BILETA

16th BILETA Annual Conference

April 9th - 10th, 2001.
University of Edinburgh, Scotland.

Digital Downloads, Copy Code, and U.S. Copyright Law.

MICHAEL LANDAU
(Georgia State University)

Introduction

There has been much controversy, and, of course, litigation, regarding the legal status of uploading and downloading music files via mp3.com and Napster. There has also been controversy regarding the protection of digital files through technological measures, and the legislation relating thereto in the recently enacted Digital Millennium Copyright Act ("DMCA"). In recent cases in the United States, courts have 1) found mp3.com liable for infringement for reproducing and storing music files on its system,[1] 2) found Napster liable for infringement for facilitating widespread infringement by end-users,[2] and 3) held that the posting of DeCSS software to defeat the copy-code used on DVD videos was a violation of new provisions of the Digital Millennium Copyright Act ("DMCA").[3] The law in the United States is regarding these issues is beginning to take form. While it will still take a while for all of the issues to be sorted out, the resolution will have a profound impact on all of the media industries.

This paper will address the legal issues related to digital downloading and technological controls by examining recent cases and the relevant portions of United States Copyright Law. In doing so, the typical defense of "fair use", as well as some of the newer arguments derived from the Digital Millennium Copyright Act, and the Audio Home Recording Act shall be discussed. I will examine arguments presented by various sides, and present my views on the scope and interpretation of the various statutes. I will also explore whether traditional concepts of "rights" and liability should apply, and whether expanded use of compulsory licenses, blanket licenses, and/or subscription models of distribution are fitting in the electronic age. Finally, the question of whether a contract model of distribution for content is at odds with the guiding principles of copyright law is analyzed.

MUSIC FILE TRANSFERS

It is highly doubtful that the problem of unauthorized uploads and downloads, or in copyright parlance, unauthorized reproductions and distributions of digital music, will go away. For some unexplained reason, there is a notion that if it is available in cyberspace, it is free for the taking. Many people, especially today's crop of college students believe that if something is easier to obtain, any prohibition against obtaining it is unreasonable. The same group of university students who upload, download, and trade files as though the end of the world were near, would never walk into a record store (that's a misnomer) and walk away with CDs.

Perhaps the refusal to acknowledge that music files, or other files for that matter, are property is the lack of mutual exclusivity that is usually associated with physical property. In the case of an actual physical sound recording or CD, no two people can possess it at once. If the physical object is taken without authorization from the lawful owner, that owner is deprived of his copy. With respect to music files on computer, the "taking" of the music does not deprive anyone of the pleasure of listening to music. Now both the original purchaser of the music and the party who has duplicated the music have the advantage of being able to listen to the songs. In the minds of many, no one is harmed; in fact, in the minds of many, the world is now a better place for more people are able to be exposed to creative product. After all, isn't that one of the purposes of Copyright Law?

The rationale to allow some degree of unauthorized digital distribution proceeds as follows: United States copyright cases often discuss two purposes behind the granting of copyright protection to works: 1) providing an incentive to "authors" to create, and 2) providing the public with as much creative product as possible. In the case of the digital reproduction and distribution of files, the author has been provided with the incentive to create; the work has already been created, and a certain number of copies have been legitimately purchased, thereby providing the creator with a royalty, albeit lower than he or she would receive in a perfect world. Purpose Number 1 has therefore been satisfied. The reproduction and distribution through digital means of copies made from legitimately purchased ones merely helps to satisfy Purpose Number 2, provide the public with easy access to the creative output of "authors." This ideology has some, although not much credence, so long as the United States courts entertain the notion that the purpose of copyright law is something other than singly providing protection to and money for works that are proper subject matter of copyright.

Respect for rights, however, should not be predicated upon the ease or difficulty of access. Assume the following example: I put an advertisement in the newspaper that the "Sound Recording Swap Club" is meeting for a 7-day marathon in a large auditorium on a college campus. In order to gain admission, one must bring with him/her at least 100 CDs for use by everyone else. Each entrant must also have a device for making "burning" copies of the sound recording CDs. If a party does not have a CD burner, one may be provided by the organizers of the shows. Each party must also agree to be subjected to massive amounts of advertising. There is no admission charge. The organizers of the show, however, do collect fees from the advertisers. Each CD will marked as to identify the owner of the "hard copy," so that at the end of the "marathon" the CDs may be returned to their owners. All of the files are compressed and converted to "mp3" or an analogous technology in order to facilitate the fast copying of the CDs. During the "marathon," thousands and thousands of CDs are copied. At the end of the marathon, each person who entered leaves with the CDs he or she arrived with, as well as at least another 100.

It is hard to imagine that this would not be infringement! It would be difficult to argue that this was "non-commercial copying for personal use."[4] It would also be difficult for one to argue that this type of activity would be permitted under the earlier mentioned restriction to section 109 regarding "rental or lending" activity. Yet isn't this what Napster is doing.

A & M RECORDS v. NAPSTER

Over the last year, several cases have illustrated some of the issues related to the digitization of content and owners' copyrights. The *Napster* case dealt with a computer system that allowed the users to locate music files on other users' computers and to then via a centralized system, download the mp3 files. The *Napster* case also presents most of the plausible defenses that can be used in connection with music downloads. Because Napster itself does not actually store the music files on its system, its liability would be for contributory infringement or vicarious liability. An explanation of the method of identifying and obtaining files follows.

Napster facilitates the transmission of MP3 files between and among its users through a process commonly called "peer-to-peer" file sharing, Napster allows its users to: (1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users; (2) search for MP3 music files stored on other users' computers; and (3) transfer exact copies of the contents of other users' MP3 files from one computer to another via the Internet. These functions are made possible by Napster's MusicShare software, available free of charge from Napster's Internet site, and Napster's network servers and server-side software. Napster provides technical support for the indexing and searching of MP3 files, as well as for its other functions, including a "chat room," where users can meet to discuss music, and a directory where participating artists can provide information about their music.

In order to copy MP3 files through the Napster system, a user must first access Napster's Internet site and download the MusicShare software to his or her individual computer. After the software has been installed, the user is able to gain access to the Napster system. The first time that the user visits Napster, he or she registers, and as is common with many Internet sites, creates a user ID and password.

If a registered user wants to list available files stored in his computer's hard drive on Napster for others to access, he must first create a "user library" directory on his computer's hard drive. The user then saves his MP3 files in the library directory, using self-designated file names. He next must log into the Napster system using his user name and password. His MusicShare software then searches his user library and verifies that the available files are properly formatted. If in the correct MP3 format, the names of the MP3 files will be uploaded from the user's computer to the Napster servers. The content of the MP3 files remains stored in the user's computer.

Once uploaded to the Napster servers, the user's MP3 file names are stored in a server-side "library" under the user's name and become part of a "collective directory" of files available for transfer during the time the user is logged onto the Napster system. The collective directory is fluid; it tracks users who are connected in real time, displaying only file names that are immediately accessible.

Napster allows a user to locate other users' MP3 files in two ways: through Napster's search function and through its "hotlist" function. Software located on the Napster servers maintains a "search index" of Napster's collective directory. To search the files available from Napster users currently connected to the network servers, the individual user accesses a form in the MusicShare software stored in his computer and enters either the name of a song or an artist as the object of the search. The form is then transmitted to a Napster server and automatically compared to the MP3 file names listed in the server's search index. Napster's server compiles a list of all MP3 file names pulled from the search index which include the same search terms entered on the search form and transmits the list to the searching user. The Napster server does not search the contents of any MP3 file; rather, the search is limited to "a text search of the file names indexed in a particular cluster. Those file names may contain typographical errors or otherwise inaccurate descriptions of the content of the files since they are designated by other users."[5] To use the "hotlist" function, the Napster user creates a list of other users' names from whom he has obtained MP3 files in the past. When logged onto Napster's servers, the system alerts the user if any user on his list (a "hotlisted user") is also logged onto the system. If so, the user can access an index of all MP3 file names in a particular hotlisted user's library and request a file in the library by selecting the file name. The contents of the hotlisted user's

MP3 file are not stored on the Napster system.

To transfer a copy of the contents of a requested MP3 file, the Napster server software obtains the Internet address of the requesting user and the Internet address of the "host user" (the user with the available files). The Napster servers then communica

In *Napster,* it was the end users who were allegedly committing the direct infringement. For several reasons, such as the problem of end-users being judgment-proof, or the need to bring thousands, if not millions, of lawsuits in order to stop the infringement, the record companies initiated the action against the company, who in their eyes, facilitated the infringement. In many ways, one is reminded of 1984 case of *Sony Corp. of America v. Universal City Studios, Inc.*[6] in which the movie studios brought an action for contributory infringement against *Sony* for the manufacture and sale of the Betamax videotape recorder. In that case, it was also the end-users who allegedly engaged in the direct infringement by videotaping television shows. I will distinguish *Sony* from *Napster* below.

As a threshold matter, in order for there to be contributory infringement, there must be direct infringement by someone. Therefore, in order to prevail against Napster, the record companies had to prove the behavior of the users infringed the copyrights. The record companies were able to do this, and the District Court granted an injunction in favor of the plaintiffs on August 10, 2000.[7] Literally, just a few hours prior to Napster's being enjoined, the Ninth Circuit stayed the injunction pending appeal. Approximately two months ago, on February 12, 2001, the Court of Appeals for the Ninth Circuit handed down its opinion, finding that the record companies were likely to succeed on the merits and would suffer irreparable harm. The court, however, remanded the case back to Judge Patel in the District Court, for the purpose of having her craft a more narrow injunction.[8]

The following is a discussion of the recent Ninth Circuit's opinion:

The Ninth Circuit held that the individuals who posted the file names on the Napster system violated the copyright holders' right of distribution[9] and that the individuals who downloaded the files violated the copyright holders' right of reproduction.[10]

Napster raised the following defenses: The uploading and downloading by the end users is excused under the doctrine of "fair use" as codified in 17 U.S.C. §107. The copying is merely "space shifting", analogous to the time shifting in the *Sony* case, and therefore, a fair use. The downloading is for the purpose of gathering "samples" of a group's work in order to determine whether or not to purchase the entire album. These "free samples" would actually help increase the market for the work, and were not substitutes for the entire work. The specific "fair use" analysis follows.

In the United States, under certain circumstances, unauthorized violations of the exclusive rights of the copyright holder[11] may be excused under the doctrine of "fair use". The fair use doctrine, sometimes called "an equitable rule of reason" was initially judicially created to allow the use of portions of a work for purposes of criticism and comment, news reporting, scholarship, teaching, [12]etc. In many situations, it is assumed that permission either would not be granted or could not be granted in time. Over time, fair use has expanded from its origins regarding criticism [13] and comment[14] to allow for other kinds of uses, such as personal copying for convenience, provided that the copy does not fill the demand for a purchased copy from the copyright holder. [15]

In reaching a fair use analysis, courts are to consider four factors:

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;

4) and the effect of the use upon the potential market for or value of the copyrighted work.[16]

1) The Purpose And Character Of The Use

Although the statute expressly talks about whether the work is commercial or nonprofit educational in the section of "the purpose and character of the use", in recent years, this factor has taken on a new meaning. Since the Supreme Court decided the case of *Campbell v Acuff- Rose Music, Inc.*[17] , the primary point of analysis under this factor has been whether the new use of the underlying work is a "transformative" use. In determining whether the work is "transformative", a court will ask "whether the new work merely replaces the object of the original creation or instead adds a further purpose or different character." [18] The Ninth Circuit affirmed the lower court's holding that the use - merely uploading and downloading copies of the music files - was not transformative, and held that that favored a finding of infringement.[19]

The court then proceeded to look to the commercial or non-commercial nature for the work. The more commercial the use the less latitude for the unauthorized user. It should be noted that prior to *Acuff-Rose*, there was language in *Sony* stating that a commercial use was presumptively unfair.[20] The Supreme Court in *Acuff-Rose*, however, said that *Sony* did not contain a presumption; commercial use by the defendant was merely a factor that weighed in favor of the plaintiffs.

The court found the use to be commercial. Although there was no exchange of money or sale of the files, the court nonetheless found the use to be commercial, affirming the district court's findings that 1) "a host user sending a file cannot be said to engage in personal use when distributing that file to an anonymous requester" and 2) "Napster users get something for free something they would ordinarily have to buy."[21] The court continued, "Commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing copies."[22] The court also noted that for purposes of criminal law, the definition of "financial gain" also includes "the receipt of other copyrighted works."[23]

The characterization of the use as commercial is correct. I have always considered the use to be commercial, but non-cash, along the lines of a massive barter system. Everyone is made better off for participating by trading and exchanging files. (See the example of the "swap meet" above.)

C. The Nature of the Copyrighted Work

In most U.S. copyright cases, the least amount of analysis goes into the second factor, "the nature of the copyrighted work". This factor is essentially a continuum with information based works on one end and purely creative or entertaining works on the other. The more factual/historical/informative the work, the more one may take; the more creative the work, the less one may take. In this case, the works being copied are creative works - music. The creative nature of the musical compositions and sound recordings "cut against" a finding of fair use. The Ninth Circuit again agreed with the lower court's determination.

D. The Amount And Substantiality Of The Portion Used In Relation To The Copyrighted Work As A Whole

In some cases, the determination of the "substantiality of the portion used" can be a complicated one. For example, in the 1985 Supreme Court case, *Harper & Row Publishers, Inc. v. Nation*

Enterprises, [24] the court held that the taking of 300 words from a manuscript containing over 200,000 words was a substantial taking because the infringer took the "heart of the matter." Therefore, despite the fact that the 300 words were quantitatively quite insubstantial, in the court's eyes, the taking was "qualitatively substantial." Since the *Harper & Row* decision, it has become very difficult to advise clients in cases involving moderate quantitative takings, for there is always the danger that a court will consider the taking to be "qualitatively" substantial. There is also a certain amount of "circular logic" with respect to the "qualitative" measurement. The argument proceeds as follows. "You took a portion of the plaintiff's work to include in your work. You would not have included it in yours if it were not important. It is, therefore, by definition "qualitatively substantial".[25]

In the *Napster* case, the determination was easy. The end-users who were doing the downloading were taking copies of the entire song. The taking was therefore both quantitatively and qualitatively substantial. This factor also favored the plaintiff record companies.

E. The Effect on the Potential Market of Value for the Work.

The court affirmed the lower court's finding that Napster harmed the market for the works in "at least" two ways: 1) "it reduces audio CD sales among college students" and 2) "it raises barriers to plaintiffs' entry into the market for the digital downloading of music."[26] In reaching its decision, the court paid particular attention to the expert's report showing that on college campuses, there was evidence of lost retail sales of CDs on college campuses. Such lost sales were taken to be sufficient to support the finding of "irreparable harm" needed for an injunction. The court did not place very much credence in the report by Napster's expert that the sharing of files stimulates demand for sales of CDs. This same argument is found a little later in the opinion as well in a separate section that discusses the "free sample for promotional purposes" aspect of the Napster setup. Needless to say, the court do not accept that argument.

The court also found Napster interfered with the record companies efforts to legitimately license their sound recordings and musical compositions for Internet related downloads themselves. If it is easy to get the music files for free, why would one go to the authorized site and pay for them, This, of course, assumes that the end-users have a sense of not being in any danger whatsoever for doing the uploading and downloading.

The marketplace may be bearing this out. Since the injunction in Napster this spring, the record companies have been announcing license agreements or joint ventures with other Internet companies to distribute their music. For example, Yahoo announced on Thursday, April 5, 2001 that it will distribute a paid online music subscription service Duet, a joint venture formed by the music divisions of Universal and Sony . On Wednesday, April 4, 2001, Viacom -owned MTVi and the technology infrastructure company RioPort announced that they plan to offer an MTV-branded streaming and digital-download service with cooperation from the major music labels. RealNetworks will be working with MusicNet, a joint venture of AOL Time Warner , Bertelsmann and EMI.[27]

Based upon the factors, the court found that the activity of the end users was not "fair use."

Sony and Contributory Infringement

Napster also claimed that the "space shifting" of music that was being done should be excused under the holding in *Sony*. In *Sony*, the movie studios sued *Sony* for contributory infringement related to the manufacture and sale of the "Betamax." The theory of the case in *Sony* was that the individuals who used the VCRs[28] to tape shows from the air were infringing. Because the end users infringed, the company that provided them with the instruments for infringement should be liable form contributory infringement.

The Supreme Court, in a 5-to-4 decision found that the acts of those who taped show from the air were excused under "fair use." With respect to the first fair use factor, the he court found the taping to be personal and non-commercial. Despite the fact that the second and third factors favored the plaintiff- the works being taped were in general creative and the tapers taped the entire shows - the use was fair, for market harm could not be shown. Because the work was not commercial, the burden was on the movie studios to show market harm. They were unable to do so.

At the time that the *Sony* case was brought in District court, over twenty years ago, the record showed that most people merely "time shifted" the television shows. They recorded shows that were on the air at inconvenient times or when they were not home. Most importantly, Universal was not able to show that the resultant tapes were kept. There was no evidence of archiving or "librarying" the tapes. Because the viewers were merely watching what they would have watched had they been at home, there was no harm. One wonders whether in this case, the market was actually helped. Had there been no VCRs, the television would have been off at the time, and the show would never have been seen. By taping, they may have been included in the audiences for the respective shows, which could have benefited the studios in terms of higher prices for films going to larger audiences. One wonders how *Sony* would have been decided had it been initiated a few years later, after the prevalence of premium channels such as HBO, Cinemax, Showtime, etc. There is much more evidence of archiving tapes and building a collection now.

The situation in *Napster* is completely different. First, there is no precedent in their favor for "space shifting". In fact, one can read the Second Circuit's decision in *American Geophysical Union v. Texaco, Inc*.[29] as directly preventing what Napster says should be excused. In *Texaco*, in-house researchers at Texaco copied and kept articles from scientific journals. The Second Circuit emphasized that they had copied and archived the articles. The court mentioned that had the scientists merely used the articles for convenience and then destroyed them when they were finished, it would have been a situation closer to *Sony*, and might have been fair. The fact that the articles were kept and not destroyed led the court to hold that the articles were substitutes for additional subscriptions or additional legitimately licensed copies. Texaco also made a "space shifting" argument, phrased a little differently, for purposes of "transformative uses". They argued that they had "transformed" the articles into a more "user-friendly" form by removing specific articles and photocopying them.

There are other differences between *Sony* and *Napster*. In *Sony,* the users of the VCRs taped shows that they were authorized to watch, and had, in essence, paid the price via commercials. In *Napster*, the users were receiving files that they were not authorized to receive. In fact, the "streaming" or real-time transmission of the files from one unknown user to others would probably have been infringement. The third difference is a variant of the previous one. In *Napster*, the "swapping" of files takes the use out of the personal and moves it into the commercial.

Finally, in *Sony*, there were probably more "non-infringing uses" for the VCRs. Although there was some discussion regarding the issue of "non-infringing uses" that issue was not dispositive. The end users engaged in "fair uses". Because there was no direct infringement, there could be no contributory infringement. The *Sony* case should have ended there. In *Napster*, the users activities infringed. Therefore, contributory infringement was more of a possibility. It should be emphasized at this point that language in *Sony* regarding a device being "capable of commercially significant noninfringing uses"[30] may, if the case goes on to the United States Supreme Court, the way out for Napster. It depends upon whether the Supreme Court would view that language as merely *dicta* or as part of the holding of the case,

With respect to the other elements of contributory infringement, the Ninth Circuit held that Napster had the requisite knowledge of infringement. "We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and continues to direct infringement."[31] Napster was found to have the

specific knowledge based upon the fact that it had been notified that copyrighted files were going back and forth, yet it did not take sufficient measures to block them.

The Audio Home Recording Act

Although owners of sound recordings have always made analogue copies of music[32] - such as recording a cassette tape version of an album, copyright holders were worried that the advent of Digital Audio Tape ("DAT") would lead to a chain of events that would erode, if not destroy, the market for the distribution of sound recordings. Unlike analogue tape recordings, in which each "generation" of taping reveals lower and lower resolution, as well as "tape hiss," digital recordings do not degrade the sound of the source.[33] Each copy sounds like the original.

Initially, the record companies were afraid that the market would be flooded with "perfect copies." There was very strong resistance to the sale, importation, etc. of both DAT players, and blank DATs. [34]

Under the compromise known as the Audio Home Recording Act, "digital audio recording device [s]"[35] and "digital audio recording medi[a]"[36] may be sold, provided that they incorporate copying controls, such as the Serial Copy Management System.[37] In order to compensate the copyright holder, royalties are collected on the sales of such media and devices, and are distributed to copyright holders.[38] Individuals are allowed to make "non-commercial" copies for "personal use."[39] Again, a balance has been achieved. Individuals may make convenience related "personal, non-commercial" copies; copyright holders receive a royalty. Again, legislation has been introduced in order to maintain a healthy market for the copyright holder's work.

Napster raised, as Section 1008 of the Audio Home Recording Act as a defense, claiming that the activities of the users were exempted from infringement under the AHRA.[40]

Section 1008 provides in pertinent part:

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 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.[41]

Once again, Napster contended that the music file-exchanges among users was "non-commercial". As discussed above, such uses should not be classified as "non-commercial". The court, however, did not base its decision regarding interpretation of section 1008 on the non-commercial issue.

The court affirmed the lower court's holding that the Audio Home Recording Act does not cover the downloading of MP3 files to computer hard drives. In 1999, the same court, the Ninth Circuit, in a case brought by the Recording Industry Association of America ("RIAA") against the manufacturer of the popular mp3 player, the "Diamond Rio", held that "[u]nder the plain meaning of the 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."[42]

The Digital Millennium Copyright Act

Napster also claimed that it was immunized from liability as a "service provider" under the "safe harbor" provisions of section 512.[43] Section 512 (k) defines a "service provider" a follows:

C. Service Provider.

C. As used in subsection(a), the term "service provider" means an entity offering the transmission routing, or providing of connections for digital online communications between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

D. As used in this section, other than in section (a), the tem "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

The Ninth Circuit held that there were issues related to the DMCA that had to be decided at trial, including whether Napster is a "service provider", the kind of "notice" that the copyright owners must provide to Napster in order for Napster to have the requisite "knowledge" for liability as a contributory infringer' and whether Napster is in compliance with section 512(i) requiring "service providers" to establish a copyright compliance policy. Despite these issues, the court agreed with Judge Patel's decision that the plaintiffs would likely be successful on the merits.

UMG RECORDINGS, INC. v. MP3.COM

Another important digital music case is *UMG Recordings Inc. v. MP3.COM*.[44] The facts of that case are a little different, and the issue was a bit easier to resolve. In *MP3.COM*, it was the defendant itself who did the unauthorized copying, as opposed to *Napster*, in which it was the user/subscribers who did the copying.

Defendant MP3.com, on or around January 12, 2000, launched its "My.MP3.com" service, which is advertised as permitting subscribers to store, customize and listen to the recordings contained on their CDs from any place where they have an Internet connection. To enable subscribers to do this , defendant purchased tens of thousands of popular CDs in which plaintiffs held the copyrights, and, without authorization, copied their recordings onto its computer servers so as to be able to replay the recordings for its subscribers on demand.

In order to access such a recording, a subscriber to MP3.com must either "prove" that he already owns the CD version of the recording by inserting his copy of the commercial CD into his computer CD-ROM drive for a few seconds (the "Beam-it Service") or must purchase the CD from one of defendant's cooperating online retailers (the "instant Listening Service"). MP3.COM was therefore claiming that it was merely providing its users with files that they already own. This is to a degree both a "time shifting" and "space shifting" argument.

Thereafter, however, the subscriber can access via the Internet from a computer anywhere in the world the copy of plaintiffs' recording made by defendant. Thus, although defendant seeks to portray its service as the "functional equivalent" of storing its subscribers' CDs, in actuality defendant is re-playing for the subscribers converted versions of the recordings it copied, without authorization, from plaintiffs' copyrighted CDs. The behavior of MP3.COM, by itself was sufficient to establish a *prima facie* case of infringement under the Copyright Act. [45]

MP3.COM, of course, asserted "fair use" as a defense. The analysis of the factors is largely the same as in *Napster.* With respect to the first factor, "the purpose and character of the use", the court found that the use was both "commercial" and "non-transformative." The first factor was in favor of the plaintiff. With respect to the second factor, the copied works were creative and not informational. Therefore the second factor favored the record companies. The defendant copied the entire work in each case. Therefore, the taking was both quantitative and qualitative. With respect to the last factor, "the effect on the potential market or value for the work," the court rejected the same arguments regarding "creating interest in the work" that the courts rejected in *Napster.* None of the factors favored MP3.COM. Infringement was found.

In subsequent proceedings, Judge Rakoff held that damages should be assessed on a per CD basis, as opposed to a per song basis. This greatly favored MP3.COM by drastically reducing the number of infringing acts.[46] Later, it was held that the infringement was deliberate and willful. Statutory damages of $25,000 per CD were assessed.[47]

For an illustration, I would like to take MP3.COM's position to an extreme. They are saying, our users already own the CDs, therefore, there should be no liability for merely listening to "their own" files. Does this mean that if I am in a bar or diner that has a "juke box" that I should not have to insert the coins to listen. Or, if I am staying at a hotel, and I notice that the pay-per-view station is showing a movie that I have at home on videotape, but I would really like to view it again, should I not have to pay? While the argument is an interesting one, it would open a "Pandora's Box" of problems should it not be infringement.

It should be noted that had MP3.COM offered Internet "locker" space (storage space for the user's own copies on MP3.COM's servers) infringement might not have been found. This however would have been quite expensive and would have required massive storage space.

UNIVERSAL CITY STUDIOS, INC. v. RAMIERDES

Universal City Studios, Inc. v. Ramierdes, was the first case to review the anticircumvention provisions of the DMCA, contained in section 1201.[48] The defendants in the case had made available over the Internet decryption software called "DeCSS"[49] that defeated the protection scheme in Digital Versatile Disks ("DVD"). One of the questions related to the case was whether the software was being used for purposes of gaining unauthorized "access" or whether it was being used by people who had lawful access, and were using it for "fair use" purposes, such as taking an excerpt for criticism or comment, or possibly making a second copy for a second DVD player in the house.

In *Ramierdes*, the suit was not brought under section 1201(a) against individuals who were, themselves, gaining unauthorized access to protected material . Despite the fact that the DMCA was passed in October of 1998, there was a two-year waiting period before the effective date of section 1201(a).[50] The action was brought under section 1201(b). Section 1201(b) provides that :

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in, any technology, product, service, device, component, or part thereof, that is (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright holder under this title.[51]

Judge Kaplan found that the primary purpose for the DeCSS program was to defeat a technological measure that prevent "access", behavior expressly forbidden by the statute. Section 1201(c)(1) expressly provides "[n]othing in this section shall effect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." The judge, however, summarily dismissed the fair use defense without sufficient analysis on the grounds that gaining access is not a violation of copyright. That decision, in a situation in which there may be other uses, required more analysis.

Other defenses, such as the section 512(c) service provider exception and the exemptions under sections 1201(f) for reverse engineering or section 1201 (g) for encryption research were rejected. In addition, a constitutional challenge under the first amendment was rejected.

There are a few problems with the analysis and the application of the provision in *Ramierdes*. One is the very real problem, especially in the case of the mere posting of the software that defeats the "technological measure", of determining how the software will be used. Will the circumvention software be used to allow one to gain unauthorized access to a work, or will the software be used to allow one who has authorized access to copy the work. Assume that I have purchased a copy of a

DVD movie. (Actually, yesterday, I bought a copy of "Gladiator" to watch on the airplane on my Mac.) I would like to make a copy of a few scenes of "Gladiator" so that I an use them to illustrate a point in class. My copy of the DVD is "copy protected," so I go to the 2600 website, or another that is posting the DeCSS software. Without it, I may not make the copy, despite the "fair use" doctrine, and possibly despite *Sony*.

Where Do We Go From Here?

The above cases illustrate that, at the present time under United States law, the mass uploading and downloading of digital files without authorization is an act of infringement. In addition, at least at present, the "anti-circumvention" provisions of the DMCA have withstood legal challenge. (Who knows what will happen on appeal?). The facts of *Napster* also indicate that the unauthorized exchange of music files, especially by college age students, is not about to stop. The question arises how may an effective balance be achieved?

A) Technological Measures Will Govern Uses

Until now, very few types of content come with technological use controls. I would not be surprised if the use of technological restrictions increases dramatically in the future. Consider the following example:. Each music CD is now sold with a "registration number" or "password" that allows the purchaser unlimited access, but prevents anyone else from having access to the CD for any purpose other than playing. If you - the authorized user - decide to make a copy, whether for an additional personal copy, or for incorporating it into another work, or criticism or comment, you may. You are the authorized user. However, if your friend pops the CD in her computer without matching the password or registration number, and attempts to do anything other than play it, nothing happens. [52] Is there anything wrong with this scenario. If the other person wants to make "non-commercial copies," let her buy the original. Defeat of the copy protection code, would be a violation.

Although restrictions on usage or on access is now being criticized, is the "right of access" really anything new...or is it merely the "lock and key" that prevents unauthorized users and trespassers in a world in which the boundaries are no longer merely physical? Should a creator of copyrightable material be able to determine who gets access to a work and under what conditions? Owners and operators of movie theatres and concert halls "control access" all the time by charging admission and requiring tickets? Museums charge admission, and also refuse to allow individuals to photograph "public domain" works. Cable companies have for years prior to the enactment of the DMCA "scrambled" their content to prevent non-subscribers from having access.

Not everyone has access to "57 channels with nothing on." If one wants to have access to more than the local snowy network stations, one must pay a fee for cable. In fact, cable presents an interesting and useful "access" paradigm. One pays for what one wants. The cost for "basic," is lower than the charge for all of the stations. If one wishes to subscribe to "premium" movie channels, such as HBO, Cinemax, Showtime, etc. One must pay a monthly subscription fee. Pay-per-view television allows access only for a single movie at a single time. Access controls allow parties to pay for what they use.

All of us in this room have been using access controlled material for years. WESTLAW and/or LEXIS/NEXIS effectively control access by offering the material on a subscription basis. Pricing is a function of use. It costs more to do many multistate searches than it does to do a search of only the Supreme Court. It costs less to view than it does to print. Breaking into WESTLAW's database for access, would be a violation; Making additional copies of material legitimately downloaded form WESTLAW involves issues of infringement, "fair use," and probably contract issues. I have not looked at the my university's license agreement with WESTLAW, but I am assuming that there are contractual restrictions.

Considering today's technologies, market, and rampant market failures, the right to control access is essential, and is necessary to achieve the purposes of the constitutional mandate. In the absence of a copyright holder's exclusive right to control access, the balance shifts too far away from the creators and/or publishers, and there is a danger that the incentives upon which we have relied may disappear. Again, I stress that the balance between the right of the public to have a steady supply of information and creative material, and the right of the copyright holder to be compensated have shifted greatly over time. Given the trend of the United States Copyright law over the last 200 years, creating new rights, and covering more and more types of material under the scope of Copyright, the ability to control access is really not that extreme a right.

That being said, there are major problems with the anticircumvention provisions in section 1201. Section 1201 attaches liability to activities related to circumventing technological measures related to "access."[53] While the analysis may be straightforward in cases in which an individual is utilizing technology to defeat a copy-code, how does one determine whether one is distributing a circumvention technology or device in order to obtain access when one has no authorization, or in order to make a copy of the work when one does indeed have authorized access?

I, personally, read *Sony*, quite narrowly. To me, *Sony* allows personal, non-commercial "time-shifting" of shows from the air, or possibly of a webcast. *Sony* does not allow archiving. This point was made in *American Geophysical Union v Texaco*, in which the court distinguished the temporary copying of articles for the researchers' convenience from the archiving or librarying of articles. It is, therefore, a quite reasonable interpretation that the non-commercial personal copying or movies for archival building a library is not permitted. I addition, at the time of the passage of the Audio Home Recording Act, it was not unforeseeable that a similar situation would arise with respect to video. It is not clear whether the absence of legislation is an indication that Congress intended to allow only the recording of music, or whether such absence was an oversight. My personal view is that it was probably an oversight. There have been several examples in the past in which obvious companion legislation was not introduced.[54] Many people, however, read *Sony* more broadly, as to allow any non-commercial personal taping, regardless of whether it is for "time-shifting" or for building a library. While this may not be legally sound, it is sound in the marketplace. Many parties subscribe to the "premium services" for the sole purpose of building a library. In addition, many people who rent videos that they like, make copies for future use.

The courts need to thoroughly discuss and analyze the proper means of achieving the balance between the rights of parties who have authorized access and would like to use the work in a fair manner, and the rights of copyright holders to restrict access.

B. Restrictions by Contract - Have the Price Paid Reflect the Use

The "variable fee per type of use" model makes sense. One may have "access" for certain purposes, but not for others. For example, in *ProCD v. Zeidenberg*, the shrink-wrap license permitted personal use, but not commercial use. When the defendant made the 95,000,000 names available, he was in violation of the license. (It should be noted that because of *Feist*, the only way that use of the telephone directories could be restricted was through contract). The fee charged for the copy of the software, and the license, however, reflected the respective reasonable intentions of the parties. Imagine an arm's-length negotiation between Mr. Zeidenberg and a ProCD employee:

ProCD: Mr. Z. What are you intending to do with the 95,000,000 names and addresses, should we license them to you?

Z: Oh, I am going to go into business, and put the names on the Internet, and maybe even sell the names so that I can compete with you. Thank you very much for compiling them for me.

ProCD: Great! That will be $89.95 please!

I can safely assume that if that were the gist of the conversation, Mr. Zeidenberg would never have had access to the work at all.

A model in which the price paid is a function of the type of use and/or amount of material used makes sound economic sense. This argument is similar to the pay television example above.

Although, at present, there are not restrictions on the number of times that a DVD video may be viewed or a CD may be heard, if unauthorized copying becomes too much of a problem, the companies should have different prices. US $ X for viewing up to five times. US $(X)(Y) for unlimited usage.

C. Reasonable Fees for On-Line Music - Subscription Model

To a large extent, the record companies have brought this upon themselves. Prices for CDs have been skyrocketing in recent years. The prices for CDs should be quiet different from the prices for music files. The cost of the physical "hard copy" of the CD includes the cost of the plastic "jewel box" holder, the price of the blank CD, the price paid for the paper and printing, the price paid for the artwork, and very importantly distribution costs and profit for the retail audio store. A music file for download does involve most of the elements listed and, therefore, is not nearly so expensive.

The record companies should charge accordingly. There should be very, very different prices for CDs and downloads. If the cost of a download to the customer reflected the cost to the record company, people may not have quite the incentive to "steal".

The market for the actual "hard copy" CD would not be killed. Many of us, the author included, like to have CDs. There are certain numbers for which a music file on my hard drive is sufficient, but they are few. I like the artwork and liner notes. Also, the resolution of mp3 is not the same as the resolution of a CD. (Actually, the author is one of those who believes that vinyl albums sound better than CD and that thermionic valves or vacuum tunes sound better than transistors).

The book industry sets the perfect example. There are different modes of delivery of the content. The hardcover is released first and costs much more than the paperback. There are many people who just have to have the hardcover as soon as it has been reviewed in the Times or some other publication. They pay a premium for that. Others, who are happy to wait for 6 months to a year for the paperback pay a significantly lower price. Those who can really wait can often obtain the "remainders" at a small fraction of the cost. Why can't the record industry do the same.

Another model would be to have subscription service, similar to the American television model, in which the price paid does reflect the use. In the future, I believe that the model with be that of authorized music downloads on a subscription basis, with a monthly fee that is based upon type of music and usage.

D. Revise the AHRA to Include Computers.

As discussed above at the time of the negotiation and passage of the Audio Home Recording Act, the primary concern was with Digital Audio Tape and Digital Audio Tap Recorders. Congress did not contemplate that a few years later there would be inexpensive CD "burners" and massive downloading of files. It should be noted that the AHRA was passed before the Internet exists as we know it. The AHRA was passed in 1992, before the widespread use of Graphical User Interfaces such as Netscape or Internet Explorer for navigating the Internet. It was not expected that this would be a problem that would eclipse the threat of DAT.

If the definition of "Digital Audio Recording Device" were to be changed to include personal computers and similar devices, then a royalty could be imposed on the sale of computers and

distributed to the copyright owners. This model assumes that the unauthorized uploading and downloading is so pervasive that it cannot be stopped. While this may not make customers or computer manufacturers happy, it does provide for a means of compensating the copyright holders.

E. Do Nothing

The final option is to do absolutely nothing, under the theory that the record companies have already built-in a certain amount of loss or "leakage" into their already way too high prices. The retail prices of Compact Disks has increased by approximately 50% over the last several years. In addition, when one considers the price of CDs compared to the price of albums several years ago, it is even more clear that the prices are too high. For example, in 1985 -86, when most record stores were still selling vinyl, Columbia Records re-released classic albums from the 1960s and 70s under their "Nice Price" campaign. At Tower Records on Broadway and 66th Street in Manhattan, the "Nice Price" was $4.44. A year later when CDs replaced vinyl records, the same titles were now being sold at the "Nice Price" of $10.99!

Just as the banks and credit card companies charge 19.8% or more to make up for those who default on their debts, so, too, it seems that the record companies charge $16.99 or $18.99 to make up for the unauthorized duplication.

CONCLUSION

It appears as though the issues that are with us regarding unauthorized uploads and downloads are not about to go away. The trick is to create a workable system that still provides adequate compensation to creative parties or their representatives to be an incentive for "Promot[ion] of the Progress of Science and the Useful Arts" while at the same time providing distribution to as many people possible at a reasonable price.

We should not have to resort to the legislatures or the courts.

---

[1]*See*, UMG Recordings, Inc. v. MP3.COM, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

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

[3]*See,* Universal City Studions, Inc. v. Ramierdes, 82 F.Supp.2d 211 (S.D.N.Y. 2000). The relevant portion of the DMCA is contained in 17 U.S.C. §1201(a)(2).

[4] 17 U.S.C. §1008.

[5] See, Napster, 114 F. Supp. 2d at 906.

[6] 464 U.S. 417 (1984).

[7]*See*, A & M Records v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), aff'd in part, rev'd in part, 239 F.3d 1004 (9th Cir. 2001).

[8] The original injunction required Napster to block "all copyrighted music". Under the newer more narrow injunction, the record companies were to provide Napster with a list of the titles that they wanted blocked. Napster then had three days in which to comply. It should be noted that some people are still able to get around then injunction by deliberately giving a music file a slightly different name. Because Napster blocks titles as they are named and presented to them by the record companies, the "typos" allow users to subvert the filtering process.

[9]*See*, 17 U.S.C.§106(3). The first sale doctrine under section 109 of the Copyright Act is not implicated because this is not a sale of the original "hard copy" of the music CD. What is being offered to users is a copy or a reproduction of the original.

[10] See, 17 U.S.C. §106(1). A copy of the file being downloaded would be made on the party's hard drive. This would constitute an unauthorized "reproduction." Under a case in the Court of Appeals for the Ninth Circuit, *MAI Systems Corp v. Peak Computers, Inc*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994), an authorized copy that is made in RAM would also violate the right of reproduction.

[11] See, 17 U.S.C. §106.

[12] It should however be noted that while professors are allowed to make "multiple copies for classroom use" (see, 17 U.S.C. §107 (preamble)) the making of multiple copies for classroom use by an outside commercial copy-shop is not a fair use and is infringement. *See*, *e.g.*, *Basic Books Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991)*; Princeton University Press v Michigan Document Services, Inc.* 99 F.3d 1381*(*6th Cir. 1996), *cert denied*, 520 U.S. 1156 (1997*).*

[13] An example that I use with my Copyright Law students at Georgia State is as follows: Imagine that you are a book critic, and you are about to give a new novel a very negative review. You believe that the author is the worst writer who has ever lived, and you need to use an actual excerpt to show your readers just how poorly the author writes. You then call the author and ask for permission. The author asks you why you wish to use his excerpt. You respond, "Because I believe that you are the worst writer who has ever lived, and I need to use your exact words in order truly illustrate my point!"

One can assume that the author would deny permission. The use of an excerpt by the critic would probably be, and should be, fair use. (I said "would probably be" because one can never be sure how American judges will rule when it comes to fair use.

[14] One can argue that parody falls under the "criticism and comment" rubric. *See, generally, Campbell v Acuff-Rose Music, Inc*., 510 U.S. 569 (1994).

[15] See*, Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417 (1984) holding that the personal copying of television shows for purposes of "time shifting" and not archiving or librarying did not have a negative effect on the market, and was therefore a "fair use."); but see *American Geophysical Union v. Texaco, Inc.* 60 F.3d 913 (2nd Cir. 1994), *cert dismissed*, 516 U.S. 1005 (1995) (holding that the copying and retention of those copies by in-house research scientists at a commercial entity was not a fair use. The retained or archived copies were substitutes for additional licensed or purchases copies).

[16] 17 U.S.C. §107.

[17] 510 U.S. 569, 579 (1994), relying heavily on Piere Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)(Judge Leval advanced the notion that only those uses that add something or "transform" the underlying work should be "fair.") It should be noted that this view is actually a revival, albeit in slightly different form" of the constitutionally based argument that only those uses that "promote the Progress of Science and the useful Arts" should be allowed. This was also articulated in the dissent in *Sony.* In the dissent, it was argued that what the end-users were doing was merely copying, and therefore not "productive."

[18]*Napster*, 239 F.3d at 1015.

[19] While the "transformative" determination in the first factor has been followed by the courts after the Supreme Court's lead, this author finds some major problems with its use. First, the statute expressly guides us to consider the commercial or non-commercial purpose and character of the use. There is nothing in the statute that even remotely suggests that a "transformative" of "non-transformative" analysis should be undertaken; Second, the consideration of whether or not the new work has been sufficiently transformed to be different from the underlying work or is merely s substitute for the underlying work sounds an awful lot like it should be considered in connection with factor number 4, " the effect on the potential market or value for the work"; and Third, the notion of giving more latitude to parties who engage in the making of transformative uses is in direct conflict with the copyright holder's exclusive right to control the preparation of "derivative works" under Section 106 (2).

[20]*See*, *Sony Corp. of America v. Universal City Studios, Inc,* 464 U.S. 417, 449 (1984).("If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair.")

[21] Napster, 239 F.3d at 1015, citing *Napster*, 114 F. Supp.2d at 912.]

[22] Napster, 239 F.3d at 1015]

[23] *See*, No Electronic Theft Act ("NET Act"), Pub. L. No. 105-147, 18 U.S.C. §101.]

[24]471 U.S. 529 (1985).]

[25] Another area in which courts have created a problem is with respect to an erroneous reading of the factor. Then statute expressly states "in relation to the copyrighted work". Some courts have looked at the percentage of the underlying copyrighted work in relation to the defendant's work, not the underlying work.

[26]*Napster*, 239 F.3d at 1016.]

[27] *See*, New York Times, TECHNOLOGY, Friday April 6, 2001 available at http://www.nytimes.com/2001/04/06/technology/06MUSI.html

[28] The opinion itself uses the term "VTRs" for videotape recorders. This term has since been replaced with the acronym "VCR" for video cassette recorder. For purposes of this article, I shall depart from the literal language of the opinion and use the current parlance.]

[29] 60 F.3d 913 (2nd Cir. 1994), *cert dismissed*, 516 U.S. 1005 (1995)

[30]*See,Sony,* 464 U.S. 442-43.]

[31] *See*, *Napster*, 239 F.3d at 1018.

[32] It should be noted that although the practice was widespread, there were no decisions directly on point allowing the behavior. *Sony*, which as discussed above dealt only with television "time-shirting" was the closest. It was only as a result of the AHRA in 1992 that Congress finally expressly gave the "green-light" to home personal non-commercial audiotaping.

Another interesting interpretation of provisions of US Copyright had been advanced (at least in casual discussion among law professors) prior to the enactment of the AHRA regarding the copying of music in digital form. Section 117 of the Copyright Act (17 U.S.C. §117) authorizes the owner of a copy of a computer program to make an "archival copy" of the master. Are audio CDs "computer

programs"? They do contain "a series of instructions to be used directly or indirectly in a computer to bring about a certain result" (17 U.S.C. §101)(definition of "computer program")

[33] I will not get into the old "vinyl v. CD" argument at this time. There is a group of hard-core audiophiles, the author included, who contend that the sound of a vinyl album, played on a good turntable "blows away" the sound of a CD played on a good CD player. The author will also disclose that he is of the camp that believes tunes are superior to transistors.

[34] Do I hear "It's deja BETA all over again?" The DAT medium did not do well. On the other hand, blank recordable CDs have taken off like wildfire!]

[35] *See,* 17 U.S.C. §1001.

[36]*See, id; see also,* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1077 -1078 (9th Cir. 1999). (holding that a computer and a hard drive are not the types of devices and media, respectively, that the AHRA was meant to cover). This was also addressed *supra*, in *Napster.*]

[37] *See*, 17 U.S.C. §1002.]

[38] *See*, 17 U.S.C. §1003.]

[39] *See*, 17 U.S.C. §1008. The section 1008 was also raised - unsuccessfully -- in the Napster case. I personally question whether the activity in Napster is "non-commercial" or "commercial, yet non-cash."]

[40] 17 U.S.C. § 1008.

[41] *Id.]*

[42] Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1077 -1078 (9th Cir. 1999). (citing S. Rep. 102-294) ("There are simply no grounds in either the plain language of the definition or in the legislative history for interpreting the term 'digital musical recording' to include songs fixed on computer hard drives.").

[43] 17 U.S.C. §512.]

[44] 92 F. Supp.2d 349 (S.D.N.Y. 2000) (liability decision); see also, *UMG Recordings Inc. v. MP3.COM*, 109 F. Supp.2d 223 (S.D.N.Y. 2000) (damages should be assessed per CD, as opposed to per song); *UMG Recordings Inc. v. MP3.COM,* 2000 WL 126568, 56 U.S.P.Q.2d 1376 (S.D.N.Y. 2000)(willful infringement found; statutory damages of $25,000 per compact disk assessed). MP3.COM just lost another case on essentially the same facts of the case. Judge Rakoff, the same judge who sat in the UMG case, , held that MP3.COM was collaterally estopped from asserting that they did not infringe. *See*, Teevee Tunes, Inc. v. MP3.COM, ____F. Supp.2d____, 2001 WL 290063 (S.D.N.Y. 2001).

[45] 17 U.S.C. § 101 et seq. See, e.g., Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132, 137 (2d Cir.1998); Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189, 192 (2d Cir.1985). Defendants actually claimed, in a footnote in their papers, that there was not a *prima facie* case of infringement because the copied versions of the recordings were not "exact duplicates." 92 F. Supp 2d at 350. The court rejected this because to the human ear, they would sound the same. The argument also missed an important point. If the works are not identical, they still would infringe the copyright holder's right to make a "derivative work", which is an "alteration, modification, recasting, transformation" of a preexisting work. *See*, 17 U.S.C. §101.

[46] See, UMG *Recordings Inc. v. MP3.COM*, 109 F. Supp.2d 223 (S.D.N.Y. 2000)

[47]*See*, *UMG Recordings Inc. v. MP3.COM,* 2000 WL 126568, 56 U.S.P.Q.2d 1376 (S.D.N.Y. 2000)

[48] 17 U.S.C. §1201.]

[49] The program that blocks access to DVD movie disks is called Content Scramble System ("CSS"). The software to break this code is logically called "DeCSS".

[50] Actually, at the time of the initiation of the suit, section 1201(a) regarding the circumvention, was not yet effective. The effective date of 1201(a) was October 28, 2000 - 2 years after the enactment of the DMCA.

[51] 17 U.S.C. §1201 (a)(2).

[52] I have allowed one party to let another borrow

[53] 17 U.S.C. §1201.

[54] My favorite example related to the changes that Congress made regarding sovereign immunity in the pre-*Seminole*, pre-*College Savings Bank* days. Several cases strongly suggested that in order for one to be able to sue a state for copyright infringement , the statute must unambiguously subject the State to liability. In response, in 1990, Congress, in the Copyright Remedy Clarification Act of 1990, amended section 501 to provide that "anyone" included States, state imstrumentalities, etc. Congress did not have the foresight to realize that the exact same problem would exist with respect to the patent statute. The Patent Remedy Clarification Act was enacted in 1992.