

THE DAY THE MUSIC DIED: THE RIAA SUES ITS CONSUMERS

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INTRODUCTION

In early September 2003, the Recording Industry Association of America (RIAA)¹ brought suit against 261 people accusing them of copyright infringement² for allegedly downloading and uploading copyrighted music from the Internet using peer-to-peer systems such as Kazaa, iMesh, Grokster, Gnutella and Blubster.³ The decision by the RIAA to pursue the users of services like Kazaa and others was somewhat unexpected. Many commentators had predicted that the RIAA would never bother going after individual users due to the potential public relations nightmare it could create, along with the logistical difficulties posed by finding and suing individual users.⁴ The fact that the RIAA has actually gone after individual computer users illustrates the lack of confidence the recording industry has in future legal battles against file-sharing entities such as Kazaa and the desperate position in which it finds itself. The avenues that the RIAA and the music industry have available to pursue against companies like Kazaa are not completely blocked, and undoubtedly there will be future litigation. In the meantime, the record conglomerates are tired of losing money due to illegal downloads and have chosen to go after those they feel are stealing from them—the users themselves.⁵ Since the first round of lawsuits filed in September 2003, the RIAA has filed over 2000 additional lawsuits in at least five more rounds of litigation.⁶ This Note looks at the complaints filed against

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1. The RIAA represents many of the major record companies including: UMG Recordings Inc.; Sony Music Entertainment Inc.; Virgin Records America Inc.; Elektra Entertainment Group Inc.; Capitol Records Inc.; Arista Records Inc.; and BMG Music. The RIAA litigates on behalf of the companies regarding various matters, most notably as of late are issues surrounding copyright infringement using the Internet.

2. See <http://www.riaa.com/news/newsletter/pdf/sampleComplaint.pdf> (last visited Nov. 24, 2004) (providing a sample complaint filed against the defendants seeking damages under 17 U.S.C. § 504(c) and fees and costs pursuant to 17 U.S.C. § 505).

3. See Jon Healey et al., *Song Swappers Face the Music*, L.A. TIMES, Sept. 9, 2003, at A1.

4. Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473, 490 (2002); Aric Jacover, Note, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2246 (2002); Jennifer Norman, Note, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 COLUM. J. L. & ARTS 371, 392 (2003).

5. See Greg Kot, *Music Industry Chooses to Bite Hand that Feeds It*, CHI. TRIB., June 29, 2003, at 10 (describing an advertisement placed in the *New York Times* by the RIAA that compares suing music customers with prosecuting shoplifters).

6. See Press Release, RIAA, Music Industry Commences New Wave of Legal Action Against Illegal File Sharers (Dec. 3, 2003) (forty-one additional suits filed), available at

the defendants accused of copyright infringement and will focus on defense strategies and theories that could possibly be used against them. Additionally, this Note points out potential problems surrounding the complaints, such as when the downloading or uploading was done by a minor.

Part I of the Note gives an overview of music on the Internet. It describes different models and systems that have been used, or are currently being used, by people to download MP3⁷ files from the Internet. It also briefly explains the technology behind these systems in order to make distinctions between them. In Part II the sparse case history dealing with music file-sharing is reviewed. This is done to further understand the position the RIAA now finds itself in and also to review the reasoning used by courts when making determinations regarding the activity of the users themselves. Part III briefly illustrates the problems that the RIAA or a court could find with using past cases dealing with music file-sharing as precedent in the current lawsuits. Part IV of the Note explores the fair use doctrine and a defense based on the Audio Home Recording Act (AHRA)⁸ that a hypothetical defendant could employ. Part V focuses on problems surrounding the lawsuits such as when the downloading has been done by a minor and the possible liability their parents could face, if any. Part VI explores solutions that could satisfy concerns of both the RIAA and individual users.

I. OVERVIEW OF INTERNET MUSIC FILE-SHARING

Although the practice of sharing song and other files on the Internet is relatively new, the technology used has morphed and branched off considerably since its inception. The speed at which technology advances is obvious and perhaps in no other area can this be seen as plainly as it can when looking at the ways computer users have avoided the outstretched arm of copyright law on the Internet.

<http://www.riaa.com/news/newsletter/120303.asp>; Press Release, RIAA, New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers (Jan. 21, 2004) [hereinafter New Wave of Record Industry Lawsuits] (532 additional suits filed), *available at* <http://www.riaa.com/news/newsletter/012104.asp>; Press Release, RIAA, 531 More File Sharers Targeted in Latest RIAA Legal Efforts (Feb. 17, 2004) (531 additional suits filed), *available at* <http://www.riaa.com/news/newsletter/021704.asp>; Press Release, RIAA, RIAA Brings New Round of Cases Against Illegal File Sharers (Mar. 23, 2004) (532 additional suits filed, including 89 against users of university systems), *available at* <http://www.riaa.com/news/newsletter/032304.asp>; Press Release, RIAA, New Wave of Illegal File Sharing Lawsuits Brought By RIAA (Apr. 28, 2004) (477 additional suits filed, including sixty-nine against users of university systems), *available at* <http://www.riaa.com/news/newsletter/042804.asp>.

7. MP3 technology “makes digitized songs into smaller, easily transferable files, notably free of any restrictive copy-management technology.” Matthew Fagin et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 458 (2002). Soon after MP3 technology became available, software capable of converting CDs into MP3 format also became available.

8. Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010 (2000).

A. Napster

The creation of Napster was undoubtedly revolutionary. This statement is not a novel or unique observation, or one that has not been thoroughly researched and written upon. However, to understand the litigation involving the RIAA and individual song downloaders, it is necessary to have a basic understanding of the history of Napster and what other programs have done since.

Napster was created as a service to allow computer users access to song-files from the Internet. It did so by utilizing peer-to-peer (P2P) technology. P2P technology generally allows users connected to the Internet to communicate with other users whose computers are connected.⁹ “Peer-to-peer . . . pools the resources of those connected to the Internet and makes those resources available to whomever is connected to that particular peer-to-peer network.”¹⁰ To access Napster a user merely had to download Napster’s MusicShare software. Once downloaded and registered with an account name and password, a user could access the centralized database that contained songs and other files from the computers of other users who used Napster.¹¹ To download a song, a user searched Napster for the song and was sent another user’s IP address that had the requested song and the computers connected allowing the download.¹² “Therefore, although no content [was] stored on, or passed through the central server, the centralized search system arguably [facilitated] file-sharing.”¹³

B. Post-Napster Technology

When Napster was shut down by the courts, many other companies created software programs that were like Napster, only with key differences. These companies were primarily attempting to build and design around problems that plagued Napster in court. The most basic change that many of the companies like Kazaa implemented was doing away with the centralized server. “Unlike Napster, the decentralized model of peer-to-peer networking does not use a central server to establish peer-to-peer connections or facilitate searches. Instead, decentralized peer-to-peer networking creates a community of users by pooling the IP addresses of other users connected to the Internet.”¹⁴ Essentially, this creates a branching structure that allows the user to have access to the computers of numerous other users and thereby minimizes the role of facilitators such as Kazaa. Additionally, upon registering for an account name, Kazaa users were required to give additional information such as their names and addresses.

9. Jacover, *supra* note 4, at 2213.

10. *Id.*

11. Llewellyn Joseph Gibbons, *Napster: The Case for the Need for a Missing Direct Infringer*, 9 VILL. SPORTS & ENT. L.J. 57, 64 (2002).

12. Norman, *supra* note 4, at 373.

13. *Id.*

14. Jacover, *supra* note 4, at 2216.

C. Current Technology

The author is reluctant to give this subheading the title "Current Technology" because as Professor Honigsberg said in his essay about Napster, "[j]ust like the technology upon which this essay is based, the essay itself will be out of date the moment the typing stops."¹⁵ However, there are some new programs and services available for users on the Internet that differ somewhat from those in the past. It has been hard to miss the advertisements for the "new" Napster service as they have appeared in magazines, on the Internet, and on television. The "new" Napster will be similar to many other existing services, in that it will be charging users to download songs from its database. There are different options; a user could pay a small fee for a single song (usually between \$1-\$2 for most services) and some services allow paying a monthly fee for unlimited downloads. There are many conflicting statements regarding the popularity of these services and it is too early to tell if they can replace so-called "free" sites like Kazaa. Additionally, a service called WinMX is available which provides users a chance to download songs on a peer-to-peer network anonymously, in as much as no personal information is given.¹⁶ The sites offering software programs are taking deliberate steps to remove themselves from their users as much as possible so as to reduce any supervisory role they might have.

Finally, the music industry has made many attempts to counter copyright infringement through technological means. The industry has toyed with the CDs themselves, by putting "watermarks" and "fingerprinting" on them. Watermarking involves encoding signals onto the CD that are capable of surviving conversion from analog to digital music.¹⁷ When a song is listened to on the Internet the signal can be read by the computer and can deliver to licensing bureaus the song title, artist name and even the serial number of the music.¹⁸ The fingerprint is virtually identical except that it also protects music that was already online.¹⁹ As one author has noted, this capability raises serious privacy concerns amongst consumers.²⁰ Additionally, some members of the music industry have teamed up with Microsoft to create CDs with Digital Rights Management (DRM) technology. The DRM technology will not allow a CD to be played on a computer unless Microsoft Windows Media Player is used, thereby limiting a

15. Honigsberg, *supra* note 4, at 473 n.a1.

16. See Frontnode Technologies, *WinMX: The Best Way to Share Your Media*, at <http://www.winmx.com> (last visited Jan. 9, 2005).

17. Amy K. Jensen, Comment, *Copy Protection of CDs: The Recording Industry's Latest Attempt at Preventing the Unauthorized Digital Distribution of Music*, 21 J. MARSHALL J. COMPUTER & INFO. L. 241, 249 (2003).

18. *Id.* (citing Konrad Roeder, *How Watermarks Protect Copyrights*, available at <http://www.mp3.com/news/424.html?hparticle1> (Nov. 4, 1999)).

19. *Id.* (citing Bruce R. Poquette, *Current Public Law and Policy Issues: Information Wants to be Free*, 22 HAMLINE J. PUB. L. & POL'Y 175, 176 (2000)).

20. *Id.* at 261-62.

user's ability to use song-files on a server or MP3 player.²¹

There is little doubt that by the time this Note reaches publication, many of the "current technologies" will not be so current, but this is the nature of the beast.

II. THE COURTS AND FILE-SHARING

Although there is very little in the way of precedent regarding file-sharing, the few cases that have been decided have had substantial repercussions on the music and computer industries. No rulings have been more significant with respect to file-sharing than the ones involving Napster.

A. *Napster—District Court*

The music industry sued Napster in the Northern District of California seeking a preliminary injunction to stop Napster and Napster users from downloading and uploading copyright protected song-files. The court granted the industry's injunction request and ordered Napster to "develop[] a means" to comply with the injunction.²² Although there were many issues of first impression decided by the court, this Note focuses on those surrounding the individual users themselves.

The court granted the preliminary injunction because it held that the plaintiffs showed a reasonable likelihood of success on contributory and vicarious copyright infringement claims.²³ To establish a contributory infringement claim in the context of copyright law, a plaintiff must show: direct infringement by the users; that the defendant had knowledge of the infringement; and either induced, caused or materially contributed to it.²⁴ To establish a vicarious liability claim the plaintiff must show that the defendant had the right and ability to supervise the user's infringing conduct and had a direct financial interest in it.²⁵ The court concluded that the plaintiffs had established a prima facie case of direct infringement, as they relied on data that suggested up to eighty-seven percent of music that was on Napster was copyrighted.²⁶ Napster argued that the users' conduct was protected by the affirmative defenses of fair use and a substantial non-infringing use. Napster argued specifically that user practices such as sampling, space-shifting and new artist distribution were each protected by fair use.²⁷ There are four factors taken into consideration when deciding whether a user's infringing activity warrants a fair use exception. They are:

21. *Id.* at 250 (citing John Borland, *New CDs Designed to End "Ripping,"* available at http://zdnet.com.com/2100-1106_2-530799.html (last visited May 7, 2004)).

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

23. *Id.* at 920, 922.

24. *Id.* at 911, 918.

25. *Id.* at 920.

26. *Id.* at 911.

27. *Id.* at 913.

1. the purpose and the character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.²⁸

Regarding the first factor the court said, “[a]scertaining whether the new work transforms the copyrighted material satisfies the main goal of the first factor . . . [but] the court must also determine whether the use is commercial.”²⁹ The court was persuaded by two factors when reaching its decision that users’ use of Napster was commercial. First, the court ruled that sending a file to an anonymous user with the aid of Napster was not engaging in personal use.³⁰ Second, the conclusion that some users did not pay for songs they normally would have bought showed the court that the users benefited economically.³¹ The court found that music was creative in nature and that when users downloaded songs they copied all of the copyrighted work, therefore the second and third factors of the fair use defense were not met.³² Finally, the court relied on plaintiff’s experts to reach the conclusion that the effect on the market was substantial because it reduced CD sales amongst college students and it raised a barrier to the plaintiff’s entry into the market for the digital downloading of music.³³

The court was not persuaded by Napster’s fair use defenses of sampling or space-shifting made on behalf of all individual users. The court held that users did not merely sample the music because they could keep a complete copy of it after sampling.³⁴ Napster’s space-shifting argument was based in part on the decision in *Sony Corp. of America v. Universal City Studios, Inc.*, which held that people who taped TV programs on their VCR tapes were merely time-shifting.³⁵ The court pointed to the plaintiff’s evidence surrounding a study of college students that found they did not previously own much of the music they downloaded and hence, were using Napster for illegitimate purposes.³⁶

One important point to note regarding this Napster case and its subsequent appeal is that there was no actual individual user named as a defendant. Napster merely argued on behalf of all possible defendants when asserting fair use defenses.

28. 17 U.S.C. § 107 (2000).

29. *Napster*, 114 F. Supp. 2d at 912.

30. *Id.*

31. *Id.*

32. *Id.* at 913.

33. *Id.* at 910-11.

34. *Id.* at 913-14.

35. *See generally* 464 U.S. 417, 443 (1984).

36. *Napster*, 114 F. Supp. 2d at 915-17.

B. Napster—Court of Appeals

The court of appeals agreed with the district court that the plaintiffs would likely succeed in showing that Napster users did not have a valid fair use defense, and that Napster was a contributory³⁷ and vicarious infringer.³⁸ The court held that neither the *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*³⁹ decision nor the *Sony Corp. of America* decision⁴⁰ applied to Napster's space-shifting fair use defense because when a user posted a song to the centralized system in order to access it in a different location the user was simultaneously making it available to many other users.⁴¹

Additionally, the court held that Napster users did not have a valid defense under the Audio Home Recording Act (AHRA).⁴² The AHRA was created primarily to protect consumers. The court in *Diamond* looked into the legislative history of the Act and said, "[t]he purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their *private, non-commercial use*."⁴³ A specific section of the Act spells out the protection provided:

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium . . . or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog music recordings.⁴⁴

Napster argued that the MP3 music-file downloading its users participated in was protected under the AHRA. The court held that computers were not digital audio recording devices under the AHRA because their primary purpose was not to make digital audio copied recordings and because computers do not make digital music recordings.⁴⁵ However, the court leaned exclusively on the analysis done by the court in *Diamond* in reaching these conclusions.

C. Aimster and Metro

1. Aimster.—Aimster (currently Madster) was a software program that

37. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001).

38. *Id.* at 1022.

39. 180 F.3d 1072, 1079 (9th Cir. 1999) (holding that a portable MP3 player merely space-shifts copies of the music-file from a user's hard drive).

40. *Sony Corp. of Am.*, 464 U.S. at 443.

41. *Napster*, 239 F.3d at 1019.

42. *Id.* at 1024; 17 U.S.C. § 1001-1010 (2000).

43. *Diamond*, 180 F.3d at 1079 (quoting S. Rep. No. 102-294, at 86 (1992) (emphasis added in case)).

44. 17 U.S.C. § 1008 (2000).

45. *Napster*, 239 F.3d at 1024.

allowed users to download files from each other by piggybacking onto AOL's instant messaging service.⁴⁶ It was more of a peer-to-peer system than Napster but, "certain aspects of the system, especially the existence of Club Aimster's 'Top 40' list, indicate that Aimster did have some sort of centralized structure."⁴⁷ The Northern District Court of Illinois ruled that Aimster was subject to a preliminary injunction based on contributory and vicarious liability.⁴⁸ The court held that because users were potentially sharing files with many others it was not a personal use and the AHRA did not apply.⁴⁹

2. *Metro*.—In *Metro-Goldwyn-Mayer, Inc., v. Grokster, Ltd.*, the defendants Streamcast and Grokster filed summary judgment motions in regards to their alleged contributory and vicarious infringement for users who file-shared using their technology, "Morpheus" and "Grokster (FastTrack)" respectively, to download and upload music-files.⁵⁰ The court held that there was direct infringement by the users, but there was no contributory or vicarious liability attributable to the defendants, and granted summary judgment in their favor.⁵¹ The peer-to-peer software systems used by the defendants were not as centralized as the Napster software was. Therefore, the court held that neither defendant had actual or specific knowledge of specific infringement at a time when they were materially contributing to it, and they were not in a position to supervise the infringing conduct because the technology used was more peer-to-peer rather than centralized.⁵²

D. Verizon

In a move one author called "actions that are a mere step away from suing direct infringers,"⁵³ the RIAA sought to obtain the identity of an anonymous Internet Service Provider (ISP) user alleged to have offered hundreds of copyrighted songs over the Internet, without first filing a complaint. The district court (twice) held that Verizon needed to comply with the subpoena, forcing them to give the RIAA the user's identifying information.⁵⁴ During the completion of this Note, the Court of Appeals for the D.C. Circuit overturned the district court's order to deny Verizon's motion to quash and the United States Supreme Court has since denied certiorari.⁵⁵ The RIAA can still find the identity

46. Norman, *supra* note 4, at 384.

47. *Id.* at 387.

48. *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 666 (N.D. Ill. 2002).

49. *Id.* at 649.

50. 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

51. *Id.* at 1046.

52. *Id.* at 1038, 1044-46.

53. Norman, *supra* note 4, at 392.

54. *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 45 (D.D.C. 2003) (granting the RIAA's motion to enforce the subpoena on the ISP); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 247 (D.D.C. 2003) (denying Verizon's motion to quash the RIAA's subpoena).

55. *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C.

of suspected infringers, but the big difference now is that they must file “John Doe” lawsuits in court first, and then get a subpoena through a judge to get the individual’s name and address.⁵⁶ The accused infringers should have the right to contest any charges brought against them before their identities are revealed. Although the recent ruling should not affect subpoenas previously served, it is likely that any individual that has been served and sued already would direct the court’s attention to the recent ruling. During the completion of this Note, the RIAA filed four rounds of lawsuits against users after the court of appeals decision.⁵⁷ The RIAA filed “John Doe” suits,⁵⁸ partly in a perceived effort to alert users that the recent ruling would not shield them from liability.

E. The RIAA’s Increasingly Desperate Position

As noted earlier, many commentators did not expect the RIAA to pursue litigation against individual file-sharers. It is logical to assume that suing the very people you depend on for survival would be a last resort. In fact, even the RIAA itself had stated that they would not pursue litigation against direct infringers.⁵⁹ However, it is apparent that the recent cases have forced the RIAA’s hand. The fact that the court in *Metro* held that the defendant peer-to-peer operators were not liable for contributory or vicarious infringement was a big blow to the RIAA. The ruling by the D.C. Court of Appeals in *Verizon* was not as decisive a blow, but will require much more time and resources to be spent when pursuing litigation against accused infringers. The bottom line is that the RIAA, and the music industry as a whole, is slowly losing the grip it once had on its copyright protected music.

III. PROBLEMS WITH USING PAST CASES WHEN DEALING WITH SUITS AGAINST DIRECT INFRINGERS

There are some potential concerns with using past case holdings dealing with file-sharing in regards to lawsuits filed against individuals. Most notably, file-sharing cases have only made it to the court of appeals level and therefore, they are not binding upon other jurisdictions. Additionally, in the past cases, there has not been an individual defendant in place to present an argument against his or her direct infringement.

A. The Cases on Point Are Not Binding

The *Napster* cases have been analyzed and used by subsequent courts when

Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004).

56. See John Borland, *Court: RIAA Lawsuit Strategy Illegal*, CNET News.com (Dec. 19, 2003), available at <http://news.com.com/2100-1027-5129687.html?tag=nl>.

57. See *supra* note 6 and accompanying text.

58. New Wave of Record Industry Lawsuits, *supra* note 6.

59. Jcover, *supra* note 4, at 2246 (citing Lee Gomes, *Music Free Tunes for Everyone!*, WALL ST. J., June 15, 1999, at B1).

dealing with the issue of file-sharing, but courts (except the Ninth Circuit) are not bound by the decisions made or reasoning used. It would be logical to assume that if any court were to follow the lead of the *Napster* cases, it would be one in the jurisdiction of the same (Ninth) circuit, yet the court in *Metro* found that the peer-to-peer systems used were not liable or essentially responsible for catching the people who used their system.⁶⁰ Even the court in *Aimster*, which essentially followed the ruling in *Napster*, disagreed with some significant conclusions the court in *Napster* reached.⁶¹ The point to be made is that a court could find that the past cases dealing with file-sharing are not persuasive and either a fair use defense or a defense based on the AHRA could apply in the case of an alleged direct infringer.

B. No Individual File-Sharer Was Directly Involved

One commentator has noted that having a specific infringer in place during the *Napster* cases would have facilitated the fact-finding process and would have given the case a human face.⁶² As Professor Gibbons said,

[t]he district court erroneously conflated unauthorized use with infringing use because the district court's analysis took a global view of whether collective activities by Napster users were excused under the theory of fair use. This approach was also adopted by the Ninth Circuit. However, Napster's individual users may have been protected under some paradigm of fair use because fair use is always an individual determination that depends upon the unique facts of the particular alleged infringing use. Because no alleged direct infringers were before the court, the court could therefore rely on a sense of collective wrongdoing as it assumed at least some use must be an infringing use due to the sheer size of the Napster enterprise.⁶³

Through forcing subpoenas on ISPs like Verizon, the RIAA was able to determine the identities of individuals who supposedly uploaded or downloaded material to which the RIAA owned the copyright. With the focus of the lawsuit being on the defenses asserted against charges of direct infringement and not merely as a means to establish a basis for contributory or vicarious liability, the fair use factors or a defense based on the AHRA could be viewed in a different light by a judge or jury. A major goal of any defendant being sued by the RIAA for file-sharing would be to at least get the case to a jury.

60. *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003).

61. *In re Aimster Copyright Litig.*, 334 F.3d 643, 649 (7th Cir. 2003).

62. Gibbons, *supra* note 11, at 60.

63. *Id.* at 77-78 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991); *People v. Collins*, 438 P.2d 33, 39 (Cal. 1968)).

Given that half of the Internet users in the United States have used a file-sharing network, the odds are high that a jury member would know someone who has downloaded music improperly. Those jurors could be sympathetic. . . . [Juries] might also consider something they are not supposed to under copyright law: intent.⁶⁴

All this being said, the RIAA has stated that it intended to pursue file-sharers who had downloaded or uploaded hundreds of copyrighted songs and it is undoubtedly true that some infringement took place. However, it is possible that a judge or jury could find that a person of age, who knowingly downloaded or uploaded many songs, could have a valid affirmative defense under the fair use doctrine or the AHRA.

IV. THE DIRECT INFRINGER

A. *The Fair Use Doctrine*

An individual using the fair use doctrine as an affirmative defense would likely make arguments similar to Napster: that they were merely sampling the downloaded material; they were space-shifting files; and/or they were only downloading songs they already owned. A defendant would be hard pressed to make a substantial argument suggesting they complied with the second and third fair use factors because the nature of the music files is creative, is for entertainment purposes and (in most cases) the entire song was likely downloaded. However, a court must balance the four fair use factors collectively. Therefore, a defendant could make a strong argument that the first and fourth factors are in their favor. “[I]ndividuals who try a fair-use defense have a chance of winning on the first and fourth tests, some experts believe. Theoretically, they could fight to a draw.”⁶⁵

1. *The First Factor: The Purpose and Character of the Use.*—Downloading music does not appear to transform the copyrighted music in any meaningful sense and it would be hard to imagine a scenario where a defendant could make a legitimate argument that he or she actually transformed the music. However, under the first factor, a court must also take into account whether or not the activity was commercial.⁶⁶ The district court in *Napster* reasoned that because a user sends files to anonymous requesters and does not have to actually buy the songs, the use is a commercial activity.⁶⁷ There are problems with this analysis for a few reasons.

One main problem with the *Napster* decision is that it singled out users that allow others to download from them. Napster’s centralized structure required a user requesting a song file to be routed by Napster to another user willing to let

64. Joseph Menn, *Suits Could Clarify File-Sharing Rules*, CHI. TRIB., Sept. 8, 2003, at C1.

65. *Id.*

66. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).

67. *Id.* at 912-13.

someone download from them.⁶⁸ Systems like the one used by Kazaa and others that are peer-to-peer systems can be used by an individual without allowing others to download files from them. With this system in place, a user could use the system without sending files to anonymous requesters. Furthermore, it is highly likely that some users were not aware that their system was set up to allow others to download from them. Although ignorance would not be a defense in and of itself, one could easily conceive of a judge or jury sympathizing with a defendant who emphatically and honestly stated they did not understand the technology involved and were not aware that they were allowing others to download from them.⁶⁹ However, in the first 261 suits filed, the RIAA stated it was targeting offenders “who shared a significant number of songs on peer-to-peer networks.”⁷⁰ If a defendant knowingly allowed others to download files from his or her computer, the *Napster* holding would seem logical in this regard. If the defendant unknowingly allowed others to download songs, his or her role in sending files to anonymous requesters becomes much less clear.

Secondly, there are many legal scenarios that involve an individual listening to copyrighted music without having bought it that are acceptable. For example, people do not pay anyone directly to listen to the radio, and there are sound booths set up in many record stores that allow people to listen to and sample selected CDs. Gibbons took issue with the *Napster* court’s reliance on studies done that showed college students bought fewer CDs because of Napster.⁷¹

The [district] court stated that students are more likely to download “free” music by using Napster [rather] than purchasing the CD. This likelihood, however, does not necessarily militate against a finding of fair use. If students bought fewer CDs after deciding they did not value the songs from those CDs, for example, then this action may constitute a fair use. This scenario resembles the business strategy of placing music listening stations in record stores, which the Copyright Act exempts as a non-infringing activity. . . . [o]ne can argue that Napster provided a convenient listening station similar to those in music stores that allow a purchaser to preview the CD before they buy it; one that does not require the purchaser to stand around in a store for long periods of time wearing headphones glazed with the ear wax of hundreds of

68. Norman, *supra* note 4, at 373.

69. For example, when the user downloaded the software, the system could require them to uncheck an onscreen box to prevent others from downloading material from them, or a system could require a user to change the system settings once the software was downloaded in order to restrict others’ ability to download from them. See Menn, *supra* note 64, at C1 (stating “[s]ome file swappers have told the networks that they didn’t want to share music—but didn’t realize that when they downloaded a file, the new music was still placed in a folder that could be accessed by others”).

70. See Healey et al., *supra* note 3, at A1.

71. Gibbons, *supra* note 11, at 79-80.

preceding patrons.⁷²

It seems the main point the *Napster* court was trying to make was that a person could download and keep the music without having paid for it, hence it is a “commercial” activity. However, it is obvious a person can record songs from the radio and could copy a CD for personal use without violating copyright law.⁷³ Additionally, there was nothing in the *Napster* opinion regarding the length of time users kept songs they downloaded as being dispositive of showing a commercial activity. It could be argued that a user who downloaded a single song, listened to it, and then promptly deleted it, could not be said to have derived an economic benefit from participating in a commercial activity.

The space-shifting argument could hold some merit when made by an individual as well. Suppose a person was merely downloading a song they already owned in order to have it on their computer. This plausible situation is one in which a judge or jury could find that there was no economic benefit or commercial activity. Again, as Gibbons reasoned, it becomes readily apparent that having a named individual defendant rather than relying on a collective sense of wrongdoing, could show that there was no commercial activity involved.⁷⁴

2. *The Fourth Factor: The Effect on the Market or Value.*—The determination of whether the use is commercial is important not only in the analysis of the first fair use factor, but also in the fourth factor because if the use is determined to be non-commercial, then the plaintiff bears the burden of showing that the practice would adversely affect the potential market if it became widespread.⁷⁵ Demonstrating the effect of downloading on the potential market or value of the music is typically going to entail an expert battle. The court in *Napster* preferred the plaintiff’s experts over the defendant’s.⁷⁶ This was likely due, in some degree, to the burden (of proving there was not an effect on the market or value of the music) falling on the defendant because of the ruling that the user’s downloading was a commercial activity.⁷⁷ If the activity had been viewed as being non-commercial, the burden would change and so, perhaps, would the weight given to expert testimony.⁷⁸

B. The AHRA

A defendant could also argue that his downloading was protected by the

72. *Id.* (citing *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 910 (N.D. Cal. 2000); 17 U.S.C. § 110(7) (1994)).

73. Jensen, *supra* note 17, at 251 n.81 (stating “it is noted that U.S. copyright law allows consumers to legally make one copy of a copyrighted work for their personal, private use”) (citing Richard Ellen, *New Audio CD Copy Protection May Already be Cracked*, available at <http://www.audiorevolution.com/news/0701/24.safeaudio.shtml> (July 24, 2001)).

74. Gibbons, *supra* note 11, at 60.

75. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

76. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 916 (N.D. Cal. 2000).

77. *Id.* at 924.

78. *Id.* at 912.

AHRA.⁷⁹ By looking at past holdings regarding file sharing and the AHRA, as well as the statute itself, it becomes apparent that a valid defense could be made. The AHRA is rich in technical language and is at times maddeningly frustrating to decipher. However, understanding the statutory language of the AHRA is what makes a defense based upon it possible.

1. *AHRA Requirements.*—In order for a direct infringer to gain protection from the AHRA, he or she essentially would be required to show that a computer is a “digital audio recording device.” In doing so a defendant would fall under 17 U.S.C. § 1008, which states,

[n]o action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, *or based on the noncommercial use by a consumer of such a device or medium for making digital music recordings or analog music recordings.*⁸⁰

Therefore, if a consumer were to use a computer to make non-commercial digital music recordings, they would be protected under the AHRA. As was previously discussed, it is clearly possible that a user could show the alleged use was non-commercial. Hence, a defendant must show that a computer is a “digital audio recording device.”

2. *The Napster Case: Rejecting the AHRA.*—The Ninth Circuit Court of Appeals in *Napster* rejected the defendant’s AHRA claim.⁸¹ The court held that the AHRA did not apply to the downloading of MP3s to computer hard drives.⁸² As noted earlier, the court relied extensively and exclusively on the ruling in *Diamond* when reaching this decision. The court stated,

[f]irst, “under the plain meaning of the Act’s definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their ‘primary purpose’ is not to make digital audio copied recordings.” Second, notwithstanding Napster’s claim that computers are “digital audio recording devices,” computers do not make “digital music recordings” as defined by the Audio Home Recording Act.⁸³

There are some potentially significant flaws with the court’s decision that will be discussed next.

a. *The AHRA and Diamond.*—To analyze the reasons given by the court in *Napster*, it will be necessary to examine the *Diamond* case in order to understand the context in which the AHRA was used in that case and subsequently applied

79. 17 U.S.C. § 1001-1010 (2000).

80. *Id.* § 1008 (emphasis added).

81. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001).

82. *Id.*

83. *Id.* (citing *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1077-78 (9th Cir. 1999)).

verbatim in *Napster*. In *Diamond*, the RIAA brought suit against Diamond seeking a preliminary injunction.⁸⁴ Diamond manufactured and distributed the Rio music player which was a hand-held device that allowed a user to download MP3s from a computer onto the device and then listen to them through headphones. The RIAA was asserting that the Rio did not comply with AHRA requirements for “digital audio recording devices” because it did not have a Serial Copyright Management System (SCMS).⁸⁵ The AHRA requires “digital audio recording devices” to have a SCMS that sends and receives information regarding the copyright status of files it plays.⁸⁶ Additionally, the RIAA sought royalty payments from Diamond because manufactures and distributors of “digital audio recording devices” are required to pay them per the AHRA.⁸⁷ Essentially, the RIAA was arguing that the Rio was a “digital audio recording device” while Diamond asserted it was not.⁸⁸

The court determined that the Rio was not a “digital audio recording device” and therefore did not have to pay royalties or include a SCMS.⁸⁹ In reaching this decision the court analyzed the definition of a “digital audio recording device” to see if, in fact, the Rio fell within the statutory language.⁹⁰ Working its way through definitions that lead through other definitions, the court eventually decided that in order for the Rio to be a “digital audio recording device,” it must be able to reproduce “either ‘directly’ or ‘from a transmission’ a ‘digital music recording.’”⁹¹ The definition of a “digital music recording” according to the AHRA is:

A material object

- (i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and
- (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.⁹²

The court then had to determine what material object the Rio directly reproduced from and concluded it was the computer hard drive.⁹³ Next, the court analyzed whether a hard drive fit the definition of a “digital music recording.” It held that a hard drive was not a “digital music recording” because hard drives contain

84. *Diamond*, 180 F.3d at 1072.

85. *Id.* at 1075.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1081.

90. *Id.* at 1075-76.

91. *Id.* at 1076.

92. 17 U.S.C. § 1001(5)(A) (2000).

93. *Diamond*, 180 F.3d at 1076.

more than fixed sounds, material, statements or instructions.⁹⁴ The court reasoned that because computer hard drives are not “digital music recordings,” the Rio (as a “digital audio recording device”) could not record directly from them.⁹⁵ Therefore, the Rio could not be a “digital audio recording device” according to the AHRA.⁹⁶

b. The problem with the Napster court’s second reason for why the AHRA did not apply to Napster users.—In the *Napster* case, Napster argued that computers themselves were “digital audio recording devices” just as the RIAA argued the Rio was a “digital audio recording device” in the *Diamond* case.⁹⁷ Simply going through the same steps the court in *Diamond* did to determine whether the Rio was a “digital audio recording device” will expose a serious flaw in the *Napster* court’s decision that a computer is not a “digital audio recording device.” Again, following *Diamond* (which the *Napster* court relied on), in order for a computer to be a “digital audio recording device,” it “must be able to reproduce, either ‘directly’ or ‘from a transmission,’ a ‘digital music recording.’”⁹⁸ Clearly, a computer is capable of directly reproducing a digital music recording such as a CD. The court in *Diamond* agreed when it explained the legislative history behind the AHRA and what constitutes a “material object” as referred to in the definition of a “digital music recording.” The court said,

[t]he Senate Report further states that the definition “is intended to cover those objects commonly understood to embody sound recordings and their underlying works.” A footnote makes explicit that this definition only extends to the material objects in which songs are normally fixed: “[t]hat is recorded compact discs, digital audio tapes, audio cassettes, long-playing albums, digital compact cassettes, and mini-discs.”⁹⁹

Additionally, the court in *Diamond* explicitly acknowledged that computers can record “digital music recordings,” saying, “[t]he legislative history thus expressly recognizes that computers (and other devices) have recording functions capable of recording digital music recordings.”¹⁰⁰ Therefore, by following the *Diamond* road-map, it is apparent that a computer could be defined as a “digital audio recording device” because it is able to reproduce directly from a “digital music recording.”

This shows that the second reason given by the *Napster* court as to why the

94. *Id.*

95. *Id.*

96. *Id.*

97. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001). The parties making the claim that a device is a “digital audio recording device” in *Diamond* and *Napster* are opposite. In *Diamond*, the RIAA is the plaintiff seeking to show that defendant’s product (the Rio) is a “digital audio recording device” while in *Napster*, the RIAA is the plaintiff, arguing against Napster’s claim that a computer is a “digital audio recording device.”

98. *Diamond*, 180 F.3d at 1076.

99. *Id.* at 1077 (quoting S. Rep. No. 102-294, at 118-19 (1992)).

100. *Id.* at 1078.

AHRA defense did not apply to Napster users is potentially flawed. At *no* point in *Diamond* did the court conclude that “computers do not make ‘digital music recordings’ as defined by the Audio Home Recording Act.”¹⁰¹ The court in *Diamond* determined that the Rio did not make “digital music recordings,” and that *computers* (and their hard drives) *were not* digital music recordings.¹⁰² The court did *not* comment on whether a *computer* could make a “digital music recording,” likely because it most obviously can.¹⁰³

It must be noted that the court in *Diamond* did state that computers are not digital audio recording devices.¹⁰⁴ However, the court reached this conclusion based on the same logic the *Napster* court used in its first reason: because a computer’s “primary purpose” is not to make digital audio copied records. While an examination of this conclusion will be conducted next, it is important to note that by following the exact same analysis performed by the *Diamond* court regarding the Rio, a computer would be considered a digital audio recording device.

c. The problem with the Napster court’s first reason for why the AHRA did not apply to Napster users.—The court in *Napster* held that “[u]nder the plain meaning of the Act’s definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their ‘primary purpose’ is not to make digital audio copied recordings.”¹⁰⁵ At first glance, this reason seems like a tough one for a defendant to overcome because it reflects the AHRA accurately and is logical. One then wonders why the court felt it necessary to throw in another, seemingly incorrect, reason to buttress something that seems ironclad.

The legislative history shows that at the time of the Act’s passing in 1992, “a personal computer’s ‘recording function [was] designed and marketed primarily for the recording of data and computer programs.’”¹⁰⁶ Upon analyzing the holding in *Diamond*, it becomes apparent that the reason computers were not considered “digital audio recording devices” was because the computer industry and its lobbyists would have bitterly opposed its being classified as such.¹⁰⁷ The opposition stemmed from the fact that the computer industry did not want to equip their computers with a SCMS or pay royalties to the RIAA,¹⁰⁸ although this has nothing to do with “the Act’s main purpose—the facilitation of personal use.”¹⁰⁹

If the stated goal of the Act is to allow consumers to record copyrighted music for their own non-commercial use, excluding a computer as a means to

101. *Napster*, 239 F.3d at 1024.

102. *Diamond*, 180 F.3d at 1076.

103. *Id.* at 1077.

104. *Id.* at 1078.

105. *Napster*, 239 F.3d at 1024 (quoting *Diamond*, 180 F.3d at 1078).

106. *Diamond*, 180 F. Supp. at 1078 (quoting S. Rep. No. 102-294, at 122 (1992)).

107. *See id.* at 1078 n.6.

108. *See id.*

109. *Id.* at 1079.

make recordings is asinine and highly implausible. Technology surrounding peer-to-peer systems has advanced considerably since the passing of the Act in 1992 and it is hard to conceive of a means of making a reproduction of copyrighted music that does not involve a computer as a “digital audio recording device.” Today, it can easily be assumed that the device most often used to make a copy of a “digital music recording” is the computer, whether it be from a peer-to-peer system or from copying already owned CDs into MP3 format in order to make a “Greatest Hits” or “Favorites” disc. As one commentator noted, “[the Napster] case clearly illustrates that the AHRA was not designed with the flexibility that is required for the regulation of modern technology.”¹¹⁰ In holding that the Act does not include computers as “digital audio recording devices,” a court could not rationally say that it is attempting to meet Congress’s stated goal of allowing consumers to record copyrighted music for private non-commercial use.

d. So what does this technological lingo all mean?—First, the court in *Napster* listed two reasons why the AHRA did not apply to direct infringers. The second reason was thoroughly inconsistent with the source it was directly cited from and was completely flawed. By following the exact same analysis done by the court in *Diamond* using the Rio as the purported “digital audio recording device,” it is apparent that a computer can make a “digital music recording” and for this reason alone it should be considered a “digital audio recording device.” The first reason given in the *Napster* decision, that computers are not “digital audio recording devices” because their primary purpose is not to make digital audio copied recordings, was determined by the court in *Diamond* to be a product of legislative negotiations and compromises between the computer industry and other involved industries.¹¹¹ This was done so computer manufacturers and distributors would not have to comply with the SCMS requirements or pay royalties to the RIAA.¹¹² However, the role computers play in 2004 is much more substantial than it was twelve years ago when AHRA was passed. To not include computers (and their hard drives) within the definition of a “digital audio recording device” runs contrary to the stated goal of allowing consumers to make recordings of copyrighted music for their private non-commercial use. Therefore, a judge or jury presented with these arguments could easily determine that a user accused of direct infringement was protected by the AHRA.

V. DIRECT INFRINGERS THAT ARE NOT SO DIRECT: CHILDREN AND THEIR PARENTS

The first round of lawsuits filed by the RIAA was highly publicized and criticized for a few reasons. The first reason the suits received such attention, as discussed earlier, was that they were relatively unexpected. Secondly, in the

110. Brian Leubitz, Note, *Digital Millennium? Technological Protections for Copyright on the Internet*, 11 TEX. INTELL. PROP. L.J. 417, 433 (2003).

111. *Diamond*, 180 F.3d at 1078 n.6.

112. *Id.* at 1078-79.

days following the filing of the suits, it became apparent that some were filed against children, while others were filed against individuals who had no access to the software programs required to download or upload the material they were accused of copying. As well as arousing public ire, the suits raised interesting legal questions regarding the liability of children and their parents.

No individual lawsuit filed by the RIAA was as publicized as the one filed against Brianna LaHara. At the time, Brianna was a twelve-year-old honors student from New York.¹¹³ Ultimately, her mother settled the suit for \$2000 along with an apology from Brianna.¹¹⁴ Many of the users of such file-sharing technology are minors and the RIAA seemed prepared to hear excuses from parents named as defendants asserting that their children were responsible for any downloading that took place. As Cary Sherman of the RIAA, said “[w]e expect to hear people say, ‘Well, it wasn’t me, it was my kid.’ Well, if they prefer that the lawsuit be amended to name the kid, we can certainly do that.”¹¹⁵ Whether a parent is sued for his or her child’s downloading or a child is named directly, there is sparse legal authority regarding parental responsibility for a child’s copyright infringement or enforceability against the parent in the event a judgment is rendered against his or her child.

A. Parental Liability

If a parent was named as a defendant and was not liable as a direct infringer (because the downloading was done by his or her child) the RIAA would likely try to hold the parent liable using either the vicarious or contributory infringement doctrines. Again, to establish a contributory infringement claim in the context of copyright law, a plaintiff must show direct infringement by the user and that the defendant had knowledge of the infringement and induced, caused or materially contributed to it.¹¹⁶ To establish a vicarious liability claim, the plaintiff must show that the defendant had the right and ability to supervise the user’s infringing conduct and had a direct financial interest in it.¹¹⁷

1. *Contributory Infringement.*—The most obvious, and perhaps strongest, argument that a parent could make in response to a claim he or she was a contributory infringer is that he or she had no knowledge the activity was taking place. This argument will likely be very case-specific and fact sensitive. Certainly, when the parent has no extraordinary computer expertise, a strong argument could be made that he or she had no knowledge of the child’s infringement.

Even if a parent was shown to have knowledge of the child’s infringement,

113. Alex Veiga, *Labels Try to Hold Parents Accountable*, AP ONLINE, Sept. 12, 2003, available at 2003 WL 63461561.

114. *Id.*

115. Monty Phan, *Facing the Music in Piracy Lawsuit*, NEWSDAY, Sept. 10, 2003, available at 2003 WL 62868652.

116. *A&M Records Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000).

117. *Id.* at 920.

the RIAA would still have to show that the parent either induced, caused, or materially contributed to it. It would be difficult for the RIAA to show that a parent induced or caused their child's infringement absent a confession admitting as much. However, the key question would still remain. Did the parent materially contribute to the infringement? "[T]he material contribution requirement can be satisfied merely by providing the 'site and facilities for known infringing activity.'"¹¹⁸ It would appear that a parent providing a computer and Internet access to his or her child would be providing the site and facilities for infringement. However, as has been noted, that conclusion could be hard to reach considering computers and the Internet have many significant non-infringing uses.¹¹⁹

Assuming a child used a parent's computer at home, it is likely that the material contribution requirement would be met. Therefore, the threshold issue under the contributory infringement doctrine would likely be whether the parent had knowledge of the infringing activity.

2. *Vicarious Infringement.*—It is likely that a judge or jury would find that a parent had the right or ability to supervise his or her child in the parent's own home. Undoubtedly, the RIAA would point to its numerous efforts in warning the public about the illegality of downloading music as evidence that parents have notice of such activity. "Several cases suggest, however, that there is no affirmative duty to police potential infringers, at least absent actual knowledge of the infringing activities."¹²⁰

The RIAA would have a much tougher time showing that the parent had a direct financial interest in, or financially benefited from, his or her child's infringement. Although the RIAA could argue that a parent saved money from not having to buy the music that the child downloaded, this would be tough to prove because it is exceedingly hypothetical. It would have to be assumed that if a child conveyed his musical choice to his parent, the parent would have bought it for him. The author of this Note does not recall a time that his parents waited, with a pen and paper in hand, for him to tell them what new CDs he wanted, just so they could run to the nearest music store and buy them for him.

Although it appears likely that a parent would be shown to have the ability to supervise his or her child's downloading activity, "[t]he direct financial interest part of it is pretty hard to meet, if it's not clear the parent is gaining anything."¹²¹

118. Memorandum from Mark Zuckerman & Devon Bush, Berkman Center for Internet & Society, to the Electronic Frontier Foundation (Oct. 24, 2003) (on file with the Indiana Law Review) [hereinafter Zuckerman & Bush] (quoting *Fonovisa v. Cherry Auction*, 76 F.3d 259, 264 (9th Cir. 1996)). Zuckerman and Bush, from the Berkman Center for Internet and Society at Harvard Law School, prepared a memorandum for the Electronic Frontier Foundation (EFF) regarding parental liability and enforceability against minors that was posted on the EFF website.

119. *See id.*

120. *Id.* (citing *Adobe Sys. Inc. v. Canus Prods.*, 173 F. Supp. 2d 1044, 1054-55 (C.D. Cal. 2001); *Artists Music v. Reed*, 31 U.S.P.Q. 2d 1623 (S.D.N.Y. 1994)).

121. Veiga, *supra* note 113.

B. Enforceability Against Parents

Yet again, there is sparse legal authority regarding whether parents can have their assets attached due to a judgment against their child.¹²² Most likely, any state statutes regarding liability of a parent for his or her child's illegal downloading will be preempted by federal copyright law, either under the U.S. Constitution or section 301 of the Copyright Act.¹²³ "For a state common law or statutory claim to be preempted, the subject matter must be within the scope of the subject of the copyright law, and the claims must be equivalent to the exclusive rights set out in the Act."¹²⁴ Any recordings made before February 15, 1972, are not subject to the Copyright Act preemption provision, but it is unlikely that many children were downloading pre-1972 music. In the event that a child did download pre-1972 music, "the question . . . is whether the claims potentially pursued by the RIAA under state civil laws are equivalent to those within the ambit of the Copyright Act."¹²⁵ For the most part, it is likely that the state claims would be preempted.¹²⁶

In the event that the claims are not preempted, state statutory law or common law will apply. "Parental liability statutes . . . create liability based on damage the child has done to 'property.'"¹²⁷ Most state statutes have a cap on damages that can be recovered from the parent.¹²⁸ The interpretation of what activity constitutes a single tort would then be a highly contested issue. The RIAA would likely contend that the downloading of each song was a separate tort while the defendant would argue the activity as a whole was a single tort. Surprisingly, there is a case that deals with the issue in a comparable factual scenario. In *Thrifty-Tel, Inc. v. Bezenek*, the court held two parents liable for the computer hacking activity of their teenage sons and their friends.¹²⁹ The children hacked into a long-distance provider's computer network in order to make free long-

122. However, "a creditor cannot 'reach . . . assets in which the judgment debtor has no interest.' . . . since a creditor merely 'stand[s] in the shoes of the judgment debtor in relation to any debt owed him or property interest he may own.'" Zuckerman & Bush, *supra* note 118 (citing *Bass v. Bass*, 528 N.Y.S.2d 558, 561 (1st Dep't 1988), as quoted in *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 83 (2d Cir. 2002)).

123. 17 U.S.C. § 301 (2000).

124. Zuckerman & Bush, *supra* note 118.

125. *Id.*

126. "Since claims based on harm caused by file sharing would appear to result exclusively from infringement of the copyrights, the argument for preemption is strong." *Id.* (citing *Murray Hill Publ'ns, Inc. v. ABC Communications, Inc.*, 264 F.3d 622 (6th Cir. 2001) (preempting state conversion claim); *Daboub v. Gibbons*, 42 F.3d 285 (5th Cir. 1995) (preempting multiple state claims based on copying, distributing and performing plaintiff's music)).

127. *Id.* (citing CAL. CIVIL CODE § 1714.1(a) (2003)). See also IND. CODE § 34-31-4-1 (1999).

128. See CAL. CIVIL CODE § 1714.1(a) (2003) (capped at \$25,000 per tort); IND. CODE § 34-31-4-1 (capped at \$5000 per tort).

129. 54 Cal. Rptr. 2d 468, 477 (4th Dist. 1996).

distance phone calls. Although the court found the parents liable for their sons' actions (because the conduct occurred in the parent's home and the children knew what they were doing was wrong) and even for the actions of their sons' friends, it held that the multiple hackings only constituted a single tort.¹³⁰ Additionally,

[i]t should be noted that the court refused to allow the long distance provider to apply the damages specified in the company's "unauthorized use" portion of its service agreement, but insisted on actual damages. This could be used as precedent indicating that parents would only be liable for actual damages, not statutory damages, of their child's infringing behavior.¹³¹

If a state has no statute regarding damages imposed on a parent due to the actions of his or her child, common law liability could be imposed. Usually, however, a parent will not be liable for the torts of his minor child.¹³²

Again, in the event that a state claim is not preempted by section 301 of the Copyright Act, it is likely that most states will have a per statutory tort damage cap and at least one similar case has ruled that the computer activity as a whole was a single tort.

VI. SOLUTIONS TO THE CONFLICT

The effect that the recent lawsuits filed by the RIAA will have on online downloading activity remains to be seen. Not only is it beyond the scope of this Note, it is primarily a sociological issue rather than a legal one. However, it is safe to say that the lawsuits will not end the conflict between copyright holders and consumers. Although many different solutions have been proposed to end or subdue this conflict, most, if not all, of them forget, ignore, or downplay the most obvious and important factor: the ability of consumers to download music from the Internet does not appear to be going away anytime soon, if ever. By examining some of these proposed solutions, it becomes apparent that the best solution is one that will involve a simple—if there is such a thing—royalty system.

A. Legislation

There have been recent attempts by Congress to pass legislation purporting to protect copyrighted digital works. Specifically, the Hollings Bill¹³³ and the

130. *Id.* at 477.

131. Zuckerman & Bush, *supra* note 118, at n.42.

132. *Id.* (citing *Van Den Eikhof v. Hocker*, 151 Cal. Rptr. 456 (Ct. App. 1978); *McCarthy v. Heiselman*, 125 N.Y.S. 13 (App. Div. 1910)).

133. Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. (2002).

Berman Bill¹³⁴ were both introduced before dying in the 107th Congress.¹³⁵ The Hollings Bill would have, “made the sale, offer of sale, or transport in interstate commerce of any digital media device unlawful, unless the device ‘include[d] and utilize[d] standard security technologies that adhere[d] to the security system standards adopted’ under the bill.”¹³⁶ It failed because, “it placed an unfair burden on the technology sector, was not a complete solution for content owners . . . and did not provide sufficient exceptions for fair use.”¹³⁷ The Berman Bill basically allowed copyright holders to hunt down unauthorized users, hack into their computers and disable or impair the mechanisms used to do the unauthorized activity.¹³⁸ The Bill essentially immunized copyright holders for any damage they caused on the user’s computer that resulted in less than \$250.00.¹³⁹ Although there have been many valid criticisms leveled against this piece of legislation, none are more obvious than those focusing on an individual’s right to privacy.

Looking at only these two proposed bills, it becomes apparent that drafting legislation regarding copyrighted material online is increasingly futile. It is virtually impossible to draft a piece of legislation that will satisfy each of the affected parties in this conflict. In the rare instance where legislation appears to do just that, it will likely be wholly or partially irrelevant in a few years—or even months—when the next “new” technology comes along rendering past statutory language obsolete. “Modern Internet technology has an incredible ability to adapt to changes in market conditions; for examples, one can look at broadband, the MP3 file format, or the current generation of file-sharing services.”¹⁴⁰ Legislation based on Internet technology that is used today would likely be of little value and a waste of time and resources. Furthermore, an attempt by Congress to look into a crystal ball to predict future technological shifts will either be so vague as to have no substantive value or will be overly burdensome like the Berman Bill.

In short, legislation is not the answer to the conflict between the music industry and consumers as it does little—if anything—to stop the fact that file-sharing technology exists and will continue to exist in the foreseeable future.

B. Technology and Copy Protection

As mentioned in Part I of this Note, the music industry has also attempted to protect its copyrighted material through the use of technology. For primarily the same reasons that legislation will not bring an end to this conflict, it is likely that

134. H.R. 5211, 107th Cong. pmb. (2002).

135. Norman, *supra* note 4, at 396-97.

136. *Id.* at 397 (quoting Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. § 5(a) (2002)).

137. *Id.* at 398.

138. H.R. 5211, 107th Cong. pmb. (2002).

139. *Id.*

140. Leubitz, *supra* note 110, at 433.

the use of copy protection or other such technology will fail in this regard. One commentator has noted a few problems with the music industry's copy protection attempts: high consumer dissatisfaction; potential invasion of privacy concerns; and most importantly, the possibility of technological circumvention.¹⁴¹ Just as technology is too fast for legislation, it is also too fast for protection. If our short computer history teaches us anything, it is that "hackers" and others will likely get around most copy protection devices.

It has happened time and time again: simply witness the ill-fated attempt of the music industry to develop copy-protected discs. A crack . . . was quickly discovered and rendered the protection technology wholly ineffective. By drawing a thick line around the outer edge of a copy-protected CD with a felt-tipped pen, CDs can be copied, despite the music industry's best efforts.¹⁴²

Although the DRM technology is innovative and it is possible that the industry could begin to lean more heavily on it, it is also capable of being circumvented. "If history is any indication, it is unlikely that any DRM technologies will ever completely eliminate illegal reproduction of copyrighted works."¹⁴³ Although as one author noted, the goal of the DRM technology is not to eliminate all illegal song downloading, but rather, "if [the] deterrent effect is great enough to substantially decrease the number of illegal copies that replace legal sales of the work, the copy protection has successfully eliminated the largest threat to the copyright owner."¹⁴⁴ If the music industry could come together and use the same method of DRM technology, it is possible that it would provide a staunch defense against copyright infringement. However, it does not seem logistically probable that this will occur anytime soon, and in the event that it does, it is likely that hackers and others could get around the technology in little time.

C. "New" Napster Models

There are quite a few online sites that offer fee-based subscription services. The plans vary but offer essentially the same thing: copyrighted songs available to download. Most allow the song to be played only on the computer used to download it, although some services let the user purchase portable downloads

141. Jensen, *supra* note 17, at 253-54.

142. John Tehranian, *All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. CIN. L. REV. 45, 80 (2003) (citing *CD Crack: Magic Marker Indeed*, at <http://www.wired.com/news/technology/0,128252665,00.html> (May 20, 2002)).

143. James S. Humphrey, Note, *Debating the Proposed Peer-to-Peer Piracy Prevention Act: Should Copyright Owners Be Permitted to Disrupt Illegal File Trading Over Peer-to-Peer Networks?*, 4 N.C.J.L. & TECH. 375, 410 (2003).

144. *Id.* (citing Stan Liebowitz, *Policing Pirates in the Networked Age*, 438 POL'Y ANALYSIS 1, 1 (2002), available at <http://www.cato.org/pubs/pas/pa-438es.html>). See also Jacover, *supra* note 4, at 2247-48.

that allow the transfer of songs to a CD or other device.¹⁴⁵ However, a problem with most, if not all, of these services is that, “none of the current business models are offering enough content, none are easy to subscribe to, and consumers do not perceive the value in the content that is being delivered.”¹⁴⁶ Although some observers have argued that these services have shown signs of success, others have disagreed.¹⁴⁷ Although a service could see some success if it partnered with any or all of the major five record companies and offered songs for a fairly cheap price, it is unlikely that this will occur anytime soon. The main reason for this is the parallel existence of the same material being offered for free, with no hassles, at similar web-sites. Right now, it is understandably difficult to persuade consumers to pay to join the services available—that do not have much selection—when they can get what they want for free. Although the deterrent effect of the recent suits filed by the RIAA is unknown, it is safe to say that they have not eliminated downloading activity completely. Accordingly, it is unlikely that services requiring payment for subscriptions will succeed due to the concurrent availability of free sites.

D. Compulsory Licensing

Many commentators have suggested that the best way to solve this apparent conflict is through the use of compulsory licensing. “Under a compulsory licensing scheme, all copyright owners would be required by law to license their content on a non-discriminatory basis, at a regulated rate, to any potential distributor who met certain baseline requirements. This would effectively replace property rules . . . with liability rules.”¹⁴⁸ “To compensate copyright holders, royalties would be collected from various entities that use copyrighted material and then distributed to copyright holders. This scheme would operate much like performance rights societies, only on a much larger scale.”¹⁴⁹ The main problem with a compulsory licensing scheme is that it would require the tracking of downloading songs in an extensive and precise manner. Besides the

145. Humphrey, *supra* note 143, at 403-04.

146. *Id.* at 404. Humphrey notes that one service, eMusic, offers “an unlimited number of downloads that can be kept forever and transferred to CDs.” *Id.* However, eMusic has not gotten any of the five major record companies to join. Therefore, although the service meets consumer’s portability expectations, there is little content available that consumers want.

147. See Tehranian, *supra* note 142, at 63 n.68 (citing Jon Healey, *Napster Service to be Revived by Year-End*, L.A. TIMES, July 28, 2003, at C1 (noting the success of Apple’s iTunes service, which has sold 6.5 million copies in its first two and one-half months of existence); Ciaran Tannam, *iTunes Sales Continue to Fall*, slyck.com (July 30, 2003), available at <http://www.slyck.com/news.php?story=208> (noting that week by week sales on iTunes have been declining and that the success of iTunes may have been exaggerated)).

148. Fagin et al., *supra* note 7, at 524.

149. Jcover, *supra* note 4, at 2251 (citing Alan R. Kabat, *Proposal for a Worldwide Internet Collecting Society: Mark Twain and Samuel Johnson Licenses*, 45 J. COPYRIGHT SOC’Y U.S.A. 329, 331-33 (1998)).

fact that this daunting task would have to be forced upon someone, there is certainly no guarantee that the tracking methods used to determine who owes royalties would not be compromised. Whether watermarking or another technological device is used, there is currently no sound way to protect any tracking system from hackers and others.

E. Tax-Royalty System

The author of this Note believes that the best solution is to institute a tax administered through either a government copyright agency or other similar entity. "Under this system, music on the Internet could be distributed at will, without fear of litigation or license payments to copyright holders."¹⁵⁰ One commentator has suggested taxing "[e]very entity that derives a financial benefit from the use of music on the Internet."¹⁵¹ This approach seems over-inclusive, burdensome, and is ultimately unnecessary. The only entities that should be taxed are ISPs. This tax will ultimately be passed on to the consumer, reflected in higher service charges or monthly billing statements. Essentially, the public will be paying the record companies to download their copyrighted material, which, if done correctly, could satisfy both. The amount that would need to be charged to the ISPs would have to be enough to reasonably accommodate the record industry as well as the ISPs for their collection services. One author suggested a one dollar monthly charge per ISP subscriber.¹⁵² Assuming that there are fifty million Internet users in the United States, this would equal \$600 million generated annually. Obviously, studies would need to be done and data would need to be collected to arrive at a figure that would compensate the music industry fairly, without gouging consumers.¹⁵³

Lemley additionally encouraged the simultaneous creation of legislation that would "criminalize software that carries the potential of mass distribution of copyrighted works."¹⁵⁴ Additionally, Lemley's proposed legislation would authorize criminal sanctions to be imposed upon individuals that possess any "decentralized P2P software already available to consumers."¹⁵⁵ The stated goal of this proposed legislation would be to "initiate a containment of available piracy software."¹⁵⁶ However, the point of having a tax system in place would be to get both the music industry and consumers what they want. Surely the

150. *Id.* at 2252-53.

151. *Id.* at 2253.

152. Kevin Michael Lemley, Comment, *Protecting Consumers From Themselves: Alleviating the Market Inequalities Created by Online Copyright Infringement in the Entertainment Industry*, 13 ALB. L.J. SCI. & TECH. 613, 645-46 (2003).

153. As it was the author's mistaken understanding upon enrolling in law school that there would be no math, the author of this Note will not offer any wild speculation on what an agreeable tax amount should be.

154. Lemley, *supra* note 152, at 638.

155. *Id.* at 641.

156. *Id.* at 638.

public would not support legislation that authorizes criminal sanctions for downloading music. Many criminal court systems in this country are already at full capacity and asking them—along with law enforcement agencies—to begin devoting an astronomical amount of time and resources chasing down individuals who download music from Internet services is impracticable at best. As one commentator noted, “[criminal sanctions would] incur heavy political and economic costs on the enforcement authorities and would ultimately become ineffective when the authorities lose interest in enforcing those penalties. Even worse, this lack of enforcement might instill in the public a lack of confidence in and respect for the legal system.”¹⁵⁷

Obviously, the music industry does not want to lose control over its copyright protected material on the Internet. However, a royalty system could ensure that the industry receives a substantial amount of compensation for the use of the material. Additionally, the music industry could alter its business model to incorporate strategies such as windowing to enhance CD sales. “A windowing strategy involves the public release of media through several different channels over a carefully sequenced time period. In the film industry, this involves releasing theatrical films to video, pay-per-view, pay cable, and then finally broadcast TV.”¹⁵⁸ This would allow consumers to purchase an artist’s CD at different times and for different prices. Also, it seems that the music industry is finally learning that including items along with the CDs will enhance sales as well. Dedicated music fans will still buy CDs, as many consumers will always prefer having their favorite artists “new” songs in front of them without having to spend time downloading each song individually.

The fact of the matter is that there are millions of consumers today who download copyrighted music from Internet related services without paying anything for it. Legislation in and of itself will not correct this situation because the process is outpaced by technological advances. Similarly, copy protection devices employed by the music industry have been simple to circumvent and raise serious privacy issues. Subscription sites that charge consumers to download song-files have not received the support of the music industry’s major players, primarily due to the fact that there is nothing to stop individuals from downloading for free. Compulsory licensing schemes could turn into a logistical nightmare and do not offer safety from hackers and others. Instituting a tax scheme is the simplest way to alleviate this conflict. A monthly per-subscriber tax placed on ISPs will be passed on to consumers and the system as a whole will remain untouched. As well as being the most simplistic way to solve this conflict, a tax scheme would ideally give both the music industry and consumers what they want.

157. Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 403 (2003).

158. Humphrey, *supra* note 143, at 406 (citing G. Krishan Bhatia et al., *Windows into the Future: How Lessons from Hollywood Will Shape the Music Industry*, Booz-Allen & Hamilton e-Insights 3 (June 2001), at http://www.bah.de/content/downloads/insights/5J_Windowsi.pdf).

CONCLUSION

It is very likely that most of the recent lawsuits filed by the RIAA against individuals accused of illegally downloading copyrighted material will be settled long before trial. In the event that some do make it to the trial stage, it is likely that defenses based on the fair use doctrine and the AHRA will be used. It will be interesting to see how long it takes before another technological advancement brings about an entirely different conflict, leaving thoughts of this one in the dust. In the mean time, it appears that taxing ISPs directly will be the most effective way to alleviate the conflict between the music industry and consumers.