commerce doctrine and copyright law the court stated:

\begin{quote}
We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective -- not merely symbolic -- protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other
\end{quote}

\textsuperscript{60} 35 U.S.C. §271(c).
\textsuperscript{61} Sony, supra, note 8, at 441.
\textsuperscript{62} Sony, ibid., at 441.
articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.  

The court then found that the potential use of the Betamax for private, noncommercial "time shifting" in the home, satisfied the substantial noninfringing use required for the article of commerce doctrine. "It does so both (A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court's factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use."  

The inclusion of the market as a factor in determining fair use is recognition of the intent of copyright to create incentives for creative effort. The noncommercial use of a work that is copyright protected may have the effect of impairing the holder of the copyright from the rewards that are intended by such protection. However, "a use that has no demonstrable effect upon the potential market, for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit."  

With respect to Napster, this issue is debatable. On the individual level of the Napster user, the downloading of a song does not seem to result in a commercial

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63 Sony, ibid., at 442.
64 Sony, ibid., at 442.
65 Sony, ibid., at 450-451.
use of the P2P network. However, when there are 60 million users downloading MP3 files, there may be commercial interests to consider. Although this is the case, when considering the fair use defence, the question to be addressed is that of the individual user because it is the individual user who must be liable for primary infringement to give way to the ability to argue third party liability. At the individual level, the argument of commercial interests is difficult to rationalize.

When determining fair use the need to balance the interests at play is a key factor. "Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative."\textsuperscript{66} The use of the Betamax to copy a program may have productive and unproductive uses and effects. One to be considered is the use of the Betamax for time shifting, which may result in a benefit of increased viewer access.

The \textit{Sony} case is a good example of the application of the Copyright Act to a new technology through consideration of the intent of copyright protection and its subsequent interpretation through statute and case law. In \textit{Sony} the court applied doctrine to the new technology of the video cassette recorder in a way that the interests at play remained balanced alongside the public interest in technological innovation. This type of reasoning is consistent with the application

\textsuperscript{66} \textit{Sony}, ibid., at 455.
of copyright to protect and balance the interests of the creator and the public, and should have been followed in the Napster case.

d) Interpretation by the Court in Napster

The District Court rejected the examples of fair use provided in defence by Napster. "The court finds that space shifting accounts for a de minimis portion of Napster use and is not a significant aspect of defendant's business." The Court found that, as a result of Napster CD purchases among college students are likely to decline. The Court considered the evidence submitted by Napster that CD sales actually increase to be unreliable. There was conflicting evidence produced by Napster and the RIAA to demonstrate the effect of Napster on the market. Research was performed by a number of professionals, and the Court placed more faith on the RIAA research. It may be true that CD purchases among college students are likely to decrease. However a number other factors should also be considered. The fact CD purchases are declining cannot wholly be attributed to Napster. When assessing consumer choices, other issues like quality, trends, and economics must also be considered.

Further, this reasoning diverges from that established by the Supreme Court in Sony. An analogy can be made with Napster and the Betamax, in terms of the fundamental characteristics that the new technology possesses and the

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67 Sony, ibid., at 7.
68 Sony, ibid., at 15.
challenge that they pose. In Sony the court looked beyond the immediate effects of the technology to see the possible long-term benefits that the technology could bring to both copyright holders and consumers. If Sony had been decided in reverse, the VCR and the video industry may have been non existent. The technology that Universal Studios attempted to quash turned into a fundamental source of capital. Napster should be regarded in the same way.

The Court also makes reference to the fact that the plaintiffs are vulnerable to Napster in that it has the intention of entering into the digital download market, and that downloading on Napster may also disrupt the plaintiffs' promotional efforts because it does not involve any restrictions.\textsuperscript{69} In some respects this is recognition by the Court of the potential for P2P technology to open new markets for distribution and consumption. However, the effect of the decision restricts who can participate in the new market, creating an imbalance of interests and competition. These interests will be discussed in depth in the following chapter.

e) Third Party Liability - Contributory and Vicarious Infringement

The RIAA maintained that the law of contributory and vicarious infringement was just as applicable to Napster as it is to any other company, "and the mere fact that [infringement is] clothed in the exotic webbing of the Internet does not disguise its illegality."\textsuperscript{70} The Internet creates an environment that is constantly

\textsuperscript{69}Sony, ibid, at 16-17.
\textsuperscript{70}Joint Motion of Plaintiffs, supra, note 18, at 4.
changing and uncertain, the application of third party liability to Napster raises concerns of the over extension of liability.

Background

When the Copyright Act was legislated into existence, there was no provision dealing with contributory infringement. Contributory infringement arises from the intent of Congress to allow copyright to be influenced by the parallel field of patent law. The Supreme Court in Sony states:

The absence of such express language in copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.

The Patent Act expressly defines the concept of infringement and the concept of contributory infringement. The concept of contributory infringement is confined to the knowledge of a sale of a component especially made for use in connection with a product that might be used in connection with other patents.

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71 Sony, supra, note 8, at 435.
72 Sony, ibid, at 435.
Contributory Infringement

There are two types of contributory infringement. First, personal conduct that forms part of or furthers the infringement, and second, contribution of machinery or goods that provide the means to infringe.

1. participation in the infringement

A party "who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer'".\textsuperscript{73} Thus, if there is knowledge that the work in question constitutes an infringement, then one who causes another to infringe will himself be liable as an infringer.\textsuperscript{74} A contributory infringer has been described by the Supreme Court as one who "was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner."\textsuperscript{75}

2. providing the means to infringe

Generally, one who provides a copyrighted work to another, who then wrongfully copies from that work may be liable as a contributory infringer. However, if

\textsuperscript{73} Gershwin Publishing Corp. v. Columbia Artists Management, Inc., (1971), 443 F.2d 1159 at 1162 (2\textsuperscript{nd} Cir.).

\textsuperscript{74} Nimmer, supra, note 2, at §12.04[A][2].

\textsuperscript{75} Sony, supra, note 8, at 437.
during this process there was a lack of knowledge regarding the other party's intended illegitimate use there may be no liability.\textsuperscript{76}

\textit{Sony}

The issue of contributory infringement was important in \textit{Sony}, because if the plaintiffs had been successful in their claim that off-the-air video taping for private use constituted copyright infringement, the monumental problems of enforcement against individual home users would have rendered such a decision largely meaningless, unless the manufacturers and sellers of the machines and tapes required to engage in such home taping were held liable as contributory infringers.\textsuperscript{77}

\textit{Vicarious Liability}

Vicarious liability exists when two elements are present. First, the defendant must possess the right and ability to supervise the infringing conduct. Second, that defendant must have "an obvious and direct financial interest in the exploitation of copyrighted materials". These two elements are independent of one another and must be demonstrated to render the defendant vicariously liable.\textsuperscript{78}

\textsuperscript{76} Nimmer, supra, note 2, at §12.04[A][2][b].
\textsuperscript{77} Nimmer, supra, note 2, at §12.04[A][2][b].
The reasoning behind the provision for vicarious liability arises from the context of landlords of premises where infringement takes place. The House Report from the 1909 enactment explains the codification of that case law:

The committee has considered and rejected an amendment to this section intended to exempt the proprietors of an establishment, such as a ballroom or night club, from liability for copyright infringement committed by an independent contractor, such as an orchestra leader. A well-established principle of copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers. To be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefit from the infringing performance. The committee has decided that no justification exists for changing existing law, and causing a significant erosion of the public performing right.  

With respect to the claims that Sony was liable for contributory and vicarious copyright infringement, the Supreme Court found no basis for such allegations. A "contributory infringer" must be in a position to control the use of the copyrighted works by others. "The only contact between Sony and the users of the Betamax that is disclosed by this record occurred at the moment of sale". If Sony were to be held liable for vicarious infringement it would have to be on the basis that "it sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted

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78 Nimmer, ibid, at §12.04[A][1].
79 H. Rep., pp 159-60.
80 Sony, supra, note 8, at 437.
material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory.  

After reviewing the law on contributory and vicarious infringement of copyright, the Supreme Court in Sony, looks to Patent law for an analogy. The Patent Act expressly defines the concept of infringement and the concept of contributory infringement. With respect to contributory infringement, it is confined to the knowledge of a sale of a component especially made for use in connection with a product that might be used in connection with other patents. The Act also expressly provides that the sale of a "staple article or commodity of commerce suitable for substantial noninfringing use" is not contributory infringement.

The staple article of commerce doctrine directs that when there is a charge of contributory infringement based entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, it may be in the public interest to have access to that article of commerce. A finding of contributory infringement would give the patentee effective control over the sale of that item, effectively holding that the disputed article is within the monopoly granted to the patentee. Thus, contributory infringement cases dealing with patents have always been cautiously approached by the court to ensure that the patentee does not extend his or her monopoly beyond the limits of the rights granted by the patent.

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81 Sony, ibid, at 439.
82 35 U.S.C. §271(c).
83 Sony, supra, note 8, at 441.
84 Sony, ibid., at 441.
With respect to the application of the article of commerce doctrine and copyright law the court stated:

We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective -- not merely symbolic -- protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.\(^85\)

**Contributory Infringement and Napster**

In response to the plaintiffs' claims of contributory infringement, Napster stated that the law did not apply.

"The law is clear that merely providing a one-to-one file sharing technology with a real-time searchable index does not constitute third-part infringement. If this were infringement, then an ISP could be found liable simply for permitting users to search for and transfer files, where the ISP was shown to have an generalized knowledge that many of those works may be copyrighted."\(^86\)

Napster claimed that it had no specific knowledge that any particular use of a file through its system was unauthorized.

\(^{85}\) *Sony*, ibid., at 442.  
\(^{86}\) Opposition of Defendant Napster, supra, note 24, at 16.
"Napster cannot know, any more than a photocopier or video recorder manufacturer, which uses of its system are fair or not." Even apart from fair use, Napster cannot know the copyright status of users' files... song titles cannot be used to distinguish authorized files from others because many song titles are used by multiple artists or... there may be multiple copies of the same work -- some may be authorized to be shared and others not."\(^87\)

Napster further argued that for contributory infringement to be found there is a requirement of substantial participation in a specific direct infringement. Napster recognized that "substantial participation might exist if Napster were given actual notice and failed to take remedial action... but every time Napster has received actual notice of infringement at a specified location, Napster has blocked the conduct by terminating the user account."\(^88\)

The claim of Napster having knowledge of the copyright infringements of its users was centered in the fact that "Napster users overwhelmingly use Napster to engage in music piracy, and very little else."\(^89\) A study performed by Professor Ingram Olkin\(^90\) found that "every single Napster user sampled was offering at least some pirated music for others to download" and that "over 87% of the files actually selected for downloading by Napster users have been conclusively confirmed to be infringing."\(^91\) The plaintiffs claimed that these facts were not new

\(^{87}\) Opposition of Defendant Napster, ibid, at 18-19.
\(^{88}\) Opposition of Defendant Napster, ibid, at 19.
\(^{89}\) Opposition of Defendant Napster, ibid, at 8.
\(^{90}\) Professor Ingrma Olkin is a Professor of Statistics and Education, and the past Chair of the Department of Statistics, at Stanford University, he was commissioned by the plaintiffs to design a statistical methodology where he could reliably estimate the level and proportion of infringements on Napster. Two questions were sought to be answered: 1) what percentage of Napster users are engaged in some level of music piracy while logged onto Napster 2) what percentage of the MP3 music files actually being downloaded by Napster users are infringing? See Opposition of Defendant Napster, ibid, at 9.
\(^{91}\) Opposition of Defendant Napster, ibid, at 9.
to Napster. Shawn Fanning, the Napster creator testified that the primary reason for developing the Napster code was to "put an end to the frustration of his college roommate in finding and downloading MP3 music files." This position is further reaffirmed in documentation of the development of the Napster business plan through statements made by Napster co-founder Sean Parker writing to co-founder John Fanning. The document specifically stated that "Users will understand that they are improving their experience by providing information about their tastes without linking that information to a name or address or other sensitive data that might endanger them (especially since they are exchanging pirated music)."

The claim of Napster having knowledge of the infringing activity which occurs through the use of its service is further supported by the plaintiffs through claims that Napster executives have used the service themselves to download pirated music. Furthermore, during an e-mail exchange between Napster co-founder Shawn Fanning and one of Napster's chat room moderators comments were made about admitting knowledge of "illegal" MP3 files being transferred through the use of Napster. Specifically, after one Napster moderator wrote to a user referring to Napster being about "free music", another moderator sent an e-mail to Shawn Fanning asking him what was the most appropriate thing to do. The e-mail stated "admitting that we know Napster is used for the transfer of illegal MP3 files might not be the best thing to do.... I mean...obviously people are going to

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92 Opposition of Defendant Napster, ibid, at 9.
93 Opposition of Defendant Napster, ibid, at 10.
use it for that purpose...but ... we might not want to actually say we know that..."shrug" just semantics I guess...but eh.... being sued can be a bitch..." In response Shawn Fanning replied that it was a good point that moderators should "try to avoid discussions similar to this....you should all be aware of what you say".95

The plaintiffs also submitted that Napster materially contributed to the infringements that occur on its system. "Napster provides the location, environment, and support (including software, servers, indexing, search functions, moderators, and staff) that enable users to access each others' computer hard drives so that the infringements can take place."96 This argument follows the line of reasoning that without the Napster support and software, the infringements would not occur. Napster provides the means of which these widespread infringements can occur.

Vicarious Liability and Napster

With respect to the Plaintiffs claims that Napster is vicariously liable for copyright infringement of its users (if it is considered to be an infringement), it was argued that both the right and the ability to control the infringing activity and a direct financial interest in the infringing activities must be found. Napster defended itself by stating that it was unable to actually control what goes on through the

94 Opposition of Defendant Napster, ibid, at 13.
95 Opposition of Defendant Napster, ibid, at 13-14.
use of its service. "The control issue turns on whether Napster can identify and prevent particular instances of infringement in its service. The answer is clearly no. As an initial matter, Napster can not have known the use to which a shared file is put, and thus cannot control whether a use is fair or not. On this basis alone, Napster cannot control and distinguish between legal or illegal user conduct."  

Napster also used a comparison between its service and that of an ISP, stating that "an ISP has no affirmative duty to police its users, and cannot be expected to monitor individual users until put on notice by the copyright holder of particular alleged infringing materials." Thus, asking Napster to supervise and police its service to exclude every copyrighted file where authorization has not been given would be impossible. "Napster cannot identify all the copyrighted music in the universe. Indeed, Plaintiffs cannot even identify the works in which they claim rights, and have refused, despite repeated requests, to give Napster a list of those recordings." In sum, Napster stated that "were Napster or any other ISP required affirmatively to identify and exclude all copyrighted materials, there could be no file sharing, and indeed, no World Wide Web."  

97 Opposition of Defendant Napster, ibid, at 16.  
98 Opposition of Defendant Napster, ibid, at 20.  
99 Opposition of Defendant Napster, ibid, at 20.  
100 Opposition of Defendant Napster, ibid, at 21. The Plaintiffs needed two teams of over 50 people and thousands of hours just to determine the status of 1150 works they selected at random from Napster. The Plaintiffs also admitted that they failed to reach closure on 10 percent of those songs, and there were some errors on others. In determining copyrights in sound recordings it is tricky, detailed, and individualized. More importantly, there are millions of MP3 files -- no 1150 -- shared on Napster.  
101 Opposition of Defendant Napster, ibid, at 21.
Vicarious Liability consists of two elements. The first requires that there be a direct financial interest in the occurrence of these infringing activities. The second requires that there is a right and ability to supervise the infringing activity.

The plaintiffs claimed that Napster had a direct financial interest, and benefits economically from the infringing activities of its service. "It already has translated into a cash infusion of over $13 million from venture capital...Napster's current value (even with this lawsuit pending) has been pegged at figures ranging from $60-80 million to $150 million." What makes this claim even more interesting is the fact that as of the date the case was heard, Napster had not earned revenues. The RIAA claimed that this fact is irrelevant because of Napster's decision to focus on new user acquisition which in turn would bring in future revenues, as well as the fact that Napster has been pursing ideas of how to turn Napster into a money maker. Thus, "with essentially every Napster user engaged in music piracy while on Napster, Napster's current value, and future plans for exploiting its user base, are directly -- indeed, solely -- attributable to the infringement of plaintiffs' music that it enables and encourages."

The plaintiffs submitted that Napster has both the right and ability to supervise its users to determine if infringements are taking place and to take appropriate action to stop the infringing activity from occurring. Napster specifically reserves

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101 Opposition of Defendant Napster, ibid, at 18.
"the right to refuse service and terminate accounts in their discretion, including, but not limited to, if Napster believes that user conduct violates applicable law or is harmful to the interests of Napster, its affiliates, or other users, or for any other reason in Napster's sole discretion, with or without cause."\textsuperscript{104} Napster has in fact terminated users and the power to discipline users is also given by Napster to its moderators, who screen messages and decide which ones to pass on to other members. This argument is further developed through the standard that where a defendant is in a position to police infringing conduct, the failure to do so gives rise to vicarious liability.\textsuperscript{105}

\textit{Court Interpretation}

An injunction may be granted to a party who demonstrates either probable success on the merits and the possibility of irreparable harm, or that there are serious questions of hardship and that hardship tips in the favour of the party seeking the injunction. The District Court found that there was prima facie case of direct infringement of copyright by users of the Napster software and system, opening Napster to the possibility of being held liable for both contributory as well as vicarious infringement of the plaintiffs' copyrights. The District Court rejected all defences put forth by Napster.

\textsuperscript{103} Opposition of Defendant Napster, Ibid, at 20.
\textsuperscript{104} Opposition of Defendant Napster, ibid, at 20-21, clause required by users to agree to upon becoming a member of the Napster community.
\textsuperscript{105} Opposition of Defendant Napster, ibid, at 21.
With respect to claims of contributory infringement the District Court found that

"any potential non-infringing use of the Napster service is minimal or connected to the infringing activity...the substantial or commercially significant use of the service was, and continues to be, the unauthorized downloading and uploading of popular music, most of which is copyrighted."\(^\text{106}\)

The District Court held that Napster did indeed have knowledge of the infringing activity, and distinguished the Napster service from an ISP, leaving Napster with little possibility of defence. However, the 9\(^{th}\) Circuit Court of Appeal, corrected the reasoning of the District Court in part. The 9\(^{th}\) Circuit stated

"...absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. To enjoin simply because a computer network allows for infringing use would, in our opinion, violate Sony and potentially restrict activity unrelated to infringing use. We nevertheless conclude that sufficient knowledge exists to impose contributory liability when linked to demonstrated infringing use of the Napster system".\(^\text{107}\)

Thus, the injunction was modified. The modification will be discussed below.

In reference to vicarious copyright infringement the District Court found that Napster has a direct financial interest in the infringing activity through its intent to make money off the service in the future. It was also found that Napster has the right and ability to supervise the infringing activity.\(^\text{108}\) Thus, the District Court found that "because plaintiffs have shown a reasonable likelihood of success on the merits of their contributory and vicarious copyright infringement claims, they

\(^{106}\) Opposition of Defendant Napster, ibid, at 18.
\(^{107}\) Napster, supra, note 54, at para. 51.
\(^{108}\) Napster, ibid, at 31.
are entitled to a presumption of irreparable harm."\textsuperscript{109} The preliminary injunction was granted to the plaintiffs. Specifically the District Court stated that the

"Defendant is hereby preliminarily ENJOINED 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."\textsuperscript{110}

After this decision came down, Napster filed successfully for a stay while waiting for appeal.

The effect of this injunction would shut down the Napster service. It can be argued that the enforcement of the injunction would in effect establish a precedent that would shut down the use of any P2P type service or network. In my view, the effect of the reasoning in the District Court is inconsistent with the balance of copyright interests. By protecting the monopoly rights of the RIAA, a technology is being controlled to the detriment of the public interest. It is noted that the injunction granted by the District Court was deemed to be too narrow on appeal, however the effect of the injunction is ultimately the same.

\textbf{f) The AHRA}

Through case law, Napster argued that the AHRA has been interpreted to include the right of a consumer to create personal MP3 files. In the \textit{Diamond}\textsuperscript{111} case it was determined that "the purpose of [the] Act is to ensure the right of

\begin{flushleft}
\textsuperscript{109} Napster, ibid, at 38.
\textsuperscript{110} Napster, ibid, at 39.
\end{flushleft}
consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use...protects all noncommercial copying by consumers of digital and analog musical recordings."\textsuperscript{112} Napster also looked at the legislative history of the AHRA to determine the intent of congress and notes comments made by Senator DeConcini who stated "As new and improved technologies become available, such clarification in the law become more important."\textsuperscript{113} Napster also noted that the volume of copying has no bearing on the intent of the AHRA to protect users and allow copying and sharing for noncommercial users. "There is nothing in the language of the AHRA, or any precedent under it, suggesting that consumers' noncommercial copying is permissible if only a few consumers do it."\textsuperscript{114}

The \textit{Sony} decision provided the catalyst for the reconsideration and interpretation of copyright by Congress, leading to the enactment of the Audio Home Recording Act of 1992, (AHRA)\textsuperscript{115} which was added as Chapter 10 to Title 17. The \textit{Sony} case was evidence of the need for Congress to address the changing needs of copyright in light of technology.

The basic methodology that the AHRA was founded upon is to provide "an equitable solution that promises everyone a share in the benefits of the digital

\textsuperscript{111} Diamond, supra, note 27.
\textsuperscript{112} Diamond, ibid, at 5.
\textsuperscript{113} Diamond, ibid, at 6.
\textsuperscript{114} Diamond, ibid, at 8.
audio revolution".116 It applies to all technologies, such as Digital audio Tape, Digital Compact Cassettes, and Mini-Discs.117 The central purpose of the AHRA is to resolve this debate [over home copying], by creating an atmosphere of certainty to pave the way for the development and availability to consumers of new digital recording technologies and new musical recordings.118

The AHRA achieves three goals. First, it allows manufactures to sell digital audio recorders and audiophiles to use them for home taping, subject to regulated boundaries. In general, the law implements a copying control system that allows the original works to be copied without limit but prevents copying of copies. Second, the AHRA compensates the affected parties for revenue they might lose due to home taping, it estimates funds to which manufactures and importers of digital audio recorders and tapes must contribute, and that will be distributed to recording artists and copyright owners. Third, it affords immunity to home tapers who make copies without direct or indirect commercial motivation. This immunity applies to both digital and analog recordings.119

The AHRA comes from a history of debate and question about the status of home taping for private use. This question was particularly concerned with whether home copying implicates the copyright owner's reproduction right and whether such copying is defensible as fair use.

119 Nimmer, supra, note 2, at § 8B.01[C].
The legislative intent behind the 1976 amendment to the Copyright Act, and the inclusion of the common law defence of fair use in the statute provides the basis on which the Sony case was determined, as well as the enactment of the AHRA. The House Report contained the following:

In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.\textsuperscript{120}

i. Interpretation of the AHRA by the Court

In \textit{RIAA v. Diamond Multimedia Systems Inc.}, 180 F. 3d 1072 (9\textsuperscript{th} Cir. 1999), it was determined that the purpose of the AHRA is "to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, non commercial use...protects all noncommercial copying by consumers of digital and analog musical recordings."\textsuperscript{121} This reasoning is consistent with the intent of copyright protection. In \textit{Diamond}, the appellants brought an action to enjoin the manufacture and distribution of a device, alleging that it did not meet the requirements for digital audio recording devices under the

\begin{footnotesize}
\textsuperscript{120} H.R. Rep. No. 487, 92d Cong., 1\textsuperscript{st} Sess. 7.
\textsuperscript{121} \textit{Diamond}, supra, note 27, at 1079.
\end{footnotesize}
AHRA. The appellants also sought payment of the royalties owned by the appellee as the manufacturer and distributor of the device. The court held that because the device could not make copies from the transmissions, but instead, could only make copies from a computer hard drive, it was not a digital audio recording device and therefore not within the ambit of the Act.

The defendants in *Diamond* manufactured and distributed a device called the Rio. Rio could store approximately one hour of digital music on its flash memory card where digital audio files can be downloaded and played. The actual device could not make duplicates of any digital audio file it stores, nor could it transfer or upload a file to a computer or the Internet.

The RIAA brought suit on the basis that the manufacture and distribution of the Rio did not meet the requirements under the AHRA because it does not employ a Serial Copyright Management System (SCMS), which receives, sends, and acts upon information about the generation and copyright status of the files it plays. (see §1001) The RIAA also sought payment of royalties owed by Diamond as the manufacturer and distributor of a digital audio recording device. (ss 1003).

The *Diamond* decision is instrumental in setting the standard and the basis for the interpretation and application of the AHRA. The Court provided reasoning to establish that under the circumstances the Rio is not a "digital audio recording
device" under the Act. A "digital audio recording device" is defined by the AHRA §1001(3) as:

Any machine or device or a type commonly distributed to individuals for use by individuals, whether or not included with or part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use...

A "digital audio copied recording" is defined as" in §1001(1) of the AHRA:

A reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission

A "digital musical recording" is defined in §1001(5)(a) of the AHRA:

A material object

(i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and

(ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Thus, to be a digital audio recording device, the Rio must be able to reproduce, either "directly" or "from a transmission", a "digital music recording."\(^{122}\)

The court determined, through comparison of the Rio to a computer hard drive, that the Rio is not a recording device under the AHRA.

"[A] hard drive is a material object in which one or more programs are fixed; thus, a hard drive is excluded from the definition of digital music recordings. This provides confirmation that the Rio does not record "directly" from "digital music recordings", and therefore could

\(^{122}\) Diamond, supra, note 27 at 1076.
not be a digital audio recording device unless it makes copies "from transmissions"."

Prior to the *Diamond* decision, there had only been one decision which discussed the AHRA. The Court discussed the legislative history of the AHRA to provide some insight into how a digital audio recording device should be interpreted. In a Senate Report discussing the AHRA, it was clearly stated that the definition of a digital musical recording device only extends to the material objects in which songs are normally fixed, the recorded compact discs, digital audio tapes, audio cassettes, long-playing albums, digital compact cassettes, and mini-discs.124 Thus, there is no basis on which to determine that songs fixed on computer hard drives can be included.

Furthermore, the purpose of the AHRA "is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use."125 The Rio makes copies to render the music portable, or "space shift" those files that already reside on a user's hard drive.126 Thus the Court decides that "a device falls within the Act's provisions if it can indirectly copy a digital music recording by making a copy from a transmission of that recording. Because the Rio cannot make copies from transmissions, but instead, can only make copies from a computer hard drive, it is not a digital audio recording device."127

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123 *Diamond*, ibid, at 1076
126 *Diamond*, supra, note 27, at 1079.
127 *Diamond*, ibid, at 1081.
g) The Digital Millenium Copyright Act

In 1998, Congress passed the Digital Millenium Copyright Act. The DMCA 1998 "is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."\textsuperscript{128}

In its defence, Napster claimed that it satisfied the conditions for eligibility under the Digital Millennium Copyright Act (DMCA) safe harbor provision. Under 17 U.S.C. §512. Section 512 of the DMCA addresses the liability of online service and Internet access providers for copyright infringements occurring online.

In submitting this argument, Napster argued that it is an Internet Service Provider for the purposes of the safe harbor provision. Subparagraph 512(k)(1)(a) of the DMCA provides:

As used in subsection (a), the term "service provider" means 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 sent or received.

Subparagraph 512(k)(1)(b) provides:

As used in this section, other than subsection (a), the term 'service provider' means a provider of online services or network access, or the operator of facilities therefore, and includes an entity described in subparagraph (a).

\textsuperscript{128} S.R. Rep 105-190 1 to 2.
First, Napster claimed to offer the "transmission, routing, or providing of connections for digital online communications" by enabling the connection of users' hard drives and the transmission of MP3 files "directly from the Host hard drive and Napster browser through the Internet to the user's Napster browser and hard drive". Second, Napster stated that its users choose the online communication points and the MP3 files to be transmitted with no direction from Napster. Lastly, the Napster system does not modify the content of the transferred files. Thus, because Napster meets the definition of 'service provider', it need only satisfy the five remaining requirements of the safe harbor to prevail in its motion for summary adjudication.

The Court partially agreed with the reasoning that Napster provided in argument that it is a service provider. Specifically, the Court agreed that the Napster server stores a transient list of the files that each user who is logged on to that server can share, if a user wants to find a particular file he or she can search the index. And the 'hot list' function allows users to search for other users' log in names and receive notification when users with whom they might want to communicate have connected. There is thus agreement that a searchable directory and index exists.

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129 Reply Brief of Appellant Napster, at 3.
130 Motion for summary injunction, at 16.
The interpretation of the application of the DMCA to the Napster case creates confusion when trying to determine the rights and liabilities which occur on line. On the one hand, the law is interpreted in a liberal fashion, where the application of traditional legal doctrine is expanded to apply to the new technology. However, on the other hand the legislation that was implemented to specifically deal with copyright in the digital age is interpreted so strictly as to forego any protection to the Napster P2P network. This is evidence of the need for clarification of what the law is, and whom it applied to. It also demonstrates the difficulty in creating new legislation to deal with changes that we face in the digital age. Changes now occur so rapidly, that a strict interpretation of any statute or law in conjunction with it would become outdated by the time it was enacted.

IV. THE UNITED STATES COURT OF APPEALS

On appeal, after a review of the findings of law by the District Court it was determined that,

"The scope of the injunction needs modification...Specifically, we reiterate that contributory liability may potentially be imposed only to the extent that Napster: (1) receives reasonable knowledge of specific infringing files with copyright musical compositions and sound recordings; (2) knows or should know that such files are available on the Napster system; and (3) fails to act to prevent viral distribution of the works...The mere existence of the Napster system, absent actual notice and Napster's demonstrated failure to remove the offending material, is insufficient to impose contributory liability."\(^\text{131}\)

\(^{131}\) *Napster*, supra note 54, at 14.
Further noted by the Court of Appeal was that Napster may be vicariously liable if it does not police or patrol its system to find and determine if any infringing files are be copied among its users. "The preliminary injunction which we stayed is overbroad because it places on Napster the entire burden of ensuring that no "copying, downloading, uploading, transmitting, or distributing" of the plaintiffs' work occur on the system." The Court of Appeal directed that the injunction remained stayed until the preliminary injunction could be modified.

a) Modified Injunction

On March 5th 2001, the United States District Court, Northern District of California, modified the original preliminary injunction against Napster. The preliminary injunction is in effect until final judgement is entered by the preceding court action. In summary the injunction orders Napster, from "engaging in, or facilitating others in, copying, downloading, uploading, transmitting, or distributing copyrighted sound recordings in accordance with [the] order." The preliminary injunction sets out a number of procedures that must be followed by both Napster and the RIAA and the record company plaintiffs. These procedures include instructions to the copyright holders to provide adequate notice of the existence of their copyrighted sound recordings to Napster. A standard of reasonable
knowledge is placed on Napster for the purposes of policing the Napster network and removing access to infringing files. All parties are also ordered to use reasonable measures in identifying variations of the filenames with the obligation to ascertain the actual identity of the work.\footnote{In an effort by many members of the Napster network, many of the titles of copyright protected sound recordings have been changed to avoid the filtering technology implemented by Napster to find and remove infringing files. This has caused some problems with the enforcement of the preliminary injunction. Most noteworthy is Aimster. Aimster has developed a system that changes file names into "pig latin". This has in many cases effectively avoided the filter, making many infringing files available over the Napster system.}
I. COPYRIGHT MISUSE

Napster put forth the accusation the plaintiffs are engaging in copyright misuse. It is argued that such engagement in copyright misuse would preclude any enforcement of copyrights against Napster. This is an interesting argument, which raises some of the paradoxical issues surrounding the relationship between technology and corporatization. The Napster decision demonstrated the imbalance that has been created between the copyright holders and the public interest. While protecting copyright, the effect of the decision hinders access to a new technology. The issue of access is a problem that must be addressed to maintain the legitimacy of copyright protection in the eyes of the public, as well as to ensure that the public interest consideration is not lost in favor of corporate interests.

The misuse argument is important for various reasons, some of which read beyond the 'black letter rule' of copyright law, and into public interest issues. The intent of copyright protection is to help promote the growth and development of
sciences and the arts, while at the same time providing the public access to the creative or inventive works. There is a delicate balance which must be maintained to ensure that things continue to be created, and the public continues to have access to the works. The misuse argument raises issues of public interest and the access of the public to technological advancements.

Arguments made by Napster regarding misuse of copyright by the plaintiffs were not treated as viable arguments by either the District court or the 9th Circuit. The District Court held that "[a]lleged antitrust violations by a copyright plaintiff generally do not afford a valid defense against an infringement action and ought not to dissuade a court from granting injunctive relief." However, this finding is not entirely correct.

Although the court has rejected the misuse argument submitted by Napster, consideration of misuse and the effect of the Napster judgement on the public interest and access to technology is important when thinking about regulatory issues, especially under these circumstances given the constitutional intention of Intellectual Property protection. The accusation of misuse highlights the wider issue of power and control over a technology, which creates public interest concerns surrounding the access to technological innovation and the organization of the media world.

136 Opposition of Defendant Napster, supra note 24.
137 Napster, District Ct. supra, note 134, at 35.
a) Background

The concept of misuse has only recently been extended to the realm of copyright law. Copyright law provides the holder of the copyright with a limited form of monopoly. An attempt to expand the monopoly right granted by the Copyright Act under certain circumstances may be a violation of antitrust laws. Such violations have been held to occur as a result of a number of copyright owners acting in combination, or alternatively, as a result of a particular copyright owner's refusal to licence certain of his more desirable product unless tied in with licenses of certain of his less desirable product.

The application of anti-trust principles to copyright infringement defences is unclear. Most cases have ruled that no such defence may be claimed, on the basis that one who has entered into an illegal contract does not thereby place himself outside the protection of the law so as to permit others to injure him without impunity. However, there are some court where such relief has been indicated if there is a violation of antitrust laws.

The court in *Bellsouth Adv. & Pub. Corp. v. Donnelly Info. Pub., Inc.* decided that no misuse defense exists except possibly where there is an attempt to extend the exclusionary power granted by copyright beyond the protected work.

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138 Nimmer, supra, note 2, at §13.09[A]
139 Nimmer, ibid, at §13.09[A]
140 Nimmer, ibid at §13.09[A]
141 *Bellsouth*, 719 F. Supp 1551, 1562 (S.D. Fla. 1988), aff'd, 933 F. 2d 952 (11th Cir. 1991)
itself. The 9th Circuit found no evidence that the Plaintiffs seek to control areas outside of their grant of monopoly. Rather that the Plaintiffs seek to control reproduction and distribution of their copyrighted works, exclusive rights of copyright holders.\textsuperscript{142} There is no debate that the Plaintiffs have copyright in the works, however there is debate about the effect of the copyright on the public interest. This is what the court seems to ignore, and should be addressed. It is particularly important when dealing with access to new technologies. The stifling of a new technology before it even reaches its full capacity is a great loss to the public, and should be avoided if possible. The interests at play need to be balanced. Here, the court weights the interests of the copyright holders to be the first and foremost consideration, disregarding the rationale of copyright law's existence.

An analogy can be made with Patent law, which has long held that a patentee who uses his patent privilege contrary to the public interest by violating the antitrust laws will be denied the relief of a court of equity in a patent infringement action.\textsuperscript{143} In \textit{Lasercomb America, Inc. v. Reynolds}\textsuperscript{144}, the forth circuit reviewed the general doctrine underlying intellectual property law to conclude that "a misuse of copyright defense is inherent in the law of copyright just as misuse of patent defence is inherent in patent law."\textsuperscript{145} It was noted by the court in \textit{Lasercomb} that uncertainty surrounds the application of misuse to copyright

\textsuperscript{142} Napster, 9th Cir, supra, note 54, at para 75.
\textsuperscript{143} Also recognized in statute 15 U.S.C. §1115(7).
\textsuperscript{144} Lasercomb, 911 F.2d 970 (4th Cir. 1990)
\textsuperscript{145} Lasercomb, ibid, at 973.
however it was held to be applicable under the circumstances. This is an example of the flexibility that is necessary when interpreting and applying copyright to new technologies.

In Lasercomb, through a standard licensing agreement, the plaintiff attempted to forbid the licensee and all of its employees from developing any kind of software that would be competitive with the plaintiffs application. The exclusive licensing provision was copyright misuse because it extended the copyright holder's control beyond the scope of copyright by discouraging licensees from developing their own competing products.\footnote{\textit{Lasercomb}, ibid, at 978-9.}

The copyright misuse issue raised in the Napster opposition is interesting in that it raises some of the paradoxical issues surrounding the relationship between technology and corporatization. Napster claims that the knowledge of software for creating MP3 files and actions by the plaintiffs to form partnership with and investment in companies is an important factor to consider with respect to the claims made against Napster. "While Sony Music now claims that Napster is harming its bottom line, Sony Electronics is seeking to profit from the vast number of MP3s currently available on the Internet."\footnote{Opposition of Defendant Napster, supra, note 24, at 22.}
In *Practice Management Info. Corp. v. American Medical Ass'n*[^48^], the Ninth Circuit held that attempts to use the limited monopoly rights bestowed on a copyright holder to control competition in an area outside the scope of the copyright constitutes misuse. *Practice Management* found copyright misuse in attempt to extend the copyright monopoly in a copyrighted code system for medical terminology by licensing it to a third party under the condition that the third party would not use competitors products. Thus, according to Napster, the Court takes a broad view of misuse under which copyrights may not be enforced if they are being used in manner that impedes the "copyright system's goal of promoting the arts and sciences by granting temporary monopolies to copyright holders."[^49^]

Napster supports the claim of copyright misuse by arguing that the "Plaintiff's legal maneuvering against Napster is less for enforcing Intellectual Property rights than to control (1) the flow of competing unsigned artists' music into the electronic marketplace, and (2) the means of and business model for distributing music over the Internet."[^50^] Thus, the "use of anticompetitive litigation against new technologies and emerging artists, cloaked as an effort to preserve copyrights, attempts to restrain the breadth of useful arts by limiting the

[^48^]: *Practice Management*, 121 F. 3d 516, 521 (9th Cir. 1997), as amended 133 F.3d 1140 (9th Cir. 1998)
[^49^]: Opposition of Defendant Napster, supra, note 24, at 24.
[^50^]: Opposition of Defendant Napster, supra, note 24, at 24.
distribution of artistic works that the Plaintiffs do not control." When examined in more detail, this accusation become more credible and probable.

II. COMMERCIALIZATION

a) Internet Development

The founding ideals of the Internet were centered in the notion of freedom of information. However, the Internet has evolved from a free place to share and distribute ideas and information, into a global marketplace. As an example of this evolution, in months the Napster phenomena had evolved from a liberal network of trading and sharing music and ideas to the negotiation of business models with media conglomerates in hopes of cornering the digital online music market.

Internet growth can be divided into three phases of development. The first phase of the Internet was confined to a community of insiders -- scientists and some government agencies. The second phase centered in the 1980s, when the Internet was opened up to a less specialized community. This strengthened the democratic and open character of the Internet, making it a space of distributed power which limits the possibility of control over the acts taking place in Cyberspace. The third phase began with the establishment of the World Wide

\[^{151}\text{Opposition of Defendant Napster, ibid, at 25.}\]
Web in 1993 and its large-scale discovery by business by 1995. This phase is
classified by attempts to commercialize the Internet.\textsuperscript{152}

\textbf{b) Role of Congress}

There has been some recognition in the United States Congress that there is a
need to address the wider issue of corporate dominance in cyberspace. The
Napster case has caused a clear division between the public interest in having
access to the technology, and the media corporations seeking to maintain their
control over the music industry and the digital distribution of its product. The
actions of Congress illustrate the evolutionary path that copyright is taking. It
recognizes that copyright law must be adapted to apply to the digital forum,
however it also demonstrates the imbalance of interests that have resulted from
such adaptation.

Prior to the Napster decision, the Senate claimed that it wanted no part of the
controversy.\textsuperscript{153} Senate Judiciary Committee Chairman Orrin Hatch, R-Utah, said
explicitly, "I think the courts can handle it." The committee's ranking Democrat,
Partrick Leahy, also added that movie studios were once "terrified" of videotapes,
which later turned into a major revenue stream for Hollywood. "In the end, things
get sorted out and new (technologies) offer new opportunities for artists and

\textsuperscript{152} Sassen, Saskia, "On the Internet and Sovereignty", (1998) 5 IJGS 2 at 545.
\textsuperscript{153} Carolyn Lochhead, "Senate Sidesteps Net Music Dispute: Panel says it will let the courts
more choices for consumers...Let's not strangle the baby in the cradle.\footnote{Lochhead, Carolyn, ibid.} However, after the decision of the District Court and the 9th Circuit Court of Appeal it is now questionable if "the courts can handle it."

Since the Napster decision, there has been some movement in the Senate to reexamine the Napster situation and the court decision. The attention given to the Napster case by the Senate demonstrates the importance and the impact of the case on copyright as well as new technologies. Ralph Nader, the former Green Party presidential candidate, has been outspoken about the implications of the Napster decision for Internet Regulation generally. Nader sees an opportunity for a new global bureaucracy, comparable to the United Nations, World Intellectual Property Organization (WIPO). According to Nader, "The technology of the Internet is far ahead of any legal framework, any ethical framework or global framework."\footnote{Lochhead, Carolyn, ibid.} Senator Orrin Hatch, has also been vocal concerning issues related directly and indirectly to Napster. Hatch has stated:

"If those digital ropes through which the new music will be delivered are significantly narrowed by gatekeepers to limit access to or divert fans to preferred content, a unique opportunity will be lost for both the creators of music and their fans...that is why I think it is crucial for policy makers to vigilant in keeping the pipes wide open."

The concerns raised by Hatch specifically deal with the need to ensure that the distributional power of the Internet is not concentrated in the hands of a few powerful corporations. To ensure that there is access to the Internet forum, Hatch feels that it is important for policy makers to step in and regulate. The
impact of this attention by government is uncertain. However, it is illustrative of the wider issues surrounding the Napster case. It is also illustrative of the power exercised by the state in trying to control the Internet.\textsuperscript{156}

c) Role of the Corporation

Now that the Internet is in its third stage of development, corporations will play a significant role in the structure that the Internet will take in the future. The Internet has become a global marketplace. It is accessible to anyone with a computer and an Internet connection. It is a marketplace in the traditional sense of e-commerce where people can log on and purchase goods and services, and it is a market in a more modern sense for sharing information and ideas in way that was never available before. The Napster case demonstrates that this traditional and modern marketplace can clash, creating a puzzle of legal rights to

\textsuperscript{155} McCullagh, Declan and Nicholas Morehead, "Nader Wants Internet Control", Jan 10, 2001, <http://www.wirednews.com/news/print/0,1294,41106,00.html> (visited 26/01/01)

\textsuperscript{156} The Napster decision, and its implications for digital distribution of music and the use of P2P networks in general, will have implications which span beyond the borders of the United States. The inherent characteristic of the Internet as a borderless entity where access is not defined by the geographical location of the person surfing the net, will effect all Internet users. This widens the scope of the public interest, to a global public interest. The development of Cyberspace will effect all of us, creating a further imbalance among the media conglomerates and the global online community. These interests should also be considered. Both the court's and the Congress ignored the global issues surrounding the application of laws to Internet related activities and technologies. This is an interesting in light of the fact that the Napster decision will have effects beyond the United States. The Napster decision will affect the Internet community, a community which by 2003 will be predominantly located outside of the borders of the United States of America. The neglect by the United States Court's and the senate to acknowledge the global issues associated with the Napster case may be justifiable because both Napster Inc. and the RIAA and represented record companies are located within the jurisdiction of the Untied States. However, when dealing with Internet issues it is important to acknowledge the affects of any decisions made regarding its uses. These affects flow beyond the border of the United States. Napster and the Internet are both parts of a global phenomenon. The decision of the United States courts will impact Cyberspace, as a whole. When dealing with any Internet related issue, consideration must be given to all that are affected.
be sorted and put into place. Currently, the media corporations are placing the pieces of the puzzle in place, while the public sits back and watches.

Corporations have attempted to use the Internet to expand their market. The Napster case is an example of this goal of market expansion, as it demonstrates how corporations are working to control the technology that threatens their current business models. They are attempts both to displace possible competition and control the digital marketplace.

d) Technology

Technological innovation is the catalyst for market growth. Through the development of new means of communication and transportation, the world has truly become a global village where one can physically travel the span of the globe in a matter of hours, purchase Italian shoes in North America, and consume a "Coke" in Japan. This idea of global access is at the heart of the Internet and the attempt to commercialize.

With the Napster code, Shawn Fanning stumbled upon something that the global Internet community is only beginning to understand. The implications and possibilities of peer-to-peer networking are vast. The data sharing network created by P2P will likely become a useful business model, for publishing, for music distribution, and for the sharing of ideas and information.
The Napster code has been cloned and copied, and has already been changed and expanded to become more powerful, and completely decentralized.

"Peer-to-peer computing could be as important to the Internet's future as the Web browser was to its past...While the most visible impact of this model has been in consumer environments, peer-to-peer computing has the potential to play a major role in business computing as well."\(^{157}\)

Peer-to-peer technology changes the idea of the marketplace for online e-commerce. Companies have been spending hundreds of millions of dollars to create a centralized marketplace, founded on the idea that Internet commerce relies on the need for a single and central destination. However, Napster, by independently connecting computers across the Internet, enables the creation of a distributed marketplace. Peer to peer allows for the creation of a marketplace with no centre and no owner, just a shared group of participants.\(^{158}\) Just as the commercialization of the Internet seemed to be at its peak, the creation of Napster has changed the fundamental structure of Internet organization. As a result, Napster has threatened the big media conglomerates, forcing them into the courts to shut down Napster with the hopes of taking over the technology and developing their own profit making business models based on P2P file sharing.

III. THE MUSIC INDUSTRY

Technology and big corporate enterprise is so intertwined that it is sometimes
difficult to see the implications and connections between motives and claims.
The accusation of copyright misuse brings into question whether the record
labels are trying to shut down Napster in hopes of taking over the technology
before it destroys the control that the five major labels have over music
distribution. During the Napster action and after the decision to implement an
injunction, the big five record conglomerates have been working to develop their
own business models.

The huge success of Napster occurred almost overnight. Napster debuted in late
1999, within a few months it had close to 20 million users, and in less than two
years there are more than 70 million Napster members. The impact of Napster
has been felt throughout the music industry, partly due to the size of the Napster
community and the speed of its growth. Some analysts claim that "[t]he record
companies have kind of blown it...they've completely lost the ability to train music
listeners into the kind of online consumption patterns that would be beneficial to
them." The success of Napster is based primarily on the access to music by
its members for no charge.

158 "Napster's Real Importance", Bill Burnham ZDNN, May 9, 2000,
<http://www.zdnet.com/filters/printerfriendly/0,6061,2565148-84,00.html> (04/02/01)
159 "Napster traffic figures raise new questions" John Borland, Staff Writer CNET News.com, Aug
Prior to Napster MP3 files were available online, however, access and searching was tedious and bothersome. Napster created a huge network of members where MP3 files could easily be searched and downloaded by anyone who signed on. Before the RIAA and record labels could do anything Napster had accumulated a huge user base. The fear is that because preliminary access to digital online music has been free, consumers have developed user behaviour accordingly. The idea that music should be free has infiltrated many online music seekers, and may create problems when online companies try to establish fee-based services. By taking Napster to court, the record companies are trying to regain some control over the damage that Napster has done to their future Internet related digital distribution.

Similar claims regarding the recording industry's unwillingness to cooperate and relinquish rights of their copyrighted works to use in the distribution of digital works have been made by the National Association of Recording Merchandisers (NARM) and the Digital Media Association (DMA). These concerns and claims are centered around the lack of content being made available to 'legitimate' retail stores to offer secure digital download sales opportunities. Retail merchants and online distribution companies claim that major labels have used the threat of piracy as a reason to withhold content from legitimate companies, while the

\[160\] In the RIAA claim against Napster there was some mention about the possible devaluation of music as a result of the Napster service. Specifically, that Napster teaches a generation of music consumers that copyright owners and artists do not deserve to be paid for their work and that creative efforts are free for the taking. See the Notice of Joint Motion and Joint Motion of Plaintiff for Preliminary Injunction: Memo of Points and Authorities, United States District Court, July 26, 2000.
recording industry developed its own business model. According to Pamela Horovitz, the president of NARM, "It would appear that most of the record companies are viewing retailers as potential competitors that they can use grudgingly until they can eliminate them, or marginalize them."\(^{161}\) This stance does not mean that NARM and the DMA are in support of Napster, to the contrary they are quite against it. Liquid Audio CEO Gerry Kerby has been said "I am aghast that a bunch of thieves like Napster could end up winning because they have 60 million users and end up with licences...It makes me feel pretty upset that I've been a boy scout. It's like making a drug dealer a pharmacist because they sell a lot of drugs."

The claims made by Napster, NARM and DMC are not unfounded. The range of actions and business decisions made by the big record labels over the past few years calls into question not only their motives for digital distribution of music but for overall control of the global media. The record companies are working together to quash Napster Inc. in hopes of using the Napster peer-to-peer technology to develop their own business model. Evidence of this intent can be found in the major mergers between large media conglomerates. It is not only the question of maintaining power and control by the record companies, it goes far beyond that to the control of the media as a whole.

While the Napster case was unfolding, Bertelsmann's eCommerce group and Napster Inc. came to an agreement. This agreement created widespread controversy. It illustrates the movement by large media corporations to take over the industry. Since 1999, parent company Bertelsmann AG has been developing a digital distribution superhighway through its Digital World Services (DWS) division. The goal is create the infrastructure to deliver secure digital media to retailers throughout the world. Johann Butting, the CEO of the DWS division said with respect to the growth of Bertelsmann, "Besides music, we are moving toward having our first publishing house online in Q1 of next year...we are already looking into movies, then games will come later. Eventually, we'll be looking into other business opportunities." Bertelsmann has created the world's largest record conglomerate, with the BMG/EMI merger, cornering nearly 23% of the global music market. Also interesting is the interconnection among large record and media companies. For example, "Bertelsmann buys CDNow, which has a strategic relationship with Time Warner, which wants to cross-licence movies with Sony, which has a subscription service project with Universal called Duet, which has a joint venture called GetMusic with BMG." The expansion of corporate interests is part of the corporate world, however when the expansion of such interests impede access to technology and innovation to the

detriment of the public interest, then there is a need to rectify the damage through regulation if the Courts prove to be insufficient.

Senator Orrin Hatch has been quite vocal in the need to make digital music accessible and ensure that a few rights holders in the marketplace do not control it. Although, Senator Hatch was at one time a supporter of Napster, he has "cautiously began to back away from his earlier support for Napster and the compulsory licences that would grant digital music companies access to the labels' catalogs."\(^{165}\) Despite Sen. Hatch's change of tune, his remarks and concerns are noteworthy. Sen. Hatch at one time warned that he would work to ensure that online music does not fall under the control of a few powerful distributors. As stated by Hatch:

"I do not think it is any benefit for artists or fans to have all the new, wide distribution channels in the online world controlled by those who have controlled the narrower ones....this is especially true if they achieve that control by leveraging their dominance in content or conduit space in an anti-competitive way to control the new independent music services that are attempting to enhance the consumer's experience of music."\(^{166}\)

The active efforts made by the 'big five' record labels, and the mergers between these labels and other large media conglomerates is something that must be considered when thinking about the power and control over technology. The actions by these corporations add to the allegation of Napster that they are working to destroy Napster because it threatens their place in the digital online

\(^{165}\) "Music Battle Lines Drawn", ibid.
\(^{166}\) "Hatch Pledges to Keep Online Music Accessible" Elizabeth Wasserman, Jan 10, 2001, <http://www.thestandard.net/article/article_print/0,1153,21388,00.html> (26/02/01)
market and could possibly mean the end of the control exercised by big record labels in the music industry.

The record labels defend themselves with the shield of copyright protection for their artists, however this is also a false claim. The RIAA has worked towards having artists under labels be considered a 'work for hire' under s. 201 (b) of *The Copyright Act*, which states "the employer or other person for whom the work was prepared is considered the author...and unless the parties have expressly agreed otherwise...owns all of the rights comprised in the copyright." This ultimately means that an artist will never regain the rights to their works. Under normal licensing of copyright the rights to the work are signed over for 35 years then they go back to the artists. Actions like this demonstrate that the RIAA is working to ensure that the record labels maintain control of copyrights. This unlimited control is in the interests of the record labels, not in the interests of the artists.

The granting of an injunction against Napster has helped the RIAA and affiliated record companies to delay the growth of P2P models online, giving them time to develop their own business models. The application of copyright law is justified. However, it is important to note the implications and result of the court decision. The law is applicable, although it may need to be changed in some respects by the legislature. The implications of the application of the law are what need to be examined. From this perspective the Internet should be dealt with in a different
manner. Corporations have the right to make business decisions and to take action to ensure the continued success of their corporations. When that success is accomplished with a motive to displace other corporations in an anti-competitive manner something must be done. When dealing with Internet technological issues there is more at stake, the application of rights or of regulations goes beyond the interested parties and has an overall effect on the technology, which given the virtues of cyberspace, affect all Internet users.

The integration of multiple corporate interests, and the struggle for control and power is an interesting phenomenon in itself. On the one hand, the production of devices to download and playback MP3 files is rampant. Most of these devices are connected, in some way, to the large media conglomerates that have taken Napster to court to find that the downloading of copyrighted MP3 files is illegal. If found illegal, why would someone purchase an MP3 player? There is an inherent contradiction to the actions of the record companies. An easy answer is that they can control the distribution of the files, and control the means with which to upload them and listen to them. The Time Warner/AOL merger presents another interesting situation. The joint company will have more Internet subscribers than any other ISP, as well as the ability to offer them all of the content produced by Time Warner's music, film and entertainment divisions. However, an interesting fact is that AOL employees created the P2P technology used in Gnutella "one of the most potent piracy tools on the Net."167 Gnutella is a

pure P2P code, with no central server. The open code of Gnutella is owned by no one and thus possibly untouchable by the law or any form of regulatory control.

The Internet was created by technological innovation under the notion that information should be free and accessible. This is the attitude of the cyberspace pioneers. When the commercial potential of the Internet began to be recognized, the big corporations moved in and began to commercialize cyberspace. The borderless nature of cyberspace allows for both the commercialization and the growth of free space to share information and ideas among the individuals who are connected around the world. Napster demonstrates that the World Wide Web and the Web browser are not the only means of organizing and exploring cyberspace. Peer-to-peer technologies reorder the exchange of information over the Internet and challenge the centralized business model that e-commerce has been premised upon. Napster directly threatens the existence of the record company, it provides for an effective and quick means of distributing and sharing music, while also building a community of members. This threatens the ability of the record labels to distribute their works, and ultimately the wider plan of the media conglomerates to corner the whole media market. The Napster/Bertelsmann alliance is evidence of the quest to take over the global distribution of media. There is a struggle for power in and over Cyberspace. Corporations seek the power to exploit the Internet for monetary gain. The Napster case is an example of the manipulation of the law by the market to
control the Internet. In theory the law is controlled by the state, which in most cases believes it has the sovereign right to control.
The balance of Interests intended by the protection of copyright law under the United States constitution has been displaced. The Internet has created the biggest issue of regulatory control and application of law that has ever been seen. Clearly, there is a need for some kind of regulation regarding copyright protection and the Internet. The Napster case is evidence that the law can be applied to the 'borderless realm' of Cyberspace.

For the most part with the technological innovation that continues to occur at an exponential rate there is likelihood that enforcement may be effective. However, this application and enforcement has re-routed the philosophy behind copyright law. The technological development surrounding the Internet is some of the most important that we have ever witnessed. The Internet is a useful tool for the dispersing of information, the sharing of ideas, the building of communities, and consumerism. This only magnifies the need to create a balance of interests to enable the maximization of the Internet as a global and multi faceted tool, as well as the Internet's continued growth and development.
The question that must be addressed is how can this be accomplished? To answer this question ideas of regulation need to be examined to assist in placing the role of technology, law and regulation into perspective and create some guidance as to where we should go from here.

I. REGULATION

This part of the chapter will examine the fundamental reasons and ideas behind the concept of regulation. This is important in understanding the question of regulation and the Internet. First, a general definition of regulation will be provided. Second, a brief history of the development of regulation will be given. Third, three ideas of regulation will be explained. Lastly, the three general frameworks of regulation will be explored.

a) Basic Definition of Regulation

A basic and general definition of regulation can be summed up in the following way:

"Regulation involves the constitution of a form of authority, whether internal or external, to achieve ordering in an area of life that has come to attention as showing tendencies to disorder, perversity or excess. Successful regulation involves the consent of the regulated and hence much effort is devoted to achieving and very often to raising standards."\(^{168}\)

The regulatory process is essentially a political one. In the process of regulation there is often extensive interaction between public and private actors. "Regulation is hence a continuous and dynamic political process: sustaining an effective regime requires evolving to meet changing circumstances and involving new regulatees as they arise."\(^{169}\) It is also important to make note of the distribution of power in the regulatory process. Besides the power of the regulator and the regulatees, there is also the power of the other interested parties to consider. This power is dependent to a large extent on the effectiveness of their mobilization and organization.\(^ {170}\)

b) History of Regulation

The rise of regulatory society can be explained by looking at three broad phases. It is important to note that regulatory society as we know it today is a relatively modern construct.

i. phase one

The first phase of the rise of regulatory society is roughly around the time of industrialization up to the end of the nineteenth century. During this time period political, economic and legal institutions became linked.

Industrialism purged the remnants of feudal distinctions and established the market and freedom of contract for all in it.

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\(^{169}\) Clarke, Michael, ibid, at 4.
\(^{170}\) Clarke, Michael, ibid, at 4.
Industrialization ushered in a key feature of modernity, namely constant economic change and an ever-diversifying division of labour and technological innovation, accompanied by endless expansion of wealth and prosperity...Individualism became established as a central political, economic and moral idea: markets were seen as composed primarily of competing individuals who were given equal rights before the law and whose rights of decision-making and integrity were increasingly required to be respected, along with a moral expectation of individual responsibility and self-help.¹⁷¹

These aspects of individualism came with an increase in individual political expression. A freer market in goods and services led to a greater social consciousness. Along with this new awareness of the disparity between rich and poor was an movement for change, demands were increasingly made for rights of full political participation, leading to the right of enfranchisement.

The rise of technology, for example mining and factories, brought with it safety hazards. Regulation was introduced to establish standards to provide safe working conditions. The introduction of regulation is concerned with the establishing of standards which take account of all parties who are eventually agreed as having a legitimate interest in the regulated activity.¹⁷²

Thus, with the rise of the industrialized state came many other areas which needed to be regulated, leading to the expansion of the state at a local level. These areas included gas, water, care of criminals, the division of labour, sewage, street maintenance, security, and health.

¹⁷¹ Clarke, Michael, ibid, at 12.
¹⁷² Clarke, Michael, ibid, at 13.
"By this point, several feature of modern society critical to regulation were clear. Economic and technical change were endemic, which posed ever-new hazards for workers, consumers and the wider public from technology, constantly reconfigured the division of labour, and generated no only new skills, but new ideas and interest groups. The achievement of the rule of law, that is the subjection of all to the law with equal rights and responsibilities as citizens, accompanied by enfranchisement, form the basis of the stable, modern, industrialized democracy which the experience of the twentieth century seems to indicate is something close to a universal in human societies. These achievements required the establishment, much against the wisdom of past centuries, of the state at local and national level, on an unheard of scale.\textsuperscript{173}

ii. phase two

The second phase of the rise of the regulatory state is roughly from 1900 to 1960, where the state emerged as a central actor. "It was a period that saw the rise of a statist ideology that portrayed it as omnicompetent, staffed by experts who would guide the society and economy in all aspects."\textsuperscript{174} During this time period both the state and the economy expanded. The labour structure also changed, a primarily manual working class became the minority, whereas there was huge growth in the managerial and professional classes.

iii. phase three

The third phase is that of contemporary society. It is based on consumerism and the demand for security. A society based on consumerism brings with it the need for increased regulation. There is a need for an increased amount of attention on

\textsuperscript{173} Clarke, Michael, ibid, at 14.
basic safety standards for workers, consumers, and the general public. Also, the general complexity of many products means that consumers cannot be expected to be able to appraise the quality of the product themselves, therefore a regulatory provision is necessary. "The consumer-based economy of affluence is then perforce a regulatory economy, in which consumer rights increasingly prevail and the market principle of *caveat emptor* is compromised."\textsuperscript{175}

c) Three ideas of regulation

When thinking about regulation there are three main ideas or meanings to consider: regulation as targeted rules, regulation as direct state intervention in the economy more generally, and regulation as encompassing all mechanisms of social control, by whomsoever exercised.\textsuperscript{176} Regulation as targeted rules is the simplest way of thinking about regulation. Here, regulation involves the promulgation of a binding set of rules to be applied by a body devoted to this purpose,\textsuperscript{177} an example of which would be legal regulation.

The second conception of regulation involves direct state intervention in the economy. This broader idea of regulation is commonly found in the area of political science, taking into consideration all of the efforts of state agencies to

\textsuperscript{174} Clarke, Michael, ibid, at 14.
\textsuperscript{175} Clarke, Michael, ibid, at 15.
steer the economy. Regulation has a more broad sense and covers all state actions designed to influence industrial or social behaviour, for example the social welfare state or grants to industry.

The third idea of regulation is that regulation encompasses all mechanisms of social control, by whomsoever exercised. Government institutions are included in this definition, however, this definition also extends to mechanisms which are not state induced. Also included in this concept of regulation would be social norms and the effects of the markets on modifying individual behaviour, for example moral regulation.

d) Three general frameworks of regulation

There are three general frameworks that can be used to explain regulation: the public interest/legal analyses, the interest-group theory, and the public choice model. Each framework will be discussed.

i. the public interest/ legal perspective framework

The public interest/legal perspective framework assumes that the state, acting in the public interest, establishes a legal framework to realize a specific set of

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178 Scott, Colin, supra, note 176, at 3.
179 Baldwin, Robert, supra, note 177, at 2.
regulatory objectives. The public interest can be understood from a utilitarian perspective - the greatest overall good. Thus, the state translates public preferences into a legal regulatory regime.

ii. interest-group theory

Interest-group theorists view regulation as an exercise among groups and between groups and the state. Groups are believed to be the source of any regulatory initiatives and the regulatory outcomes are likely to be the result of either a close working relationship between a dominant group and the state or of compromises among groups.

The perspectives of interest-group theorists vary from open-ended pluralism to corporatism. The pluralist model focuses on the state as an arena where competing groups struggle for power. The corporatist model, on the other hand, views the group as acting in partnership with the state. The state and the group establish a regime that may have the consequence of a close public/private co-operative regulatory structure. Another possible consequence may be the exclusion of groups that are not part of the corporatist framework.

\[^{180}\text{Francis, John, G., the Politics of Regulation: A Comparative Perspective, (Cambridge: Blackwell Publishers, 1993) at 7.}\]
\[^{181}\text{Francis, John, G., ibid, at 8.}\]
\[^{182}\text{Francis, John, G., ibid, at 8.}\]
iii. the public choice model

The core assumption of the public choice model is that individuals, as they act in society, seek to realize their preference. This perspective draws heavily from micro-economic theory.\textsuperscript{183} The focus of the public choice model is on the individual, not the group or the state. However, the choices made by the individual have an impact on the group and the state. The rational decision of the individual does not necessarily mean the rational action by the organization. The purported objectives of large organizations are easily subverted by the pursuit of the competing preferences of their respective members unless the organization is carefully structured.\textsuperscript{184}

The Napster case provides an example of the need for regulation to protect copyright interests. Copyright protection is explicitly recognized through constitutional recognition, and must be implemented in a way that provides a balance of interests among the artists and the public. The courts and legislature have both dealt with the application of legal doctrine to the Internet. The Napster court has applied the law in a way that is detrimental to the public interests and calls for a public interest regulatory approach. Congress, as mandated by the constitution, must step in to re establish the balance of interests to ensure the protection of copyright, and the maintenance of the public interest.

\textsuperscript{183} Francis, John, G., ibid, at 9.
\textsuperscript{184} Francis, John, G., ibid, at 9.
II. INTERNET REGULATION

Although, it is recognized that there exists a need to regulate the Internet with respect to the protection of copyright, there are wider issues related to Internet regulation in general. The approaches to Internet regulation can be grouped into four main schools of thought. The traditionalist school, self-regulatory school, internationalist school and the technology school.

a) The Traditionalist School

The Traditionalist School believes that the Internet does not pose any problems which traditional legal doctrine cannot answer. This school of thought concedes that the law can be either applied as it would be applied in the 'real' world, or simply extended to apply to Internet issues. This appears to be the current view of most states and courts. Through the extension of the law and legislation, traditional legal approaches have been applied to the Internet. The Napster case is an example of such an application.

b) The Self-Regulatory School

The Self-Regulatory School believes that traditional legal doctrine does not work in Cyberspace. The most dominant scholars within this school of thought are David Post and David Johnson. Post and Johnson argue that the state does not
have the ability to impose sanctions and law in Cyberspace because of its borderless nature, making Cyberspace almost a-jurisdictional, because physical locations, and physical boundaries, are irrelevant in the networked environment of the Internet. Thus, the Internet should be viewed as its own jurisdiction, where laws and regulation will develop freely within that jurisdiction.

"The rise of the computer network is destroying the link between geographical location and (1) the power of the local government's to assert control over the online behaviour (2) the effects of online behaviour on individuals or things (3) the legitimacy of the efforts of a local sovereign to enforce rules applicable to global phenomena (4) the ability of physical location to give notice of which sets of rules apply."

Within the self-regulation school of thought is the idea that the Internet has developed its own distinct online community. Virtual communities can be defined as "social aggregations that emerge from the Net when enough people carry on those public discussions long enough, with sufficient human feeling, to form webs of personal relationships in Cyberspace". With this idea of community comes the concept that those who inhabit it should regulate Cyberspace. Those who support this idea of communities in cyberspace argue that those communities have, and will, develop appropriate norms and values to govern the spaces, which they inhabit.

187 Maltz, Tamir, "Customary Law & Power in Internet Communities", School of Law, University of New South Wales, <http://www.ascusc.org/jcmc/vol2/issue1/custome.html#introduction> (visited 10/12/00)
Thus, the inherent nature of the Internet goes beyond the jurisdiction of the state, and in effect creates its own jurisdiction. This separate jurisdiction of Cyberspace, should be left alone to self-regulate. The state has no power in Cyberspace.

c) The Internationalist School

The Internationalist school of thought is premised on the idea that the Internet should be governed through international mechanisms. These mechanisms include the establishment of international treaties and bodies to harmonize the laws applicable to the Internet. Though there has been some effort to harmonize Internet issues and law, there is the possibility that it would only work if every single nation in the world signed on and enforced the treaty. However, efforts to harmonize will become more and more effective as the leaders in technology and countries with the highest proportion of users sign on to a common agreement.

d) The Technology School

Scholar Lawrence Lessig advances the view that the Internet can be regulated through its technological framework, through its code.\(^{188}\) Lessig supports the view that the Internet can be regulated through its technological architectures:

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"... code writers are increasingly lawmakers. They determine what the defaults of the Internet will be; whether privacy will be protected; the degree to which anonymity will be allowed; the extent to which access will be guaranteed. They are the ones who set its nature. Their decisions, now made in the interstices of how the Net is coded, define what the Net is."\(^{189}\)

Thus, "the choice is not between regulation and no regulation. The choice is whether we architect the network to give power to network owners to regulate innovation, or whether we architect it to remove that power to regulate."\(^{190}\)

With respect to the Napster situation, there has been an extension of traditional legal principles into a new area of application. Napster demonstrates that although the Court may have misconstrued the law in a manner that is inconsistent with the copyright founding initiative, the law can be applied. Evidence is the application of the law in prior cases dealing with new technologies, i.e. Sony. What is necessary to deal with the new issues which have arisen as a result of copyright and the Internet is the application of traditional principles in their true form, alongside the continued growth of technological innovation to ensure that the laws can be enforced. This is where the technology school and the traditionalist school must meet. Together, effective regulation and copyright protection can take place where traditional principles can be extended to apply to the new media and technology can be adapted to ensure that the law is enforced. This mandates the need for a

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\(^{189}\) Lessig, Lawrence, *Code*, ibid, at 60

\(^{190}\) Lessig, Lawrence, "Innovation, Regulation, and the Internet", *The American Prospect*, vol. 111 no. 10, March 27-April 10, 2000, at 6
cooperative environment among the artists, the copyright holders, the media conglomerates, and the actual developers of the technology.

III. THE EVOLUTION OF TECHNOLOGY

The development of technology is an important point in this discussion. Through technology these phenomena were conceived and able to evolve into what we see today. Technology has also been used to solve many of the issues which arise as a result of these phenomena. The Napster case demonstrates that the ability of technology to evolve to meet the needs of interested parties and individuals can lead to the regulation of the Internet. Currently, this type of regulation is limited, but Napster demonstrates the flexibility of technological innovation to meet the needs that are placed upon it.

The injunction placed on Napster by the U.S. Courts requires the service to filter out copyright infringing files. When the injunction was originally put into place there was an outcry by Napster that such filtering was not possible because of the technological nature of its peer to peer system. This was later proved to not be the case. Over the months following the injunction various forms of filtering were developed, some proving to be more capable than others. As each new filtering technique was put into place, a new way to circumvent the filter was also found and used by some members of the Napster system. When the filtering system was originally put in place, within 24 hours most of the blocked songs
were once again available on the system with new file names or minor typos, these small changes allowed Napster users to circumvent the new limitations.\footnote{Goodin, Dan, "Napster Injunction Puts Burden on Labels", The Standard.com, <http://www.thestandard.com/article/0.1902,22662,00.html?printer_friendly> (visited 25/04/01)}

This lead to the belief that the filtering system would never work and that Napster could not meet the requirements of the injunction.

As each filtering system was circumvented a new technology developed to meet the changing needs hoping to provide an adequate filter to meet the terms of the injunction.\footnote{One particularly publicized service used to circumvent the Napster text filters is a software program released by Aimster that turns file names into Pig Latin, this serves as a temporary way around the blocking mechanism. The program was launched March 9, 2001, three days afterwards more than 20,000 people had downloaded the program. Robert Thompson "Company uses pig Latin to avoid Napster block", March 12, 2001, The National Post Online, <http://www.nationalpost.com/scripts/printer/printer.asp?f=stories/20010312/497929.html> (visited 25/04/01); Brad King, "File Tracker May Go Too Far", May 11, 2001, Wired News, <http://www.wired.com/news/print/0,1294,43714,00.html> (visited 11/05/01)  }

New filters have been put into place using the developing technology of digital fingerprinting, digital watermarking, and filters that can read the sonic characteristics of a song file.\footnote{Aimster is also very controversial because it has set up a Napster like service through the use of AOL buddy lists, where people can create a buddy list and open their computers to a select group of people. The RIAA has filed a lawsuit against Aimster, charging that it is violating copyrights in the same manner as Napster. Aimster’s CEO, Johnny Deep, has defended the Aimster service, claiming that the fact that people are opening their computers to a select group of people preserves it from outside scrutiny. These "private virtual networks" use Aimster software to do more than trade music files, and breaking into these personal private networks to look for copyrighted files would possibly be a violation of copyright itself. See, John Borland, "RIAA sues Aimster over file swapping", CNET News.com, May 25, 2001, <http://news.cnet.com/news/0-1005-200-6033575.html> (visited 03/06/01); “Aimster also claims that it would be illegal for the RIAA to reverse-engineer its scheme and try to filter the encrypted file names since federal law bars anybody from breaking through or helping to break encryption designed to protect copyrighted works", Cecily Barnes, "Napster fans squeeze through loopholes", CNET News.com, March 6, 2001, <http://news.cnet.com/news/0-1005-200-5042145.html> (visited 04/06/01); "Aimster Sues the Recording Industry", The Standard, May 2, 2001, <http://www.thestandard.com/article/0,1902,24170,00.html> (visited 03/05/01)  

"The development of highly sophisticated filtering and tracking software is making such limitations possible for the first time. As a result, the new technologies are resurrecting a volatile issue long thought dead: the idea that the Internet can be regulated by geographic boundaries within the United States and from country to country."\textsuperscript{194}

In a period of a few months the filtering technology has been changed, modified, and re-invented to the point that Napster can now effectively filter out the copyright protected files from its system. The new generation of software can block and track people based on their physical locations. These tracking programs work in a similar manner as that used for consumer profiling used by advertisers. They track a person's Internet Protocol address, which can then be used to locate where an individual lives or works.\textsuperscript{195}

The technological innovation occurring after the Napster decision has provided a temporary solution to the problem of policing the Napster network and removing infringing files. This provides support for the argument that technology will meet the needs to regulate other technology. On the one hand the technology has developed to meet the needs of Napster. On the other hand, new technology will be developed to evade tracking and filtering software. A simple example would be the inability to track people who use filters that conceal Internet Protocol


\textsuperscript{195} Jacobus, Patricia, ibid.
addresses along with personal information like age, sex and income.\textsuperscript{196} There are still many outstanding issues concerning the application of the law to other Napster-like peer to peer networks that are located outside of the United States.

\section{IV. CONCLUSION}

The Internet is a topic of interest and debate in many disciplines. The application of law to Internet related activities has only just begun to be an important issue to be debated and worked through by courts and legislatures around the world. The Napster case provides a concrete and important example of the difficulty in applying traditional legal reasoning to new media. However, it demonstrates the power that an individual has in the forum of Cyberspace, how one person can create something that changes the application of the law, and calls for new regulatory methods to be reconciled with the old ones.

When interpreting the law to meet the necessary regulatory standards that the Internet is dictating to ensure the protection of the rights that the legal system stands for, it is important not to loose sight of the foundation that those values were premised upon. This is essential to maintain faith and legitimacy in the legal system. Napster shows that the current interpretation of prior common law doctrine related to copyright and technological innovation is questionable. However, it also provides us with a 'red flag' reminding us that there is a necessary balance that must be maintained.

\textsuperscript{196} Jacobus, ibid.
In the era of transnational corporations and multi national co-operation, the public interest factor is fundamental when thinking about the regulation of copyright interests. The consideration of the public interest is fundamental to ensure that future creators and authors will enjoy the exclusive rights of their work, while allowing the public to enjoy the benefits such works. Thus, it is necessary for new co operative measures to be taken by the state to ensure that copyright law evolves in a manner consistent with this philosophy.
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