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A&M RECORDS, INC. V. NAPSTER, INC.: COPYRIGHT INFRINGEMENT ON THE INTERNET

I. INTRODUCTION

The United States Constitution vests in Congress the power to protect the creative works of authors and inventors.[1] In order to facilitate technological advancement, Congress has utilized its express constitutional authority by making necessary changes to federal copyright law.[2] The Federal Copyright Act is an example of modernization of Congressional copyright law.[3] At present, United States copyright law protects an artist's work from the moment the work is completed, regardless of whether the artist has notified the public of the work's authorship.[4]

Alternatively, innovative technology has also demanded that Congress provide the general public with exceptions and defenses to an alleged violation of copyright law.[5] Consumers have the ability to reproduce copyrighted works with the aid of advanced technologies through the use of photographic cameras, video recorders, and dual cassette decks. The Audio Home Recording Act is one example of Congressional efforts to minimize consumer liability when using these products.[6] The Act insulates individuals from liability for the manufacture or distribution of devices that digitally record audio mediums, or for employing these mechanisms in a noncommercial fashion.[7] Another example is the Digital Millennium Copyright Act, which shields Internet service providers from liability based on use of the network by subscribers.[8]

Despite Congressional efforts, legislative responses to ever-changing computer technology are often outdated upon introduction.[9] The courts' propensity to defer to Congress regarding copyright law compounds this problem.[10] Traditionally, courts have "refused to unilaterally broaden protections in response to technological change."[11] In response to technological advancement, however, courts are being called

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1. U.S. CONST. art. I, § 8, cl. 8.
2. *See* April M. Major, *Copyright Law Tackles Yet Another Challenge: The Electronic Frontier of the Worldwide Web*, 24 RUTGERS COMPUTER & TECH. L.J. 75, 76 (1998).
3. *Id.* at 86.
4. *Id.*
5. *See* 17 U.S.C. § 1008 (2001).
6. 17 U.S.C. § 1008.
7. *Id.*
8. *See id.* at. § 512.
9. Kevin Davis, *Fair Use on the Internet: A Fine Line Between Fair and Foul*, 34 U.S.F. L.REV. 129, 162 (1999).
10. *Id.* at 132.
11. *Id.*

upon to move away from their deferential stance and enjoin the harmful treatment of copyrighted works.[12]

II. FACTS

A California student created Napster, Inc. to assist his college roommate's efforts to exchange music with others.[13] Napster software provides a forum in which users may distribute, trade, or download music files free over the Internet.[14] A subscriber can use Napster to share a collection of music with others by first copying compact discs to a computer hard drive and then uploading those files onto the Napster network.[15] While the contents of those files remain on the uploading user's hard drive, Napster lists the files in an on-line "collective directory."[16] All Napster subscribers may then access this library via the Internet.[17]

Napster's system grew out of recent technology that uncovered a new digital file format which can be used to store audio recordings, commonly referred to as MP3 files.[18] By compressing audio recordings onto a computer's hard drive from a compact disc, this digital format allows a person to transmit these files to another computer very quickly by the use of an electronic mail account.[19] Napster, through a process referred to as 'peer-to-peer file sharing,' essentially "facilitates the transmission of MP3 files between and among users."[20]

While Napster is currently a free service, the company was not designed to be a non-profit organization.[21] With an estimated 75 million current users, over 100 people try to gain access to Napster every second.[22] Napster "plans to delay the maximization of revenues while it attracts a large user base," and the "value of the system grows as the quantity and quality of available music increases."[23] The company planned to eventually 'monetize' its system through the use of advertising, marketing products and paybacks for providing links to other related sites.[24]

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12. Sony Corp. of Am. v. Universal City Studios, Inc., 64 U.S. 417, 457 (1984) (Blackmun, J., dissenting).
13. A&M Records, Inc. v. Napster, Inc., 114 F.Supp.2d 896, 902 (N.D.Cal. 2000).
14. *Id.* at 901.
15. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).
16. *Napster,* 239 F.3d at 1012.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. A&M Records v. Napster, Inc., 114 F.Supp.2d 896, 902 (N.D.Cal. 2000).
22. *Napster,* 114 F.Supp.2d at 902.
23. *Id.*
24. *Id.*

Nearly all of the files that are uploaded or downloaded through Napster's system are copyrighted.[25] "Napster, Inc. has never obtained licenses to distribute or download, or to facilitate others in distributing or downloading, the music" copyrighted to others.[26] Nevertheless, Napster has continued to grow in size and popularity as a source for people to increase their musical collections without having to pay what they would ordinarily be required to pay by the copyright holder.[27]

III. BACKGROUND

In 1983, the Supreme Court of the United States addressed the issue of time-shifting, which involves the copying of a copyrighted work for the convenience of watching or listening to it at a different time.[28] Universal City Studios, Inc. brought an action alleging that the consumers of video tape recorders (VTRs), manufactured by Sony Corporation of America, were infringing on Universal's copyrights by recording copyrighted works broadcast on television for later viewing.[29] Universal sought an injunction against the manufacture of the video tape recorders, in addition to monetary damages.[30] In denying relief to Universal, the district court applied 'fair use' case law to determine whether the use of VTRs was infringing, instrumentally affecting modern copyright law.[31]

As codified in Title 17 of the United States Code, a court may identify and weigh several factors in deciding whether the use of copyrighted material constitutes fair use.[32] Those factors include the character and purpose of the material, the nature of the work, the amount copied, and the market effects caused by the alleged infringement.[33] After considering the facts in light of these factors, the district court concluded that "non-commercial home-use" of VTRs was a fair use and ruled for Sony on all claims.[34]

The Ninth Circuit reversed the district court, finding Sony liable for contributory infringement.[35] On review, the Supreme Court overturned the Ninth Circuit's decision, ruling that Sony had prevailed in regard to contributory infringement because the company had shown that most of the copyright holders, particularly those involved with "sports, religious, educational and other programming," approved of time-shifting.[36] The

25. *Id.* at 902-03.
26. *Id.* at 903.
27. *Id.* at 914.
28. *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 421 (1984).
29. *Id.* at 420.
30. *Id.*
31. *See* Davis, *supra* note 9, at 136.
32. *Sony*, 464 U.S. at 447-48.
33. 17 U.S.C. § 107 (2001).
34. *See* Davis, *supra* note 9, at 136.
35. *Id.*
36. *Sony*, 464 U.S. at 443-44.

Supreme Court stated that "a finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting."[37] Furthermore, the Court reasoned, Universal had failed to identify any possible significant harm to potential markets for the copyrighted work.[38] The Court relied heavily on the fact that once a program had been recorded onto a hard copy, that tape was not normally used in any illegal or prohibited way.[39]

In 1994, the Court again used the fair use doctrine to rule in favor of an alleged infringer of copyrighted works in *Campbell v. Acuff-Rose Music.*[40] The case involved the leader of the musical group 2 Live Crew, Luther Campbell, who was sued for infringing upon the copyrights of Acuff-Rose Music.[41] The alleged infringement occurred when 2 Live Crew recorded and distributed a commercial parody of Roy Orbison's "Pretty Woman."[42] Significantly, the Court protected Campbell under the doctrine of fair use even though the reproduced work was commercial in nature as opposed to the private use of recorded television programs in *Sony.*[43] The Court applied the factors of fair use listed in 17 U.S.C. §107, and found that the original work had been transformed into a new work, in this case a parody, and neither the commercial nature nor the fact that the work had been copied in its entirety undercut Campbell's fair use of the song.[44]

In 1995 the United States District Court for the Northern District of California heard a landmark case involving an allegation of copyright infringement.[45] Religious Technology Center sued Netcom, an on-line system operator, for contributory copyright infringement.[46] Netcom had been maintaining a 'computer bulletin board' on which both infringing and non-infringing material was found posted.[47] The significance of this case rests with the court's insistence that the operator of a computer system must have actual knowledge of infringing acts to be liable for contributory copyright infringement.[48] The *Religious Technology* court determined that a service provider such as Netcom can be found liable for contributory copyright infringement when it fails to remove material

37. *Id.* at 446.
38. *Id.*
39. Davis, *supra* note 9, at 137.
40. 510 U.S. 569 (1994).
41. *Campbell,* 510 U.S. at 569.
42. Davis, *supra* note 9, at 141.
43. *Id.* at 143.
44. *Id.* at 142.
45. *See* Religious Tech. Ctr. v. Netcom On-line Comm. Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995).
46. *See Religious Tech,* 907 F.Supp. at 1361.
47. *See id.*
48. *Id.* at 1374.

subsequent to being notified by the copyright holder of the material's infringing nature.[49] The Court further confirmed that secondary liability in regard to copyright infringement relies on a finding of direct infringement by a third party.[50]

Two recent decisions, *Worldwide Church of God v. Philadelphia Church of God*[51] and *UMG Recordings, Inc. v. MP3.com, Inc.*,[52] have both given today's courts added guidance when confronted with copyright infringement claims. The *Worldwide* court noted that commercial use does not depend on the sale of the reproduced material.[53] Rather, the proper inquiry of whether a reproduced copyrighted work is used for profit is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[54] The *UMG* court determined that the compression of an audio compact disk onto an MP-3 does not transform the work.[55] Unlike Luther Campbell's transformation of "Pretty Woman" into a parody, the use of MP3s does not make the necessary transformation to be determined a fair use in light of the factors listed in 17 U.S.C. §107.[56]

IV. *A&M RECORDS, INC. V. NAPSTER, INC.*

In August of 2000, plaintiffs A&M Records, et. al., sought and received a preliminary injunction from the United States District Court for the Northern District of California.[57] That injunction enjoined Napster from "engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiff's copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner."[58] The district court based the injunction on its finding that the plaintiffs own the copyrights for around seventy percent of the files downloaded from the Napster site and that Napster materially contributes to the downloading of those works.[59]

On review in the Ninth Circuit, Judge Beezer addressed the issues of whether the district court had employed appropriate legal standards governing the issuance of a preliminary injunction and also whether the

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49. *Id.*

50. *Id.* at 1371.

51. Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1486 (2001).

52. UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

53. *Worldwide*, 227 F.3d at 1117.

54. *Id.* (citing Harper & Rowe, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).

55. *UMG*, 92 F. Supp. 2d at 351.

56. *Id.*

57. A&M Records, Inc. v. Napster, Inc., 114 F. Supp 2d 896, 927 (N.D. Cal. 2000), *aff'd*, 239 F.3d 1004 (9th Cir. 2001).

58. *Napster*, 114 F. Supp 2d at 927.

59. *See id.*

district court correctly apprehended the law with respect to the underlying issues of the case.[60] Holding preliminary injunctive relief available only when a party "demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor,"[61] the Court of Appeals affirmed in part, reversed in part, and remanded the case for decision in compliance with its ruling.[62]

The appellate court first affirmed the district court's findings that the plaintiffs had established a prima facie case of direct infringement by Napster users.[63] Such a showing requires that a plaintiff demonstrate (1) ownership of material allegedly infringed, and (2) that at least one right given copyright holders under 17 U.S.C. §106 has been violated.[64] Finding that the record supported a conclusion of copyright ownership over the material allegedly infringed, the Ninth Circuit noted that two exclusive rights under 17 U.S.C. §106 had been violated: the right of reproduction,[65] evidenced by the downloading of files from Napster's site, and the right of distribution,[66] as evidenced by the uploading of files onto Napster's site.[67]

The appellate court went on to affirm that Napster's users are not fair users under the factors of 17 U.S.C. §107.[68] Napster had unsuccessfully argued that people who use Napster's site are merely involved in sampling, space-shifting, and permissive distribution.[69] The Ninth Circuit generally affirmed the district court's findings, relying on the holding in *UMG Recordings* that no transformation occurs when music is compressed to compact disc, which means that the purpose and character of the work remains unchanged.[70] Also relevant to the first factor under §107 is whether the reproduction is commercial rather than personal. The court deferred to the precedent of *Worldwide Church of God* that "[d]irect economic benefit is not required to demonstrate commercial use. Rather, repeated and exploitive copying of copyrighted works, even if copies are not offered for sale, may constitute commercial use."[71] Here,

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60. *Napster*, 239 F.3d at 1013.

61. *Id.*

62. *See id.* at 1029.

63. *See id.* at 1013.

64. *See id.*; *see also* 17 U.S.C. § 501(a) (2001) (explaining that infringement equals the violation of rights listed in § 106).

65. 17 U.S.C. § 106(1).

66. *Id.* at § 106(3).

67. *See* A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001).

68. *See Napster*, 239 F.3d at 1014.

69. *See id.*

70. *See id.* at 1015 (citing UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d. 349, 351 (S.D.N.Y. 2000)).

71. *Napster*, 239 F.3d at 1015 (citing Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000)).

the court focused on the fact that uploading music to share and trade with others does not evidence personal use.[72]

After agreeing with the district court that under the second factor the original work is creative in nature, the court then focused on the third factor, specifically the portion of the original used.[73] While finding no error in the district court's conclusion that the fact that Napster users trade and download entire copyrighted works favors the plaintiffs, the appellate court made clear that wholesale copying, by itself, is generally fair use under the holding of *Sony*.[74]

Finally, regarding the effect on the market, the appellate court rejected Napster's claim that permissive uses such as sampling invalidate plaintiffs' claim of harm to a new, potential market.[75] Specifically, the appellate court noted that because the effect on the current market does not mediate a claim that a potential market is harmed, and due to the commercial nature, sampling here does not lend itself to the defendants.[76] Finding no error in the district court's decision that space-shifting is not fair use in regard to Napster users, the court distinguished the present facts from those of *Sony*. In *Sony*, the video recordings were viewed by individuals in their home. Here, however, once a work is recorded it is simultaneously distributed to the general public.[77] The court found no reason to address Napster's argument that other uses, such as permissive use, are fair uses, since plaintiffs did not challenge that point on appeal.[78]

The appellate court further affirmed the district court's ruling that "plaintiffs in all likelihood would establish Napster's liability as a contributory infringer," since Napster's very conduct is evidence that it "knowingly encourages and assists the infringement of plaintiffs' copyrights."[79] The Ninth Circuit refused to allow Napster protection under *Sony*, pointing out that Sony had constructive knowledge that users *could* infringe, as compared to Napster's actual and constructive knowledge that infringement was taking place.[80] The *Napster* Court added that the *Sony* Court found the use of Sony's products substantially non-infringing, as compared to plaintiffs' present allegations.[81]

Nevertheless, the appellate court then departed from the reasoning of the district court, which "improperly confined the use analysis to cur-

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72. *See Napster*, 239 F.3d at 1015.
73. *See id.* at 1016.
74. *See id.* (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).
75. *See Napster*, 239 F.3d at 1016, 1018.
76. *See id.* at 1018.
77. *See id.* at 1019.
78. *See id.*
79. *Id.* at 1020.
80. *See id.* (emphasis added).
81. *Id.*

rent uses, ignoring the system's capabilities."[82] While the court did not hold the district court's ruling on this issue clearly erroneous regarding plaintiffs' probable success, it stressed the holding of *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*,[83] which determined that a computer system operator is not liable for infringing uses of the service by others absent sufficient knowledge, demonstrated by a copyright holder providing documentation to the service provider informing it that infringing activities are taking place on the service.[84] By providing "the site and facilities" by which its users can infringe upon plaintiffs' copyrighted works, the court found that Napster materially contributes to copyright infringement, adding to the probable success on the issue of contributory liability.[85]

Regarding vicarious liability, the appellate court again affirmed.[86] Agreeing that Napster receives a financial benefit, the Ninth Circuit remarked that "financial benefit exists where the availability of infringing material 'acts as a 'draw' for customers.'"[87] Further, the court held that Napster has failed to employ its policing power, instead turning its back to allegations of infringement occurring on its site thereby violating the ruling of *Fonovisa, Inc. v. Cherry Auction, Inc.*,[88] that the ability to block infringing activity evidences supervision as required for vicarious liability.[89]

Napster argued that, in any event, a preliminary injunction should have been denied due to two statutes:[90] the Audio Home Recording Act (AHRA) of 1992[91] and the Digital Millennium Copyright Act (DMCA).[92] Napster argued specifically that its users are protected by the AHRA from claims of copyright infringement, and that Napster is alternatively protected from contributory and vicarious liability under the DMCA.[93] The appellate court responded first by interpreting the AHRA as not covering the "downloading of MP3 files to computer hard drives," since the "primary purpose" of computers is not to record, and computers record in a different manner than that outlined in the Act.[94] However, regarding the applicability of the DMCA, the appellate court disagreed with the district

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82. *Id.* at 1021.
83. 907 F. Supp. 1361, 1374-75 (N.D. Cal. 1995).
84. *See Napster*, 239 F.3d at 1021.
85. *Id.* at 1022.
86. *See id.* at 1024.
87. *Id.* at 1023 (quoting Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263-64 (9th Cir. 1996)).
88. *See Fonovisa*, 76 F.3d at 262-64.
89. *See Napster*, 239 F.3d at 1023.
90. *See id.* at 1024.
91. 17 U.S.C. § 1008 (1994).
92. *Id.* at § 512(a)-(d).
93. *See Napster*, 239 F.3d at 1024.
94. *Id.*

court's finding that § 512 of the DMCA is always inapplicable to secondary infringers.[95] Nevertheless, the appellate court affirmed the district court's ruling that a preliminary injunction was appropriate because "plaintiffs raise[d] serious questions regarding Napster's ability to obtain shelter under § 512, and plaintiffs also demonstrate that the balance of hardships tips in their favor."[96]

Particularly concerned with the district court's over-sweeping view of contributory liability, the appellate court ultimately decided that the preliminary injunction, while warranted, needed modification.[97] "Specifically, [the appellate court] reiterate[d] that contributory liability may potentially be imposed only to the extent that Napster: (1) receives reasonable knowledge of specific infringing files with copyrighted 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."[98] The court held that Napster could still be vicariously liable, "when it fails . . . to patrol its system and preclude access to potentially infringing files listed in its search index."[99] The court held, however, that the injunction was overbroad in that it relied only on Napster to protect plaintiff's works, above and beyond the requirement that Napster "police the system within the limits of the system."[100] The appellate court placed the burden on the plaintiffs to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content.[101] The Ninth Circuit having stayed the preliminary injunction pending appeal ruled that the injunction was to remain stayed until modified in accordance with its decision.[102]

The District Court for the Northern District of California reissued its preliminary injunction against Napster in accordance with the Ninth Circuit's findings on March 5, 2001.[103] The district court again enjoined Napster from "engaging in, or facilitating others in, copying, downloading, uploading, transmitting, or distributing copyrighted sound recordings . . . ."[104] However this injunction required plaintiffs to provide Napster with notice of copyrighted material, and specifically stated that both "parties shall use reasonable measures in identifying variations of the

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95. *See id.* at 1025 (construing 17 U.S.C. § 512(a)-(d)).

96. *Napster*, 239 F.3d at 1025.

97. *Id.* at 1027

98. *Id.* (citing Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc., 907 F. Supp. 1361, 1374-75 (N.D. Cal. 1995)).

99. *Napster*, 239 F.3d at 1027.

100. *Id.*

101. *Id.*

102. *Id.* at 1029.

103. A&M Records, Inc. v. Napster, Inc., No. C99-05183 MHP, 2001 WL 227083, at *1 (N.D. Cal. Mar. 5, 2001).

104. *A&M. Records, Inc.*, 2001 WL 227083 at *1.

filename(s), or of the spelling of the titles or artists' names, of the works identified by plaintiffs."[105] The district court further reiterated the Ninth Circuit's ruling that the burden of keeping plaintiff's copyrighted material is on both parties.[106]

V. ANALYSIS

A. *Congress v. The Courts*

These cases illustrate a shift of opinion regarding the role of the judiciary when confronted with copyright issues. Courts, including the majority in *Sony*, have long deferred to congressional decisions concerning the fit of modern technologies with copyright law.[107] As the *Sony* Court aptly stated, "[r]epeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary."[108] Overturning the Ninth Circuit Court of Appeals decision that the taping of televised programs on equipment manufactured by Sony was not fair use, the United States Supreme Court ruled that "[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials."[109]

Justice Blackmun dissented, joined by Justices Marshall, Powell and Rehnquist, attacking the majority's deferential stance, calling their decision a way to "evade the hard issues when they arise in the area of copyright law."[110] It is important to note that the same court that heard Napster's appeals found Sony secondarily liable for copyright infringement, declaring that because most of the material recorded by Sony betamax machines was copyrighted work, "[Sony's machines] (VTRs) were not suitable for any substantial noninfringing use . . . ."[111] The Ninth Circuit also declined to accept a fair use defense by Sony because the "cumulative effect of mass production made possible by VTRs would tend to diminish the potential market."[112]

The Ninth Circuit's line of reasoning in the present case is strikingly similar. Much debate exists as to whether the use of Napster currently harms or supports plaintiff's business.[113] However, when applying the fair use doctrine factor that examines the effect of use on the market,[114] the

105. *Id.*
106. *Id.*
107. Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 429 (1984).
108. *Sony*, 464 U.S. at 430-31.
109. *Id.* at 431.
110. *Id.* at 457.
111. *Id.* at 428.
112. *Id.* at 427.
113. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001).
114. 17 U.S.C. § 107(4) (2001).

Ninth Circuit Court of Appeals again relied on the effect on plaintiffs' potential market (distribution of copyrighted works on the Internet), even if plaintiffs' current business is not harmed.[115] This is a crucial finding, as copyright holders do not have exclusive rights for those uses that are determined fair under the factors of 17 U.S.C. §107.[116]

Technology will continue to present innovative businesses with many new and untested markets. The *Sony* Court's majority opinion, refusing to interfere with Congress's constitutional duty in regard to the expansion or reduction of copyright holders' rights, seems overwhelmingly sensible from this view. Through the use of special committees and other resources, Congress likely has the means to make more informed decisions than the judiciary, regardless of how long the decisional process takes when compared to the speed of technological changes. This case, on the other hand, is evidence of the fact that many courts will not wait for Congress to act when confronted with copyright problems.

B. *The Audio Home Recording Act and The Digital Millennium Copyright Act*

Congress enacted the Audio Home Recording Act[117] in October of 1992, eight years after the Supreme Court decided in *Sony* to defer to Congress the power to decide the issue of copyright infringement in relation to the manufacture and use of home audio recording devices. Therein, Congress exempted the production and implementation of these devices for noncommercial uses.[118] Again, just three years after the District Court for the Northern District of California decided that a web site host needs specific knowledge of infringing activities as well as time to correct or somehow stop the infringing activity on its site before it will be liable for copyright infringement, Congress responded to technological advances by passing the Digital Millennium Copyright Act.[119] This legislation provides that a service provider of 'transitory digital network communications' will not be held liable for copyright infringement based on the infringing activities of its users, according to certain guidelines.[120] It is possible that Congress will either amend these acts or draft something new in order to define when a provider of services similar to those of Napster is responsible for copyright infringement.

The reasoning of both the district court and the appellate court in denying Napster's users protection under the Audio Home Recording Act relied primarily on the fact that "under the plain meaning of the

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115. *Napster*, 239 F.3d at 1017.
116. *See Sony*, 464 U.S. at 433; 17 U.S.C. § 107.
117. 17 U.S.C. § 1008.
118. *See id.* at § 1008.
119. 17 U.S.C. § 512 (2001).
120. *See id.*

Act's definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their 'primary purpose' is not to make digital audio copied recordings."[121] A lay reading of the statute's name, however, implies that uses of home recording devices will not render a user liable of copyright infringement.

Napster's defense to contributory and vicarious liability is not as clear. The district court insisted that a finding of potential contributory and vicarious liability required that Napster be precluded from the insulation afforded by §512 of the Digital Millennium Copyright Act.[122] The appellate court refused to decide the issue, ruling that such potential liability did not make the statute invalid per se, and left that question for the district court on remand.[123] Only because the plaintiffs "raised serious questions regarding Napster's ability to obtain shelter under §512," combined with plaintiffs' demonstration "that the balance of hardships tips in their favor" did the Ninth Circuit affirm the district court's findings.[124]

Section 512 provides that a "service provider shall not be liable . . . for injunctive or other relief" so long as the work is transmitted by someone other than the service provider. In other words, the material is transmitted through a process that does not require the "selection of material by the service provider," recipients of works are not selected by the service provider, *"no copy of the material made by the service provider in the course of intermediate or transient storage"* is accessible to persons other than the intended recipients, and the material passes through the service provider's site unchanged.[125] On remand, the district court will be forced to interpret this statute. Of interest is the fact that the copy of the MP3 file viewed by the other users who are logged on to Napster's site is a copy that was made by the uploading user.[126] Napster does not copy the material listed on a user's computer, another user does.[127] Napster merely provides the forum for this to take place.[128]

In *Sony*, Universal unsuccessfully relied on the holding of *Kalem Co. v. Harper Brothers*,[129] which found liable a producer who had made a film dramatization of a copyrighted work.[130] The *Sony* Court distinguished the facts of *Kalem*, in which a product displaying a recorded performance was sold.[131] "The producer had personally appropriated the

121. A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024 (9th Cir. 2001).
122. *Napster*, 239 F.3d at 1025.
123. *Id.*
124. *Id.*
125. *See* 17 U.S.C. § 512.
126. *Napster*, 239 F.3d at 1011-12.
127. *Id.* at 1012.
128. *Id.*
129. 222 U.S. 55 (1911).
130. Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 435-36 (1984).
131. *Sony*, 464 U.S. at 436.

copyright owner's protected work and, as the owner of the tangible medium of expression upon which the protected work was recorded, authorized that use."[132] The *Kalem* court disagreed that the producer had any right to authorize this use of the film, adding that the producer had also advertised the infringing product.[133]

The *Sony* court, in contrasting the film involved in *Kalem* with the recording machine sold by Sony, stressed that the recorders are only a means by which to reproduce, and Sony did not advertise infringing activities.[134] "Sony supplies a piece of equipment that is generally capable of copying the entire range of programs that may be televised: those that are uncopyrighted, those that are copyrighted but may be copied without objection from the copyright holder, and those that the copyright holder would prefer not to have copied."[135] The Court certainly seemed to be impressed by the range of uses by which the VTRs could be used.[136]

It is very possible that the district court will subsequently find Napster insulated by the Digital Millennium Copyright Act. The consequence of that finding would be devastating to the plaintiffs' position. Since it is Napster that the plaintiffs wish to enjoin, a finding that Napster's users are liable for direct infringement while Napster is protected by statute would frustrate the plaintiffs' hardship claims.

If Napster is alternatively found liable for secondary copyright infringement, the line of liability may indeed become a slippery slope. That finding could possibly mean that an Internet search engine, such as Yahoo, that routes a web user to Napster's site is also vicariously liable. It is obvious that search engines provide a service to obtain financial benefit, and they also have the power to supervise what Internet sites are to be found through the search function of such an engine. Would Yahoo be forced to block or remove infringing material with notice by a copyright holder? What about the manufacturer of the equipment that facilitates these functions? Would *Sony* control? The answer likely lies with the decision of Napster's liability by the district court on remand.

VI. CONCLUSION

Copyright law in the United States continues to remain flexible, though fundamentally lacking predictability. While traditionally relying on the power of Congress to establish laws reflecting changed technology, businesses such as Napster must now study judicial trends. As modern technology affords the public faster and more efficient means by which to reproduce copyrighted material, case law and federal statutes

132. *Id.*
133. *Id.*
134. *See id.*
135. *Id.*
136. *See id.*

will likely be unable to keep up with technological advances in regard to the infringement of copyrighted works.

A&M Records, Inc. v. Napster, Inc. suggests that some courts are willing to assist in the effort to provide public access to copyrighted works while reserving the rights of the holder. There is no guarantee that courts will be equipped to apply narrow technological statutes to specific factual situations. When a statute does not seem to address an unexpected factual situation made possible by modern technology, such as the use of MP3s on computers, courts are required to substitute their judgment for that of Congress. Technological advances will demand that courts apply facts to ever-changing technological conditions, leaving case precedent outdated almost immediately upon announcement. It seems, therefore, that Congress will have the most success in guiding copyright law through the twenty-first century. However it is anyone's guess as to whether courts in the future will agree.

In the meantime, decisions such as *Sony* and the shelter of 17 U.S.C. § 512 should lead companies such as Napster to reconsider the structure of their business. The Ninth Circuit's refusal to find Napster's users "fair users" relied in part on the fact that the use of Napster was likely commercial, due to the nature of uploading files containing music onto Napster's site, allowing all others also logged on at that time to view and download these files. Napster or a competitor might be able to fashion a similar service whereby it only provides the means by which to record, similar to the machines used in *Sony*. The simple copying between users who have found each other through their own endeavor certainly seems less commercial than the uploading of files for the general public to copy.

Not allowing the uploading of files would also serve to weaken the argument regarding future markets. If record companies and performers are concerned with not being able to sell their product over the Internet, simple trading and copying between private individuals probably would have little economic effect, as those people could record the same onto tape or compact disk at home with no penalty.

The Ninth Circuit also distinguished the facts of *Napster* from *Sony*, stating that Napster had more than the constructive knowledge found in *Sony*. The elimination of the uploading feature might again strengthen the position of Napster. In any case, a few changes in the functions of Napster's web site could drastically change the legal situation, moving the facts of *Napster* much closer to those of *Sony*.

A fundamental difference between Internet services like Napster and other recording mediums, such as dual cassette decks and video recorders is the sheer number of people who use the service. Most recording technology still requires people to find another who most likely bought an official copy of the copyrighted work. These methods allow people to

potentially engage in infringing activities, however, the actual method of making copies assures that there is little effect on a copyright holder's current and potential markets, as it is usually only the copyright holder that has the means to mass-produce and mass-market a copyrighted work. Napster's site, on the other hand, imposes on a copyright holder's ability to outnumber possibly infringing uses by allowing millions of people to access one person's uploaded music files. Viewed in this sense, legal scholars will perhaps never be able to justify the co-existence of decisions like *Sony* and *Napster*. If that is the case, Congress again appears the best equipped to make technological decisions regarding copyright law, since, unlike courts of law, legislation does not have to follow a consistent, logical path of reasoning.

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