

War Stories

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The copyright law is in the midst of revolutionary change. We are remaking our world as we adjust to networked digital technology. The borders between legitimate and illegal behavior are the subject of bitter dispute.¹ What we have come to call the conventional entertainment industries -- movie studios, music publishers, record companies -- have declared war on the new digital media, and the courtrooms are battlefields.

It is by now a cliché that the Internet enables individuals to communicate with one another without needing to rely on traditional intermediaries. Novelists can reach readers without a printing press, a publisher, a book distributor or bookstore. Consumers can find music without going through record stores, radio stations, record companies or music publishers. Filmmakers can exhibit their films without movie studios, movie theaters, or even film. That's threatening, of course, to the traditional intermediaries. It also poses a fundamental problem for copyright policy, because our law has been designed to funnel

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¹ How the copyright law written for older media applies to new technology, and how recent amendments to shape new media might change that, are being litigated all over the country. See e.g., *N.Y. Times Co. v. Tasini*, ___ U.S. ___, 121 S. Ct. 2381 (2001); *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001); *Recording Industry Association v. Diamond Multimedia*, 180 F.3d 1072 (9th Cir. 1999); *Random House v. Rosetta Books*, 2001 U.S. Dist. LEXIS 9456 (S.D.N.Y. July 11, 2001); *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000); *Intellectual Reserve v. Utah Lighthouse Ministry*, 75 F. Supp. 2d 1290 (D. Utah. 1999).

compensation to creators by regulating the behavior of intermediaries.² The copyright statute doesn't give copyright owners the exclusive right to *use* their works for limited times, or the exclusive right to *exploit their works commercially* for limited times. Instead, it gives copyright owners the exclusive rights to reproduce, adapt, distribute to the public and publicly perform or display their works,³ subject to a host of statutory exceptions.⁴ The design of the whole 205 page edifice orders the behavior of writers and publishers, composers and record companies, directors, movie studios and movie theatres, broadcast and cable and satellite television. It does not have a lot to say about the behavior of individual consumers, because the last time it went through a fundamental overhaul was 25 years ago, when the behavior of individual consumers seemed like a *de minimis* concern.⁵

Today, what we might class as personal, noncommercial, private consumer copying, distribution, performance and display of copyrighted material occupies an increasingly large share of the copyright market. Nascent businesses are trying to find a way to make a buck (or a billion bucks) by facilitating individual consumers' enjoyment of copyrighted material. One of the things that everyone is fighting over is whether personal copying, distribution, performance or display requires a copyright license and, if so, whether facilitating unlicensed personal uses is itself illegal.

Surprisingly, the question whether individuals are liable for copyright infringement when they make unauthorized uses of copyrighted works has no clear answer. When Congress has been asked to address the potential infringement liability of individual consumers making unauthorized noncommercial uses of protected works, it has spoken inconsistently.⁶ Copyright owners have rights to control public performances and displays, but private performances and displays are

² See Jessica Litman, *The Exclusive Right to Read*, 13 *Cardozo Arts & Entertainment L.J.* 29, 37-52 (1994).

³ See 17 U.S.C. § 106.

⁴ See 17 U.S.C. § 107-122, 601-602, 512, 513, 1008.

⁵ See Litman, *supra* note 2, at 34-39.

⁶ Compare Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat 391; H. R. Rep. No. 92-487 (1971); with Audio Home Recording Act of 1992, Public Law No. 102-563, 106 Stat. 4237; H. Rep. 102-873 (1992); with No Electronic Theft Act, Public Law 105-147; H.R. Rep. 105-339 (1997); and with Digital Millennium Copyright Act, Public Law 105-304; H.R. Rep. 105-551 (1998). See Jessica Litman, *Copyright Legislation and Technological Change*, 68 *ore. L. Rev.* 275, 313-14, 346-54 (1989).

lawful without regard to the copyright owner's permission.⁷ Copyright owners have somewhat constrained rights over distribution to the public,⁸ while private distributions are presumably exempt⁹ -- it's hard to be too certain, though, because the law leaves "distribution to the public" undefined.¹⁰ Copyright owners' exclusive reproduction and adaptation rights have no public/private limitation. Nothing in the statute expressly distinguishes your use of a photocopier to make your own copy of a novel from a publisher's use of a printing press to make hundreds of thousands of them.¹¹ Nor does the statutory language admit a difference between a motion picture studio's filming an unauthorized movie based on the novel you just read, and your imagining such a picture in your head.¹² At the same time, when Congress has focused on the possibility of individual liability for specific noncommercial consumer uses, it has commonly decided that individual consumers should not be held liable. When Congress gave record companies exclusive rights over the reproduction of records, it emphasized in the legislative history that the right did not extend to control of home copying of recorded or broadcast music.¹³ In 1976, Congress enacted an express exception to the public performance right for consumers (and small businesses) who play radios or televisions in public places.¹⁴ In 1992, Congress passed a law requiring digital recorders to incorporate technology that permitted an unlimited number of digital copies of a purchased CD, but prevented copying of the digital copies. The law incorporated an express exemption for consumers who made noncommercial digital or analog copies of recorded music:

No action may be brought under this title alleging infringement of copyright ... based on the noncommercial use by a consumer of

⁷ See 17 U.S.C. § 106(4), 106(5).

⁸ See *id.* at 106(3), 109. The copyright owner is entitled to control the initial distribution of any given copy of a work. Resale or loan of that copy thereafter is beyond the scope of the copyright owner's rights. See *Quality King Distributors v. L'Anza Research Int'l*, 523 U.S. 135 (1998).

⁹ 17 U.S.C. § 106(3).

¹⁰ See 17 U.S.C. § 101.

¹¹ See 17 U.S.C. § 106(1).

¹² See 17 U.S.C. § 106(2).

¹³ Sound Recording Amendment of 1971, 85 Stat. 391. See H. R. Rep. No. 92-487 at 7 (C.D. Cal. 1971); *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 444-46 (1979), *aff'd in part, rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

¹⁴ See 17 U.S.C. 110(5)(A).

such a device or medium for making digital musical recordings or analog musical recordings.¹⁵

In 1998, Congress amended the statute to add, for the first time, a provision apparently designed to impose liability on individual consumers for noncommercial, private actions. Under the Digital Millennium Copyright Act,¹⁶ it is now illegal for anyone to circumvent any technological device or system that controls access to a copyright-protected work, unless one does so within an extremely narrow class of circumstances.¹⁷ The resort to negatives pregnant, then, gets us nowhere: the statute has several provisions expressly addressing consumer liability and rejecting it,¹⁸ at least one apparently imposing it,¹⁹ and 200 pages that speak to it, if at all, only by murky implication.

Nor have court rulings resolved the ambiguity. In 1984, the United States Supreme Court ruled that individual consumer videotaping of broadcast television programs was lawful fair use. It emphasized repeatedly, however, that the decision whether to impose liability was Congress's to make.²⁰ Later courts have evaluated claims against intermediaries for facilitating unlicensed consumer uses against the background of unexamined and inconsistent assumptions about whether

¹⁵ Audio Home Recording Act of 1992, Public Law No. 102-563, 106 Stat. 4237 codified at 17 U.S.C. § 1008. The full text of section 1008 is reproduced *infra* text at footnote 95.

¹⁶ Public Law 105-304, codified at 17 U.S.C. §§ 114, 512, 1201-05.

¹⁷ Law enforcement authorities have a privilege to circumvent access protection controls. 17 U.S.C. 1201(e). Libraries may circumvent solely in order to determine whether to purchase access. *Id.* at 1201(d). Software engineers and encryption researchers have very narrow circumvention privileges that permit unauthorized access under specific conditions and impose significant restrictions on the use of any information learned in the course of that access. *Id.* at 1201(f), 1201(g), 1201(j). Individuals may circumvent in some circumstances solely in order to protect minors from exposure to pornography, 1201(h), or prevent the surreptitious collection of personally identifying information, 1201(i). Pursuant to regulations issued in October 2000 by the Library of Congress, individuals may circumvent access controls to view lists of websites blocked by Internet content filtering software, and to regain licensed access to computer programs and databases when access controls malfunction. See Recommendation of the Register of Copyrights and Determination of the Librarian of Congress, 65 FR 64555 (Oct. 27, 2000). The Library declined to adopt a regulation that would have permitted individuals to circumvent malfunctioning access controls to regain licensed access to other works, such as recorded music or DVDs.

¹⁸ 17 U.S.C. § 106(4)(5)(6), 110(5)(A), 1008.

¹⁹ *Id.* at 1201(a)(1)(a).

²⁰ *Sony v. Universal Studios*, 464 U.S. 417 (1984).

Congress has decided to hold individual consumers liable for unauthorized, noncommercial, consumptive uses.²¹

The question comes up with increasing frequency because the copyright statute doesn't reckon infringement in terms of profit. Unless a business makes unauthorized copies, creates unlicensed adaptations, distributes copies to the public without permission, or conducts forbidden public performances or displays, it is not itself doing anything the copyright law restrains. The fact that it may be reaping large profits from other people's copyrights is not in itself enough to support liability. The business can be enjoined only to the extent that it can be held responsible for the illegal reproduction, adaptation, distribution, performance or display of others.

Napster is the paradigmatic case. Napster facilitated unauthorized consumer copying of recorded music on a massive scale. What Napster did not do, however, was reproduce, adapt, distribute, perform or display copyrighted works. Instead, millions of individuals²² downloaded Napster software, which permitted them to locate copies of music files on other Napster users' computer hard drives, and then retrieve copies of those files over the Internet.²³ Napster's users unquestionably made copies of

²¹ Compare, e.g., *A&M v. Napster*, 114 F. Supp. 2d 896, 911 (C.D. Cal. 2001), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001)(unauthorized consumer downloading is infringement), with *Recording Industry Association v. Diamond Multimedia*, 180 F.3d 1072 (9th Cir. 1999)(Congress's "main purpose" in enacting the Audio Home Recording Act was "the facilitation of personal use"), and with *Vault v. Quaid*, 847 F.2d 255, 266 (5th Cir.1985)(" We read the statute as it is now written to authorize the owner of the PROLOK diskette to copy both the PROLOK program and the software program for any reason... so long as the owner uses the copy for archival purposes only and not for an unauthorized transfer.").

²² At its peak, Napster claimed to have 70 million individual users. "User" is Napster's term. I don't know whether the connotation of addictive drugs is intentional.

²³ The Napster system in place at the time of the litigation worked as follows: Napster made its client software available to anyone for free download. Upon installation, the Napster client software created a directory on the hard disk of each individual's computer, and instructed her to put copies of any music file she wanted to "share" in that directory. When she signed on to Napster, her computer was connected, over the Internet, with one of Napster's servers. The server would read the list of files in her Napster directory, and add those names and file locations to a dynamic directory of the files in the directories of all Napster users currently signed on via that server. She could then search the directory by typing in the name of a song or a performer, and the Napster server would retrieve a list of users who has made files available meeting that specification. She could choose from that list, and the Napster server would supply the IP address of the computer with the file, so that her Napster client software could contact that computer directly and initiate the transfer. She and the other user, between them,

copyright-protected material, and arguably performed or distributed them. Napster itself, however, did none of that. It exercised no control over file transfers. No copies passed through Napster's servers. Rather, Napster supplied information location tools and a file transfer utility to allow its users to exchange files directly. Under the statute we have on the books, then, Napster cannot be held liable unless its individual users were breaking the law. And, that's a point on which the law remains unclear.

The issue is fundamental: As I have argued elsewhere, if we mean to hold individuals liable for unauthorized receipt, viewing or hearing of infringing copies of works, the rules embodied in the current statute won't serve.²⁴ They were designed for the benefit of firms with copyright lawyers on retainer and are (by design) nearly incomprehensible to others.²⁵ On the other hand, if individuals may freely retrieve, view, hear and share copyright-protected material in a world where intermediaries are optional, copyright owners may be without recourse. It is over that question that the war is being fought. The battleground of the moment is the courtroom. A dozen pending cases are trying to sort out fundamental questions by looking at the impenetrable language of a 205 page statute (written before anyone imagined Napster) to see whether what Napster and its fellow travelers happen to do happens to fit into tightly constructed little boxes designed and built for completely different purposes.

I'm not going to predict how this war will come out. My aim in this paper is instead to tell a handful of war stories to demonstrate that the tools at our disposal are unlikely to give us the opportunity to find answers that make sense.

unquestionably made a copy of someone's copyrighted material, and if her tastes are like those of the majority of Napster's users, that copy was unauthorized. She and her transfer partner also engaged in performance and possible distribution of that material, although a fair argument can be made that both the performance and the distribution were private rather than public, and therefore exempt. Napster did not: the file never passed through Napster's server.

²⁴ See Jessica Litman, *Copyright NonCompliance or Why we can't Just say Yes to Licensing*, 29 *New York University Journal of International Law & Policy* 237 (1997)

²⁵ See Litman, *supra* note 2.

*1. First story: Herein of Pirates*²⁶

The first story is one about models and metaphors. Models, analogies and metaphors matter more than we often think. Not only are they persuasive rhetorical tools, they're also the means by which we fool ourselves into "realizing" that reality corresponds to the story the model or metaphor tells. From there, it's a short step to interpreting the law accordingly. A whirlwind, abridged version of the intellectual history of U.S. copyright law reveals some unmistakable trends.

For the first 200 years the US had a copyright statute, it was fair to describe it as giving authors limited rights for limited times while reserving other rights to the public.²⁷ Copyright owners' control over uses of their works was narrow; and this was considered to be a feature rather than a bug. Under the old model, there were lots of unauthorized but completely legal uses.²⁸ The premise was that we wanted authors to have enough control over their works to enable them to extract some of the commercial value of those works -- that's what let them make a living creating works of authorship. At the same time, the purpose of the system was to benefit the public at large, and that worked best when the rest of the value of the work could be enjoyed by the public at large.²⁹

²⁶ This story is told in greater detail in JESSICA LITMAN, *DIGITAL COPYRIGHT* 77-89, 151-166 (2001).

²⁷ The first US federal copyright statute was enacted in 1790. Copyright Act of May 31, 1790, 1 Stat. 124.

²⁸ As recently as a few years ago, for example, it was clear that while copyright owners had the right to prevent unauthorized copying, making a personal copy of a music CD was legal whether you kept it or gave it to a friend. See 17 U.S.C. § 1008. Recording a TV program off the air was legal whether you watched it now or put it on your shelf to watch it later. *Sony v. Universal Studios*, 464 U.S. 417 (1984). Copyright owners had the right to control distribution of copies, but anyone who owned a legitimate copy could sell it, loan it, or give it away whether the copyright owner liked that or not. See 17 U.S.C. 109. Copyright owners had the exclusive right to adapt their works, but unauthorized reverse engineering was legal. See *Sony v. Connectix*, 203 F.3d 596 (9th Cir. 1999). Copyright owners had control over public performances of their work, but not over private performances. 17 U.S.C. 106. And so forth. A suggestion that copyright law ought to give authors control over who could read their works, or see them, or hear them, would have been ridiculous.

²⁹ See, e.g., *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

US Copyrights now last about 95 years.³⁰ 95 years ago, in 1906, the predominant metaphor for copyright was the notion of a *quid pro quo*.³¹ The public agreed to give narrow exclusive rights to authors who complied with formal preconditions, in return for the publication of the work and its eventual dedication to the public domain.³²

As the century wore on, the importance of formal prerequisites receded. The *quid pro quo* model evolved into a model of copyright as a bargain between authors and the public. The public granted authors limited exclusive rights in order to advance the public interest. This model was about compensation.³³ Copyright permitted authors to earn enough money from the works they authored to make it worthwhile for them to create the works and make them available to the public, while not allowing them to impose unwarranted conditions on the public's use of their works. The rights secured to the author were balanced by those retained by the public.

More recently, the idea of a bargain has been superseded by a model that characterizes copyright as a system of incentives.³⁴ Today, this is the standard law-and-economics model of copyright law, whereby copyright provides an economic incentive for the creation and distribution of original works of authorship.³⁵ The model is powerful because it is simple: it posits a direct relationship between the scope of copyright protection and the quantity and quality of authorship produced and distributed. An increase in the scope or subject matter or duration of

³⁰ 17 U.S.C. § 302, 303, 304. The official term is 95 years for works created and published before 1978. For later works, copyright in works created by individual authors outside of an employment context lasts for the life of the author plus 70 years. Copyright in works made for hire lasts for 95 years from creation or 120 years from publication.

³¹ See Jessica Litman, *The Public Domain*, 39 *Emory L.J.* 965, 977-92 (1990).

³² See, e.g., *London v. Biograph*, 231 F. 696 (1916); *Stone & McCarrick v. Dugan Piano*, 210 F. 399 (ED La 1914).

³³ I'm indebted to Professor Niva Elkin-Koren for this insight. See Niva Elkin-Koren, *Turning Culture into a Market for Consumer Goods* (3/00 draft).

³⁴ See, e.g., Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 *J. Copyright Socy* 209 (1982); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 *Colum. L. Rev.* 1600 (1982); William M. Landes & Richard Posner, *An Economic Analysis of Copyright*, 18 *J. Legal Stud.* 325 (1989).

³⁵ See, e.g., Dennis Karjala, *Copyright in Electronic Maps*, 35 *Jurimetrics J.* 395 (1995); Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law*, 62 *U. Colo. L. Rev.* 1173 (1991).

copyright, the model tells us, will inspire more and better authorship, while a limitation on copyright will at the margin result in reduced authorial production.

The economic analysis model concentrates on the effect greater or lesser copyright rights might have on incentives to create and exploit new works. It necessarily excludes concerns extraneous to that focus. Unless they affect the incentive structure for creating and exploiting new works, balances and bargains are beside the point. If copyright limitations like fair use are good policy, the reason is that authors and publishers need them in order to create new works of authorship, rather than because the limitations enrich the public domain and enhance the public's share of the copyright bargain. The model is not rooted in compensation. It doesn't inquire what authors deserve. It asks instead whether an increase in copyright protection will lead to the production of more or better works of authorship. The answer to that question is always yes -- that's how this sort of linear model operates. If we treat that the model as an accurate description of reality rather than a useful rhetorical device, then we're trapped in a construct in which there's no good reason why copyrights shouldn't cover everything and last forever. Recently, copyright legislation has seemed to be a one-way ratchet, increasing the subject matter, scope, and duration of copyright with every amendment. Within the confines of the conventional incentive model, it is difficult to argue that that is a bad thing.

In the past five or six years we've seen another evolution. Copyright talk no longer focuses on incentives. Instead it concerns itself almost obsessively with issues of control.³⁶ Professor Jane Ginsburg is the most articulate proponent of greatly enhanced copyright owner control. Ginsburg argues that, in a digital age, the copyright clause of the US constitution permits (and may even require) Congress to grant authors exclusive rights to control *access* to their works.³⁷ In a nutshell, the Constitution tells Congress to grant authors the "exclusive rights" to their writings, and in a digital age, the only way to accomplish that is to give authors control over access -- not merely initial access, but continuing control over every subsequent act of gaining access to the content of a work. In essence, that's an exclusive right to use. In other words, in order

³⁶ Again, I'm indebted to Professor Elkin-Koren for the taxonomy.

³⁷ Jane C. Ginsburg, Essay: From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law, in HUGH HANSEN, ED, U.S. INTELLECTUAL PROPERTY: LAW AND POLICY (Sweet & Maxwell 2000).

to effectively protect authors' "exclusive rights" to their writings, which is to say, control, we need to give them power to permit or prevent any use that might undermine their control. That means that copyright owners *must* have the power to control individual consumers' reading, viewing, hearing or using copies of their works on an ongoing basis.

Encouraged by that viewpoint, the powers that are have come around to the view that, in a networked digital world, limitations on copyright owners' control of their works are no longer so desirable.³⁸ In the 1990s, Congress added about 100 pages to the statute, almost all of them billed as loophole-closers.³⁹ We've also come around to a new way of thinking about copyright: Copyright is now a tool for copyright owners to use to extract all the potential commercial value from works of authorship, even if that means that uses that have long been deemed legal are now brought within the copyright owner's control.

Under the old way of thinking about things, copying your CD and carrying the copy around with you to play in your car, in your Walkman, or in your cassette deck at work is legal. Borrowing a music CD and making a copy on some other medium for your personal use is legal. Recording music from the radio; mixing different recorded tracks for a "party tape," and making a copy of one of your CDs for your next-door neighbor are, similarly, all lawful acts. The copyright law says so: section 1008 of the copyright statute provides that consumers may make non-commercial copies of recorded music without liability. Many people seem not to know this any more. An increasingly large slice of the population

³⁸ See, e.g., 144 Cong. Rec. H9952 (1998) (remarks of Rep. Mary Bono):

Actually, Sony wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.

³⁹ See Intellectual Property and Communications Omnibus Reform Act of 1999, Public L. 106-113 (1999); Digital Theft and Copyright Damages Improvement Act, Public L. 106-160 (1999); Digital Millennium Copyright Act, Public L. 105-204 (1998); No Electronic Theft (NET) Act, Public L. 105-147, 111 Stat. 2678 (1997); Anticounterfeiting Consumer Protection Act, Public L. 104-153, 110 Stat. 1386, 1388 (1996); Digital Performance Right in Sound Recordings Act, Public L. 104-39, 109 Stat. 336 (1995); Audio Home Recording Act, Public L. 102-563, 106 Stat. 4237 (1992); Copyright Renewal Act, Public L. 102-307, 106 Stat. 264 (1992); Computer Software Rental Amendments, Public L. 101-650, 104 Stat. 5089, 5134; Copyright Remedy Clarification Act, Public L. 101-553, 104 Stat. 287 (1990).

appears to believe that copying recorded music is -- and probably should be -- against the law.⁴⁰ A fortiori, commercial concerns that encourage private consumer copying are appropriate targets for copyright enforcement.

In the new world, we have MP3.com. MP3.com came up with a scheme that allows you to play music over your computer from anywhere, so long as you demonstrate that you already own, or have borrowed, the CD that it's from. This is something that most copyright experts agree you could do for yourself.⁴¹ Even under the old way of looking at the law, it isn't something that MP3.com could do for you without getting a license from the composers of the songs to perform them publicly. But MP3.com negotiated and paid for such a license, so one can imagine why it figured it had nothing to worry about as far as the copyright law was concerned.

When MP3.com rolled out this new service, however, it got sued, both by the folks that own the copyrights in the music⁴² and by the (different) folks who own copyrights in the records.⁴³ Both sorts of lawsuits claimed that in order to play the music for you, MP3.com had to make copies of it. While MP3.com may have purchased a license to perform the music, it didn't have a license to make the copies. That fact, standing alone, shouldn't be determinative. Making temporary unlicensed copies to facilitate licensed broadcasts is something radio and television broadcasters have done as a matter of course for 40 years.⁴⁴ One would

⁴⁰ See, e.g., *Music on the Internet: Is There an Upside to Downloading?: Hearing Before the Senate Judiciary Comm., 106th Cong., 2d Sess. (July 11, 2000).*

⁴¹ Making the copy would be permitted under section 1008. Transmitting it over the Internet to a password-protected file on a server would be permitted because the transmission would qualify as a private (and therefore exempt) performance.

⁴² See *TeeVee Toons v. MP3.com*, 134 F. Supp. 2d 546 (S.D.N.Y. 2001).

⁴³ See *UMG Recording v. MP3.com*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000)

⁴⁴ Broadcasters began this practice without any legal authority, but since 1976 have had a statutory exemption to make incidental copies of music, although not of film or video, in order to facilitate licensed performances. See 17 U.S.C. § 112(a). The original language of the exception, drafted more than a quarter century ago, made it available to "transmitting organization[s]." The original version, then, would have at least arguably privileged MP3.com's copies. In 1998, however, after MP3.com launched its website but before it rolled out its "My MP3.com" service, Congress amended 112(a) to limit the availability of the privilege for those performing recorded music to "a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission." 17 U.S.C. § 112(a).

expect a court to be sympathetic to an argument that the license to perform the music carried with it an implied license to make copies necessary to facilitate the performance,⁴⁵ but that wasn't how it played out in court. MP3.com lost the lawsuits, and lost them badly.⁴⁶ Ultimately, it sold itself to one of the companies that had crushed it in court, and is remaking itself an adjunct to "PressPlay" -- a named but as-yet undesigned major label music subscription service.⁴⁷

In the new world, we have Napster. As of this writing, Napster is still in court arguing that that everything it does, and everything the majority of its subscribers do, is permitted under both the letter and the spirit of the copyright statute. Those arguments are better than colorable, as I'll outline below in detail.⁴⁸ The district court, though, ordered Napster

Nobody has sued broadcasters for making copies of film and video, both beyond the scope of the statutory exception. That should be no surprise: Because copyright rights are phrased so broadly and copyright exceptions are phrased so narrowly, there are a host of common everyday things that, if you apply the language of the statute literally, are clearly illegal, yet nobody sues over them. One of my favorite examples derives from the language of 17 U.S.C. § 110(5). Bars and restaurants currently have a privilege, under § 110(5)(A), to publicly perform a television signal on a single small television set. (This means that it's okay for bars and restaurants to turn on a TV where their customers can see it.) They also are permitted, under § 110(5)(B), to perform the musical part of a television signal, but not the picture part of a television signal, on up to four televisions, so long as the television screens are no larger than 55". This means that a law abiding sports bar is entitled to operate four televisions so long as it turns off the picture on three of them.

⁴⁵ Such an argument is complicated by the fact that copies of recorded music are protected by two distinct copyrights belonging to different copyright owners, both of whom are distinct from the entity that licenses public performance rights. That inconvenient fact, however, also characterizes the two examples described supra note 44, neither of which have generated litigation. What the new digital media have discovered is that when they engage in common everyday unlicensed uses without express statutory exemptions, someone will most certainly sue over them.

⁴⁶ See *TV Toons v. MP3.com*, 134 F. Supp. 2d 546 (S.D.N.Y. 2001); *UMG Recordings v. MP3.com*, 109 F. Supp. 2d 223, (S.D.N.Y. 2000)

⁴⁷ See Brad King, *MP3.com Goes Major Labels League*, WIRE News, July 20, 2001, at URL: <<http://www.wired.com/news/print/0,1294,45377,00.html>>; Brad King, *MP3.com Goes Universal*, WIRE News, May 21, 2001 at URL: <<http://www.wired.com/news/print/0,1294,43972,00.html>>; Justin Oppelaar, *Vivendi U Uploads MP3 for \$370 mil*, Daily Variety, May 21, 2001, at 1.

⁴⁸ See *infra* Third Story, text at notes 82-119. See also Amicus Curiae Brief of 17 copyright law professors, *A&M v. Napster*, Nos. 00-16401 & 00-16403 (9th Cir. Filed 8/__/00)

to shut down.⁴⁹ The 9th Circuit concluded that some of Napster's legal arguments seemed persuasive, at least in part. It nonetheless concluded that an injunction was appropriate because the balance of hardships favored the record companies.⁵⁰ On July 2, 2001, Napster went dark, defeated by its efforts to comply with copyright owners' demands that it prevent any file transfers of protected recordings.⁵¹

Under the old way of thinking about things, if you wanted to design a computer program that was interoperable with another program, or just wanted to look at how the program worked, you reverse-engineered it, and, even if this meant you disassembled and decompiled the code, that was completely legal.⁵² You could use what you learned to create and sell an interoperable program, or just publish what you discovered about the ideas and functional elements embodied in the program, so long as your end product didn't itself infringe the code. So, when Accolade reverse-engineered Sega Genesis software in order to get around the security system that prevented unlicensed games from being played on the Sega Genesis console, and then marketed its own games that circumvented the security system, the court ruled that what it did was completely legal.⁵³

In the new world, we have the DVD Content Scramble System. DVDs are protected by a fairly weak encryption that is intended to prevent them from being played on unlicensed players.⁵⁴ A Norwegian teenager named Jon Johansen reverse-engineered the content scrambling system in order to write a utility that would permit computers running Linux to play DVDs, so that people who went out and bought or rented DVDs wouldn't also have to go out and buy a DVD player or a computer running Windows or Mac OS in order to watch the movies. Because the utility allowed people to circumvent access controls encoded in DVDs, it also

⁴⁹ *A&M Records v. Napster*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). See also *A&M Records v. Napster*, 2001 U.S. Dist. LEXIS 2186 (N.D. Cal.) (modified injunction on remand); *in re Napster Copyright Litigation*, No. MDL-00-1369-MHP, C-99-5183-MHP (N.D. Cal. July 11, 2001) (prohibiting Napster from resuming file trading operations).

⁵⁰ 239 F.3d at 1020-25.

⁵¹ See *infra* notes 121-126 and accompanying text.

⁵² E.g., *Sony v. Connectix*, 203 F.3d 596 (9th Cir. 2000).

⁵³ See *Sega v. Accolade*, 997 F.2d 1510 (9th Cir. 1992).

⁵⁴ Licensed players are required to incorporate a number of features and restrictions, ranging from copy controls to limits on the ability of consumers to play DVDs in other geographic regions or to fast forward through material.

permitted them to play DVDs purchased in Britain on DVD players made and sold in the U.S. and vice versa, or to skip past Disney's 10 minutes of otherwise unskippable previews. Johansen distributed the utility on the Internet. Folks mirrored it. Motion picture studios filed suit, arguing that even if the reverse engineering were legal (since its purpose was to create an interoperable computer program), the utility was itself illegal because it allowed folks to circumvent their content scrambling system, and that, therefore, distributing it was illegal without regard to what people wanted to use it for.⁵⁵ U.S. movie studios didn't have jurisdiction over Johansen, so they sicced the Norwegian police on him.⁵⁶ They did, however, file suit in US courts against people who posted Johansen's code, and people who linked to sites that posted Johansen's code. The judge went along, concluding that posting the code or *linking* to a site that posted the code violated the copyright statute.⁵⁷ The case is on appeal to the Second Circuit.

These cases are where the questions I raised will be decided. Every effort is being made to characterize the defendants in these cases as "pirates", because we all know that pirates are bad and that pirates should lose.⁵⁸ Telling the story that way, though, has required an evolution in what we mean when we call something piracy. Piracy used to be about folks who made and sold large numbers of counterfeit copies. Today, the term "piracy" seems to describe any unlicensed activity. The content industry calls some things that are unquestionably legal piracy -- like making the recordings expressly privileged under section 1008 of the

⁵⁵ See *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 311-13 (SDNY 2000). The basis of this claim was the anti-circumvention statute discussed supra notes 16-17 and accompanying text.

⁵⁶ See Jon Johansen Indicted by the MPA(A), Slashdot, Jan. 24, 2000, at URL: <<http://slashdot.org/articles/00/01/24/2024233.shtml>>.

⁵⁷ See *Universal City Studios v. Reimerdes*, 82 F. Supp. 2d 211 (SDNY 2000). In a related action, the trade association that licenses the CSS content scrambling system sued Copyleft, a non-profit organization that created a teeshirt in support of the defendants for misappropriation of trade secrets. The back of the teeshirt reproduced an image of DeCSS code. See *DVD Copy Control Association v. McLaughlin*, Case No. CV 786804 (Super. Santa Clara, CA).

⁵⁸ See Brief of Plaintiffs-Appellees, *Universal Studios v. Corley*, (No. 00-9185) (2d Cir. Filed 2/20/01) at __; Brief of Plaintiffs-Appellees, *A&M Records v. Napster*, at 2-5 (No. 00-160401); MPAA, Press Release, Film Studios Bring Claim Against DVD Hackers in Federal Court (Jan. 14, 2000), online at URL: <http://www.mpaa.org/Press/>; Brief of Amici Curiae Motion Picture Assn of Am et. al., *A&M Records v. Napster* (No. 00-160401).

Audio Home Recording Act.⁵⁹ And more and more people appear to believe them.

Content owners argue that the reason consumers are now pirates is that technology now makes it possible for small-scale unauthorized users to commit grand theft.⁶⁰ From the so-called pirates' point of view, though, they are doing the same sort of things unlicensed users have always done -- making copies of things for their own consumptive use, sharing their copies with their friends, or taking the works apart to figure out how they operate. What has changed is not the behavior but the epithet. Content owners are understandably concerned that in a digital environment, conduct that used to be harmless might have the same effect as the commercial sale of large numbers of counterfeit copies. They have managed to persuade a substantial segment of the public that if behavior theoretically could have the same effect as piracy, it must *be* piracy, and must therefore reflect the same moral turpitude we attach to piracy, even if it is the same behavior that we all called legitimate before.

If all this stuff is piracy, then, it must be illegal, and helping it along is giving aid and comfort to pirates. That must be illegal, too, whatever the pesky statute says.

Second story: Herein of Jukeboxes

This is the Darwinian story of the jukebox. It's important, in understanding this tale, to realize that our copyright laws have been written not by Congress, not by Congressional staffers, not by the copyright office or by any public servant in the executive branch, but by copyright lobbyists negotiating complex deals among themselves in complicated multiparty negotiations.⁶¹ That process, unsurprisingly, shapes the sorts of laws that Congress is able to pass.

⁵⁹ See, e.g., Music on the Internet: Is There an Upside to Downloading?: Hearing Before the Senate Judiciary Comm., 106th Cong., 2d Sess. (July 11, 2000) (remarks of Hilary Rosen, RIAA).

⁶⁰ See, e.g., Copyrighted Webcast Programming on the Internet, Hearing Before The Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 106th Cong. 2d Sess. 51 (June 15, 2000) (testimony of Jack Valenti, Motion Picture Ass'n of Amer.) (transcript online at URL: <http://commdocs.house.gov/committees/judiciary/hju66178.000/hju66178_0f.htm>).

⁶¹ See Jessica Litman, Copyright and Technological Change, 68 Ore. L. Rev. 275 (1989).

Consider the copyright laws' treatment of music: Composers' copyright began in 1831 as a right to reproduce and sell sheet music.⁶² The copyright statute first gave composers legal control over public performances in 1897,⁶³ but composers couldn't do anything to enforce it. The basic structure of the business was that composers wrote songs and then assigned their copyrights to music publishers, who published sheet music; collecting royalties from sheet music sales was how composers made money.⁶⁴ Once composers (and therefore publishers) received a public performance right, the music publishers dealt with it by licensing the public performance right as an incident of sheet music purchase, in essence requiring anyone who publicly performed music to have a purchased copy of the sheet music in hand.

That worked for a time, since musicians and singers needed to buy sheet music in order to play or sing the song, but then Thomas Edison invented the precursor to the phonograph, and suddenly we had the possibility of a single performer's performance being enjoyed, more or less simultaneously, in hundreds of different places.⁶⁵ In 1914, though, composers got together and started the American Society of Composers, Authors and Publishers (ASCAP). ASCAP's innovation was to persuade many composers to assign their public performance rights to ASCAP.

⁶² See General Revision of Copyright, Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

⁶³ See Act of January 6, 1897, 29 Stat. 694.

⁶⁴ Although by then there were both player piano rolls and the precursors of phonographs -- called "talking machines" (including both the Victrola disk player and the Edison rotating cylinder) -- composers didn't earn any money from them, because, at the time, putting songs on piano rolls or other mechanical devices didn't infringe any rights in the copyright bundle. See *White Smith Music Publishing v. Apollo*, 209 U.S. 1 (1908).

⁶⁵ Until 1909, music publishers and composers got no money whatsoever from even public "talking machine" performances, since they had tied performance compensation to sales of copies, and their statutory rights to license copies of sheet music didn't cover records or piano rolls. Piano roll manufacturers didn't bother to ask permission before making piano rolls that played popular music, and the courts ultimately held that they didn't need permission. See *White Smith Music Publishing v. Apollo*, 209 U.S. 1 (1908). This struck composers and music publishers as outrageous. So, in 1909, Congress gave composers and their music publishers a right to control the manufacture of piano rolls and phonograph records. The expanded reproduction right was phrased as a right to control "mechanical reproductions" or the manufacture of "parts of instruments serving to reproduce mechanically the musical work." Copyright Act of March 4, 1909, 35 Stat 1075 § 1(e). That allowed composers to collect money from the manufacture and sale of piano rolls, phonograph cylinders, Victrola disks and the like. Composers and music publishers still did not have any practical way to enforce their legal right to control public performances.

ASCAP would then approach commercial establishments that played music and offer to sell them licenses to play any and all works by ASCAP composers for a year in return for a flat fee. Otherwise, ASCAP would sue. A few businesses bought licenses. Most businesses did not. ASCAP sued and won.⁶⁶

Suddenly, a lot of people were upset. ASCAP licenses were relatively cheap then as now, but people resented being asked to pay, say, a dime per seat per year in order to buy the right to perform music when they were already either paying some performer or had bought both a phonograph and phonograph records.⁶⁷

When commercial broadcast radio hit the scene, the radio broadcasters didn't ask for permission to perform the music they played. ASCAP knocked on the door and, a couple of lawsuits later, had persuaded most of the larger radio broadcasters to buy licenses. Broadcasters, theater owners and restaurant owners were unhappy with the situation, and engaged in long and concerted efforts to get rid of ASCAP, with not much success.⁶⁸

They were more successful, however, in finding a way around ASCAP. There was an exemption in the copyright statute for the public performance of music on coin operated machines. The coin-operated phonograph or gramophone had been invented in the late 19th century. In the early 1900s it was an unamplified, single-play novelty machine, found in penny arcades, playing whatever song the local sheet music store designated as song-of-the-week. Congress exempted these machines so that the operators of penny arcades wouldn't need to buy a copy of sheet music or otherwise seek permission for what, after all, was a novelty device being used to promote the sale of sheet music.⁶⁹

⁶⁶ See ROBERT A. GORMAN AND JANE C. GINSBURG, *COPYRIGHT: CASES AND MATERIALS* 575-76 (5th Ed. 1999); Litman, *supra* note 61, at 291-99, 303-304; Ralph Oman: Source Licensing: the Latest Skirmish in an Old Battle, 11 *Colum-VLA J. L. & Arts* 251 (1987).

⁶⁷ See Litman, *supra* note 2, at 49-50.

⁶⁸ See Oman, *supra* note 66. Until the 1998 Fairness in Music Licensing Act, Public Law No. 105-298, all that ASCAP's opponents had managed was to persuade the Justice Department to bring only modestly successful antitrust charges resulting in a consent decree. See Gorman & Ginsburg, *supra* note 66, at 579-83.

⁶⁹ See H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7-9 (1909).

But by the 1920s, folks had invented multiple play machines, and, in 1927, the American Music Instrument Company marketed the first jukeboxes with amplified speakers. Here was the thing about jukeboxes: There was an exemption in the copyright law for public performance on coin operated machines. A jukebox was a coin-operated machine. If you had a jukebox in your bar, restaurant or bowling alley, you could play music over the jukebox, collect a nickel per song, and be legally exempt from ASCAP royalties. So jukeboxes exploded; businesses with jukeboxes no longer needed ASCAP licenses.

When the exception was included in the statute, what everyone had in mind were un-amplified, one-play, novelty machines. The jukebox of the late 1920s, in contrast, was a pretty good substitute for what passed in those days for a commercial sound system. The statutory language, though, exempted the "rendition of a musical composition by or upon coin-operated machines." Composers and music publishers tried to get the jukebox exemption repealed without any success. (Indeed, it stayed in the law in one form or another for eighty years.)⁷⁰

The next time the statute was revised, therefore, the music industry was bound and determined that nothing like that would ever, ever happen again. Music industry lobbyists insisted that the public performance right be defined as broadly as possible, and it was.⁷¹ First of all, the courts had interpreted the old law to distinguish between broadcasting, which was performing, and turning on a television or radio, which was not.⁷² The 1976 Act defined performance much more broadly: broadcasting is still performing; turning on your television is also performing; operating the satellite that transmits the signal from the network to the local broadcaster is performing. The law gives copyright owners control over public performances, and public is defined to cover both any performance in a public place and any performance transmitted to members of the public.⁷³ There are lots of exceptions, but, stung by the jukebox experience, copyright owners in general and music copyright owners in particular

⁷⁰ See Oman, *supra* note 66. The jukebox exemption was replaced in 1976 by an essentially unenforced compulsory license with an \$8 per jukebox annual license fee, and repealed entirely in 1989 when we joined the Berne Convention. There aren't a lot of jukeboxes anymore now that they've lost their copyright exemption, and not many of the ones that remain are licensed.

⁷¹ See Litman, *supra* note 61, at 319-32.

⁷² See *Twentieth Century Music v. Aiken*, 422 U.S. 151 (1975).

⁷³ See 17 U.S.C. § 101.

resisted and have continued to resist any proposals for privileges or exemptions that are phrased in broad terms that could be generally useful. The 1909 Act was 12 pages long, while the current law is 205 pages long, and most of the extra pages are taken up by conditions limiting the scope of possible exceptions.⁷⁴

Even so, there are always unanticipated results from linguistic fortuity. The growth of the Internet has given us a lot of new businesses that need copyright licenses, and many copyright owners have been reluctant to sell them. Some of these new businesses have plausible arguments that their business models take advantage of an existing statutory privilege, exception or loophole. To deter new media from claiming the benefit of old shelters, the music industry has adopted scorched-earth litigation as its backup strategy. Someone comes up with a new concept that might fit within a statutory exception, privilege or compulsory license? The music industry files suit. It's a little thing that won't have much impact on the bottom line? File suit anyway. Remember the jukebox. File suit just in case. Winning is good, but running upstart new companies out of business through expensive litigation is nearly as good, and much more certain. By the end of the year 2000, many interesting new businesses had folded their tents, citing the cost of litigation as the biggest reason why.⁷⁵ By the following summer, even high profile, well-capitalized dot coms like MP3.com and Napster had conceded defeat.⁷⁶

The music and recording industries, meanwhile, moved on to more ambitious targets. If the goal is to prevent unlicensed use by individual consumers, without actually litigating whether those uses are illegal,

⁷⁴ The 1909 Copyright Act occupied 12 pages of the United States Code. As originally enacted, the 1976 Copyright Act was 61 pages long. By 1995, a variety of amendments had expanded its length to 142 pages. Today it is 205 pages long.

⁷⁵ See, e.g., Sara Robinson, *Online Music Companies Out-Played*, *Interactive Week*, Jan. 29, 2000, at URL: <<http://www.zdnet.com/intweek/stories/news/0,4164,2678955,00.html>>. Scour.com, for example, was an entertainment portal that operated a search engine. Scour's search engine allowed people to search for music, video, image and radio material on the web, and, like other search engines, it returned results without distinguishing between files posted with the copyright owner's permission and files posted without it. Scour.com also allowed visitors to download a file sharing utility that permitted the exchange of music, video and audio files. I don't see anything in the story so far that indicates that anything Scour.com was doing was breaking the law, but the recording and film industries sued it right into bankruptcy.

⁷⁶ See *supra* notes 47--50 and accompanying text.

Internet Service Providers are the handiest choke-point in the system. Using software to track individuals' use of file trading networks and to identify unauthorized copies of works on users' computer hard disks, copyright owners and independent copyright-enforcement services demanded that Internet service providers terminate individual subscribers who engaged in unlicensed file trading.⁷⁷ Their legal authority for doing so was shaky: the law gives an Internet service provider a shelter from liability for its subscribers' infringement, so long as it maintains a policy prohibiting infringement and expeditiously removes or disables access to infringing material residing on its system.⁷⁸ The statute imposes no express obligation to disable access to material residing on subscribers' hard disks and passing through the service provider's system on its way to another computer.⁷⁹ Copyright owners have argued, however, that providing connectivity for individuals identified as having downloaded or uploaded unauthorized copies should be deemed contributory infringement.⁸⁰ According to media reports, some service providers are reluctant to comply with requests to terminate subscribers; others have gone along.⁸¹

3. Third Story: Herein of Trial Lawyers

The rules of the litigation art form require litigants to cast their arguments as enforcing extant law -- Congress, they must insist, addressed and resolved these issues 25 years ago when it enacted the applicable

⁷⁷ See John Borland, File-Trading Pressure Mounts on ISPs, c|net News.com, July 25, 2001 at URL: <http://news.cnet.com/news/0-1004-202-6674297.html>; John Borland, ISPs wary of Role in anti-piracy actions, c|net News.com, June 8, 2001, at URL: <http://news.cnet.com/news/0-1005-202-6221068.html>; Janelle Brown, Who is Spying on Your Downloads?, Salon.com, Mach 27, 2001, at URL: http://www.salon.com/tech/feature/2001/03/27/media_tracker/; Kevin Featherly, RIAA Sends "Ominous" RIAA Letter Over Napster Clones, Newsbytes, Feb. 22, 2001, at URL: <<http://www.newsbytes.com/news/01/162372.html>>. See also Amy Harmon, Internet Services Must Help Fight Online Movie Pirates, Studios Say, New York Times, July 30, 2001, at C4 (motion picture studios demand that ISPs terminate subscribers with infringing material on their hard disks).

⁷⁸ 17 U.S.C. § 512. I discuss Section 512 in greater detail infra notes 107-114.

⁷⁹ 17 U.S.C. § 512(a).

⁸⁰ See Harmon, supra note 77

⁸¹ See sources cited supra note 77.

law⁸² (or 21, 17, 11, 9, 6 or 3 years ago, when it amended it).⁸³ When the issue on the table is the liability of consumers for undifferentiated noncommercial uses, however, that assertion is demonstrably false. Indeed, the legislative history is rife with examples of interested parties' studiously avoiding the issue of consumer liability,⁸⁴ or dismissing it as not a problem.⁸⁵

Whether that's a large obstacle depends on one's position in the copyright food chain. The purpose of much of the litigation is to shut down unlicensed consumer uses without ever squarely addressing the issue of consumer liability. The current popular strategy seems to rely on running out of business through ruinous litigation any commercial or institutional actor who seeks to facilitate unlicensed consumer use. The litigation targets are not, for the most part, doing what they're doing in order to set us free⁸⁶ -- they're in it to make money, and if the legal bills get too high, they will shut down,⁸⁷ agree to roll over and play dead,⁸⁸ or try to put themselves up for sale to their adversaries.⁸⁹ For that purpose, any legal argument will serve so long as it is colorable, and any statute as long and as infelicitously phrased as the Copyright Act has more than a handful of ambiguous hooks on which to hang a better-than-colorable argument.

⁸² 1976 Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541.

⁸³ See 1980 Computer Program Amendments, Public Law 96-517, 94 Stat. 3015; Record Rental Act, Pub. L. No. 98-450, 98 Stat. 1727 (1984); Computer Software Rental Act of 1990, Pub. L. 101-650, 104 Stat. 5134; Audio Home Recording Act of 1992, Pub. L. 102-563, 106 Stat. 4237; Digital Performance Right in Sound Recordings Act, Public L. 104-39, 109 Stat. 336 (1995); No Electronic Theft (NET) Act, Public L. 105-147, 111 Stat. 2678 (1997); Digital Millennium Copyright Act, Public L. 105-204 (1998).

⁸⁴ See Litman, *supra* note 6, at 313-14.

⁸⁵ See, e.g., S. Rep. No. 102-294 (1991); H. R. Rep. No. 92-487 (1971); 9117 Cong. Rec. 4748-34749 (1971)(colloquy).

⁸⁶ But see *Universal v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000)(Hacker journal sued for posting circumvention software); See also *Microsystems v. Scandinavia Online*, 98 F. Supp. 2d 74 (D. Mass.), appeal dismissed, 226 F.3d 35 (2000)(suit to enjoin free speech advocates' posting of program to circumvent Internet content filtering software).

⁸⁷ See *Twentieth Century Fox Film Corp. v. Scour, Inc.* (S.D.N.Y. filed 7/20/00) (Complaint online at URL: <<http://www.mpa.org/Press/ScourComplaint.htm>>; Jim Hu, *Scour Files for Bankruptcy Protection*, c|net News.com, Oct. 13, 2001, at URL: <<http://news.cnet.com/news/0-1005-200-3178822.html>>.

⁸⁸ See *Twentieth Century Fox Film Corp v. iCraveTV*, 53 U.S.P.Q. 2d 1831 (W.D. Pa. 2000)

⁸⁹ See *supra* note 47 and accompanying text.

When we rely on court interpretations of statutes written without these problems in mind to supply the answer to major policy questions, however, we're consigning ourselves to government by linguistic fortuity. It's a little like running a business (or a country) by consulting a child's eight ball toy for every major decision and reliably following its direction. This isn't unworkable when the decisions are minor ones; that's how a common law system that gives primacy to statutes is designed to work. Where the decisions are fundamental choices about the structure of a legal system, though, parsing the language of statutes written about something else entirely is likely to supply unsatisfactory answers.

The Napster litigation offers some instructive examples. If you're a copyright lawyer, Napster probably changed your life. Not long ago, copyright lawyers were toiling in a lucrative but arcane specialty trying to put a little extra excitement in our lives by expanding into Internet law. By the end of 2000, there were 60 million people who knew that they had a big copyright problem and who had begun to form impassioned opinions about what the copyright law should have to say about it.

Whether Napster actually did anything illegal under the laws now on the books is unclear. Napster raised a variety of arguments in its own defense.⁹⁰ All of them began with the premise that Napster did nothing directly that violates the copyright statute -- a premise its opponents conceded. Record companies, composers and music publishers sought to hold Napster vicariously or contributorily liable for the actions of its 60 million users. That meant that there were two hurdles before Napster itself could be held accountable under the current law: First, copyright owners needed to show that Napster's users were breaking the law. Then, and in addition, they had to show that Napster met established legal criteria for vicarious or contributory liability.⁹¹ If people believe that what Napster was doing *ought* to be illegal, but that what its users were doing *ought not* to be, then our current legal means for analyzing this is exactly backwards.

Napster argued that its users were, by and large, behaving entirely lawfully. It relied for this argument on section 1008, which permits consumers to use analog or digital devices to make noncommercial

⁹⁰ See Brief of Appellant Napster, *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401 and 00-16402)

⁹¹ See Gorman & Ginsburg, *supra* note 66, at 752-68; William F. Patry, 2 *Copyright Law and Practice* 1142-51 (1994).

recordings of music.⁹² Napster said that that's what the members of the Napster community did. Napster did not itself copy or transmit any music files; it merely facilitated copying and transmitting by its members, and if their activities were legal, then so were Napster's. Whether that argument works turns on the results of a fairly intricate problem in statutory construction.

Section 1008 was enacted by Congress as part of the Audio Home Recording Act. In return for requiring manufacturers of digital audio tape recorders to incorporate technology preventing serial digital copying, and the levy of a royalty on digital recorders and digital audio tape, the law prohibited suits against consumers for noncommercial copying of recorded music, using either analog or digital devices. Whether consumers could be held liable under pre-AHRA law for home taping was doubtful,⁹³ but the section was touted as finally putting to rest the question of consumer liability for home recording.⁹⁴

The language full of the relevant section of the statute is:

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.⁹⁵

"Digital audio recording device,"⁹⁶ "digital audio recording medium"⁹⁷ and "digital musical recording"⁹⁸ are themselves defined

⁹² See *supra* text at footnote 15.

⁹³ In *Sony v. Universal Studios*, 464 U.S. 417 (1984), the Supreme Court had held that consumer home videotaping of television broadcasts was not copyright infringement, adopting an analysis that appeared to apply with equal force to home audio recording.

⁹⁴ See H.R. Rep. 102-873 (1992); S. Rep. No. 102-294 (1991).

⁹⁵ 17 USC § 1008.

⁹⁶ 17 U.S.C. § 1001(3):

A "digital audio recording device" is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for-

(A) professional model products, and

(analog recording device, analog recording medium, and analog music recordings are not). Napster argued that consumers' file sharing using Napster constituted "noncommercial use by a consumer of such a device

(B) dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds.

"Digital audio copied recordings" are defined as

a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission.

17 U.S.C. 1001(1).

⁹⁷ 17 U.S.C. § 1001(4):

(A) A "digital audio recording medium" is any material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device.

(B) Such term does not include any material object-

(i) that embodies a sound recording at the time it is first distributed by the importer or manufacturer; or

(ii) that is primarily marketed and most commonly used by consumers either for the purpose of making copies of motion pictures or other audiovisual works or for the purpose of making copies of nonmusical literary works, including computer programs or data bases.

⁹⁸ 17 U.S.C. § 1001(5):

(A) A "digital musical recording" 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.

(B) A "digital musical recording" does not include a material object-

(i) in which the fixed sounds consist entirely of spoken word recordings, or

(ii) in which one or more computer programs are fixed, except that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material.

or medium for making digital musical recordings."⁹⁹ Record companies argued that "such a device" should be read as limited to "a digital audio recording device," or "an analog recording device." Napster was obviously not an analog recording device, so its users were acting lawfully only to the extent that they were using digital audio recording devices. The definition of "digital audio recording device," though, excluded audio recording equipment designed primarily to record nonmusical sounds. The recording industry argued that that exclusion should be read to extend to computers.¹⁰⁰ Since Napster users made their copies using computers and saved the copies to their hard drives, the record companies argued, the Audio Home Recording Act exemption didn't apply.¹⁰¹ Napster responded that "such a device" encompassed the devices defined in the statute and other devices like them. Even if a computer were not a digital audio recording device, and were therefore not obliged to comply with the AHRA's royalty and SCMS provisions, a computer used to make copies of recorded music was sufficiently akin to digital and audio recording devices to be "such a device" within the meaning of section 1008. Napster claimed that the legislative history of section 1008 supported its interpretation.¹⁰² Members of Congress had insisted that section 1008 would relieve consumers of the threat of liability for any home copying of music, whether or not copies were made on devices covered by the Act.¹⁰³

⁹⁹ Napster opening brief, *supra* note 90, at 18-22; Napster reply brief at 3-11, *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir 2001)(Nos.00-16401, 16403).

¹⁰⁰ Brief of Appellees A&M Records et.al. at 26-28, *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir 2001)(Nos.00-16401, 16403) (Hereinafter RIAA brief). In addition, record companies insisted that Napster was not used to make "digital music recordings" within the meaning of the statute, because that statutory definition excluded material objects "primarily marketed and most commonly used by consumers for the purpose of making copies of nonmusical literary works, including computer programs."

¹⁰¹ As the RIAA's website puts it: "General purpose computers are not covered by the AHRA, so that statute imposes no obligations on Napster and provides no immunity for either Napster or its users." See RIAA /On Deck / FAQ on Napster and Digital Music at URL: <<http://www.riaa.org/Napster.cfm>>. That reading of the language would put all recording devices that use computers outside of the scope of the AHRA. That would probably suit the record companies, who have come to dislike the way the AHRA has worked out in practice.

¹⁰² Napster opening brief, *supra* note 90, at 20.

¹⁰³ See, e.g, H.R. Rep. 102-873 (1992):

Section 1008 covers one of the critical components of the legislation: exemptions from liability for suit under title 17 for home taping of copyrighted musical works and sound recordings, and, for contributory infringement actions under title 17 against manufacturers, importers, and distributors of digital and analog audio recording devices and recording

Record companies responded that resort to legislative history was improper when the plain meaning of the statutory language was clear.¹⁰⁴

Both of these arguments are better than colorable. The statutory language could support either reading.¹⁰⁵ The legislative history evidence is similarly equivocal. Napster's lawyers argued, entirely accurately, that members of Congress had understood section 1008 to give consumers a free pass to make noncommercial copies of recorded music regardless of the technology they used. The record companies argued completely accurately that in 1992, Congress didn't have Napster in mind. The district court sided with the record companies. The Court of Appeals for the 9th Circuit affirmed: "[T]he Audio Home Recording Act does not cover the downloading of MP3 files to computer hard drives."¹⁰⁶

Napster also argued that even if the majority of its members were using its service illegally, it could not be held vicariously or contributorily liable. It relied on a provision in the copyright statute exempting "service providers"¹⁰⁷ from liability for copyright infringements by their subscribers so long as they complied with a variety of statutory conditions. Here, the statutory language seemed to support Napster's claim. Section 512 of the statute establishes a safe harbor that protects service providers

media. In the case of home taping, the exemption protects all noncommercial copying by consumers of digital and analog musical recordings.

¹⁰⁴ RIAA brief, *supra* note 100, at 27.

¹⁰⁵ Perhaps the most reasonable reading is one that neither party advocated: If we were to treat Napster client software as a Digital Audio Recording Device, Napster would be obliged to pay the statutory recording device tax into a fund that is divided among composers, record companies and performers, and to incorporate serial copy management into its software. The tax is set by the statute at 2% of the wholesale price with a floor of \$1 per device. Since Napster makes its software available for free download, it would be obligated to pay the minimum, or \$1 per download into the fund. That would give us \$60 million to be distributed among composers, record companies, and performers, but they would lose the control they insist the law gives them. In addition, SCMS would presumably allow unlimited downloads of music files directly from a computer containing an "original" MP3 file, but prevent copying of the file from a computer that downloaded it from Napster. Napster apparently believed it could not continue to do business if it needed to comply with the AHRA. Record companies and music publishers don't like this solution either because it would vitiate their control. Unsurprisingly, no party to the *Napster* litigation advanced this interpretation in court.

¹⁰⁶ *A&M Records v. Napster*, 239 F.3d at 1024..

¹⁰⁷ A "service provider" is defined in section 512(k)(1)(B) as " a provider of online services or network access, or the operator of facilities therefor..."

from liability for their subscriber's infringing activity. Section 512(d) addresses "information location tools":

A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider-

(1)(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection

The purpose of section 512 was to protect the providers of Internet and online services from the fear of liability for third party infringement, and relieve them of responsibility for monitoring and censoring third party communications. So long as they maintained a copyright enforcement policy, and complied with a series of conditions (some more reasonable than others), service providers who didn't know that someone was using their services to commit copyright infringement, and didn't profit directly from the infringing activity, were protected from contributory liability.

The exemption in 512(d) for information location tools was drafted to protect Internet search engines and portals from being sued if they indexed or posted a link to an infringing site. Search engines like Yahoo¹⁰⁸ or Google,¹⁰⁹ for example, respond to individual queries with

¹⁰⁸ <<http://www.yahoo.com>>.

lists of hyperlinks to websites, without distinguishing sites that might contain infringing content.¹¹⁰ Because clicking on the hyperlink allows consumers to visit the site and view it on their computer screens, search engines and portals were concerned that they might be attractive deep pockets in a suit claiming that the linked-to site contained infringing material. Although content owners and members of Congress were skeptical that courts would hold search engines or portals liable on those grounds, they included section 512(d) to assuage those concerns.

Napster is neither a conventional search engine nor a portal, but it argued that it fit the language of 512(d) in every particular. It used information location tools to refer its users to locations where allegedly infringing material might be found. It had no actual knowledge that any particular file in any user's Napster directory was unlawful. It received no financial benefit directly attributable to infringing activity; indeed it charged no fee of any sort, accepted no advertising, and, thus far, had earned no revenue. Further, Napster had terminated more than 70,000 users upon receiving notice from copyright owners that those users were exchanging infringing material.¹¹¹ The district court dismissed this claim on an unpersuasive technicality: because a condition of the safe harbor requires service providers to have in place a copyright policy terminating infringing subscribers, and because Napster failed to put its policy in place until after suit was filed, the court held that Napster could not avail itself of any of section 512's protections, even for behavior that followed scrupulous compliance.¹¹² The Ninth Circuit disagreed. It suggested that Napster's section 512 argument might well shelter it from liability. It concluded, however, that the record companies had raised serious questions about the meaning of section 512(d), and that the district court had correctly concluded that the balance of hardships tipped in the record companies' favor.¹¹³ It therefore left the application of section 512 to be resolved at trial.¹¹⁴

¹⁰⁹ <<http://www.google.com>>.

¹¹⁰ Scour.com, a portal herded into bankruptcy by copyright litigation, see *supra* note 75, did the same, but never got the opportunity to test a defense based on § 512(d) in court.

¹¹¹ See Napster opening brief, *supra* note 90, at 50-55.

¹¹² See *A&M Records v. Napster*, 54 U.S.P.Q.2D (BNA) 1746 (N.D. Cal. 2000), *aff'd* in part, *rev'd* in part, 239 F.3d 1004 (9th Cir. 2001).

¹¹³ 239 F.3d at 1025 (quoting *Micro Star v. Formgen*, 154 F.3d 1007, 1009 (9th Cir. 1998)).

¹¹⁴ *Id.*

Finally, Napster had a powerful case law argument, which attracted four amicus briefs in its support.¹¹⁵ When the United States Supreme Court decided in 1984 that the Sony corporation was not liable for copyright infringement based on its manufacture and sale of Betamax video cassette recorders,¹¹⁶ it announced a test for the imposition contributory infringement on "staple articles of commerce" like video cassette recorders: "The sale of copying equipment," the Court wrote "like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." The test has been controversial in the content-owner community since its announcement, and the scope of its application has been widely disputed. Some have read *Sony* to apply to any new technology that is capable of infringing use.¹¹⁷ Others have insisted that it applies only to a narrow class of machines, and then only in very limited circumstances.¹¹⁸ The test has remained important, and has been widely applied in a variety of different cases because it makes policy sense. It seems unreasonable to prohibit devices or technologies with significant legitimate uses merely because they could be used illegally. Napster was unquestionably "capable" of substantial non-infringing uses. Indeed, even if record companies were correct when they claimed that any unlicensed download of music was illegal, Napster was regularly used in non-infringing ways, although the substantiality of that use depends on whether one looked at it in isolation or compared it with the activities of the vast majority of Napster's community of 60 million users. The district court held that *Sony* was inapplicable, in part because of the possibility that Napster could redesign its system to prevent unauthorized copying. The 9th Circuit again concluded that the district court erred. Napster, Judge Beezer wrote, had demonstrated that its system was capable of commercially significant non-infringing uses. That did not, however, get Napster off the hook. The

¹¹⁵ See Brief Amicus Curiae of Copyright Law Professors, *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir 2001)(Nos.00-16401, 16403); Amicus Curiae Brief of the Consumer Electronics Association, the Digital Future Coalition, and the Computer & Communications Industry Association, *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir 2001)(Nos.00-16401, 16403); Amicus Curiae Brief of Digital Media Association, *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir 2001)(Nos.00-16401, 16403); Amicus Curiae Brief of the American Civil Liberties Union, *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir 2001)(Nos.00-16401, 16403).

¹¹⁶ *Sony v. Universal Studios*, 464 U.S. 417 (1984).

¹¹⁷ See Brief Amicus Curiae of Copyright Law Professors, *supra* note 115, at 3-6.

¹¹⁸ See RIAA Brief, *supra* note 100, at 44-46.

court concluded that *Sony* merely prohibited imputing knowledge of infringement to the purveyor of a system that was used for infringement. Here, other evidence in the record demonstrated Napster's actual knowledge of specific infringing activity.¹¹⁹ The Ninth Circuit therefore directed Judge Patel to enter a narrower preliminary injunction, requiring Napster to block access to infringing material when notified of its location, and to police its system for infringement within the limits of existing system architecture.¹²⁰

In March, the district court entered a modified injunction.¹²¹ The injunction obliged Napster to detect and prevent transmission of files containing recordings that plaintiffs had identified as theirs. Napster petitioned the Court of Appeals for the Ninth Circuit for rehearing, arguing that the breadth of the district court's injunction required it to block the exchange of files that did not belong to plaintiffs, including files representing recordings whose copyright owners had expressly authorized distribution over Napster.¹²² The plaintiffs, meanwhile, appealed the injunction as insufficiently protective of their copyrights,¹²³ while accusing Napster of deliberately using ineffective filtering technology to evade the court's injunction.¹²⁴ Napster employed a series of increasingly restrictive technologies to identify and block material claimed by the recording industry. None of the technologies proved perfect, however, and each caused technical problems of its own.¹²⁵ On June 25, 2001 the 9th Circuit rejected Napster's rehearing request. On July 2, the Napster file-trading network went dark.¹²⁶

¹¹⁹ 239 F.3d at 1020-23.

¹²⁰ *Id.* at 1027-29.

¹²¹ *A&M Records v. Napster*, 2001 U.S. Dist. LEXIS 2186 (C.D. Cal. 2001).

¹²² Napster's Supplemental Memorandum in Support of Petition for Rehearing and Rehearing En Banc, *A&M v. Napster*, (March 26, 2001) (Nos. 00-16401, 00-16403).

¹²³ Brief of Plaintiffs/Appellants/Cross Appellees, *A&M v. Napster* (June 25, 2001)(No. 01-15998, 01-16003, 01-16011).

¹²⁴ See Plaintiffs' Report on Napster's Non-Compliance with Modified Preliminary Injunctions, *A&M v. Napster* (March 27, 2001)(No. No. C-MDL-00-169-MHP).

¹²⁵ See Napster's Third Consolidated Report of Compliance with the Modified Preliminary Injunction, *A&M v. Napster* (April 3, 2001) (No. C-MDL-00-169-MHP).

¹²⁶ Napster disabled existing versions of its software and required users to download a new version of its client software designed to facilitate blocking of infringing files. The new software caused a variety of problems, and Napster suspended all file trading on July 2d, allegedly to enable it to address the technical glitches. On July 11, the district court ordered Napster not to resume file-transfer capability until it could demonstrate that no

The Moral

Whether you, and I, and every citizen needs permission for each act of reading, viewing, listening, or learning from material created by others is a core question that will define the nature of our information society. That is why the content industries have seemed willing to plough limitless resources into fighting the copyright wars. That is why the battles have become so bitter. Content owners understandably hope to extend their exclusive rights to encompass a right and ability to prevent unlicensed consumer personal use. This is something that copyright owners have tried to achieve before, with only limited success.¹²⁷ The Internet has provoked them to launch a fierce new campaign to bring private consumer uses within their control. They have found the potential of networked digital technology sufficiently frightening that they are pursuing the prevention of unlicensed personal use with unprecedented ferocity.

Rather than seeking to change or clarify the law in Congress, copyright owners are insisting that the current law already makes unlicensed consumer uses illegal, and that it imposes liability on any business that facilitates them. That strategy bypasses the political difficulties of persuading Congress that the law should prohibit customary consumer behavior.¹²⁸ Whether to impose a complicated legal regime on individual consumer consumption of copyrighted works is a crucial question on which reasonable people might differ violently. Resolving it requires us to decide what we have a copyright law *for*. Requiring consumers to secure permission for each act of consumption will decrease access to and use of copyrighted works by making access and use more burdensome and expensive. Refusing to make consumers pay for

infringing transmissions could evade its filtering software. See Appellant Napster, Inc.'s Emergency Motion for Stay, *A&M v. Napster* (July 12, 2001) (No.01-____). The 9th Circuit granted Napster's emergency motion and vacated the order. Napster nonetheless did not restore file transfer capability. As of the end of July, Napster's website advised its fans that it was still fine tuning" its software, and was putting the finishing touches on a new, licensed, subscription-based service it hoped to debut soon. See Napster Home Page URL: <<http://www.napster.com/index.html>> (visited 7/30/01).

¹²⁷ See *Sony v. Universal Studios*, 464 U.S. 417 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151(1975); *Bobbs Merrill Co. v. Strauss*, 210 U.S. 339 (1908); Jessica Litman, *Copyright and Information Policy*, 55 L. & Contemp. Probs., Spring 1992, at 185; Jonathan Weinberg, *Digital TV, Copy Control and Public Policy*, ___ *Cardozo Arts & Entertainment L.J.* ___ (2001).

¹²⁸ See Litman, *supra* note 2, at 43.

personal, consumptive use, on the other hand, will, at least if the current legal infrastructure remains the same, reduce the incentive to create, invest in, and distribute new works, which may well decrease consumer's opportunities to use them. This is not the sort of choice that it makes sense to resolve by pretending we settled it years ago. It is not the sort of choice that it makes sense to resolve by relying on linguistic fortuity. It seems increasingly unlikely, however, that any alternative resolution is feasible.

Commercial content owners (and their copyright lawyers) believe they are in a war for their own survival, and are committing extraordinary resources to ensure that they emerge victorious. They are fighting the copyright wars using all of the public relations tools at their disposal. They are fielding armies of copyright lobbyists and making campaign contributions so substantial that members of Congress have started to wage turf battles of their own to get jurisdiction over copyright legislation.¹²⁹ Finally, content owners have invested heavily in a strategy based on ruinous litigation. Litigation is effective because the ambiguities in the law supply a sheaf of plausible arguments to take to court, and getting to court turns out to be much of the battle. Enough litigation may enable content owners to prevent inconvenient consumer behaviors by making it too expensive to help them to do what they want to do, without ever addressing whether what consumers want to do is legitimate. By the time the rest of us figure out what policy choices we ought to make, the copyright wars may already be lost.

¹²⁹ See Litman, *supra* note 26, at 133-45.