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The Resounding Impact of Napster, Inc. An Analysis of A & M Records, Inc. v. Napster, Inc.

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The Resounding Impact of Napster, Inc.
An Analysis of *A & M Records, Inc. v. Napster, Inc.*

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ABSTRACT

When Napster was first launched on the Internet in August of 1999 by young programmer, Shawn Fanning, the intension was that the platform would easily link Internet users with the free MP3 downloads they sought out on the web. By the time an injunction against the platform was granted and upheld by a state then federal court, Napster had made a far bigger impact than simply linking music listeners with free downloads.

The proceedings of *A & M Records, Inc. v. Napster, Inc.* through the District Court Northern District of California then the United States Court of Appeals for the Ninth Circuit acted to test the applicability of copyright protections that had been legislatively heightened throughout the 1990's and built the framework for specifications for copyright protection on the Internet.

Even after fifteen years of being offline, the peer-to-peer platform still remains a household name due to the influence Napster had on shaping music consumers' expectations of access to digital music as well as distributors' practices.

Through a review of *A & M Records, Inc. v. Napster, Inc.* in the district and appellate courts I will explore the workings of the Napster platform and the legal issues surrounding it - with an emphasis on vicarious copyright infringement, contributory copyright infringement, the application of the DMCA, and the application of the substantial non-infringing use doctrine to software technologies, as established by *Sony Corporation of America v. Universal City Studios, Inc.*

I conclude that Napster has had a resounding legal, psychological, and technical impact on both the distribution and consumption of music in the digital space.

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1

INTRODUCTION

It grew out of a desire to listen to music. More music than was possible before at less of a cost. As the twenty-first century neared and the capabilities of the World Wide Web began to be realized, the role the Internet could play in influencing the business of music became apparent. The story of Napster is the story of the beginning of this realization. Operating from August 1999 until June 2002, Napster left an impact on music distribution, consumer preferences, legal treatments toward copyright infringement, and intellectual property in cyberspace that extends far beyond the peer-to-peer platform's three-year life span.

Legal Proceedings

Upon Napster's official launch in August of 1999, the peer-to-peer file sharing platform rapidly grew in popularity. Only four months after being made available on the Internet, the Recording Industry Association of America (RIAA) filed suit against Napster on December 6th, 1999 in the District Court for the Northern District of California. The RIAA is a lobbying and trading group that represents the interests of the recording industry, with an emphasis on the Big 5 record labels - Warner, EMI, Universal, Sony, and BMG (which later merged with Sony in 2004 after the Napster proceedings)[1].

The record companies represented in the suit as plaintiffs included A & M Records as well as seventeen other record companies - Geffen Records, Inc., Interscope Records, Sony Music Entertainment, Inc., MCA Records, Inc., Atlantic Recording Corporation, Island Records, Inc., Motown Records Company L.P., Capitol Records, La Face Records, The RCA Records Label, Universal Records, Inc., Elektra Entertainment Group, Inc., Arista Records, Inc., Sire Records Group, Inc., Polygram Records, Inc., Virgin Records America, Inc., and Warner Bros. Records, Inc.

Music publisher plaintiffs- Jerry Lieber, Mike Stoller, and Frank Music Corporation – entered into a joint motion with the record company plaintiffs in the spring of 2000 merging *Jerry Lieber Music v. Napster* with *A & M Records, Inc. v. Napster, Inc.* The case was seen before the U.S. District Court for the Northern District of California and later reviewed by the United States Court of Appeals for the Ninth Circuit.

The district court suit was filed by Los Angeles lawyer, Russell Frackman[2]. The complaints filed by the plaintiffs included contributory and vicarious copyright infringement, unfair competition created by Napster, Inc., and violations of California Civil Code section 980(a)(2). In response, defendant relied upon the “fair use” doctrine from *Sony Corp. of America v. Universal City Studios, Inc.*, rebutting contributory and

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[1] Tom McCourt and Patrick J. Burkhart, "When Creators, Corporations and Consumers Collide: Napster and the Development of On-line Music Distribution," *Media, Culture & Society* 25, no. 3 (2003): accessed October 10, 2017, 339.
[2] Joseph Menn, *All the Rave: The Rise and Fall of Shawn Fanning's Napster* (New York, New York: Crown Business, 2003), 125.

vicarious copyright infringement motions and emphasizing that copyright holders were not injured by Napster's activities.

Appointed to the district court in 1980, Chief District Judge Marilyn Hall Patel led the district court through the 2000 *A & M Records, Inc. v. Napster, Inc.* decision. An experienced jurist, Judge Patel was the first woman to serve in the Northern District of California and then became the first woman to serve as Chief Judge for the Northern District of California in 1997. Judge Patel served the court as Chief Judge for seven years, overseeing numerous notable cases including *Korematsu v. United States*, *Bernstein v. US Department of Justice*, and *A & M Records, Inc. v. Napster, Inc.* until she stepped down from the court in 2004[3].

After an injunction was granted against Napster, Inc. by the district court, the defendant filed an appeal. The majority opinion from the appellate proceeding was written by Circuit Judge Beezer – known for his conservative voice in the traditionally liberal leaning appellate court of the Ninth Circuit[4]. The other sitting judges on the appellate court included Judge Mary M. Schroeder and Judge Richard Paez. The proceedings took a total of fifty-one minutes. The primary issues discussed were the exchange of copyrighted MP3 files on the Napster platform and the degree to which Internet companies, such as Napster, were responsible for enforcing copyright regulations. A seven-page unanimous opinion resulted from the proceeding, largely

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[3] William Michael Treanor, "Judge Marilyn Hall Patel: A Dedication," *Fordham Urban Law Journal* 34 (2007): accessed October 10, 2017, Georgetown Law Center.
[4] Douglas Martin, "Robert R. Beezer, Conservative Voice on Liberal Court, Dies at 83," *The New York Times Online*, April 4, 2012, accessed November 30, 2017. http://www.nytimes.com/2012/04/05/us/robert-r-beezer-judge-on-ninth-circuit-dies-at-83.html.

affirming the district court’s ruling and ultimately remanding the case with instructions to modify the injunction. *A & M Records, Inc. v. Napster, Inc.* serves as the first major case to address the application of copyright laws to peer-to-peer filing sharing.

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The Extension of Intellectual Property Rights

The landscape of intellectual property legislation changed greatly throughout the 1990's. A vast expansion of intellectual property rights in the United States occurred. As the dawn of the digital age drew near, the United States legislator prepared by extending protections around intellectual property rights both on and off the Internet. In chronological order the Telecommunications Act of 1996, the Sonny Bono Copyright Term Extension Act, and the Digital Millennial Copyright Act all significantly contributed to this expansion.

Telecommunications Act of 1996

This transition was initiated by the Telecommunications Act of 1996, a much needed update to the Telecommunications Act of 1934. The act was signed into law by President Clinton on February 8th, 1996. This updated act encourages competition and confirmed US commitment to universal service while aiming to clarify the general duties of telecommunication carriers and establish standards for telecommunication services[5]. It was designed to form a regulatory platform that facilitated broad competition among telecommunication service providers with the goal of encouraging unregulated competitors as opposed to monopolistic service providers[6]. The act mandates that the

[5] H.R. Rep. No. 104th-S.652 (1996).

[6] Patricia Aufderheide, *Communications Policy and the Public Interest: The Telecommunications Act of 1996* (New York: Guilford Press, 1999), 9.

FCC and the States ensure that rates for universal services remain, “just, reasonable, and affordable”[7]. This act updated telecommunication legislation by further defining, standardizing, regulating, and granting greater protections to the subscriber of a service. This update was especially necessary considering the exponential growth in computer usage and the dawn of the Internet. A massive increase in host computers (devices that store information and relay communications) occurred between 1981 and 1999. 300 host computers were recorded in 1981 while 200 million host computers were identified in 1999[8].

During the drafting of the Telecommunications Act of 1996 computing interest groups advocated for open standards for Internet services, opposing the lumping of Internet services into the definition of telecommunications services.[9].When passed in 1996, the Telecommunications Act differentiated the services of the Internet and computer networks as not generally subject to the majority of broadcast or telecommunications regulations. Further distinctiveness of cyberspace was also carved out by the June 1997 Supreme Court case - *Reno v. American Civil Liberties Union* - which centered around the issue of indecency on the Internet. The Court concluded that the Internet had never been subject to broadcast-type regulation and thus title V of the Telecommunications Act of 1996 - The Communications Decency Act – was struck from the Telecommunications Act[10].

The Sonny Bono Copyright Term Extension Act

[7] H.R. Rep. No. 104th-S.652 (1996).
[8] Aufderheide, 88.
[9] Ibid., 49.
[10] Ibid., 96.

Enacted by the 105th United States Congress, the Sonny Bono Copyright Term Extension Act was brought into effect on October 27th, 1998. The law extended protections over copyrighted works by twenty years, elongating the period before works become part of the public domain. Previously copyrights had applied to length of the life of the author plus fifty years under the Copyright Act of 1976[11]. The Sonny Bono Copyright Extension Act amended the Copyright Act of 1976, replacing the length of time after the author's life plus fifty years to plus seventy years[12]. Meanwhile, for corporate 'works for hire' the copyright was extended to last ninety-five years as opposed to the previous seventy-five years under the Copyright Act of 1976[13]. The Sonny Bono Copyright Term Extension Act applied to all works created on or after January 1, 1978 but did not restore copyright protections to works already part of the public domain. The Sonny Bono Copyright Extension Act benefitted content industries by granting longer lasting competitive advantages over the commercial distribution of copyrighted works.

The Digital Millennial Copyright Act

The next major intellectual copyright expansion of the 1990's occurred on October 28th, 1998 when the Digital Millennial Copyright Act was signed into law. The act addressed copyright issues and expanded intellectual property protections to apply to

[11] Christina N. Gifford, "The Sonny Bono Copyright Term Extension Act, "*University of Memphis Law Review* 30 (Winter 2000): accessed November 26, 2017.
[12] 17 U.S.C.A. § 304
[13] McCourt and Burkhart, *When Creators, Corporations and Consumers Collide: Napster and the Development of On-line Music Distribution*, 338.

the Internet. This legislative initiative was led by the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA)[14].

The DMCA can ultimately be split into two major parts – Section 1201, which prohibits the circumvention of copyright protections[15], and Section 51269, which creates "safe harbors for Internet service providers accused of contributory infringement when their subscribers infringe copyrights"[16].

Section 103 works in unison with Section 1201 to implement, "the obligation to provide adequate and effective protection against circumvention of technological measures used by copyright owners to protect their works"[17]. Technological measures are understood in two ways. The first type of measure is aimed at protecting access to copyrighted works (such as through viewing or consumption on the internet) and the second measure prevents unauthorized copying of protected works in the digital space.

Section 51269 of the DMCA is intended to shelter Internet service providers from liability when users of the Internet platform engage in copyright infringement. Protective safe harbor provisions for Internet service providers are created and extend to direct, contributory, and vicarious copyright infringement[18]. Under these provisions, qualified Internet providers are freed from liability for monetary damages and eligible for the majority of injunctive relief related to the identified infringement.

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[14] Ibid., 8.
[15] 17 U.S.C. §1201
[16] Ibid. at §51269
[17] U.S. Copyright Office, "The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary," Copyright.gov, December 1998, accessed October 16, 2017, 3. https://www.copyright.gov/legislation/dmca.pdf
[18] Zepeda, 74.

In order to be protected by the DMCA chapter five, *Copyright Infringement and Remedies*, subsection 512, *Limitations on Liability Relating to Material Online* outlines classification, condition, and qualification requirements that clarify when the safe harbors of the DMCA are applicable. To benefit from the DMCA's safe harbors the Internet service provider must be characterizable as one of the following two types of providers:

1. An entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received[19].

OR

2. A provider of online services or network access, or the operator of facilities therefore[20].

If the service provider can be classified under either definition 1 or 2 then the provider must fulfill both of the following conditions in order to qualify for DMCA protections:

- The service provider must adopt, reasonably implement, and inform its users of a termination policy for users found to be repeat infringers[21].
- The service provider must accommodate technical measures that are used by copyright owners to identify or protect copyrighted works[22].

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[19] 17 U.S.C. § 512(k)(1)(A)
[20] Ibid. at § 512(k)(1)(B)
[21] Ibid. at § 512(i)(1)(A)
[22] Ibid. at § 512(i)(1)(B)

Importantly, Internet service provider's excluded from DMCA protections include those that either:

- Has actual knowledge that the material or activity is infringing[23].

OR

- Is aware of facts or circumstances from which infringing activity is apparent[24].

These classification, condition, and qualification requirements became especially relevant in the Napster district court and ninth circuit court proceedings.

Soon after the DMCA was signed into law, numerous, deep flaws of the act became apparent. To this day, the DMCA is rebuffed widely by different facets of the music industry from songwriters, to publishers, to managers, and largely by artists. It is often voiced that the DMCA does not put enough responsibility on the Internet service provider for policing illegal uploads and instead relies on the copyright owner to notify the service provider of infringing material on their platform[25].

The DMCA eliminated the fair-use provision of the of the 1976 Federal Copyright Act. Between 1998 and 2006, after which the act was amended, the DMCA not only

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[23] Ibid. at § 512(d)(1)(A)
[24] Ibid. at § 512(d)(1)(B)
[25] Bobby Owsinski, "Music Artists Need More Than Taylor Swift To Win DMCA Challenge," *Forbes*, June 21, 2016, , accessed November 30, 2017, https://www.forbes.com/sites/bobbyowsinski/2016/06/21/music-artists-dmca-challenge/#ddaf85c4d24d.

made it difficult for technology entrepreneurs to incorporate copyrighted content into their platforms, but it also limited previous educational guarantees to fair use[26].

Additionally the DMCA recognized Internet providers and telecommunications networks as publishers, leading copyright to include anything "fixed in a tangible medium of expression"[27]. This extension of copyright law to the Internet came with numerous initial flaws. When first published in 1998, the section 1201 anti-circumvention clause allowed the RIAA to issue subpoenas to Internet service providers on behalf of copyright holders. When these subpoenas were issued the Internet service provider was then required to release the name, address, and telephone number of the accused online copyright infringer. These subpoenas could be issued before proof of infringement was validated by a reviewing judge and led to extensive privacy concerns[28].

Before the amendment of section 1201 the anti-circumvention clause was executed as follows - service providers were granted liability protections on their platforms if they aided copyright owners in identifying and taking action against infringers on their platform. If service providers were complicit in this process, the service provider would not be pursed on infringement grounds by the copyright owners[29]. Now seen as a clear violation of digital privacy the 2003 D.C. Circuit Court of Appeals case *Verizon v. RIAA* led to the amendment of the DMCA and serves as an example of cyber liberties activism.

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[26] Patrick Burkart, *Music and Cyber Liberties* (Middletown, CT: Wesleyan University Press, 2010), 32.
[27] McCourt and Burkhart, *When Creators, Corporations and Consumers Collide: Napster and the Development of On-line Music Distribution*, 338.
[28] Burkart, *Music and Cyber Liberties*, 68.
[29] Lackman, 1172.

In the 2000 lawsuit, *Metallica v. Napster, Inc. Metallica,* also seen in the United States District Court for the Northern District of California under Judge Patel, the DMCA played a large, public role in the proceedings as the DMCA established the instituted takedown policy. After asking the Internet service provider to take down any files attributed to Metallica and protected under the artist's copyright, the plaintiff was told that removing the files would be impossible as users named files independently - although Napster conceded if the names of infringing users were given to them, they would take action.

Metallica drummer, Lars Ulrich, and entertainment lawyer, Howard King, made a spectacle of dropping off 335,435 names of Napster users identified by Metallica's legal team as guilty of copyright infringement on Napster's platform to Napster's San Mateo office[30]. This scene on May 3rd, 2000 was soon followed a few weeks later by King's submission of 240,000 names of accused copyright infringers identified as exploiting the works of King's other client, rapper Dr. Dre[31]. While Napster initially addressed the user name submissions as a publicity stunt, the Internet service provider was soon forced to take action in order to remain in compliance with the DMCA.

After Napster removed the users listed by King's team, the DMCA mandates that the artists Metallica and Dr. Dre had ten days to take further legal action against users if they wished to receive compensation for the use of the copyrighted materials. This process is called filing a DMCA counterclaim. Neither Metallica nor Dr. Dre opted to file

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[30] John Alderman, *Sonic boom: Napster, MP3, and the new pioneers of music* (London: HarperCollins Publishers, 2010), 8.
[31] Greg Kot, *Ripped: How the Wired Generation Revolutionized Music* (New York: Scribner, 2009), 34.

these claims. From a public image standpoint, the legal persecution of fans by an artist would not have been received favorably, leading Metallica to instead hold Napster, Inc. legally accountable.

In both the district and ninth circuit courts *Metallica v. Napster, Inc.* challenged the applicability of the DMCA safe harbor protection provisions.

3

HOW NAPSTER WORKED

The Founding

Like many technology start-ups, Napster began in a dorm room. In 1998, nineteen-year old Northeastern University student and programmer, Shawn Fanning, built a platform that revolutionized the consumption of music. A frequent user of InternetRelay Chat – a 24 hour Internet chat room platform – and a music lover, Fanning set out to solve a problem he often heard voiced by his college peers and those he interacted with in chat rooms[32]. Internet users were longing for a less laborious way to find free music files on the web.

The desired files that Internet users were in search of are called MP3s. The MP3 is a digital format that compresses a sound file to 1/12th of its original size. Although the MP3 format was created in 1987[33] it was not until the 90's that the full capabilities of the MP3 began to be realized. MP3s offer a convenient way to consume music because they do not take up any physical space. Unlike buying CDs or vinyl records the MP3 exists in a digital form. An MP3 can be shared, downloaded, and stored on a computer. It can be burned onto to CD's and shared in both digital and physical formats. However, digital sharing is the most immediate method of sharing as it allows users to play the track right away and whenever they want, no extra equipment, such as a boom box or a record player, required. MP3s was the direction music was headed in 1999. Major labels heavily

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[32] Burkart and McCourt, *Digital Music Wars: Ownership and Control of the Celestial Jukebox*, 103.
[33] Kot, 25.

invested in the research and development of digital platforms to distribute MP3s, however Napster made the biggest first impression through its free peer-to-peer file sharing platform and thus acted to normalize music consumption in the digital format.

Fixated on creating a convenient solution for digital MP3 file finding, Fanning dropped out of Northeastern in the spring of 1999 to develop the Napster platform in collaboration with two programmers he met online – Jordan Ritter and Sean Parker. By May of that year Fanning incorporated Napster in collaboration with his uncle, John Fanning, launching a free test version of the software in June 1999[34].

Napster was officially launched on the Internet in August of 1999. The speed at which Napster's user base grew remains unparalleled. Napster continues to hold the record for fasted growing software application ever recorded. From February to August of 2000 the number of Napster users grew from 1.1 million to 6.7 million. Napster grew at a 200% monthly rate, eventually facilitating the sharing of 10,000 music files per second[35]. The company claimed that when all was said and done, twenty-nine million users downloaded the program[36].

Napster eventually came to be used on 6% of home PC computers with modems however, the company found its most immediate success on college campuses after its launch. Dorm rooms with free high speed Internet readily available to students became the ideal setting for the software's usage. As Fanning had intended, Napster was perfectly

[34] Kevin Parks, *Music & Copyright in America: Toward the Celestial Jukebox,* 2nd ed. (American Bar Association, 2014), 181.
[35] Ibid., 182.
[36] Burkart and McCourt, *Digital Music Wars: Ownership and Control of the Celestial Jukebox*, 55.

designed to fulfill college students vast demand for music. Eventually, half of Napster's user base came to be made up of users under the age of thirty[37]. A survey cited in the 2000 *A & M Records, Inc. v. Napster, Inc.* district court case claimed that almost half of college students owned less than 10% of songs they downloaded[38].

Soon universities began banning Napster because the high volume of users on the network was seen to dominate bandwidth functioning across campus. UCSD was the first of an eventual two-hundred campuses to ban the program[39]. Meanwhile, MIT, Stanford, and Princeton refused to restrict Napster use in order to preserve free speech according to the universities[40].

<u>A Peer-to-Peer Platform</u>

Before the Internet was commercialized, peer-to-peer (P2P) networking was the standard method of exchanging information on the web[41]. Peer-to-peer networking entails the sharing of data between separate servers. Peer-to-peer networking can be efficient at reducing operating costs because it mitigates the need for operating platforms to own numerous, extensive servers by instead outsourcing this storage work to all devices involved in the network[42]. The Napster platform ultimately scanned the hard drivers of the users logged in to facilitate the exchange of music without hosting any music files on

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[37] Menn, 135.
[38] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 905.
[39] Parks, 133.
[40] Alderman, 112.
[41] Burkart and McCourt, *Digital Music Wars: Ownership and Control of the Celestial Jukebox*, 11.
[42] Burkart, *Music and Cyber Liberties*, 37.

the platform itself. Using a peer-to-peer exchange framework, Napster created a cultural commons by way of a publicly searchable index that hosted MP3 files. Users could type their requested song, artist, and album name or key word into this index to then find the file they were looking for. According to Napster Inc.'s executive summary, Napster gave users the ability to, "locate music by their favorite artists in MP3 format"[43], advertising the platform's ability to "take the frustration out of locating servers with MP3 files"[44]. The index search on the platform pulled up the files located on the personal computers or shared directories of all other users logged on at that point in time[45]. The online database of songs was referred to as Napster network's MusicShare client[46].

This search the index was not consistently organized by song title or artist name as users controlled the titling of the tracks they uploaded. Therefore, the sound files associated with the track names were not consistently accurate. Clicking the "Find It" button on Napster did not guarantee error-free results. Because this was the case, Napster did not have an accurate handle on exactly how many versions of a copyrighted track appeared in the index.

Napster's creator, Sean Fanning, described the index concept as follows: "My idea was to have a real-time index that reflects all sites that are up and available to others

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[43] "Napster Home Page", Napster.com, August 1999, Accessed November 03, 2017. http://www.napster.com/.
[44] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 902.
[45] Burkart, *Music and Cyber Liberties*, 85.
[46] McCourt and Burkhart, *When Creators, Corporations and Consumers Collide: Napster and the Development of On-line Music Distribution*, 338.

on the network at that moment….Anyone who disconnected from the server would be immediately dropped from our index"[47].

One of the most attractive attributes of Napster was that as membership grew so did the selection of songs. The library of songs available through MusicShare was constantly updated with the addition of every new user. At the platform's peak, Napster was able to connect users with twenty million songs[48].

After a user located the content they were interested in on the index and selected the MP3 file, the Napster network facilitated the sharing of the file by using the server side of the network to engage with the host user's device, communicating the host user's address and routing information to the requesting user to then initiate the connection between the browsers and allowing for the download from the host user to the requesting user[49].

While Napster was not the first digital file sharing service, the platform's layout and features led it to be the most user-friendly at its time and the most efficient in accessing desired digital music files. Additionally, the software worked to ensure successful downloads by queuing files that could not be downloaded immediately. If the other user who had the desired file on their server logged off before the download on another server could be completed it was then stored to be continued later when both parties were back online.

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[47] Menn, 34.
[48] Kot, 31.
[49] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 906.

In addition to providing users with a central platform to find and share music, users could involve in further shared experiences on the site through Napster's chat rooms and personal messaging option. For example, there were chat rooms organized by genre such as "country" or "pop" that allowed users to discuss music, building virtual communities of music fans within each chat room.

Overall the Napster platform had a community basis while offering a diverse selection of MP3 files, all free of charge. For Napster users, it was a dream come true. For copyright owners, it was a nightmare.

4

The Proceedings: United States District Court for the Northern District of California

Originally filed on December 6th, 1999 by lawyer Russell Frackman on behalf of the RIAA, the first lawsuit against Napster in San Francisco's district court accused Napster of contributory and vicarious copyright infringement. Included as plaintiffs in the proceeding were A & M Records and seventeen other labels. All labels were unanimous in the feeling that the boundary between sharing and theft had been crossed, resulting in blatant copyright infringement. Contributory and vicarious infringement is in violation of California Civil Code section 980(a)(2) which states:

> *"The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording"*[50].

On January 7th, 2000, a month after the initial suit was filed by the RIAA, Jerry Leiber, Mike Stolle, and Frank Music Corporation filed a suit against Napster on behalf of music publishers, also citing vicarious and contributory copyright infringement.

The licensing for a musical work is split between the sound recording or the masters (the audio recording) and the composition or the work (the written composition

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[50] Cal. Civ. Code § 980 A.2

and lyrics). Separate rights are associated with each property. Ownership of the masters is usually attributed to the label under which the music was released while the rights to the publishing lay with the associated publishing company – effectively splitting the copyright for a track into two parts to make up the intellectual property.

The music publishing plaintiffs joined the record company plaintiffs in the United States District Court, N.D. California suit against Napster, Inc. This joint motion aimed to "preliminarily enjoin Napster, Inc. from engaging in or assisting others in copying, downloading, uploading, transmitting, or distributing copyrighted music without the express permission of the rights owners"[51].

Meanwhile, Napster's legal team mounted a fair-use defense based on the "substantial non-infringing use doctrine" expressed in *Sony Corp. of America v. Universal City Studio*[52]. The defendant contended that the plaintiffs had not convincingly demonstrated contributory and vicarious infringement claims, and that copyright holders are not harmed by the Napster service.

A & M Records, Inc. v. Napster, Inc. was ultimately decided in the plaintiff's favor on December 10th, 2000 under Chief Judge Patel with a preliminary injunction granted against Napster, Inc.

Conclusions of Law

Sony Corporation of America v. Universal City Studios Inc.

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[51] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 900.
[52] Veronica Corsaro, "From Betamax to YouTube: How Sony Corporation of America v. Universal City Studios, Inc. Could Still be a Standard for New Technology," Federal Communications Law Journal 64, no. 449 (2012): 450-74. Accessed September 17, 2017, Westlaw, 451.

The 1984 Supreme Court case *Sony Corporation of America v. Universal City Studios Inc.* set the precedent that in order for a vicarious or contributory copyright claim to be established, a plaintiff must demonstrate direct infringement by a third party. In *Sony Corp. v. Universal City Studios, Inc.* Universal sued Sony for secondary copyright liability as Sony's "Betamax" home tape recorder was being used by buyers to record Universal's copyrighted content that was aired on public broadcasts. The Supreme Court differentiated the sale of copying equipment from contributory infringement, ultimately relieving Sony of contributory infringement. Neither the manufacture nor retailers of the Betamax video tape recorders were held liable for contributory infringement.

> Justice Stevens states in his delivery of the Opinion of the Court:
>
> **"***If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory"* [53].

The defendant in *A & M Records, Inc. v. Napster, Inc*. heavily relied on *Sony Corporation of America v. Universal City Studios Inc.* to assert that Napster, Inc. was not liable for the violation of copyrights as it distributed a product (i.e. an Internet platform). Napster provided the framework for music downloading and uploading through a file sharing platform but Napster, Inc. itself did not upload copyrighted materials onto the platform. That was the work of the users.

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[53] *Sony Corp of America v. Universal City Studios, Inc.,* 464 U.S. 417, 440 (1984), 464.

Additionally, the precedent of *Sony Corp. v. Universal City Studios, Inc.* was applied to the district court as the defendant made the argument that if copyrighted material is used for non-commercial purposes, the plaintiff has the responsibility of demonstrating such use is likely to adversely affect the potential market for that copyright[54].

In *Sony Corp. v Universal City Studios, Inc.* Justice Steven's outlines this concept with his following statement from the majority opinion:

"…a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit"[55].

The defendant then made the argument that if the Napster service was to have a negative economic impact on the record industry the plaintiff must prove the validity of this claim as Napster itself does not directly profit from the copyrighted works. The defendant also claimed the reverse that Napster actually promoted record sales as the sharing of MP3 files on the site acted as sampling, assisting in exposing users to music that they would then purchase in traditional formats.

The district court differentiates *Sony Corp. v. Universal City Studios* from *A & M Records, Inc. v. Napster, Inc.* in terms of sampling, asserting that "sampling" through Napster allows the user to obtain permanent MP3 copies of a track that they could potentially monetize (such as by burning CDs) while the copying onto VCRs, relevant in *Sony Corp*, was confined to the household, thus diminishing the potential for profit from

[54] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 912.
[55] *Sony Corp of America v. Universal City Studios, Inc.,* 464 U.S. 417, 451 (1984), 464.

the recording[56]. Furthermore, the consideration of time-shifting was key in *Sony Corp.* It was ruled that the viewers of television broadcasts were invited to see the content on the air, free of charge, the only difference being that the viewer now had the ability to capture the content to then watch at a later point in time. In contrast, the content on Napster could not be procured free of charge in MP3 format in a comparable way. The success of the time-shifting argument in *Sony Corp. v. Universal City Studios* may have been effective if applied to the recording and conversion of audio from the radio to MP3 format that was then made accessible on the Internet. Instead, the content shared on Napster was previously distributed at a cost. Napster enabled users to access audio content without the requirement of payment. The district court feared that this unauthorized distribution on Napster could lead to potentially greater damages to copyrighted materials on the Internet at an "exponential rate"[57].

Furthermore, the court acknowledged that a space-shifting principle was under consideration in *A & M Records, Inc. v. Napster* while *Sony Corp. v. Universal City Studios* focused on time-shifting. The court concluded that the defendant failed to show that space-shifting constituted a commercially significant use of Napster. Most Napster users used the platform in order to access MP3 files that were not in their personal library as opposed to accessing their own library remotely from another device. Napster did not aim to act as an early cloud-data storage platform. Napster's mission was instead to create greater and easier access to MP3 files free of charge[58].

[56] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 913.
[57] Ibid.
[58] Ibid.

Unlike *Sony Corp*, where Betamax relinquished control over use of its product after sale, as an online platform Napster continued to maintain and supervise the software's integrated system. The defendant continued to exercise control over the product, constantly improving Napster's code and operating systems in order to elevate user experience. Ultimately Napster provided users the support services to facilitate unauthorized file sharing, thus pointing to contributory copyright infringement in the eyes of the court[59].

To make this case, the plaintiff compared Napster to a swap meet because the platform facilitates the trade of goods, encouraging users to barter file for file without any financial compensation reaching the owner of the copyright. The plaintiff thus likened *A & M Records, Inc. v. Napster, Inc.* to the 1996 ninth circuit case, *Fonovisa v. Cherry Auction, Inc.* In this case Cherry Auction was found guilty of contributory copyright infringement. As the swap meet organizer, Cherry Auction was aware vendors were selling illegal music on their premises and provided the resources and organization for said illegal sales to take place[60]. Converting the tangible to the digital space, the concept of facilitating direct infringement applied to Napster as online users could not accomplish such direct infringement without the site and facilities of the Napster platform, much like the sellers at a swap meet.

In the district court's comparisons of *Fonovisa v. Cherry Auction, Inc.* with *A & M Records, Inc. v. Napster, Inc.* the court did not emphasize the distinction that Napster did not charge its "vendors" or make any sales. The court instead found liability from a

[59] Ibid., 920.
[60] Ibid., 917.

theoretical line of revenue from Napster Inc.'s potential benefits from a growing user base (such as potential investment and the growing commercial value of the company) as opposed to actual payments received from vendors by Cherry Auction, Inc.[61].

<u>Contributory Copyright Infringement</u>

Although Justice Stevens stated in *Sony,* **"**If vicarious liability is to be imposed… it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material"[62] the *Sony* Court did not define the requisite level of knowledge necessary to qualify a substantial non-infringing use. *Religious Technology Center v. Netcom On-Line Communication Service, Inc*. (1995) applied the requisite level of knowledge concept to the online context, suggesting evidence of "knowledge of specific acts of infringement is required to hold a computer system operator liable for contributory copyright infringement"[63].

The district court cites *Cable/Home Communication Corp v. Network Prods., Inc.* and *Religious Tech. Ctr. V. Netcom On-Line* as establishing the precedent that contributory liability requires the secondary infringer, in this case Napster Inc., to know of direct infringement. Based on evidence provided, the court found Napster had constructive and actual knowledge that those using the platform freely exchanged protected, copyrighted works to the detriment of the plaintiff.

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[61] Corsaro, 459.
[62] *Sony Corp of America v. Universal City Studios, Inc.*, 464 U.S. 417, 440 (1984), 464.
[63] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001), 1021.

The plaintiff highlighted both the defendant's knowledge and facilitation of contributory copyright infringement through Napster's integrated file-sharing service. In order to illustrate Napster's liability for contributory infringement the plaintiffs cited evidence that the leadership at Napster was aware of the illegal use of MP3 files and worked to continue operations despite this knowledge[64]. The plaintiff presented a document written by the company's co-founder, Sean Parker, that stated that the company must remain ignorant as to the tenuous legal boundaries it was treading.

Furthermore, excused unawareness of the infringement was not a viable justification as the RIAA (Recording Industry Association of America) had notified Napster that over 12,000 infringing files were posted on the platform[65]. Other artists independently contacted Napster highlighting infringing MP3s including Metallica and Dr. Dre.

Evidence of Napster executives downloading copyrighted materials on their own computers and knowledge of copyright infringement on the platform was illustrated by the presentation of screenshots of the site featuring infringed content on company computers. These screenshots were also used for sanctioned marketing purposes. The court concluded that such use of images indicated that the leadership at Napster was aware and advertising the site's ability to provide users with downloads to copyrighted materials for free – thus insinuating Napster leaders' awareness of contributory copyright infringement[66].

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[64] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 917.
[65] Ibid., 918.
[66] Ibid., 919.

In footnote twenty-four the court identifies that the findings indicating Napster, Inc.'s knowledge of infringement thereby, "puts an end to defendant's persistent attempts to invoke the protection of the Digital Millennium Copyright Act"[67] due to the DMCA's awareness and actual knowledge of infringement qualification that can disqualify internet service providers from safe harbor protections - § 512(d) (1) (A) and § 512(d) (1) (B).

The court concluded its contributory copyright infringement considerations by rejecting Napster's claim that the inability to differentiate copyrighted from non-copyrighted works uploaded and exchanged by users on the platform frees Napster from contributory copyright infringement[68].

Vicarious Copyright Infringement

The court ruled that Napster had both the right and the ability to supervise its users infringing conduct[69]. Although Napster was not directly, financially benefitting from the free exchange of copyrighted works, the company clearly derived value from providing this service and captured a large user base because of it. This value was recognized as the company had plans to implement future business models that would facilitate the monetization of the service and generate revenue. Napster's value was also clearly identified by a number of investors including the venture capital firm, Hummer

[67] Ibid., 928.
[68] Christopher Wolf, *The Digital Millennium Copyright Act: Text, History, and Caselaw* (Silver Spring, MD: Pike & Fischer, 2003), 742.
[69] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 921.

Winblad, that invested thirteen million dollars in Napster at 20% interest in May of 2000 – three months before the district court decision was handed down[70].

Expert Witnesses and Reports

The plaintiff made use of expert witnesses to illustrate how Napster harms the copyright market, resulting in reduced market sales. The three main reports compiled by expert witnesses for the plaintiff were the Jay Report, the Fine Report, and the Teece Report.

The Jay Report

Dr. E. Deborah Jay conducted a survey using random sampling of college students to look for patterns between Napster use and music purchasing habits. The report focused on the college student population rather than Napster users at large. The defendant claimed the focused demographic of the report was a weakness of the study. The defendant further asserted that since the Jay Report was under-inclusive in analyzing all Napster users it should be struck from the proceedings. The report was ruled admissible as the college-population represents a significant portion of potential music buyers with habits that can have a demonstrable effect on the overall potential market[71].

The Fine Report

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[70] Parks, 181.
[71] Chief J. Patel. "A & M Records, Inc. v. Napster, Inc.: "Memorandum and Order Re Admissibility of Expert Reports." United States District Court, N.D. California, August 10, 2000. May 26, 2015. Accessed November 12, 2017. https://h2o.law.harvard.edu/cases/5096.

Michael Fine, Chief Executive Officer of Soundscan, a retail tracking system for music sales, supported Dr. Jay's claim that a loss of record sales in the college market had occurred and was correlated with Napster use on college campuses. This report was introduced by the plaintiffs in order to show evidence of irreparable harm caused to copyright owners and distributors due to the free distribution of music online (not limited to Napster). The report was structured around the examination of retail music sales in stores located in close proximity to college campuses. From 1997-2000 the report used data collected by Soundscan to track and compare sales at locations close to colleges. Comparing national sales as having an upward trend, record sales at retailers close to colleges showed a decline from 1997-2000. Prior to the launch of Napster in 1999, the report showed a decline in record sales so Napster's introduction could not be interpreted as the sole purpose for the loss of sales. The court declined the defendant's request to exclude the Fine Report as Mr. Fine clarified that the conclusions made acknowledge the impact of all music file-sharing services, not Napster exclusively[72].

The Teece Report

Dr. David J. Teece analyzed the way Napster, Inc. benefited from providing the free service, the existing and potential harm inflicted on plaintiffs, and the interaction between intellectual property and the US economy. For his analysis Teece examined

[72] Ibid.

depositions and documents related to the litigation and external media reports and studies.

The defendant challenged the validity of the Teece Report under the *Daubert* standard, Rule 702, questioning Dr. Teece's qualifications.

> Rule 702: Testimony by Expert Witnesses
>
> *A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:*
>
> ***(a)*** *the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue*[73].

In reply to the defendant's assertion of rule 702 the court found Dr. Teece fully qualified due to his Ph.D. education, academic background and professorship, and as well as his then decade of experience directing an international economics consulting firm[74].

Beyond the argument that Napster had a demonstrable effect upon the potential market, the plaintiff asserted that as the labels were preparing to transition to digital platforms, Napster raised the barrier to entry into the market for the digital downloading of music[75], thus continuing to adversely affect the copyright market.

Steve Drellishak, Vice President of Finance at Universal Music Group, noted that the major record labels were heavily preparing to enter the digital space in the late 1990's.

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73 F.R.E. § 702

74 Chief J. Patel. "A & M Records, Inc. v. Napster, Inc.: "Memorandum and Order Re Admissibility of Expert Reports." United States District Court, N.D. California, August 10, 2000. May 26, 2015. Accessed November 12, 2017. https://h2o.law.harvard.edu/cases/5096.

75 A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 913.

Universal Music Group had commissioned significant investment into research and the development of digital platforms, including the following:

- Creation of the PressPlay and MusicNet join ventures (streaming subscription services).
- Creation of IT systems to handle digital file storage, meta data, and content delivery.
- Internal development of a digital download platform (never launched).
- Licensed content to digital download partners (e.g. Real/Rhapsody)[76].

Napster undercut the labels rights holder-sanctioned digital services by providing a platform that offered the free exchange of copyrighted materials. Therefore, unlike *Sony Corp*, there was a demonstrable, effect upon the potential market. This effect had both financial and social impacts including the loss of retail sales in the college market, the creation of barriers for record labels hoping to enter the digital distribution market for-profit, and the development of a social devaluing of the worth of music due to its free, permanent distribution on Napster[77].

The defendant argued that use of Napster acted as sampling, which in turn encouraged greater records sales. Evidence for this argument originated from a commissioned survey, come to be known as the Fader Report, that was assembled by Associate Professor of Marketing at the Wharton School of the University of Pennsylvania, Dr. Peter S. Fader. The report concluded that the use of Napster would boost sales by acting as de-facto marketing. Consumers would be further exposed to

[76] "Senior Thesis Questions on Napster for Steve Drellishak." E-mail message to author. November 17, 2017.
[77] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 914.

recorded content through the online platform. The report states that consumers do not view MP3 files as perfect substitutes for CDs, therefore Napster use would not detract from records sales[78].

In response to the Fader report, the court highlighted the caveat that Napster users could keep the music they downloaded rather than temporarily having access to the MP3s. The permanent nature of the files supported both the plaintiff and the court's doubts that Napster was actually boosting the purchase of copyrighted music.

Under Chief Judge Patel's leadership, the district court was convinced by the plaintiff's data, research, and expert reports on Napster's negative impact on the record business and the value of a copyright.

<u>Conclusions of the District Court</u>

On July 26th, 2000 the district court granted the plaintiffs' motion for a preliminary injunction against Napster, thereby enjoining Napster from facilitating others in distributing the plaintiffs' copyrighted material without express permission. This initial injunction came to be seen as too broad and onerous and would later be modified on August 10th, 2000 and March 5th, 2001[79].

The district court's injunction ordered Napster to cooperate with the plaintiffs in identifying copyrighted works on the Napster platform. The burden was then placed on the plaintiffs to file a plan identifying the most efficient manner to ascertain their rights

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[78] Ibid.
[79] Parks, 184.

while the defendant was ordered to eventually execute said plan. Finally, the defendant was ordered to post bond at $5,000,000[80].

[80] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), 927.

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The Proceedings: United States Court of Appeals for the Ninth Circuit

The joint motion *A & M Records, Inc. v. Napster Inc*. and *Jerry Lieber Music v. Napster, Inc.* progressed to the Ninth Circuit Court of Appeals after appeal by Napster, Inc. The case was argued on October 2nd, 2000 in front of judges Mary M. Schroeder, Richard Paez, and Robert R. Beezer and decided on February 12th, 2001. Circuit Judge Beezer wrote the majority opinion in this intellectual property case addressing the application of copyright laws to peer-to-peer filing sharing. Attorney David Boies represented Napster in the court of appeals proceedings while the Russel Frackman served as the attorney for A & M Records and Jerry Lieber Music[81].

The ninth circuit court primarily affirmed the district court's holding of Napster's liability as a contributory infringer with a few divergences in reasoning, ultimately affirming in part, reversing in part, and calling for a remand[82]. Regarding the contributory liability analysis, the ninth circuit court felt the district court ignored Napster's current and future non-infringing capabilities although the ninth circuit agreed that Napster benefitted from infringement. The ninth circuit court also acknowledged difficulties in policing the platform faced by Napster. Agreeing with the district court's evaluation that the balance of hardships weighed in favor of the plaintiff, the ninth circuit supported the

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[81] C-SPAN.org / *A&M Records v. Napster*, October 2, 2000, accessed November 30, 2017. https://www.c-span.org/video/?159534-1%2Frecords-v-napster.
[82] A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001), 1029.

issuance of a preliminary injunction while requiring future modification of said injunction with a partial remand of the case.

Contributory Copyright Infringement

Further differentiating the proceedings from *Sony Corp. v. Universal City Studios, Inc.* Circuit Judge Beezer emphasized the distinction, "between the architecture of the Napster system and Napster's conduct in relation to the operational capacity of the system"[83]. Acknowledging the court's obligation to follow *Sony*, which did not define the requisite level of knowledge necessary to establish a contributory liability copyright violation, the ninth circuit court rejected the district court's reasoning that, "Napster failed to demonstrate that its system is capable of commercially significant non-infringing uses"[84]. The ninth circuit court expressed disagreement with the previous emphasis on current infringing use as opposed to current and future non-infringing uses. The appellate court felt that the district court disregarded the platform's potential to monetize in commercially significant, non-infringing ways – ex. through event sponsorship, the use of chat rooms and message boards, any distribution authorized by rights holders, and the New Artist Program aimed at spotlighting emerging musicians who desired to have their tracks available on Napster. The New Artist Program was first set in motion by the defendant in October of 1999[85].

[83] Ibid., 1020.
[84] Ibid., 1021.
[85] Ibid.

In accordance with *Netcom*, the appellate court found the establishment of knowledge to be essential in determining contributory copyright infringement in cyberspace, stating that if an operating system does not purge known copyrighted materials from the system, the system operator contributes to direct infringement. However, the court clarified that in accordance with *Sony*, merely the opportunity the platform provides to exchange copyrighted materials does not guarantee that the platform is in a position of liability.

In the case of Napster, Inc. the evidentiary materials indicated that sufficient knowledge existed to impose contributory liability due to the Napster leaderships' actual knowledge of both the infringement and the existence of specific infringing materials on the platform.

Vicarious Copyright Infringement

The ninth circuit court agreed with the district court's determination that Napster had a direct financial interest in the infringing activities as the growing user base was enticed by the availability of free, copyrighted works.

In a statement on Napster Inc.'s website the company reserved the "right to refuse service and terminate accounts at its discretion, including, but not limited to, if Napster believes that user's conduct violated applicable law…or any reason in Napster's sole discretion, with or without cause"[86]. Such a statement was intended to allow for the escape from vicarious liability, however this clarification identified Napster as having

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[86] "Napster Home Page".

control over the platform and the ability to remove protected, copyright works as well as offending users. Unlike the district court though, the ninth circuit court acknowledged the difficulty presented by the user-controlled file naming system that identify the MP3s on the platform, which created greater challenges for Napster when policing the system[87].

The ninth circuit court accepted the district court's vicarious copyright infringement claim on the basis of Napster's failure to the police the platform (despite the difficulties presented in doing so) and the financial benefit repeat by Napster by providing access to copyright-protected files[88].

Application of the DMCA

In footnote seventy-four the ninth circuit court rejected the district court's, "blanket conclusion that 512 of the Digital Millennium Copyright Act will never protect secondary infringers"[89]. Instead, the ninth circuit court voiced that the platform's potential liability for contributory and vicarious infringement disqualified Napster, Inc. from all safe harbor protections and agreed with the district court that the balance of hardship weighed in favor of the plaintiffs.

Ninth Circuit Conclusions

The ninth circuit ordered the preliminary injunction, issued under Chief Judge Patel in the district court, to remain stayed while demanding a partial remand of the case

[87] Zepeda, 79.
[88] A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001), 1029.
[89] Ibid.

in order to modify said injunction. The modifications created a shared balance of responsibility for the plaintiffs and the defendant to police for copyright infringement with the plaintiffs now responsible for notifying Napster of specific cases of infringement on the platform while Napster maintained the duty of removing said files. In addition to being responsible for the immediate removal of copyrighted files when notified, Napster was also made accountable for policing its system. Therefore, the platform was required to allocate resources to provide for this monitoring. The Napster decision illustrated that when an Internet service provider is held accountable for the copyright infringements generated by users through a peer-to-peer system a large burden of liability is placed on the service provider.

Although Napster made alterations to its platform, working to prevent copyrighted materials from being exchanged through the service, Napster eventually filed for bankruptcy on June 3rd, 20002 listing $7.9 million in assets and $101 million in liabilities (including $91 million in loans from the record label, BMG, that had also been involved in the proceedings as a plaintiff against Napster). Roxio, Inc. was the first of a number of buyers to acquire the remnants of Napster. Roxio purchased Napster's intellectual property profile, including the platform's software code base, domain name, and logo, for $5 million and 100,00 stock warrants[90]. At the time of the bankruptcy only the preliminary injunction was in place.

[90] Burkart and McCourt, *Digital Music Wars: Ownership and Control of the Celestial Jukebox*, 62.

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The Napster Legacy

Although the Napster technology was capable of legitimate uses, the direct infringements on copyrights, as executed by Napster users, and facilitated by the Napster platform, were interpreted as inflicting a demonstrable, negative effects on the potential market and the value of copyrighted works[91]. Given the emphasis on the burden placed on the plaintiffs in *A & M Records, Inc. v. Napster, Inc.* as opposed to the benefits made possible through the Napster technology, a wave of fear rushed through technology and software developers, specifically centered on the legal burdens presented by peer-to-peer platforms. The highly publicized, celebrity-studded *A & M Records, Inc. v. Napster, Inc.* case serves as memorable, early intellectual property in cyberspace proceedings.

A & M Records, Inc. v. Napster, Inc. significantly revised understandings of *Sony*'s substantial non-infringing use doctrine. The *Sony* precedent previously favored technology and widened the scope of fair use exceptions[92]. This doctrine had been applied successfully to establish fair use through a time-shifting argument, thus releasing Sony from liability for infringement. This same doctrine did not offer substantial secondary infringement liability protections to peer-to-peer platforms, such as Napster. Due to *A & M Records, Inc. v. Napster, Inc*. liability was attributed to software

[91] *Sony Corp of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), 464.
[92] Corsaro, 451.

technologies, unlike it had been to physical technology, at an almost unprecedented scale of liability[93].

A & M Records, Inc. v. Napster, Inc. initiated the movement away from *Sony* that was strongly felt in the unanimous 2005 Supreme Court decision, *MGM Studios, Inc. v. Grokster, Ltd.,* which ultimately ruled in favor of copyright owners, MGM Studios. In *MGM Studios, Inc. v. Grokster, Ltd.* the *Sony* precedent was again used unsuccessfully by the peer-to-peer filing sharing platform, Grokster, which sought protections from secondary copyright infringement charges. Beginning with *A & M Records, Inc. v. Napster, Inc.*, the first decade of the 21st century saw the shift away from *Sony*'s substantial non-infringing use doctrine[94]. As a result of the highly public legal examples of peer-to-peer platforms failing to mount successful defenses against secondary liability charges, the attractiveness of building and implementing peer-to-peer platforms diminished due to this operating model's legal pitfalls.

A movement towards other legally sound platforms for file downloading instead rose to prominence. After its 2003 launch Apple Inc. grew to dominate the market for the digital distribution of music through the iTunes store, which offers users immediate MP3 purchases and downloads at the click of a button. Vertically integrating both music acquisition and playback systems, Apple Inc. also used the iTunes store to direct consumers towards other Apple products such as the iPod - a defining product of the 2000's[95].

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[93] Ibid.
[94] Ibid. 453.
[95] Burkart, 17.

Like peer-to-peer file sharing platforms, the download-based iTunes store would not rule digital distribution forever. iTunes was later eclipsed by online streaming services such as Pandora, Spotify, and Apple Music. The streaming model plays off the sensation of free music that Napster psychologically cultivated in music consumers[96]. Streaming services harness the monthly payment model to grant users unlimited access to streams rather than necessitating payment per track.

The establishment of the safe harbor provisions within the DMCA in 1998 was a legal victory for technology at the time[97]. The Napster proceedings then worked to test the applicability of the DMCA. As Napster was unable to rely on the DMCA's safe harbor provisions to continue operations, the DMCA proved to be a less dependable statute for future peer-to-peer platforms to rely upon for a legal loophole - further contributing to the movement away from peer-to-peer platforms as a medium for music distribution.

From a music consumption standpoint, journalist at *Spin Magazine*, Andy Greenwald, noted that the downloading of individual song files on Napster placed an emphasis on tracks as individual, single entities rather than full albums, encouraging a shift towards singles[98].

Steve Drellishak, current Vice President of Finance at Universal Music Group, was heavily involved in finance work in the digital music space in the early 2000's as the

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[96] Alex Sayf Cummings, *Democracy of Sound: Music Piracy and the Remaking of American Copyright in the Twentieth Century*, New York, NY: Oxford University Press, 2017, 215.
[97] Corsaro, 452.
[98] Burkart and McCourt, *Digital Music Wars: Ownership and Control of the Celestial Jukebox*, 50.

Napster proceedings unfolded. From a distribution and systems perspective he notes the biggest impact of Napster on a major record company like Universal Music Group stemmed from this change in the consumption of tracks over albums. This shift in music listeners' behavior, "Required structural redesigns of all of our systems and greatly increased transactional volume. To a lesser extent, we had to update reporting to track the new formats"[99]. Mr. Drellishak notes the necessary changes that were made to specific financial systems included:

- The upgrade of royalty systems to store and pay by track. A platform upgrade was required to handle data volumes.
- A system was constructed to handle operations of the Digital Signal Processing's monthly files.
- Metadata systems were built to properly catalog and productize these new digital files.
- Reporting and Accounting systems required new account structures to track these new platforms[100].

Record labels made use of new technologies and systems in order fulfill the demand for digital consumption and the MP3 format that Napster gave music listeners an affinity for.

Napster had an enormous effect in shifting the value placed on music in the MP3 format. On a psychological level, Napster's brief operating period at the turn of the 20th century allowed music to be downloaded for free, thus normalizing copyright infringement and devaluing the worth of copyrighted MP3s. Since then, a concentrated

[99] Senior Thesis Questions on Napster for Steve Drellishak
[100] Ibid.

effort has been mounted by the music industry to remind consumers that the purchasing of music files is necessary to support artists' careers.

The Napster proceedings are seen by many legal analysts as extending traditional copyright protections to the previously uncharted territory of the Internet. The rulings of *A & M Records, Inc. v. Napster, Inc*. built upon the tradition of extending copyright protections that were inaugurated throughout the 1990's. *A & M Records, Inc. v. Napster, Inc*. tested the width of copyright protections on the rapidly expanding Internet. The Napster proceedings allowed for the copyright expansions of the previous decade to find their footing, setting a new precedent for copyright protections in the digitalized 21st century.

Bibliography

A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000).

A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).

Alderman, John. *Sonic Boom: Napster, MP3, and the new pioneers of music*. London: HarperCollins Publishers, 2010.

Aufderheide, Patricia. *Communications policy and the public interest: the Telecommunications Act of 1996*. New York: Guilford Press, 1999.

Bolter, Walter G., James W. MacConnaughey, and Fred J. Kelsey. *Telecommunications policy for the 1990s and beyond*. Armonk, N.Y. u.a.: Sharpe, 1990.

Burkart, Patrick, and Tom McCourt. *Digital music wars: ownership and control of the celestial jukebox*. Lanham, MD: Rowman & Littlefield, 2006.

Burkart, Patrick. *Music and Cyber Liberties*. Middletown, CT: Wesleyan University Press, 2010.

Cal. Civ. Code § 980

Chief J. Patel. "A & M Records, Inc. v. Napster, Inc.: Memorandum and Order Re Admissibility of Expert Reports." United States District Court, N.D. California, August 10, 2000. May 26, 2015. Accessed November 12, 2017. https://h2o.law.harvard.edu/cases/5096.

Corsaro, Veronica. "From Betamax to Youtube: How Sony Corporation of America v. Universal City Studios, Inc. Could Still be a Standard for New Technology." Federal Communications Law Journal 64, no. 449 (2012): 450-74. Accessed September 17, 2017. Westlaw. http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1620&context=fclj

C-SPAN.org / *A&M Records v. Napster* . October 2, 2000. Accessed November 30, 2017. https://www.c-span.org/video/?159534-1%2Frecords-v-napster.

Cummings, Alex Sayf. *Democracy of sound: music piracy and the remaking of American copyright in the twentieth century*. New York, NY: Oxford University Press, 2017.

Digital Millennium Copyright Act, 17 U.S.C.

Federal Rules of Evidence § 702

Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996).

Gifford, Christina N. "The Sonny Bono Copyright Term Extension Act ." *University of Memphis Law Review* 30 (Winter 2000): 1-47. Accessed November 26, 2017. Westlaw.

H.R. Rep. No. 104th-S.652 (1996).

Jansen , Greg. "Whose Burden Is It Anyway? Addressing the Needs of Content In DMCA Safe Harbors." *Federal Communications Law Journal* 62, no. 153 (January 2010): 154-81. Accessed September 10, 2017. Westlaw.

Kot, Greg. *Ripped: How the Wired Generation Revolutionized Music*. New York: Scribner, 2009.

Ku, Raymond Shih Ray. "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology." University of Chicago Law Review 69, no. 263 (Winter 2002): 263-324. Accessed September 13, 2017. Westlaw.

Lackman, Eleanor M. "Slowing Down the Speed of Sound: A Transatlantic Race to Head Off Digital Copyright Infringement." *Fordham Intellectual Property, Media and Entertainment Law Journal*, 4th ser., 13, no. 4 (2003): 1161-208. Accessed October 23, 2017. http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1268&context=iplj.

Martin, Douglas. "Robert R. Beezer, Conservative Voice on Liberal Court, Dies at 83." *The New York Times Online*, April 4, 2012. Accessed November 30, 2017. http://www.nytimes.com/2012/04/05/us/robert-r-beezer-judge-on-ninth-circuit-dies-at-83.html.

McCourt, Tom, and Patrick J. Burkhart. "When Creators, Corporations and Consumers Collide: Napster and the Development of On-Line Music Distribution." *Media, Culture & Society* 25, no. 3 (2003): 333-50. Accessed October 10, 2017. http://journals.sagepub.com/doi/abs/10.1177/0163443703025003003

Menn, Joseph. *All the Rave: The Rise and Fall of Shawn Fanning's Napster*. New York, New York: Crown Business, 2003.

"Napster Home Page ." Napster.com . August 1999. Accessed November 03, 2017. http://www.napster.com/.

Owsinski, Bobby. "Music Artists Need More Than Taylor Swift To Win DMCA Challenge." *Forbes*, June 21, 2016. Accessed November 30, 2017.

https://www.forbes.com/sites/bobbyowsinski/2016/06/21/music-artists-dmca-challenge/#244c29044d24.

Parks, Kevin. *Music & Copyright in America: Toward the Celestial Jukebox.* 2nd ed. American Bar Association, 2014.

Rasenberger, Mary, and Christine Pepe. "Copyright Enforcement and Online File Hosting Services: Have Courts Struck The Proper Balance." Journal of the Copyright Society of the U.S.A. 59, no. 627 (Spring 2012): 628-95. Accessed September 13, 2017. Westlaw.

"Senior Thesis Questions on Napster for Steve Drellishak." E-mail message to author. November 17, 2017.

Sonny Bono Copyright Term Extension Act, 17 U.S.C.A. § 304

Sony Corp of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)

Treanor, William Michael . "Judge Marilyn Hall Patel: A Dedication." *Fordham Urban Law Journal* 34 (2007): 1-2. Accessed October 10, 2017. Georgetown Law Center. http://ir.lawnet.fordham.edu/ulj/vol34/iss1/18/

U.S. Copyright Office, "The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary," Copyright.gov. December 1998. Accessed October 16, 2017, https://www.copyright.gov/legislation/dmca.pdf.

Wolf, Christopher. *The Digital Millennium Copyright Act: text, history, and caselaw*. Silver Spring, MD: Pike & Fischer, 2003.

Zepeda , Lisa M. "A&M Records, Inc. v. Napster, Inc." *Berkeley Technology Law Journal*, 6th ser., 17, no. 1 (January 2002): 71-90. Accessed October 24, 2017. http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1341&context=btlj.