

By Harrison J. Dossick and David Halberstadter

Facing the Music

The fate of Napster in federal court will have far-reaching implications for the distribution of all forms of entertainment over the Internet

After nearly six months of deliberation, the Ninth Circuit finally issued the decision that had been eagerly and anxiously awaited by the entire music industry and countless music fans. Its opinion in *A&M Records, Inc. v. Napster, Inc.*¹ was a near-total endorsement of the district court's ruling granting preliminary injunctive relief in favor of the music industry plaintiffs. Certainly the music industry—and copyright owners in general—have won a huge and decisive battle in the war against the digital piracy of their intellectual property. Despite the ruling, more skirmishes are expected, and the war will no doubt continue on the legal, technological, public relations, and even legislative fronts.

Much is at stake. Internet-based digital technologies have launched a continuing revolution in the home entertainment arena. The key to many of these services is MP3,² a technology that allows millions of Internet users to search for, access, listen to, and—most significantly for Napster and related cases—share digital files of their favorite music without charge. Other new technologies enable computer users to access radio station transmissions and other audio as well as video media that can be “streamed” over the Internet.

Although they were unheard of several years ago, MP3-based services are now poised to displace compact discs as the preferred method for storing and listening to recorded music, just as cassettes replaced eight-track tapes and compact discs supplanted vinyl LPs. What distinguishes these latest forms of delivery from their predecessors, however, is that many of the companies currently attempting to profit from their growing popularity do not own the copyright to the recorded music. In fact, the initial business models for a number of the more popular MP3-based services presumed that the services could freely exploit the intellectual property of others.

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Take, for example, Napster, the brainchild of a college student who devised a peer-to-peer file-sharing system in order to easily exchange MP3 music files with his roommate. This system has evolved so that anyone logging on to Napster's Web site and downloading Napster's proprietary MusicShare software for free can perform Internet searches for MP3 music files located on the computer hard drives of other Napster subscribers.

Searching for MP3 files with MusicShare is accomplished in one of two ways: either by initiating a search on Napster's proprietary search engine or by accessing Napster's Hot List tool, which allows someone with a Napster account to compile and store lists of the user names of other account holders. In either case, a Napster music search quickly produces a list of the names of MP3 files stored in the hard drives of other Napster users. Once a selection is made, Napster's software creates a connection directly between the searching computer and the host computer that has stored the desired MP3 file. The selected MP3 file is transferred directly from user to user rather than through Napster's network or servers.³

The fact that Napster presently does not charge for these services⁴ no doubt explains why the popularity of Napster's file-sharing service has grown exponentially, especially among college students, who traditionally are among the recording industry's most highly valued and loyal customers. According to documents filed with the district court, Napster connects 100 users and facilitates the sharing of 10,000 MP3 music files every second.⁵

Historically, Napster also has not paid a penny to record companies, music publishers, or recording artists. Although some of the MP3 recordings available through Napster have been placed there intentionally by artists for promotional purposes, the recording industry contends that over 85 percent have been illegally "ripped" (copied) from someone's CD collection into the MP3 format.

Not unexpectedly, the music industry did not simply sit by while its greatest assets—copyrighted sound recordings and musical compositions—were streamed or traded for free over the Internet by third parties. Indeed, record labels and publishers have long recognized that the Internet may prove to be a valuable tool for distributing music to consumers, but they have been slow to establish their own services for a number of reasons, including security and privacy concerns. In an effort to preserve its ability

to use the Internet in the future, the industry launched a series of lawsuits against a number of services that were offering copyrighted recorded music over the Internet.

In January 2000, the major record labels sued a company called MP3.com. The company promoted a service called My.MP3.com, which functioned like an interactive Internet jukebox. My.MP3.com allowed a subscriber to "register" the music the subscriber supposedly already "owned" and the music was streamed back to the user's computer on demand. According to the record companies, MP3.com could not legally offer this service without compensating the record companies for the use of their copyrighted sound recordings. Last May, a federal trial judge issued a scathing opinion finding that the My.MP3.com service engaged in wholesale copyright infringement.⁶

The Music Industry versus Napster

Despite that victory for the record companies, the dispute that has garnered by far the most attention from the legal community and the media is the recording industry's action against Napster. In December 1999, the major record labels and music publishers filed an action against Napster alleging that Napster's service facilitated widespread, systematic copyright infringement.⁷ Initially, Napster sought dismissal of the lawsuit on the grounds that it was an Internet service provider within the meaning of the recently enacted Digital Millennium Copyright Act, and thus it was entitled to the protections of the DMCA's safe harbor provisions—even if infringing content was being transferred over its service. After that effort failed,⁸ the recording industry plaintiffs filed their motion for a preliminary injunction on the basis that 1) the plaintiffs were likely to establish at trial that Napster was liable for both contributory and vicarious infringement, and 2) the potential damage to the recording industry from permitting Napster to continue infringing on the industry's intellectual property while the lawsuit was pending would be staggering to the point of being incalculable.⁹

Napster raised an assortment of defenses for its conduct. Most prominently, Napster claimed that it could not be held liable for contributory infringement because its users were not themselves engaging in any infringing activity.

In July 2000, the district court granted the request for a preliminary injunction. In doing so, the court methodically considered and rejected every defense that Napster had offered. Its sweeping preliminary injunction

order prevented Napster from "engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner."¹⁰

Napster responded to the preliminary injunction by filing an emergency petition with the Ninth Circuit to stay enforcement pending an expedited appeal. Napster stressed the importance of the issues presented in the case to the Internet business community. It claimed that the district court had made many rulings of first impression and that the injunction was impermissibly broad because it blocked the transmission of all music, not solely the sound recordings that were owned by the plaintiffs.

Just hours before the injunction was to take effect, the Ninth Circuit surprised most observers by staying enforcement of the preliminary injunction and expediting Napster's appeal of that order. The Ninth Circuit held oral argument on Napster's appeal in October 2000. A speedy decision was widely anticipated, but the appeal languished for many months.

In the interim, Napster continued to expand its user base. It also pursued a business solution to its dispute with the music industry. On October 31, 2000, Napster made the stunning announcement that it was forming a strategic alliance with Bertelsmann A.G., a German music conglomerate and a plaintiff in the lawsuit. The terms of the deal were not disclosed, but it was reported that Bertelsmann acquired a 60 percent equity interest in Napster in exchange for an infusion of capital ranging from \$20 million to \$60 million and the settlement of Bertelsmann's infringement claims. It was also reported that Bertelsmann and Napster were developing a plan to convert Napster's peer-to-peer file-sharing technology from a free service to a pay service so that the company could begin to generate revenue. Ironically, among the many challenges facing Napster and Bertelsmann will be to create a secure service that prevents nonsubscribers from obtaining Bertelsmann's copyrighted music without charge.¹¹

With the exception of one issue pertaining to the scope of the preliminary injunction, the Ninth Circuit affirmed the district court's ruling in every respect. It found that the recording industry plaintiffs had demonstrated a likelihood of proving at trial that 1) users of Napster engage in

copyright infringement, 2) the swapping of files by users did not constitute a fair use of the plaintiffs' works, 3) Napster was likely liable to the plaintiffs as a contributory infringer, and 4) Napster was likely liable for vicarious copyright infringement. Each of these rulings has significant implications for the future.

To prove contributory infringement, a plaintiff first must show an act of direct infringement by a third party.¹² In order to establish this essential element of their claim, the recording industry plaintiffs must first demonstrate a likelihood of proving that Napster users have committed copyright infringement and then establish that Napster had actual or constructive knowledge of these acts.

The Ninth Circuit concluded that the plaintiffs had, in fact, demonstrated a likelihood of proving that Napster's users were engaging in acts of direct infringement.¹³ By uploading to Napster's search index the names of the music files that were available for others to copy, Napster users infringed upon the exclusive right of the copyright holders to distribute their works.¹⁴ Also, Napster users who downloaded the music files of other users infringed upon the copyright holders' exclusive right to reproduce their works.¹⁵

Fair Use

Napster sought to convince the Ninth Circuit that its users were not infringers and that they were perfectly entitled to do what they were doing based upon the fair use defense to copyright infringement under Section 107 of the Copyright Act. According to Napster, its users were engaging in three specific fair uses of the plaintiffs' copyrighted works. First, Napster users were "sampling"—that is, making temporary copies before actually purchasing the sound recordings. Second, they were "space shifting," or accessing sound recordings on their computers via the Internet that they already owned in audio CD format. Third, Napster users were downloading copies of sound recordings that were on the Napster system with the permission of the copyright owners.

In determining whether the use of another's copyrighted material constitutes fair use, courts consider four factors: 1) The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes. 2) The nature of the copyrighted work. 3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

4) The effect of the use upon the potential market for, or value of, the copyrighted work.¹⁶

The Ninth Circuit affirmed the district court's application of this four factor test to Napster's service. It agreed that the purpose and character of Napster's use of the plaintiffs' copyrighted works militated against a finding of fair use. The appellate court confirmed that Napster's use was not "transformative"; that is, it did not change the character of the work but merely retransmitted the work in a different medium.¹⁷

The Ninth Circuit also concluded that Napster's use of the copyrighted works was commercial in nature even though the copyrighted files were not being sold for profit. The appellate court observed that direct economic benefit was not required to demonstrate a commercial use: "Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use." In this case, commercial use was demonstrated by the plaintiffs' showing that "repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies."¹⁸

Next, the Ninth Circuit endorsed the trial court's conclusions that the second and third factors—the nature of the use and the portion used—as applied in this case would not support a finding of fair use. The Ninth Circuit found no error in the district court's views that the copyrighted files in issue were creative in nature and that the Napster users copied the plaintiffs' music files in their entirety.

The appellate court also agreed with the district court's finding that Napster harmed the market for the plaintiffs' works by reducing compact disc sales among college students and raising the barriers to the plaintiffs' entry into the market for the digital downloading of music. According to the Ninth Circuit, "Having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads."¹⁹

Addressing the specific fair uses that Napster claimed were applicable to its users, the Ninth Circuit—like the district court—rejected Napster's claims that 1) its subscribers use Napster to sample music before making purchases, 2) Napster's presence has helped to stimulate sales of recorded music, and 3) its users are engaged in permissible space-shifting similar to the acceptable practice of time-shifting (taping a broadcast for later viewing) that consumers

may employ when they use their VCRs.²⁰

To bolster its space-shifting argument, Napster had argued that under the Ninth Circuit's 1999 decision in *Recording Industry Association of America (RIAA) v. Diamond Multimedia Systems, Inc.*,²¹ it is permissible to copy copyrighted material for noncommercial space-shifting purposes. For example, the purchaser of a compact disc is entitled to make an audio cassette copy of the disc to play in the purchaser's car. Nevertheless, the appellate court agreed with the lower court's refusal to apply the space-shifting analysis, because the method of shifting in *RIAA* "did not also simultaneously involve distribution of the copyrighted material to the general public; the time- or space-shifting of copyrighted music was transferred from the user's computer hard drive to the user's portable MP3 player."²²

Contributory and Vicarious Infringement

After disposing of the fair use issue, the Ninth Circuit in *Napster* turned to whether the plaintiffs were likely to prove that Napster was liable for contributory infringement. The plaintiffs were required to demonstrate that Napster had knowledge of the infringing activity of its users and was either inducing, causing, or materially contributing to that conduct.²³ Actual knowledge of infringing action was not required; Napster merely had to have some reason to know of direct infringement by users of its service.

The Ninth Circuit agreed with the district court's conclusion that Napster had both constructive and actual knowledge of direct infringement by its users and thus contributed to the infringing activity.²⁴ The district court had analogized Napster's conduct to that of the defendant in the *Fonovisa v. Cherry Auction, Inc.* swap meet case, in which the operator of a swap meet was found liable for contributory infringement arising from the conduct of participants in the meet because the owner "ha[d] the right and ability to supervise the infringing activity and also ha[d] a direct financial interest in such activities."²⁵ Although Napster may not have the same ability as a swap meet owner to actually see the infringing conduct, the district court concluded that Napster supervises the use of its system, at times polices the conduct of its users, and, in all reasonable likelihood, has a direct financial interest in the infringing activity conducted by its users—largely because it has economic incentives for

tolerating the underlying unlawful behavior.²⁶ The Ninth Circuit endorsed this analysis.²⁷

Napster had contended that it was protected from contributory liability because its conduct constituted a “substantial noninfringing use.” Also known as the “staple article of commerce doctrine,” this defense derives from the U.S. Supreme Court’s 1984 decision in *Sony Corporation v. Universal City Studios, Inc.*²⁸ regarding the Betamax technology. In *Sony*, the Supreme Court found the practice of time-shifting to be the predominant use of Sony’s VCR and a fair use of the works copied. The Court therefore refused to hold the manufacturer and retailers of videotape recorders liable for contributory infringement even though such machines could be and were used to make unauthorized copies of copyrighted motion pictures.²⁹

The Ninth Circuit in *Napster* made clear that it was bound to follow the Supreme Court’s decision in *Sony*. However, the evidentiary record supported the district court’s finding that “Napster has actual knowledge that specific infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material.”³⁰ These facts rendered Sony’s holding of limited assistance to Napster and were more than enough to support the district court’s finding that the recording industry plaintiffs would likely prevail in establishing that Napster was contributorily liable for its users’ copyright infringement.

The appellate court also agreed with the district court on the issue of whether the plaintiffs were likely to prove that Napster engages in vicarious copyright infringement. Noting that vicarious copyright infringement was an outgrowth of the doctrine of respondeat superior, the Ninth Circuit observed that, in the area of copyright law, vicarious liability extends to cases in which a defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”³¹ According to the Ninth Circuit, the district court properly had found that Napster benefits financially from the availability of protected works on its system because Napster’s future revenue is directly dependent upon increases in its user base, and the availability of such works acts as a draw for future Napster customers.³²

The Ninth Circuit also concluded that Napster had at least a limited right and ability to supervise and police its system and failed

to exercise that right to prevent the exchange of copyrighted material. Based upon this finding and the determination that Napster benefits financially from the continuing availability of infringing files on its system, the Ninth Circuit affirmed the district court’s conclusion that the plaintiffs had demonstrated a likelihood of success on the merits of their vicarious copyright infringement claim.³³

Napster sought to invoke in its defense the provisions of the Audio Home Recording Act of 1992.³⁴ Napster claimed that its users engage in actions protected by Section 1008 of the AHRA, which exempted from claims of copyright infringement the use by a consumer of digital or analog recording devices for making copies of musical recordings for “noncommercial use.” Agreeing with the district court yet again, the Ninth Circuit rejected this defense on the basis that Congress did not intend for the AHRA to apply to the downloading of MP3 files to computers or computer hard drives. Napster also renewed on appeal its claim that it was entitled to the protections of the safe harbor provisions of the DMCA. While the Ninth Circuit declined to go as far as the lower court in rejecting these claims, it concluded that the plaintiffs had raised “serious questions regarding Napster’s ability to obtain shelter” under the DMCA, including whether Napster even qualified as an Internet service provider as defined by the DMCA.³⁵

Based on all these conclusions, the Ninth Circuit agreed that a preliminary injunction was “not only warranted but required.” Its most significant disagreement with the district court, however, was regarding the appropriate scope of the preliminary injunction order. The Ninth Circuit considered the district court’s preliminary injunction too broad because “it places on Napster the entire burden of ensuring that no ‘copying, downloading, uploading, transmitting, or distributing’ of plaintiffs’ works occur on the system.”³⁶ The appellate court placed the burden on the plaintiffs “to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content.” It also placed upon Napster “the burden of policing the system within the limits of the system.”³⁷

The Injunction

After the Ninth Circuit issued its ruling, Napster tried to avoid the issuance of an injunction. First, Napster sought to negotiate a resolution of the dispute with the aid of a

court-appointed mediator. Shortly thereafter, Napster publicly offered to settle the dispute with all plaintiffs for \$1 billion, payable over five years.

With no resolution in hand, the parties returned to district court on March 2, 2001, to argue the scope of the injunction. Napster stated in open court that it had developed the ability to screen individual files and therefore block further sharing of copyrighted music, which it intended to implement immediately. This marked a dramatic change in position, as Napster earlier had contended that it lacked the technical ability to police its system in this manner.

In the end, none of these efforts appears to have influenced the district court. Within days after the hearing, the district court issued its order entering a revised preliminary injunction. The order clearly attempts to conform to the Ninth Circuit’s opinion, particularly with regard to the relative burdens each side must bear. The court placed the initial burden on the plaintiffs to provide notice to Napster of specific copyrighted files available on the system (by actual song name and variations thereof to account for accidental or intentional misspelling) but placed the ultimate burden on Napster to assure that identified files will be removed from the system within three business days. Perhaps the most significant feature of the district court’s order is its attempt to anticipate and prevent infringement of future releases. Once the record companies provide notice to Napster of a future release, Napster must implement screening procedures to ensure that the release will not be accessible from its system.

In the meantime, Napster vows to seek en banc review of the Ninth Circuit’s ruling and perhaps even a review by the U.S. Supreme Court. Nevertheless, the recording industry unquestionably scored a major victory against Napster in the Ninth Circuit and in doing so has clarified a number of important legal issues that will likely affect the future of the Internet. Although the full ramifications of the Ninth Circuit’s decision are not yet known, it already appears as if the traditional business of Napster will be the first casualty. How that ultimately will occur is not yet clear.

Napster could continue to negotiate a global resolution with the other member companies of the RIAA. If this were to occur, Napster ironically would become aligned with the rest of the RIAA establishment and would face some of the same piracy issues it is now accused of

creating. Short of a settlement, another Ninth Circuit stay, or some legislative reprieve, and even if Napster could find a way to operate within the injunction, Napster still will face the prospect of being saddled with a monetary judgment that likely will be in the tens of millions of dollars should the case ultimately go to trial—and this result would most certainly force Napster to shut down.

Whatever happens next in the Napster case, the recording industry's current victory against Napster does not really solve the larger problem. Indeed, the Ninth Circuit's conclusions that Napster users were not engaging in any fair use of copyrighted recordings and were therefore engaging in wide-scale infringement were not remarkable to those knowledgeable about copyright law. What is remarkable, however, is that a considerable amount of public opinion seems to consider the court's rulings to be an encroachment on the public's supposed right to free access to music. "I suggest that the old mind-set of selling music as if it were a tangible property is history," said one online commentator. "The new market must deal with reality, not morality." Another expressed the view that shutting down Napster will "just erase the name, not the philosophy."³⁸ Many Napster users speak as though they have an inalienable right to free music and that the Ninth Circuit's opinion is tantamount to censorship.

These views are not held by teenagers and college students alone. Many who work in Internet-related businesses share similar opinions. For example, the president of the Consumer Electronics Association expressed the view that the Ninth Circuit's decision will have the improper effect of "widening the digital divide and stalling the revolution in instant, global access to education, information, and entertainment."³⁹ Even one of the country's best-known political leaders, Republican Senator Orrin Hatch of Utah, seems to endorse the notion that the public's appetite for free music equates to an entitlement to it. Although Hatch is reputed to be one of the strongest advocates of copyright protection, he (and presumably others) are becoming increasingly concerned that the music industry is not moving quickly enough into new technologies.

For better or worse, Napster has exposed not only the huge public demand for free music but also the public's desire to be liberated from the traditional album-oriented record company sales model. (Unlike the record companies or the

Internet-based music retailers like CDnow and Amazon.com, Napster allows users to access music on a track-by-track basis without having to purchase an entire album of songs.) Whether Napster survives, the market demand for an Internet-based music delivery service will remain unaffected. For artists as well as consumers, Napster tapped a desire for an easily accessible service that allows emerging artists without recording contracts to reach the public.

At the root of most of these remaining issues is a growing public perception that the music industry has been too slow to design a system that would satisfy an increasing appetite for enhanced convenience and greater choice. Indeed, many have observed, like Senator Hatch, that services such as Napster fill a vacuum that the industry itself created and could have avoided.

If the industry cannot find a way to respond to these new demands, other Napsterlike services certainly are poised to do so. Unfortunately for the recording industry, Napster may be just the first in a long line of music pirates that will need to be pursued. Smaller Napsterlike services such as Aimster, Freenet, Gnutella, and Napigator offer the same basic features as Napster but have yet to become targets of litigation by the music industry. While most of the Internet services offering downloads of copyrighted material are music-oriented at present, some companies already have developed technologies that can search for motion pictures and television programs posted on the Internet and stream those images back to their subscribers.⁴⁰

The Napsterlike services may be able to capture a large segment of the Napster users who likely will flee if and when Napster either begins to charge a subscription fee or is forced to unplug its servers. Indeed, these similar services may prove to be an even more formidable adversary than Napster because many employ technology that reportedly is less centralized and thus more difficult to interdict.⁴¹ There is also little to stop new Internet entrepreneurs from trying to devise services that conform to the Ninth Circuit's opinion or evading U.S. law by moving their operations offshore. This latter technique has allowed otherwise illegal Internet gambling services to flourish. Even if the industry is able to roll out new services quickly enough, many difficult questions remain. Will the public embrace a subscription-based service that many, rightly or wrongly, believe should be available for free? Will these new services be able to generate a viable revenue structure that will strike the necessary balance between what the public will tolerate and what the

record companies, publishers, and artists will deem sufficient? How will these services generate revenues from high school and college students—traditionally the services' best customers—when many of them do not have access to credit cards? Will millions of these Net-friendly customers continue to look for ways to get their music for free? And finally, will the industry be able to protect its greatest assets from hackers and pirates once sound recordings are distributed by record companies over the Internet? At present, there are no clear answers to these questions. But, to borrow a line from the Beatles (whose sound recordings no doubt continue to be downloaded as you read this), the Napster battle may be just the first step in a long and winding road. n

1 A&M Records, Inc. v. Napster, Inc., No. 00-16401 (9th Cir. Feb. 12, 2001).

2 MP3 is an abbreviation of MPEG-3, a digital format that was developed in the late 1980s by the Moving Picture Experts Group. Napster, id., slip op. at 3.

3 In addition to these basic search-and-download features, Napster supports a New Artist Program, which allows unsigned recording artists to distribute their music over the Internet, and provides a chat service.

4 But see text and note 11, *infra*.

5 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000).

6 UMG Recording, Inc. v. MP3.com, Inc., S.D. N.Y. Case No. 00 Civ. 472 (JSR) (May 4, 2000) (opinion granting partial summary judgment in favor of the plaintiffs).

7 The record labels were not the only ones to complain about Napster's service; in April 2000, the heavy metal group Metallica also sued Napster for copyright infringement and violations of the Racketeering Influence and Corrupt Organizations Act. *Metallica v. Napster, Inc.*, Case No. 0003914 AHM (Cwx) (C.D. Cal. Apr. 2000).

8 Napster's efforts to qualify for the DMCA §512(a) safe harbor provisions failed in large part because it had already admitted that the transmission of MP3 files occurred directly between its users without passing through Napster's servers. Napster took this position in order to avoid liability for direct copyright infringement. In doing so, however, Napster was unable to meet one of the threshold requirements for the DMCA's safe harbor provisions. *A&M Records, Inc. v. Napster, Inc.*, 2000 WL 573136 (N.D. Cal. May 12, 2000).

9 Notice of Joint Motion and Joint Motion of Plaintiffs for Preliminary Injunction, *Napster*, N.D. Cal. Case No. C-99-5183 MHP (June 12, 2000).

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

11 Within a week of the Ninth Circuit's decision, Napster and Bertelsmann jointly reported that they had developed a digital rights management system to prevent unauthorized transfers of music files and were planning to launch a subscription-based version of Napster. *Napster Offers Plan to Beat the Clock*, at <http://www.CBS.MarketWatch.com> (Feb. 16, 2001).

- 12 Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 434 (1984).
- 13 A&M Records, Inc. v. Napster, Inc., No. 00-16401, slip op. at 10 (9th Cir. Feb. 12, 2001).
- 14 17 U.S.C. §106(3).
- 15 17 U.S.C. §106(1).
- 16 17 U.S.C. §107.
- 17 See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (determining whether the use is transformative satisfies the first prong of the fair use test).
- 18 A&M Records, Inc. v. Napster, Inc., No. 00-16401, slip op. at 14 (9th Cir. Feb. 12, 2001). The district court observed that Napster users “get for free something they would ordinarily have to buy, suggest[ing] that they reap economic advantages from Napster use.” A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).
- 19 Napster, slip op. at 20.
- 20 Id. at 21-24.
- 21 Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F. 3d 1072, 1079 (9th Cir. 1999).
- 22 Napster, slip. op. at 24.
- 23 Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F. 2d 1159, 1162 (2d. Cir. 1971).
- 24 Napster, slip op. at 27.
- 25 Fonovisa v. Cherry Auction, Inc., 76 F. 3d 259, 262 (9th Cir. 1996).
- 26 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 919-20 (N.D. Cal. 2000). 27 Napster, slip op. at 32-33.
- 28 Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).
- 29 Id. at 439.
- 30 Napster, slip op. at 31-3 (emphasis in original).
- 31 Id. at 33.
- 32 Id. at 34.
- 33 Id. at 38. The Ninth Circuit did not go as far as the district court on this issue, however. In the Ninth Circuit’s view, the district court failed to recognize that the boundaries of the “premises” that Napster was able to police were limited by the system’s architecture. Id. at 36-37. The Napster system does not “read” the content of indexed files and therefore could not police their content. But it could locate infringing material simply by checking the titles listed in its search indices, which users search to find the recordings they wish to download. Napster, for obvious reasons, did not monitor these indices for infringing material.
- 34 Audio Home Recording Act of 1992 (AHRA), 17 U.S.C. §1008.
- 35 Napster, slip op. at 41.
- 36 Id. at 47.
- 37 Id.
- 38 Vox Populi on Napster, at <http://www.TheStandard.com> (Feb. 12, 2001).
- 39 Hollywood Lauds Victory on Copyrights, Daily Variety, Feb. 13, 2001, at 19.
- 40 In June 2000, the motion picture industry brought a copyright infringement action against RecordTV, which operates like a virtual VCR by searching for television programs that it then streams back to its users. The recording industry and the motion picture industry also teamed up in July 2000 to bring an infringement action against Scour, Inc., which has a service that allows users to search for and obtain MP3 music files and compressed video files. Because the issues raised in these lawsuits are similar to those presented in the Napster case, their fates have likely been determined by the Ninth Circuit’s decision in Napster. In November 2000, however, the financial realities of protracted litigation took their toll on Scour, which filed for bankruptcy protection.
- 41 A battle with Aimster and other similar services may put the music industry in the position of having to pursue the actual users—their best customers—rather than the service, creating a potential public relations nightmare.

The attorneys of Katten Muchin Zavis Rosenman are preeminent providers of legal services to the technology, e-business, entertainment and new media industries. We take equal pride in helping multibillion-dollar companies achieve their business goals and in assisting young entrepreneurs with their first steps. More than just dealmakers and litigators, KMZ Rosenman lawyers have the depth and experience to give you the answers and solutions you need for your successful enterprise.

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