

LEGAL UPDATE

RIAA V. NAPSTER: DEFINING COPYRIGHT FOR THE TWENTY-FIRST CENTURY?

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I. INTRODUCTION

In the past year a small Internet start-up created by a college freshman has become the forerunner of a legal and musical revolution. Napster, Inc. ("Napster") and its surrounding legal controversy has brought the intersection of copyright law and the fast evolving world of the Internet to the attention of mainstream America.¹ After challenging the recording industry's model of distribution and making "MP3" a household word,² Napster now stands on the brink of a legal precedent that may decide the degree of control copyright owners will retain over the Internet.

Napster is a file-sharing program that lets users freely trade music files over the Internet. It has been hailed as revolutionary by some and as unfettered piracy by others.³ In response to Napster's growth and popularity,⁴ the

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¹ See Reuters, *AOL Stays No.1 U.S. Site, Napster Moves Into Top 50*, YAHOO NEWS (Aug. 22, 2000) <http://dailynews.yahoo.com/h/nm/20000822/wr/mediamatrix_rankings_dc_1.html>. The Napster website <www.napster.com> has moved into the Top 50 most visited digital media and Web properties in the U.S. See *id.*

² See Ronald Warren Deutsch, *Lycos Gets Fast With MP3*, Wired News (Feb. 1, 1999) <<http://www.wired.com/news/culture/0,1284,17651,00.html>>. "MP3" has become the second most requested search on both www.Lycos.com and www.Searchterms.com, with "sex" remaining the number one request. See *id.*

³ Compare Celeste Fremon, *One Mom's Napster Dilemma* (Aug. 2, 2000) <<http://www.msnbc.com/news/438844.asp?cp1=1>> (noting that Courtney Love believes Napster offers an alternate distribution system that will force record companies to "deal more fairly with artists"), and Derek Caney, *Prince Excited by Napster, Slams Record Companies*, YAHOO NEWS (Aug. 10, 2000) <http://dailynews.yahoo.com/h/nm/20000810/re/napster_prince_dc_3.html> (noting that the artist formerly known as Prince has called Napster "exciting" and ". . . a new development in the history of music"), with Fremon, *supra* (noting that Lars Ulrich of Metallica and rapper Dr. Dre have both been

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Recording Industry Association of America (“RIAA”)⁵ filed suit on behalf of numerous record companies charging Napster with contributory and vicarious copyright infringement.⁶

This update will explore the terms and technology involved in the Napster lawsuit, discuss the RIAA’s copyright infringement claims and Napster’s asserted defenses, present the current district and appellate court’s opinions and examine the possible effect of the case on the future of copyright law and the Internet.

II. NAPSTER, “MP3”, AND “PEER-TO-PEER FILE SHARING”: A NEW VOCABULARY

An understanding of the Napster case requires knowledge of the underlying computer terms and technology. Although computers are becoming more common, and many households are connecting to the Internet,⁷ knowledge of the terms and of how the programs and hardware work “can be more daunting than actually using the technology.”⁸

Central to the Napster controversy is the term “MP3”, which refers to a type of compressed digital music file.⁹ Prior to the development of MP3 compression technology, digital music files (WAV files) were very large, taking up a lot hard drive space on a computer and making the transmission of a single song over the Internet a task that took hours to complete.¹⁰ MP3

very vocal in their beliefs that Napster assists piracy of copyrighted works and reduces compensation to artists and copyright holders). As Ulrich states: “This isn’t sharing . . . it’s stealing.” *See id.*

⁴ *See* Greg Lefevre & Casey Wian, *Napster Shutdown Seen as Potential Boon for Competitors* (July 27, 2000) <<http://www.cnn.com/2000/LAW/07/27/napster.backlash/index.html>>. Napster currently has over 20 million users, a number that is expected to grow to over 70 million by the end the year. It is estimated that over 1,400 songs are downloaded each minute using the Napster program. *See* Associated Press, *Judge Shuts Down Napster, Says It Has Created a “Monster”*, FINDLAW LEGAL NEWS (July 27, 2000) <<http://www.legalnews.findlaw.com/news/s/20000727/napsterclosed.html>>.

⁵ The RIAA is a trade group representing about 90% of the American music industry. *See* RIAA, *About Us* (visited Nov. 22, 2000) <<http://www.riaa.com/About-Who.cfm>>.

⁶ *See* Complaint at 2, *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 869 (N.D. Cal. 2000) (No. 99-5183), available at <http://www.riaa.com/napster_legal.cfm>.

⁷ *See* Ariel Bershadsky, *RIAA v. Napster: A Window Into the Future of Copyright Law in the Internet Age*, 18 J. MARSHALL J. COMPUTER & INFO. L. 755, 758 (2000). It is estimated that 60 million homes own personal computers and 43 million of those are connected to the Internet. *See id.*

⁸ Steven Levy, *The Noisy War Over Napster*, NEWSWEEK, June 5, 2000, at 46, 49.

⁹ Rebecca J. Hill, Comment, *Pirates of the 21st Century: The Threat and Promise of Digital Audio Technology on the Internet*, 16 COMPUTER & HIGH TECH. L.J. 311, 312 (2000).

¹⁰ *See* Bershadsky, *supra* note 7, at 758; Hill *supra* note 9, at 316; Wendy M. Pollack,

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compression results in near-CD quality sound and the ability to make and distribute unlimited copies with no deterioration in sound quality.¹¹

MP3 files are created through a process colloquially called “ripping”.¹² To “rip” a music CD and create an MP3 music file, a standard music CD is inserted in a computer and then, using one of the freely available MP3 encoding programs, the songs are copied to the computer’s hard drive compressing them into the small, easily transmitted MP3 file format.¹³

MP3 has become the current standard for transmission of music over the Internet.¹⁴ More importantly, and central to the Napster controversy, MP3 files currently carry no copyright management system, and therefore do not allow for control over reproduction, distribution, or tracking of copyright infringers.¹⁵

The Napster program, called MusicShare, uses what is called “peer-to-peer” architecture.¹⁶ This structure decentralizes the information sharing process and allows each user to both supply and access information rather than rely on the traditional method of using large centralized information servers to supply the requested files.¹⁷

All users are connected to the central Napster servers, which compile a database of the MP3 files each person is willing to share with others.¹⁸ These databases are continually updated as users log on and off.¹⁹ Each user may search the Napster database for MP3 files available from others and download

Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium, 68 *FORDHAM L. REV.* 2445, 2450 (2000).

¹¹ See Berschadsky, *supra* note 7, at 759; Hill, *supra* note 9, at 316; Pollack, *supra* note 10, at 2449.

¹² See Pollack, *supra* note 8, at 49.

¹³ See Opposition of Defendant Napster, Inc. to Plaintiffs’ Motion for Preliminary Injunction at 3, *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 869 (N.D. Cal. 2000) (No. 99-5183), available at <<http://www.napster.com/pressroom/legal.html>>.

¹⁴ See *id.* at 3-4. “Ripping” has become so common that it is estimated that every CD issued has been converted in to MP3 files that could be potentially sent over the Internet. See *id.*

¹⁵ See Pollack, *supra* note 10, at 2450.

¹⁶ See Hane C. Lee & Ashlee Vance, *Napster to Court: The Judge Screwed Up*, *THE STANDARD* (Aug. 21, 2000), available at <http://thestandard.com/article/article_print/1,1153,17847,00.html>.

¹⁷ See Opposition of Defendant Napster, Inc. to Plaintiffs’ Motion for Preliminary Injunction at 4. The peer-to-peer structure of Napster has many possibilities that may transform the Internet outside of the music sharing context. Karl Taro Greenfeld, *Meet the Napster*, *TIME*, Oct. 2, 2000, at 60, 64.

¹⁸ See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 905 (2000); Berschadsky, *supra* note 7, at 760-61.

¹⁹ See *Napster*, F. Supp. 2d at 905-06; Berschadsky, *supra* note 7, at 761.

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those songs directly from the other person's computer.²⁰ The files themselves never pass through any Napster server.²¹ The central Napster servers only function as search engines for the databases of songs available from other users who are connected to them.²²

Napster's MusicShare program offers other features as well. There are a number of "chat rooms" categorized by music type.²³ The new artist program allows a user to enter the name of a favorite, known artist, after which the program responds by suggesting similar unsigned artists.²⁴ This is significant as only 2% of artists are signed to the major record labels, leaving many who may wish to self-promote using the Napster system.²⁵

The ease with which MP3 files can be created and traded disrupts the music industry's traditional methods of distribution and promotion.²⁶ As a result of the proliferation of Napster and the number of MP3's "shared" that are believed to be copies of copyrighted songs, the RIAA filed a copyright infringement suit against Napster in December 1999, just months after the program's release.²⁷

III. THE RIAA'S CLAIMS AND NAPSTER'S DEFENSES

Napster cannot be liable for direct infringement because it does not make or distribute any copies of the Plaintiffs' musical works.²⁸ The RIAA's claim is that Napster is liable for contributory and vicarious copyright infringement because it provides the program that enables users to commit direct copyright infringement.²⁹

A. *The RIAA's Contributory Infringement Claims*

Contributory copyright infringement "stems from the notion that one who

²⁰ See *Napster*, F. Supp. 2d at 906-07; Berschadsky, *supra* note 7, at 760-61.

²¹ See *Napster*, F. Supp. 2d at 907; Berschadsky, *supra* note 7, at 760.

²² See *Napster*, F. Supp. 2d at 907; Berschadsky, *supra* note 7, at 760.

²³ See *Napster*, F. Supp. 2d at 907; Hill, *supra* note 9, at 320.

²⁴ See *Napster*, F. Supp. 2d at 907.

²⁵ See Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 24, *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 869 (N.D. Cal. 2000) (No. 99-5283), available at <<http://www.napster.com/pressroom/legal.html>>.

²⁶ See Hill, *supra* note 9, at 321.

²⁷ See *Napster*, F. Supp. 2d at 900; Berschadsky, *supra* note 7, at 761. Napster's MusicShare program was first released in August 1999 and the RIAA's Lawsuit was filed December 6, 1999. See *id.*

²⁸ See *supra* notes 18-22 and accompanying text.

²⁹ See *Napster*, 114 F. Supp. 2d at 911. Direct infringement is a prerequisite to a contributory or vicarious infringement claim, however, the direct infringer does not need to be a defendant. See *Danjaq, S.A. v. MGM/UA Comm. Co.*, 773 F. Supp. 194, 201 (C.D. Cal. 1991).

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directly contributes to another's infringement should be held accountable."³⁰ To be contributorily liable, one must have knowledge, constructive or actual, of the infringing activities of others and material contribution to those infringing acts.³¹ In arguing that Napster had actual knowledge of the direct infringements of its users, the RIAA draws parallels between Napster and a swap meet operator who was found liable because he provided the site and facilities for the flea market where he knew sales of infringing copies of music recordings were being sold.³²

Napster argues that to be found contributorily liable, it must have knowledge that each specific file exchange is infringing, not the general knowledge that the RIAA claims is necessary.³³ Napster argues that, unlike an auction owner who knows the vendors and patrols the grounds of the market, it is more similar to a card catalog that merely indexes information and lacks particularized knowledge or control of each file.³⁴ Moreover, MP3 files carry no copyright notices and are named by users, which is an undependable means to determine the copyright status of each file.³⁵ Additionally, there may be multiple recordings of the same work, or use of the same title by multiple artists, some of which may be authorized.³⁶

To prove material contribution, the RIAA argues that Napster is a "but for" cause of the users' infringements.³⁷ Drawing analogies to the swap meet operator in *Fonovisa*, the RIAA points out that "Napster provides the location, environment, and support (including software, servers, indexing, search functions, moderators, and staff) . . . so that the infringements can take place."³⁸ Without any of these functions, the connections between the users to exchange files could not be established.³⁹

Napster refutes Plaintiff's "but for" argument by pointing out that there are many other search engines and sites on the Internet that provide links to MP3

³⁰ *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

³¹ *See Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

³² *See* Plaintiffs' Joint Motion for Preliminary Injunction at 6, *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 869 (N.D. Cal. 2000) (No. 99-5183) (citing *Fonovisa*, 76 F.3d at 264), available at <http://www.riaa.com/napster_legal.cfm>.

³³ *See Napster*, F. Supp. 2d at 918.

³⁴ *See* Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 16-17, *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 869 (N.D. Cal. 2000) (No. 99-5283), available at <<http://www.napster.com/pressroom/legal.html>>.

³⁵ *See id.* at 18-19.

³⁶ *See id.*

³⁷ *See* Plaintiffs' Motion for Preliminary Injunction at 16.

³⁸ *Id.*

³⁹ *See id.*

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files.⁴⁰ Napster contends that merely providing a link to another user's computer is insufficient participation to render it liable.⁴¹

B. *RIAA's Vicarious Infringement Claim*

The RIAA alleges that Napster's scheme is marked by an ability to supervise the direct infringer, material contribution,⁴² and direct financial benefit from the infringing activity.⁴³ These factors, taken together, are sufficient to impose vicarious liability for copyright infringement.⁴⁴ Promotion, ability to terminate users and controlled access are factors that may prove an alleged vicarious infringer's ability to supervise.⁴⁵ Accordingly, the RIAA argues that Napster promotes its service, has the right to terminate a user's account and controls users' access to the system by requiring users to login with passwords.⁴⁶ Napster responds by arguing that it never knows the use to which files shared through its system are put and therefore cannot have the required amount of control for vicarious infringement.⁴⁷

Napster has yet to earn revenue and has focused on building a large user base before exploring commercialization of its product.⁴⁸ However, Napster's allegedly infringing activities need only "enhance the attractiveness of the venue to potential customers" in order to fulfill the financial benefit factor.⁴⁹ The RIAA argues that the ability to download infringing music is what draws users to Napster.⁵⁰ Furthermore, the RIAA contends, Napster's alleged future plans for exploiting the users for financial benefits, possibly including usage charges, product sales and advertising revenues, indicate a potential direct benefit to Napster as a result of its users' infringement.⁵¹ Napster responds

⁴⁰ See Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 19.

⁴¹ See *id.*

⁴² The analysis for material contribution under vicarious infringement is the same as in contributory infringement. See *supra* notes 37-39 and accompanying text.

⁴³ See *supra* Section III-A for a discussion of the RIAA's arguments concerning material contribution.

⁴⁴ See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996); Bershadsky, *supra* note 7, at 766.

⁴⁵ See *Fonovisa*, 76 F.3d at 262.

⁴⁶ See Plaintiffs' Joint Motion for Preliminary Injunction at 21, *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 869 (N.D. Cal. 2000) (No. 99-5183), available at <http://www.riaa.com/napster_legal.cfm>.

⁴⁷ See Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 20.

⁴⁸ See Plaintiffs' Joint Motion for Preliminary Injunction at 19.

⁴⁹ *Fonovisa*, 76 F.3d at 263.

⁵⁰ See Plaintiffs' Joint Motion for Preliminary Injunction at 18.

⁵¹ See *id.* at 17-20.

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that the RIAA ignores the potential financial benefits related to Napster's non-infringing uses, such as chat rooms, the new artist program, and peer-to-peer sharing of authorized files.⁵² These financial benefits, according to Napster, would not otherwise render Napster liable for vicarious copyright infringement.⁵³

C. Napster's Defenses

Napster proffers four main arguments in its defense: (1) Napster users do not directly infringe, due to exemptions under the Audio Home Recording Act ("AHRA");⁵⁴ (2) Napster's users have a fair use exemption to direct infringement;⁵⁵ (3) even if the users are found to directly infringe, Napster is not liable because its technology is a staple of commerce;⁵⁶ and (4) the Digital Millennium Copyright Act ("DMCA") limits Napster's liability as an Internet Service Provider.⁵⁷

1. The AHRA Immunizes Non-Commercial Copying by Consumers

The Ninth Circuit has found that "all noncommercial copying by consumers" is protected by section 1008 of the AHRA.⁵⁸ The history of the AHRA, according to Napster, suggests that the exemptions should be read liberally and that Congress intended that consumers share music with others.⁵⁹ Napster further argues that the RIAA is asking the court to set a limit on the number of people with whom music can be shared, a problem that should be addressed by Congress, not the courts.⁶⁰

⁵² See Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 21.

⁵³ See *id.*

⁵⁴ See 17 U.S.C. §§ 1001-10 (1994 & Supp. 1998); Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 5-8, 9.

⁵⁵ See 17 U.S.C. § 107 (1994); Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 9-16.

⁵⁶ See Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 8-9 (citing *Sony Corp. of Am. v. Universal Studios*, 464 U.S. 417 (1984) (finding no liability for manufacturer of video cassette recorders because item has substantial non-infringing uses)).

⁵⁷ See 17 U.S.C.A. § 512 (d) (Supp. 2000); Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 32-34.

⁵⁸ *RIAA v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (citing H.R. REP. NO. 102-873, pt. 1, at 59 (1992); Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 5).

⁵⁹ See Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 6-7.

⁶⁰ See *id.* at 8.

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2. Napster's Users do not Infringe: They Engage in Protected Fair Use

When judging whether a use is fair, courts will examine the four factors set out in the statute: “the purpose and character of the use”; “the nature of the copyrighted work, the amount and substantiality of the portion used”; and effect on the potential market for plaintiff’s work.⁶¹ These four factors are to be weighed together, with no one factor controlling the outcome.⁶²

Napster argues that the first factor weighs heavily in its favor because its users engage in non-commercial infringement, as they receive no compensation for their sharing of files.⁶³ The second factor, the nature of the copyrighted work, weighs against fair use because the users are copying creative works, which receive more protection under copyright law than factual works.⁶⁴ Under the third factor, Napster points out that space-shifting, sampling, and home taping are all examples of fair use in which copying of the whole work would not count against fair use.⁶⁵ However, apart from these uses, Napster’s users copy whole songs, which would usually weigh against fair use. Under the final factor, Napster argues that when the conduct is noncommercial, the burden shifts to Plaintiffs to prove the likelihood that if a particular use is harmful, or becomes common, it would affect the market for the copyrighted work.⁶⁶ Napster points to record industry studies that show copying of MP3 files has simply displaced copying to cassette tape and therefore does not cause any harm to the market.⁶⁷ Napster also stands by its studies and belief that its users sample works before deciding whether to buy an album, an activity that has no market.⁶⁸

3. Napster is Protected as a Staple of Commerce

The staple of commerce defense comes from the Supreme Court’s decision in *Sony*, which found VCRs to be non-infringing because they have substantial non-infringing uses.⁶⁹ As Napster points out, the product “need merely be

⁶¹ 17 U.S.C. § 107 (1994).

⁶² See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

⁶³ See Opposition of Defendant Napster, Inc. to Plaintiffs’ Motion for Preliminary Injunction at 11. The Supreme Court has indicated that a use is commercial when the user exploits the copyrighted work for a profit. See *Harper & Rowe Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

⁶⁴ See *Harper & Rowe Pubs., Inc.*, 471 U.S. at 563.

⁶⁵ See Opposition of Defendant Napster, Inc. to Plaintiffs’ Motion for Preliminary Injunction at 12-13.

⁶⁶ See *id.* at 12; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

⁶⁷ See Opposition of Defendant Napster, Inc. to Plaintiffs’ Motion for Preliminary Injunction at 12.

⁶⁸ See *id.* at 13.

⁶⁹ See *Sony*, 464 U.S. at 442.

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capable of substantial non-infringing uses.”⁷⁰ As Napster notes, courts have found that a single potential non-infringing use is enough for immunity under *Sony*.⁷¹

Napster argues that its program can be used for purposes that are non-infringing fair use, such as space-shifting from one device or computer to another or sampling.⁷² Furthermore, the Napster program may be used to distribute works authorized by copyright holders.⁷³ Additionally, many artists approve of fans recording and sharing live performances.⁷⁴ Moreover, Napster’s new artist program is authorized by over 17,000 artists.⁷⁵ Napster suggests that if the RIAA prevails, the resulting scenario would exclude the 98% of artists not represented by the plaintiffs from exercising their rights.⁷⁶

4. The DMCA “Safe Harbors” Shield Napster

Napster’s final defense is that under the DMCA, its liability is limited to the removal of specific users found sharing copyrighted files.⁷⁷ Section 512(d) limits the liability of Internet Service Providers (“ISPs”)⁷⁸ who provide information location tools as long as there is no actual knowledge of infringement, and if the ISP is notified or becomes aware of apparent infringement, it removes or disables access to the infringing files.⁷⁹ Furthermore, the ISP must not receive a financial benefit from the infringing activity.⁸⁰ According to Napster, generalized knowledge is insufficient to remove it from the DMCA protection.⁸¹ Furthermore, Napster notes that it has terminated users it identified as sharing copyrighted material and it has

⁷⁰ *Id.*

⁷¹ See Opposition of Defendant Napster, Inc. to Plaintiffs’ Motion for Preliminary Injunction at 9 (citing *Vault v. Quaid*, 847 F.2d 255, 266-67 (6th Cir. 1988); *RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 776-77 (8th Cir. 1988).

⁷² See Opposition of Defendant Napster, Inc. to Plaintiffs’ Motion for Preliminary Injunction at 9.

⁷³ See *id.*

⁷⁴ See *id.* at 10 (discussing Metallica, Courtney Love, Motley Crue, and the Beastie Boys among others who approve of the recording and trading of live concerts).

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See Opposition of Defendant Napster, Inc. to Plaintiffs’ Motion for Preliminary Injunction at 32.

⁷⁸ See Berschadsky, *supra* note 7, at 768. ISP has been practically defined to include providing access to the Internet or online services such as storage, linking, and indexing. See *id.*

⁷⁹ See 17 U.S.C.A. § 512(d)(1)(B),(C); Berschadsky, *supra* note 7, at 769.

⁸⁰ See 17 U.S.C.A. § 512(d)(1)(A); Berschadsky, *supra* note 7, at 769.

⁸¹ See Opposition of Defendant Napster, Inc. to Plaintiffs’ Motion for Preliminary Injunction at 32-33.

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publicized its policy to inform account holders.⁸²

The RIAA responds that Napster is specially designed to provide anonymity to users.⁸³ They point to Napster's separation of user names from the real names and addresses of its users as an example of its attempts to provide anonymous protection to infringing users.⁸⁴ The RIAA further notes that Napster's copyright infringement policies were not even posted until after the start of litigation.⁸⁵ It argues that Napster's acts render it ineligible for the DMCA safe harbors.⁸⁶

IV. DECISIONS BY THE DISTRICT AND APPELLATE COURTS

The district court decided against Napster on its motion for summary judgment on the applicability of DMCA section 512(a).⁸⁷ This section of the DMCA gives limited liability to ISPs that are "transmitting, routing or providing connections . . . through a system or network controlled by or for the service provider . . ."⁸⁸ The Court found that Napster not only fails to transmit the infringing material through its system, as required by the statute, but that Napster has emphasized the fact that all file transfers occur over the Internet rather than through its servers.⁸⁹ The Court decided that section 512(a) protects only service providers that act merely as a conduit.⁹⁰

The district court later found for the RIAA, granting a preliminary injunction against Napster.⁹¹ Based on a sampling of files downloaded from Napster, the district court judge agreed with the RIAA that Napster's users directly infringed the companies' copyrights.⁹² Thus, the court agreed with the RIAA's swap meet analogy, finding Napster contributorily liable and holding that generalized knowledge of infringement is sufficient for liability.⁹³ For the vicarious infringement claim, the court decided that Napster has the ability to

⁸² *See id.* at 33-34.

⁸³ *See* Plaintiffs' Motion for Preliminary Injunction at 24, *R&A Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 869 (N.D. Cal. 2000) (No. 99-5183), *available at* <http://www.riaa.com/napster_legal.cfm>.

⁸⁴ *See id.* at 25.

⁸⁵ *See id.* at 24.

⁸⁶ *See* Plaintiffs' Opposition to Defendant Napster, Inc.'s Motion for Summary Adjudication at 23, *R&A Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 869 (N.D. Cal. 2000) (No. 99-5183), *available at* <http://www.riaa.com/napster_legal.cfm>.

⁸⁷ *See* *A&M Records, Inc. v. Napster, Inc.*, No. 99-05183, 2000 U.S. Dist. LEXIS 6243, at *25 (N.D. Cal. May 5, 2000).

⁸⁸ 17 U.S.C.A. § 512(a) (Supp. 2000).

⁸⁹ *See* *Napster*, 2000 U.S. Dist. LEXIS 6243, at *21-22.

⁹⁰ *See id.* at 24.

⁹¹ *See* *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 869, 901 (2000).

⁹² *See id.* at 911.

⁹³ *See id.* at 919-20.

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supervise its users and “has economic incentives for tolerating unlawful behavior.”⁹⁴

The court summarily dismissed Napster’s AHRA defense in a footnote, simply stating that section 1008 applies only to claims brought under the AHRA.⁹⁵ In dismissing Napster’s fair use defense, the court found that the use was not personal because the users “get for free something they would ordinarily have to buy . . . reap[ing] economic advantages from Napster use.”⁹⁶ Furthermore, the court found harm to the plaintiffs’ market for music sales and through the erection of barriers to their entry into the digital download market.⁹⁷ The district court rejected Napster’s staple of commerce defense, finding no substantial non-infringing use.⁹⁸ The court distinguished Napster from *Sony*, noting that Napster facilitates distribution of infringing files instead of time-shifting free broadcasts and exercises ongoing control over its service rather than merely manufacturing and selling a product.⁹⁹ Finally, because the Court found Napster to have knowledge of the infringing activity, the DMCA safe harbors did not apply.¹⁰⁰

However, in a surprising decision, Napster was granted both a stay of the injunction and an expedited appeal.¹⁰¹ The court of appeals stated that there were “substantial questions of first impression going to both the merits and the form of the injunction”¹⁰² In its appeal, Napster challenges the form and breadth of the injunction, which effectively shuts down the entire service, as well as most of the district court’s findings and conclusions of law.¹⁰³

V. NAPSTER’S EFFECT ON THE FUTURE OF THE INTERNET AND COPYRIGHT
LAW

The immediate effect of the Napster case will be to determine how copyright law will address new technologies, such as the Internet and peer-to-peer architecture. More generally, this case will decide if the twenty-first century copyright holder will be able to use the law to address infringement or be forced to use technologies such as encryption and digital watermarking to

⁹⁴ *Id.* at 920-21.

⁹⁵ *See id.* at 916 n.19.

⁹⁶ *Id.* at 912.

⁹⁷ *See id.* at 913.

⁹⁸ *See id.* at 916-17.

⁹⁹ *See id.* at 913, 916-17.

¹⁰⁰ *See id.* at 919 n.24.

¹⁰¹ *A&M Records, Inc. v. Napster, Inc.*, No. 00-16401, 2000 U.S. App. LEXIS 18688, at *1 (9th Cir. July 28, 2000).

¹⁰² *Id.*

¹⁰³ *See* Defendant-Appellant Napster, Inc’s Opening Brief at 1-4, *available at* <<http://www.napster.com/pressroom/legal.html>>.

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protect and track their rights. Either option alone is insufficient to protect rights holders; technology may be circumvented and infringers may be difficult to locate over the Internet.¹⁰⁴ While a combination of law and technology may serve to protect the current position of the record industries, the Napster case suggests that a transformation may be at hand. The transformation of a market brings both new people and structures, a change that “can be traumatic to those who depend financially upon the status quo.”¹⁰⁵

Napster has created an entirely new form of distribution that may necessitate a change in how the record industry distributes its product, as well as a shift towards more artist control.¹⁰⁶ As the recording industry reacts to this sudden change, the tension in copyright law between encouraging creation of new works through protected rights and dissemination of these works to the public comes to the forefront.¹⁰⁷ In adapting to changes in technology, copyright law must preserve the balance between these two goals and not simply preserve the existing structure.¹⁰⁸ Measures to prevent piracy cannot overstep the limitations of the copyright monopoly; legitimate technologies with non-infringing uses must be protected.¹⁰⁹ In construing copyright law in the Napster case, the court must ensure that by enforcing the recording industry’s rights, it does not destroy an information sharing revolution that could redefine the Internet.

¹⁰⁴ See Hill, *supra* note 9, at 341.

¹⁰⁵ Bershadsky, *supra* note 7, at 785.

¹⁰⁶ See *id.* at 786.

¹⁰⁷ See Fred Von Lohmann, *Free to Be “P2P”*, LEGAL TIMES, Oct. 24, 2000, available at <<http://www.law.com/cgi-bin/gx.cgi/AppLogic+FTContentServer?pagename=law/View&c=Article&cid=ZZZFFASLOEC&live=true&cst=&pc=0&pa=0>>.

¹⁰⁸ See Hill, *supra* note 9, at 341-42.

¹⁰⁹ See *id.* at 342.