

# Transparent Walls: An Article on the Effects of the Internet on U.S. Copyright Laws<sup>1</sup>

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## I. Introduction

When the USSR surprised the world by launching the Sputnik 1 into earth's orbit on October 4<sup>th</sup>, 1957, the United States' reaction was to create the Advanced Research Project Agency (ARPA) within its Ministry of Defense<sup>3</sup>. ARPA's initial mission was to apply state-of-the-art technology to U.S. defense and its primary focus was on space, ballistic missiles, and nuclear test monitoring. However, soon after its creation ARPA undertook the task to develop an advanced computer network to link its research computers abroad by launching the ARPANET project, which gave birth to what is now known as the Internet<sup>4</sup>.

The commercial version of the Internet, the World Wide Web, was still under development<sup>5</sup> when Universal City Studios, Inc. brought a lawsuit against Sony Corp. of America, claiming copyright infringement<sup>6</sup>. By the time the Supreme Court's decision was

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<sup>3</sup> See *Internet for Historians, History of Internet*, Lecture 1, Section 1.4, *The History of the Internet*. <[http://www.let.leidenuniv.nl/history/ivh/frame\\_theorie.html](http://www.let.leidenuniv.nl/history/ivh/frame_theorie.html)> (Visited July 26, 2000)

<sup>4</sup> See *id.*

<sup>5</sup> See *How the Internet Came to Be*. <<http://www.bell-labs.com/user/zhwang/vcerf.html>> (Visited July 26, 2000). See also, *A Brief History of the Internet*. <<http://www.isoc.org/internet-history/>> (Visited July 26, 2000).

<sup>6</sup> *Universal City Studios v. Sony Corp. of America*, 480 F. Supp. 429 (C.D. Cal. 1979), rev'd, 659 F. 2d 963 (9<sup>th</sup> Cir. 1981), the court of appeals reversed the district court's finding for the defendant, and was in turn reversed by the Supreme Court, see *infra* note 5.

published<sup>7</sup>, a small portion of the public and a large sector of the academic community were communicating by Electronic Mails (E-Mail) via the Internet. The rapid growth of the Internet has created a technology that allows the dissemination of information to millions of people throughout the world by a simple click of the mouse. The legal ramifications of such advances in information exchange must be dealt with within the framework of the U.S. Copyright Laws<sup>8</sup>.

This article will discuss the effects of the Internet on U.S. Copyright Laws. Specifically, it will explore today's technology of online dissemination of digital music files. First, the article will briefly discuss U.S. Copyright Law and its primary purpose, which is to encourage individuals to actively participate in the progress of the arts and sciences for the intellectual enrichment of the public. It achieves this goal by protecting the intellectual properties of authors by granting them exclusive rights, permitting them to reap the benefits of their creative work<sup>9</sup>. Second, it will set forth an overview of the "fair use" provision of the statute<sup>10</sup> and the difficulty associated with its application in the face of new technological innovations. In particular, it will focus on the Supreme Court's ruling in *Sony Corp. of America v. Universal Studios*<sup>11</sup> and illuminate its limitation as applied to private home recording of digital music files in light of the Internet technology. Third, the paper will discuss the rulings of two recent cases<sup>12</sup> in order to provide a better understanding of how the courts deal with online dissemination of copyrighted digital music. These cases involved the application of the Audio Home Recording Act<sup>13</sup> (AHRA) of 1992's home taping exemption<sup>14</sup> and the Copyright Law's "fair use" provision. The AHRA

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<sup>7</sup> *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

<sup>8</sup> Title 17 United States Code. *See also* < <http://www.loc.gov/copyright/title17/circ92.pdf>>

<sup>9</sup> 17 USC § 106.

<sup>10</sup> 17 USC § 107.

<sup>11</sup> *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

<sup>12</sup> *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (1999), and *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (2000).

<sup>13</sup> 17 USC § 1001 et seq.

<sup>14</sup> 17 USC § 1008.

will be reviewed and its application to digital music files, namely MP3<sup>15</sup> files, will be examined<sup>16</sup>. It will be shown that while the AHRA protects individuals' rights to make copies of digital music files for their private home use, the legislator did not intend to legalize the mass sharing of such files throughout the Internet community<sup>17</sup>. Finally, based on the analyses, the paper will predict the outcome of the ongoing controversy between the institutions of the record industry and the online music company, Napster, Inc. (Napster)<sup>18</sup>. The discussion will be limited to the issue of whether or not Napster's freely available software<sup>19</sup> has enabled its users to, effectively, make millions of copies of copyrighted materials under the camouflage of private home recording.

The essence of the Internet is the merger of isolated computers in private homes or businesses. According to one of the pioneers of the Internet, Vinton G. Cerf, senior vice president, Internet Architecture and Technology, at MCI WorldCom, "[t]he objective was to develop communication protocols, which would allow networked computers to communicate transparently across multiple, linked packet networks. This was called the Internetting project and the system of networks, which emerged from the research, was known as the Internet."<sup>20</sup> The very purpose of the Internet is to break the barriers that once stood between computing machines, such as personal computers. The Internet has eradicated the privacy attribute of home

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<sup>15</sup> MP3 is short for MPEG-1, Layer-3, and was developed between 1988-1992 by an international group of companies called the Moving Picture Coding Experts Group. See David Weiss, *MP3: The Real Deal, Musician*, Apr. 1999, at 40. The Moving Picture Coding Experts Group is an international group of computer technicians and scientists who meet several times annually to codify technological specifications for encoding and compressing digital audio and digital signals. The MPEG group pioneered the technologies that have led to such innovations as DVD and DirectTV.

<sup>16</sup> 17 USC § 1008.

<sup>17</sup> See *id.*

<sup>18</sup> See e.g. *A & M Records, Inc. v. Napster, Inc.*, 2000 U.S. Dist. Lexis 6243. See also Opposition to RIAA's Motion for Preliminary Injunction, <<http://dl.napster.com/opposition.pdf>> (Visited July 29, 2000).

<sup>19</sup> See <<http://www.napster.com/download/>> (Visited July 22, 2000).

<sup>20</sup> See *A Brief History of the Internet and Related Networks*, <<http://www.isoc.org/internet-history/cerf.html>> (Visited July 24, 2000).

computers. It has transformed the opaque barriers that once separated them into transparent walls.

## II. The Primary Purpose of Copyright

The fundamental historic sources that convey the central message of copyright laws can be found in the original British copyright statutes, the Statute of Anne of 1709,<sup>21</sup> and the U.S. Constitution<sup>22</sup>. The express language of both texts conveys the message that the primary goal of copyright laws is to invite individuals to actively participate in advancing the human knowledge. The preamble of the British statute declares its “purpose to be ‘for the Encouragement of Learned Men to compose and write useful Books.’”<sup>23</sup> The U.S. Constitution states: “The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>24</sup> The framers of the Constitution intended to instill fundamental rights in individuals in order to promote creative and genius work. Their primary objective was to inspire authors and stimulate activity and progress in the arts to promote intellectual enrichment of the public. This utilitarian objective is achieved by allowing creative individuals to reap the benefits of their creative work. “The copyright law embodies a recognition that creative intellectual activity is vital to well-being of society. It is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists (as it does for

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<sup>21</sup> Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

<sup>22</sup> U.S. Constitution, Article I, § 8, Clause 8.

<sup>23</sup> See *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1108, (quoting from Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.)

<sup>24</sup> U.S. Constitution, Article I, § 8, Clause 8.

inventors), in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.”<sup>25</sup>

The Supreme Court has in many instances conveyed identical messages with regards to the basic goal of copyright laws.<sup>26</sup> “It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control.”<sup>27</sup> In many prior rulings, the Supreme Court has espoused similar notions with respect to the basic goal of copyright law<sup>28</sup>. “Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”<sup>29</sup> Other Supreme Court rulings have similarly delineated that the main purpose of copyright law is to reward anyone who contributes and deposits in society’s bank of knowledge.<sup>30</sup>

Authors can rely on receiving compensation for their contribution to society because copyright laws grant them exclusive rights to exploit their creative work.<sup>31</sup> These rights,

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<sup>25</sup> See *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1109.

<sup>26</sup> See e.g. *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

<sup>27</sup> *Id.* at 429.

<sup>28</sup> *Twentieth Century Music Corp. V. Aiken*, 422 U.S. 151 (1975)

<sup>29</sup> *Id.* at 156.

<sup>30</sup> See generally *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

<sup>31</sup> 17 USCS § 106. Exclusive rights in copyrighted works

“Subject to sections 107 through 121, the owner of 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, panto-mimes, and motion pictures and other audiovisual works, to perform the copy-righted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, panto-mimes, 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

commonly referred to as the “bundle of rights” are specially designed to facilitate the dissemination of individuals’ artistic works to their anxiously awaiting audience.

To illustrate how an artist, say a musician, may benefit from his creative work, consider the treatment of the song “Black Magic Woman” under the Copyright Law.<sup>32</sup> Carlos Santana wrote both the melody and the lyrics of the song. He also made a sound recording and the complete work is now recorded on a CD. According to the copyright law he is entitled to exclusive ownership of the underlying copyright.<sup>33</sup> Therefore, he is entitled to exclusive right to reproduce the copyrighted work, i.e., he may make copies of the CD.<sup>34</sup> He is also entitled to exclusive right to generate income by distributing the copies, i.e., by selling copies of the CD to the public.<sup>35</sup> If the CD is played on radio, as the owner of the copyright to the work that is comprised of the melody (a series of notes on a piece of paper), the lyrics, and the sound recording (playing the notes using a musical instrument, and singing the lyrics), Carlos Santana will be compensated because he has the exclusive right to perform the copyrighted CD.<sup>36</sup> Prior to 1995, he would only be compensated for his exclusive right to publicly perform the melody and the lyrics. That is because the Copyright Law did not have an exclusive public performance right for sound recordings. Through the Digital Performance Right in Sound Recordings Act of 1995, Congress amended a new sixth right to the original Copyright Act of 1976.<sup>37</sup> That right is limited to only one type of work-sound recordings. Furthermore, unlike the other five rights, it is limited

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

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 17 U.S.C. § 106(1).

<sup>35</sup> 17 U.S.C. § 106(3).

<sup>36</sup> 17 U.S.C. § 106(4).

<sup>37</sup> 17 U.S.C. § 106(6).

to the domain of “digital audio transmission.”<sup>38</sup> For the purposes of this paper, it is enough to focus only on the first five rights.<sup>39</sup>

### III. Fair Use

Shortly after the creation of the copyright by the Statute of Anne of 1709<sup>40</sup>, courts recognized that in many instances, certain unauthorized reproduction of copyrighted material that was then described as “fair abridgment,” and later referred to as “fair use,” would not infringe the author’s rights.<sup>41</sup> This doctrine was incorporated into the Copyright Act of 1976, which provides that “the fair use of a copyrighted work . . . is not an infringement of copyright.”<sup>42</sup>

The most curious aspect of this doctrine is its susceptibility to misapplication in the face of new technologies. Neither 300 years of case law, nor its eventual statutory formulation, gives clear guidance or standards as to how the doctrine should be applied. In 1841, Justice Story articulated an often-cited summary of how the doctrine of fair use should be applied: “In short, we must often . . . look to 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.”<sup>43</sup> This interpretation was, by and large, incorporated into the Copyright Act of 1976.<sup>44</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> For a thorough discussion of the Digital Audio Transmission Right encompassed in 17 U.S.C. § 106(6), see *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA Ent. L. Rev. 189.

<sup>40</sup> Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

<sup>41</sup> See, e.g., *Gyles v. Wilcox*, 26 Eng. Rep. 489, 2 Atk. 141 (1740) (No. 130). See generally W. Patry, *The Fair Use Privileges in Copyright Law* 6-17 (1985).

<sup>42</sup> 17 U.S.C. § 107.

<sup>43</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C. C. D. Mass. 1841) (No. 4901).

<sup>44</sup> The statute states:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,

Those 4 factors furnish only a minimal guidance on how to recognize fair use.<sup>45</sup> Their application to any fact pattern requires extensive analyses and usually involves the exercise of wide discretion. This is because, for example, the first two factors require an assessment of “the purpose and character” of the secondary use, and “the nature of the copyrighted work.” The statute provides no guidance as to what to look for in the “purpose and character” of the secondary use. Beyond mentioning a preference for noncommercial or educational use, it gives no clue as to how to determine “the purpose and character” of the secondary use. It is of little aid to anyone who is to assess “the nature of the copyrighted work.” Although it states that when embarking on a fair use analysis, one must consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” and “the effect of the use upon the potential market for or value of the copyrighted work,” it provides no information as to what may be regarded as acceptable and what may be deemed excessive. Finally, it leaves open the possibility of considering other factors that may be regarded equitable in deciding whether or not a secondary use is a fair use.

For example in *Sony* the Supreme Court read the House Report on Copyright Act of 1976 on the Fair Use provision to mean that “the doctrine is an equitable rule of reason, [and thus,] no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”<sup>46</sup> “Curiously, judges generally have neither complained of the absence of

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is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include - -

- (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 value of the copyrighted work.

17 U. S. C. § 107.

<sup>45</sup> *Id.*

<sup>46</sup> *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 450 (1984).

guidance, nor made substantial efforts to fill the void. Uttering confident conclusions as to whether the particular taking was or was not fair use, courts have treated the definition of the doctrine as assumed common ground,” says Pierre N. Leval, the U.S. District Court Judge for the southern District of New York.<sup>47</sup> Many decisions reflect various notions of the meaning of fair use.<sup>48</sup>

For the reader to get a better grasp of the difficulties associated with applying the aforementioned factors in a fair use analysis in the face of new technological innovations such the Internet consider the above example of the song “Black Magic Woman.” Carlos Santana owns the copyrighted song on CD. The material on the CD is in digital format whose size is approximately 45 megabytes.<sup>49</sup> This file can be downloaded to a computer hard drive and then transformed into a compressed version using MP3 technology.<sup>50</sup> The Mp3 version of the original 45-megabyte CD file is only 1/12 or roughly 3.8 megabyte. Notwithstanding the fact that the downloading of the original file on the CD to a computer hard drive or a server may constitute copyright infringement,<sup>51</sup> one needs to examine whether or not the use of the MP3 version of the original file is a fair use. Applying the 4 factors enumerated in the Fair Use provision of the Copyright Law,<sup>52</sup> the fair user will claim that the “purpose and character,” and “the nature” of the converted file is merely to save storage area on the computer hard drive. However, the

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<sup>47</sup> See Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1106.

<sup>48</sup> See generally, Rosemont Enterprises, Inc. v. Random House, Inc., 256 F. Supp. 55 (S.D.N.Y.), rev'd, 366 F.2d 303 (2d Cir. 1966), cert. Denied, 385 U.S. 1009 (1967); Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429 (C.D. Cal. 1979), rev'd, 659 F.2d 963 (9<sup>th</sup> Cir. 1981), rev'd, 464 U.S. 417 (1984); Harper & Row, Publishers, Inc. v. Nation Enterprises, 557 F. Supp. 1067 (S.D.N.Y.), modified, 723 F.2d 195 (2d Cir. 1983), rev'd, 471 U.S. 539 (1985); Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), rev'd, 811 F.2d 90 (2d Cir.), cert. Denied, 484 U.S. 890 (1987); New Era Publications International v. Henry Holt & Co., 695 F. Supp. 1493 (S.D.N.Y. 1988), aff'd on other grounds, 873 F.2d 576 (2d Cir. 1989); Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975); Columbia Broadcasting Sys. V. Loew's, Inc., 356 U.S. 43 (1958);

<sup>49</sup> See Jonathan Vankin, *Downloading the Future: The MP3 revolution-The End of the Industry as We Know It*, LA Weekly, Mar. 26, 1999, at 40.

<sup>50</sup> See *supra* note 11.

<sup>51</sup> UMG Recordings, Inc. v. Mp3.com, Inc., 92 F. Supp. 2d 349 (2000).

<sup>52</sup> 17 U. S. C. § 107.

opposite view is that such a conversion is only to facilitate the easy uploading and downloading of such files to and from like fair users via the Internet. It is also difficult to predict whether or not “the amount and substantiality of the [MP3 version] in relation to the [CD version],” satisfies the “fair use” provision. Is 1/12 the magic number? Would 1/20 be a substantial portion of the original copyrighted work? It would not be surprising if in the near future, the technology facilitated means to compress these files to 1/100 of the original file. Two recent decisions<sup>53</sup> attest to the difficulties associated with applying the “fair use” provision of the Copyright Law in light of new technologies. When confronted with these situations, courts have focused on the commercial nature of the use, and whether or not the secondary use has detrimental effects “upon the potential market for value of the copyrighted work.” In *Sony*,<sup>54</sup> the subject of the next section discussed below, the Supreme Court had to deal with the invention of Video Tape Recorders and their effects on the Copyright Law.

#### A. *Sony’s* Ruling on Private Home Recording

In *Universal Studios v. Sony Corp. of America*,<sup>55</sup> the defendant manufactured Video Tape Recorders, a novel device at the time, which allowed users to record television programs on videotapes for later viewing. This practice was referred to as “time-shifting.”<sup>56</sup> The plaintiff, owner and lessee of copyrighted TV programs brought a lawsuit against the manufacturer for contributory copyright infringement. The Supreme Court held: 1) “Home time-shifting is fair use,”<sup>57</sup> and 2) “Sony’s sale of such equipment to general public does not constitute contributory

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<sup>53</sup> See *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (1999), and *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (2000).

<sup>54</sup> 464 U.S. 417, 450

<sup>55</sup> 429 F. Supp. 407 (1977)

<sup>56</sup> 464 U.S. 417, 421.

<sup>57</sup> *Id.* at 456.

infringement of respondents' copyrights."<sup>58</sup> In order to arrive at a conclusion as to whether or not the users of the online music company, Napster, are copyright infringers, it will be necessary to outline the reasons, set forth by the Supreme Court, why private home recording of TV programs was fair use.

The Court put heavy emphasis on the private nature of home recording.<sup>59</sup> It stated that the practice of "time-shifting" "for private home use must be characterized as a noncommercial, nonprofit activity."<sup>60</sup> It went on to hold that "a use that has no demonstrable effect on the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create."<sup>61</sup> The militating effect of mass reproductions was apparent where the court admitted that home users of Video Tape Recorders did not carry a library of recorded TV programs on tapes.<sup>62</sup>

The Internet was created to bring researchers, distantly apart, together by enabling them to voluntarily share their research. It achieved that by facilitating the means to share computer files. It formed the cyberspace community of researchers. Its very purpose was to make private research files available to ARPA's research community. There was no question of copyright infringement, since the researchers were voluntarily sharing their research. They were not concerned with commercial aspect of their work since they were all working for a more important purpose, and that was free exchange of information. There was no concern about potential market for their work, since they were all employed by the same employer, ARPA, that was part of the government and whose work could not be copyrighted.

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Id.* at 448.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Id.* at 450.

<sup>62</sup> *Id.* at 451.

Considering these facts, it becomes clear that the *Sony's* decision cannot be extended to home recordings of music files that reside on consumers' personal computers if they are connected to each other through the Internet. The consumers make the Internet community and as such their activities, while online, is no longer private. For these reasons one can no longer disguise online file sharing as private activity. Companies like Napster who enable consumers to share their music files online cannot cry "fair use", because they are accountable for transforming consumers' private activities into public activities.

#### IV. Recent Rulings on Dissemination of Digital Music Files

Two recent ruling will be discussed in order to show what the courts will and will not tolerate with respect to dissemination of digital music files. The first case involves copying of digital music files by consumers onto their walk-man style devices. The device frees consumers from having to listen to their digital music files while at their computer station. The second case discusses direct copying of CDs on computer servers and making them available to the general public via the Internet. The ruling of both cases will be compared with that of *Sony's*.

##### A. *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*<sup>63</sup>

Although the Audio Home Recording Act of 1992<sup>64</sup> (AHRA) was promulgated by Congress to prohibit manufacturers of Digital Audio Recording Devices<sup>65</sup> (DARD) that do not comply with certain requirements,<sup>66</sup> "the Act's main purpose [is] the facilitation of personal

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<sup>63</sup> 180 F.3d 1072(1999).

<sup>64</sup> 17 U. S. C. § 1001 et seq.

<sup>65</sup> 17 U. S. C. § 1001

<sup>66</sup> According to AHRA, Digital Audio Recording devices must incorporate a Serial Copyright Management System ("SCMS") "that sends, receives, and acts upon information about the generation and copyright status of the files that it plays." *See id.* § 1002(a)(2).

use<sup>67</sup> of digital musical recordings.<sup>68</sup> The findings of the Circuit Court in favor of the manufacturer, Diamond Multimedia, Inc. (Diamond) was primarily based on similar grounds<sup>69</sup> as that in *Sony*, namely that the device fell within the AHRA's home taping exemption,<sup>70</sup> which “ ‘protects all noncommercial copying by consumers of digital and analog musical recordings.’ ”<sup>71</sup> To better understand the interrelationship between the holdings of *Sony* and *Diamond* and to show that both decisions were based on noncommercial, private nature of home recordings, it is necessary to put forth the facts and analyses of the latter.

Diamond manufactures walk-man style devices, called Rio that can be connected to a PC and, through its proprietary software<sup>72</sup>, which is included in the purchase of the device, download MP3 music files to its internal memory. The Rio thus renders portable MP3 files that are either downloaded to one's PC via the Internet or “ripped”<sup>73</sup> from a CD. The Court's analyses were based on the followings:

- Digital Audio Recording Device (DARD) is a device that can make copies of digital musical recordings.<sup>74</sup>
- Digital musical recording is a material object that contains musical sounds in digital format.

For example a CD is a digital musical recording.<sup>75</sup>

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<sup>67</sup> Recording Industry Association of America v. Diamond Multimedia, Inc., 180 F.3d 1072, 1079.

<sup>68</sup> 17 U. S. C. § 1001

<sup>69</sup> Recording Industry Association of America v. Diamond Multimedia, Inc., 180 F.3d 1072, 1079.

<sup>70</sup> 17 U. S. C. § 1008.

<sup>71</sup> Recording Industry Association of America v. Diamond Multimedia, Inc., 180 F.3d 1072, 1079, (quoting H.R. Rep. 102-873(I) at 59.)

<sup>72</sup> Rio Manager.

<sup>73</sup> “New software technologies called ‘ripper’ software enable consumers to upload songs to the Internet from their own CD collections, so consumers may trade files with others. Furthermore, new electronic devices that free consumers from having to listen to MP3 files while confined to their computer terminal have begun to flood the market. These innovations will accelerate the appeal of Internet music distribution to mainstream consumers.” See Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution, 7 UCLA Ent. L. Rev. 57, at 64.

<sup>74</sup> 180 F.3d 1072, 1075.

<sup>75</sup> *Id.* at 1076.

- For a device to qualify as a DARD, it must be capable of making direct or indirect<sup>76</sup> copies of digital musical recordings.
- The purpose of AHRA is to prohibit the manufacturer of DARDs that do not incorporate in them the SCMS<sup>77</sup>. The reason being that DARDs, because of their digital copying capabilities, can produce thousands of perfect to near perfect copies (and copies of copies) of the original digital musical recordings (CDs). The recording industry's concern was that DARDs could be easy tools for music pirates to reproduce original quality copies that would eventually diminish the sales of CDs.<sup>78</sup>
- Rio makes copies of MP3 files that reside on a computer hard drive. Therefore, for Rio to qualify as a DARD, it must be proven that a computer hard drive is a digital musical recording.<sup>79</sup>
- A computer hard drive is not a digital musical recording because it falls within the exception provided in the statute, which precludes devices that store other files besides digital music files. A computer hard drive contains computer programs, databases, and other files that are not digital musical files.<sup>80</sup>
- Since a computer hard drive is not a digital musical recording, Rio can not qualify as a DARD because it makes copies of files that are on computer hard drives.<sup>81</sup>
- Computers are not DARDs because their primary purpose is other than making digital audio copied recordings.<sup>82</sup>

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<sup>76</sup> The Court decided that indirect copies referred to copies made from a "transmission" such as radio broadcast. 180 F.3d 1072, 1079.

<sup>77</sup> *See supra* note 65.

<sup>78</sup> 180 F.3d 1072, 1076.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Id.* at 1077.

<sup>82</sup> *Id.* at 1078.

It is clear that the Court's ruling was based on noncommercial and private nature of consumers' activities. It referred to consumers' use of Rio to copy digital musical recordings for the purpose of making them portable as "space-shifting."<sup>83</sup> It compared its holding to that of *Sony's*<sup>84</sup> and stated that "[t]he Rio merely makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive. *Cf. Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984) (holding that 'time-shifting' of copyrighted television shows with VCR's constitutes fair use under the Copyright Act, and thus is not an infringement). Such copying is paradigmatic noncommercial personal use entirely consistent with the purpose of the Act."<sup>85</sup> Considering the court's findings it is clear that users of Rio engaged in activities that were noncommercial and private, that their activities had no demonstrable effect on the potential market for, or the value of, the copyrighted work, and there was no militating effect of mass reproductions of digital music files, consistent with *Sony's* holdings.<sup>86</sup>

B. *UMG Recordings, Inc. v. MP3.Com. Inc.*<sup>87</sup>

The Court found this case to be a blatant violation of the Copyright Law when it stated: "The complex marvels of cyberspatial communication may create difficult legal issues; but not in this case."<sup>88</sup> Here the defendant purchased tens of thousands of CDs, "ripped"<sup>89</sup> their contents, converted them into MP3 music file and stored them on its computer servers to be accessed by consumers via the Internet. Although the defendant required the consumers to prove they already

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<sup>83</sup> *Id.* at 1079.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *See supra*, notes 55.

<sup>87</sup> 92 F. Supp. 2d 349 (2000).

<sup>88</sup> *Id.* at 350.

<sup>89</sup> *See supra* note 73.

owned the original CDs to the requested songs, the court held that direct copying of copyrighted work for commercial public distribution is in violation of the Copyright Act. The court found “defendant’s ‘fair use’ defense . . . indefensible”<sup>90</sup> when it determined that its conduct was against the overall purpose of the Copyright Law. The court’s step by step analysis of the 4 factors of “fair use” indicated that 1) “[defendant’s] purpose [was] commercial”<sup>91</sup> because its website drew advertising money and made profits, 2) “ ‘the nature of the copyrighted work’ – the creative recordings, . . . [were] ‘close to the core of intended copyrighted protection,’”<sup>92</sup> and defendant was copying those recordings and storing them in its computer servers for mass distribution to the public, 3) “defendant copie[d], and replay[ed], the entirety of the copyrighted works,”<sup>93</sup> and 4) “defendant’s activities on their face invade[d] plaintiff’s statutory right to license their copyrighted sound recordings to others for reproduction.”<sup>94</sup>

It is clear that the court’s ruling was consistent with that of *Sony’s*<sup>95</sup> with respect to non-applicability of “fair use” defense where mass copies of copyrighted material are made. Specifically, the findings were based on the commercial and public nature of defendant’s activities, its impact on “potential market for, and value of,” plaintiff’s copyrighted work, and the militating effect of defendant’s carrying a library of copyrighted materials.

## V. The Napster Controversy<sup>96</sup>

Are Napster users copyright infringers? The above analyses have demonstrated that courts tolerate “fair use” of copyrighted materials where the activities are of a private,

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<sup>90</sup> 92 F. Supp. 2d 349, 352.

<sup>91</sup> *Id.* at 351.

<sup>92</sup> *Ibid.*, (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, at 586 (1994).)

<sup>93</sup> *Ibid.*

<sup>94</sup> *Id.* at 352.

<sup>95</sup> *See supra* notes 60, 61, and 62.

<sup>96</sup> *A & M Recordings, Inc. v. Napster, Inc.*, 2000 U.S. Dist. Lexis 6243 (2000).

noncommercial nature with no demonstrable effect on the potential market and do not involve mass reproductions of copyrighted materials. Accordingly, it will be shown that each subscriber to the Napster website is engaged in public, commercial, mass reproductions of copyrighted music files that could potentially affect the market value of musicians' creative works. In other words, the users' activities are not immune under the "fair use" doctrine.<sup>97</sup>

Napster is an online music company. It makes its proprietary MusicShare software freely available to the Internet community to download. Users of this software can share MP3 music files with others that are concurrently logged-on to the Napster system. The actual process involves the following:

- Users who, at any given time, are connected to the Napster website can upload to the Napster's 150 servers the names of MP3 files, which reside on their personal computer hardware.<sup>98</sup>
- The Napster servers store only the names of the MP3 files of all the currently connected users and do not themselves store any of those files. The Napster servers create and store a directory, what could be thought of as a digital catalog, of MP3 files.<sup>99</sup>
- The users makeup the Napster community. Through the Napster MusicShare software, any given user is enabled to send request commands to the Napster servers. Upon receiving them, the Napster server performs a search on its own directory and upon finding a match, it sends the Internet protocol address<sup>100</sup> of the users owning the MP3 file to the user who requested it.

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<sup>97</sup> 17 USC § 107.

<sup>98</sup> *Id.* at \*3.

<sup>99</sup> *Ibid.*

<sup>100</sup> *See supra* note 3.

Subsequently, the requesting user may download the file via the Internet directly from the other user's computer hard drive.<sup>101</sup>

The cases that have been discussed in this paper, namely, *Sony*, *Diamond*, and *MP3.com*, all have emphasized, heavily, the private, noncommercial nature of consumers' activities with respect to making copies of copyrighted materials. It has been shown that both the AHRA and the "fair use" provision of the Copyright Law protect consumers engaged in private home recording of copyrighted materials.<sup>102</sup> The courts do not tolerate reproductions of copyrighted materials for public consumption. In *MP3.com* the company stored copies of music files that were available to the public, or more precisely, to the subscribers of the MP3 website community. The Napster MusicShare software makes each of its users' activity identical to that of MP3.com's. Each user is in effect capable of sharing its Mp3 files to 20 million of other users throughout the Napster community.<sup>103</sup> Napster technology makes it possible for its users to effectively make copies for all the other members of the Napster community. This technology in effect connects millions of PCs together throughout the Napster community. Whereas PCs are ordinarily isolated, the Napster technology merges them into one unitary system. When one user privately copies an MP3 music file onto his computer hard drive, through Napster's service, he is, potentially, making 20 million other copies for the members of the Napster community, and as such, it is no longer a private activity.

Members of the Napster community can also make their own custom-made CDs from MP3 files obtained over the Internet. New electronic devices, commonly known as CD-Rs, make

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<sup>101</sup> A & M Recordings, Inc. v. Napster, Inc., 2000 U.S. Dist. Lexis 6243, at \* 4 (N.D. Cal. May 5, 2000).

<sup>102</sup> See *supra* notes 59, 84, and 92.

<sup>103</sup> See Appellant Napster Inc's Emergency Motion for Stay Pursuant to Rule 27-3 and Motion to Expedite Appeal at 1, Napster, Inc. v. A & M Records, Inc. (9<sup>th</sup> Cir. 2000)(No. 00-16401)

it possible to burn MP3 files into blank CDs.<sup>104</sup> These devices are readily available in the marketplace, allowing consumers to copy their MP3 files onto CDs and use them away from their computers. They are easily affordable as their price range is from \$200 to \$500.<sup>105</sup> CDs can be purchased for less than a dollar each.<sup>106</sup> After the initial investment of purchasing a CD-R and blank CDs, members of the Napster community are capable of making their own CDs without ever spending another dime in music stores. They are also capable of selling the CDs for a profit. Last year, law enforcement officials in Plainview, Texas, raided an online pirate operation and confiscated a large number of such CDs.<sup>107</sup>

It is also self evident that Napster community's activities will in the near future dramatically reduce the market for CDs. Most individuals purchase CDs for only a particular song in the entire sound track. One can easily store up to 120 MP3 files in a CD<sup>108</sup>. This can potentially reduce the market for CDs by a factor of 120. Furthermore, it is estimated that, in the past year, more than 750 million tracks were downloaded illegally, and that every year the music industry in America loses \$300 million due to piracy.<sup>109</sup>

## VI. Conclusion

The Internet technology has far-reaching effects on U.S. Copyright Law. The essence of the Internet technology is to connect isolated computers, be it personal computers, computer

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<sup>104</sup> See Edward C. Baig, Audio: *Sweet Sounds on the Web*, Bus. Wk., Feb. 16, 1998, at 121.

<sup>105</sup> See Doug Reece, *Sharp Jump Reported in CD-R Piracy*, Billboard, Sept. 5, 1998, at 12.

<sup>106</sup> See *Id.*

<sup>107</sup> See Reese, *Industry Grapples with MP3 Dilemma*, Billboard, Jul. 18, 1998, at 1.

<sup>108</sup> *Ibid.*

<sup>109</sup> See Gordon Masson, *IFPI's New Tech Tackles Net Pirates*, Billboard, Apr. 1, 2000 at 104. See also Larry Lange, *MP3 Compression Opens Recording Industry's Coffers to Hackers-Net Pirates Plunder the High Cs*, Electronic Engineering Times, July 21, 1997, stating this number may be lower due to the implementation of new licensing schemes, however the amount of new and unlicensed web sites increases every year. See also *Before the Committee on International Economic Policy and Trade*, 105th Cong. (1998) (statement of Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks), stating revenues from all online activities are expected to increase from \$ 278.4 billion in 1996 to \$ 357 billion by 2001.

servers, or computer networks, and transform them into a single, unified network. The private home recording immunity under the *Sony* decision will no longer apply when one considers the interconnection of individual home computers made possible by the Internet. Recent decisions<sup>110</sup> have shown that the courts will tolerate reproductions of MP3 digital musical files only if it is of a noncommercial, private nature that has no demonstrable effect on the potential market for the creative work of the artist. An online service provider<sup>111</sup>, such as Napster, who facilitates the interconnection of the members of its community, transform their private home recordings into public mass file-sharing. With the availability of new electronic devices that allow consumers to burn their MP3 files onto their blank CDs, it becomes evident that mass file sharing made possible through such technologies, will have profound detrimental effects on the potential market for, and the value of, copyrighted musical work.

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<sup>110</sup> See *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (1999), and *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (2000).

<sup>111</sup> Whether or not Napster qualifies as an online service provider is an ongoing controversy. The U.S. District court (N.D. Cal.) did not qualify Napster as an online service provider, while the U.S. Court of Appeals (9<sup>th</sup> Cir.), in its opinion (see *supra* note 104, at 5) called Napster an online service provider.