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THE FATE OF NAPSTER: DIGITAL DOWNLOADING FACES AN UPHILL BATTLE

Copyrights and Trademarks Group

First Diamond Multimedia,[1] then MP3.com,[2] now Napster.[3] The recording industry, in a flurry to protect its copyrighted material, has waged an all-out battle against the dot-coms for the future of copyrighted music on the Internet. Since A&M Records, along with several other labels which comprise the Recording Industry Association of America (RIAA), filed suit against Napster, emotions have run high in the online community. Some have heralded this technology as a much-needed alternative to the strangling grasp of the major record labels; others view it as blatant theft of property. Students, musicians, computer programmers, trade organizations, and even the US government have voiced their opinions - all perhaps sensing that the outcome of the Napster litigation will have far-reaching consequences. Not only does the current battle over the fate of peer-to-peer technology promise to reshape the face of copyright law, it will also mark the future of the music industry, emerging technologies, and business models for years to come.The following iBrief describes the emergence of Napster's peer-to-peer technology, the legal proceedings to date, and Napster's defensive strategy, as well as the potential technological and cultural ramifications of the Napster cause celebre.

Napster's Technology

¶1 The storing and trading of files on individual personal computers is by no means a new phenomenon. In fact, since the proliferation of the PC began in the early-to-mid 1980s, computer owners have traded files amongst themselves using various methods. As the World Wide Web gained prominence in the early 1990's, however, computer users had access to a virtually unlimited supply of information and, consequently, software files. These early days of the World Wide Web were beset by limitations on the sharing of digital multimedia content such as music and video. The cumbersome size of these files posed a burden to local storage as well

as a nearly impassable roadblock to transmission over the then-prevalent modems.

¶2 These problems nearly disappeared as the 1990s approached an end. First, more efficient methods of reducing the size of multimedia files were created, known as compression algorithms, which allowed the downsizing of multimedia files.[4] Second, advances in hard disk technology gave computer users unprecedented archival capabilities on their home computers. Third, increases in modem bandwidth - the amount of data transmitted over a set period of time - permitted increasingly greater amounts of data to be transferred in the same amount of time using a modem or other communications device.

¶3 While the infrastructure was finally in place for the virtual free-flow of files between users, there was still inefficiency in the mechanics of file sharing. The predominant method utilized for file transfe rs over the World Wide Web was one in which files were stored on a central server made available on a web page. Users from around the globe would then visit the web page and transfer the file to their computers by clicking a hyperlink that directed the user to the location of the file on the server. While revolutionary at the time, this methodology created a bottleneck at the site of the server. Because all users were directed to one central storage server, the server's bandwidth was constantly taxed, limiting the free flow of information. In addition, popular search engines for locating MP3 files were beset by problems. The search engines often did not portray an accurate representation of the files available, or led users to out-of-date pages that no longer hosted the file sought.

¶4 Seeing the limitations of the current Internet distribution system, Northeastern University student Shawn Fanning created software that radically altered the way in which music files were traded.[5] The software Fanning developed utilized a peer-to-peer distribution network as an alternative to the central distribution network that was prevalent at the time. Peer-to-peer distribution circumvents the bottleneck effect by enabling an individual user to connect directly with other users whose hard disks contain the file he or she is seeking. Because each user connects directly to another user, there are a potentially infinite number of hosts from which a file can be obtained.

¶5 The technology works simply enough. A user downloads the Napster MusicShare software program onto her computer. Running the MusicShare program logs the user onto the Napster server-side client, which automatically catalogs the MP3 files the user has designated as available for sharing within the Napster community, as well as the user's Internet Protocol (IP) address - the method by which computers are located on the Internet. This catalog of files is

indexed and made searchable through user-directed interaction with the MusicShare software. A search submitted by the MusicShare Client is sent to the Napster server, which sends a list of matching files to the user's client.[6] The user selects the file she would like to download by highlighting it and then clicking the "Get Selected Song(s)" button.[7] Once this button is pressed, the MusicShare client submits the request to the Napster server, which in turn sends a request to the file's host computer. The host computer then responds that it is either able or unable to supply the desired file. If the response from the host computer is affirmative, the Napster server transfers the IP address to the requesting client, thus facilitating a connection between the seeker and the host user. Once a connection is made between the two users, the file is then automatically transferred between the two MusicShare clients. Thus, the bandwidth intensive process of transferring the song occurs directly over the Internet between the two users.

Legal Proceedings Against Napster

¶6 The subjects of the Napster lawsuit were the lawfulness of swapping copyrighted music using Napster, and further, whether Napster should bear secondary liability for any copyright violations perpetrated by its customer s. In the complaint filed on December 6, 1999, eighteen record company affiliates of five major labels, all members of the RIAA, alleged that Napster's conduct constituted both contributory and vicarious copyright infringement in violation of the Copyright Act, 17 U.S.C. §§ 106, 115, and 501.[8] On January 7, 2000, Jerry Lieber, Mike Stoller and The Frank Music Corporation filed a second action alleging similar claims.[9]

¶7 Napster quickly moved for summary adjudication, pleading an exemption from liability under the Digital Millennium Copyright Act's safe harbor provision, 17 U.S.C. §512(a).[10] The district court granted partial summary judgment. On June 12, 2000, the plaintiffs moved for a preliminary injunction to prevent Napster from "engaging in, or enabling, facilitating, or assisting others in, the copying, downloading, uploading, transmission, or distribution of copyrighted musical works." Napster's July 3 brief opposing the motion for preliminary injunction failed to persuade Judge Marilyn Patel, who ordered an end to the transmission of copyrighted files and the posting of a $5 million bond to compensate Napster for damages it might suffer during the period of the injunction, should it prevail at trial.[11]

¶8 On July 28, 2000, the US Court of Appeals for the Ninth Circuit stayed Judge Patel's preliminary injunction, tersely noting that Napster "raised substantial questions of first impression going both to the merits and the form of the injunction." [12] Napster filed an opening brief on August 18, and the RIAA filed its consolidated answering brief on September 8, 2000.

Napster filed an Optional Reply brief on September 12. Oral arguments were heard on October 2, 2000.

¶9 On March 5, 2001, Judge Patel issued an injunction enjoining Napster from "engaging in, or facilitating others in, copying, downloading, uploading, transmitting, or distributing copyrighted sound recordings."[13] Napster complied with this order by setting up filters which block access to any copyrighted song which a recording company has provided it with. However, as Napster users have altered song names in order to avoid such filters, traffic on the site has hardly been curbed (2.79 billion songs were downloaded in February, prior to the injunction, and 2.49 billion songs were downloaded in March, after the injunction.).[14]

Napster's Defensive Strategy

¶10 In its briefs and oral arguments to the Ninth Circuit, Napster mounted several classic defenses to copyright infringement. First, it argued that Napster users did not infringe the copyrights protecting music swapped over the Internet. To that end, it invoked the principal defenses of (1) fair use, and (2) immunity under the Audio Home Recording Act. Second, and in the alternative, Napster argued that even if its customers were guilty of copyright infringement, Napster was not secondarily liable. On this count, Napster maintained its innocence under the common law doctrines of contributory and vicarious copyright infringement, as well as the new §512 safe harbor provisions for online service providers.

Old School Analogy: The Sony Case and Fair Use

¶11 *Sony v. Universal Studios* was one of the principal cases relied on by Napster, as it established the proposition that the public is authorized to utilize new copying technology that is capable of substantial noninfringing use. In *Sony*, Universal City Studios sued the Sony Corporation for the sale and manufacture of the Betamax, charging Sony with secondary liability for unauthorized reproductions of Universal's copyrighted motion pictures.[15] On appeal, the US Supreme Court held that the sale of any staple article of commerce, including VCRs, did not constitute contributory copyright infringement so long as the device in question is capable of substantial noninfringing use.

¶12 Tracking the reasoning expounded in *Sony*, Napster contended that Napster users, in addition to making non-infringing use of music that is authorized by artists, make fair use of unauthorized copyrighted works when they use the Napster system for space-shifting music files.[16] Relying on *Sony*, which held that "time-shifting for private home use must be

characterized as non-commercial, non-profit activity," Napster focused on the fact that many Napster users own copyrighted musical recordings, which they are merely shifting into a new format for convenience.[17] Napster therefore asserted that its users are merely space-shifting musical recordings to which the user already has gained access.[18] The transfer of musical recordings from one space to another, contended Napster, constitutes fair use, and is therefore substantially non-infringing.[19] For the specific proposition that music files can be legitimately space-shifted, Napster also relied on the *Diamond* decision, which explicitly states that space-shifting of MP3 files are the "paradigmatic noncommercial personal use."[20] Moreover, Napster asserted, the RIAA produced "absolutely no evidence" that space-shifting in any way harmed the market for copyrighted works.[21] To the contrary, Napster argued that space-shifting may even increase CD sales.[22]

¶13 In rebuttal to Napster's *Sony* arguments, the RIAA maintained that space-shifting via Napster is markedly different from the time-shifting that amounted to fair use in *Sony*. While *Sony* involved taping of over-the-air television programming which the public had been invi ted to watch free of charge, Napster users were enjoying the benefit of free music which they otherwise would have had to purchase.[23] Moreover, unlike *Sony*, where users were most likely to view a recorded program and then erase it, Napster users were far more likely to archive their collections.[24] Finally, the RIAA emphasized that the *Sony* court made it clear that it was dealing only with private home use and not the transfer of tapes to other persons.[25] In contrast, downloading onto Napster was much more than copying for home use, because the moment the download was completed, the downloader became a distributor, creating the potential for distribution to millions of people.[26]

¶14 In addition to arguing that Napster did not fall under the *Sony* "substantial non-infringing use" exception, the RIAA contended that Napster's users failed traditional fair use analysis. In determining that Napster's users failed the first factor of the fair use doctrine, the RIAA focused on whether downloading MP3 files transformed the copyrighted music. Under *Campbell v. Acuff-Rose Music, Inc.*, if a new work transforms and adds new meaning or understanding to the original creation, this fact weighs in favor of finding fair use.[27] In *Campbell*, the rap music group 2 Live Crew recorded a new version of Roy Orbison's "Pretty Woman," claiming the song was a parody that made fair use of the rock ballad.[28] 2 Live Crew successfully argued that they quoted from Orbison's work in order to create a piece that provides commentary on the original.[29]

¶15 In stark contrast, said the RIAA, the downloading of MP3 files does not transform or add new expression to copyrighted music. The RIAA cited the recent case of *UMG Recordings, Inc. v. MP3.com, Inc.*, in which MP3.com argued that downloading MP3 files amounts to "a transformative space shift" which allows users to listen to music files on their computers without the burden of carrying the actual CD.[30] The court disagreed, holding that MP3.com simply repackaged the materials to allow their transmission through a different medium and added "no new aesthetics, new insights, and understandings to the original."[31]

¶16 Fair use also requires consideration of the commercial nature of the use.[32] Napster contended that using its system to sample music was akin to visiting a free listening station at a record store, or listening to song samples on a retail website, both of which constitute fair use.[33] For this Napster relied heavily on the Fader Report, whi ch states: (1) consumers do not view MP3 files as a substitute to CDs; (2) 60% of online users who download free digital music do so to preview music before buying the CD; and (3) 28% of Napster users indicate that their music purchases have increased since they began using the Napster software.[34]

¶17 The RIAA argued that, contrary to the Fader Report, the downloading and uploading of MP3 files is commercial activity. In *Sega Enterprises Ltd. v. MAPHIA*, the court found that copying "for the purpose of making multiple copies of the original, thereby saving users the expense of purchasing additional authorized copies ... militates against a finding of fair use under the purpose of the use factors."[35] In *Sega*, the copyright owner of video games brought an action against the operators of an Internet bulletin board from which users could upload and download plaintiff's games.[36] Because users of the MAPHIA bulletin board were likely to download the video games in order to save the expense of purchasing the games from Sega, the court found that the activity was for a commercial purpose that weighed against a finding of fair use.[37]

¶18 Similarly, in the case of Napster, downloading MP3 files allows Napster users to avoid purchasing the CDs from record companies. The RIAA contended that the commercial character of this activity does not support a finding of fair use.[38] Unlike traditional authorized methods of sampling cited by Napster, Napster users retain permanent copies of downloaded recordings.[39] Additionally, the RIAA maintained that Napster prevents the copyright holders from entering the online market, since Napster is already offering their products for free, and that consequently customers are more likely to choose a free service over a pay-per-download site.[40] In sum, said the RIAA, Napster undoubtedly has an adverse effect upon the market inasmuch as it (1) reduces CD sales among college students[41] and (2) raises barriers to plaintiff's

entry into the market for the digital downloading of music.[42]

¶19 The RIAA also argued that the third factor of the fair use analysis, the nature of the copyrighted work, weighed against a finding of fair use. In this case, the musical compositions and recordings are creative works that provide entertainment, weighing against a finding of fair use.[43] As to the fourth fair use factor, the amount and substantiality of copying, effectual space-shifting, like time-shifting, necessitates copying of protected works in their entirely. Thus, with respect to space shifting, the RIAA claimed that the fact that Napster users copy musical recordings in th eir entirety should weigh against a finding of fair use.

The Audio Home Recording Act

¶20 Napster additionally asserted that its users' copying is protected by §1008 of the Audio Home Recording Act (AHRA), which immunizes all noncommercial consumer copying in digital or analog form. Specifically, §1008 provides:

> No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording 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.[44]

¶21 One of the principal issues under the AHRA was whether Napster satisfied the statutory definition of a digital audio recording device. In *RIAA v. Diamond Multimedia*, the RIAA brought suit against Diamond to enjoin the manufacture and distribution of the Rio, a portable playback device which copied MP3 files from computer hard drives for convenient listening. The RIAA alleged that the Rio did not meet the requirements for digital audio recording devices under the AHRA because it did not employ 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.[45] To be a digital audio recording device, said the court, the Rio must be able to reproduce, either "directly: or "from a transmission," a "digital music recording."[46] As Rio was used primarily for the purpose of creating compilations of MP3's which originate from computer hard drives, the court ruled that there were 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.[47] As such, the AHRA was held inapposite to the audio recording device in *Diamond*.

¶22 Citing *RIAA v. Diamond Multimedia*, the RIAA contended that Napster is not a digital audio recording device the use of which shields Napster users from liability for copyright infringement.[48] Napster replied that *Diamond Multimedia's* construction of the statute was limited to the central issue in that case - namely, the existence of a copyright management system - and that, in any case, the phrase "such a device or medium" in the last clause of the statute does not refer back to analog and digital audio recording devices.[49] Furthermore, Napster argued, the RIAA's interpretation of the AHRA, if taken to its logical conclusion, means that the AHRA protects private, non-commercial copying from CD to audio cassette, but not copying from CD to personal computer - a highly dubious proposition in Napster's view.[50]

New School: §512 of The Copyright Act

¶23 In the alternative, Napster argued that even if its users violated copyright laws, Napster itself would be exempt under §512 of the Copyright Act as an online service provider. For purposes of §512(a), a service provider is an entity that transmits, routes or provides of connections for online communications "without modification to the content of the material as sent or received."[51] For the remaining sections of §512, an online service provider is an entity that provides "services or network access, or the operator of facilities therefor," and includes service providers under §512(a).[52]

¶24 Looking at the mechanics of the Napster system, the MusicShare proprietary software program (available free on Napster's web site) allows users to interact with Napster's servers, which stores Napster's directory of log-in and MP3 file names.[53] A user queries the Napster's search engine for particular music files, which may be downloaded from another user's hard drive.[54] Napster's servers route file requests from one host user browser to another, but the actual transfer of music files occurs directly over the Internet without passing through Napster's servers.[55]

¶25 The district court nonetheless rejected Napster's motion for summary judgment based on §512. Interpreting §512(n), the court found that each of the safe harbors requires an independent assessment of liability because each describes a "separate and distinct function for the purpose of applying" §512.[56] In other words, said the court, the safe harbors are mutually exclusive respecting liability, such that a service provider may be liable for infringement under §512(a), for example, but innocent under §512(b), (c) or (d).[57] Regarding the §512(a) safe harbor for routing and transmission of infringing material, the district court held that Napster neither copies, alters nor initiates the transmission of MP3 file, but is *not* a service provider for

purposes of this section because it does not route, transmit or otherwise provide connections for infringing MP3 files to pass through its system.[58] Regarding the §512(d) safe harbor for deep linking to online sites containing infringing material, however, the court noted in dicta that Napster may be eligible for protection.[59]

¶26 Napster unsuccessfully pursued the safe harbor against contributory and vicarious liability claims under §512(d). Section 512(d) concerns referring and linking to online locations containing infringing material. Under this section, a service provider cannot be liable for linking to infringing sites if (1) it had neither actual or constructive knowledge of the infringing activity; (2) upon obtaining actual or constructive knowledge or notification of claimed infringement, it acted "expeditiously" to remove or disable access to the infringing material; *and* (3) it is not vicariously liable for the infringing activity.[60] To defeat a §512(d) safe harbor claim, the RIAA countered evidence that the MP3 file names stored on Napster's servers contain neither copyright notices nor any indication of authorization for reproduction and distribution. with proof that Napster had actual or constructive knowledge of infringing activity.[61] Alternatively, the RIAA demonstrated that Napster failed to expeditiously remove or disable access to infringing material following notification or independent knowledge of claimed infringement.[62]

Outlook: The Post-Napster Landscape

A Change in Culture?

¶27 When all is said and done, what will the post-Napster landscape look like? The RIAA claims that increased Napster use will ultimately lead to a social devaluing of music, leaving no incentive for artists to create.[63] They claim that Napster is instilling in its users the notion that music ought to be free, and that if the perception of music as a free commodity becomes persuasive, it may be difficult to reverse.[64] As Jerry Harrison, keyboardist of the band "Talking Heads" observes, "One of the things the Internet might do is cheapen music and make it less valuable if it's free. That might change the way the budgets are put together and music is created. Would Pink Floyd have created 'The Wall' if it was only going to be on MP3? I don't know."[65]

¶28 Napster states that the RIAA has monopolized the music industry, leaving artists with little alternatives for viable distribution and leaving consumers little choice but to pay the exorbitant prices of CDs.[66] Napster has the ability to expose more music to more people, since artists wouldn't have to fight the big record labels for space in the stores.[67] Napster could also circumvent bans that many police groups have been placing on controversial CDs, a trend that arguably raises First Amendment issues.[68] Moreover, the more obscure artists who don't fit the

commercial radio mold will have more opportunity to reach potential fans through Napster users who are sampling music online.[69] Finally, digital distribution would shrink the power of the middleman, enabling musicians to keep more of the proceeds from the sale of their records, currently about one dollar per CD.[70]

Effect on Computer Technology

¶29 Despite the injunction issued against Napster on March 5, traffic on the site has hardly slowed down. Even if Napster had been shut down entirely, however, the technology behind the MusicShare program would still survive in the form of private open-source servers. There is already a viable infrastructure of open-source servers in place which technology-savvy users are able to utilize to usurp the role of Napster's central file directory servers. Various third-party-developed software such as "Napigator" allow a user to select an independent server with which to connect in lieu of the Napster server. Because the role of the Napster server infrastructure is fairly computationally limited, it is relatively inexpensive to setup substitutes. Thus, a user can utilize the Napster technology and MusicShare program without using "official" Napster servers.

¶30 Additionally, new file sharing programs, such as Gnutella, seem to be in perpetual development. Gnutella takes the peer-to-peer concept to the extreme by completely circumventing the role of the central server. Gnutella operates by having client software on users' computers, which make direct connections to other clients by searching directly from computer to computer in a free-flow of information. This contrasts Napster's structure of a central file database. Gnutella's technological structure potentially may be used in file searching and other applications yet undeveloped.

¶31 The ruling against Napster has not frustrated the public and private sectors' efforts to innovate new file sharing technology. Indeed, it seems that the music industry is acceding to the new technology that promises soon to govern music distribution. On April 2, three of the owners of the major record labels - AOL Time Warner, Bertelsmann and EMI agreed to make their music available for downloading over the Internet via a platform called MusicNet.[71] These companies have expressed that they may license the MusicNet service to others, including Napster, if certain criteria are met.[72]

Conclusion

¶32 In sum, whether one supports the RIAA's arguments or Napster's, it cannot be denied that the debate over peer-to-peer file sharing technology has served a multitude of purposes. It has forced the music industry to turn a critical eye on its own outdated business methods; it has raised awareness of the broader implications this technology may have on society, and how the Napster proceedings may shape these implications; and it has opened up new possibilities for viable online business models. Regardless of the ultimate legal outcome, Napster has clearly had a profound effect on the music industry, programmers, artists, consumers and beyond.

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Footnotes

1. *See* Recording Industry Association of America v. Diamond Multimedia Systems Inc., 180 F3d 1072 (9th Cir. 1999) (holding that Diamond's portable music player complied with section 1008 of the Copyright Act).

2. *See* UMG Recording Inc. v. MP3.com, Inc., 92 F.Supp.2d 349 (S.D.N.Y. 2000) (granting partial summary judgment in favor of UMG Recording).

3. A & M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, 2000 WL 573136 (N.D. Cal.).

4. The most prominent such compression is known as MP3, which is utilized in the compression of audio files.

5. *See* Giancarlo Varanini, *Q&A: Napster Creator Shawn Fanning*, ZDNet, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2455495,00.html(last modified March 3, 2000).

6. *See* Sam Costello, *How VCRs May Help Shape Napster's Legal Fight*, The Industry Standard, *at*

http://www.thestandard.com/article/article_print/1,1153,17095,00.html(last visited March 4, 2000).

7. *See id.*

8. *See* A & M Records, Inc. v. Napster, Inc., 2000 WL 573136, 1 (W.D. Cal. ___).

9. *See* A & M Records, Inc. v. Napster, Inc., 2000 WL 1182467, 1 (W.D. Cal. ___).

10. *See* Napster, 2000 WL 573136, at 1.

11. *See* A & M, Inc. v. Napster, Inc., No. C 99-5183 MHP, C 00-0074 MFP, 2000 WL 1182467 (N.D. Cal. ___).

12. A & M, Inc. v. Napster, Inc., No. 00-16401, 00-16403, 2000 WL 1055915, *1 (9th Cir. ___).

13. A&M, Inc. v. Napster, Inc., No. C 99-05183 MHP, C 00-1369 MHP, 2001 WL 227083 (N.D. Cal. ____).

14. *See* http://www.nytimes.com/reuters/technology/tech-napster-dc.html.

15. *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 455 note 40 (1984).

16. *See id*. at 32-47.

17. *See id.* at 39.

18. *See* Diamond, 180 F.3d at 1079.

19. *See* Napster Opening Brief at 33.

20. Diamond, 180 F.3d at 1079.

21. *See* Napster Opening Brief at 18.

22. *See id.* at 39.

23. Brief of Plaintiffs, filed Sept. 8, 2000, at page 51, 52.

24. *See id.* at 52.

25. *See id.* at 53.

26. *See id.*

27. *See* 510 U.S. 569, 579 (1994).

28. *See id.* at 578.

29. *See id.*

30. 92 F.Supp.2d 349, 351 (S.D.N.Y. 2000).

31. *Id.* at 351.

32. *See* Copyright Act, 17 U.S.C. §107.

33. *See* Napster, 2000 WL 1182467, at 14

34. *See id.*

35. 802 F.Supp. 1, 14-16 (S.D.N.Y. 1992); *see also* Sega Enters. Ltd. v. MAPHIA, 857 F.Supp. 679, 684 (N.D. Cal. 1994).

36. *See* 857 F.Supp. 679, 684 (N.D. Cal. 1994).

37. *See id.*

38. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985).

39. *See* Plaintiff's Brief at 60.

40. *See id.* at 61.

41. *See id.*

42. *See id.*

43. *See id.*

44. Audio Home Recording Act, 17 U.S.C. §1008.

45. *See* Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (C.A. 1999).

46. *See* Diamond, 180 F.3d at 1076.

47. *See id.* at 1077.

48. *See* A & M Reply at 2-4.

49. *See* Napster Brief. in Reply to 9th Cir. Stay of Prelim. Inj. at 8-9.

50. *See id*. at 10-11.

51. 17 U.S.C.A. §512(k)(1)(A).

52. 17 U.S.C.A. §512(k)(1)(B).

53. *See* Napster, 2000 WL 573136, at *3-4.

54. *See id.*

55. *See id*.

56. *See id*. at *4-5.

57. *See id*.

58. *See id*. at *6-8; *see also* 17 U.S.C.A. §512(i)(1)(A) (definition of service provider).

59. *See id*. at *5-6.

60. 17 U.S.C.A. §510(d).

61. *See* Napster Appeal at 8-11.

62. 17 U.S.C.A. §512(d).

63. *See* Plaintiff's Brief at 15.

64. *See id.*

65. http://www.wired.com/news/culture/0,1284,38778,00.html.

66. *See id*.

67. *See* http://www.usnews.com/usnews/issue/000612/share.html.

68. *See id.*

69. *See* http://www.wired.com/news/print/0,1294,37018,00.html.

70. *See id.*

71. *See* http://www.nytimes.com/2001/04/04/technology/04MUSI.html.

72. *See id.*