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The Music Owners' Listening Rights Act of 2000: I Want My MP3

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INTRODUCTION

Whether it is used for work or play, the Internet has become a valuable source in our everyday lives. Its technology has truly brought the world to our fingertips. Along with all of the Internet's benefits have also come a series of challenging questions regarding how existing law can be applied to this new medium. One of the most interesting and complex issues revolves around copyright law and intellectual property.[1]

At the forefront of this debate in the music world, is how to create a balance between the rights of the copyright holder and that of the music owner. Although Congress has attempted to create legislation to answer some of these questions, technology continues to advance at a rate much quicker than that of our law making body. The most recent attempt is the Music Owners' Listening Rights Act of 2000,[2] sponsored by Representative Rick Boucher.

I. BACKGROUND

A.Federal Legislation

1. The Copyright Act of 1976

The need for federal law governing copyrights is recognized in the United States Constitution. The Copyright Clause, Article I, Section 8, Clause 8 grants Congress the power, "to promote the

[1] ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHALL KWALL, INTELLECTUAL PROPERTY 1 (1996) Copyrights protect ownership rights with respect to products created through intellectual efforts.
[2] H.R. 5725, 106th Cong. (1999).

progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[3] Copyright law is embodied in Title 17 of the United States Code.[4] Copyright protection subsists in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[5] Congress constantly must weigh the law's objectives: to promote widespread dissemination of original creative works, while providing incentives to authors and owners to create such works.[6] Copyright law thus represents a delicate balance between society's optimal use of resources and the optimal impetus for individual creativity.[7]

a. Exclusive Rights

Fundamental to copyright law is the idea that the copyright holder has exclusive rights to certain areas and activities pertaining to their work. Section 106 of the Copyright Act establishes these exclusive rights, which include the right to do and to authorize: reproductions of the work, preparations of derivative works based on the work, distribution of copies to the public, performances of the work, and to display the work publicly.[8] The Act grants the legal or beneficial owner of an exclusive right under a copyright to institute an action for any infringement of that particular right, thus safeguarding the value of the copyrighted work by promoting the creative process and providing financial incentives to its creator.[9]

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[3] U.S. CONST. art. I, § 8, cl. 8.
[4] 17 U.S.C. § 101 (West 1976).
[5] 17 U.S.C. § 102 (West 1976).
[6] *See* David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 U.S.F.L. Rev. 1, 9-10 (1998).
[7] Dreyfuss at 233.
[8] 17 U.S.C. § (1) through (3) & (5) (West 1976).
[9] 17 U.S.C. § 501(b) (West 1976).

b. Fair Use

The defense of fair use carves out of the exclusive rights conferred by the Copyright Act, and legally empowers a person to use the copyrighted works in a reasonable manner without the consent of the copyright owner.[10] The first case to introduce the doctrine of fair use as an affirmative defense to copyright infringement was *Folsom v. Marsh*.[11] In *Folsom*, the court looked to three factors to determine whether copying was permissible: 1) the nature and objectives of the selections made; 2) the quantity and value (quality) of materials used; and 3) the degree to which the use may prejudice the sale by the plaintiff or diminish the plaintiff's profits.[12] Congress later codified these factors in Section 107 of the Copyright Act.[13]

The factors examined in *Folsom* were expanded upon in Section 107 to determine whether the use made of a work in any particular case is a fair use to include:

> 1)the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> 2)the nature of the copyrighted work;
>
> 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> 4)the effect of the use upon the potential market for the value of the copyrighted work.[14]

No single factor is determinative and the list is not intended to be exclusive.[15] Neither does a single definition of fair use exist, as the defense applies on a case-by-case basis as a rule of equity and

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[10] 17 U.S.C. § 107 (West 1976).
[11] 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).
[12] *Id.* at 344.
[13] 17 U.S.C. § 107 (West 1976).
[14] *Id.*
[15] *See* Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417, 450 (1984).

reason.[16] The fair use defense thus "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[17]

Due to technological advances, the principles of intellectual property have expanded into the realm of cyberspace and the Internet.[18] The Copyright Act, though effective in protecting the rights of copyright owners regarding most incidents of infringement, was not written with the forecast of the digital age to come. As such numerous pieces of legislation have been proposed throughout the years to compensate for the Copyright Act's shortcomings.

2. The Audio Home Recording Act

In 1992, Congress amended the 1976 Copyright Act in an attempt to balance the issues concerning the recording and electronics industries.[19] The Audio Home Recording Act ("AHRA") placed restrictions on consumers and certain requirements on manufacturers before granting immunity to consumers. The AHRA presented three pertinent alterations to the Copyright Act, it: 1) establishes a royalty system for digital recording devices and media, which compensates the recording industry for lost retail sales[20]; 2) requires an anti-copying digital device in all digital devices, which eliminates the threat of "serial copying", the Serial Copy Management System ("SCMS")[21]; and 3) establishes non-commercial, home audio taping (digital or analog) as permissible, eliminating both manufacturer contributory

[16] *Id.* at 420.
[17] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (*quoting* Stewart v. Abend, 495 U.S. 207, 236 (1990)).
[18] Fred Koenigsberg , *Guarding Intangible Property In A New, Intangible Realm*, NAT'L L.J., 68 (col. 2), Aug. 3, 1998 at ¶ 1.
[19] *See* 17 U.S.C. § 101-914 (West 1999).
[20] 17 U.S.C. § 1003 (West 1992).
[21] 17 U.S.C. § 1002 (West 1992).

infringement liability as well as direct infringement liability of the consumer.[22]

The most significant aspect of the AHRA was that it permitted the introduction of digital copying and digital copying devices to the United States market. A compromise reached in order to get the Act passed through Congress, exempted computer hard drives from the SCMS requirement.[23] This, for the most part, rendered the legislation irrelevant to music distribution on the Internet.[24] Undoubtedly Congress intended that the Act would be flexible enough to deal with the emerging technologies. However, Congress did not anticipate MP3 technology which did not develop until 1991, pushing the need for copyright protection to new limits.

3. The Digital Millennium Copyright Act[25]

The Digital Millennium Copyright Act ("DMCA") was signed into law on October 28, 1998. The legislation implements two 1996 World Intellectual Property (WIPO) Treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.[26] Title II of the DMCA amends Federal Copyright Law, adding a new section 512 to the Copyright Act of 1976, creating several new limitations on the potential of online service providers for copyright infringement.[27] Congress stated in its conference report that Title II "preserves strong incentives for service providers concerning their legal exposure for infringements that may occur in the course of their activities."[28] This is accomplished

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[22] 17 U.S.C. § 1008 (West 1992).

[23] *See* Philip S. Corwin, *RIAA Commits Legal Hara-Kiri* (June 6, 1999) <http://www.mp3.com/news/277.html> *as cited in* Wendy M. Pollack, *Tuning in: The Future of Copyright Protection for Online Music In the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2462 (2000).

[24] *Id.*

[25] 17 U.S.C. § 512 (West 1998).

[26] The Digital Millennium Copyright Act of 1998, U.S. COPYRIGHT OFFICE SUMMARY, Dec. 1998, at 1.

[27] *Id.* at 8.

[28] H.R. Conf. Rep. No. 105-796, at 72 (1998), reprinted in 1998 U.S.C.C.A.N. 639, 649.

by providing limitations on their liability for copyright infringement as long as specific requirements are met.[29]

Title II provides "safe harbors" for Internet Service Providers ("ISPs").[30] These limitations which severely limit liability fall into four categories of conduct: 1) transitory communications, 2) system caching, 3) storage of information on either systems or networks at the direction of users, and 4) information location tools.[31] Section 512(a), limitations for transitory communications, limits the liability of ISPs when the provider serves merely as a "conduit," transmitting information from one point to another.[32] This section includes acts of "transmission, routing, or providing connections for the information."[33] Section 512(b), limitations for system caching, limits the liability of ISPs when a provider "retains copies, for a limited time, of material that has been made available online by a person other than the provider, and then transmitted at his or her direction."[34] This limitation is applicable to both the intermediate and temporary storage of information.[35] Section 512(c), limitations for information residing on systems or networks at the direction of users, limits the service provider's liability concerning infringing information that is posted on websites hosted by their systems.[36] Finally, section 512(d), limitations for information location tools, provides limitations for liability pertaining to "hyperlinks, online directories, and search engines."[37] It limits liability to acts that refer or link users to sites containing infringing materials.[38]

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[29] See *supra* note 26 at 9.
[30] *See* Mark Radcliffe, *Digital Millennium Copyright Act Forging the Copyright Framework for the Internet: First Steps*, 557 PLI/PAT 365, 368 (1999) (The limitations on liability are commonly referred to as "safe harbors.").
[31] See *supra* note 26 at 8.
[32] *Id.* at 10.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 11.
[36] See *supra* note 26 at 11.
[37] *Id.* at 12.
[38] *Id.*

A service provider must meet two overall conditions to be eligible for any of the limitations.[39] First, it must adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers.[40] Secondly, it must accommodate and not interfere with "standard technical measures."[41] "Standard technical measures" would include measures that have been developed pursuant to a broad consensus of copyright owners and service providers and do not impose a substantial cost or burden to service providers.[42]

Title II requires copyright owners to individually pursue the actual infringers who choose to upload and download music over the Internet against an artist's will. This protects "innocent" ISPs which were previously a liability target. Repeat individual infringers will face losing their Internet access, as "Congress intends to ensure that those who 'flagrantly' abuse their access to the Internet through disrespect for the intellectual property rights of others will understand that they face a realistic threat of losing that access."[43] The DMCA also gives ISPs incentive to monitor their services to ensure that they continue to qualify for "safe harbor" protections.

Although the DMCA goes a long way in implementing legal protection for ISPs who are innocent of infringing activities, technology has continued to expand leaving a new set of questions about the law unanswered. One of the most debated questions revolves around the definition of an ISP and to who qualifies for protection under that definition. The term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing,

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[39] *Id.* at 9.

[40] *Id.*

[41] The Digital Millennium Copyright Act of 1998, U.S. COPYRIGHT OFFICE SUMMARY, Dec. 1998, at 9.

[42] *Id.*

[43] *See* Mark Radcliffe, Digital Millennium Copyright Act Forging the Copyright Framework for the Internet: First Steps, 557 PLI/PAT 365, 377 (1999).

without modification to the material sent or received.[44] A "service provider" also includes a provider of online services, or network access, or the operator of facilities therefor.[45] The second definition of "service provider" set forth in subsection (j)(1)(B) of the DMCA is broader than the first, including services such as providing Internet access, e-mail, chat room and web page hosting services.[46] It is from this broad language that debate often ensues.

B. MP3 Technology

MP3 is a digital technology that compresses music, allowing it to be more easily and quickly copied, transmitted, and downloaded over the Internet.[47] It was developed at the Fraunhofer Institute, a German research firm, by a team overseen by Dieter Seitzer and Heinz Gerhauser.[48] Developed originally for high-definition television transmissions in 1987, the technology eventually became a standard of the Moving Pictures Experts Group.[49] Later the technology became known as MPEG 1 Audio Layer 3, and eventually shortened to MP3.[50]

The technology relies heavily on perceptual coding techniques, which eliminate those portions of an audio signal our ears don't hear well.[51] When sounds are digitized the computer collects all the sound and stores it as numbers.[52] Even if parts of the sound are beyond the range of human hearing, they're digitized anyway.[53] MP3 technology compresses the file by removing any numbers representing sounds beyond the range of human hearing.[54] The

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[44] 17 U.S.C. § 512(K)(1)(A) (West 1998).
[45] 17 U.S.C. § 512(K)(1)(B) (West 1998).
[46] S.Rep. No. 105-190 105th Cong., 2d Sess. (May 11, 1998).
[47] Jim Heid, *So Long, CDs*, Macworld, July 1999, at 88.
[48] *See* ANDY ROTHBONE, MP3 FOR DUMMIES 15 (1999).
[49] *How the Online Music Controversy Mushroomed*, COX NEWS SERVICE, Sept. 27, 2000.
[50] *Id.*
[51] See *supra* note 47 at 88.
[52] ANDY ROTHBONE, MP3 FOR DUMMIES 15 (1999).
[53] *Id.*
[54] *Id.*

quality of an MP3 depends entirely on how its been compressed.[55] Simply because a file's name ends with MP3 doesn't mean you are getting CD quality sound. However, most high-quality MP3s on the Internet are encoded at a bit rate in the range needed to obtain near CD quality sound.[56]

Downloading a high-quality MP3 via a modem may take a half-hour or more.[57] Once downloaded, MP3s can continue to be stored on a users hard drive or, with the purchase of a burner and some software, the MP3 data can be stored on a CD-R[58] that can contain roughly ten hours of music, instead of the 74 minutes an audio CD can manage.[59] What makes MP3s attractive are the free or nearly free tools for playing and making MP3 files and the staggering number of MP3 files available for easy downloading.[60]

C. Litigation

Although the music's artists and copyright holders sanction that certain MP3 files be available throughout the Internet, many exist because of users that create MP3 files from their own personal CD collections. Due to the conflict this creates regarding the breadth of copyright protection, there has been a substantial amount of litigation over MP3s and how they, and the equipment used with them, fit into existing copyright law. Whereas some of these legal questions have already been decided through litigation, two of the most prominent cases are still on appeal. Passage of the Music

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[55] See *supra* note 47 at 88.

[56] *Id.*

[57] Steve Alexander, *Quest Offers Faster Net Access at Same Price Move Likely Aimed at Cable Competitors*, Minneapolis-St. Paul Star Tribune, September 7, 2000. The length of time it takes a song to download depends on the speed of the users modem. A home computer usually has a 56K modem which will take on average a half hour. Use of a cable modem or DSL will significantly reduce that time. "The new entry-level DSL speed is 11 times faster than the speediest personal computer modem, while the cable modem service is 27 to 36 times faster."

[58] See *supra* note 48 at 163. CD-R is short for CD-Recordable. Data can be written on to these disks once and then read many times.

[59] See *supra* note 47 at 88.

[60] *Id.* at 89.

Owners' Listening Rights Act would have a profound effect on their outcome.

1. Recording Industry Association of America v. Diamond Multimedia Systems Inc.[61]

Recording Indus. Ass'n of America v. Diamond Multimedia Systems Inc.,[62] was the first battle fought over MP3 technology. The RIAA sought to enjoin the manufacture and distribution by Diamond Multimedia Systems Inc. ("Diamond") of the Rio portable music player.[63] The Rio was a small portable device with headphones that allowed users to download MP3 audio files from a computer and listen to them elsewhere.[64] RIAA's claim alleged that the Rio did not meet the requirements for digital audio recording devices under the Audio Home Recording Act[65] because it did not employ a Serial Copyright Management System.[66]

In making its decision the district court looked to the language of the AHRA. Most relevant to the case was that the Act provides that "no person shall import, manufacture, or distribute any digital audio recording device . . . that does not conform to the Serial Copy Management System ("SCMS") [or] a system that has the same functional characteristics."[67] The court reasoned that computers (and their hard drives) were not digital audio recording devices under the plain meaning of the Act's definition because their "primary purpose" was not to make digital audio copied recordings.[68] A device was determined to fall within the Act's provisions if it could indirectly copy a digital music recording by making a transmission of that recording.[69] The Rio could not make copies from transmissions, instead it could only make copies

[61] 180 F.3d 1072 (9th Cir. 1999).
[62] *Id.*
[63] *Id.* at 1073.
[64] *Id.*
[65] 17 U.S.C. § 1001 *et seq.*
[66] *Diamond*, 180 F.3d at 1075.
[67] *See Id. quoting* 17 U.S.C. § 1002(a)(1), (2).
[68] *See Id. quoting* 17 U.S.C. § 1001(3).
[69] *Diamond*, 180 F.3d at 1081.

from a computer hard drive.[70] The district court thus ruled that it is not a digital audio recording device.[71] The appellate court affirmed the ruling in favor of Diamond.[72]

2. A & M Records, Inc., et al. v. Napster, Inc.[73]

When the RIAA failed in its attempt to end production and distribution of the Rio it decided to go after the web companies themselves in an attempt to stop the infringement at its source.[74] The first suit that ensued was *A & M Records, Inc., et al. v. Napster, Inc.*[75] Napster is an Internet company that distributes its proprietary file sharing software free of charge via its website.[76] Users who have downloaded the software are able to share MP3 files with other users that are currently logged-on to the system.[77] Napster currently collects no revenues and charges its clientele no fees.[78] It plans to delay the maximization of revenues while it attracts a larger user base.[79] There are a number of potential revenue sources which include targeted email; advertising; commissions from links to commercial websites; and direct marketing of CDs, Napster products, and CD burners.[80] According to defendant's internal documents, there will be 75 million Napster users by the end of 2000.[81]

The seventeen record companies that comprise the plaintiffs filed a complaint against Napster alleging contributory and

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[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] A & M Records, Inc., et al. v. Napster, Inc., 2000 U.S. LEXIS 11862.
[74] Charles L. Simmons, Jr., *Digital Distribution of Entertainment Content. . . The Battle Lines are Drawn*, 33 AUG MD. B.J. 31, 34 (2000).
[75] *A & M Records*, 2000 LEXIS 11862.
[76] *Id.* at 6.
[77] *Id.*
[78] *Id.* at 8.
[79] *Id. See* 1 Frackman Dec., Ex. 127 at ER00130.
[80] *A & M Records,* 2000 LEXIS 11862 at 9, *See* 1 Frackman Dec., Ex. C (Parker Dep.) at 160:1-162:14, Ex. 254 at SF00099-100; Teece Rep. at 2-3.
[81] *Id.* at 8, *See* 1 Frackman Dec., Ex. A (Richardson Dep.) at 318:19-319:1, Ex. 166 at 002725.

vicarious copyright infringement and unfair competition.[82] Liability for contributory copyright infringement would be imposed only when the defendant, with knowledge of infringing activity, induces, causes, or materially contributes to the infringing conduct of another.[83] A defendant is vicariously liable for copyright infringement only if it has the right and ability to supervise the infringing activity and also has direct financial interest in such activities.[84] Evidence showed that virtually all Napster users upload or download copyrighted files and that the vast majority of music available on Napster is copyrighted.[85] The defendant's internal documents also demonstrated that its executives knew that its users were engaging in unauthorized uploading and downloading of copyrighted material.[86]

In opposition to the plaintiff's complaint Napster sought to expand the fair use doctrine as used in *Sony Corp. of America v. Universal City Studios, Inc.,*[87] known as the "Beta-max defense." Alternatively, it contended that there was insufficient evidence to support the plaintiff's claims of contributory or vicarious infringement.[88] Napster also sought to have the court make a finding that copyright holders are not injured by services created to assist users in the free downloading of MP3 music files.[89]

The district court ruled for the plaintiffs, resolving that even if the type of sampling done on Napster were a non-commercial use,

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[82] *Id.*

[83] 17 U.S.C. §501 (West 1976).

[84] *Id.*

[85] See *supra* note 73 at 10.

[86] *Id.* at 13, *See* e.g. 1 Frackman Dec., Exh. C. (Parker Dep.) at 160:1-162:14, Exh. 254 at SF00100 (stating that Napster users "are exchanging *pirated* music ."); *Id.* at SF00102 ("We are not just making *pirated* music available but are also pushing demand").

[87] *Id.* at 4, *See* 464 U.S. 417 (1984) (suit against VCR manufacturer on claims that the product allowed home viewers to duplicate copyrighted material off the television. Manufacturers claimed that the VCR also served the legitimate purpose for which it was developed, time shifting. Supreme Court held that the sale of copying equipment does not constitute contributory infringement if the product is widely used for legitimate purposes).

[88] *Id* at 4.

[89] *A & M Records,* 2000 LEXIS 11862 at 4.

there was enough evidence to demonstrate a likelihood of adverse affect on the plaintiff's potential market for their copyrighted works.[90] The court found that any potential non-infringing use of the Napster service was minimal or connected to the infringing activity or both.[91] Napster was thus preliminarily enjoined from engaging in, or facilitating others in the copying or distribution of the plaintiff's copyrighted sound recordings.[92] On July 28, 2000 Napster was granted a temporary reprieve from the injunction while the case is heard on appeal.[93]

A development in the case arose on October 31, 2000, when Bertelsmann, one of the music firms that sued Napster reached a settlement deal.[94] Based on this settlement Bertelsmann agreed to pay for the website to develop software allowing it to charge for its use.[95] The fee, which may be as low as five dollars a month, would then be used to pay royalties and to provide a profit for both companies.[96]

3. *UMG Recordings, et al. v. MP3.com, Inc.*[97]

A second suit was brought in the battle against MP3 computer services in *UMG Recordings, et al. v. MP3.com.*[98] MP3.com advertised its "My.MP3.com" service as permitting subscribers to store, customize, and listen to the recordings contained on their CDs from any place where they have an Internet connection.[99] In order to provide this service MP3.com purchased tens of thousands of popular CDs in which the plaintiffs held the copyrights and

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[90] *Id.* at 47.
[91] *Id.* at 39.
[92] *Id* at 91.
[93] See *supra* note 49 at 1.
[94] *Napster Deal Sounds Sweet for All*, CHICAGO TRIBUNE, November 3, 2000.
[95] *Id.*
[96] *Id.*
[97] UMG Recordings, Inc. et al. v. MP3.com, Inc., 92 F. Supp.2d 349 (S.D.N.Y. 2000).
[98] *Id.*
[99] *Id.* at 350.

copied their recordings onto its computer service, without the plaintiff's permission, so that its subscribers would be able to replay the recordings.[100] Subscribers were able to access the MP3.com recordings by first "proving" that they already owned the CD version either by inserting their own copy of the CD into their computer or by purchasing the CD through one of the defendant's online retailers.[101]

The Recording Industry's suit asserted that although MP3.com sought to portray its service as the "functional equivalent" of storing its subscribers' CDs, it actually re-played for the subscribers the copied versions of the recordings that it obtained without the copyright holders permission.[102] Based on that fact, the RIAA said there was, on its face, a presumptive case of copyright infringement under the Copyright Act.[103]

The defendant argued against the claim of copyright infringement by asserting an affirmative fair use defense.[104] It claimed that the simulated sounds on MP3 files are not physically identical to the sounds on the original CD recordings.[105] Therefore, it was MP3.com's position that its use of the copyrighted materials transformed it in such a way that it was infused with new meaning, new understanding, or the like.[106]

The district court did not accept MP3.com's defense. It found that while MP3.com did provide a transformative "space shift" of the sound recordings, this was basically just another way of saying that it transmitted the recordings in another medium.[107] The defendant did not add anything new to the recordings; it simply repackaged them to facilitate their accessibility through the new medium.[108] While the court found MP3.com's services to be

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[100] *Id.*
[101] *Id.*
[102] *UMG Recordings*, 92 F. Supp.2d 349.
[103] *Id. See* 17 U.S.C. § 101 et seq.
[104] *Id. See* 17 U.S.C. § 107.
[105] *Id.*
[106] *UMG Recordings*, at 351. *See* e.g., *Campbell* at 579.
[107] *Id.*
[108] *Id.*

innovative it did not find them transformative under the requisite of the fair use defense.[109]

After the district court handed down its opinion MP3.com entered into licensing agreements with all but one of the labels that had sued.[110] Under the agreements, MP3.com will pay royalties to the label for its copyrighted materials that are downloaded from the MP3.com site.[111] The only record label that has held out from settling is Universal Music Group. In a decision by New York federal judge Jed S. Rakoff on September 6, 2000, MP3.com was held to have "willfully infringed" on Universal's copyrights.[112] Therefore the judge ordered MP3.com to pay $25,000 per CD for the infringement.[113] Based on MP3.com's estimate that there are no more than 4,700 CDs for which the plaintiff qualifies for statutory damages, the total award will be approximately $118,000,000.[114] The judge is expected to set the final amount of damages in November 2000.[115] However, MP3.com has stated that it will appeal the decision.[116]

III. PROPOSED FEDERAL LEGISLATION

New legislation has been proposed to amend copyright law as it continues to change to meet the challenges of intellectual property. Congressman Rick Boucher introduced the Music Owners' Listening Rights Act of 2000 on September 25, 2000.[117] This bill would amend Title 17, United States Code, with respect to personal interactive performances of recorded nondramatic musical works, and other purposes.[118] As proposed, the bill would allow consumers who purchase compact discs to store and listen to

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[109] *Id.* at 352.
[110] See *supra* note 49 at 1.
[111] *Id.*
[112] UMG Recordings, Inc. v. MP3.com, Inc., 2000 U.S. Dist. LEXIS 13293 at 5.
[113] *Id.* at 18.
[114] *Id.*
[115] See *supra* note 49 at 1.
[116] *Id.*
[117] 146 CONG.REC. E1583 (September 25, 2000).
[118] H.R. 5275, 106th Cong. (1999).

their music online by first demonstrating lawful possession of the CDs without incurring a per listen charge.[119] Under the new legislation "the transmission of personal interactive performances of a sound recording, and of any nondramatic musical works embodied therein, would not be an infringement of copyright."[120] Additionally, it would not be an infringement of copyright for "a transmitting organization that transmits personal interactive performances to make or cause to be made phonorecords or copies of a sound recording and any nondramatic musical works embodied therein if such phonorecords and copies are used by the transmitting organization solely in connection with the transmission of personal interactive performances."[121] In sum, the legislation would permit consumers who have purchased CDs to place them at a location on the Internet and access that music from any location, at any time and in any way they choose.[122]

However, the legislation does not allow consumers to transfer music to someone else or to use the music for commercial purposes.[123] Under this bill the consumer will be in some way required to show proof of ownership before access is granted through the services of an Internet music provider.[124] This will allow people to go from one place to another without carrying their CD collection with them while still protecting against the potential nonpayment of legitimate royalty fees.[125]

The Music Owners' Listening Rights Act is currently sitting before the Committee on the Judiciary.[126] When Congress breaks from its current session the bill's future will be vastly unknown.

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[119] *MP3.com Kicks Off Million Email March in Support of CD Owners' Rights; Campaign Gives Consumers Ability to Support Music Owners' Listening Rights Act of 2000*, PR Newswire, September 28, 2000.

[120] H.R. 5725, 106th Cong. (1999).

[121] *Id.*

[122] *Boucher Announces Introduction of Copyright Reform Legislation*, ¶ 2, at <http://www.mp3.com/million/copyright_reform.html> (last visited Nov. 20, 2000).

[123] *Cosponsor the Music Owners' Listening Rights Act of 2000*, ¶ 5, at http://www.mp3.com/million/congress_bill.html (last visited Nov. 20, 2000).

[124] *Id.*

[125] *Id.*

[126] 146 CONG. REC. H8061 (daily ed. September 25, 2000).

In order to even be considered next session the Music Owners' Listening Rights Act will need to be reintroduced when the next session begins in January.[127] "What matters is whether new technologies are consistent with the details of the copyright law," Boucher stated in an interview.[128] "This legislation addresses the growing gap between our outdated Federal laws and revolutionary new technologies that could allow consumers to do more, see more, hear more, enjoy more, if only the laws would permit it."[129] Boucher has said he feels strongly that it is "time for Congress [to] step up and say, 'Wait a minute, this is a legitimate technology'."[130] Whether that desire is powerful enough to attempt to push through this legislation will remain to be seen.

The bill has three congressional co-sponsors: republicans Richard Burr, Ray LaHood, and Fred Upton.[131] As of October 3, 2000 the Digital Future Coalition ("DFC") has also pledged its support.[132] The DFC has stated that it is "committed to striking an appropriate balance in law and public policy between protecting intellectual property and affording public access to it."[133] According to Professor Peter Jaszi of the DFC, "H.R. 5275 allows consumers to take advantage of the technological wonder of the Internet without harming the legitimate economic interests of the music industry."[134]

The bill has also found support in those companies most likely to benefit from the pending legislation if it were to pass.

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[127] See *generally* U.S. CONST. art. I § 2, cl. 1.

[128] *Copyright Laws, Congress Suffering From E-Strain*, TULSA WORLD, October 2, 2000.

[129] See *supra* note 122 at ¶ 3.

[130] Bill Holland, *Lawmaker Aims to Legalize Personal Music Downloads*, BILLBOARD, October 7, 2000.

[131] 146 CONG. REC. E1583 (September 25, 2000).

[132] *DFC Announces Support of MP3 Bill*, ¶ 1, at http://www.mp3.com/million/support_bill.html (last visited Nov. 20, 2000) (The DFC consists of forty-two national organizations representing a wide range of non-profit and for-profit entities. Its membership includes educators, computer and telecommunications industry associations, libraries, artists, software and hardware producers, archivists and scientists).

[133] *Id.* at ¶ 2.

[134] *Id.* at ¶ 3 *quoting* Professor Peter Jaszi.

Representatives from MP3.com have launched a comprehensive legislative web site designed to provide consumers with the means to support the Music Owners' Listening Rights Act.[135] The campaign, designated as the Million Email March, provides a step-by-step action plan for CD owners who want to contact key legislators in an effort to generate support.[136] Located on the web site are several informational as well as interactive services.[137] Some of these services include: notes from the sponsor of the bill, congressman Rick Boucher, a letter from the congressional co-sponsors explaining why the legislation is necessary, information on the organizations that stand in support of the bill, results of an MP3.com sponsored survey about music and the Internet, and access to resources allowing visitors to e-mail their congressman to ask for their support of the legislation.[138] MP3.com's representatives hope that if enough constituents demonstrate their concern for listener's rights this legislation may gain the backing it needs to become law.[139]

Many groups stand in opposition to the Music Owners' Listening Rights Act. The Recording Industry Association of America ("RIAA"), the National Music Publishers' Association, the Songwriters Guild of America, ASCAP (American Society of Composers, Authors, and Publishers), BMI (Broadcast Music, Inc.), and the Motion Picture Association of America have come out against this piece of legislation.[140] The loudest of these protesters is perhaps the RIAA. The RIAA is the trade group of the recording industry which includes recording companies and copyright owners of music made and distributed in the United States. The RIAA represents over ninety percent of the recording industry.[141] Some of RIAA's most notable members include: UMG Recordings, Inc., Sony Music Entertainment, Inc., Warner Bros. Records, Inc., Arista Records, Inc., Atlantic Recording

[135] See *supra* note 119.
[136] *Id.*
[137] See *supra* note 122 at ¶ 3.
[138] *Id.*
[139] See *supra* note 119.
[140] See *supra* note 130.
[141] *Recording Industry Association of America*, at 1074.

Corporation, BMG d/b/a/ The RCA Records Label, Capitol Records, Inc., Elektra Entertainment Group, Inc., Interscope Records, and Sire Records Group, Inc.[142] The recording industry's mission is to further the business and legal objectives of industry members.[143] The RIAA also sets the policies of intellectual property rights of music artists and the copyright holders as well as participating actively in lobbying efforts.[144]

The RIAA has stated its belief that if this bill were to go forward it would take away from the property interest that music creators have invested in their work.[145] By making sound recordings legally transmittable via the Internet, the music industry fears that the market for CDs will be greatly diminished. The bill would expand a music purchaser's rights in regards to their ability to share the music with others without being liable for copyright infringement.[146] Currently the copyright act grants certain protected rights to the copyright holder as to the reproduction and distribution of their work.[147] This legislation would in effect cut into the rights now exclusively possessed by the copyright holder. Hillary B. Rosen, president of the RIAA has said that the Copyright Act is a "strict liability" law that prohibits all copying, except in cases that fall under the fair use doctrine.[148] In a joint letter of opposition to Congress, executive members of the music industry have characterized the bill as "misguided as a matter of public policy and grossly unfair to creators."[149]

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[142] See *supra* note 74 at 32.
[143] <http://riaa.com/About-Who.cfm> (visited Nov. 20, 2000).
[144] *Id.*
[145] See *supra* note 130.
[146] H.R. 5275, 106th Cong. (1999).
[147] 17 U.S.C. § 106(1) through (3) & (5) (West 1976).
[148] See *supra* note 128 *quoting* Hillary B. Rosen.
[149] See *supra* note 130.

IV. ANALYSIS

"From its beginning, the law of copyright has developed in response to significant changes in technology."[150] Copyright law is now lagging behind technology. There is currently no law that can be fully applied to the exploitation of music, or any other copyrightable work, via the Internet. Whether this piece of legislation is the answer remains to be seen. What is obvious, is that the number of people using the Internet grows exponentially each year. As a result, this issue will inevitably need to be addressed by Congress.

MP3s are not going away. The technology surrounding them will only become more advanced and continue to grow. A balance will eventually need to be made between the rights of the copyright holder and the rights of the CD owner. Any new legislation should encompass protection for the hard work and creativity that goes into producing a record as well as for the listener that wants to utilize the technology available to enjoy that same piece of work.

Not surprisingly, one of the largest issues on the forefront of the MP3 debate is over money. Who should gain the most benefit from the new technology? The ease of distributing music over the Internet may create a fear in recording labels that artists may no longer need them.[151] However, record labels offer artists much more than distribution including: contracts, advanced recording equipment, and marketing channels.[152] The shift in leverage that artists will receive by using MP3 to gain popularity before negotiating contracts will actually benefit both the artists and the consumers as well, resulting from their ability to ultimately

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[150] See *supra* note 15 at 430.

[151] Wendy M. Pollack, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2485 (2000).

[152] *Id. citing* George M. Borkowski & Robert C. Welsh, Cyberians at the Gate? Though it is causing a sensation, and consternation, MP3 does not spell the end of the music business as we know it (visited July 25, 1999) <http://www.ipmag.com/monthly/99-june/welsh.html>

produce better music.[153] Consequently, everyone could gain if all the parties would work together.

V. CONCLUSION

As previously stated, the objectives of the Copyright Act are to promote widespread dissemination of original creative works, while providing incentives to authors and owners to create such works.[154] The passage of the Music Owners' Listeners Rights Act would push these objectives to new limits. While still allowing copyright owners to maintain a sizable interest in their work, the proposed bill would cut into their current given rights. How Congress will choose to respond to this new challenge is still largely unknown. What is significant about this legislation is that for the first time in the battle over the MP3, it raises the question of what is right rather than what is legal.[155]

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[153] *Id.*
[154] See *supra* note 6 at 9-10.
[155] See *supra* note 128.