

# Fair Use in the Digital Age: Are We Playing Fair?

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## I. INTRODUCTION

As technology has advanced, copyright law's presence has embroiled the two in a ubiquitous legal battle.<sup>1</sup> This battle is driven by copyright's utilitarian goal "to promote the Progress of Science and useful Arts"<sup>2</sup> which calls upon Congress to strike a balance between two distinct aims: (1) encouraging artists to create artistic works and (2) providing mechanisms by which the public may enjoy such works.<sup>3</sup> When new technologies emerge, the balance between these aims can be upset, requiring a reassessment of the scope of legal protection provided to both the artists-owners and the public-users.

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1. See DOREEN L. BLADES, COPYRIGHT ISSUES AND THE INTERNET 577 PLI/Pat. 87, 89 (1999).

2. U.S. CONST. art. I, § 8, cl. 8.

3. See David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 U.S.F. L. REV. 1, 9-10 (1998).

The technologies of the digital age have made a great amount of information freely available, a development that has left copyright owners with the view that cyberspace is a threat to the traditional rules of copyright law and that unruly users will overrun its boundaries.<sup>4</sup> The digitalization of information has allowed for instantaneous dissemination of nearly perfect copies of copyrighted works that could potentially be delivered to any user over the Internet.<sup>5</sup> Although all types of copyrighted materials have experienced nonpermissive Internet dissemination, music has been the most affected sector to date. With the development of compressed music files<sup>6</sup> (the MPEG-1 Audio Layer 3, or MP3, being the most popular), the Internet has become a burgeoning trading post for song distribution.<sup>7</sup> In fact, MP3 has replaced “sex” as the most sought after word on the Internet.<sup>8</sup> Thus, with the proliferation of music trading currently occurring via digital technologies, the copyright owner’s needed their fears assuaged.

In response to copyright owners’ fears, Congress recently enacted legislation that has expanded owners’ rights, such as the Digital Millennium Copyright Act (DMCA)<sup>9</sup> and the Copyright Term Extension Act (CTEA).<sup>10</sup> However, it has been suggested that both the substantive provisions of recent statutes and the process by which the legislature enacted them give rise to concerns about Congress’s commitment to the public welfare prong of copyright protection.<sup>11</sup> In addition, judicial interpretations of traditional copyright law in the cyberspace context have

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4. See Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 109 (2001).

5. See Adam P. Segal, Comment, *Dissemination of Digitalized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 97, 100 (1996).

6. Compression technologies downsize audio data that retains its CD-quality and permit its easy transfer via the Internet, which has only increased with faster modems and processors. Heather D. Rafter et al., *Streaming Into the Future: Music and Video on the Internet*, 547 PLI/Pat 605, 614-15 & n.30 (1999).

7. Besides compressed files, there are a variety of ways that users can access their favorite songs over the Internet. For example, some sites employ “streaming”—a real-time audio transmission that does not generally make a permanent copy on the user’s system, although the technology to do so is now available. Steven W. Kopp & Tracy S. Suter, *Developments in Copyright Policy and Network Technologies: The First Generation*, 17 J. PUB. POL’Y & MKTG. 303, 306 (1998). Another popular mechanism for distributing music over the Internet is “web-casting,” which provides a live broadcast, usually of concerts or videos. Stephanie Haun, *Musical Works Performance and the Internet: A Discouragement of Old and New Copyright Rules*, 6 RICHMOND J.L. & TECH. 3:15 & n.4 (1999).

8. See Paul Veraranich, *Rio Grande: The MP3 Showdown at Highnoon in Cyberspace* 10 Fordham I.P., MEDIA & ENT. L.J. 433, 480 (2000).

9. DIGITAL MILLENNIUM COPYRIGHT ACT, Pub. L. No. 105-304 (1998).

10. SONNY BONO COPYRIGHT TERM EXTENSION ACT, Pub. L. No. 105-298, 112 STAT. 2827 (1998) (codified at 17 U.S.C. §§ 301-304 (1998)).

11. See Okediji, *supra* note 4, at 110-11.

limited the public interest, especially as fair use has traditionally been understood.<sup>12</sup>

Although purely free dissemination of information is arguably in the spirit of the digital age, there should be some safeguards against total dissolution of the public interest in copyright law. This Comment proposes that in light of recent legislative initiatives and judicial decisions addressing the digital age, the fair use doctrine needs to be re-evaluated and digitized as well. The public interest must remain a vital part of the American utilitarian copyright system's future. Part I introduces the current state of copyright law in the United States, including the impact of the Digital Millennium Copyright Act on both users and their online service providers (ISPs). Part II analyzes three recent fair use decisions in the digital music industry. Part III discusses the continuing importance of the fair use doctrine in the digital age in light of the current pro-owner climate. Part IV asserts that in order for the public interest to be fully integrated in the digital age, the legal milieu needs to recognize that it is an integral part of copyright law.

## II. LEGAL BACKGROUND OF UNITED STATES COPYRIGHT LAW

### A. *The Copyright Act of 1976 and the Fair Use Doctrine*

#### 1. Protections and Rights Under the 1976 Act

The Copyright Act of 1976 (Act) provides copyright owners with an automatic “bundle of rights” for “original works of authorship fixed in any tangible medium of expression.”<sup>13</sup> Under the 1976 copyright Act, registration is not necessary in order to obtain protection for a work, yet registration does provide access to greater protections.<sup>14</sup> The Act specifically provides creators of musical works (including lyrics) and sound recordings with a property right in their expressions.<sup>15</sup> Because of the diversity of rights between musical works/lyrics and sound recordings, copyright rights are generally shared jointly among authors—usually the artists and the production teams.<sup>16</sup> The protection of rights

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12. *E.g.*, UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (2000).

13. 17 U.S.C. § 102 (1994).

14. In infringement cases, registration provides an automatic presumption of the existence of a valid copyright. *Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923, 931 (N.D. Cal. 1996).

15. The Sound Recording Act of 1971 was passed pursuant to industry concerns about recording piracy. Pub. L. No. 92-104, 85 Stat. 391 (1971) (codified in dispersed sections throughout 17 U.S.C.).

16. Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1669 (1999) (describing the distinction between recording and song copyrights).

that an owner is afforded under the Act includes a right to reproduce, to prepare derivative works, to distribute, and to perform the protected work publicly.<sup>17</sup> In 1995, Congress expanded the bundle of rights to include a performance right for sound recordings via a digital audio transmission under the Digital Performance Right in Sound Recordings Act (DPRSRA).<sup>18</sup>

The three exclusive rights most often at issue in digital music infringement cases are the rights of reproduction,<sup>19</sup> distribution,<sup>20</sup> and public performance.<sup>21</sup> The right of digital audio transmission, and thus public performance, is protected by the DPRSRA. Although it could be argued that the placing of a copy of a song on a server is not a “transmission,” Congress intended the digital audio transmission right to include delivery via electronic means.<sup>22</sup> Therefore, the delivery of music files to a server would implicate a copyright owner’s exclusive right to public performance.

As to the rights of reproduction and distribution, the Act does place an important limitation on a copyright owner. Under section 109(a), the owner of a specific recording is permitted to discard that copy.<sup>23</sup> This section of the statute, commonly referred to as the “first sale doctrine,” allows consumers to purchase an original copy of a CD and resell that

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17. 17 U.S.C. § 106 states:

The owner of a copyright under this title 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 pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (5) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (1994 & Supp. III 1997).

18. *Id.* § 106(6). This amendment was spurred by industry concern regarding the market the Internet had created for such recordings. See generally Jeffery A. Abrahamson, *Tuning Up for a New Musical Age: Sound Recording Copyright Protection in a Digital Environment*, 25 AM. INTELL. PROP. ASS’N Q.J. 181 (1997).

19. 17 U.S.C. § 106(1).

20. *Id.* § 106(3).

21. *Id.* § 106(6).

22. See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 431, 439 (1997).

23. Section 109(a) states, “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” 17 U.S.C. § 109(a).

copy without violating the copyright holders' right of distribution. However, in the realm of cyberspace, the users who freely upload<sup>24</sup> and download<sup>25</sup> are not protected by the first sale doctrine. The first sale doctrine is not designed to protect individuals who, without authorization, post copies of their own CDs on the Internet, but rather protects those who subsequently transfer the entire physical copy of the recording.<sup>26</sup> Thus, the first sale doctrine is not a safe harbor for users who post copies of their CDs without authorization and would be considered in violation of the copyright owners' distribution and reproduction rights.

## 2. Theories of Infringement Under the Act

Infringement occurs when an individual makes an unauthorized use of a copyrighted work.<sup>27</sup> There are three basic theories of infringement: direct infringement, contributory infringement, and vicarious liability.<sup>28</sup>

Direct infringement occurs when a defendant violates one or more of the copyright owner's exclusive rights. In a direct infringement case, plaintiff-copyright owner must prove: (1) the existence of a valid copyright to the work at issue; and (2) that the defendant copied the work.<sup>29</sup> There is no element of intent necessary to prove infringement, thus regardless of whether the alleged infringer knew he or she was acting illegally—infringement has occurred.<sup>30</sup> Furthermore, because the making of one copy for personal use constitutes direct infringement, the uploading of a song without authorization from the copyright owners in order to make it available over the Internet is also direct infringement.<sup>31</sup>

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24. See Karen S. Frank, *Potential Liability on the Internet*, 437 PLI/Pat 417, 425 (1996) (“‘[U]ploading’ refers to the process of transferring information from a user’s personal computer to the Internet . . .”).

25. *Id.* (“‘[D]ownloading’ refers to the process of transferring information from the Internet . . . to an Internet user’s personal computer.”).

26. See 17 U.S.C. § 109(a).

27. See *id.* § 501(a) (infringing occurs when an alleged infringer engages in a § 106 activity); see also Mark Radcliffe, *Digital Millennium Copyright Act Forging the Copyright Framework for the Internet: First Steps*, 557 PLI/Pat 365, 370-71 (1999) (discussing copyright basics).

28. Frank, *supra* note 24, at 428 (reviewing bases of copyright liability).

29. Kevin Davis, Comment, *Fair Use on the Internet: A Fine Line Between Fair and Foul*, 34 U.S.F. L. REV. 129, 135 (1999). Copying of a plaintiff’s work can be proven through circumstantial evidence showing that (1) defendant has access to the copyrighted work and (2) that defendant’s work is substantially similar to the plaintiff’s protected work. CRAIG JOYCE ET AL., COPYRIGHT LAW 619-20 (4th ed. 1998).

30. Jeffery P. Cunard & Albert L. Wells, *The Evolving Standard of Copyright Liability Online*, 497 PLI/Pat 365, 374 (1997).

31. *Id.*

However, due to the high cost and potentially lower monetary returns of pursuing Internet users individually, copyright owners generally choose to sue the users' Internet service providers (ISPs) on one of the other theories of infringement.

An ISP could potentially be liable for contributory infringement. The theory of contributory infringement requires a showing that: (1) direct infringement occurred; (2) the defendant knew or had reason to know that infringement was occurring; and (3) the defendant participated in the infringement by causing, inducing, or materially contributing to its occurrence.<sup>32</sup> Although the Act does not specifically include the theory of contributory infringement, the courts have found this theory to be an equitable solution for finding liability.<sup>33</sup>

The third theory of infringement, vicarious liability, is another popular avenue for copyright owners to pursue in order to find a remedy for online infringement. This theory focuses on the relationship between the direct infringer and the defendant, rather than on the defendant's own knowledge and actions.<sup>34</sup> In order to prevail on the theory of vicarious liability, the copyright owner must show that the defendant: (1) has a supervisory position regarding the infringing activity; and (2) stands to gain financially from the infringing activity.<sup>35</sup> The theory of vicarious liability has led to confusion among the courts as to the requisite level of knowledge necessary for vicarious liability to attach and the exact role of ISPs on the Internet: Are they mere channels through which information flows or do they play a more substantial role?<sup>36</sup> The confusion surrounding the role of ISPs led Congress to enact Title II of the Digital Millennium Copyright Act, which categorizes ISPs to aid courts in their analysis of infringing activities.<sup>37</sup>

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32. See Frank, *supra* note 24, at 428; see also *Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923, 932-33 (N.D. Cal. 1996).

33. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1983) (holding that contributory copyright infringement is merely part of the larger challenge of identifying circumstances in which it is proper to hold a party responsible for the actions of another).

34. See Frank, *supra* note 24, at 429.

35. *Id.*

36. See Michelle A. Ravn, *Navigating Terra Incognita: Why the Digital Millennium Copyright Act Was Needed to Chart the Course of Online Service Provider Liability for Copyright Infringement*, 60 OHIO ST. L.J. 755, 766 (1999).

37. 17 U.S.C. § 512 (Supp. IV 1998).

*B. A Defense to Internet Infringement: The Fair Use Doctrine*

The modern day fair use doctrine is rooted more than 100 years of jurisprudence.<sup>38</sup> The originators of the fair use doctrine realized that users who contributed to the corpus of intellectual property by utilizing protected works as a foundation for further creative works could be entitled to protection.<sup>39</sup> Common law fair use emphasized the introduction of new works to the public and turned the question of infringement on the end product rather than the fact of use itself.<sup>40</sup> Thus, at common law, the core of fair use dialog centered on prohibiting misappropriation of the original author's work.<sup>41</sup>

The modern interpretation of the fair use doctrine has been codified in section 107 of the 1976 Act.<sup>42</sup> Because no single definition of what constitutes fair use exists, the courts continue to employ a case-by-case rationale to reach an equitable decision.<sup>43</sup> Under this regime of fluidity, courts have read the fair use defense to invite and encourage a rigid application of statutory language that would hinder the very artistry that the law attempts to cultivate.<sup>44</sup>

In analyzing the application of the fair use doctrine, the courts look to the four nonexclusive factors delineated in section 107 of the 1976 Act: (1) the purpose and character of the use; (2) the nature of the protected work; (3) the amount and substantiality of the portion used;

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38. Justice Story engaged in the first analysis of a fair use defense in *Folsom v. Marsh*, in which he identified five elements constituting a fair use defense: "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1993) (citing *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)).

39. See Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 30-32 (1997) (criticizing modern judicial focus on transformative use over productive use in copyright cases).

40. See Okediji, *supra* note 4, at 120 (citing *Cary v. Kears*, 170 Eng. Rep. 679, 679-80 (K.B. 1803) (explaining that the court's inquiry turned on the "animus furandi" (intent) to determine whether in use was to produce a new work or mere pretense to copy the original work); Thomas Jefferson expressed concern about bestowing a property right upon inventors: "ideas should freely spread from on to another over the globe, for the moral and mutual instruction of man, and improvement of his condition . . . and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation." Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), THE COMPLETE JEFFERSON 1011, 1015 (Saul K. Padover ed., 1943)).

41. See *id.* Okediji, *supra* note 4, at 121.

42. With the enactment of § 107 of the 1976 Act, Congress intended to simply codify the judicial doctrine of fair use without any modification. *Campbell*, 510 U.S. at 577 (citing H.R. REP. NO. 94-1476 p. 66 (1976)).

43. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (citing H.R. 94-No.1476 p.66 (1976)).

44. See *Campbell*, 510 U.S. at 577 (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

and (4) the market impact.<sup>45</sup> The modern understanding of the first element has been generally understood to turn on the question of how “transformative” the second work is in comparison to the first.<sup>46</sup> In other words, does the new work add something, thus altering the meaning or expression of the first work? However, transformative use is not necessary for a finding of fair use.<sup>47</sup>

The second factor concerning the “nature of the copyrighted work” requires the court to analyze how related the two works are, indicating that some works may be more closely tied than others.<sup>48</sup> This element reinforces the idea behind the fair use doctrine in that if the second work merely replaces the first, it’s weighed against a finding of fair use. The analysis of the third element is suggested by both the purpose and character of the use and the fourth regards the potential effect on the market.<sup>49</sup> The fourth factor requires the courts to look not only at the effect on the copyright owner’s present market, but also at possible future markets.<sup>50</sup> In the digital music context, the fair use analysis has generally turned on this fourth factor of market impact.<sup>51</sup> Thus, the fair use defense

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45. 17 U.S.C. § 107 (1994). Section 107 states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by 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 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:

- (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 the value of the copyrighted work.

46. See Pierce N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990). The inquiry into the “purpose and character of the use” also looks to the commercial or nonprofit aspect of the allegedly infringing work. *Sony v. Universal City Studios*, 464 U.S. 417, 448-49 (1984).

47. See *Sony*, 464 U.S. at 455 n.40.

48. See *Campbell*, 510 U.S. at 586 (citing cases in which courts compared and contrasted the “cores” of the two works at issue).

49. See *id.* at 587.

50. “[W]hether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market.” *Id.* at 590 (citing M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4], at 13-102.61 (footnote omitted)).

51. See discussion *infra* Part II.



has been used to maintain the balance between the artist-owners and the public-users.<sup>52</sup>

### C. Digital Media Addressed in Recent Amendments

#### 1. Audio Home Recording Act

In the late 1980s, the introduction of digital audio tapes (DATs) caused concern within the music industry that this new technology would soon replace the traditional audio cassette.<sup>53</sup> The DAT utilizes digital tapes to create CD quality copies of sound recordings regardless of how many generations (copies) are made.<sup>54</sup> The music industry claimed that this new technology would result in a decrease in commercial music sales because perfectly reproduced illegal copies would flood the market.<sup>55</sup> The concern that this technology caused the music industry stimulated Congress to enact the Audio Home Recording Act of 1992 (AHRA).<sup>56</sup> Interesting enough, the outcry and resistance that the DAT initially received from the music industry can be paralleled to the current battle over the advent of the MP3s.<sup>57</sup>

The AHRA is comprised of three main sections. First, it requires that every DAT machine incorporate a mechanism called the Serial Copy Management System that blocks a user from making digital copies of an original digital rendition.<sup>58</sup> The second component of the AHRA is a royalty scheme that requires digital audio recording device manufactures and distributors to pay percentages to the copyright owners who distribute their works in digital form.<sup>59</sup> The final element of the ARHA is a prohibition against specified infringement actions.<sup>60</sup> This section provides consumers with the right to make digital copies for noncommercial use.<sup>61</sup>

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52. See discussion *infra* Part III.

53. See Veravanich, *supra* note 8, at 450 (citing Wayne Thompson, *Audio Cassette Recorder Market Thrives*, SAN DIEGO UNION-TRIB., Feb. 2, 1995, at E2).

54. See Rafter et al., *supra* note 6, at 620.

55. See H.R. REP. NO. 102-873 (II).

56. See Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified in 17 U.S.C. §§ 1001-1010).

57. See Veravanich, *supra* note 8, at 450.

58. 17 U.S.C. § 1002 (1994).

59. *Id.* § 1003-06.

60. *Id.* § 1008.

61. Section 1008 provides:

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording

Although this legislation led to the introduction of DAT recording devices into the U.S. marketplace,<sup>62</sup> it appears to be an inadequate means to address the issue of downloading music from the Internet. In two recent decisions,<sup>63</sup> the Ninth Circuit stated that computer hard drives are not within the statutory definition of “digital audio recording device,”<sup>64</sup> thus, rendering the AHRA ineffective for addressing either an infringement action or a fair use defense by users downloading digital music from the Internet.

## 2. Digital Millennium Copyright Act

The continuing globalization of the digital age and the confusion amongst the courts as to ultimate infringement liability led to further congressional action. In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA) with two purposes in mind: to implement the WIPO (World Intellectual Property Organization) treaties and to delineate online liability. Title I of the DMCA was designed to implement the two WIPO treaties that had been recently enacted: the World Copyright Treaty<sup>65</sup> and the WIPO Performances and Phonograms Treaty.<sup>66</sup> These treaties have two functions. First, they provide copyright owners in the United States protection for their works abroad by extending to the owners the exclusive right to authorize the availability of their works over the Internet.<sup>67</sup> Second, and more importantly in terms of a fair use discussion, Title I expressly prohibits piracy of copyrighted works by means of circumventing technological mechanisms designed to

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medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

*Id.*

62. H.R. REP. NO. 102-873 (II). The congressional intent behind enacting the AHRA was “to create the necessary legal environment for the digital audio tape (DAT) technology to be introduced in to the commercial marketplace in the United States.” *Id.*

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

64. Section 1001(3) provides:

A “digital audio recording device” is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as 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. . . .

17 U.S.C. § 1001(3) (1994).

65. WIPO COPYRIGHT TREATY, Dec. 20, 1996, 36 I.L.M. 65 (1997).

66. WIPO PERFORMANCES AND PHONOGRAMS TREATY, Dec. 20, 1996, 36 I.L.M. 76 (1997).

67. See Wendy M. Pollack, Note, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 *FORDHAM L. REV.* 2445, 2463 (2000).

control user access to copyrighted material.<sup>68</sup> The circumvention language is primarily designed to eliminate piracy through the “black boxes.” These black boxes circumvent emerging protectionist technologies referred to as “digital envelopes”<sup>69</sup> or “digital objects” used to protect copyrighted works online.<sup>70</sup>

The “black box” provision has led to controversy concerning fair use privileges, especially in the software development, cryptology, and library communities. This controversy led Congress to delay the prohibition on circumvention for two years and to grant these industries limited exemptions.<sup>71</sup> The software development exemption is limited to reverse engineering in order to establish “interoperability” with other software programs.<sup>72</sup> The cryptology community is permitted to circumvent protections in either “good faith” encryption research or in order to test the effectiveness of anticircumvention procedures.<sup>73</sup> Nonprofit, archival, or educational libraries are granted an exemption limited to previewing potential acquisitions.<sup>74</sup>

Although Congress granted these fair use exemptions, they are unlikely to be relevant in the digital music context. First, general Internet users do not fall within one of the exempted communities. Second, the music industry will incorporate the digital envelopes and other like technologies in order to protect their copyrighted works and utilize the protections afforded them under the DMCA. Thus, the DMCA creates a legal and viable arena in which the music industry should comfortably

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68. Section § 1201(a)(2) states in pertinent part:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title.

17 U.S.C. § 1201(a)(2)(A) and (B) (1999).

69. See Maureen S. Dorney, *New High-tech Solutions for High-tech Infringement: The Digital Millennium Copyright Act has Integrated Technological Developments as Well as Legal Protection into Copyright Law*, NAT'L L.J., May 17, 1999, at B5 (requiring user to pay a fee to access protected information in digital envelopes).

70. Mark Radcliffe, *The Digital Millennium Copyright Act 4* (Nov. 1998), [http://www.gcwf.com/articles/interest/interest\\_11.html](http://www.gcwf.com/articles/interest/interest_11.html) (last visited Feb. 12, 2001).

71. See *id.*

72. See *id.*

73. See *id.*

74. See *id.*

market its wares on the Internet without fear of losing revenue to infringers.

Title II of the DMCA has proven to be a more functional provision in terms of online infringement actions.<sup>75</sup> As a result of the confusion in the courts as to the infringement liability of ISPs,<sup>76</sup> Congress enacted the Online Copyright Infringement Liability Limitation Act in order to “preserve strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment . . . while providing greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”<sup>77</sup> Thus, Congress envisioned a bifurcated system of responsibility: (1) on the copyright owners who have a duty to inform ISPs of allegedly infringing activities and (2) on the ISPs to act quickly and responsibly once informed of possible infringing activities.

Section 512 provides for four possible ISP “safe harbor” provisions. The first provision is available for ISPs who act as mere conduits—those systems that provide transmission, routing, or connection through a network, including intermediate and transient storage of material en route.<sup>78</sup> In order to qualify for this provision, the material must have been initiated by a third party,<sup>79</sup> the process must have been automatic (without action by the ISP),<sup>80</sup> the copy produced must have been only for purposes of performing the necessary functions of transmission,<sup>81</sup> and the material must have remained unchanged by the ISP.<sup>82</sup> The second “safe harbor” provision deals with system caching.<sup>83</sup> This section protects ISPs who retain material as intermediaries.<sup>84</sup> Again, the ISP cannot have posted or altered the material.<sup>85</sup> The system—caching “safe harbor” places a responsibility on the ISP to remove the material upon notification by the copyright owner that the material is infringing.<sup>86</sup> The third provision provides protection to ISPs who permit users to store material on their

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75. 17 U.S.C. § 512 (1998).

76. See discussion *supra* Part I.A.ii.

77. H.R. CONF. REP. NO. 105-796, at 72, *reprinted in* 1998 U.S.C.C.A.N. 639, 649 (1998).

78. 17 U.S.C. § 512(a) (1998).

79. *Id.* § 512(a)(1).

80. *Id.* § 512(a)(2).

81. *Id.* § 512(a)(4).

82. *Id.* § 512(a)(5).

83. *Id.* § 512(b).

84. *Id.*

85. *Id.*

86. *Id.*

system.<sup>87</sup> Under this “safe harbor,” a qualifying ISP (1) cannot have actual or constructive knowledge the material is infringing; (2) must not derive direct economic benefit from the infringing material; and (3) must act promptly to remove/disable any infringing material upon notification to the ISP’s designated agent.<sup>88</sup> The final “safe harbor” in section 512 grants protection to online information location devices.<sup>89</sup> The devices included in this provision include search engines, hyperlinks, and online directories.<sup>90</sup> ISP liability is limited in this context so long as the section 512(c) conditions are met.<sup>91</sup> It is important to point out that each of the “safe harbors” are distinct, so that ineligibility under one provision does not result in ineligibility under another.<sup>92</sup> Thus, if an ISP falls within one of the “safe harbors” and meets all the requirements, it is not liable for infringement. However, if an ISP fails to find protection under section 512, it is not precluded from relying on pre-DMCA defenses, such as fair use.<sup>93</sup>

The DMCA provides an incentive for communication between copyright owners and service providers concerning online infringement activity. However, the public-user rights remain outside new legislation regarding online activity. In terms of the DMCA, the circumvention provisions embodied in Title I represent the music industry’s interests. The service providers are protected by the “safe harbors” expressed in Title II. Although laws that promote stronger copyright laws advocate new innovation, the doctrine of fair use should not be forgotten as another means by which the digital economy can grow by aiding the diffusion of information and empowering all society.<sup>94</sup>

### III. TWO RECENT DECISIONS SHAPING THE MODERN UNDERSTANDING OF THE FAIR USE DOCTRINE

#### A. Recording Industry Ass’n of America v. Diamond Multimedia Systems, Inc.

In April 1999, the Recording Industry Association of America (RIAA) appealed a district court denial of motion for preliminary injunction. The RIAA filed suit in October 1998 alleging that Diamond

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87. *Id.* § 512(c).

88. *Id.*

89. *Id.* § 512(d).

90. *See* Radcliffe, *supra* note 27, at 382.

91. 17 U.S.C. § 512(d).

92. *Id.* § 512(n); *see also* Radcliffe, *supra* note 70, at 4.

93. 17 U.S.C. § 512(l).

94. Okediji, *supra* note 4, at 137.

Multimedia Systems' manufacture and sale of a device called the "Rio" a portable disc player, violated the restrictions of the AHRA.<sup>95</sup> The District Court for the Central District of California found that RIAA's likelihood of success on the merits was based upon a combination of law and fact and that the balance of hardships did not favor RIAA.<sup>96</sup>

The Rio technology allows users to download audio files from their hard drive onto the portable player.<sup>97</sup> The files on the hard drive, usually derived from either the user's CD collection or the Internet, are transferred via the Rio Manager (separate computer software provided with the Rio) to the Rio itself.<sup>98</sup> The portable player alone is unable to effect transfer and can only receive files transferred from a computer equipped with the Rio Manager.<sup>99</sup>

The circuit court outlined the circumstances that gave rise to the advent of the Rio. First, the court recognized that the digital music phenomenon began in the late 1980s with the gradual switch from analog to digital recording.<sup>100</sup> Second, the compression technologies, such as the MP3, gave users a viable system in which to trade music electronically.<sup>101</sup> Finally, the rise of cable modems permitted users to download files in minutes instead of hours.<sup>102</sup>

The court then focused its inquiry on whether the AHRA addressed devices such as the Rio and found that it did not. First, the court decided that because the Rio was not a "digital audio recording device" as intended by the AHRA, it did not need to incorporate the Serial Copy Management System.<sup>103</sup> The court found that in order to qualify as a "digital audio recording device," the Rio itself had to be able to reproduce either "directly" or "from a transmission" a "digital music recording."<sup>104</sup> Second, the court found that computer hard drives to be

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95. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1073 (9th Cir. 1999). The RIAA predicted that pirated digital music proliferated by devices such as the Rio would cost the music industry over \$300 million annually. Critics of the industry predictions noted that prices of commercially available recordings already reflected the costs of illegal copying. *Id.* at 1074.

96. *See generally* *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d 624 (C.D. Cal. 1998).

97. *Diamond*, 180 F.3d at 1079.

98. *See id.*

99. *See id.* at 1075.

100. *Id.* at 1073.

101. *Id.* at 1074.

102. *Id.*

103. *Id.* at 1075-76; *see also* 17 U.S.C. § 1001(3) (defining "digital audio recording device"); *id.* § 1001(5)(A) (defining "digital music recording").

104. *Diamond*, 180 F.3d at 1076.

exempt from the AHRA.<sup>105</sup> This conclusion led some commentators to contend that music files that have moved through a computer hard drive are exempt from the royalty and serial restrictions of the ARHA.<sup>106</sup> However, as later cases suggest,<sup>107</sup> simply because the ARHA may not protect the copyright interests, such interests are still protectable under other legislation such as the DMCA.

Finally, the circuit court examined the fair use purpose of the AHRA—the “facilitation of personal use.”<sup>108</sup> The court concluded that pursuant to the legislative history and the exemption embodied in § 1008 of the AHRA consumers are assured the right to make recordings for their “private noncommercial use.”<sup>109</sup> The court also analogized the “time-shifting” use of VCRs to the Rio’s ability to permit users to “space-shift” files already on the user’s hard drive.<sup>110</sup> This fair use portion of the decision has been criticized as a far-reaching holding by the court.<sup>111</sup> Theoretically, the “space-shifting” exception poses a limitation on the RIAA: it permits prosecution of those who post infringing material, but provides no remedy against those who download. However, in reality, if the source is eliminated, so is the infringing activity no matter its nature.

The *Diamond II* decision furthered the existence of a fair use that the Supreme Court identified in *Sony*. Private, noncommercial use of copyrighted works is permissible. This boundary of fair use was critical to the Ninth Circuit’s next digital music decision.

#### B. A & M Records, Inc. v. Napster, Inc.

In late 1999, a group of recording industry companies filed suit against Napster Inc., a company that established an online community of MP3 sharing, alleging that the company’s users were directly infringing and Napster itself was guilty of contributory and vicarious

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105. *Id.* at 1078 (discussing how computer hard drives do not have the “primary purpose” of making digital audio recordings, and thus cannot be classified as digital audio recording devices).

106. *See* Pollack, *supra* note 67, at 2472.

107. *See* Napster discussion *infra* Part II.B.

108. *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.* 180 F.3d 1072, 1079 (9th Cir. 1999).

109. *Id.* (citing S. REP. NO. 102-294 (1992), 1992 WL 133198, at \*86).

110. *Id.* (comparing the *Diamond II* case to *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 455 (1984) (holding that VCR “time-shifting” of copyrighted television shows constituted fair use)).

111. *See* Pollack, *supra* note 67, at 2472.

infringement.<sup>112</sup> In July 2000, Judge Patel of the District Court for the Northern District of California preliminarily enjoined Napster from continuing to operate without copyright permission.<sup>113</sup> On February 12, 2001, the Ninth Circuit affirmed the district court's issuance of the preliminary injunction.<sup>114</sup>

The circuit court initially engaged in an analysis of the technology through which the Napster community operates.<sup>115</sup> The court identified the process as "peer-to-peer" file sharing that permits users to: (1) make MP3 files available on their hard drives accessible to other Napster users; (2) search other Napster users' hard drives; and (3) transfer from one computer to another perfect copies of the MP3 files over the Internet.<sup>116</sup> The facilitating software, MusicShare, is available free of charge at the company's website.<sup>117</sup> In addition to the peer-to-peer sharing, Napster also provides its users with technical support, a "chat room," and a directory for participating artists to provide information about themselves.<sup>118</sup>

The plaintiffs alleged that the peer-to-peer activities constituted distribution and reproduction of copyrighted works, and thus direct infringement by Napster's users.<sup>119</sup> Napster contended that its users were not direct infringers, rather they were simply engaged in fair use under § 107 of the 1976 Act.<sup>120</sup> Napster illustrated its users' fair use in three distinct ways: (1) sampling (temporary copying of a protected work prior to purchasing the work); (2) space-shifting (accessing a copy of a recording that the users already own through the Napster system); (3) permissive distribution (works distributed by both new and established artists).<sup>121</sup> The Ninth Circuit rejected all of Napster's assertions, with a small exception for permissive distribution by artists who willingly posted their music in the Napster system.

In the first part of the Ninth Circuit's fair use discussion, it engaged in a detailed analysis of the fair use doctrine as it applied to Napster users. First, the court recognized that under the first element of § 107—

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112. See generally *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000). Although the question of Napster's status as an ISP is an interesting one, this Comment will only address the direct infringement/fair use discussion in this case.

113. *Napster*, 114 F. Supp. at 927.

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

115. *Napster*, 239 F.3d at 1011-13.

116. *Id.* at 1011-12.

117. See <http://www.napster.com> (last visited Feb. 12, 2001).

118. *Napster*, 239 F.3d at 1011.

119. *Id.* at 1013.

120. *Id.* at 1014.

121. *Id.*



“purpose and character of the use”—simple reformation of a copyrighted work in a new medium (here, CD to MP3) was unlikely to be considered transformative enough for a finding of fair use.<sup>122</sup> In addition, the Ninth Circuit explained that the Napster users’ use was commercial because it was not private and users would otherwise have to pay for the music they were freely downloading.<sup>123</sup> Thus, the Ninth Circuit found that free-riding was enough to constitute commercial use for purposes of a fair use analysis.<sup>124</sup> Second, the court found that copying of creative works tends to lean away from a finding of fair use.<sup>125</sup> Third, the fact that Napster users engaged in copying of the whole work weighs against a finding of fair use.<sup>126</sup> Finally, the court concluded that there was a potential effect on the market because of the possible reduction in CD sales and heightened barriers to plaintiffs’ ability to enter the digital downloading market.<sup>127</sup> Thus, the Ninth Circuit concluded that the plaintiffs met the threshold against a finding of fair use by the Napster users.<sup>128</sup>

The second part of the fair use discussion centered on Napster’s three identified fair uses. First, the Ninth Circuit summarily declined to extend the fair use doctrine to incorporate “sampling,” due to the potential detrimental effect on the plaintiff’s present CD market and possible future digital download market.<sup>129</sup> Second, Napster’s assertion that its users engaged in permissive “space-shifting” was an attempt to capitalize on the Ninth Circuit decision in *Diamond II*, which was an outgrowth of the Supreme Court’s 1984 decision in *Sony* regarding time-shifting of entire copyrighted works.<sup>130</sup> Here, the Ninth Circuit upheld the district court by making a distinction between the earlier decisions and the Napster situation.<sup>131</sup> The distinguishing factor the Ninth Circuit court found concerned the fact that in the prior decisions the “shifting” that occurred was for the benefit of the single user who “shifted” the copyrighted material.<sup>132</sup> Napster’s users, on the other hand, disseminated the “shifted” material to a mass audience.<sup>133</sup> The plaintiffs did not dispute

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122. *Id.* at 1015 (listing cases in which re-formation was not found “transformative”).

123. *Id.* at 1013-14.

124. *Id.*

125. *Id.* at 1016.

126. *Id.* However, the Ninth Circuit noted that the *Sony* case upheld fair use where the entire work was reproduced. *Id.*

127. *Id.* at 1018 (citing *Napster*, 114 F. Supp. 2d at 913).

128. *See id.* at 1017.

129. *Id.* at 1018.

130. *Id.* at 1019.

131. *Id.*

132. *Id.*

133. *Id.*

the third category of fair use identified by Napster, permissive distribution.<sup>134</sup>

The Ninth Circuit's analysis of Napster's users fair use supports the traditional boundaries drawn by the courts. If defendants can show that the allegedly infringing use is primarily private and noncommercial, then the courts will find it to be a fair use. Here, even though Napster users are not "selling" copies of copyrighted material, their use is a commercial one. The court refused to accept the argument that subsequent purchase of music, after exposure to the music on Napster, supports a finding of fair use. A showing that infringing use leads to positive impact in the copyright holder's market does not obviate the owner's right to capitalize on alternative markets.<sup>135</sup> Thus, the Napster decision promotes the fair use doctrine's balance between promotion of new products for the public good and protection of an original creator's work.

#### IV. FUTURE OF FAIR USE IN THE DIGITAL AGE

The importance of the fair use doctrine should not be underplayed as the body of copyright law grows. The fair use doctrine is the ultimate statement of the utilitarian goal of American copyright law. The emphasis of the doctrine is to protect existing work from misappropriation while not hindering the introduction of new works to the public.<sup>136</sup> Thus it is important that the fair use doctrine remain as a vital part of copyright law.

The bifurcated relationship between the artist-owners and public-users is even more tense in cyberspace. First, the global nature of the Internet compels the need for a fair use framework on an international level. However, thus far, the focus has been primarily on the protection of the property interests without addressing the issue of fair use.<sup>137</sup> Although Internet copyrighted works are so widely available, international legislation continues to fail to address the implications of creating of a work in one country that uses a work protected in another.<sup>138</sup>

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134. *Id.*

135. *See Campbell*, 510 U.S. at 590 n.21; *L.A. Times v. Free Republic*, 54 U.S.P.Q.2d 1453, 1469-71 (C.D. Cal. 2000).

136. *See Okediji*, *supra* note 4, at 146.

137. *Id.* at 147.

138. Currently the Berne Convention and the Universal Copyright Convention simply require member states to treat foreign creators of fellow member states no different than they treat their own. *See Okediji*, *supra* note 4, at 148-52.

Not only has fair use been omitted on the international level, domestic digital legislation<sup>139</sup> has failed to address the equitable doctrine of fair use. Industry fears have caused an increase in technological protections without recognizing that, as owners receive a surge in protection, so should the public.

In addition, judicial decisions have shifted the fair use inquiry from its traditional focus on whether or not a substantial amount of the protected work was taken to a focus on a market-driven analysis. This view correlates to the prevailing notion that fair use is a privilege granted to subsequent users that subordinates and limits the public interest side of copyright law.<sup>140</sup>

Thus, there is a need to redefine the terms in which fair use is examined in the digital age. As information flows freely through cyberspace, the role of the user has expanded. Because public interest lies at the heart of American copyright law, the users should be entitled to the same level of protection afforded to the owners. The public-user role should not be diminished in the digital age.

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139. I recognize that the AHRA addresses fair use with its § 1008 exception for personal use, however that legislation was passed prior to the Internet explosion.

140. See MERGES ET AL., *supra* note 22, at 333.