

## Case Summary

### *A&M Records, Inc. v. Napster, Inc.:* Implications for the Digital Music Library

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*A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001),  
*affirming*, 114 F.Supp.2d 896 (N.D. Cal. 2000).

#### I. Introduction

The Ninth Circuit Court of Appeals ruled on 12 February 2001 that the music file-sharing system known as “Napster” committed repeated infringements of copyright law as millions of users uploaded and downloaded copyright protected sound recordings.<sup>1</sup> Recent news reports have focused on the practical implications of the computer-based system and the court’s ruling, examining the opportunities for users to find and share recorded music and the potential losses of revenue for the music industry. Further accounts have demonstrated the difficulties Napster faces as it attempts to comply with the ruling and block access to multitudes of song files and strives to become a subscription service that pays royalties to the music industry.

This paper will, by contrast, provide a summary of the legal reasoning offered by the Ninth Circuit in its decision, and it will examine some possible implications of the ruling for the use of new technologies to store and retrieve files of music and other works in the context of education, research, and library services. This summary gives special attention to possible implications of the *Napster* ruling on the development of a digital library of sound recordings and other works related to music. This examination of the court decision is in furtherance of the Digital Music Library (DML) project based at Indiana University and supported by a grant from the National Science Foundation.

A direct summary of the legal analysis in this case is not always deeply meaningful. Quite bluntly, the analysis presented by the court is thin and poorly explained. The effort to describe the court's approach to the complex legal issues leaves one wanting. Moreover, this is a decision on appeal that is largely affirming the earlier ruling from the district court. The appellate court is generally asking whether the lower court was clearly in error and therefore should be reversed. It is a low standard of review that often defers to the district court's decision—which is also not a paragon of explication—and that does not necessarily compel the most trenchant scrutiny and legal justification. The skimpy explanations in both rulings—combined with a result that is overwhelmingly against Napster—also suggests that the judges felt little need to justify strongly their conclusions. The courts unquestionably found little opportunity under the law for Napster to prevail.

## II. Background and Operation of Napster

Napster is the epitome of what has become known as “peer-to-peer” file sharing. Users may load files onto their own computers and by connecting to the Napster system, allow any other user in any location to retrieve that file on demand. Users can make works available at their own choosing, and can locate and obtain electronic copies of materials that any other person may have chosen to enter into the system. Napster, Inc., the named defendant in this case, does not maintain a central computer system that stores and delivers content files. Instead, individual users employ Napster's software to find and locate files that are stored on the computers owned by other individuals who connect voluntarily to Napster's system.

Technologically, the success of such a system depends on highly creative and sophisticated software and the utilization of the Internet for connecting users throughout the world. The music files are duplicated, stored, and transferred by means of the “MP3” technology for efficiently reproducing sound recordings in a computer-readable format. The fact that the network connections and the software are relatively reliable and easy to use also means that users can quite simply upload and download large quantities of files with relatively little effort. These reproductions and distributions give rise to the potential copyright violations.

Napster represents an innovative and powerful tool for sharing information. However, this tool can generate legal quandaries when the files are protected by copyright law and the owner of the copyright has not given permission for the dissemination of the works. Such was the claim from many members of the music industry, who hold the copyrights to many of the compositions and sound recordings, and who argued that the sharing of files on Napster would replace potential sales of compact disks and other media embodying those same works.

## III. Overview of the Lawsuit

Members of the music industry brought a lawsuit against Napster, Inc., alleging copyright infringement, and in July 2000 the District Court for the Northern District of California issued a preliminary injunction against most uses of the plaintiffs' copyright files. On appeal, the Ninth Circuit upheld that injunction, finding that the "sharing" of the copyrighted files was not fair use and was not within other exemptions from and limitations on copyright infringements created by the Audio Home Recording Act<sup>2</sup> or the Digital Millennium Copyright Act.<sup>3</sup>

The essence of a copyright infringement is the use of a work in violation of one or more of the rights of the copyright owner.<sup>4</sup> In the *Napster* case, the most significant rights at issue were the owner's rights to make reproductions of the work and to distribute copies of the work to the public. The concept of "file sharing" builds on exactly those activities. Users of Napster might, for example, purchase a compact disk of a copyrighted sound recording and duplicate the work into the memory of the user's computer. By then connecting to Napster and permitting access to the personal computer, other users of the system are in effect requesting the system to make additional copies of the work and to transmit those copies through the Internet to the requestor's computer. With each request, the system makes an additional "reproduction," and the transmission can constitute a "distribution" of the work.<sup>5</sup>

If each request is a technological means for making a copy and sending it to an individual elsewhere on the network, then the essential functioning of Napster seemingly creates a copyright infringement with each use. Barring fair use and other exemptions from infringement, the basis for a plausible copyright infringement claim was clear.<sup>6</sup> Given the extraordinary numbers of users and files shared through Napster, the music industry also had little trouble envisioning that it was losing enormous revenues. In fact, given the basic operation of Napster, the Court of Appeals also had little trouble agreeing with the court below that the users of Napster are violating both the reproduction and distribution rights of the copyright owners of the music.

To conclude that the users were committing infringements can result in legal liability imposed on millions of Napster users. Litigation against vast number of individuals is obviously problematic; a lawsuit against the Napster corporation itself is a vastly more efficient means of either shutting down the system or restructuring it to include payment of royalties. The court found that the users were committing the infringements when they uploaded and downloaded files. The company is liable for the misdeeds of the users, if the court can find that Napster committed "contributory infringement" or "vicarious infringement." The court found that Napster was liable on both counts.<sup>7</sup>

Of central importance in the ruling—and of great importance to the DML—was the court's analysis of whether the actions of Napster and its users fit into any of the exceptions in the law from copyright liability. Most notably, the court ruled that file sharing by individual users was not a "fair use" of the copyrighted sound recordings, which would have exempted the activities from infringement liability. The court also ruled that Napster's role in facilitating the dissemination of recordings was not within the

various “safe harbors” created by either the Audio Home Recording Act or the Digital Millennium Copyright Act.

#### IV. Fair Use

The determination of whether or not an activity is within fair use depends on an application and balancing of four factors outlined in Section 107 of the Copyright Act:

1. the purpose of the use
2. the nature of the work being used
3. the amount of the work used
4. the effect of the use on the market for or value of the original work.<sup>8</sup>

The court’s analysis of the four factors was relatively succinct and blunt in its conclusion that the exchange of music files had little chance of surviving a test of fair use. The court took the following view of the factors:

##### *Purpose of the Use*

The court found two reasons for determining that this factor does not favor fair use: the use of the music is not “transformative,” and the users of Napster stood to gain a “commercial” benefit. In both instances, the analysis is weak and often flawed, but the court gave little hint that regardless of any adjustments in its approach it might be more sympathetic to the users.

The concept of “transformative use” inquires whether the activities in some respect change the original work into a new work of new utility. For example, commenting on or excerpting from an existing text can create a new work that serves a new need and a new audience of users. The U.S. Supreme court ruled in 1994 that a parody of a song could be “transformative” as it comments on the work and serves a distinctive purpose, apart from the objectives of the original work.<sup>9</sup>

The *Napster* court rushed the analysis, seemingly holding that the purpose factor requires a finding a “transformative” use, then resolving with no hesitation that the conversion of a work from one medium to another—such as from analog recordings or a CD-ROM to an MP3 file—does not constitute a transformative use.<sup>10</sup> More specifically, the court stated: “Courts have been reluctant to find a fair use when an original work is merely retransmitted in a different medium.”<sup>11</sup> Beyond that statement, the court offered little insight, perhaps with justification. On appeal, the court is only deciding whether the lower court acted properly in enjoining Napster from further activity. The appeals court only needed to resolve, as it did, that the district court’s conclusion was “supportable.”<sup>12</sup>

The appeals court was similarly circumspect in its examination of the “commercial” aspect of the use. Section 107 specifies that with regard to the first factor, the court shall consider “the purpose and character of the use, including whether such use

is of a commercial nature or is for nonprofit educational purposes.” From this language, the court resolved that the law “requires the district court to determine whether the allegedly infringing use is commercial or noncommercial.”<sup>13</sup> In fact, the law makes no such requirement. Whether the use is commercial or educational may be an important fact in the analysis, but such a finding is by no means required under the law. Nevertheless, the finding of a commercial purpose does weigh against a finding of fair use.

The court found a commercial use in the “repeated and exploitative copying” of the works, even if they are not offered for sale.<sup>14</sup> In particular, the court found a commercial purpose in the repeated copying “made to save the expense of purchasing authorized copies.”<sup>15</sup> It seems that making copies to save money may not necessarily prejudice the claim of fair use, but if the copying is “repeated” and “exploitative” and “unauthorized,” the court might infer a net substantial economic advantage to the user and hence resolve that the activity has a “commercial” purpose.

This analysis is dubious at best. The magnitude of the copying or other use may well be indicative of the user’s purpose or objective. A person who makes a single, isolated copy is likely engaged in a personal or research use, while someone who makes multiple copies might be using them in teaching or sharing the copies around the office or among friends. Sometimes the activity is lawful, sometimes not, but the facts surrounding multiple copying can be relevant to inferring the purpose. Quantity is also important to the determination of the potential market harm—the fourth factor—explained below. If the scale of copying is treated as more than just evidence and actually drives the conclusion that the use is “commercial,” then the one fact is virtually determinative of two of the four factors. Large-scale copying stands little chance of ever surviving a fair-use test. The nuances of the law for considering educational applications, networking of research, and communication of news events becomes deeply constrained.

### *Nature of the Original Work*

In just a few sentences, the court ruled that because more creative works receive greater protection than fact-based works, and because the musical compositions and recordings are “creative in nature,” this second factor weighs against fair use.<sup>16</sup> In light of a long series of recent court rulings reinforcing this premise, the court found little flexibility.

Once again, however, the court’s analysis is simplistic. When the Supreme Court ruled that a parody of a song could be a fair use, the Court refrained from reaching a *pro forma* conclusion about the creative nature of music. Instead, the court held that this factor made little or no difference in the analysis, because a parody is possible of any type of work.<sup>17</sup> Hence, no one type of work should be more or less favored in the application of fair use, when the purpose is parody. Such an analysis leaves open the possibility that this second factor could at least be neutral when the “purpose” is a favored one. This approach suggests—as can be demonstrated in many cases—that the court’s resolution of one factor shapes the approach it takes in examining subsequent

factors. An influential relationship among factors is considerably different from the earlier criticism about a single fact bearing dominant influence on the outcome of multiple factors.

#### *Amount of the Work Used*

The court was quick to acknowledge that copying of entire works may well be within fair use, citing among other cases a 1984 ruling from the U.S. Supreme Court that permitted individuals to record television programs for later home viewing.<sup>18</sup> Nevertheless, the court found that Napster users engage in “wholesale copying” of entire works, which weighed against fair use.<sup>19</sup> Yet the court made no effort to explain or clarify “wholesale copying” and how it might be different from any other examples of copying of entire works.

#### *Effect on the Market*

The appeals court agreed with the district court’s conclusion that the use of Napster results in at least two forms of harm to the music industry: the loss of sales of compact disks and a heightened barrier to entry by the music industry into the market for electronic delivery of music. The court noted that market harm could include not merely damage to the present market, but also to future markets that the copyright owner may seek to exploit.<sup>20</sup>

In reaching its conclusion, the court relied extensively on studies commissioned by the recording industry to test the effect of Napster on sales and other markets.<sup>21</sup> The court was clearly persuaded. Napster introduced its own study in an attempt to show that sampling of music on Napster actually leads to increased sales of CDs. The court discounted the significance of that report, citing apparent flaws in the study and the lack of objective data.<sup>22</sup>

Overall, the court gave little room for Napster to make a credible claim of fair use, having found rather summarily that all four of the factors weigh against fair use and in favor of infringement. Moreover, the court rejected Napster’s claims that it could defend its activities as “sampling” or “space-shifting.” Other courts had given these notions some significance as particular varieties of fair use.<sup>23</sup>

## V. Audio Home Recording Act

Congress enacted the AHRA in 1992 in response to the advent of digital audio tape recording equipment and supplies entering the American market.<sup>24</sup> The law imposed monetary duties on the equipment and supplies, but in exchange permitted “noncommercial” users to be protected from copyright infringement liability when they make copies of “digital musical recordings or analog musical recordings.”<sup>25</sup> The court swiftly dismissed any argument that these protections could apply to the copies of MP3 files that Napster users make when they download files to their computers.<sup>26</sup>

The AHRA applies to the use of a “digital audio recording device.” Such a device may well include a computer, but the definition in the Copyright Act specifies about the 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. . . .”<sup>27</sup> The court ruled that a computer and its hard drives do not have their “primary purpose” of making audio recordings. Moreover, the court—with no scrutiny of the statutory language—ruled that the sounds saved to a computer drive are not within the statutory definition of a “digital music recording.”<sup>28</sup>

## VI. Digital Millennium Copyright Act

Congress enacted the DMCA in October 1998, and it is a lengthy and complex bill addressing numerous issues of copyright law and making many fundamental changes in the Copyright Act.<sup>29</sup> One of those changes was the addition of provisions offering a “safe harbor” from liability for “online service providers” that provide access to computer network systems on which a user may ultimately commit a copyright infringement. The DMCA holds the possibility of protecting Napster itself from liability for the infringements committed by its users.

The appeals court agreed with Napster that the DMCA provisions could conceivably apply in this case. But the court outlined a series of questions that remained unresolved with respect to the parties’ compliance with the specific procedures in the code and whether Napster itself is a service provider within the meaning of the statute. The appeals court left these questions for the lower court to resolve at trial—should this case ever actually go to trial.<sup>30</sup>

## VII. Conclusion: Implications for the Digital Library

At an absolute minimum, the *Napster* decision is a firm reminder that copyright law clearly applies to sound recordings, that courts will look critically at large-scale services that copy and distribute works, and that the applicable law is multi-layered and subject to potentially complex definitions and interpretations. The *Napster* decision demands a close look at the copyright implications of the digital library, but its superficial legal analysis offers little insight for better understanding the law. Neither the district court nor the appeals court seemed to have any sympathy for Napster’s legal position, and consequently neither court seemed to perceive a need to explore and explain the subtleties of the rulings.

The proposed digital library is also, from a legal perspective, considerably different from the structure of Napster. Napster is a service that allows users to decide what music to make available, and the users store the recorded files on their own computers. Much of the legal analysis involving Napster, therefore, positions Napster as a “contributory infringer” or subject to “vicarious liability.” The direct infringers are the

individual users who make and share the copies. By contrast, managers of a digital library will typically determine which materials are available for use and will take the appropriate steps to copy, store, and permit access to the files. The library can potentially be in the position of facing accusations of direct infringement, along with the users who might download, copy, share, and manipulate the files.

Such a library system will be most unlikely to have any benefit of the “safe harbor” for online service providers; that protection generally applies only to systems that operate as “conduits” and do not actually choose and post the content. The *Napster* ruling and other cases also suggest strongly that a library storing music files on a computer system may not fit within the protections of the AHRA.<sup>31</sup> In the end, the library will most likely need to depend on fair use and other exceptions and limitations on the rights of the copyright owner.

The *Napster* ruling also gives only vague clues about the meaning of fair use. Unfortunately, the rulings from both courts suggest strongly that the judges had little inclination to find in favor of Napster, and their analysis of fair use therefore seems to hurry toward an inevitable conclusion without much elaboration. Yet in the struggle for understanding fair use, the case offers these hints about the meaning of the four factors:

*Purpose:* Transformative uses are strongly favored. To the extent that the library stores recordings in their original form, or simply converts them to digital files, the uses are not likely to be transformative. Courts will also be dubious of “commercial” uses or any uses that might ultimately benefit a commercial party—as the private uses ultimately benefit Napster, Inc.—or that blatantly interfere with customary marketing of the works. The *Napster* decisions shed little light on noncommercial implications, but fair use does apply much more generously when the purpose is noncommercial, and especially when the use is specifically limited to education or research.

*Nature:* This factor remains problematic when one is seeking act within fair use. Creative works are generally subject to narrow fair use, and musical works are easily deemed “creative.” When the “purpose” is favored, however, such as for education or research, a court might look more sympathetically at the “nature of the work” and its specific suitability and necessity for fulfilling that purpose.

*Amount:* This factor will also be a challenge when the entire work is copied. Nevertheless, even the *Napster* court conceded that fair use is still possible when the entire work is copied.

*Effect:* Market harm is most easily inferred when the use directly competes with customary sales or other distributions of the works by the copyright owner. Courts also look to the markets that the copyright owner is likely to exploit in the future. Market harm might be found, for example, if the library makes an entire work accessible at a time when the owner also provides a reasonable means for accessing the same work for students to use in the same manner. Market harm might be difficult to infer if the library provides an original collection of excerpts for students to use in a manner that is ideally



sued to a particular course, and the copyright owners do not make the works available in a similar manner.

This examination of fair use is of course superficial, and it is a reflection of the weak analysis in this one court ruling. While the *Napster* ruling is an unavoidable feature on the legal landscape of the DML, it does not inform the issues with any thoroughness. A future study will examine the issue of fair use more thoroughly and will examine its potential implications for the DML.

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<sup>1</sup> 239 F.3d at 1011.

<sup>2</sup> Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237.

<sup>3</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>4</sup> The fundamental rights of the copyright owner are specified at 17 U.S.C. § 106. These rights are also subject of another paper prepared in connection with the DML project and available at <http://www.dml.indiana.edu/legal/index.html>.

<sup>5</sup> The court was specific in concluding that users of Napster violate the distribution right when they upload music files and violate the reproduction right when they download the files as copies in their own computer systems. 239 F.3d at 1014.

<sup>6</sup> Exceptions to, or limitations on, the rights of the copyright owner are detailed in the code sections at 17 U.S.C. §§ 107-122. Some of those provisions are summarized in another paper prepared in connection with the DML project and available at <http://www.dml.indiana.edu/legal/index.html>.

<sup>7</sup> 239 F.3d at 1019-24.

<sup>8</sup> 17 U.S.C. § 107.

<sup>9</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>10</sup> 239 F.3d at 1015.

<sup>11</sup> 239 F.3d at 1015.

<sup>12</sup> 239 F.3d at 1015.

<sup>13</sup> 239 F.3d at 1015.

<sup>14</sup> 239 F.3d at 1015.

<sup>15</sup> 239 F.3d at 1015.

<sup>16</sup> 239 F.3d at 1016.

<sup>17</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

<sup>18</sup> *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984).

<sup>19</sup> 239 F.3d at 1016.

<sup>20</sup> 239 F.3d at 1016.

<sup>21</sup> 239 F.3d at 1016-17.

<sup>22</sup> 239 F.3d at 1017.

<sup>23</sup> 239 F.3d at 1018-19. Of particular note, the U.S. Supreme Court held in the *Sony* case that recording television programs for purposes of “time-shifting” by viewers was within fair use. *See* note 18 above.

<sup>24</sup> Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237.

<sup>25</sup> 17 U.S.C. § 1008.

<sup>26</sup> 239 F.3d at 1024-25.

<sup>27</sup> 17 U.S.C. § 1001(3).

<sup>28</sup> 239 F.3d at 1024-25.

<sup>29</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>30</sup> 239 F.3d at 1025.

<sup>31</sup> *See also* Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir.1999).