

**COPYRIGHT, CLEARANCE, AND**  
**RELATED ISSUES**  
**CONCERNING**  
**DIGITALLY DISTRIBUTED CONTENTS**

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**COPYRIGHT, CLEARANCE, AND RELATED ISSUES**  
**CONCERNING DIGITALLY DISTRIBUTED CONTENTS**

A. **EXCLUSIVE RIGHTS OF COPYRIGHT OWNER WITH RESPECT TO ALL COPYRIGHTABLE WORKS (SECTION 106):**

1. Exclusive right to reproduce.
2. Exclusive right to distribute.
3. Exclusive right to display.
4. Exclusive right to perform (Section 114 qualifications regarding sound recordings).
5. Exclusive right to create derivative works (i.e. creating new works incorporating substantial parts of pre-existing work).
6. Issue of content that is within the public domain.
7. See Paragraph N regarding compulsory license qualifications.

B. **INTELLECTUAL PROPERTY CONTENT TO BE REVIEWED (CONTENT THAT IS PROPRIETARY TO OWNER AND ADDITIONAL CONTRIBUTED ELEMENTS UNDER THIRD PARTY LICENSES):**

1. Music, including lyrics.
2. Sound recordings.
3. Films.
4. Television shows.
5. Videos.
6. Text.
7. Visuals, including:
  - (a) Photographs.
  - (b) Art.

- (c) Illustrations.
- (d) Designs.
- 8. Talent name and likeness uses.
- 9. Trademarks.

C. QUESTIONS TO EXPLORE WITH PARTY FROM WHOM SEEKING RIGHTS (“LICENSOR”):

- 1. Authority of rights holder, Licensor.
- 2. Scope of Licensor’s rights with respect to granting a third party certain rights to use content, including:
  - (a) Scope of rights Licensor is authorized to grant with respect to uses, territory, media, and time.
  - (b) Any pre-existing limitations.
  - (c) Any pre-existing conflicting guarantees to third parties.
  - (d) Scope of uses and media rights granted to Licensor by its grantors.
  - (e) Duration of time and territory on rights granted to Licensor by its grantors.

D. INTELLECTUAL PROPERTIES TO BE LICENSED AND IDENTITY OF RIGHTS GRANTORS INVOLVED:

- 1. Music:
  - (a) Music publisher.
  - (b) Composer/lyricist.
  - (c) Print publisher with respect to musical notation and lyrics.
  - (d) Established third party industry representatives, including:
    - (i) The Harry Fox Agency.
    - (ii) Performing rights societies: BMI/ASCAP/SESAC, plus performing rights societies outside of the United States.

(iii) Copyright Office.

2. Sound Recordings:

- (a) Record company.
- (b) Recording artists (managers/attorneys).
- (c) Session musicians.
- (d) Producers.
- (e) Unions: AFTRA; AF of M; IATSE.
- (f) RIAA.

3. Television/film/videos:

- (a) Must determine if Licensor has authority to grant use rights with respect to all elements included within the audio-visual work, not all of which may have been created by or under the direction of the “owner”, but may have been licensed for use in the audio-visual work:
- (b) Studio/production company.
- (c) Talent/artists (agents, manager, attorneys).
- (d) Unions/guilds; WGA; DGA; SAG; AFTRA; AF of M; IATSE.
- (e) Composers/publishers of score.
- (f) Pre-existing music licensed for soundtrack.
- (g) Authors of underlying text/book.
- (h) Publishers of text/book and any authorizations to exploit text/book in other media.
- (i) Illustrators/other content suppliers.

4. Text:

- (a) Publisher.
- (b) Author.
- (c) Sublicensed publishers.

- (d) Unions: WGA (if text/book done for film or television).
- 5. Visuals (including Photographs, Art, Illustrations, and Designs):
  - (a) Photographers/artists/designers.
  - (b) “Publisher” of the images with regard to reproduction rights.
- 6. Name and likeness.
  - (a) Talent/artist (agent/manager/attorney).
  - (b) Exclusive rights holders based on services committed.
  - (c) Contractual restrictions on uses.
- 7. Trademarks, to the extent that the re-purposing and re-publishing of any licensed intellectual property content is coupled with the trademark of Licensor or provider of product and trademarks used within the production, then need trademark license.

E. SCOPE OF USE RIGHTS REQUEST WITH REGARD TO MEDIA USES:

- 1. Right to reproduce, distribute, perform, display, and to create derivative works.
- 2. Scope of defined media, including:
  - (a) Physical media, such as VHS and DVD (open source) and DVD (dedicated hardware).
  - (b) Internet.
  - (c) Portals/servers/caching/streaming/downloading/P2P.
  - (d) Hyperlinking.
  - (e) Using content in packaging and text inserts.
  - (f) Using content in all media for marketing, promotion, publicity, distribution, advertising, and sale purposes.
- 3. Transmission/delivery modes, including over the Internet by way of cable, wireless, wired, and satellite.
- 4. Providing access to consumer:
  - (a) “Free” access.

- (b) “Paid-for” access by unlocking encrypted intellectual property on submission of key/payment or paid-for subscriptions or pay-per-view.
- 5. Duration of rights.
- 6. Territorial scope of rights.
- 7. Issues of bundling and coupling with content licensed or contributed by others.

F. 1995 DIGITAL PERFORMANCE RIGHTS IN SOUND RECORDINGS ACT (“DPRSRA”):

- 1. 1972 Phonorecord Act Amendment to Copyright Act provided copyright protection for sound recordings, effective as of February 15, 1972, but excluded public performance of the sound recording from the scope of the exclusive protected rights of the copyright owner, although this is a right that has been common for sound recording copyright owners under the relevant laws of most major jurisdictions outside of the United States.
- 2. In 1995, the DPRSRA provided a public performance right in the sound recording for the copyright owner for the first time in the United States (amending Section 106 and Section 114 of the Copyright Act). This grant applied, however, only in certain limited circumstances:
  - (a) Applies only to:
    - (i) Public performance by means of digital audio interactive and on-demand transmissions for which a voluntary license is required; therefore, it is the exclusive right of the sound recording owner (i.e. the record company) to decide whether to issue a license permitting interactive transmissions.
    - (ii) Public performance by means of subscription non-interactive transmission – for which a compulsory blanket license applies; i.e., a voluntary license is not required from the sound recording owner; for example, DMX, Music Choice, CD Radio, Sirius, and XM Satellite. (This legislation fostered a debate on whether the DPRSRA applied to Internet webcasters resulting in a provision being included in the DMCA).
    - (iii) DPRSRA does not apply to digital broadcasters (i.e. transmissions by FCC licensed terrestrial broadcast stations), which are exempt from needing a public performance license (whether voluntary or compulsory) for sound recordings. The Copyright Office has ruled, however, that the DMCA applies to the simulcast of such stations’ programs over the Internet, and they must file for a compulsory

license and pay the fee once established under the DMCA (see Paragraph G below). Copyright Office and federal court determine that terrestrial radio stations (e.g., Clear Channel) must pay labels for the webcasting of their radio programs using the master records of the labels. This ruling is being challenged.

- (b) Compensation for digital performances under compulsory license, which was established by arbitration panel under the auspices of the Copyright Office, currently is set at 6 1/2% of gross:
  - (i) Distribution of proceeds:
    - (1) 2 1/2% to non-featured musicians.
    - (2) 2 1/2% to non-featured vocalists.
    - (3) 45% to featured artist.
    - (4) 50% to record company.
- (c) Conditions to qualify for compulsory license, without which transmission would be an infringement of copyright:
  - (i) Must not exceed “sound recording performance complement”; i.e., over a three (3) hour period, cannot transmit: more than two (2) consecutive or three (3) total selections from one (1) sound recording; or more than four (4) songs, or three (3) in a row, from same artist.
  - (ii) Must transmit owner encoded copyright information with recordings, i.e., must identify sound recordings, the album, and featured artist.
  - (iii) Prior announcements not permitted, cannot publish a program guide.
  - (iv) Looped or continuous programs may not be less than three (3) hours in duration; and programs of less than one (1) hour and performed at schedule times may be performed only three (3) times in a two (2) week period, or four (4) times in a two (2) week period if one (1) hour or more in duration.
  - (v) Archived programs may not be less than five (5) hours in duration and may reside on website for no more than a total of two (2) weeks.

3. DPRSRA also covers music (as distinct from sound recordings) by providing that statutory mechanical royalties, i.e., the reproduction and distribution rights of

music owners (publishers), apply to “Digital Phonorecord Deliveries” (DPDs) by any subscription service:

- (a) But still need permission of owner of the sound recordings to do a DPD which is a voluntary rather than a compulsory license.
- (b) DPRSRA provides that when records are distributed by “digital phonorecord delivery,” the compulsory mechanical license rate for the music on the sound recording must be paid by record companies – rather than the rate set forth in any negotiated controlled composition clause under the contract with the recording artist – except under two (2) circumstances. First, contracts containing controlled composition clauses that were entered into on or before June 22, 1995 will continue to be given effect. And second, contracts containing controlled composition clauses that are entered into by singer-songwriters who retain the right to grant licenses to their songs – that is, who act as their own music publishers – will be given effect, *if* they are entered into *after* the songs in question have been recorded. [Section 115(c)(3)(E)].
- (c) Current statutory rate, effective through December 31, 2003, is 8¢ per song, or 1.55¢ per minute of playing time if recording of song is greater than five (5) minutes. Presently, the rates are scheduled to increase for physical phonorecords every two (2) years at the beginning of the even year through 2008. This rate applied to DPDs under industry negotiated agreement until December 31, 2000, at which time it was subject to extension or adjustment by industry agreement. As no agreement has been reached, determination on what rates to apply submitted to an arbitration panel under the auspices of Copyright Office. (See also Paragraph J.)

G. 1998 DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA – SECTION 405):

1. The DMCA (further amending Section 114 of the Copyright Act) grants a public performance license for digital transmission or streaming of music sound recordings by webcasters, i.e. playing or performing (as distinct from a digital download) of audio musical sound recordings over the Internet. This activity does not fall directly within the three (3) categories addressed by the DPRSRA, and Section 405 of the DMCA amended the DPRSRA to expand the statutory (compulsory) license for non-subscription transmission to include webcasting as a new category of eligible transmission, and therefore subject to a compulsory license. As such, the sound recording copyright owner cannot prevent the webcasting provided that all of the criteria required by the statute are satisfied by the webcaster and it has timely filed for a compulsory license.
2. Webcasters took the position that the DPRSRA did not apply to them as their conduct was a “non-subscription transmission” and non-interactive, and therefore exempt from requiring the permission of sound recording copyright owners.

3. RIAA's position was that webcasters were required to get licenses from the sound recording copyright owners (i.e. the DPRSRA's exemptions were only available to FCC terrestrial licensed broadcasters).
4. The DMCA confirmed that a license, either compulsory or voluntary, was required, by providing that the sound recording copyright owners have the exclusive right to control on-line or Internet delivery of their sound recordings.
5. The statutory license applies, however, only to certain non-interactive subscription and non-subscription transmissions. "Interactive service" is defined in the DMCA to exclude transmission of songs specifically requested by and for a particular user, and programming that is specifically designed for a particular user.
6. To be eligible for the statutory license, a webcaster's service and programming must meet several criteria. Services that do not meet the criteria need to obtain (i.e. negotiate) voluntary licenses directly from the recording companies or through the RIAA clearinghouse. Some webcaster/streaming companies (such as Yahoo! and Music Match) to eliminate any doubt have secured voluntary licenses even though they might have qualified for a compulsory license.
7. The eligibility criteria for the compulsory license includes the following:
  - (a) Programming must comply with limitations designed to assure the sound recording copyright owner that webcasting (which generally occurs as uninterrupted programming) does not displace sales. As a condition for eligibility:
    - (i) programming should comply with the "sound recording performance complement", which is defined under current law (basically as provided in the DPRSRA), to provide that over a three-hour period, a service should not intentionally program more than three songs or more than two in a row from the same recording, or four songs or more than three in a row from the same recording artist or anthology;
    - (ii) archived programs that, when accessed, always start in the same place and play in the same order should be at least five hours long, and should not be available for more than two weeks at a time;
    - (iii) continuous "looped" programs that always perform in the same order, but are accessed in a continuous play stream should be at least three hours long; and,
    - (iv) rebroadcasts of programs can be performed at scheduled times three times in a two-week period for programs of less than an hour and four times for programs of an hour or more.

- (b) The webcaster is not permitted to publish advance program guides or use other means to pre-announce when particular sound recordings will be played.
- (c) The webcaster must use only sound recordings that are authorized for performance in the United States (e.g., do not play bootleg recordings).
- (d) Within one year of enactment (i.e. by October 28, 1999), the webcaster must provide some means for the end user to identify the song, artist, and album title of the recording as it is being played.
- (e) Any identification or technological protection information included in the sound recording must be passed through, as long as it does not impose substantial costs or burdens on the webcaster, or create any audible or visible effects for the end user.
- (f) The webcaster must not deploy or support technological means to evade these requirements.
- (g) To the extent it is technologically available, the webcaster must set transmissions so that receiving software will inhibit the end user from doing any direct digital copying of the transmitted data, and must not explicitly encourage home taping.

#### H. RATES FOR WEBCASTING MASTERS:

For streaming their masters under compulsory licenses in a non-interactive environment (interactive use requires a negotiated license with record company), the Copyright Office has issued a schedule of fees computed at .07¢ (i.e., \$.0007) per performance per listener for “pure” webcasters and for webcasting of terrestrial radio programs. Objections have been filed by all sides. Implementation likely affected by anticipated litigation and legislative activity over dissatisfaction with the fee schedule.

1. Allocation of fees collected and issue of direct payment to artists of their share of the fees:
  - (a) 50% record label.
  - (b) 45% featured artist.
  - (c) 2.5% session musician (AFM).
  - (d) 2.5% session vocalist (AFTRA).
2. Sound Exchange: Under auspices of RIAA established to collect fees under compulsory licenses (and voluntarily negotiated licenses (e.g., Yahoo!)) for webcasting masters:

- (a) Sound Exchange needs to be authorized by Copyright Office as collecting agency; not restricted to there being only one (1). Hearings and comments currently being held on procedures to govern Sound Exchange.
  - (b) Controversy regarding RIAA, a record company trade association representing interest of artists. Sound Exchange authorized by record companies to pay artists share directly. Sound Exchange now a separate “independent” non-profit with a Board equally divided between representatives of record companies and artists.
  - (d) AFTRA, AFM, and AFIM support Sound Exchange.
  - (e) RIAA already is the sole collector for DMX and Music Choice under the DPRSRA for cable and satellite subscription services; should include Sirius and XM Satellite focused on the automobile market.
3. IFPI and collection societies in 24 countries provide a one-stop shop approach for licensing use of masters on the Internet. A single international license from one source for entire repertoire. Participating countries include Austria, Denmark, Germany, Greece, Ireland, Netherlands, Portugal, Sweden, U.K., Czech Republic, Hungary, Poland, Slovak Republic, Canada, Hong Kong, Malaysia, Singapore, New Zealand, Taiwan, South Africa, Argentina, Mexico, Peru, and Venezuela.

I. RATES FOR MASTERS ON DPDs:

Record companies can establish their own voluntary rates for digital downloads of the master sound recordings as Copyright Act provisions do not apply to digital phonorecord deliveries of masters:

- 1. Agency model through retailers (BMG, Universal, and Sony), with label selling the copy and keeping on average 80% to 90% of digital phonorecord delivery sales to consumers and the retailer as agent keeping the balance.
- 2. Gross Margin model (EMI and Warner Music) with retailer “buying” the title from the label (as at a wholesale price) and setting its own resale price to the consumer downloading the master.

J. RATES FOR MUSIC ON DPDs (see also Paragraph F3(c)):

- 1. Music publishers’ position is that a digital phonorecord delivery requires a mechanical license and a performance license, as both rights are being used.
- 2. Record companies’ position as it relates to the music on the masters is that a digital phonorecord delivery requires only a mechanical license and not a performance license.

3. Recent Copyright Office Section 104 report affirms the record companies' position (see Paragraph L for details).
4. See Paragraph F3(c) for rates.

K. RATES FOR STREAMING MUSIC.

1. RIAA and NMPA entered into negotiation to establish rates for streaming music and conditional downloads from record companies' subscription services, but did not reach an agreement.
2. NMPA sued Universal Music for its Farmclub.com subscription service for failing to get clearance to stream music and to do the necessary caching or storing and making copies for temporary memory buffers (i.e., reproduction) of the music to create the database of music to be streamed.
3. Each has petitioned Copyright Office to establish the fee schedules and payment obligations. The law in this area is uncertain on whether it is covered by the compulsory licensing provisions of the Copyright Act. According to the RIAA petition, record companies are ready and willing to pay royalties to music copyright owners when record companies use or authorize the use of musical works in services that transmit On-Demand Streams (i.e., streaming transmissions that permit users to listen to the music they want when they want and as it is transmitted to them) and/or Limited Downloads (i.e., on-demand transmissions of downloads to a local storage device using technology that causes the downloaded file to be available for listening only for a limited period of time or a limited number of times). The Copyright Office has convened a CARP proceeding to determine the rate if the rulemaking indicates that the compulsory mechanical license provisions apply.
4. Copyright Office to conduct hearings on what subscription services will pay as a "mechanical" royalty fee to music publishers for streaming and conditional downloading, but that likely will not occur until second half of 2002, with no decision before second half of 2003. The major label groups have reached agreement with music publishers to license songs for their subscription music services, but have left to the CARP proceeding what the rate will be. The terms call for the labels to pay publishers \$1 million in royalty advances for use of their music for two (2) years to be applied as a credit against whatever rates are eventually set. The labels are expected to pay \$750,000 per year in royalties after the first two (2) years if a rate still has not been determined. The tentative agreement allows labels to offer on-demand streams and conditional downloads that become inactive after a certain period of time.
5. Licenses for performances of music on streaming and webcasting are issued by BMI, ASCAP, and SESAC at rates established through their calculation formulas.

L. COPYRIGHT OFFICE ISSUES SECTION 104 REPORT ON DMCA:

1. Amend DMCA to provide that temporary copies made during licensed Internet media streaming do not infringe on copyright:
  - (i) Buffers have no independent economic significance as made solely to enable to the performance.
  - (ii) Economic value is in performance of the music and the sound recording which are paid-for.
2. Same concept applies to a vendor transferring digital downloads to a consumer's PC.
3. First sale doctrine should not be extended to digital media, i.e., consumers would not have the right to re-sell purchased digital music.
  - (a) Digital transmission are different than transferring physical goods.
  - (b) Digital transmission creates additional copies.
4. Consumers should be allowed to create back-up copies of non-infringing digital media.
  - (a) Amend law so fair use copies are not subject to first sale doctrine; or
  - (b) Allow an archival exemption that back-up digital copies may not be distributed.

M. MUSIC ONLINE COMPETITION ACT (MOCA) INTRODUCED TO ADDRESS VARIOUS DMCA ISSUES, INCLUDING:

1. Incidental and archival copying.
2. In-store sampling exemption.
3. Extending the mechanical compulsory license to Internet file swapping music services.
4. Permit limited performances (30 to 60 seconds) for promoting sales.
5. Content owner is not required to license to any digital distributor or subscription services. If it does license, it may do so on any terms and conditions it negotiates with any unaffiliated entity, but requires a master content owner that licenses its catalog to a digital distributor in which it has a 5% or greater interest (e.g., MusicNet or PressPlay) to license its content to any other digital distributor on the same terms and conditions.

6. If there are material differences in scope of license regarding type of service, particular sound recordings, frequency of use, number of subscribers served, or duration of license, then different terms and conditions may be established, but all who want a similar scope of use would get the same terms and conditions.
7. Limit copyright owners' ability to require use of a particular DRM technology or digital music player.
8. Confirms allocation of collected fees as follows:
  - (a) 45% to featured artist.
  - (b) 2.5% to AFTRA.
  - (c) 2.5% to AFM.
  - (d) 50% to copyright owner.

N. REVIEW OF COMPULSORY/VOLUNTARY LICENSES WITH RESPECT TO LISTED INTELLECTUAL PROPERTIES AND THEIR USES:

1. Compulsory License: Right of non-owner to use as permitted by statute.
  - (a) Mechanical license for phonorecords, but applies to audio-only; does not apply to audio-visual projects.
  - (b) Certain basic cable transmissions.
  - (c) Digital audio-only transmissions:
    - (i) Performance or streaming of sound recording as distinct from a digital phonorecord delivery (or digital download)) of sound recordings.
    - (ii) Compulsory right does not apply to audio-visual products even though sound recordings embodied in same.
    - (iii) Compulsory only applies with regard to non-interactive and non-subscription (i.e. not on demand) and must meet a series of specific technical requirements to qualify, even if non-interactive and non-subscription; and must file notice of intent to rely on compulsory right.
  - (d) Ephemeral recording (caching) for transmission from multiple servers.

2. Voluntary License: All uses not covered by compulsory license are subject to and require a voluntary license, necessitating specific negotiation with and permission of the owner or the authorized Licensor of the content. Uses requiring a voluntary license include, but are not limited to:
- (a) Reproduction, distribution, display, and performance of music, sound recordings, film, television programs, and any other intellectual property in DVD magazine.
  - (b) Performance of music requires licenses from the performing rights societies, BMI, ASCAP, and SESAC (and international counterparts), to the extent that the music is performed/streamed via a portal site over the Internet (rather than off the disc in the consumer's home not connected to the Internet, for which the music performance license is not needed).
  - (c) Sound recording performance license in digital mode for interactive access or subscription (i.e. "on demand"); such access and use not subject to compulsory license and requires record company approval based on negotiations. Again, applies to a performance by way of a portal site over the Internet, but not to performance in the consumer's home by playing, for example, a DVD through the hardware not connected to Internet.
  - (d) Uploading content to servers for access by subscribers:
    - (i) Mechanical license for music.
    - (ii) Music performance license.
    - (iii) Synchronization license for music if coupled with visuals.
    - (iv) License for sound recording.
    - (v) License for other intellectual property content, including film, television, video, text/books, photographs (etc.), talent/artist's name and likeness, and trademarks.

O. TISANI:

The lead plaintiff in Tasini was Jonathan Tasini, a freelance writer who had written some articles for the New York Times in the early 1990s. When Tasini discovered that the paper was republishing his articles in electronic databases without permission or payment, he sued, claiming the newspaper was violating his copyright. Tasini argued that while he had given the Times the right to publish his articles in its newspaper, this right did not include the right to republish his work in electronic form.

Justice Ruth Bader Ginsburg, writing for the majority of the Court, agreed: the right of initial publication, she reasoned, did not automatically subsume the right to include the work in an online database. That right remained with Tasini.

So far, the story is pretty straightforward—Tasini and the other freelancer plaintiffs gave a limited publication right to the paper, and the paper exceeded that right, infringing upon the authors' copyright. But there's a catch.

The Court suggested that the trial court could fashion a creative solution that ensured that Tasini's articles, and those of other freelancers, would still be available to the public in electronic databases. The Court noted that the goals of copyright law are "not always best served by automatically granting injunctive relief." Thus, just because Tasini owns his articles, that does not mean that he can force the New York Times to remove them from its databases. The Court even implied that the trial court could compel Tasini and other freelancers to allow the Times to license their work for publication in electronic databases—as long as they were compensated.

Why did the Court suggest possible limits on the freelancers' property right? Because the majority was responding to the concern that there would be "holes in history" created by the removal of the freelancers' important work from electronic databases.

The Court suggested that such holes might be avoided if the two sides – the authors and the publishers – could get together and agree contractually on the terms of electronic publication.

Failing that, the Court noted that the holes still could be addressed by the lower courts and Congress — each of which could "draw on numerous models for distributing copyrighted works and remunerating authors for their distribution." The Court offered the example of a law that allows noncommercial public broadcasters the right to use music or photos, either by voluntary negotiation or — importantly — by compulsory license.

**Compulsory Licensing: Eminent Domain for the Written Word** A compulsory license forces a copyright or patent owner to permit someone else to use the work for a predetermined fee. Accordingly, it precludes the owner from refusing to license his or her work to other people in certain, specified circumstances. In the compulsory licensing model the Court cited, for example, if the parties cannot agree on a royalty for a given copyright license, then an arbitration panel would decide the rate for them.

#### P. NAPSTER:

The RIAA and NMPA in December, 1999, sued Napster for copyright infringement (contributory (one who with knowledge of infringing activity, induces, causes or materially contributes to the infringing conduct of another) and vicarious (one who has control over and financially benefits from the infringing activity)) as its P2P file sharing system facilitates the exchange of copyrighted master sound recordings and musical compositions.

District Court issued preliminary injunction in July, 2000, but Ninth Circuit stayed it and ordered a hearing which took place in October, 2000. In February, 2001, Ninth Circuit concluded

Napster activities infringed at least the exclusive rights to reproduce and distribute. Ninth Circuit rejected fair use defense (purpose and character of the use; nature of copyright work; amount and substantiality of portion used; and effect of use on potential market for the work or the value of the work).

Ninth Circuit preliminarily enjoined Napster from engaging in, or facilitating others in, the copying, downloading, uploading, transmitting, or distributing of sound recordings, and directed plaintiffs to provide notice to Napster of their copyrighted sound recordings by providing for each work: title; name of featured recording artist; name of one or more files on Napster system containing such work; and certification that plaintiffs own or control the rights allegedly infringed.

On remand to District Court, Napster was ordered in March, 2001, to curb exchange of copyrighted sound recordings on its Internet service. Napster must prevent users from trading unauthorized files within 3 business days of receiving notice from copyright holders.

District Court also required record companies to provide names of masters to which they owned the copyright, and also to provide evidence that those masters were being traded on Napster.

In early July, 2001, Napster went dark to implement and test its filtering system. Later in July, 2001, District Court said Napster could not restart until its filtering system was 100% effective. Napster has appealed this to the Ninth Circuit as over-broad.

Record companies and NMPA subsequently (August, 2001) filed for summary judgment on Napster's liability, which Napster opposes. All is still pending.

Q. COPYRIGHT.NET:

A new lawsuit filed against MP3.com seeks to hold the San Diego music-locker service liable not just for songs it improperly copied and distributed -- but for every bootleg track exchanged through Napster and other underground file-swapping services.

The suit, filed on behalf of 52 independent songwriters and music publishers, accuses MP3.com of "viral" infringement. It alleges MP3.com's technology set the stage for widespread music piracy, enabling bootlegged songs to pass from computer to computer faster than you can say "Oops, I Did It Again".

The argument goes like this: MP3.com made compressed copies of about 900,000 songs, which it placed on its computer servers -- without obtaining the rights to do so. That created a vast bootleg library, from which MP3.com subscribers could download songs. Once on the user's computer hard-drive, a single song could be copied and passed around infinitely in the music underground.

"If a song has been downloaded hundreds of thousands of times on Napster, and at least a portion of that is attributable to MP3.com, the magnitude of damages that should be assessed would be many, many times what they would be liable for under direct infringement," said Ray

Mantle, a New York attorney representing the independent artists. Mantle is seeking damages greater than the award Universal Music Group won from MP3.com. last September, when a federal district court judge found it willfully infringed the record label's copyrights. At that time, the judge ordered MP3.com to pay \$25,000 for every Universal CD on the My.MP3.com service.

R. TERTIARY COPYRIGHT INFRINGEMENT:

The term, "tertiary copyright infringement", could apply to acts one step removed from contributory and vicarious infringement, the charges that federal courts have ruled will likely apply to Napster.

A tertiary infringer would be one who has knowledge of and contributes to the acts of a contributory or vicarious infringer, or one who supervises and financially benefits from a contributory or vicarious infringer.

Traditionally, courts have only held as liable those parties who are very close to the act of infringement, such as Napster, which ran a central server that managed all searches and connections for the exchange of copyrighted material. But some newer file-sharing services, which are designed to limit the liability of the companies that provide them, may force the courts to reevaluate traditional notions of liability, said Peter Jaszi, a professor of copyright law at American University. "In order to reach these activities, these doctrines of third-party liability will have to be stretched even further than they've been stretched before," Jaszi said.

What if a company distributes software that directs users to the nearest mini-Napster server every time they log on -- is it liable? What if a web site operator provides a list of instructions as to where others can obtain copyrighted content -- is the operator liable? The current body of law suggests not. Still, as Jaszi points out, that body is small. There just aren't many precedents that define third-party liability since the concept was relatively unimportant before the Internet.

So far, makers of the various versions of Gnutella software have avoided lawsuits because, once installed, clients have no further interaction with the company that wrote them. This means Gnutella developers have no power to terminate users and no control over what they trade. That a court would bend the law far enough to make Gnutella developers vulnerable, legal experts say, seems unlikely, since it might chill all software development.

Instead, the entertainment companies are going after the Internet service providers (ISPs) that host infringing Gnutella users, asking users to notify and eventually terminate them, or risk contributory or vicarious liability, although it's not clear whether this strategy is legally enforceable. Shutting down individual file sharers, however, is nowhere near as effective as stopping the software at the source. Thus, the entertainment companies may be tempted to pursue MusicCity, whose popular Morpheus file-sharing software is emerging as the "new" Napster.