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BY SHAWN D. CHAPMAN*

**INTRODUCTION**

"Napster may win or lose in court, but copyright law will never be the same."¹

Despite its relative youth, the technology of the Internet has already had enormous social, political, and economic impacts. Though such a statement already seems clichéd, there is a fair amount of truth to it. The near-instantaneous delivery of e-mail has radically changed the way we communicate in both personal and business contexts. The "complex interconnection"² of the World Wide Web has "profoundly altered the conditions we use to establish the intelligibility of an issue or judgment"³ by providing us with immediate access to myriad sources of information—a final step towards a sort of "permanent media"⁴ that surpasses even the promises of 500-channel cable systems with twenty-four hour news networks and innumerable manifestations of "educational" programming. Advertisers rarely fail to include a Web address, or "URL."⁵

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* J.D. expected 2002, University of Kentucky. For Callie Owen, *il miglior fabbro.*
3. *Id.* at 9-10.
4. *Id.* at 10.

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The Internet has even changed the way we shop, as more and more people turn to “e-tailers” to make their purchases. The Internet has in some manner touched almost every facet of contemporary life.

But until recently, the Internet has had limited impact upon the law. Legislators are obviously aware of the changes being wrought by the Internet, and they have slowly enacted legislation that at least contemplates or recognizes those changes. The courts, however, have only recently been confronted with the impact of the Internet and related technology upon more traditional areas of the law. One of the most prominent, and most natural, areas of the law to experience the effects of the Internet is copyright law. Computers and the Internet make the circumvention of copyright, through the copying and distribution of formerly tangible media, a relatively simple endeavor. The increased availability, appeal, and ease of use of computers and digital technologies, particularly where audio and visual media are concerned, have created a sufficiently large user base that copyright holders are growing increasingly concerned about the viability of their copyrights, especially given the ease of copyright evasion. In an effort to protect their interests, copyright holders, particularly the music recording industry, have turned their attention to the providers of the technologies that allow (or at least appear to allow) avoidance of copyright protection. The recent focus of the litigation regarding these issues has been upon technologies that deal with MP3s, a digital music medium.

This Note traces the relevant aspects of American copyright law and analyzes its application in the recent MP3 cases. Part I of this Note


6 See, e.g., Jessica Davis, E-tailers Bracing for Online Holiday Rush (indicating that 2000 online holiday sales in North America are expected to exceed $10 billion), at http://www.idg.net/crd_idgsearch_258150.html?sc=57020139_16136 (Sept. 29, 2000).


8 For example, the software for Napster, the technology dealt with at length in this Note, is available for free on the Internet, and the Napster service is currently free. Napster already has millions of users. See infra Part II.A.

explicates *Sony Corp. of America v. Universal City Studios, Inc.*, the preeminent contemporary case on copyright infringement, and briefly discusses the early cases concerning the copyright issues posed by the creation, distribution, and use of MP3 files. Part II offers an analysis of both the district court and Ninth Circuit opinions in the Napster case. In particular, this part focuses on the courts' failure to apply the basic philosophy behind the *Sony* decision and, more specifically, the failure to apply *Sony*'s "staple of commerce" doctrine to the Napster system. Part III addresses the overwhelming social response to the Napster controversy, examining the legitimacy (or lack thereof) that a ruling in the Napster case might have in the eyes of the public.

I. A DECIDEDLY BRIEF HISTORY OF COPYRIGHT LAW AND THE DIGITAL REVOLUTION

Copyright has been an important facet of American law since the birth of the nation. The Constitution expressly provides Congress with the power to regulate in this area: "The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress has exercised its power to protect copyrights several times by enacting comprehensive legislation, most

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11 *See infra* notes 14-113 and accompanying text.
12 *See infra* notes 114-251 and accompanying text.
13 *See infra* notes 252-315 and accompanying text.
15 *See* U.S. CONST. art. I, § 8, cl. 8 (dealing expressly with the power to regulate copyrights). *See also* *Sony Corp.*, 464 U.S. at 430 (discussing the historical origins of copyright law). The *Sony* Court indicated that developments in copyright law have been due to technological innovations. *Id.* at 430-31. The Court pointed to the Copyright Act of 1909, which was partly a result of the advent of player pianos with perforated music roles, as an example. *Id.* at 430 n.11.
16 U.S. CONST. art. I, § 8, cl. 8.
17 Congress enacted the first copyright statute in 1790. ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL KWALL, INTELLECTUAL PROPERTY 232 (1996).
recently with the Copyright Act of 1976,\textsuperscript{18} the Audio Home Recording Act of 1992,\textsuperscript{19} and the Digital Millennium Copyright Act.\textsuperscript{20}

A. The Not-So-Primordial Ooze, or How Things Were Before the Internet: The Sony Decision and the "Staple Article of Commerce" and "Fair Use" Doctrines

Congress’s copyright legislation has created a framework through which some intellectual property can be protected. Through a combination of the broad coverage of copyright law\textsuperscript{21} and the snail’s pace of most legislation, however, technology often outstrips the precise coverage of copyright legislation, leaving to the courts the undesired role of arbiter between copyright holders and alleged copyright infringers.\textsuperscript{22} The most


\textsuperscript{21} The scope of copyright protection is quite broad, extending to the form of almost all creative works and excluding only the ideas themselves:

(a) Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . . Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, illustrated, or embodied in such work.


\textsuperscript{22} See generally Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984). One especially relevant quote comes at the end of the majority opinion: “It may well be that Congress will take a fresh look at this new technology, just as
important of these decisions to contemporary jurisprudence is *Sony Corp. of America v. Universal City Studios, Inc.*

In *Sony*, the Court delineated the limits of copyright law protections against encroachments by new technologies. There, Universal City Studios, Inc. ("Universal") and Walt Disney Productions ("Disney") brought a copyright infringement suit against Sony and several other retailers for manufacturing and selling Betamax video tape recorders (VTRs). Universal and Disney claimed that because the VTRs were capable of recording television broadcasts, they could be used to record copyrighted programming, which would infringe upon the copyrights held by Universal and Disney. Universal and Disney further alleged that Sony and the retailers were liable for the resulting copyright infringement because the Betamax VTRs were marketed specifically as recording devices. Ultimately, the Court rejected Universal and Disney's copyright infringement claims.

In rejecting the infringement claims, the Court relied heavily on the factual findings of the district court. The district court found that the "primary use of the machine for most owners was 'time-shifting'—the practice of recording a program to view once at a later time." VTR owners were also recording programs and keeping them for repeated viewing—in effect, building libraries of tapes. Despite this, VTR owners had not decreased the amount of television they watched. Sony also showed that a significant amount of copyrighted programming could be recorded without objection by the copyright owners.

The Court also recounted a significant amount of policy and copyright history to further support its holding. The Court indicated that copyright

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it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written." *Id.* at 456. See also infra note 34 and accompanying text.

23 *Sony*, 464 U.S. at 417.
24 *Id.* at 420-22.
25 *Id.* at 420.
26 See *id.*
27 *Id.* at 456.
28 *Id.* at 423.
29 *Id.*
30 *Id.* at 423-24.
31 *Id.* at 424. The Court cited a survey indicating that 7.3% of VTR use was for recording sports programming, and that "representatives of professional [sports] testified that they had no objection to the recording of their televised events for home use." *Id.* Religious and educational programming also could be copied without objection. *Id.*
law arose from and further developed in response to technological changes \(^{32}\) and that "the protection given to copyrights is wholly statutory." \(^{33}\) As such, the Court indicated that the judiciary is reluctant to "expand the protection afforded by the copyright without explicit legislative guidance." \(^{34}\) The Court warned that when "Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests." \(^{35}\) The basic function of the copyright is to "promote[ ] broad public availability of literature, music, and the other arts," which is done by encouraging and rewarding creative work. \(^{36}\) The copyright and subsequent financial rewards are simply a means to an end. The basic purpose of the copyright is the public good, not enrichment of the copyright holder. \(^{37}\) As such, the copyright is not entirely exclusive; the holder does not receive a complete "bundle" of rights from the copyright. \(^{38}\) Moreover,

\(^{32}\) Id. at 430. "Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection."

\(^{33}\) Id. at 431.

\(^{34}\) Id. (emphasis added).

\(^{35}\) Id.

\(^{36}\) Id. at 431-32 (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

\(^{37}\) Id. (quoting Aiken, 422 U.S. at 156).

\(^{38}\) Id. Copyright holders have six exclusive rights:

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

"When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."³³⁹

Confronted with a significant technological change—the advent of readily available machines that could record freely broadcast television programs—the Court proceeded cautiously, with "this basic purpose" in mind.⁴⁰ Initially, the Court dealt with the issue of Sony's liability for the VTR owners' infringing actions. The Court indicated that the Copyright Act did not expressly provide for vicarious or contributory liability for copyright infringement, though absence of such a provision would not preclude liability.⁴¹ Because Sony simply provided the means of copyright infringement and was not "in a position to control the use of copyrighted works by others and had [not] authorized the use without permission from the copyright owner,"² a finding of vicarious liability would have had to "rest on the fact that [Sony] ha[d] sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material."³⁴³

Because there was "no precedent in the law of copyright for the imposition of vicarious liability on such a theory,"³⁴⁴ the Court turned to patent law as the closest conceptual analogue.⁴⁵ The Court adopted the "staple article of commerce" theory as the appropriate means of evaluating claims of vicarious or contributory copyright infringement.⁴⁶ The staple article of commerce doctrine indicates "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."³⁴⁷ The Court also phrased the test as whether a product is "capable of commercially significant noninfringing uses"³⁴⁸ and as whether "a significant number of [uses of the product] would be noninfringing."³⁴⁹

Unfortunately, neither formulation of this test is a model of clarity. What exactly do "substantial" and "significant" mean? Where should the

³³⁹ Sony Corp., 464 U.S. at 432 (quoting Aiken, 422 U.S. at 156).
⁴⁰ Id. at 431-32.
⁴¹ Id. at 434-35.
⁴² Id. at 437-38.
⁴³ Id. at 439.
⁴⁴ Id.
⁴⁵ Id. at 439-40.
⁴⁶ Id. at 441-42.
⁴⁷ Id. at 442 (emphasis added).
⁴⁸ Id.
⁴⁹ Id.
line be drawn? The Court alleviated a need for precise quantification, indicating that "in order to resolve this case we need not give precise content to the question of how much use is commercially significant." Again, this stipulation is not wholly satisfying given the Court's reliance on statistics concerning the "millions of owners of VTRs." Other language in the opinion points towards a very low threshold that must be met in order to satisfy the staple of commerce test. For example, in response to Universal and Disney's proposition that an injunction is appropriate where the infringing use outweighs the noninfringing use, thus presumably overcoming the value preserved by the staple article of commerce test, the Court quoted the district court's opinion: "Whatever the future percentage of legal versus illegal home-use recording might be, an injunction that seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law."

The Court held that Sony satisfied the staple article of commerce test. The Court interpreted the district court's language as a finding that the religious, educational, and sports programming, which was authorized to be copied for home use and which constitutes a minority of programming, was sufficient to meet the "significant noninfringing uses" standard. Because there was a range of programming authorized to be copied and millions of people made copies of these programs, VTRs were found to be capable of noninfringing uses. Furthermore, "in an action for contributory infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome." In other words, a finding of contributory liability is not mandated just because the technology in question allows for infringing use. The Court refused to find Sony liable because the millions of authorized copies served as evidence that VTRs were "capable of some noninfringing use."

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50 Id.
51 Id. at 446.
52 See id. at 444.
53 Id. (emphasis added).
54 See id. at 443-44; supra note 31.
55 Sony Corp., 464 U.S. at 445 (noting Mr. Rogers' Neighborhood as an example of programming that is authorized for home recording and use).
56 Id. at 446.
57 Id.
58 Id. at 444-46.
The Court also indicated that the “fair use” doctrine protected the recording of the programming that was not authorized for recording, such as that produced by Universal and Disney, so long as the recording was not for a “commercial or profit-making purpose.” A commercial or profit-making recording would be “presumptively an unfair exploitation of the monopoly privilege.” The district court’s findings indicated the opposite—that “time-shifting for private home use must be characterized as a noncommercial, nonprofit activity.” Further, even if a use is noncommercial, it can still be considered “unfair” if a preponderance of the evidence shows the activity to be “harmful” or if its widespread use “would adversely affect the potential market for the copyrighted work.” Unfair uses constitute infringing uses. In applying the “fair use” doctrine to Betamax’s VTRs, the Court pointed to several parts of the district court’s opinion, indicating:

Harm from time-shifting is speculative and, at best, minimal . . . . Benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts . . . . Testimony at trial suggested that Betamax may require adjustments in marketing strategy, but it did not establish even a likelihood of harm. Television production by plaintiffs today is more profitable than it has ever been, and . . . there was no concrete evidence to suggest that the Betamax will change the studios’ financial picture.

The Court indicated that these factors, when “weighed in the ‘equitable rule of reason’ balance,” lead to the conclusion that even the recording of programming to which the copyright holder objected constituted a “fair use,” and thus was protected.

The Court’s use of the “staple of commerce” and “fair use” doctrines to protect the manufacture and sale of VTRs made Sony a landmark case. But more important than the application of these doctrines, especially in light of the direction of copyright law today, is the Court’s emphasis on the ideas and policies behind copyright law. As the Court pointed out, the

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59 Id. at 447-49.
60 Id. at 451.
61 Id. at 449.
62 Id. at 452.
63 Id. at 451 (citations omitted).
64 Id.
65 Id. at 454-55.
rights guaranteed by copyright law can only be found in what Congress has written, and the rights asserted by Universal and Disney are not found in the Copyright Act:

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.66

Any expansion of the rights guaranteed by copyright law, even in light of a radical new technology, would have to come directly from Congress.67

B. Sony’s Children: Copyright Enters the Digital Age

With the rapid expanse of the Internet and the use of digital technologies such as CDs68 and DVDs,69 lawmakers and the courts have once again come face-to-face with challenges to copyright law. Congress responded by enacting the Audio Home Recording Act of 1992 ("AHRA")70 and the Digital Millennium Copyright Act ("DMCA"),71 the first significant revisions to copyright law since 1976. The AHRA was promulgated "to implement a royalty payment system and a serial copy management system...

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66 Id. at 456.
67 See id.
69 "‘DVD’ as a product name does not stand for anything—... DVD is a branded, trademarked name (owned by the DVD Consortium). As an acronym, DVD has various interpretations, including Digital Versatile Disc and Digital Video Disc, but these initials have come to represent more than just an acronym.” DVD and Microsoft Operating Systems, at http://www.microsoft.com/hwdev/devdes/dvdwp.htm (last visited Mar. 5, 2001). The Introduction of this web page includes a further technical discussion of the DVD technology.
for digital audio recording, to prohibit certain copyright infringement actions, and for other purposes,\textsuperscript{72} while the DMCA sought to bring copyright law into the digital age by providing, among other things, for civil and criminal penalties for the circumvention of copyright protection systems\textsuperscript{73} and granting a safe harbor against liability for Internet service providers.\textsuperscript{74} Technology has already outpaced these revisions, however, presenting a situation that does not appear to have been anticipated by either the AHIRA or the DMCA.\textsuperscript{75} The convergence of communications and digital technology, specifically the Internet and MP3s, has created a challenge to copyright law of even larger proportions than that in \textit{Sony}.\textsuperscript{76}
Two cases have been decided in federal courts already—*Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.* and *UMG Recordings, Inc. v. MP3.com, Inc.* These cases only deal tangentially with the issue of MP3 files as an infringement of copyright, and thus they have failed to resolve the issue of liability. They do, however, offer some insight into the issue that is currently brewing in the Napster case.

1. **Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.**

   The federal courts first encountered MP3 files in the fall of 1998 with *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.* There, the court was asked to apply a portion of the copyright law, the Audio Home Recording Act of 1992, to prevent the further production and distribution of the Diamond Rio, a small portable MP3 player manufactured by Diamond Multimedia Systems, Inc. ("Diamond"). The Recording Industry Association of America ("RIAA"), which "represents the roughly half-dozen major record companies (and the artists on their labels) that control approximately ninety percent of the distribution of recorded music in the United States," based its case on the AHRA's

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


*79 Diamond Multimedia, 180 F.3d at 1072.*


*81 Diamond Multimedia, 180 F.3d at 1074.*
requirements that any "digital audio recording device" distributed in the United States incorporate an anti-copying system known as the Serial Copyright Management System ("SCMS") and that a royalty be paid to the recording industry for each such device sold. The RIAA asserted that the Rio was a digital recording device, and thus RIAA clients were owed royalties on each Rio sold in the United States. Additionally, the RIAA requested that the court enjoin Diamond from further production of the Rio without the SCMS.

Ultimately, the Ninth Circuit held that the Rio fell outside the "ambit of the Act." The Rio was not a "digital audio recording device," and thus it was not subject to the requirements of the AHRA. The court based its holding on a detailed analysis of the language and legislative history of the AHRA, concluding that computers, computer hard drives, and their contents had been intentionally excluded from the definitions of "digital music recordings" and "digital audio recording devices." As such, computers and hard drives fell outside the SCMS requirement. Additionally, because the Rio's source of digital files was a computer hard drive, the Rio was not a digital music recorder.

While ultimately Diamond Multimedia is an important victory for champions of the MP3 format, the specific holding of the case—that portable MP3 players do not violate the Audio Home Recording Act—does little to advance Napster's cause. Judge O'Scannlain's dicta, however, anticipates several of the arguments used in the Napster litigation, indicating that MP3s, or at least some of the practices concerning the use and distribution of MP3s, might be excluded from the reach of copyright law. For example, in a footnote, Judge O'Scannlain indicates that whether piracy actually causes serious harm to the recording industry is a matter of serious dispute for two reasons. First, "a willingness to download illicit files for free does not necessarily correlate to lost sales, for the simple
reason that persons willing to accept an item for free often will not purchase the same item, even if no longer freely available." Additionally, "the price of commercially available recordings already reflects the existence of copying and the benefits and harms such copying causes; thus . . . the current price of recordings offsets, at least in part, the losses incurred by the industry from home taping and piracy." Essentially, the recording industry’s product is priced so as to incorporate the risk of piracy. While neither of these arguments constitutes an affirmative defense to a claim of copyright infringement, they do indicate the dubiousness of the recording industry’s claims of over $300 million in losses to piracy each year. The court indicated that "the Internet also supports a burgeoning traffic in legitimate audio computer files."

More important, however, is Judge O’Scannlain’s discussion of "space-shifting." Space-shifting involves the transfer of a sound recording from one medium to another in order to increase ease of use. For example, dubbing a CD onto a cassette tape would constitute space-shifting. The court indicated that moving MP3 files from the user’s hard drive to the Rio was merely space-shifting. Presumably, converting a song from a CD into an MP3 on a computer’s hard drive using the Rio’s software would also constitute space-shifting. As such, space-shifting is analogous to the time-shifting that was protected in Sony by the fair-use doctrine, and deserves similar protection as an exception to copyright liability. The court indicated that the main purpose of the Audio Home Recording Act is the "facilitation of personal use" and that "[s]uch copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act."

2. UMG Recordings, Inc. v. MP3.com, Inc.

The United States District Court for the Southern District of New York encountered a far more complex and questionable set of facts in early 2000

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93 Id.
94 Id.
95 See id. at 1074.
96 Id.
97 See id. at 1079.
98 Id.
99 Id.
100 Id. (emphasis added).
with *UMG Recordings, Inc. v. MP3.com, Inc.*\(^{101}\) MP3.com began offering its “My.MP3.com” service in January 2000.\(^{102}\) The service allowed subscribers to access MP3 files in one of two ways. Under the first alternative, the “Beam-It Service,” subscribers had to prove that they owned a CD by placing it in the CD-ROM drive of a computer.\(^{103}\) Under the second, the “Instant Listening Service,” a subscriber bought a CD online from one of MP3.com’s affiliates.\(^{104}\) That subscriber could then use any computer with an Internet connection to download an MP3 of a song contained on the “owned” CD from MP3.com’s collection of over “tens of thousands of CDs.”\(^{105}\) MP3.com claimed that its service was simply the equivalent of storage for subscribers’ CDs.\(^{106}\)

The court, however, indicated that “in actuality defendant is re-playing for the subscribers converted versions of the recordings it copied, without authorization, from plaintiff’s copyrighted CDs. On its face, this makes out a presumptive case of infringement under the Copyright Act of 1976.”\(^{107}\) Relying on several factors—specifically that the service was commercial in nature and added nothing to the copyrighted works,\(^{108}\) that the works in question were at the “core of intended-copyright protection,”\(^{109}\) that the entire albums were copied,\(^{110}\) and that the service had a significant effect on plaintiffs’ potential market\(^{111}\)—the court denied MP3.com’s affirmative defense of “fair use.”\(^{112}\) It should be noted, however, that UMG reached a settlement agreement with MP3.com on the same day that the district court awarded damages to UMG, “grant[ing] MP3.com a non-exclusive, North American license for the use of UMG-controlled recordings on the My.MP3.com system, including the ‘Beam-it™’ and ‘Instant Listening™’ software services.”\(^{113}\)

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\(^{102}\) Id. at 350.

\(^{103}\) Id.

\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) Id.

\(^{107}\) Id. at 351.

\(^{108}\) Id. at 351.

\(^{109}\) Id.

\(^{110}\) Id. at 352.

\(^{111}\) Id.

\(^{112}\) Id. at 351-52.

\(^{113}\) Court Awards Judgment to Universal Music Group in Copyright Infringe-ment Suit with MP3.com, PRESS RELEASES, ABOUT MP3.COM (Nov. 14, 2000), at
II. "THE FUTURE IS NOW": NAPSTER

In mid-1999, Shawn Fanning, an eighteen-year-old dropout from Northeastern University, wrote the file-sharing software known popularly as Napster. Less than six months later, Fanning's company, Napster, Inc., came under legal fire from the recording industry. The RIAA and several record companies filed lawsuits against Napster, Inc. in December 1999 in federal district court, "alleging contributory and vicarious federal copyright infringement." The district court has issued several written opinions in the case, including a grant of a preliminary injunction against further copyright infringement. The injunction was appealed to the Court of Appeals for the Ninth Circuit, which recently issued an opinion upholding the district court's injunction but requiring a narrowing of the injunction's coverage. Because the court of appeals primarily covered the same ground as the district court, this Note focuses primarily on the district court's opinion. Where the Ninth Circuit offers a different rationale, however, this Note addresses the opinion of the court of appeals explicitly.

Judge Marilyn Hall Patel's first opinion dealt with Napster's motion for summary judgment based on the "safe harbor" provision of the Digital Millennium Copyright Act, 17 U.S.C. § 512(a). The DMCA's safe harbor grants immunity from vicarious liability to Internet service providers for the actions of their customers. Napster claimed that the 17 U.S.C. § 512(a) safe harbor provision protected it from liability for copyright infringement.


115 Karl Taro Greenfeld, Meet the Napster, TIME, Oct. 2, 2000, at 60, 63-64.
118 Napster, 114 F. Supp. 2d at 927.
120 Napster, 54 U.S.P.Q.2d (BNA) at 1746-47.
by users of the Napster software and servers. Judge Patel, however, denied the defense because 17 U.S.C. § 512(a) requires that the safe harbor only apply where connections and routing occur through the service provider’s systems. Because the MP3 files implicated in the case were transmitted not through Napster’s servers but via the Internet, Napster could not claim the safe harbor protection. If Napster had simply routed the MP3 files through its own server, presumably it could have claimed the safe harbor exception since it would then meet the requirements of 17 U.S.C. § 512(a). The court of appeals indicated that the DMCA’s safe harbor was not necessarily inapplicable to Napster, but a proper resolution of the issue would require a depth of factual determination available only at trial.

Because a restrictive reading of the exception like the interpretation employed by the district court virtually assured that no Internet company can claim the exception, other commentators have dealt it with at length. While this is an interesting issue, the Napster litigation has focused on other, more important issues such as “fair use” and “staple of commerce,” which are discussed in this Note. Before turning to those issues, however, some discussion of the background of the case, especially how the Napster system functions, is necessary.

A. Background

Shawn Fanning’s software became the basis for Napster, Inc., an Internet start-up company in California. Napster provides its software, called “MusicShare,” free of charge over the Internet. Napster provides servers that gather information, such as file names and sizes, concerning the

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123 Napster, 54 U.S.P.Q.2d (BNA) at 1751-52.
124 Id. at 1752.
126 See, e.g., Berschadsky, supra note 122. It should be noted, however, that Berschadsky’s article, like the majority of the academic writing on the Napster issue, was written and published before Judge Patel had issued any rulings or opinions.
127 See infra Part II.B.
128 Napster, 54 U.S.P.Q.2d (BNA) at 1747.
129 Id.
"shared" MP3 files on a user's computer when that user logs on.\(^{130}\) The server then makes that information available to other Napster users who are online and searching for MP3 files using the Napster software.\(^{131}\) Once a user has found a file that she wishes to download, the Napster software "facilitate[s] a connection between the two users."\(^{132}\) The transfer of the MP3 file itself, however, occurs via the Internet—a direct connection between the computers of two users—rather than through Napster's servers.\(^{133}\) While the primary function of the "Napster system . . . [is to] allow[ ] users to search for, request, and download MP3 files," it does have several other functions, including an MP3 player and chat program.\(^{134}\)

Apart from defending itself against the allegations of the recording industry, Napster has shown some concern regarding the legality of some of the transfers facilitated through its system. The company "has developed a policy that makes compliance with all copyright laws one of the 'terms of use' of its service,"\(^{135}\) and it warns users that their accounts may be terminated for copyright infringement.\(^{136}\) Despite this policy and warning, "evidence shows that virtually all Napster users download or upload copyrighted files and that the vast majority of the music available on Napster is copyrighted."\(^{137}\) Currently Napster does not charge users for its

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\(^{130}\) Id. MP3 files "reproduce nearly CD-quality sound in a compressed format." Id. "The Motion Picture Experts Group first created MP3 in the early 1980s . . . . MP3 technology allows for the fast and efficient conversion of compact disc recordings into computer files that may be downloaded over the Internet." Id. n. 1 (citing Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1073-1074 (9th Cir. 1999)). See also supra note 76.


\(^{132}\) Id.

\(^{133}\) Id. It should be noted that "direct connection" is something of an oversimplification here. The files do not literally pass directly from one user's computer to another—they must first pass through the extensive infrastructure of the Internet. What is most important here, however, is that the files are not transmitted via Napster's servers.

\(^{134}\) Id.

\(^{135}\) Id. at 1747-48.

\(^{136}\) Id. at 1748. It should be pointed out, however, that Napster "did not document or notify users of the existence of this policy until February 7, 2000," a full month after the initiation of litigation. Id.

software or its services because it is waiting to build a large user base. Some estimates indicated that Napster would have as many as "75 million ... users by the end of 2000." While the numbers are actually lower, Napster does currently have "more than 50 million members."

B. The District Court's August (?) Opinion and the Ninth Circuit Appeal

On August 10, 2000, Judge Patel granted a motion for a preliminary injunction against Napster's operations that involved the unauthorized transfer of copyrighted music. She ordered that Napster refrain "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner." That decision was appealed to the Ninth Circuit, which recently handed down a decision upholding most of the district court's legal conclusions.

In her opinion for the district court, Judge Patel made extensive findings of fact and law. The findings of fact are comprehensive, including descriptions of the MP3 technology, Napster's business model, Napster's system and technology, the recording industry, and Napster's effect on the recording industry. The court emphasized the fact that "Napster users were engaging in unauthorized downloading and

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138 Id. at 902. Napster has settled with some record companies, including BMG’s parent company Bertelsmann AG, and it plans to institute some form of subscription-based service. Napster Says It Will Appeal Ruling, CNN.COM (Feb. 12, 2001), at http://www.cnn.com/2001/LAW/02/12/napster.decision.04.
139 Napster, 114 F. Supp. 2d at 902 (emphasis added).
140 Napster Says It Will Appeal Ruling, supra note 138.
141 Napster, 114 F. Supp. 2d at 896.
142 Id. at 927.
143 See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). The court of appeals, however, remanded the injunction, indicating that the district court's initial injunction was too broad because it placed the entire burden of enforcing the plaintiffs' copyrights on Napster. Id. at 1027.
144 Napster, 114 F. Supp. 2d at 901-11.
145 Id. at 911-27.
146 Id. at 901.
147 Id. at 901-05.
148 Id. at 905-08.
149 Id. at 908-09.
150 Id. at 909-11.
uploading of copyrighted music,"\textsuperscript{151} that most of the files involved were copyrighted,\textsuperscript{152} and that Napster knew of this practice.\textsuperscript{153} The court indicated that these factors lead to the conclusion that A&M Records and the other plaintiffs had established a prima facie case of direct copyright infringement by Napster users (and thus, by implication, a case of contributory or vicarious infringement on Napster's part).\textsuperscript{154} Napster attacked the claim of vicarious infringement with two affirmative defenses: fair use and substantial non-infringing use.\textsuperscript{155}

1. Napster's Fair Use Defense

"[A]n individual may reproduce a copyrighted work for a 'fair use'; the copyright holder does not possess the exclusive right to such a use."\textsuperscript{156} As such, a finding of fair use is very important because it allows an exception to the copyright liability of the direct infringer (i.e., the Napster user in this case). Fair use would constitute a defense for Napster because contributory infringement and vicarious liability require the existence of direct copyright infringement.\textsuperscript{157} Judge Patel first analyzed the general statutory description of the fair use exception,\textsuperscript{158} which includes the following 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; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{159}

Because the "downloading and uploading [of] MP3 music files with assistance of Napster are not private uses"\textsuperscript{160} and Napster users "reap

\textsuperscript{151} Id. at 903 (emphasis added).
\textsuperscript{152} Id. at 902-03.
\textsuperscript{153} Id. at 903-04.
\textsuperscript{154} Id. at 911.
\textsuperscript{155} Id. at 912.
\textsuperscript{156} Id. (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984)).
\textsuperscript{157} Id. at 911 (citing Sony Corp., 464 U.S. at 434). This logic is the basis of the staple article of commerce defense. See infra note 176 and accompanying text.
\textsuperscript{158} Napster, 114 F. Supp. 2d at 912.
\textsuperscript{159} 17 U.S.C. § 107 (1994).
\textsuperscript{160} Napster, 114 F. Supp. 2d at 912.
economic advantages from Napster use" by downloading songs they would normally have to buy, Napster use was found to be commercial under the first factor, which weighs against a finding of fair use. Under the second factor, the songs in question were found to "constitute entertainment, which cuts against a finding of fair use." Because "it is undisputed that downloading or uploading MP3 music files involves copying the entirety of the copyrighted work," the third factor also weighs against a finding of fair use. Finally, the fact that Napster "reduces CD sales among college students" and "raises barriers to plaintiffs' entry into the market for the digital downloading of music" evidences an adverse effect on the market for copyrighted music, thus weighing against a finding of fair use under the fourth factor.

Much of Judge Patel's analysis of Napster's defense of "fair use" is correct, and the court of appeals agreed after reviewing the district court's decision for abuse of discretion and clear error. Judge Patel's rejection of a general fair use exception for Napster use simply makes sense. Napster and its users are engaged in a commercial activity that involves copying of protected material and ultimately has an adverse effect on the record companies' market. All four of the factors in 17 U.S.C. § 107 are met. The problem, however, arises from Judge Patel's analysis of Napster's specific claims of fair use: "sampling, space-shifting, and the authorized distribution of new artists' work." She first applied the § 107 factors in an extensive, and quite persuasive, analysis of sampling. Ultimately, because users can permanently keep the music they "sample" from

161 Id.
162 Id. at 912-13.
163 Id. at 913 (citations omitted).
164 Id.
165 Id.
166 Id.
167 Id.
168 Id.
170 Napster, 114 F. Supp. 2d at 912-13. It should be noted that the effect on the market is a finding of fact specific to this case. Evidence exists, and has been acknowledged by the Ninth Circuit, which indicates that the recording industry may not suffer economic harm from MP3 piracy. See supra notes 92-96 and accompanying text.
171 Napster, 114 F. Supp. 2d at 913.
172 Id. at 913-15.
Napster and because of the adverse economic effect of widespread Napster use, sampling does not constitute a fair use in this context. This reasoning is sound. Napster’s comparison of its service to a free listening station in a record store simply defies common sense, since Napster users “obtain a permanent copy of the song.”

Judge Patel’s analysis of the other claimed fair uses—authorized distribution and space-shifting—is not as convincing. This becomes especially important when considered in light of the argument that if specific practices are deemed “fair uses,” then “the staple article of commerce doctrine precludes liability for contributory or vicarious infringement.” Because of their importance in the analysis behind the staple article of commerce doctrine, these specific fair uses—space-shifting and authorized distribution—are discussed in the following section.

2. Napster’s Staple Article of Commerce Defense

In denying Napster’s fair use (and subsequent staple article of commerce) claim regarding space-shifting and legitimate distribution, Judge Patel misapplied the Supreme Court’s decision in Sony Corp. of America v. University City Studios, Inc.

Space-shifting “refer[s] to the process of converting a CD the consumer already owns into MP3 format and using Napster to transfer the music to a different computer—from home to office, for example.” The Ninth Circuit in Recording Industry Ass’n of America v. Diamond Multimedia Systems, Inc. expressly analogized the space shifting of MP3s to the “time-shifting” protected in Sony—holding that “[s]uch copying is paradigmatic noncommercial personal use.” As such, the practice of space-shifting should constitute a fair use.

Judge Patel attempted to dispel this argument by claiming that because the Ninth Circuit was applying a provision of the Audio Home Recording

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173 Id. at 914.
174 Id. at 914-15.
175 Id. at 914.
176 Id. at 916.
177 See infra notes 178-251 and accompanying text.
179 Napster, 114 F. Supp. 2d at 904.
180 Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999).
181 Id. at 1079.
Act, an "inapplicable statute" in this case, its analysis of space-shifting was also inapplicable. In an extensive footnote, the judge attempted to support this dismissal of Napster's argument, but the note consists of little more than a reiteration that the AHRA is inapplicable. The Ninth Circuit's dicta is not "of limited relevance," if only for the simple reason that Judge O'Scannlain's opinion in Diamond Multimedia makes clear the analogy between space-shifting and Sony's time-shifting—an analogy whose application is not limited only to the AHRA. Judge Patel's "irrele-

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182 Napster, 114 F. Supp. 2d at 915.
183 Id. at 915 n.19.
184 In its entirety, Footnote 19 reads:

Defendant's opposition brief opens with a perplexing argument. It cites Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F.3d 1072, 1079 (9th Cir. 1999), for the proposition that the Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010 ("AHRA"), immunizes the non-commercial use of Napster to space-shift music. The AHRA is irrelevant to the instant action. Neither the record company nor music publisher plaintiffs have brought claims under the AHRA; moreover, the Ninth Circuit did not hold in Diamond Multimedia that the AHRA covers the downloading of MP3 files.

Diamond Multimedia involved a suit under the AHRA by the Recording Industry Association of America ("RIAA") to enjoin the manufacture and distribution of the Rio portable music player—a hand-held device that can receive, store, and re-play MP3 files. See Diamond Multimedia, 180 F.3d at 1074. The Ninth Circuit held that the Rio player is not a digital audio recording device subject to the AHRA's restrictions. See id. at 1081. Nor are computers and their hard drives digital audio recording devices. See id. at 1078. The Diamond Multimedia court did opine that making copies with the Rio to space-shift, or make portable, files already on a user's hard drive constitutes "paradigmatic noncommercial personal use entirely consistent with the purposes of the Act [i.e. the facilitation of personal use]." Id. at 1079. However, this dicta is of limited relevance. Because plaintiffs have not made AHRA claims, the purposes and legislative history of the AHRA do not govern the appropriateness of a preliminary injunction against Napster, Inc. Furthermore, as explained below, the court is not persuaded that space-shifting constitutes a substantial, non-infringing use of the Napster service. The Ninth Circuit did not discuss the fair use doctrine in Diamond Multimedia.

This court denies defendant's request for judicial notice of the legislative history of the AHRA, filings in Diamond Multimedia, and certain other materials deemed irrelevant or inappropriate for judicial notice.

Id. (alteration in original).

185 Id.
vance" argument is something of a bad-faith effort at avoiding this issue—making a tautological argument that the dicta is irrelevant because it is irrelevant. The analogy is clear, and a failure to apply it in this case amounts to a misreading of Diamond Multimedia. Properly applied, Diamond Multimedia indicates that the space-shifting of MP3 files, whether it be from a personal computer to a portable device or from one personal computer to another over the Internet, is the sort of non-infringing use contemplated by Sony's staple article of commerce doctrine (i.e., "merely . . . capable of substantial noninfringing uses").

Judge Patel also attempted to support this finding of no fair use with facts from the Napster case itself. The court found that "space-shifting accounts for a de minimis portion of Napster use and is not a significant aspect of defendant's business." The court reached this conclusion through the application of "[c]ommon sense," basing its reasoning on several factors including Napster's failure to show that it "saw space-shifting as an attraction for its user base," and evidence showing that "almost half of college-student survey respondents previously owned less than ten percent of the songs they have downloaded." She pointed to an expert opinion indicating that a significant portion of college-age Napster users do not own the music that they download. These facts, however, do not support the idea that space-shifting is not a fair use. Rather, they are part of the staple article of commerce inquiry into whether or not the non-infringing use is substantial. Judge Patel again misread the Sony opinion, claiming that the finding of time-shifting as a fair use was due to the fact the "time-shifting represented the principal, rather than an occasional use of VCRs." While it is true that the Sony Court did accept that time-shifting was the principal use of VCRs, its finding of fair use was based on an analysis of the four factors in 17 U.S.C. § 107.

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187 Napster, 114 F. Supp. 2d at 916.
188 Id. at 904.
189 Id. at 905.
190 Id.
191 Id.
192 Id. at 916 ("[A]pproximately forty-nine percent of . . . college-student survey respondents previously owned less than ten percent of the songs they downloaded, and about sixty-nine percent owned less than a quarter." (citation omitted)).
193 Id. (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984)).
overall use that a given fair use constitutes is only relevant in determining whether the staple article of commerce doctrine is applicable, not in evaluating whether a given use is a fair use. Judge Patel commingled two separate aspects of the staple article of commerce analysis; determination of "fair use" comes first and is based on the criteria laid out in 17 U.S.C. § 107. That said, a clear reading of Diamond Multimedia and Sony indicates that space-shifting is a non-commercial, fair, non-infringing use.

The Ninth Circuit reached the same conclusion regarding space-shifting, though it applied a different, yet equally flawed, analysis. The court of appeals pointed out that in Sony and Diamond Multimedia, the person who "shifted" the copyrighted material did not also distribute that material. The court indicated that Napster use was different from Diamond Multimedia and Sony because "once a user lists a copy of music he already owns on the Napster system in order to access the music from another location, the song becomes "available to millions of other individuals." Simply because other persons are able to access the files, the space-shifting is no longer a fair use. While this is certainly a stronger argument than that offered by the district court, it again fails to convince. Just because files are available to other persons does not change the fact that the files are space-shifted, which is paradigmatic fair use. Space-shifting is a separate activity from distribution to other persons. Simply because a technology allows a fair use and an unfair use to occur simultaneously does not make the fair use unfair.

195 Id. at 442.
196 Id. at 447-56.
198 Id.
199 Id.
200 See Sony Corp., 464 U.S. at 442 ("Indeed, [a product] need merely be capable of substantial noninfringing uses." (emphasis added)).

Perhaps an analogy to VCRs in the following hypothetical situation will make this analysis clearer. Suppose X lives in a region where a copyrighted television show is broadcast. X cannot watch the show when broadcast, so he records it for later viewing. Clearly, the time-shifting is a fair use, as per Sony. But what if X then sells the same videotape to Y, who lives in a region where the television show that X has recorded is not broadcast (though the company that produces the show plans to market video copies of the program in Y's region)? Presumably this would not be a fair use under the 17 U.S.C. § 107 analysis (i.e., (1) X has recorded the entire program, (2) his use is commercial in nature, (3) the program is entertainment, and (4) X is causing a demonstrable financial impact on the copyright holder because Y will not have to buy the commercial copy of the program). The simple fact that X has used his VCR in a patently unfair manner does not change the fact that his shifting use is a protected, fair use.
The court of appeals attempted to support its position by citing two cases: *UMG Recordings, Inc. v. MP3.com, Inc.* and *Religious Technology Center v. Lerma.* These cases, however, are clearly distinguishable. The Ninth Circuit claimed that the *MP3.com* case includes a finding that "space-shifting of MP3 files [is] not a fair use even when previous ownership is demonstrated before a download is allowed." This argument fails to take into account the most basic factual difference between *MP3.com* and *Napster*: MP3.com provided the files, whereas Napster users provide their own files. The fundamental idea behind a fair use is that it is *personal.* In the *MP3.com* case, the use was not personal because the company provided files (and thus they were directly infringing copyrights), and because they reaped a financial benefit for the distribution of the files. In the context of "time-shifting," this would be analogous to a company selling bootleg copies of a television program so that people could watch the programs at a time other than when broadcast. This is clearly not a personal or fair use. As such, the difference between the practices in the *MP3.com* case and the use of Napster, while subtle, are significant. The court indicated that *Religious Technology Center* supported its position because it "suggest[ed] that storing copyrighted material on computer disk for later review is not a fair use." Again, the alleged use in *Religious Technology Center,* much like in *MP3.com,* was not a personal use. Without getting into the messy details of that case, it should be noted that the defendant in *Religious Technology Center* did not previously own the materials that he was "space-shifting." And the court’s use of *Religious Technology Center* directly contradicts the Ninth Circuit’s previous holding in *Diamond Multimedia*—that space-shifting of MP3 files is "paradigmatic" fair use.

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203 See discussion *supra* Part I.B.2.
204 *Napster*, 239 F.3d at 1019.
205 Id.
206 *Religious Technology Center* dealt with a civil action for copyright infringement brought by the Church of Scientology, a group known for its "aggressive[ ] policing [of] any breaches in security or unauthorized disclosures." *Religious Tech. Ctr.*, 40 U.S.P.Q.2d (BNA) at 1572.
207 Id. at 1571-72, 1574.
208 *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).
If anything, the space-shifting analyses offered by the district court and the Ninth Circuit show only that some of the uses of Napster are not fair. Thus, fair use by the direct infringers (Napster's users) is not a complete defense. As such, Napster must ultimately employ this fair use as merely part of a defense based on the staple article of commerce doctrine. The staple article of commerce analysis simply addresses whether the product is "capable of substantial noninfringing uses." As noted above, the Sony Court was reluctant to apply a rigid standard regarding whether a noninfringing use was "significant" or "substantial." The very statistics cited by the district court in Napster show that a large percentage of Napster users are engaging in some sort of space-shifting. Again, the Court's language in Sony indicates resorting to mere accounting is unnecessary: "Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law." Clearly, under the staple article of commerce doctrine, the amount of space-shifting encountered on Napster should be enough to prevent an injunction and ultimately serve as an affirmative defense at trial.

The district court's final argument against applying the staple article of commerce doctrine is perhaps the strongest. The court indicated that the doctrine does not apply because "Napster exercises ongoing control over its service," whereas Sony's "participation did not extend past manufacturing and selling the VCRs." This argument is somewhat misleading, especially when considered in light of the Sony Court's doctrinal concerns regarding the rationale behind copyright law. The Court indicated that the basic function of copyright is to encourage the "broad public availability of literature, music, and the other arts," and that the monopoly granted to the copyright holder is simply a subservient means to that end. When

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210 See supra notes 50-53 and accompanying text.
212 Sony Corp., 464 U.S. at 444 (emphasis added).
213 Napster, 114 F. Supp. 2d at 916.
214 Id.
215 See supra notes 32-39 and accompanying text.
216 Sony Corp., 464 U.S. at 431-32 (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).
217 Id. at 432.
technology has advanced so as to elude a clear answer under current copyright law, courts should be very reluctant to expand copyright protection by interpreting the law through the lens of this basic function. As such, the Sony Court was reluctant to give broadcasters a right to suppress the new technology of the VCR. The cases that Judge Patel cited in this regard (i.e., that retaining control of a product eliminates the staple article of commerce defense) were all based on specific uses of currently existing technology—technology that the copyright law has had time to ingest and adjust to accordingly. Napster, on the other hand, is more like the VCR when it was introduced in the late 1970s. It is a new technology, the primary function of which is democratization of access to music—a function that coincides perfectly with the basic aims of copyright law. Thus, rather than suppressing Napster, the Napster court should have been loath to expand the recording industry’s copyright monopoly, especially in the initial stages of litigation when a potentially damaging injunction lies ready to envelop and potentially destroy this new technology. The basic philosophy of American copyright urges the release and support—not hindrance—of new technology.

Given the district court’s difficulty with the staple article of commerce doctrine, the Ninth Circuit, with its furthest departure from the district court’s opinion, attempted to clarify the discussion by differentiating between contributory liability and vicarious liability and then proceeding to discuss the doctrine’s application to each theory of liability. The court defined a contributory copyright infringer as “one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another . . . . Put differently, liability exists if the defendant engages in personal conduct that encourages or assists the infringement.” The court indicated that “Napster’s actual, specific knowledge of direct infringement renders Sony’s holding of limited assistance to Napster. [The court is] compelled to make a clear distinction between the architecture of the Napster system and Napster’s conduct in relation to the operational capacity of the system.” Essentially, the Ninth

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218 See supra notes 40-67 and accompanying text.
219 Napster, 114 F. Supp. 2d at 917. The cases Judge Patel cites, all from 1984 or later, concern various issues surrounding the use and control of VCRs and video cassettes—technology that had already been encountered by the Sony Court. Id.
220 See supra notes 32-39, 66-67 and accompanying text.
222 Id. at 1019 (citations and quotation marks omitted).
223 Id.
Circuit concluded that because Napster had knowledge of users’ direct infringement on its system, it could not claim staple article of commerce immunity from contributory liability.

This assertion is troubling in two respects. First, Napster’s knowledge is simply an element of the claim of contributory infringement to which the staple article of commerce doctrine is an affirmative defense. The court of appeals asserted that Sony simply requires that a court “not impute the requisite level of knowledge . . . merely because [the] technology may be used to infringe plaintiffs’ copyrights.” On this point, the court “depart[ed] from the reasoning of the district court that Napster failed to demonstrate that its system is capable of commercially significant noninfringing uses.” The court then took a curious turn in its reasoning, noting that if knowledge can be proven otherwise, then contributory liability ensues. The staple article of commerce doctrine does more than create a rebuttable presumption of a lack of knowledge; it is an affirmative defense. A reading of the Sony opinion, especially the areas repeatedly cited by the court of appeals in support of this proposition fails to show any sign of this twist in the doctrine. In fact, the Sony Court pointed out that to assert the defense one need only show that the technology in question is “merely . . . capable of substantial noninfringing uses.” The Ninth Circuit offers the same analysis regarding the material contribution element of contributory liability, but again the fact that staple article of commerce is an affirmative defense undermines the logic of such a position.

The Ninth Circuit’s second reason for asserting that actual knowledge trumps the staple article of commerce doctrine was that the court felt “compelled to make a clear distinction between the architecture of the Napster system and Napster’s conduct in relation to the operational capacity of the system.” Essentially, the court contended that Napster’s “conduct in relation” to its system—its continued control of the system and subsequent failure to “block access to the system by suppliers of the

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225 Napster, 239 F.3d at 1020-21 (citing Sony Corp., 464 U.S. at 436).
227 Id.
228 Sony Corp., 464 U.S. at 436, 442-43.
229 Id. at 442.
230 Napster, 239 F.3d at 1022.
231 Id. at 1020.
infringing material, and . . . fail[ure] to remove the material"—when combined with knowledge of the direct infringement was enough to overcome the staple article of commerce doctrine. Aside from the objections raised in the preceding paragraph to such an interpretation, this appears to be just the sort of confusion between contributory and vicarious liability that the court of appeals warned against just a few pages later. Not only that, the confusion also appears to be crucial in the court's argument against the application of the staple article of commerce defense.

The court indicated that, "[i]n the context of copyright law, vicarious liability extends beyond an employer/employee relationship to cases in which a defendant has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." Essentially, vicarious liability is "a form of risk allocation" wherein, presumably, the entity with supervisory power over the infringing activity can protect the copyright most efficiently (i.e., cheaper than the entity without supervisory control). Vicarious liability focuses on continuing control of the technology, a concern clearly implicated in the court's discussion of contributory negligence, yet the court went to great length

\[\text{Id. at 1022.}\]
\[\text{Id. at 1019-22.}\]
\[\text{Id. at 1022-23.}\]
\[\text{Id. at 1022 (citations and quotation marks omitted).}\]
\[\text{Risk allocation to the party who can most cheaply deal with the problem is a typical "law and economics" argument. It is interesting to note that the Ninth Circuit has posited another law and economics argument that, in the particular context of alleged MP3 piracy, counters this risk allocation argument—specifically, Judge O'Scannlain's argument that recording companies price the risk of piracy ex ante by incorporating it into the price of their commercial recordings. See supra note 94 and accompanying text.}\]

While the focus of this section is on the staple article of commerce doctrine, it is important to note that the applicability of contributory and vicarious liability theories based on Napster's continued control of its service is by no means clear. The court of appeals buried its analysis of the extent of Napster's continued control in a footnote, repeating the district court's mistaken analysis:

Plaintiff[s] . . . demonstrate that defendant had actual notice of direct infringement because the RIAA informed it of more than 12,000 infringing files. Although Napster, Inc. purportedly terminated the users offering these files, the songs are still available using the Napster service, as are the copyrighted works which the record company plaintiffs identified in . . . their complaint.
to express the difference between the two theories of liability, "not[ing] that Sony’s 'staple article of commerce' analysis has no application to Napster’s potential liability for vicarious copyright infringement." The court cited two authorities for this claim: the Sony case itself, and an article by Anne Hiaring for the Practising Law Institute’s Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series. The court correctly pointed out that specific claims of direct and vicarious liability were not before the Sony Court and that the Court “recognized that the ‘lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn.’” The court, however, proceeded to argue that as a result, the Sony Court used the terms contributory and vicarious liability imprecisely and interchangeably. Despite the Ninth Circuit’s characterization, an imprecise use of the terminology of these two theories of indirect liability does not necessarily mean that the Sony Court intended the staple article of commerce analysis to only apply to one theory. Nothing in the Sony opinion supports such a reading. In fact, a look at the philosophical underpinnings of the Sony Court’s opinion—that the arts, sciences, and new technology should be promoted, not hampered by the limited monopoly provided by copyright law—indicates that the opposite conclusion is proper. The staple article of commerce analysis is an affirmative defense to both theories of indirect copyright liability. To read Sony otherwise would allow the fundamental rationale behind

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239 Id. at 1022 n.6 (first alteration in original) (citations omitted). At first glance, this is damning evidence for sure. But upon careful consideration of the nature of the Napster service and of peer-to-peer file-sharing in general, it becomes clear that this analysis suffers from a logical flaw. The presence of infringing files after Napster “purportedly” terminated the users offering those files does not necessarily lead to the conclusion that those users were not actually terminated (i.e., that Napster was not exercising a degree of control necessary to show that it was actually respecting the recording industry’s copyrights). It simply means that other persons on the service could have made the songs available after other users were terminated.
241 Ann Hiaring, Copyright Infringement Issues on the Internet, 617 PLI/PAT 455, 528 (Sept. 2, 2000).
242 Napster, 239 F.3d at 1022 (quoting Sony Corp., 464 U.S. at 435 n.17).
243 Id. at 1022-23.
244 For a more in-depth look at this analysis of Sony’s philosophical rationale, see supra notes 32-39 and accompanying text.
copyright to be swallowed by a distinction between two theories of liability that essentially merge in practice (as evidenced both by the Supreme Court’s interchangeable use of the two theories and the Ninth Circuit’s difficulty in drawing a distinct line between the two despite its express desire to do so).

Furthermore, the Ninth Circuit’s faith in its other claimed authority is mistaken. The court claimed that Anne Hiaring’s article “indicat[es] that the ‘staple article of commerce’ doctrine ‘provides a defense only to contributory infringement, not to vicarious infringement.’ ”245 Apparently the court misread Hiaring’s article, as the quoted language is not part of Hiaring’s original analysis. Rather, it is part of an attachment—an exhibit—that consists of the Notice of Joint Motion and Joint Motion of Plaintiffs for Preliminary Injunction filed by the Napster plaintiffs, A&M Records, et al.246 Essentially, the court cited the plaintiff’s brief as authority for its contention. Given that the Sony decision seems to indicate otherwise, reliance on the Hiaring article as support for the idea that the staple article of commerce doctrine does not constitute an affirmative defense to vicarious liability is both unnecessary and misplaced.

Napster also claimed that the authorized distribution of digital content is a sufficient fair use to invoke the staple article of commerce defense.247 Napster had begun a “New Artist Program,” where “[n]ew or unsigned artists [could] promote their works and distribute them via the Napster service.”248 For an artist to participate, permission must be granted to Napster and its users to distribute the artist’s songs.249 While “at least on paper” this program was part of Napster’s business plan as early as October 1999, the program was not implemented “until April 2000—well after plaintiffs filed this action.”250 As such, the district court found that the program “accounts for a small portion of Napster use and did not become central to defendant’s business strategy until this action made it convenient to give the program top billing.”251 Again, the court confused the existence of a fair use with the “substantial” requirement of the staple article of commerce doctrine. No one disputes that the authorized distribution of

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245 Napster, 239 F.3d at 1022 (quoting Hiaring, supra note 241, at 528).
246 Hiaring, supra note 241, at 497-540.
247 Napster, 239 F.3d at 1019.
249 Id. at 907.
250 Id. at 904.
251 Id.
MP3s is a legitimate use; such activity constitutes the crux of legitimate use.

As such, the question for the court should simply have been whether either use—space-shifting or authorized use—is substantial. As discussed above, the Sony Court’s language indicates a very lenient standard: merely being capable of some legitimate use indicates that the staple article of commerce defense is appropriate.

III. THE GHOST OF THE DIGITAL FUTURE:
NOT SO DEAD AFTER ALL

In the six months between Judge Patel’s grant of injunctive relief and the Ninth Circuit’s decision upholding (in part) that grant, the world waited anxiously. But the wait was anything but quiet. Each of the MP3 cases—Diamond Multimedia, MP3.com, and especially Napster—fostered dramatic and varied responses.

Electronics manufacturers have taken the Diamond Multimedia decision as an invitation to literally flood the market with MP3 players. Several companies, including Sony—one of the plaintiffs in Napster and, ironically, the defendant in Sony—have already put portable MP3 players on the market. More than fifty other manufacturers have now released portable players. One estimate indicates that the market for portable MP3 players should reach "$1.25 billion by the end of 2002." The Napster case, however, has cast some doubt upon these numbers and prospects for the portable MP3 player market. For example, one analyst indicates that


253 Richard Wilson, Playing MP3s, ELECTRONICS WEEKLY (Oct. 11, 2000), 2000 WL 28779402.254 Id.
online sales of MP3 players dropped by twenty-eight percent in the quarter ending September 30, 2000.\textsuperscript{255}

Despite its initial court loss, including a staggering verdict of well over $100 million,\textsuperscript{256} MP3.com is not succumbing to the pressure. With a final determination of damages in November 2000,\textsuperscript{257} MP3.com announced that it had secured a licensing agreement with Universal Music Group, which represents several of the larger record companies, including A&M Records, MCA Records, and Interscope Records.\textsuperscript{258} MP3.com has also gone on the offensive with a campaign to lobby Congress to change copyright law.\textsuperscript{259} The campaign, called the "Million E-mail March," is aimed at encouraging voters to contact their representatives in an effort to garner support for the Music Owners’ Listening Rights Act of 2000, which essentially would add a section to Title 17 of the U.S.C. removing services such as those offered by MP3.com from copyright liability.\textsuperscript{260} The Bill has received bipartisan support, at least insofar as its sponsors are concerned,\textsuperscript{261} but its ultimate chances of success remain to be seen.\textsuperscript{262} MP3.com, however, has not relied upon the Bill as its only means of protection, instead continuing to work to reach licensing agreements with other record companies.\textsuperscript{263}

The Napster case, however, has garnered the most publicity, receiving more than its fair share of both damnation and praise. After Judge Patel ruled against Napster on July 26, 2000, the Court of Appeals for the Ninth Circuit almost immediately stayed the injunction.\textsuperscript{264} The aftermath of Judge

\textsuperscript{255} Tony Kontzer, Do Fans Fear a Noose on Napster?, INFORMATION WEEK (Oct. 23, 2000), 2000 WL 24586440.


\textsuperscript{258} Id.


\textsuperscript{260} H.R. 5275, 106th Cong. (2000).

\textsuperscript{261} Id.

\textsuperscript{262} The Bill was not considered during the 2000 session, but its primary sponsor, Rick Boucher, has vowed to reintroduce it in 2001. Shawn Zeller, Compromise, Hell!, 32 NAT'L J. 3668, 3671 (2000).


Patel’s decision to enjoin Napster brought to the controversy unprecedented media coverage and penetration into American culture. After the injunction was granted, Napster graced the cover of several major periodicals that cover a range of interests—ABA Journal,265 Time,266 and Wired,267 just to name a few. When the parties argued before the Ninth Circuit Court of Appeals on October 3, 2000, little more than two months after the district court’s ruling, the story reached a roaring peak, becoming one of the hottest stories of the year. Television news crews set up outside the courthouse in the predawn hours, and hundreds of reporters created a “crush that resembled past media circuses that centered on bloody gloves or whether the president had sex with ‘that woman.’”268 The extensive interest in the story led the Ninth Circuit to issue a “Media Notice” concerning the upcoming release of its opinion on its website.269

Most interesting of all is that Napster use is soaring as a result of the extensive media coverage. Before July 26, 2000, Napster already boasted over twenty million users.270 The day after the district court ruling, Napster’s traffic shot up seventy-one percent.271 And, thus with that single district court decision, the first shot in “the great cultural war” was fired.272 Literally millions of Napster users have shown where their loyalties lie—not with the record companies, but with Napster—evidencing, much to Judge Patel’s distaste, “a new attitude that digitally-downloaded songs ought to be free.”273 With the ease of accessibility offered by Napster due to the low barriers to “entry” into the new technology (all one needs is a computer with Internet access, as the Napster service is currently free), the digital revolution stands poised to become more than the mere rhetoric of...

269 This notice, of course, only lasted until the court’s decision on February 12, 2001. After the decision was released, the court removed this notice and replaced it with one stating that the decision had been made public. References to Napster have been completely removed from the website now that public attention in the ongoing legal battle is no longer focused on the Ninth Circuit. See Ninth Circuit Homepage, at http://www.ce9.uscourts.gov (last visited Mar. 3, 2001).
270 Kuptz, supra note 114, at 134.
271 Id.
pundits and techno-geeks. Certainly some commentators will (and already have) label Napster as just another fad, another dot-com whose stock price will peak immediately after its IPO, then plummet into bankruptcy. Others, however, see Napster as the first sign of a new paradigm, of the actual "new economy."\textsuperscript{274}

The most important part of the controversy, however, is the idea itself. As French writer Victor Hugo observed over a century ago, "An invasion of armies can be resisted, but not an idea whose time has come."\textsuperscript{275} Even if Napster ultimately loses its case, the impact will be temporary and centralized to Napster itself. The idea behind Napster—peer-to-peer networking—is out of the bag. As such, the effect on the Internet community of an ultimate decision against Napster could be minimal. Users could simply ignore it. If Napster disappears, several other peer-to-peer formats stand ready to take its place: for example, Scour,\textsuperscript{276} Gnutella,\textsuperscript{277} and Freenet.\textsuperscript{278} While services like Scour would be susceptible to a decision against Napster given their similar use of central servers,\textsuperscript{279} Gnutella and Freenet are truly peer-to-peer because users interact directly with each other without the use of servers to create an index of users and files.\textsuperscript{280} Because they avoid central servers, Gnutella and Freenet allow almost complete anonymity.\textsuperscript{281} Additionally, these systems have "no centralized control or administration,"\textsuperscript{282} so "there's no company to sue."\textsuperscript{283}

\textsuperscript{274} See Barlow, \textit{supra} note 272.

\textsuperscript{275} Victor Hugo, \textit{quoted in} Barlow, \textit{supra} note 272, at 238.


\textsuperscript{279} Like Napster, Scour has also been sued by the RIAA. \textit{Recent Press Releases}, \textit{at} http://www.scour.com/General/Company/Press/Releases (last visited Mar. 23, 2001). In addition to its legal troubles, Scour was forced into Chapter 11 Bankruptcy and suspended the use of its file-sharing service. \textit{Id.} Most recently, Scour's assets were purchased by CenterSpan Communications, which has vowed to reopen the service as a "legal digital distribution channel for music, movies, e-books, images, and documents." \textit{Welcome to Scour}, \textit{at} http://www.scour.com (last visited Mar. 23, 2001).

\textsuperscript{280} Kuptz, \textit{supra} note 114, at 236 (describing in detail how Gnutella works without the use of central servers).


\textsuperscript{282} Gibeaut, \textit{supra} note 281, at 41.

\textsuperscript{283} \textit{Id.}
the only recourse would be countless lawsuits against individual users of these file-sharing softwares, practical enforcement of copyright claims against either of these systems would be impossible. As one commentator indicated, “[a]ny chance of shutting down unauthorized file-sharing ended on March 14 [2000], when programmers at AOL’s Nullsoft division unleashed their server-less P2P client, Gnutella.”

Gnutella and Freenet, however, are not as easy to use as Napster; thus, they have “so far failed to live up to their promise.” Other commentators have noted that while alternate peer-to-peer systems do work, they are currently far too complex for the casual user and thus have a long way to go before they can fill Napster’s shoes, should it flounder under economic or legal pressure.

But again, the peer-to-peer idea itself is the key. Given Napster’s relative ease of use, imitators have reverse-engineered the Napster interface to set up competing free services that may succeed where the more difficult alternatives may drive users away.

For many people, Napster has become a symbol of the techno-political clash that the Internet has effected. As another commentator, John Barlow, has pointed out, the Napster controversy has transformed an evolving economy into a cause, and turned millions of politically apathetic youngsters into electronic Hezbollah. Neither the best efforts of Judge Patel—nor those of the Porsche-driving executives of the Recording Industry Association of America, nor the sleek legal defenders of existing copyright law—will alter this simple fact: No law can be successfully imposed on a huge population that does not morally support it and possesses easy means for its invisible evasion.

What Barlow is describing is a form of civil disobedience that has a distinct advantage over that practiced in Alabama in the 1960s: it is almost

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284 Kuptz, supra note 114, at 236.
287 Knocking Off Napster, supra note 285, at 89. The copycats include MyNapster (http://www.mynapster.com), Napigator (http://www.napigator.com), and OpenNap (http://opennap.sourceforge.net). Id. These services often incorporate more features than Napster, including the ability to search multiple networks and download files other than MP3s. Id. For a more complete list of all things peer-to-peer on the Internet, see Wired’s Guide to Global File-Sharing, WIRED, Oct. 2000, at 243.
288 Barlow, supra note 272, at 240.
entirely without consequence. Perhaps in this case, the technology has completely outstripped the resources of the law to the point where "the ease of stealing music and movies in cyberspace makes the traditional protections of copyright law worthless."289 Even Judge Patel recognized the possibility that other services and software might simply absorb the demand for "free" music in the absence of Napster.290 If this is the case, then as more and more of the populace comes online and becomes Internet-savvy, perhaps the traditional conception of copyright becomes worthless, or at least unenforceable. As a result, the debate over whether Napster use (or any peer-to-peer file sharing) is legal or moral becomes irrelevant, since the questions assume (erroneously) that enforcement is viable.

As it stands, however, Napster's legal prospects look bleak. While the Ninth Circuit remanded the injunction order to the district court, it noted that "a preliminary injunction against Napster’s participation in copyright infringement is not only warranted but required."291 Its only concession to Napster was a requirement that the injunction be narrowed in order to remove "the entire burden of ensuring that no ‘copying, downloading, uploading, transmitting, or distributing’ of plaintiffs’ works occur on the system."292 As such, the district court must simply remold its injunctive order to reflect the recording industry’s burden "to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content"293 and to reflect Napster’s "burden of policing the system within the limits of the system."294 At the time of the final drafting of this Note, news was released that plaintiffs in the Napster case had "ask[ed] a San Francisco federal judge [Judge Patel] to order Napster to "patrol" the site, removing song titles that record companies identify as being copyrighted."295 Napster fears that the order will close them down.296

While Napster certainly is not giving up in its court battles, a recent look at the Napster website indicates that the company may be looking in

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289 Gibeaut, supra note 281, at 38.
292 Id.
293 Id.
294 Id.
295 Id.
296 Id.
another legal direction—towards congressional and other political (as opposed to judicial) action.297 Like MP3.com’s “Million E-mail March,”298 Napster is attempting to start a grassroots, democratically-oriented political movement. They have posted a notice calling for people to contact Congress and to sign up for the “Napster Action Network.”299 Already, Senator Orrin Hatch, chairman of the Senate Judiciary Committee, has promised to hold hearings to look at the Ninth Circuit’s decision upholding the Napster injunction.300 Senator Hatch commented in a speech before the Senate: “I guess my feeling about this Ninth Circuit decision is a gnawing concern that this legal victory for the record labels may prove pyrrhic and short-sighted from a policy perspective.”301

Fortunately, there is another alternative—one that the convergence of judicial and legislative pressure might effect, and one that is perhaps best for all the parties involved. New research indicates that many of the presumptions and “facts” that lead Judge Patel and the recording industry to see Napster users as little more than thieves were unfounded.302 While this research may not meet the high demands of the evidence rules in a court proceeding, it does indicate that the record companies may (and should) be willing to move away from attempts at quashing Napster and choose to partner with it instead. On October 31, 2000, Napster announced a licensing partnership with Bertelsmann AG, the parent company of BMG (one of the major plaintiffs in the litigation).303 Napster has offered to settle the case before—proposing, for example, a plan where users pay a monthly fee from which the record companies could then be paid304—and there is some indication that the other major defendants in Napster might also be willing to enter into some sort of settlement.305 Such a deal would effectively diffuse the growing legal and social tensions surrounding the

298 See supra note 259 and accompanying text.
301 Id.
305 Id.
status of Napster and MP3s. Following the lead of Bertelsmann AG, two of the suit's largest independent record companies, TVT Records and Edel Music, have also agreed to cooperate with Napster. An amiable solution may be possible after all: "subscription-based services are definitely on the horizon." Napster and partner Bertelsmann AG are planning to release a subscription-based version of the Napster service soon, and they are currently developing technology that will allow greater protection against direct copyright infringement. A settlement with the other record companies would allow a preservation and perpetuation of Napster, perhaps even encouraging further development of the technology while simultaneously allowing the record companies to retain some measure of control over their copyrighted material.

This solution would allay, at least temporarily, the "great cultural war" forecast by John Barlow. Furthermore, such an option would more fully achieve the "purposes" of copyright found in Sony, since a settlement would allow for the preservation of a new technology while increasing public access to artistic material. Perhaps more than anything, a voluntary settlement between Napster and the recording industry would serve as a shining example of "[l]awmaking as a complicated process that takes place in a larger universe than the confines of legislatures and courts" where "the common law of cyberspace [can] evolve as users express their concerns and seek consensual solutions to common problems."

**CONCLUSION**

As it stands, the effects of the "near-perfect anarchy" have yet to fully materialize, and the ultimate outcome in the legal arena has yet to take

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308 See Raymond, *supra* note 302, at 40.
310 Barlow, *supra* note 272, at 240.
312 *id.*
313 This phrase is borrowed from the creators of Freenet, who have used the term to describe their own peer-to-peer system. Don Tapscott, *Freenet May Make the Internet a Wilder Place*, COMPUTERWORLD (May 22, 2001), at http://www.computerworld.com/cwi/story/0,1199,NAV47-74_STO45119,00.html; see also *supra* note 278.
Congress and the Supreme Court have attempted to formulate an approach to copyright law that gives practical effect to the most basic constitutional goals of the copyright while reflecting the reality of constantly changing and emerging technologies. The Court's decision in *Sony* strikes the balance between the philosophical and the practical. Unfortunately, when confronted with a technology as radical in impact as the Internet, the courts have had difficulty in establishing a foothold from which to consistently apply that balance.

The line of MP3 cases—*Diamond Multimedia*, *MP3.com*, and *Napster*—has stretched the contemporary understanding of copyright law to its limit. The traditional notions of copyright may in fact have reached the end of their useful lifetime in light of the significant challenges that the Internet has already posed in its short tenure. It has become readily apparent that "[t]he whole structure of intellectual property, and the value of it, is changing." Much depends on the ultimate outcome of the *Napster* case. The Ninth Circuit has attempted to return an element of stability to copyright law, but the technological changes of the past decade have rendered this an unrealistic possibility. A lasting solution to the challenges


The events in this case are proceeding at an extremely rapid pace. By the time this Note is published, the status of Napster could be very different from the picture presented here. The interested reader is urged to follow this constantly breaking news and to take it into account when reading this Note.

315 Charles Nesson, Director, Harvard Law School Berkman Center for Internet & Society, quoted in Gibeaut, supra note 281, at 38.
to copyright law does not appear to lie within the grasp of the judiciary, which faces rapid technological progress but is constrained by a set of laws with limited elasticity. Only by turning to the fundamental underlying principles of copyright jurisprudence can the judiciary hope to reach an adequate solution.

Failing there, perhaps the solution will come from the legislature, or perhaps the market will solve the problem through an out-of-court settlement. Whatever the outcome, wherever the decision, Napster’s impact on intellectual property practices and on society at large will be undeniable and long felt.