

2000

# A Day in the Life of the Digital Music Wars: The RIAA v. Diamond Multimedia

Lisa M. Needham

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

Needham, Lisa M. (2000) "A Day in the Life of the Digital Music Wars: The RIAA v. Diamond Multimedia," *William Mitchell Law Review*: Vol. 26: Iss. 4, Article 8.

Available at: <http://open.mitchellhamline.edu/wmlr/vol26/iss4/8>

This Note is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

## A DAY IN THE LIFE OF THE DIGITAL MUSIC WARS: *THE RIAA V. DIAMOND MULTIMEDIA*

Lisa M. Needham†

I. INTRODUCTION .....	1136
II. THE AUDIO HOME RECORDING ACT OF 1992 .....	1137
A. <i>The Debate Over Home Copying and Fair Use</i> .....	1138
B. <i>The Relevant AHRA Definitions</i> .....	1140
III. MP3 TECHNOLOGY.....	1143
IV. THE RIAA CASES .....	1147
A. RIAA I— <i>The District Court Decision</i> .....	1147
1. <i>The Preliminary Injunction Standard Debate</i> .....	1148
2. <i>The District Court’s Review of the AHRA</i> .....	1150
3. <i>The District Court Examination of AHRA Legislative History</i> .....	1151
4. <i>Serial Copying and the District Court’s Decision</i> .....	1153
B. RIAA II— <i>The Appellate Court Decision</i> .....	1154
1. <i>The Court’s Technology and Piracy Overview</i> .....	1155
2. <i>The Appellate Court and the AHRA</i> .....	1156
3. <i>The Rio and Personal Use</i> .....	1158
4. <i>The Loophole in the AHRA</i> .....	1159
V. IMPACT OF THE RIAA DECISIONS .....	1159
A. <i>The Slow Pace of Congressional Change</i> .....	1159
B. <i>Secure Digital Music Initiative</i> .....	1161
C. <i>Future Digital Protection Difficulties</i> .....	1162
D. <i>Continuing Legal Troubles</i> .....	1163
1. <i>The MP3 Cases</i> .....	1163
a. <i>RIAA v. MP3.com</i> .....	1163
b. <i>MP3.com v. RIAA</i> .....	1165
c. <i>The Uneasy Recording Industry—MP3.com Truce</i> .....	1166
d. <i>Lester Chambers v. MP3.com</i> .....	1166
e. <i>MPL Communications, Inc. v. MP3.com</i> .....	1167

---

† J.D. Candidate, May 2001, William Mitchell College of Law; B.A., College of Saint Benedict, 1991.

2. <i>The Napster Trilogy: The RIAA, Metallica and Dr. Dre</i> .....	1167
VI. CONCLUSION.....	1169

## I. INTRODUCTION

The Recording Industry Association of America (RIAA) is a powerful lobbying force. As the recording industry's premiere trade organization, the RIAA represents the "creators, manufacturers, and distributors of over ninety percent of all legitimate sound recordings."<sup>1</sup> As such, the RIAA exercises considerable influence over music copyright policy and legislation, though this influence is tempered by the sometimes contrary goals of the electronics industry.<sup>2</sup> The RIAA seeks to restrictively define music copyrights, hoping to limit new digital recording technologies that ostensibly encourage piracy. Conversely, the electronics industry seeks to maximize profits by continually introducing new and improved digital technologies that might be perceived as facilitating piracy.<sup>3</sup> On a superficial level, the Audio Home Recording Act of 1992 (AHRA)<sup>4</sup> resolved these competing interests by imposing a levy scheme on each digital recorder sold in exchange for a "home recording exemption" which legitimizes limited consumer copying.<sup>5</sup> However, technology has outstripped traditional copyright law,<sup>6</sup> and the industries were at

1. Recording Indus. Ass'n of America v. Diamond Multimedia Sys., Inc., 29 F. Supp.2d 624, 625 (C.D.Cal. 1998) [hereinafter *RIAA I*] The RIAA serves as the lobbying arm for the recorded music industry, which is dominated by five major labels: BMG Entertainment, Warner Music Group, Universal Music Group, EMI Recorded Music, and Sony Music. See Heather D. Rafter et. al., *Streaming Into the Future: Music and Video on the Internet*, in 19TH ANNUAL INST. ON COMPUTER LAW 605, 611 (Practicing Law Institute 1999). These industry giants, which control approximately eighty percent of the "popular" music industry, dominate and constrain the political goals of the industry.

2. See generally Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC'Y U.S.A. 497, 499-500 (1998).

3. This debate already has played out between the electronics industry and the entertainment industry in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455-56 (1984) (holding that VCRs have legitimate uses, such as creation of home videos, despite their possible role in facilitating piracy).

4. The Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 [hereinafter *AHRA*] (codified as amended at 17 U.S.C. §§ 1001-1010 (1994 & Supp. IV 1998)). The AHRA sought to create a working, mutually profitable compromise between the electronics and recording industries.

5. See 17 U.S.C. §§ 1003, 1008.

6. See Jennifer E. Markiewicz, *Seeking Shelter from the MP3 Storm: How Far Does the Digital Millennium Copyright Act Online Service Provider Liability Limitation Reach?*, 7 COMMLAW CONSPECTUS 423, 426 (1999).

loggerheads again in 1998 with the advent of portable MP3 technology in the form of Diamond Multimedia's Rio player. MP3 is a form of compression technology (which will be discussed at length later) that allows computer music files to be rendered significantly smaller. MP3 files typically are available for downloading from the Internet and Diamond's portable Rio player (much like a Sony Walkman) enables the user to transport these files easily.

The RIAA's recent Ninth Circuit lawsuit against Diamond Multimedia, an electronics company, sought to block Diamond from selling the first portable MP3 player. Both the district<sup>7</sup> and appellate<sup>8</sup> courts returned verdicts for Diamond, which surprised industry watchers expecting an easy RIAA victory.<sup>9</sup> Part II of this article examines the AHRA and clarifies the controlling standard in the law of digital music reproduction. Part III explains MP3 technology and its potential threat to the traditional recorded music industry. Part IV details the district and appellate court decisions, focusing on the differences in the decisions. Part V discusses the ramifications of the appellate court's assertions and explores the legal future of digital music technology. Part VI concludes that the appellate court decision flings open the door for technological expansion and new digital recording futures.

## II. THE AUDIO HOME RECORDING ACT OF 1992

The RIAA sued Diamond under several provisions of the AHRA. Both the trial and appellate courts undertook an extensive examination of the AHRA in deciding the case.<sup>10</sup> The courts came to vastly differing conclusions, however, regarding the intent and scope of the Act.<sup>11</sup>

---

Technology has proven to be a continuous challenge for legislators attempting to preserve the basic premise of the Copyright Act. Prior to the recent amendments to the Copyright Act . . . case law clumsily attempted to apply old standards to new problems. Courts have struggled to discover a nexus between copyright theories that were intended to endure modern technology and situations that exist online.

*Id.* (citations omitted).

7. See *RIAA I*, 29 F. Supp.2d 624, 633 (C.D.Cal. 1998).

8. See *Recording Indus. Ass'n of America v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999) [hereinafter *RIAA II*].

9. The force of the RIAA as a shaper of music technology policy will be discussed in the section on the AHRA. See *infra* Part II.

10. See *RIAA II*, 180 F.3d at 1075; *RIAA I*, 29 F. Supp.2d at 628. Both decisions delved into the legislative history of the Act.

11. See *infra* Part IV. The trial court found that the Rio fell within a narrow exception to the Act based on the Rio's inability to digitally output sound files and

The AHRA largely was a Congressional response to the introduction of Digital Audio Tape (DAT) technology in the mid-1980s.<sup>12</sup> Whereas previous home taping involved analog transfer with poorer sound quality in the copy, DAT permitted perfect digital copies, regardless of the number of copies made.<sup>13</sup> Though Americans showed only lukewarm enthusiasm towards the DAT technology, a worried recording industry worked to block rampant digital audio recording.<sup>14</sup>

Matters reached a boiling point in 1990 when pop songwriter Sammie Cahn and four music publishers instigated a class-action lawsuit against Sony (a DAT manufacturer) in an attempt to block all digital recording technology from being imported, manufactured or sold in the United States.<sup>15</sup> When this case settled in 1991,<sup>16</sup> it included an agreement between the recording and electronics industries wherein the electronics industry promised to support efforts to create legislation that would resolve the home taping problem.<sup>17</sup> The AHRA largely codified the settlement agreement.<sup>18</sup>

#### A. *The Debate Over Home Copying and Fair Use*

Digital recording created new concerns for the recorded music industry, but the status of unauthorized home taping—even analog reproduction—long had been undefined, largely because sound recordings were not eligible for copyright until the relatively late date of

---

thereby produce serial digital copies. See *RIAA I*, 29 F. Supp.2d at 632. However, the appellate court broadly construed the Act, finding a loophole that excluded any music file first recorded to a hard drive. This holding legitimized MP3 players, which receive music files from a computer hard drive. See *RIAA II*, 180 F.3d at 1078.

12. See *The Audio Home Recording Act: Hearings on S. 1623 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 102nd Cong. 19 (1991) [hereinafter *Hearings on S. 1623*] (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services).

13. See *id.* at 90 (statement of Edward P. Murphy, President, National Music Publishers' Association, Inc. on behalf of the © Copyright Coalition). "Unlike the copies created by analog recording devices found in most American homes today, digital copies are perfect clones of the original—even after many generations of copies have been made. Thus, a copy of a copy sounds as pristine as the original source material." *Id.*

14. See *id.* at 19 (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services).

15. See Kurlantzick & Pennino, *supra* note 2, at 500.

16. See *id.* at 500 (citing *Cahn v. Sony Corp.*, No. 90 Civ. 4537 (S.D.N.Y. July 11, 1991)).

17. See *id.* at 501.

18. See *id.*

1971.<sup>19</sup> A fierce debate immediately ensued as to whether home recording constituted fair use under the copyright act.<sup>20</sup>

The electronics industry contended that the legislative history of the Sound Recording Act of 1971<sup>21</sup> displayed support for home audio taping.<sup>22</sup> However, that language was not incorporated into the final act. The recording industry relied upon this omission to assert that home copying was not fair use.<sup>23</sup>

This matter remained unresolved until passage of the AHRA. In the legislative history of the AHRA, the Register of Copyrights concluded that the Copyright Office had reviewed both commentary and legislative history and determined that there was no fair use exception under the Copyright Act as it stood prior to the AHRA.<sup>24</sup>

The recording industry contended that it would suffer great economic loss due to piracy if home taping constituted fair use. Industry-sponsored studies asserted a yearly loss of as much as \$2.85 billion due to home taping of prerecorded music.<sup>25</sup> Researchers question these studies,

19. See *Hearings on S. 1623*, *supra* note 12, at 11 (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services).

20. See Kurlantzick & Pennino, *supra* note 2, at 499-500.

In the period between 1971 and the passage of the Audio Home Recording Act, the legal status of home recording was ambiguous. That is to say, it was not clear whether or not the practice constituted an infringement of copyright. During this period a lengthy lobbying struggle occurred between the recording industry, which sought congressional intervention in the form of a levy scheme, and the electronics manufacturers, who opposed such schemes and championed the cause of home recording.

*Id.*

21. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. §§ 101-02 (1994)).

22. See H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566. The electronics industry relied upon this statement: "Specifically, it is not the intention of the Committee to restrain the home recording, from broadcast or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it." *Id.* at 1572.

23. See *Hearings on S. 1623*, *supra* note 12, at 12 (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services) (noting that the Sound Recording Act does not recognize home taping as fair use).

24. See *id.* at 13-14. This conclusion definitively declares home taping to be a copyright-infringing activity, neatly setting up the need for the compromises demanded by the AHRA.

25. See Kurlantzick & Pennino, *supra* note 2, at 502. Note that this figure is from a 1980 Warner Communications study and thus is pre-digital. If these analog figures are realistic estimates, the losses resulting from online piracy would be

noting that the figures posit an unlikely one-to-one ratio whereby each home copy represents a lost sale.<sup>26</sup> In any event, even allowing for recording industry hyperbole, the amount of home recording is substantial.

Increasing tension between the recording and electronics industry interests led to the need for a compromise. Both industries represented well-established lobby interests with significant economic concerns. The AHRA sought to resolve these competing interests by providing both a technological solution and a royalty-based solution, examined in detail below.

### B. *The Relevant AHRA Definitions*

The AHRA sought to define and limit what types of devices could be covered under the Act. The Act, under its definition of "digital audio recording device," encompasses:

any machine or device of a type commonly distributed to

---

substantially higher today.

26. *See id.* at 505-07. Kurlantzick & Pennino analyze the error that each home copy represents a lost sale:

[T]his [one-to-one] ratio is in error. The error is apparent if we look closely at what is occurring economically when a consumer chooses to purchase a "pirate" tape or when a home recorder opts to tape a recording. Imagine that a pre-recorded tape from a record company sells at retail for \$10 and that a duplicator's version of that same tape is priced at \$5. Our hypothetical consumer elects to buy the latter product at \$5. Does it follow that he would have purchased the record company's offering at \$10 if the pirate version were not available? Of course not. A person's willingness to buy a product at \$X does not demonstrate that he would be willing to purchase that product at \$X + Y. The only conclusion we can confidently draw from the consumer's behavior is that he was willing to pay \$X for the recording, as there is no reason to believe that demand for this product is completely inelastic . . . . A similar analysis applies to home recording. Imagine a home recorder who borrows a pre-recorded tape . . . [and] makes a copy of the recording on his duplicating equipment . . . . [L]et us assume that the cost is \$3. That cost is less than the retail price of the pre-recorded tape. In choosing to home record the person opts for a cost of \$3. Again, his behavior does not establish a willingness to purchase the original producer's tape at \$10. In other words, not all music taped off air or from borrowed discs or tapes represents lost sales since individuals who are willing to tape music would not necessarily be willing to pay the full price to buy the prerecorded cassette or disc.

*Id.* at 506-07.

individuals for use by individuals, whether or not included with or as part of some other machine or device, the 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.<sup>27</sup>

The AHRA also provides a specific exemption for home taping, thus ending the “fair use” debate over sound recordings.<sup>28</sup> The Act makes no distinction between digital or analog home copying, allowing both. This concession to home copying required a concurrent agreement on the part of the electronics industry to create a tariff on each digital audio recording device and each digital audio recording medium (i.e., recordable compact discs, minidisks, digital audio tapes, etc., sold).<sup>29</sup> Thus, the electronics industry was given free reign to import and manufacture all digital recording devices that permit home copying, such as DAT machines and compact disc recorders. The imposed tariffs go into a sound recording fund that distributes the proceeds to various music copyright holders.<sup>30</sup>

---

27. 17 U.S.C. § 1001(3) (1994). The exception for professional equipment is designed to allow those components “intended for use by recording professionals in the ordinary course of a lawful business.” *Id.* at § 1001(10). Interestingly, this exception leaves *untaxed* precisely those pieces of equipment that can most easily be used for large-scale piracy, such as CD recorders with multiple-disc record capabilities. The Act also provides no restrictions on who may purchase this “professional” equipment, and it is routinely and widely available, albeit more expensive than its noncommercial counterparts.

28. *Id.* § 1008. “No action may be brought . . . based on the noncommercial use by a consumer of such a device or medium for making digital musical recording or analog musical recordings.” *Id.* By basing the home copying exemption on the consumer’s lack of commercial gain, the Act does not explicitly outlaw the type of behavior so feared by Internet naysayers—the posting of MP3 and regular audio files for free downloading. No commercial gain is realized where music collections are posted to the Web for downloading. It took an entirely different piece of legislation to outlaw non-profitable copyright infringement. This legislation—the No Electronic Theft Act—is discussed briefly *infra* at Part V.

29. See 17 U.S.C. § 1004(a) (1994) (providing that the tariff on “each digital audio recording device . . . shall be 2 percent of the transfer price”). Another subsection of the statute sets the royalty payment for each piece of blank digital audio recording media at three percent of the transfer price. See *id.* § 1004(b).

30. See *Id.* § 1006(a). This section states:

The royalty payments . . . shall . . . be distributed to any interested copyright party  
 (1) whose musical work or sound recording has been—

The recording industry was concerned that home digital copying had the potential to develop into rampant commercial piracy. One of the primary concerns with DAT technology—and, indeed, with all digital recording technologies—was that unlimited digital copying created the potential for unlimited serial copying<sup>31</sup> and piracy. Serial copying, rather than the ability to make one copy, was the AHRA's primary concern. To combat serial copying, electronics manufacturers had to agree to a technological solution, the Serial Copy Management System (SCMS).<sup>32</sup> This technological solution makes serial copying impossible on equipment sold for home use. Devices equipped with SCMS can make a digital copy of a digital original, but the digital copy cannot be reproduced. However, a home user still is free to copy the digital original as many times as desired.

The AHRA also defined a “digital musical recording” and, pertinent for purposes here, noted that it does not include:

[A] material object—

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

---

embodied in a digital musical recording or an analog musical recording lawfully made under this title that has been distributed [to the public], and

distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions, during the period to which such payments pertain. . . .

*Id.*

31. Serial copying refers to the act of making a copy from a copy. Digital copies show none of the degradation in sound quality that afflicts analog recordings. Thus, one could make a theoretically infinite series of perfect copies. *See Hearings on S. 1623, supra* note 12, at 109 (statement of Jason S. Berman, President, Recording Industry Association of America, Washington D.C.). Mr. Berman stated:

Digital audiotape and other digital audio recording formats, such as DCC, minidisc, and recordable CD, now make possible digital—as opposed to analog—copying. The result is a perfect clone with the same brilliant sound quality as the original, and unique to digital copying, every subsequent copy of that copy, whether the first or the 1,000th generation, will be as perfect as the prerecorded original.

*Id.*

32. *See* 17 U.S.C. § 1002 (prohibiting the importation, manufacture or distribution of any digital audio recording device or interface lacking a Serial Copy Management System or its functional equivalent).

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.<sup>33</sup>

The AHRA sought a compromise between competing lucrative industries. Understandably, the explosion of digital musical transmission was not foreseen in 1992 when the bill was passed. However, while the recording industry steadfastly refused to acknowledge and accommodate new digital music technology, the electronics industry hurtled forward, setting the stage for 1998's RIAA-Diamond juggernaut.

### III. MP3 TECHNOLOGY

Transmission of digital music over computer networks always has been theoretically possible. Compact discs encode music in a digital format (called a "wave file") that can be stored on a hard drive and uploaded to the Internet. Until recently, however, transmission of these files proved difficult, as each minute of music required ten megabytes, making the average pop song a forty- to fifty-megabyte file.<sup>34</sup> Moreover, until the last two years, home consumer Internet access speed was relatively slow, generally only 33.6 kilobytes per second (kbps).<sup>35</sup> A 33.6 kbps modem would take about three to four hours to download a single song. Lately, however, cable and digital subscriber line (DSL) modem technologies have provided home consumers with high-speed access to the Internet, allowing for dramatically increased download speeds.<sup>36</sup>

---

33. *Id.* § 1001(5)(B). In *RIAA I*, examined in depth in Part IV, Diamond Multimedia relied heavily upon this language, asserting that "section 5(B)(ii) is unambiguous on its face and that 'material objects . . . in which one or more computer programs are fixed' encompasses not only computer programs on CD-ROM, but also hard drives . . . ." *RIAA I*, 29 F. Supp.2d 624, 629 (C.D.Cal. 1998). Indeed, Diamond used section 5(B)(ii) to argue that Congress explicitly intended to "exclude the personal computer industry" from regulation under the AHRA." *Id.*

34. See Howard Siegel, *Digital Distribution of Music: How Current Trends Affect Industry*, MULTIMEDIA STRATEGIST, Oct. 1998. "The current .mp3 file format is four to five times more efficient than the former .wav files." *Id.*

35. See *id.* "In days of yore (about three to five years ago), those who sought CD-quality audio from an Internet site had to endure hefty download periods due to large file sizes and sluggish data throughput." *Id.*

36. DSL technology uses existing copper telephone loops, but greatly expands their capacity, allowing faster transmission of music and video files. See

Additionally, mass storage prices have dropped drastically, making not only transmission, but also storage of a multitude of MP3 files a reality for even the casual home computer user.<sup>37</sup>

MP3 technology (Motion Picture Experts Group 1 layer 3) provides a dramatic reduction in the size of voice or music computer files without loss of sound quality.<sup>38</sup> The file reduction results from removal of inaudible, redundant data.<sup>39</sup> By shrinking the file size to three or four megabytes (a mere one-twelfth of its original size), MP3 allows for rapid transmission of music files.<sup>40</sup>

More importantly, MP3 technology is almost universally available. The Internet offers free software applications for playing and creating MP3 files.<sup>41</sup> Even Microsoft, typically an anti-piracy stalwart, included MP3 capabilities in its recent Windows Media Player.<sup>42</sup> Previous use of MP3

---

HENK BRANDS & EVAN T. LEO, *THE LAW & REGULATION OF TELECOMMUNICATIONS CARRIERS* 548-49 (1999).

37. See Siegel, *supra* note 34. The author notes that "higher-capacity mass storage devices (e.g., improved hard drives), faster modems and the ever-increasing presence of multimedia-capable home computers" have transformed the Internet into "an operational music broadcast and reproduction network." *Id.*

38. See Rafter et. al., *supra* note 1, at 615.

39. See Ted Greenwald, *Decoding the Codecs*, WIRED, Aug. 1999, at 142.

A codec [of which MP3 is one] is a formula that removes data—redundant data, data you aren't likely to notice, data that can be derived from other data, and so on—so files can be transmitted more quickly. . . .

A codec's effectiveness is measured by three criteria: the processing power needed to decode it, the data rate required to play back encoded data, and how close to the original the final result looks or sounds. For instance, MP3 audio . . . can be decoded by an average desktop machine. An MP3 file plays back at roughly 128 Kbps (that is, you can't play it back in real time over a modem; you must download it first, which takes about 4 ½ minutes per minute of music). And it sounds very close to the original.

*Id.*

40. See Neil J. Rosini & Howard M. Singer, *Music and the Internet*, in *REPRESENTING THE NEW MEDIA COMPANY* 1999 865, 870 (Practicing Law Institute 1999). "Using only a 28.8 modem, a consumer can download a typical [MP3-encoded] song to a hard drive in under 20 minutes." *Id.* With the widespread advent of 56K modems, this estimate can be halved. Greenwald postulates that the MP3 file size and transmission rate is almost ideal: "Tuned to deliver highest efficiency at 128 Kbps [kilobytes per second], MP3 is too dense to stream [transmit in 'real time'] over dialup connections but just light enough to encourage downloading entire songs." Greenwald, *supra* note 39, at 143.

41. Rafter et. al., *supra* note 1, at 614-15.

42. See Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 U.C.L.A. ENT. L. REV. 57, 63 (1999).

technology was limited to hackers and technophiles, but the widespread availability and simplicity of MP3 encoders and players now threatens the traditional recorded music industry. Additionally, MP3 technology is non-proprietary and anyone can use it.<sup>43</sup> A music consumer easily can post an entire music collection to the Web in MP3 format, permitting theoretically innumerable consumers to download the files. This practice has proven problematic at college campuses, where high-speed connections and storage space are ample.<sup>44</sup> Unsurprisingly, the first person prosecuted under a new Department of Justice piracy initiative was a student.<sup>45</sup>

The widespread potential for piracy has worried the recorded music industry.<sup>46</sup> When Diamond proposed the first portable MP3 player<sup>47</sup> in

43. See *id.* at 60-61 (noting that “the inventors of MP3 created a file format without copyright protection or a royalty streaming mechanism”).

44. See Rafter et. al., *supra* note 1, at 616.

45. See Andy Patrizio, *DOJ Cracks Down on MP3 Pirate*, WIRED NEWS (Aug. 23, 1999) <<http://www.wired.com/news/news/politics/mpthree/story/21391.html>> (on file with author).

The convicted . . . student may face jail time for illegally distributing copyrighted material. Jeffrey Gerard Levy . . . faces three years in prison and a \$250,000 fine, but is likely to get probation and a fine . . . .

The NET [No Electronic Theft] Act passed in 1997, closing a loophole in piracy laws. Previously, it was illegal only to sell copyrighted software and other electronic media. If the content was not exchanged for money, individuals could escape prosecution . . . .

In a two hour period, Levy’s site sent out 1.7 GB of data. . . . With MP3 files averaging four to five megabytes in size, that translates to around 500 files.

*Id.*

46. See Markiewicz, *supra* note 6, at 439. In fact, the RIAA has directed 80% of its anti-piracy funds to combat online piracy since 1997. See *id.* at 442.

47. See Ted J. Barthel, *RIAA v. Diamond Multimedia Systems, Inc.: The Sale of the Rio Player Forces the Music Industry to Dance to a New Beat*, 9 DEPAUL-LCA J. ART & ENT. L. 279, 286 (1999).

The Rio Player is a battery-operated, compact, portable music player that plays music files downloaded from the Internet or from CDs. It is designed to store and play audio files transferred from a computer’s hard drive. What is new about this type of computer peripheral device is that a user can detach the Rio Player from the computer and play back the audio files separately through headphones while away from the computer. The player is about the size of a deck of cards and roughly the same weight. It has no moving parts which makes it especially well suited to use during vigorous activity.

1998, the recording industry faced the threat of MP3 fans who now could take files anywhere:<sup>48</sup>

So far, regular use of MP3 has been limited to the kind of people likely to have the patience to do much of their music listening through a pair of computer speakers—principally hard-core hardware freaks and college students with high bandwidth Net connections. But now, with the sexy, Walkman-esque Rio . . . that could change. Plug the Rio into your computer, copy a load of MP3 files into its memory and go. It's a no-brainer for consumers and a nightmare for record executives.<sup>49</sup>

The above is not traditional recorded music industry hyperbole. The mobility, availability and ease of MP3 files is unprecedented in digital technology.<sup>50</sup> Indeed, observers estimate that as many as 200,000 illegal MP3 sites exist on the web.<sup>51</sup> Lycos, a prominent Internet search engine, further legitimized the trend toward widely available MP3 files when it added an MP3 search, which scans the Web by artist or song to find both legal and pirated MP3 files, making no guarantees as to the legality of those files.<sup>52</sup> The RIAA has threatened separate legal action over this turn of events.<sup>53</sup>

---

*Id.* (citations omitted).

48. See Rafter et. al., *supra* note 1, at 616.

49. *Id.*

50. Not only are MP3 files small, and therefore technologically manageable; they also have spawned a vast number of easy-to-use applications with which the most technophobic consumer still can feel comfortable. See Henriquez, *supra* note 42, at 63.

51. See Barak D. Jolish, *Scuttling the Music Pirate: Protecting Recordings in the Age of the Internet*, ENT. & SPORTS LAW., Spring 1999, at 9, 10. Independent and industry figures differ. A cnet.com-sponsored study sets the number of illegal recordings at 80,000, on 2,000 sites. The RIAA's estimate places the number of sites at 200,000. See *id.*

52. Lycos' links to MP3 files are considerable: "[Lycos'] Fast MP3 Search . . . reportedly posted over a half million links to MP3 song files on February 1, 1999. The computer equipment powering the search engine had to be upgraded within 48 hours because the demand was four to five times higher than anticipated." Markiewicz, *supra* note 6, at 440 (citations omitted).

53. See *RIAA May Sue Lycos over MP3*, WIRED NEWS (Mar. 25, 1999) <<http://www.wired.com/news/news/business/story/18723.html>> (on file with author). In March 1999, the RIAA stated that it was considering a lawsuit against Lycos, echoing a recent European filing whereby the International Federation of the Phonographic Industry sued Lycos' Norwegian partner. See *id.* This lawsuit, if filed in the United States, most likely would be predicated on Internet service provider liability for online content, not piracy per se. See Markiewicz, *supra* note

MP3's ease and availability, combined with Diamond's proposal for newfound portability, made a recording industry lawsuit inevitable. The industry scrambled to use now-ancient (in technology terms) definitions found in the AHRA to restrict what it perceived as almost uncontrollable piracy potential.

#### IV. THE RIAA CASES

##### A. RIAA I—*The District Court Decision*

The RIAA's lawsuit against Diamond Multimedia, the Rio's manufacturer, involved not only a giant industry clash, it also provided the first opportunity for a court to examine the AHRA.<sup>54</sup> Industry watchers from both the recording and electronics camps waited to see how the district court would decide the case.<sup>55</sup> At stake was not merely Diamond's right to manufacture and sell its first MP3 player. If the court affirmed Diamond's rights, numerous other portable MP3 player manufacturers would be free to offer their wares. Also, an electronics industry-friendly interpretation of the AHRA could make more digital recording technology available in the United States.

In October 1998, the RIAA sought a preliminary injunction against Diamond Multimedia.<sup>56</sup> The RIAA alleged that the sale and manufacture of the Rio violated the AHRA because it was a digital audio recording device.<sup>57</sup> Under the Act, all digital audio recording devices must incorporate a Serial Copy Management System (SCMS) in order to prevent unlimited serial copying.<sup>58</sup> Diamond Multimedia asserted first

---

6, at 442.

54. See *RIAA II*, 180 F.3d 1072, 1077 n. 4 (9th Cir. 1999) ("The Act has only been discussed once in a published opinion by another federal court, and there, only to explain why it had no effect on the Copyright Act provisions at issue in that case.").

55. See Don Biederman, *Copyright Trends: With Friends Like These. . .*, 17 ENT. AND SPORTS L., Fall 1999, at 3.

56. See *RIAA I*, 29 F. Supp.2d 624, 625 (C.D.Cal. 1998). The RIAA initially filed a complaint and *ex parte* application for a temporary restraining order and an order to show cause regarding the preliminary injunction. See *id.* at 625-26. The district court heard oral arguments and initially issued a temporary restraining order restricting Diamond from manufacture or distribution of its Rio player. See *id.* at 626. The RIAA posted a bond to ensure the temporary restraining order, and Diamond then filed its opposition to the preliminary injunction. See *id.*

57. See *id.* at 625. The term "digital audio recording device" is defined in the AHRA. See 17 U.S.C. § 1001(3) (1994).

58. See 17 U.S.C. § 1002; *RIAA I*, 29 F. Supp.2d at 631. Note that that the RIAA's purpose in this lawsuit is twofold. It seeks not only to allege that the lack of SCMS renders the Rio unfit for sale, but rather to also assert that the Act controls

that the Rio did not qualify as a digital audio recording device because the source of the MP3 files copied to the Rio was a computer hard drive, which could not be considered a "digital musical recording."<sup>59</sup> In the alternative, Diamond argued that the Rio was not a digital audio recording device because it had no digital recording function.<sup>60</sup> The Rio lacks any output capability and thus is incapable of passing along further generations of digital copies.<sup>61</sup>

### 1. *The Preliminary Injunction Standard Debate*

The prickly relations between the recorded music and consumer electronics industries immediately led to a dispute as to the standard for granting the preliminary injunction.<sup>62</sup> Under the traditional injunction standard, a plaintiff must prove that (1) the plaintiff will experience irreparable injury without the injunction; (2) the plaintiff most likely will win the case on the merits; (3) harms favor the plaintiff; and (4) public interest favors the plaintiff.<sup>63</sup> The district court noted that an "alternative standard" for injunctive relief also exists, whereby the plaintiff must show either "(1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted; or (2) the existence of serious questions going to the merits and the balance of hardships tips sharply in its favor."<sup>64</sup>

The RIAA proposed a departure from the traditional theories of injunctive relief, arguing that the "traditional proof of irreparable harm is not required . . . [w]here a federal statute grants authority to enjoin violations."<sup>65</sup> The RIAA relied specifically upon a provision in the AHRA which notes that the court can grant temporary or permanent injunctions as necessary to prevent violations of the Act.<sup>66</sup> The recording industry should not have to await extensive economic losses to enjoin a device designed for piracy. However, at the district court level, the RIAA's

---

the device.

59. *See RIAA I*, 29 F. Supp.2d at 628. The court notes that, for the Rio to be making "digital audio copied recordings" under the Act, it must be making a "reproduction in a digital recording format of a digital musical recording." *Id.* (quoting 17 U.S.C. § 1001(1) (1994)).

60. *See id.*

61. *See id.* at 632.

62. *See id.* at 626.

63. *See id.* (referring to *International Jensen v. Metrosound U.S.A.*, 4 F.3d 819, 822 (9th Cir. 1993)).

64. *Id.*

65. *Id.* (quoting *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983)).

66. *See id.* (referring to 17 U.S.C. § 1009(c)(1) (1994)).

arguments under this proposed standard were a bit muddled. First, the RIAA asserted that the rights under the AHRA were “inextricably related” to the rights of the traditional copyright act,<sup>67</sup> thus entitling the RIAA to the presumption of irreparable harms consistent with all copyright actions.<sup>68</sup> However, the court noted that copyright actions by definition are incompatible with the AHRA, and the RIAA cannot simultaneously contend that the Rio is subject to both the AHRA and the copyright act.<sup>69</sup> The court acknowledged that copyright claims are entitled to a presumption of irreparable harm in certain circumstances, but concluded that such circumstances did not exist in the instant case.<sup>70</sup> The court then noted that the mere existence of a federal statute “does not per se preclude consideration of traditional equitable factors, including irreparable harm.”<sup>71</sup> The district court concluded that the type of harm alleged by the RIAA did not meet the “incalculable and incurable” injury standard and that injunctive relief was inappropriate under the federal statute standard.<sup>72</sup>

---

67. *See id.* at 627.

68. *See id.*

69. *See id.* The court stated, “In the instant action, however, Plaintiffs are not asserting a copyright claim. If, as Plaintiffs contend, the Rio is subject to the AHRA, then copyright infringement is impossible as a matter of law.” *Id.* The AHRA specifically bans copyright infringement actions:

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.

17 U.S.C. § 1008 (1994).

70. *See RIAA I*, 29 F. Supp.2d at 627. The cases cited by the RIAA referred to issues of “reputation, quality of goods, or consumer confusion,” none of which were asserted in the RIAA’s suit. *Id.* No consumer confusion can arise from an MP3 version of a commercial CD audio track, as one is a mere digital file, and the other is physically located on a commercial CD. The “consumer confusion” standard seems more applicable to CD pirates who seek to provide physically identical packaging to promote their illicit product.

71. *Id.* at 626.

72. *See id.* at 627. The court adds:

Moreover, although a copyright action might “normally” entail “incalculable and incurable” injuries, the instant action does not. The only potentially “incalculable” injury asserted by Plaintiffs is the Rio’s contribution to the traffic in illegal MP3 files . . . . [A]lthough this type of injury is undeniably “incalculable,” it is not a compensable injury under the Act and fails to justify an extension of the irreparable harm

## 2. *The District Court's Review of the AHRA*

The district court determined that it needed to examine the AHRA, beginning with the plain language of the statute itself. The court would delve into history only if necessary. No precedent existed in case law, as this was the first case that required substantial interpretation of the AHRA.<sup>73</sup> Due to diverging views of the Rio's status as a digital audio recording device under the AHRA, the court carefully examined the relevant definitions, specifically whether the computer hard drive necessary to receive MP3 files qualified as a "digital musical recording"<sup>74</sup> or a "digital audio recording device."<sup>75</sup>

Under the AHRA, a digital audio recording device must be able to make a "digital audio copied recording" from a "digital musical recording."<sup>76</sup> Diamond asserted that, since a computer hard drive is the source of MP3 files, the hard drive did not qualify as a digital musical recording and thus was not subject to the AHRA.<sup>77</sup> Diamond pointed to an exception in the AHRA where a digital musical recording could not include any material object "in which one or more computer programs are fixed,"<sup>78</sup> such as the hard drive of a computer. The Rio player cannot receive MP3 files until they are downloaded to a computer hard drive. Diamond asserted that this was a "hard drive exception," but the RIAA contended that the intent of this section of the AHRA was narrowly drawn to except only CD-ROMs (such as games or multimedia presentations, as distinct from audio CDs) with "incidental audio tracks."<sup>79</sup>

The RIAA admitted that hard drives by definition were not subject to the AHRA.<sup>80</sup> The RIAA asserted, however, that this exclusion resulted from the very definition of a digital audio recording device, which excluded any device whose "primary purpose" was not recording digital audio.<sup>81</sup> The RIAA argued that Diamond's Rio player's primary purpose was to record digital audio, subjecting it to the AHRA.<sup>82</sup> The question of

---

presumption applicable in Copyright actions.

*Id.*

73. *See id.*

74. *See supra* note 33.

75. *See supra* note 27.

76. *See RIAA I*, 29 F.Supp.2d at 628.

77. *See id.*

78. *See id.* (quoting 17 U.S.C. § 1001(5)(B)(ii) (1994)).

79. *See id.*

80. *See id.*

81. *See id.* at 628-29.

82. *See id.* at 629.

whether a hard drive exemption results from section 1001(5)(B)(ii) (“digital musical recording”) of the AHRA or from section 1001(3) (“digital audio recording device”) became moot in the appellate court opinion, which determined that the hard drive exemption stems from both parts of the Act.<sup>83</sup>

### 3. *The District Court Examination of AHRA Legislative History*

Much of the district court’s discussion of AHRA’s legislative history centered upon how computers and hard drives should be construed under the Act<sup>84</sup> but the court’s analysis provided almost no clear guidance. Diamond asserted that hard drives were exempt from the AHRA, relying upon the testimony of James Burger, head of a computer industry trade association, who asserted that the computer industry went along with the AHRA precisely because it would not cover “a computer nor any of its peripherals. . . .”<sup>85</sup> The court dismissed Burger’s contribution, noting that

---

83. See *RIAA II*, 180 F.3d 1072, 1076 (9th Cir. 1999).

84. See *id.*

85. See *id.* (quoting *Burger Decl.* paras. 10-11). The court’s treatment in full is as follows:

Defendant relies heavily on the declaration of James Burger, an attorney and former Chairman of the Intellectual Property Committee of the Information Industry Council (“ITI”), a trade association representing the interests of the computer industry. In his capacity as Chairman of ITI, Burger purports to have “engaged in direct discussions with representatives of the [Consumer Electronics Manufacturers Association ‘CEMA’] and RIAA officials regarding the AHRA, as well as Legislators and their staff.” On the issue of whether Section (5)(B)(ii) encompasses hard drives, Burger provided the following narrative:

“I was asked if [ITI] would not oppose the bill if computers were specifically excluded from the legislation. My response was that if the bill contained language that made it clear that neither a computer nor any of its peripherals were covered we would not oppose the legislation.

The result of our discussions was the specific language now contained in Section 1001(5)(B)(ii). Under that subsection once a music file was fixed on a computer’s hard drive as semipermanent memory of any kind, it was no longer a digital musical recording covered by the Act. Accordingly, we advised CEMA members and the RIAA that we would not oppose the AHRA. The legislative history is clear on this point: ‘Similarly, neither a personal computer whose recording function is designed and marketed primarily for the recording of data and computer programs, nor a machine whose recording function is designed and marketed for the primary purpose of copying multimedia products, would qualify as a digital audio recording device.’”

Burger's declaration concerned digital audio devices, not digital musical recordings.<sup>86</sup> The court preferred to rely upon the equally partisan statement of Cary Sherman, an RIAA representative.<sup>87</sup>

The district court showed a general inclination to accept the RIAA's interpretations over that of Diamond, noting that Diamond's construction would "effectively eviscerate the AHRA."<sup>88</sup> Specifically, the district court supported the RIAA's interpretations of "digital music recording."<sup>89</sup> The

---

Although Burger unequivocally opines that Section (5)(B)(ii) includes hard drives, his reference to the legislative history is not persuasive. The sentence Burger quotes from the Senate report to support Defendant's interpretation of Section (5)(B)(ii) actually appears in the context of a discussion of Section 1001(3), the definition of "DAR device."

*Id.* (citations omitted).

86. See *RIAA I*, 29 F. Supp.2d at 629. Contrast this with the clear reading given by the appellate court:

The Senate Report states that "if the material object contains computer programs or data bases that are not incidental to the fixed sounds, then the material object would not qualify" under the basic definition of a digital musical recording. The Senate Report further states that the definition "is intended to cover those objects commonly understood to embody sound recordings and their underlying works." A footnote makes explicit that this definition only extends to the material objects in which songs are normally fixed: "[t]hat is recorded compact discs, digital audio tapes, audio cassettes, long-playing albums, digital compact cassettes, and mini-discs."

*RIAA II*, 180 F.3d at 1077 (citations omitted).

87. See *RIAA I*, 29 F. Supp.2d at 630 n.3. Though the court found that Sherman was a "far from a disinterested witness," it used his statement to disregard Burger's testimony. See *id.* The court never addressed why the electronics and computer industries would have agreed to the compromises in the AHRA (a tariff scheme, restrictions on multigenerational copies—both of which are an expense to the industries) if something so widespread and vital as hard drives were encompassed under the tariff scheme.

88. See *id.* at 630. Diamond's interpretation of the AHRA—that a music file's residence on a hard drive automatically creates an exemption whereby the file no longer is a digital musical recording—would allow any device that required a download to a hard drive to avoid AHRA regulation. See *id.*

89. See *id.* The House Judiciary Committee Report, for example, states that:

A definition of "digital musical recording" has been added, with revisions reflecting exemptions for talking books and computer programs. . . . As with "talking books," the bill specifically excludes computer programs (which generally are classified under the Copyright Act as literary works). In addition to containing an express exclusion of computer programs in the definition of "digital musical recording," the Committee expressly includes the technical embodiment of statements of instructions incidental to the playback or reproduction of music by referencing such

district court found that the Rio probably was a digital audio recording device, and thus should fall under the AHRA.<sup>90</sup>

The court also rejected Diamond's argument that technological change simply had outstripped the AHRA, rendering it meaningless.<sup>91</sup>

The district court proceeded in the same fashion to examine portions of the legislative history and strongly rejected Diamond's interpretations.<sup>92</sup> The court noted that Diamond's arguments held "superficial appeal" but were antithetical to the purpose of the AHRA.<sup>93</sup>

#### 4. *Serial Copying and the District Court's Decision*

Though the court rejected Diamond's arguments regarding the inapplicability of the AHRA definitions to the present case, it held for Diamond on the serial copying issue.<sup>94</sup>

To pass muster under the AHRA, devices must be equipped with an SCMS device to restrict creation of multigenerational digital copies.<sup>95</sup> These copies constitute the greatest problem with digital recording

statements or instructions in both sections 1001(5)(A)(i) and (B)(ii).

*Id.* (citing House Judiciary Committee, 102nd Cong. (Sept. 17, 1992) (emphasis omitted)). From this, the court infers a "legislative intent to avoid immunizing the illegitimate copying of computer programs from liability for copyright infringement." *Id.*

90. *See id.* at 632.

91. *See id.* at 630. The court's attitude contrasts sharply with that of legal experts in the field. Vito Peraino, a technology lawyer at Hancock Rotherth & Bunshoft in Los Angeles, California, recently wrote in *Wired*:

MP3 is colliding head-on with antiquated copyright laws—laws that the record execs are clinging to in an attempt to control a future market where music will exist only in bytes.

The loudest voice in Big Music, the Recording Industry Association of America, has spent the last few years ignoring the fact that old laws and outmoded business models will never stop technology, when the industry should have been fast-tracking online delivery formats that cater to the consumer while offering artists a reasonable guarantee that their work won't get ripped off.

Vito Peraino, *The Law of Increasing Returns*, *WIRED*, Aug. 1999, at 144.

92. *See RIAA I*, 29 F. Supp.2d at 630-631. Diamond's additional argument that the Rio player depends on personal computer software and has no independent recording function was rejected as inconsistent with the purposes of the AHRA.

93. *See id.* at 629.

94. *See id.* at 631.

95. *See* 17 U.S.C. § 1002(a) (1994). "Multigenerational" refers to digital copies made from digital copies.

devices.<sup>96</sup> The Rio does not employ an SCMS device, largely because it lacks digital output capability and therefore is inherently incapable of creating digital copies. The district court concluded that it was “nonsensical” to demand incorporation of SCMS technology, as it would fail to prevent the Rio’s ability to copy pirated MP3 files from the Internet.<sup>97</sup>

The court held that the RIAA had established no presumption of success on the merits regarding the SCMS issue.<sup>98</sup> Additionally, the district court determined that the Rio could have substantial noninfringing uses (the copying of legitimate MP3 files; the conversion of personally-owned CD tracks to MP3 format) and concluded that an injunction would “deprive the public of a device with significant beneficial uses.”<sup>99</sup>

The district court’s decision was muddled and strangely narrow. The court assumed that an interpretation of the legislative history was needed, even though it could have based its decision on the language of the AHRA alone.<sup>100</sup> The court thus missed an opportunity to provide clear guidance on the scope of the Act. Moreover, the court seriously limited its own understanding of what was at stake by refusing to carefully examine the technology in the case. The appellate court was left with the task of carefully analyzing the new technology and providing a clear resolution of the AHRA’s scope.

### B. RIAA II—*The Appellate Court Decision*

After failing at the district court level, the RIAA appealed to the Ninth Circuit Court of Appeals.<sup>101</sup> The appellate court issued a sweeping, pro-technology decision that found a large loophole in the AHRA for any device (such as the Rio) that first passes files through a computer hard drive.

---

96. Because a digital copy of a digital copy is a perfect replica (unlike analog copies, which degrade with each successive copy) a potential for unlimited piracy arises. See *Hearings on S. 1623*, *supra* note 12, at 115 (statement of Jason S. Berman, President, Recording Industry Association of America, Washington D.C.).

97. See *RIAA I*, 29 F. Supp.2d at 632.

98. See *id.* Having requested injunctive relief, the RIAA needed to prove a presumption of success on the merits. The court concluded that the RIAA had not established that it would be able to prove that the Rio should be required to possess an SCMS device. See *id.*

99. *Id.* at 633.

100. The appellate court specifically criticized the lower court’s procedure in this regard. See *RIAA II*, 180 F.3d 1072, 1076 (9th Cir. 1999) (“We need not resort to the legislative history because the statutory language is clear.”).

101. See *id.* at 1072.

### 1. *The Court's Technology and Piracy Overview*

The appellate court began with a cogent analysis of the technology in the case. The court noted that the widely available, non-proprietary nature of the MP3 algorithm, combined with its considerable compression powers, significantly increases the availability of Internet music.<sup>102</sup>

In evaluating the Rio, the court minimized the RIAA's piracy concerns. It refused to take for granted the RIAA's complaints of a \$300 million annual loss from current piracy and a fear of increasing digital Internet piracy.<sup>103</sup> Though the Internet offers pirated MP3 files, it also contains a considerable number of lawful MP3 files. The appellate court noted this large traffic in legitimate MP3 files, both free and available for sale, and stated that these represent considerable legitimate future profit potential for both labels and independent recording artists.<sup>104</sup> The court also delineated the limited digital reproduction potential of the Rio player. The device cannot receive files without Rio-specific software, it stores only one hour of music, it offers only analog output via headphones

---

102. *See id.* at 1074. The court stated:

MP3's popularity is due in large part to the fact that it is a standard, non-proprietary compression algorithm freely available for use by anyone, unlike various proprietary (and copyright-secure) competitor algorithms. Coupled with the use of cable modems, compression algorithms like MP3 may soon allow an hour of music to be downloaded from the Internet to a personal computer in just a few minutes.

*Id.* This thoughtful explanation of the technology rivals those found in popular technology journals. The appellate court's technological discussion contrasts sharply with that in *RIAA I*, where the district court offered only a brief overview of the Rio as a handheld device and discussed MP3's compression possibilities without clearly delineating the revolutionary implications of the technology. *See RIAA I*, 29 F. Supp.2d at 625. *RIAA I* paints the initial lawsuit as a mere technical legal dispute that did not require serious consideration of recorded music technology. *See id.*

103. *See RIAA II*, 180 F.3d at 1074. The court noted that the RIAA routinely brings lawsuits and shuts down pirate websites. *See id.* Other sources state that "few, if any" pirate sites are located in the United States and MP3 files are difficult to locate and download. *See id.* The appellate court specifically noted the Kurlantzick & Pennino critique of the "lost-sale" theory (*see supra* note 26) stating that "a willingness to download illicit files for free does not necessarily correlate to lost sales, for the simple reason that persons willing to accept an item for free often will not purchase the same item, even if no longer freely available." *Id.* at 1074 n.1.

104. *See id.* at 1074. The court relied upon a 1998 Jupiter Communications report (cited by Diamond) that predicts online sales for pre-recorded music in excess of \$1.4 billion by 2002. *See id.*

and it cannot upload files to a computer.<sup>105</sup> In short, the appellate court did not take at face value the RIAA's claims that Rio would foster rampant digital piracy.

## 2. *The Appellate Court and the AHRA*

The appellate court also examined the AHRA. It found that the district court erred by examining the legislative history of the Act when the statutory language was clear.<sup>106</sup> The appellate court still extensively examined the legislative history, which both parties briefed thoroughly.<sup>107</sup> The court seized the opportunity to scrutinize the intent of the Act, which had never been studied at the appellate level.<sup>108</sup>

Rejecting the district court's conclusion, the appellate court concluded that the AHRA did indeed contain a "hard-drive exemption."<sup>109</sup> The court rested this finding on several pieces of the AHRA, bolstering its conclusions with legislative history of the Act.<sup>110</sup> First, the court stated that AHRA's plain language excludes material objects "in which one or more computer programs are fixed" from the definition of a digital musical recording.<sup>111</sup> The court reasoned that a hard drive undeniably is a material object which contains many fixed programs and therefore falls outside the definition of a digital musical recording.<sup>112</sup> Because the district court rejected this argument,<sup>113</sup> the appellate court bolstered its conclusion with evidence from the Senate and House Reports of the debate on the AHRA.<sup>114</sup> Here, it found a footnote delineating those

---

105. *See id.* at 1075.

106. *See id.* at 1076.

107. *See id.* at 1077. Perhaps the court's willingness to pay attention to the legislative history stemmed from its awareness that it was breaking new ground.

108. *See id.* at 1077 n.4.

109. *See id.* at 1078. "Under the plain meaning of the Act's definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their 'primary purpose' is not to make digital audio copied recordings." *Id.*; *see also* 17 U.S.C. § 1001(3) (1994).

110. *See RIAA II*, 180 F.3d at 1078. The Senate Report of the debate surrounding the Act noted that a personal computer's recording function is not primarily for audio recording, and the mere capability to record did not render it a digital audio recording device. *See id.*

111. *See id.* at 1076 (quoting 17 U.S.C. § 1001(5)(B) (1994)).

112. *See id.*

113. *See id.* at 1078. "The district court concluded that the exemption of hard drives from the definition of digital music recording, and the exemption of computers generally from the Act's ambit, 'would effectively eviscerate the [Act]. . . .'" *Id.* (quoting *RIAA I*, 29 F. Supp.2d 625, 630 (C.D.Cal. 1998)).

114. *See id.* at 1078:

The legislative history thus expressly recognizes that computers (and

material objects in which songs can be fixed: compact discs, cassettes, albums and the like.<sup>115</sup> The Act thus contains an *intended* exemption whereby a hard drive cannot be considered a digital musical recording.<sup>116</sup> Since the only possible source of MP3 files for the Rio is a computer's hard drive, the Rio does not fall under the AHRA regulations.

The appellate court also found RIAA's other arguments wanting. The court found that computer hard drives were not limited primarily to making digital audio recordings, thus they could not be "digital audio recording devices" under the Act.<sup>117</sup> The court found substantial support for this conclusion in the legislative history. It located a senate report<sup>118</sup> that stated that a personal computer could not fall under the definition of "digital audio recording device" since a personal computer's ability to record primarily is for recording computer programs.<sup>119</sup> The appellate court found that the legislative history very forward-thinking, noting that legislators knowingly exempted personal computers from the Act despite their digital recording capabilities.<sup>120</sup>

This distinction has important ramifications for personal computers. If computers are not digital audio recording devices, they are not taxable under the Act, need not be equipped with SCMS and need not send or receive copyright information where music tracks are concerned.<sup>121</sup>

---

other devices) have recording functions capable of recording digital musical recordings, and thus implicate the home taping and piracy concerns to which the Act is responsive. Nonetheless, the legislative history is consistent with the Act's plain language—computers are *not* digital audio recording devices.

*Id.*

115. *See id.* at 1077.

116. *See id.* at 1078. The appellate court relies upon an affidavit from Diamond, stating that the "exclusion of computers from the Act's scope was part of a carefully negotiated compromise between the various industries with interests at stake, and without which, the computer industry would have vigorously opposed passage of the Act." *Id.* at 1078 n.6.

117. *See id.* at 1078.

118. *See* S. REP 102-294 (1992), *reprinted in* 1992 WL 133198, at \*118-19.

119. *RIAA II*, 180 F.3d at 1078. The court recapitulated an additional portion of the same Senate Report, which noted, "If the 'primary purpose' of the recording function is to make objects other than digital audio copied recordings, then the machine or device is not a 'digital audio recording device,' *even if the machine or device is technically capable of making such recordings.*" *Id.* (citing S. REP 102-294, *supra* note 118).

120. *See id.*

121. *See id.* The court agreed with the district court that, were a computer or the Rio to be equipped with SCMS, it would make no difference in piracy prevention, as most MP3 files do not carry copyright information. *See id.* at 1078-79. The appellate court explained how an SCMS-equipped Rio player might

Where the district court discussed this issue narrowly in light of the Rio player itself, the appellate court framed the issue as determining the status of computers themselves and examining a powerful tool for digital recording of audio files.<sup>122</sup>

### 3. *The Rio and Personal Use*

The appellate court further asserted that the Rio conformed to the main purpose of the Act: facilitation of personal use.<sup>123</sup> The Act specifically outlawed any action against consumers for personal use,<sup>124</sup> and the Rio clearly existed for personal use. The court likened the Rio to a VCR,<sup>125</sup> stating that the Rio “merely makes copies in order to render portable, or ‘space-shift,’ those files that already reside on a user’s hard drive.”<sup>126</sup> Framing the Rio as a device for personal use allowed the court clearly to assert the legitimacy of the device.

---

actually foster more piracy:

As the Technical Reference Document that describes the SCMS system explains, “[d]igital audio signals . . . that have no information concerning copyright and/or generation status *shall be recorded* by the [digital audio recording] device so that the digital copy is copyright asserted and original generation status.” Thus, the incorporation of SCMS into the Rio would allow the Rio to copy MP3 files lacking SCMS codes so long as it marked the copied files as “original generation status.” And such a marking would allow another SCMS device to make unlimited further copies of such “original generation status” files, . . . despite the fact that the Rio does not permit such further copies to be made because it simply cannot download or transmit the files that it stores to any other device. Thus, the Rio without SCMS inherently allows *less* copying than SCMS permits.

*Id.* at 1079 (quoting the Technical Reference Document for the AHRA).

122. *See id.* at 1078 n.6 (stating that the fragile compromise between industries was crucial for the passage of the Act).

123. *See id.* at 1079.

124. *See* Kurlantzick & Pennino, *supra* note 2, at 497.

125. *See RIAA II*, 180 F.3d at 1079. Though the court’s holding is appealing in terms of the future of digital musical recording and transmission, its comparison of VCRs and Rios seems a bit disingenuous. Where VCRs create analog recordings from broadcasts that are often free, the Rio digitally reproduces files that are often pirated versions of copyrighted material.

126. *Id.* The court relied upon *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which held that merely “time-shifting” television shows for future viewing was fair use under the Copyright Act. *See Sony*, 464 U.S. at 455.

#### 4. *The Loophole in the AHRA*

The appellate court not only refused to grant an injunction to the RIAA (the narrow relief requested), but confirmed the existence of a vast loophole in the AHRA.<sup>127</sup> If a recording device such as the Rio first passes its files through a computer hard drive, this transmission renders it legal.<sup>128</sup> This loophole provides a clear pathway for MP3 devices, which are being released in great numbers.<sup>129</sup> The appellate ruling also throws down a gauntlet before Congress, demanding either that the Act's loophole be closed or that the vagaries of new digital technology be recognized and accommodated. As of the writing of this article, Congress has not modified the Act in any way.

### V. IMPACT OF THE RIAA DECISIONS

#### A. *The Slow Pace of Congressional Change*

The RIAA decisions leave a loophole in U.S. copyright policy regarding Internet music and digital piracy. Technology has moved much faster than federal lawmakers, who now must play catch-up, hoping they can rewrite old laws to regulate as-yet-uninvented technology.

Congress recently closed a loophole where a copyright infringer was required to turn a profit from his or her ill-gotten works to be liable. In *United States v. LaMacchia*,<sup>130</sup> an MIT student set up an Internet account where users were encouraged to upload and download copyrighted computer programs.<sup>131</sup> The student did not charge for the "service" and hence made no profit.<sup>132</sup> Because traditional copyright infringement

127. See *RIAA II*, 180 F.3d at 1078 (noting Diamond's argument that the Act does not cover any recording device that first passes the music through a computer and holding that the Act "seems to have been expressly designed to create this loophole").

128. See *id.* at 1078-79.

129. See Jesse Freund, *The MP3 Players*, WIRED, Aug. 1999, at 136-37. Slated for release this year, among others, are two more versions of Diamond Multimedia's Rio player, both with greater storage capacity. Several other companies, including Creative Lab's Nomad player (which is substantially similar to the Rio in shape and storage), several models from Saehan and models from Samsung, will be released in 1999-2000. The devices range in price from \$199 to \$999, making copying of MP3 files reasonably affordable. See *id.*

130. 871 F. Supp. 535 (D. Mass. 1994).

131. See *id.* at 536.

132. See *id.* at 536-37. Although LaMacchia made no profit, "[t]he indictment alleges that LaMacchia's scheme caused losses of more than one million dollars to software copyright holders. The indictment does not allege that LaMacchia sought or derived any personal benefit from the scheme to defraud." *Id.*

requires profit, and copyright piracy could not automatically be equated with theft,<sup>133</sup> the court was forced to dismiss the case.<sup>134</sup> However, the court asserted that there was nothing “edifying” about the student’s conduct and exhorted Congress to modify copyright laws to criminalize such behavior.<sup>135</sup> Notably, the court still expressed fears that copyright infringement would be criminalized to the point where individuals copying software for personal use could be prosecuted.<sup>136</sup> This loophole requiring profit remained open until the No Electronic Theft (NET) Act passed in December 1997.<sup>137</sup> Congress took almost three years to close this costly loophole, even with instruction from the court and compelling evidence of piracy.<sup>138</sup>

The NET act, however, does not represent a total solution. The NET

---

133. *See id.* at 538. The limitations of copyright law regarding cyberspace even a mere five years ago are evident in the government’s prosecution of LaMacchia. The wire fraud statute was the only tool the government had at its disposal to criminalize the digital transmission of computer programs. *See id.* at 536.

134. *See id.* at 545.

135. *See id.* The court remarked:

This is not, of course, to suggest that there is anything edifying about what LaMacchia is alleged to have done. If the indictment is to be believed, one might at best describe his actions as heedlessly irresponsible, and at worst as nihilistic, self-indulgent, and lacking in any fundamental sense of values. Criminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer. One can envision ways that the copyright law could be modified to permit such prosecution.

*Id.*

136. *See id.* The court could not have been aware of the coming furor over music files, but made its decision independently.

137. *See* No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (1997). As one commentator explains:

The No Electronic Theft Act gives the government the ability to prosecute those who have stolen copyrighted works and then given them away over the Internet, rather than sold them for financial gain. The new law applies to individuals who reproduce or distribute, by electronic or other means, 10 or more copies of a copyrighted work during any 180 day period.

John F. Delaney et al., *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, in REPRESENTING THE NEW MEDIA COMPANY, *supra* note 40, at 61, 106.

138. However, an actual conviction under the initiative took far longer. The conviction of an Oregon student, mentioned earlier in this article, did not occur until August 1999. *See* Patrizio, *supra* note 45.

act requires the retail value of the electronically infringed material to exceed \$2,500.<sup>139</sup> This requirement presents a problem. The casual MP3 user who occasionally posts a song to a website will never fall under the new Act's ambit,<sup>140</sup> but still can cause economic loss. In short, though the new NET Act makes substantial strides towards dealing with new technology, it does little to address the concerns raised in the RIAA cases.

### B. *Secure Digital Music Initiative*

As an alternative to the difficulties of legislation, the electronic and recording industries so opposed during the RIAA cases have joined together to create a digital music protection scheme that will work across all platforms.<sup>141</sup> Besides Diamond and the RIAA, the SDMI consortium includes the International Federation of Phonographic Institutes (IFPI), other technology companies and various record labels.<sup>142</sup> The SDMI seeks to provide consumers with continued access to music and to allow limited home copying while allowing the recording industry to restrict multigenerational digital copies.<sup>143</sup>

SDMI intends to create a universal technological specification that

139. See 18 U.S.C. 2319(b)(1) (1994); see also Delaney et. al., *supra* note 137, at 106.

140. As such, a user would fail to meet the \$2,500 economic loss limit. One or two songs shared on the Internet and downloaded a few times will simply not meet this amount.

141. See *Discord Surrounding Diamond Multimedia's Rio Player is Ended Through Settlement Agreement*, 1 No. 12 INTELL. PROP. STRATEGIST 4 (1999) "The SDMI is a set of guidelines that describes the basic technical features of a system that will limit copying of music distributed on the World Wide Web, and will, the industry hopes, become universal." *Id.*

The announcement surrounding the shared SDMI endeavor positively glowed with cooperative spirit:

Ron Moore, Diamond Multimedia's general counsel, stated that his company and its Rio Port subsidiary were happy to end the legal dispute and "move forward with the music industry on the development of secure e-commerce music offerings through the Secure Digital Music Initiative (SDMI). . . . "The RIAA is also pleased to bring a formal end to this legal process," said Sherman, adding that the "announcement makes clear that the future of the digital music marketplace will be created in the marketplace itself, enabled by initiatives like SDMI."

*Id.*

142. See Henriquez, *supra* note 42, at 87.

143. The AHRA attempted to provide home consumers with the right to make copies—digital or analog—for personal use. The SDMI attempts to restrict the possibility of multigenerational copies while allowing the home user to engage in home copying. See *id.* at 88-89.

accommodates the consumer's desire for readily available digital reproduction technology, while providing copyright support to copyright owners.<sup>144</sup> If it succeeds, SDMI will work where the AHRA essentially failed. It remains unclear, however, whether digital protection is best accomplished by a hardware solution, a software solution or both.<sup>145</sup> SDMI's solution must be more forward-thinking than the fragile compromises of the AHRA and must anticipate and accommodate yet unimagined technologies.

### C. Future Digital Protection Difficulties

Digital technology, by its very nature, is insecure. The storage of data in binary digital form eventually can be copied. Quite recently, the supposedly secure digital versatile disk (DVD) format<sup>146</sup> (used primarily for videos) was cracked.<sup>147</sup> As recordable DVD players now exist, breaking copy protection on various commercially available DVD movies could create a substantial piracy concern. Thus, the motion picture industry seems poised to repeat the recorded music industry's problems.<sup>148</sup> A

144. See *id.* at 88.

145. See *id.* at 89. "By March 31, 1999, one year before the anticipated launch of the universal specification, eighteen companies had presented proposals . . . including content providers, consumer electronics manufacturers, security technology vendors, and information technology companies." *Id.*

146. DVD is rapidly gaining popularity and may be poised to eventually replace videocassettes.

DVDs are five-inch wide discs that, in this application, hold full-length motion pictures. They are the latest technology for private home viewing of recorded motion pictures. This technology drastically improves the clarity and overall quality of a motion picture shown on a television or computer screen.

Universal City Studios, Inc. v. Reimerdes, 82 F. Supp.2d 211, 214 (S.D.N.Y. 2000).

147. See Chris Oakes, *DVD Hackers Hit With Lawsuit*, WIRED NEWS (Dec. 28, 1999) <<http://www.wired.com/news/business/0,1367,33303,00.html>> (on file with author). A group of programmers "hacked" (that is, cracked the copyright protection) on DVD, ostensibly out of disappointment over the lack of DVD playback software for the Linux platform. See *id.* The hack allows a knowledgeable user easily to copy entire DVD movies—anywhere from 4.7 to 9.4 gigabytes in size. See *id.*

148. The fears of multigenerational DVD copies are strikingly similar to fears of multigenerational music recording copies:

DVDs contain motion pictures in digital form, which presents an enhanced risk of unauthorized reproduction and distribution because digital copies made from DVDs do not degrade from generation to generation. Concerned about this risk, motion picture companies,

California Superior Court judge initially denied the DVD Copy Control Association's request for a temporary injunction restraining the hackers from posting the cracked code on the Internet.<sup>149</sup> However, the U.S. District Court in the Southern District of New York recently granted the motion picture industry's similar injunction request.<sup>150</sup> Continued vigilance will be required to ensure copyright integrity as long as new digital technologies arise.<sup>151</sup>

#### D. Continuing Legal Troubles

##### 1. The MP3 Cases

###### a. RIAA v. MP3.com

The RIAA's litigation efforts against MP3 technology did not stop with the Diamond Multimedia lawsuit or the SMDI. On January 21, 2000, the RIAA filed suit against the website MP3.com,<sup>152</sup> asserting that the website's new service, My.MP3, constituted copyright infringement.<sup>153</sup>

---

including plaintiffs, insisted upon the development of an access control and copy prevention system to inhibit the unauthorized reproduction and distribution of motion pictures before they released films in the DVD format.

*Universal City Studios*, 82 F. Supp.2d at 214. This case showed that the industry's fears were warranted and the protection inadequate.

149. See Chris Oakes, *DVD Round 1 Goes to Hackers*, WIRED NEWS (Dec. 29, 1999) <<http://www.wired.com/news/politics/0,1283,33340,00.html>> (on file with author).

150. See *Universal City Studios*, 82 F. Supp.2d at 213.

151. See Kevin Davis, *Fair Use on the Internet: A Fine Line Between Fair and Foul*, 34 U.S.F. L. REV. 129, 161 (1999). The author comments:

Technologically, the development of devices that block unauthorized reproductions are a first step toward stopping the seemingly unstoppable practice of bootlegging. The problem faced by the industry, however, is that for every obstacle it puts in front of infringers, a counter technology is soon developed to bypass the hurdle.

*Id.*

152. MP3.com is a website devoted to using MP3 technology to provide recorded music to users over the Internet. MP3.com enters into direct arrangements with musicians and also works with labels. See *MP3.com, Inc. v. Rosen*, No. GIC 742982, at ¶ 10 (Super. Ct. San Diego Co. filed Feb. 7, 2000) (complaint) <[http://www.mp3.com/news/extra/mp3com\\_riaa\\_020800.html](http://www.mp3.com/news/extra/mp3com_riaa_020800.html)> (on file with author).

153. See *UMG Recordings, Inc. v. MP3.com*, No. 00 Civ. 0472 (JSR) (S.D.N.Y. filed Jan. 21, 2000) (complaint) <<http://www.mp3.com/news/extra/->

My.MP3 is a service where the consumer places a CD that he or she ostensibly owns into a CD-ROM drive on a computer. Using its “Beam-it” technology, MP3.com confirms the existence of the CD and gives the user permanent web access to the tracks on that disc.<sup>154</sup> The problems with this scheme, RIAA asserts, are twofold: first, MP3.com has no way of verifying the ownership or legitimacy of the disc inserted by the consumer,<sup>155</sup> and, second, MP3.com has no right to provide reproductions of CDs copyrighted by RIAA’s member musicians.<sup>156</sup>

Unlike the Diamond Multimedia suit, this case was decided in favor of the RIAA and the associated record companies.<sup>157</sup> Here, MP3.com’s technological argument failed to dazzle the court. MP3.com argued that its recordings were not exact reproductions of plaintiffs’ work, as they are technically of lesser quality.<sup>158</sup> However, as the court noted, and as MP3.com conceded, the human ear is generally unable to detect the distinction between MP3 and CD files, rendering the difference meaningless.<sup>159</sup> Additionally, since MP3.com’s admitted goal was to create an MP3 file that sounded as close to the original as possible, the argument fell flat.<sup>160</sup>

The court undertook a fair use analysis, which MP3.com failed.<sup>161</sup> The first factor—the commercial nature of the work—failed because MP3.com clearly stated that its goal was to facilitate higher traffic to the site, thus attracting greater advertising dollars.<sup>162</sup> Additionally, the court noted that the mere retransmission of files did not rise to the level of “transformation” required by the first factor of the fair use test.<sup>163</sup> Next, a fair use test demands an examination of the nature of the copyrighted

---

riaa\_mp3com\_lawsuit.html> (on file with author). Though the RIAA lay behind the suit, the complaint lists the following plaintiffs: UMG Recordings, Inc.; Sony Music Entertainment, Inc.; Warner Brothers Records, Inc.; Arista Records, Inc.; Atlantic Recording Corporation; BMG Music d/b/a The RCA Records Label; Capitol Records, Inc.; Elektra Entertainment Group, Inc.; Interscope Records; Sire Records Group, Inc. *See id.*

154. *See id.* at ¶ 4.

155. *See id.*

156. *See id.* at ¶¶ 6, 28. MP3.com does not reproduce a single copy of the consumer’s CD [which technically would be fair use, as the consumer has the right to listen to his or her music from any location] but rather, contends RIAA, has made infringing reproductions of 45,000 CDs. *See id.* at ¶ 1.

157. *See* UMG Recordings v. MP3.com, 92 F.Supp.2d 349, 350 (2000).

158. *See id.* at 350, n.1.

159. *See id.*

160. *See id.*

161. *See id.* at 350-52.

162. *See id.* at 351.

163. *See id.*

work.<sup>164</sup> The near-perfect MP3 copies are not descriptive in any way—they merely seek to replicate, as closely as possible, the original CD track. As such, the court stated, MP3.com’s claim fails the second factor.<sup>165</sup> The third factor, which addresses the amount of the copyrighted work that is used, was especially problematic, as MP3.com expressly copies and transmits the entire copyrighted CD in each instance.<sup>166</sup> The fourth factor, which goes towards market effect, failed on its face, as MP3.com’s actions infringe upon the statutory right of a copyright holder to market his or her sound recording.<sup>167</sup>

The court’s careful dismantling of MP3.com’s fair use claim does not bode well for new technology. It makes clear that the idea of “shifting” music into cyberspace can only be done by the end-user directly—MP3.com cannot act as a proxy. It ensures that mass MP3 reproduction of CDs will not be considered a legitimate activity, even without proof of piracy.

#### b. MP3.com v. RIAA

Not to be outdone, MP3.com had filed a wholly separate lawsuit against the RIAA alleging defamation, trade libel, interference with prospective economic advantage and unfair business practices.<sup>168</sup> MP3.com asserted that the RIAA continually makes statements characterizing the website’s services as “akin to stealing a CD from a record store”<sup>169</sup> and that MP3.com steals and exploits music and musicians.<sup>170</sup> Though the lawsuit does not so specify, one assumes that these RIAA statements are made regarding the recent My.MP3 service. MP3.com also states that the RIAA had approached investment bankers, securities analysts, and MP3.com’s financial partners and disparaged the website and its services.<sup>171</sup> It is unclear where this new litigation may lead, but it certainly shows that the uneasy truce of SDMI was short-lived.

---

164. *See id.* at 351.

165. *See id.*

166. *See id.* at 352.

167. *See id.*

168. *See* MP3.com, Inc. v. Rosen, No. GIC 742982, at ¶ 10 (Super. Ct. San Diego Co. filed Feb. 7, 2000) (complaint) <[http://www.mp3.com/news/extra/-mp3com\\_riaa\\_020800.html](http://www.mp3.com/news/extra/-mp3com_riaa_020800.html)> (on file with author).

169. *See id.* at ¶ 15.

170. *See id.* at ¶ 16.

171. *See id.* at ¶¶ 17, 18.

c. *The Uneasy Recording Industry—MP3.com Truce*

After expensive lawsuits and extensive mudslinging, at least two of the record company plaintiffs have come to some sort of agreement with MP3.com. Warner Music Group and BMG Entertainment have come to an agreement where MP3.com will pay record labels for the right to legally offer users the much-beleaguered “Beam-It” technology.<sup>172</sup> This deal provides MP3.com with access to big name, big label artists such as Santana, R.E.M., and Whitney Houston.<sup>173</sup>

However, this deal is not without a high price tag. Though actual numbers have not been put forth, most estimates assert that this will cost MP3.com around \$100 million.<sup>174</sup> Although, like many new Net companies, MP3.com is relatively cash-rich right now,<sup>175</sup> analysts are skeptical about how this will ultimately benefit MP3.com in particular and the digital music industry in general.<sup>176</sup>

This type of deal-making seems to point to increased record industry control over content and licensing. Perhaps soon people will begin to bemoan the loss of the free-wheeling, entrepreneurial spirit of the web. Certainly these developments are good for traditional copyright, but do they help us take full advantage of new technological possibilities? Moreover, if all resolution requires costly lawsuits and even costlier settlements, how will newcomers break into the market?

d. *Lester Chambers v. MP3.com*

As if the loss in the RIAA cases, combined with hefty settlement costs, weren't enough, MP3.com faces additional lawsuits. In the Chambers<sup>177</sup> lawsuit, a group of recording artists<sup>178</sup> have asserted that the record companies at issue in the original *RIAA v. MP3.com* suit failed to

172. See *MP3.com Strikes Agreement with Warner Bros., BMG*, <[http://www.dailynews.yahoo.com/h/rolls/2000...es\\_agreement\\_with\\_warner\\_bros.\\_bmg\\_1.htm](http://www.dailynews.yahoo.com/h/rolls/2000...es_agreement_with_warner_bros._bmg_1.htm)>.

173. See *id.*

174. See Derek Caney, *Major Record Labels Seen Successful in MP3.com Deal*, <[www.dailynews.yahoo.com/h/nm/20000611/en/music-mp3.com\\_3.htm](http://www.dailynews.yahoo.com/h/nm/20000611/en/music-mp3.com_3.htm)>.

175. See *id.*

176. See P.J. Huffstutter, *MP3.com Settles Copyright Suit With Two Labels*, <<http://www.calendarlive.com/music/20000609/t000054954.html>> (“[MP3.com] is paying a ton of money for something that, at least right now they’re not getting any direct revenue. It smacks of arm-twisting. . . . What this says is if MP3.com plays nice, they’ll have this content and maybe they’ll be around next year.”) (quoting Malcolm Maclachlan, a senior industry analyst).

177. *Lester Chambers v. Time Warner, Inc.*, 00 Civ. 2839 (S.D.N.Y. filed Apr. 12, 2000).

178. A varied group, representing artists who have recorded for Time Warner, BMG, RCA, Sony and Columbia. See *id.* at ¶¶ 11-14.

distinguish between sound recordings undertaken by the plaintiffs prior to revision of the copyright laws in 1972 and 1978.<sup>179</sup> They have asserted that they, and not the record companies, are the true owners of the copyrights in these sound recordings.<sup>180</sup> As such, they have chosen to sue both the record companies and MP3.com for copyright infringement.

This lawsuit raises interesting questions about the nature of who owns music. The RIAA has acted under color of the notion that it stands for the best interests of its member musicians, but this lawsuit seems to undermine that assertion. Additionally, as a class action lawsuit,<sup>181</sup> a plaintiff victory could shift economic power greatly, and possibly make way for those popular artists who have asserted their right to record and post MP3 tracks.<sup>182</sup>

*e. MPL Communications, Inc. v. MP3.com*<sup>183</sup>

As music publishers, MPL and Peer license recording and distribution rights for musical works.<sup>184</sup> With copyright charges largely similar to those at stake in the RIAA case,<sup>185</sup> the case now seems destined to be a victory for plaintiffs. However, the court may use this as an opportunity to determine the rights of music publishers in relation to record companies, musicians, and online content providers.

2. *The Napster Trilogy: The RIAA, Metallica and Dr. Dre*

At the forefront of the latest MP3 controversy is a small startup company called Napster.<sup>186</sup> Napster provides users with software called Music Share, which allows a user to share MP3 music directly with other computers equipped with the same software.<sup>187</sup> Napster does not act as a server, and therefore does not technically "host" the potentially infringing

179. See *id.* at ¶ 26.

180. See *id.* at ¶ 27.

181. See *id.* at ¶¶ 38-43.

182. Most notably, rap star Chuck D. and his group, Public Enemy, have stepped to the forefront of supporting Internet music. See <[http://www.rapstation.com/promo/lars\\_vs\\_chuckd.html](http://www.rapstation.com/promo/lars_vs_chuckd.html)>.

183. MPL Communications, Inc. and Peer Int'l v. MP3.com, 00 Civ. 1979 (S.D.N.Y. filed Mar. 14, 2000).

184. See *id.* at ¶¶ 4-5.

185. See *id.* at ¶¶ 22 and 26.

186. See <<http://www.napster.com>>.

187. See *Record Industry Scores Significant Wins in Battles Against Unauthorized MP3 Files; In Separate Cases, Court Rule that MP3.com Infringed Record Companies' Copyrights, and that Napster is not Protected by Safe Harbor Provisions of Digital Millennium Copyright Act*, 21 No. 12 ENT. L. REP 4, 4 (2000).

files.<sup>188</sup> The RIAA sued Napster in December 1999, alleging contributory and vicarious copyright infringement.<sup>189</sup> Initially, Napster filed for partial summary judgment, claiming that it should be protected under the “safe harbor” provision of the Digital Millennium Copyright Act because it does not actually house infringing files.<sup>190</sup> This claim was not upheld by the court.<sup>191</sup> The case now awaits a full trial, where it is expected that Napster will allege that it has substantial noninfringing uses and align itself with the Sony Betamax<sup>192</sup> cases.<sup>193</sup>

Napster has also been sued by the prominent music group, Metallica.<sup>194</sup> Metallica asserts that Napster’s software allows for contributory and vicarious software infringement, but goes on to raise a RICO charge alleging that Napster’s activities are an enterprise that displays a pattern of racketeering activity.<sup>195</sup> The group so far has succeeded in forcing Napster to block 300,000 users who allegedly infringed songs by the band.<sup>196</sup>

Rap artist Dr. Dre also filed suit against Napster, stating that Napster aids and abets the piracy of his songs over the Internet.<sup>197</sup> Dre had initially requested, in writing, that Napster remove his songs but Napster did not comply.<sup>198</sup>

As these lawsuits rage on, many musicians have come out in favor of Napster. Southern California punk band the Offspring has formed a

188. *See id.*

189. *See A & M Records Inc. v. Napster Inc.*, No. C 99-05183 MHP (N.D. Cal., May 8, 2000).

190. *See No DMCA Safe Harbor for Napster, California Judge Rules*, 3 No. 10 ANDREWS TELECOMM. INDUS. LITIG. REP. 7, 7 (2000); *see also supra* note 178, at 4 (noting that the safe harbor provision applies only to those providers who transmit or route information through their network. All routing in Napster takes place via the Internet, rendering it ineligible for protection).

191. *See Record Industry Scores Significant Wins in Battles Against Unauthorized Mp3 Files, supra* note 187, at 4.

192. *Sony Corp. v. Universal Studios, Inc.*, 465 U.S. 1112 (1984).

193. *See* < <http://www.wired.com/news/print/0,1294,36191,00.htm>.

194. *See Metallica et al. v. Napster Inc.*, No. 00-0391 (complaint) (C.D. Cal. filed Apr. 13, 2000).

195. *See Rock Group Hits Napster, Universities with Copyright and RICO Lawsuit*, 6 No. 19 ANDREWS INTELL. PROP. LITIG. REP. 5, 5 (2000).

196. *See Record Industry Scores Significant Wins in Battles Against Unauthorized Mp3 Files, supra* note 187, at 4. However, eager Napster users figured out a way to hack around the block within days. *See id.*

197. *See Young v. Napster Inc.*, No. 00-04366 (complaint) (C.D. Cal. filed Apr. 25, 2000).

198. *See Rap Artist Spins Suit Against Internet Music Pirate*, 12 No. 1. ANDREWS SPORTS & ENT. LITIG. REP. 5, 5 (2000). This piracy, however, has failed to hurt Dre, whose latest record sold four million copies. *See id.*

partnership with Napster to sell Napster merchandise.<sup>199</sup> Meanwhile, rapper Chuck D., who founded an Internet MP3 site of his own,<sup>200</sup> provided Napster with \$5,000 in prize money for a contest that asked up-and-coming artists to write a song to the tune of Public Enemy's seminal rap song "Power to the People and the Beats."<sup>201</sup> The contest asks artists to write about why they support Napster.<sup>202</sup>

At heart of these debates—musician against musician, industry against technology, label owner against artist—is the underlying uncertainty of who, in this digital day and age, owns the music. Decisions in the above cases will shape how music copyright is viewed in the digital future, and should be watched carefully.

## VI. CONCLUSION

The Internet and digital music transmission technology have provided end-user consumers with unprecedented access to both legal and pirated material. The courts have struggled to fit radical new capabilities into an outmoded copyright framework. The electronics and recording industries have been forced to look to private solutions, as legislative maneuvering is not timely. The RIAA cases showcase these legislative shortcomings. Private industry solutions serve as mere stopgaps, as recent DVD technology hacking shows. Though the pace of congressional change often is slow, new copyright laws are needed to handle the revolutionary developments of Internet technology.

---

199. See < <http://www.wired.com/news/print/0,1294,36786,00.htm>>.

200. See < <http://www.rapstation.com>>.

201. See *id.*; <http://www.napster.com>>.

202. See *id.*

\*\*\*