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High-Tech Boxing Match: A Discussion of Copyright Theory Underlying the Heated Battle Between the RIAA and MP3ers

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I. Introduction

1. A battle is being waged in internet chatrooms, through online bulletin boards,[1] on public relations and news web sites,[2] and now, more officially, in the courts. This battle is being fought over a new technology called MP3. Short for MPEG Layer 3, MP3 files are the result of a type of audio data compression that can reduce digital sound files by up to a twelve to one ratio.[3] This reduction in size is paired with virtually no loss in quality from that provided by a compact disc.[4] The Recording Industry Association of America (hereinafter, the "RIAA") is the most active opponent of the compression form. Michael Robertson, founder of MP3.com -- a company that distributes non-infringing MP3 files over the web -- has been a harsh critic of the RIAA. He feels that the RIAA does not represent the interests of the artists. According to this MP3 industry leader, "None of the A's in RIAA stands for artist. They support the record industry. We believe MP3 is a good thing for artists. It empowers them and gives them a vehicle to distribute their works."[5] The following quote from MP3 advocate, Kent Witt, epitomizes the arguments of MP3 format supporters:

> [I]t appears that the RIAA's [litigation strategy] is being driven by the interests of its largest members, the big five record labels, who are seeking to maintain their control of music distribution and prevent the unfettered freedom of musicians without recording contracts at their member companies to distribute their music to a broad audience. Upcoming musicians, numbering in the thousands, are using the Internet to their advantage to create awareness in a cost-effective manner, which is clearly a threat [to] the major record label's current distribution model.[6]

2. The RIAA disagrees. The president and CEO for the association, Hilary Rosen, articulated "[The RIAA] sincerely doubt[s] there would be a market for the MP3 portable recording devices but for the thousands and thousands of copies of illegal songs on the net."[7] The two sides of this battle over a new music production format have now taken their views to the courts and continue to be extremely outspoken about their positions. This fervor has the ability to cause any Internet observer to further pursue an inquiry into the issues involved and learn what is at the heart of these heated discussions.

3. MP3 files are the result of audio data compression which has the ability to reduce digital sound files to a form that can easily be uploaded to and downloaded from the Internet. The MP3 technology also allows the user to make unlimited digital copies of a sound recording.[8] As the format becomes more popular, the risk of copyright infringement also increases. The number of users of MP3 technology is increasing dramatically. More than 5 million MP3 players have been downloaded from the Internet and the search term, MP3, is the third most popular term on the AltaVista search engine according to Mark Mooradian, a consumer analyst at Jupiter Communications.[9]

4. The MP3 files available on the web fall into two categories, those posted for free distribution intentionally by an artist and "illegal" MP3 files that have been "ripped"[10] from copyrighted compact discs. Generally, when posted for free distribution by an artist, the artist is looking for publicity and exposure to a wide range of listeners without having to overcome the hurdle of first being signed by a major record label. Thus, the MP3 format has great appeal to many new artists as the more traditional distribution networks for musical expression are closed to many of them. The large record companies control these traditional methods for distribution of recorded music through record stores, and the artists represented by these record companies dominate traditional radio stations.[11] Now, smaller record companies can distribute music cost effectively over the Internet, allowing new artists a means for their music to be heard.[12] MP3 technology is a major way to make Internet distribution even more efficient and inexpensive. This distribution may create a platform from which large future profits may be made for artists that might not otherwise be distributed on a national basis through ordinary methods.[13]

5. Consumer choice is also satisfied through the use of MP3 files. According to Tom McPartland, CEO of TCI Music, a digital media company owned by cable producer TCI, "[Consumers] want the ability to manipulate what they ... hear with some granularity."[14] An MP3 file can allow those consumers to arrange and rearrange previously recorded songs.

6. As a result of high consumer interests, companies are developing new multimedia technologies that have MP3 playing capabilities. For example, the Empeg MP3 is a player being developed by a small British Company.[15] The Empeg player is a mobile player for cars that would combine a laptop computer with stereo technology.[16] The Empeg player allows songs from CDs to be saved to the player itself and not to a computer hard drive, allowing around 35 hours of music to be saved on its hard disk so users can create a long playing compilation of their favorite songs.[17]

7. Another portable MP3 player has been developed by Diamond Multimedia Systems, Inc called the Rio PMP 300 ("Rio").[18] This player is smaller than a deck of cards, has no moving parts, and plays back songs recorded in the MP3 format. After the songs are transferred to the Rio from a computer, the device can play the music back through attached headphones achieving near CD-quality sound.[19] The Rio device is capable of storing 32 megabytes of compressed music resulting in approximately 60 minutes of playtime from its memory capacity.[20] Additional removable memory cards can also be purchased which allows the music to be saved outside of the Rio player and used interchangeably.[21] This device is distinguished from the British Empeg player in that it is only capable of receiving, storing, and re-playing digital audio files previously stored on the hard drive of a personal computer.[22] With all of these developments, questions regarding the legality of various aspects of the MP3 technology abound, resulting in a major threat to the future of the MP3 format. Users have begun to ask questions including: Are you breaking the law by downloading an MP3 from the Internet? Is it illegal to copy a song from a CD you own to MP3? What laws apply to the newly developed players?

8. This paper hopes to answer these questions by reviewing the applicable copyright law and the impact of new legislation including the Audio Home Recording Act. It will then discuss the legal arguments presented in the case decided recently brought by the Recording Industry of America, Inc. and the Alliance of Artists and Recording Companies against the creator of the Rio, Diamond Multimedia Systems, Inc.

II. Legal Structure

9. The Constitution grants to Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[23] Pursuant to this clause, Congress has enacted both copyright and patent legislation.[24] According to the Copyright Act, the owner of the copyright has the exclusive right to reproduce, distribute, display, perform, and license the work that the copyright covers.[25] Section 107 of the Copyright Act limits this "exclusive right," by providing an exception for such acts that relate to criticism, comment, news reporting, teaching, scholarship and research.[26] While Section 107 does not explicitly allow for other uses of copyrighted materials, the "fair use" notion in Section 107 is viewed as allowing a person to copy material which he or she has purchased,[27] thereby providing for a consumer's ability to make duplications for personal or private use.

10. The actual breadth of the fair use notion has been confused in public opinion. The average citizen does not believe that copyright laws apply to individuals in relation to non-commercial use of copyrighted works.[28] Copyright holders, on the other hand, have a much broader conception of their protections, often believing that there are no privileges or exemptions related to the usage of copyrighted works.[29] Copyright law has never been so broad as to provide copyright holders with the ability to restrict parties from looking at, listening to, or learning from copyrighted works.[30] What the law does prohibit is copying copyrighted material for redistribution and sale.[31] Any copying of this type constitutes piracy. Most discussions of copyright theory relate to how far the restrictions on copying extend and what activities an individual can legally engage in under our current copyright system.

11. The more recent difficulties surround the determination of how the theories translate into the computer age. One first turns to the original Copyright Act and finds that "copies" are defined as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[32] The legislative materials discussing the Copyright Act show that Congress intended to assimilate the appearance of a work in a computer's random access memory to tangible, or material, evanescent images rather than copies.[33] Digital reproductions are, however, considered copies in some instances. As technology advances, making digital reproductions of a work in the process of reading, viewing, listening to, learning from, sharing, improving, and reusing works embodied in digital media may be unavoidable.[34] Although the Audio Home Recording Act, Digital Performance Right in Sound Recordings Act and the Digital Millennium Copyright Act have somewhat answered how the law will treat these reproductions,[35] there is no way for the law to proactively address all issues that will arise.

12. The Copyright Act also restricts the provision of copy equipment to a limited degree. The law of copyright is based on providing the originators of a work the control over making copies of that work.[36] Part of this control is thought to be restrictions on methods of copying. From that perspective, copying technology can itself be viewed as the greatest threat to copyright.[37] Restricting the development of copying technologies as a solution to the possibility of infringement is, nonetheless, too extreme.[38] The doctrine of contributory infringement has developed to allow the courts to address questions relating to copyright equipment and the associated conduct of a party other than the direct infringer.[39]

13. The doctrine of contributory infringement was developed in *Harper v. Shoppel* in 1886.[40] The theory was developed from the "historic kinship between patent law and copyright law."[41] As applied in cases like *Sony Corporation of America v. Universal City Studios, Inc.*, the doctrine allows for theories of contributory infringement to converge with copyright theories.[42] Courts have used the doctrine to impose liability on parties who play a significant role in copyright infringement, extending copyright accountability to behavior that is insufficient to attract liability for primary infringement.[43]

14. There are two types of contributory conduct: (1) personal conduct that "induces, causes or materially contributes to the infringing conduct of another";[44] and (2) the production of an item that provides the means to infringe.[45] Samuel Oddi has developed a useful list of factors that should be considered in a court's determination of whether the acts of a defendant constitute contributory infringement.[46]

15. First, contributory infringement requires direct infringement. A third party must be engaging in actual conduct that constitutes copyright infringement under the federal copyright laws. Without a party actually using the technology at issue to break the copyright laws, it would be difficult to develop a convincing argument that the technological advancement contributes to the breach of the law. Second, the contributory conduct must meet the fault standard necessary for that type of conduct. Generally to have the necessary level of fault, the contributory infringer must have knowledge of the infringing activity.[47] Without knowledge of the activity, the degree of culpability necessary for court action is not present. Constructive knowledge might be imputed to a defendant if that party sells, manufactures, or provides access to equipment that facilitates infringement. For example in *RCA Records, Inc. v. All-Fast Systems, Inc.*, the court found a copy service that gave customers access to a machine capable of making high-speed copies of cassette tapes guilty of contributory infringement.[48] It appears the relative level of infringing use compared to legitimate use must be egregious before liability will be imposed. It is largely unresolved whether this requisite knowledge could be found in parties who only sell and manufacture devices that facilitate infringement.[49]

16. The next factors outlined by Oddi are whether the owner of the intellectual property has misused it in a way that extended their government granted monopoly beyond the scope of the grant; the nature of the article being infringed upon (also called the "staple of commerce doctrine"); and whether the contributory infringer has a duty to the copyright holder.[50] Finally, and generally most important, "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."[51] These factors are somewhat interdependent in that the determination of whether or not contributory infringement occurred may depend on the characterization of the product which thereby defines to some degree the permissible conduct associated with use.[52] This was the analysis utilized in *Sony Corporation v. Universal City Studios*.

17. In 1984, the sale of Betamax videocassette recorders, which enabled home copying of television programs, was challenged under the copyright statute as a "contributory infringement" of copyrights held by program creators including Universal City Studios.[53] The Court believed that Sony had not induced infringement because there were no personal contacts with the users, nor did the company encourage infringement in its advertisements.[54] A company must be found to have sold the equipment with constructive knowledge that the equipment was being used to directly infringe copyrights for liability or injunctive relief to be imposed.[55] Additionally, the Supreme Court found the recorders were a "staple of commerce" since they were capable of substantial non-infringing uses.[56] Based on this reasoning, the Court held that the sale of a recorder manufactured by Sony was not copyright infringement.[57] Key in the decision was the belief that parties have the right to engage freely in substantially unrelated commerce.[58] The purposes of the government's grant of a copyright is not to prevent other creators from marketing their developments. The owners of television program copyrights were also unsuccessful when they took their concerns over copying technology to Congress.[59] Notwithstanding, a decade later Congress was forced by technological developments to reexamine their protection of copyright.

A. The Audio Home Recording Act

18. In 1992, Congress Amended the Copyright Act by enacting the Audio Home Recording Act (hereinafter, the "AHRA"). The AHRA provides restrictions on digital audio recording devices. A "digital audio recording device" is "any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use . . . ."[60] The Act defines a "digital musical recording" as "a material object -- (i) in which are fixed, in a digital recording format, only sounds, . . . and (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[61]

19. Digital audio recordings do not include material objects where the fixed sound consists entirely of spoken word recordings or where computer programs are fixed. For example, a disk that has vocal instructions for installation of a program would not be included within the purview of the AHRA. A digital audio recording may, however, contain statements of instructions constituting the fixed sounds and incidental material, and instructions of a program would not be included within the purview of the AHRA. A digital audio recording may, however, contain statements of instructions constituting the fixed sounds and incidental material, and the AHRA was designed to permit the recording of digital audio material. A digital audio recording device copied recording for private use.[62] To illustrate, a file that is primarily musical in nature, but also includes interviews with the artist or instructions for viewing images would be within the purview of the act.

20. This structure was a reflection of the involvement of the computer industry in the drafting of the AHRA. An important issue debated during the enactment was its effect on the computer industry and the concerns related to including the AHRA requirements on computer products. Representative Collins, a principal sponsor of the Act, explained as the legislation was being passed in the House that "the legislation [would] not cover products primarily marketed by the computer industry."[63] James Burger, an attorney and former Chairman of the Intellectual Property Committee of the Information Industry Council (hereinafter, the "ITI"), a trade association, represented the interests of the computer industry during consideration of the legislation.[64] This viewpoint was reflected in the legislation. A digital audio recording device must be a machine or device that has a recording function that is designed or marketed for the primary purpose of making digital audio copied recordings.[65] Accordingly, a computer generally would not fall within the definition of "digital audio recording device" nor would typical peripheral devices.[66] There is an additional special exception for recordings that emanate from material objects on which computer programs are stored, such as a hard drive or a server.[67] This exception provides for the differentiated treatment of material objects used for data storage like the hard drive and an object like a CD which contains nothing but music.[68] A separate peripheral device for a computer could, however, be found to be a digital audio recording device if it had an independent recording function and that recording function was designed or marketed for the primary purpose of making digital audio copied recordings for private use.[69]

21. The enactment of the AHRA was a response to concerns with serial copying -- the ability to reproduce a large number of almost perfect replications from a single copy of digital music.[70] The AHRA created a requirement that all recording devices capable of serial copying include a Serial Copy Management System (hereinafter "SCMS").[71] SCMS is a type of code that can be included in a recording that renders the recording incapable of subsequent recordings or causes the subsequent recordings to be of lower quality. Basically, it limits the ability to make numerous high quality replications and the ability to play those replications. Such a system incorporated on hardware computes circuitry that prevents copying from copies of digital audio recordings.[72] The Act prohibits the manufacture and distribution of any digital recording device that does not meet the requirements of SCMS.[73]

22. Congress still recognized the fair use idea and worked to ensure the right of consumers to make analog or digital copies of sound recordings for personal use.[74] A device that allowed for the home recording of legally obtained original works was not infringement in the past, nor did Congress want to eliminate this activity in the future through the AHRA.[75]

23. The purpose of the AHRA was to "benefit American consumers, creators and innovators . . . protect[ing] the legitimate right[] of our songwriters, performers, and record companies to be fairly rewarded for their tremendous talent, expertise, and capital investment."[76] If a device is regulated by the AHRA, then an action for copyright infringement is precluded as a matter of law.[77] The problem with the AHRA is that it did not envision the situation created by the advent of the MP3 format. According to Walter McDonough, a Boston-based entertainment and music-industry attorney, "When the Congress enacted [the AHRA], they never envisioned that people could download and play digital samples from the Internet." McDonough feels the only way to address the new issue presented by advancements in MP3 technology is through further legislation.[78]

B. Additional Restrictions on Digital Reproductions

24. While not in answer to the questions raised by MP3 technology, Congress has addressed concerns inherent to the digital medium. The Digital Performance Right in Sound Recordings Act of 1995 (hereinafter, the "Digital Performance Act") was an amendment to the Copyright Act which created an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly the sound recordings by means of certain digital audio transmissions.[79] Since the Digital Performance Act deals primarily with the *broadcast* of digital performances, as opposed to digital parties primarily with the trading and personal use of MP3 files a limited discussion is all that is necessary. The Digital Performance Act conforms that the scope of compulsory licenses to distribute phonorecords includes digital transmissions.[80] The Act also worked to confine the transmission of unauthorized digital performances by restricting the ability for someone to broadcast music over the Internet without paying royalty fees.[81] An Internet broadcaster could use an MP3 file in his online broadcasting and the repercussions of that use would fall under the Digital Performance Act.

25. Similarly the Digital Millennium Copyright Act (hereinafter, the "DMCA"), enacted on October 28th of this year, also applies only tangentially to the discussion central to this paper. The DMCA makes major changes in U.S. copyright law to address digital issues.[82] The DMCA has five titles which serve to accomplish the following: (1) implement the WIPO Internet Treaties; (2) establish safe harbors for online service providers; (3) permit temporary copies of programs during the performance of computer maintenance; (4) make miscellaneous amendments to the Copyright Act, including amendments which facilitate Internet broadcasting; and (5) create sui generis protection for boat hull designs.[83] The related portions of the DMCA are Title I, WIPO Treaties Implementation, and Title II, Online Copyright Infringement Liability Limitations. Title I enables reciprocal copyright protection for sound recordings that are protected by any government with whom the U.S. has entered into an Internet copyright treaty.[84] Title II limits liability for online service providers for their role in online copyright infringement.[85] The DMCA online service providers are exempted from copyright liability for passively transferring information over the Internet.[86] Since the source of infringements is often untraceable, the Internet service provider was an alternative defendant prior to this Act. The DCMA greatly reduces a provider's exposure to damages, however its protections are limited and it does not entirely exempt the provider from legal actions or injunctive relief.[87]

26. For the purposes of this paper discussing the impact of the MP3 format, it is necessary to be aware of the following: 1) The DMCA does not alter the rights, remedies, limitations, or defenses to copyright infringement, including fair use;[88] 2) it does not alter the existing doctrines of vicarious and contributory liability;[89] and 3) it does not require manufacturers of consumer electronics, telecommunications, and computing products to design their products to include copyright protection technologies.[90]

III. Record Company Opposition to the MP3 Format

27. While the direction to take in regulation is uncertain, one thing that cannot be disputed is that the music industry is concerned with the piracy threat present in MP3 technology.[91] This threat is embodied in the belief that a digital audio recording device has the capability of permitting the user to produce unlimited copies of recorded music that are nearly indistinguishable from commercially prepared originals.[92] Hilary Rosen, the CEO of the RIAA, is a vocal opponent to the MP3 format. Her statements highlight the problems that face the industry in controlling illegal usage of the MP3 file format.[93] The RIAA describes itself as a trade association representing the creators, manufacturers, and distributors of over ninety percent of all legitimate sound recordings sold in the United States.[94] The RIAA has been the most active opponent to the illegal use of the MP3 file. According to Rosen, "The RIAA has drawn a line in cyberspace."[95] This line includes a large amount of active litigation against parties who are breaking copyright laws and parties the RIAA sees as contributing to the infringement.

28. This legal fight involves continuous suits against copyright violators. For example, the RIAA has filed suits in June of 1997 alone against webmasters of "MP3 archive" sites.[96] The RIAA have entities to scour the Internet for pirated MP3 files and then files lawsuits to shut down the offenders.[97] The June suits were settled out of court with the RIAA receiving $100,000 for each recording named in their compliant. Since each of the three archive sites had over 300 MP3s listed, the stakes in the RIAA's legal actions are high.[98] The RIAA has decided to focus its efforts on education of teenage users, rather than suing, but the organization warns that this may not be the avenue pursued in the future, stating that the initial round of suits provided the necessary notice that illegal usage of the MP3 format may have serious consequences.[99]

29. The RIAA has more recently pursued the avenue of the courts to restrict the MP3 format by enjoining the release of the Rio PMP 300 ("Rio"), a portable MP3 player, produced by Diamond Multimedia.[100] The main focus of the RIAA's complaint against Diamond was the belief that sales of a portable MP3 player promotes the illicit use of MP3 files.[101] According to Diamond's complaint, the Rio was "designed to enable [users] to record and play back illegally recorded copyright MP3 files that had been compressed using MP3 technology . . ." The RIAA stated that the Rio's only . . . purpose [was] to enable computer . . . digital audio recording device."[102] The RIAA found that the Rio's "ambiguous" nature . . . compliance with SCMS [Serial Copy Management System] requirements and failure to pay royalties.[102] The RIAA also argued that the devices, which it believed encourage the increased availability of illicit files. This availability of large quantities of MP3 files, according to the recording industry advocates "stymie the development of legitimate digitally downloadable music" ([103]).[104] Illegal MP3 files, according to RIAA, diminish the value of an artist's work.[105] Filing the suit against Diamond was an effort by the RIAA to reduce the ability of the public to use the MP3 format in an illegal manner.

IV. Support for the MP3 Format

30. Diamond Multimedia was quick to rally opposition to the suit by the RIAA. Diamond accused the RIAA of having dishonorable intentions. Diamond claimed the RIAA as a trade organization representing the commercial interests of record companies, not artists.[106] Rather, the organization represents the interests of the largest record companies that dominate existing distribution networks. Diamond is claiming that the RIAA is attempting to threaten a lot of artists, the majority of whom are not represented by the RIAA's member companies, who will receive more publicity through the Internet. Diamond is claiming that the RIAA is inhibiting new advancements in MP3 technology in order to stop the RIAA members' from losing their current control in the marketing and distribution market. According to Diamond, who will benefit, not harm, the public interest at large.[106]

31. In addition to the aforementioned policy arguments, Diamond claimed the RIAA's legal arguments were unfounded. The company characterized its Rio player as a computer peripheral device designed to store and play back audio files transferred from the computer's hard drive.[107] According to Diamond, the Rio Player does not receive any transmissions. Its abilities are limited to the storage of MP3 files that a computer has already downloaded to its local hard drive.[108] Because of its finite functional capabilities, Diamond argued that the Rio device is not a "digital audio recording device."

32. Diamond defended its innovation by arguing that the source of the copy is the computer's hard drive, not a "digital musical recording." The company's legal argument of a computer as the source which, according to Diamond, leads to the device falling outside of the AHRA's definitions.[109] Diamond's defense was based on the view that the Rio was not designed to make copies of the digital music. This is based on the point that it is only capable of facilitating the serial copying of recordings.[110] The company also argued that Rio does not even record music.[111] The personal computer performs the recording function and then transmits the data to the Rio. Diamond compared its technology to a Walkman. If the Rio is an audio tape combined with a Walkman, this comparison to a Walkman that only plays recordings provided to it.[112] The personal computer performs the recording function and then writes the resulting files to the Rio. The Rio itself does not record anything. Its function is similar to a Walkman headphone (Rio is necessary to listen to a computer audio tape combined with a Walkman that only plays recordings provided to it.[112] The litigation answered the question of whose argument was more persuasive.

V. Diamond's Rio Litigation

33. The MP3 litigation became a short-term strategic weapon for the RIAA as it battle against the MP3 format. [113] The RIAA requested an injunction as they fought to prevent the release of Diamond's Rio player. The AHRA provides the power for a court to grant temporary injunctive relief.[114] The RIAA requested injunction a reasonable avenue to prevent or restrain violations of the act.[115] The RIAA's action found initial success, with Judge A. Collins, a United States District Court Judge granting a temporary restraining order blocking the release of the Rio.[116] The hearing on the request for the preliminary injunction was set as successful.

34. Requests for injunctions in copyright cases are common. A court can order a preliminary injunction if the following are shown:

1) the moving party will suffer irreparable injury if the relief is denied;
2) the moving party will probably prevail on the merits;
3) the balance of potential harm favors the moving party; and
4) the public interest favors granting relief.[118]

35. For the purposes of a preliminary injunction, the irreparable injury must be "caused by the alleged wrongful conduct."[119] The courts are justifiably wary of restricting the marketplace of ideas through injunctions. As articulated by the Ninth Circuit, "[p]ublic policy does not advocate the liberal issuance of preliminary injunctions in copyright cases."[120] Nonetheless, "[a] copyright plaintiff who makes out a prima facie case of infringement is entitled to a preliminary injunction without a detailed showing of irreparable harm."[121] The California District court did not decide that the RIAA had not made the necessary showing for an injunction.

36. The motion for preliminary injunction was heard on October 26, 1998.[122] The court found that while a digital audio recording device does not have to be sold to the public, "designed or marketed . . . a computer is used only be 'capable of making a recording.'"[123] This requirement of Diamond's argument did not, however, result in success for Diamond. This court held that "the Rio's argument that the Rio's decision to function as a storage capability" for MP3 files falls within the terms of Section [[124] — this court held that the Rio's decision was not fatal to the AHRA Section 1001.[124] Additionally, the court determined that the Rio qualified as a "digital audio recording device" within the meaning of the AHRA.[125] However, the court held that the RIAA failed to establish irreparable or incalculable injury.

37. The court decided that the defendant was therefore acting in a way that was functionally equivalent to compliance with the statute. Due to the functional capabilities of the Rio player, it adequately "prohibit[ed] unauthorized serial copying" for the purposes of Section 1002(a).[126] Additionally, the court determined that for a preliminary injunction the violation must be causing a real and unavoidable harm. While the court held the statute fully, users could still engage in the activity the RIAA was seeking to prevent by filing the suit. Accordingly, the absence of the SCMS information did not harm the plaintiff. The court determined that the record did not support injunctive relief or that the plaintiff failed to establish irreparable or incalculable injury necessary for a preliminary injunction.[130]

VI. Conclusion

38. The battle is far from over. On October 28, just two days after the denial of the bid for a preliminary injunction, the RIAA filed an appeal arguing that the Rio could be accompanied by the AHRA.[131] On December 11, 1998, Diamond filed a counterclaim alleging that the RIAA was guilty of multiple antitrust violations.[132] In the state suit, Diamond had also sought to have the AHRA found unconstitutional based on alleged violations of First Amendment rights to free expression and Fifth Amendment due process guarantees.[133] At this time it is difficult to predict the outcome of this newly filed litigation, but its existence highlights the fact that the direction of the law surrounding digital reproductions is not yet determined.

39. Some argue that the protections of copyright law should be limited to provide only the incentive necessary to motivate prospective copyright holders to create.[134] However, this is difficult to ascertain. One must make the delicate determination of exactly what level of protection is necessary to motivate creative endeavors.[135] From the events in the past months, it is obvious that the RIAA and MP3 supporters have a very different view of what is necessary. With industry leaders disagreeing and consumer choice arguments often ignored by the government in making regulatory choices that may have a wide range of impacts, this will be a difficult issue. As Michael Overly, an attorney with Foley & Lardner said, "We don't want to legislate the Internet out of existence by making it too strict ... [we should avoid our] tendency to rush in and legislate before we know what's going on with new technology."[136]

40. This article provided a review of applicable copyright law and the new legislation relating to digital recording, including a discussion of the recent battle between the RIAA and Diamond Multimedia. Since the original court date, Diamond has begun nationwide distribution of the Rio which (to the surprise of many) now includes software that records in MP3 format.[137] Diamond is now also selling MP3 files, making sales to the extent necessary to make up for payments it was required by the AHRA. The company will continue to sell the Rio and attempt to obtain a favorable outcome in the appellate litigation. There is no certain that while we will not know the outcome of the legislation, it is certain that this is not the last attempt by copyright owners of songs from a CD you own to an MP3 format, it is still a violation of copyright law to trade illicit MP3 files. This paper hopes to leave the reader with one important message: The future is not certain and the battle has just begun.

Footnotes

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[1] Hard-hitting comments are common. For example:

> "The people that are making the big money are record companies, and they are (surprise) not after MP3 spreaders. Furthermore I think that the RIAA and similar organizations are getting a bit scared now when they see that they might be outclassed by their likes that they are not as a distributed channel." – Marcus, MP3 user

[2] Successful recording artists are touting the harms of MP3 postings. For example, Mariah Carey's home page includes quotes such as, "Each time you or someone you know downloads a MP3 file of a song of Mariah's, you're making a contribution to an RIAA song ..." (http://www.mariahc.com/).

[3] *See* MP3 (last modified June 13, 1997) <http://webopedia.internet.com/TERM/M/MP3.html>.

[4] *See Webopedia*, *supra* note 3.

[5] Statement released to INSIDERZ.com on October 12, 1998.

[6] ...

[7] ...

[8] *See* Kroczmal, *supra* note 3.

[9] Kroczmal, *supra* note 3.

[10] "Ripping" is the industry term for the process of copying a file from a compact disk and then compressing it to create an MP3 file.

[11] *See* Diamond Multimedia Systems' Points And Authorities In Opposition To Temporary Restraining Order at 6, *Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc.*, 29 F.Supp. 624 (C.D. Cal. 1998). [hereinafter "TRO Opposition"].

[12] *See id*.

[13] Proof that some believe this theory is provided by the Netscape example. ...

[14] Kroczmal, *supra* note 3.

[15] ...

[16] *See id*.

[17] *See id*. ...

[18] *See* Patrizio & Maclachlan, *supra* note 15.

[19] *See Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc.*, 29 F.Supp. 624, 629 (C.D. Cal. 1998) (denying preliminary injunction) [hereinafter "Order"].

[20] *See id*.

[21] *See id*. The court in describing the player noted that this card allows users to trade cards containing recorded music with other Rio owners.

[22] *See id*.

[23] U.S. Const. art. I, § 8, cl. 8. ...

[24] ...

[25] Copyright Act, 17 U.S.C. § 106 (1998).

[26] Copyright Act, 17 U.S.C. § 107 (1998).

[27] *See id*.

[28] Litman, *supra* note 24 ...

[29] ...

[30] Litman, *supra* note 24, at Sec. III.

[31] ...

[32] 17 U.S.C. § 101. ...

[33] *See* H.R. Rep. No. 94-1476, at 52-53 (1976). ...

[34] *See* Litman, *supra* note 24, at Sec. IV ...

[35] See text associated with notes 60 through 90.

[36] *See* Litman, *supra* note 24, at Sec. III.

[37] ...

[38] ...

[39] ...

[40] *Harper v. Shoppell*, 28 F. 613 (S.D.N.Y. 1886). ...

[41] *See Sony*, 464 U.S. at 439. ...

[42] *See id*. (applying the theory to video cassette recorders).

[43] ...

[44] ...

[45] ...

[46] Oddi, *supra* note 39, at 53-54.

[47] ...

[48] ...

[49] ...

[50] Oddi, *supra* note 39, at 53-54.

[51] *Sony*, 464 U.S. at 442.

[52] Oddi, *supra* note 39, at 54.

[53] *See Sony*, 464 U.S. at 417.

[54] *See id*. at 438.

[55] *See id*. at 439.

[56] *See id*. at 442-56.

[57] ...

[58] *See Sony*, 464 U.S. at 442.

[59] *Home Recording of Copyrighted Works: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Comm.*, 97th Cong., 2d Sess. (1982).

[60] Audio Home Recording Act, 17 U.S.C. § 1001(3) (1994).

[61] 17 U.S.C. § 1001(5)(A).

[62] 17 U.S.C. § 1001(5)(B).

[63] 138 Cong. Rec. H9029-01 at H9036 (daily ed. Sept. 22, 1992) (statement of Rep. Collins).

[64] *Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc.*, 29 F.Supp. 624, 629 (C.D. Cal. 1998) (quoting Burger Decl. ¶¶ 10-11).

[65] 17 U.S.C. § 1001(4)(A).

[66] ...

[67] *See* 17 U.S.C. § 1001(5)(B)(ii). Section 1001(5)(B) provides:

> A "digital musical recording" does not include a material object -- (i) in which the fixed sounds consist entirely of spoken word recordings, or (ii) 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.

[68] 17 U.S.C. § 1001(5)(B)(ii).

[69] S. Rep. No. 102-294, at 48 (1992).

[70] Serial copying is defined as "the duplication in a digital format of copyrighted musical work or sound recording from a digital reproduction of a digital musical recording." 17 U.S.C. § 1001(11).

[71] S. Rep. No. 102-294 at 60-61.

[72] ...

[73] 17 U.S.C. § 1002. Section 1002(a) provides:

> No person shall import, manufacture, or distribute any digital audio recording device or digital audio interface device that does not conform to --
> (1) the Serial Copy Management System;
> (2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system's method of serial copying regulation and devices using the Serial Copy Management System; or
> (3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

Section 1003(a) provides:

> No person shall import into and distribute, or manufacture and distribute, any digital audio recording device or digital audio recording medium unless such person records the notice specified by this section and subsequently deposits the statements of account and applicable royalty payments for such device or medium as specified in section 1004.

[74] *See* S. Rep. No. 102-294 at 51-53 (1992). The AHRA expressly immunizes this activity in 17 U.S.C. § 1008.

[75] ...

[76] Statement by President George Bush Upon Signing S. 1623 [the AHRA], 28 Weekly Comp. Pres. Doc. 2188 (Nov. 2, 1992), 6 U.S.C.C.A.N. 3595.

[77] 17 U.S.C. § 1008.

[78] Nelson, *supra* note 7.

[79] *See* 17 U.S.C. 106(6).

[80] 17 U.S.C. 115(c)(3).

[81] 37 C.F.R. § 255.5 (1995).

[82] Jonathan Band, The Digital Millennium Copyright Act (last modified Nov. 25, 1998) ...

[83] The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[84] The Digital Millennium Copyright Act, H.R. Conf. Rep. No. 105-796, 105th Cong., 2d Sess. (1998), *reprinted in* 1998 U.S.C.C.A.N. 645.

[85] This portion of the act protects (1) entities offering the transmission, routing, or providing connections for digital online communications without modification of the material; and (2) providers of online services or network access. *Id*.

[86] ...

[87] ...

[88] 17 U.S.C. § 1201(c)(1) (1998).

[89] 17 U.S.C. § 1201(c)(2) (1998).

[90] 17 U.S.C. § 1201(c)(3) (1998). The Act does, however, make it illegal for any party to develop software that disables copyright protective encryption on software and CDs. Nodell, *supra* note 86.

[91] Kroczmal, *supra* note 3.

[92] Memorandum of Points and Authorities in Support of the Recording Industry Association of America's Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction at 5, *Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc.*, 29 F.Supp. 624 (C.D. Cal. 1998). [hereinafter "TRO Application"].

[93] According to Rosen, "On some college campuses, people are not buying music anymore" and instead they are downloading free MP3 files. Kroczmal, *supra* note 3. It is hard not to see her viewpoint as an exaggeration, but illegal files are prolific on the internet.

[94] Recording Industry Association of America's Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction at 2, Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc., 29 F.Supp. 624 (C.D. Cal. 1998).

[95] Derek Chaiken, MP3 vs. MP3 (visited Oct. 21, 1998) <http://dimensionmusic.com/articles/mp3usa.txt>.

[96] Chaiken, *supra* note 95. Archive sites are web sites that have numerous uploaded MP3 files available for a web browser to download either for no charge or for a very limited charge.

[97] Kroczmal, *supra* note 3. With an estimated 300 million illegal MP3 files on the internet, this job is enormous. Nodell, *supra* note 86. Many companies have even resorted to hiring "digital detectives" to locate sites violating the Copyright Act.

[98] Chaiken, *supra* note 95.

[99] Chaiken, *supra* note 95.

[100] Patrizio & Maclachlan, *supra* note 15. See discussion of the Rio recorder associated with notes 18 through 22.

[101] TRO Application, *supra* note 92, at 7,10.

[102] TRO Application, *supra* note 92, at 8.

[103] TRO Application, *supra* note 92, at 10.

[104] TRO Application, *supra* note 92, at 10.

[105] TRO Opposition, *supra* note 11, at 6.

[106] TRO Opposition, *supra* note 11, at 22.

[107] TRO Opposition, *supra* note 11, at 3.

[108] TRO Opposition, *supra* note 11, at 16.

[109] A digital audio copied recording is defined as "a reproduction in a digital recording format of a digital musical recording." 17 U.S.C. § 1001(1).

[110] TRO Opposition, *supra* note 11, at 3. The manufacturer argued that the Rio player should be analogized to a printer, a set of speakers, or any other peripheral device that is connected, locally, to the computer. *Id*. at 16.

[111] *Compare* TRO Opposition, *supra* note 11, at 4 *with* TRO Application, *supra* note 92, at 8.

[112] TRO Opposition, *supra* note 11, at 5.

[113] TRO Opposition, *supra* note 11, at 5.

[114] TRO Opposition, *supra* note 11, at 5.

[115] *See, e.g.*, Nelson, *supra* note 7.

[116] 17 U.S.C. § 1009(c)(1).

[117] Patrizio & Maclachlan, *supra* note 15 (discussing grant of injunction on October 16, 1998). For some it was surprising that the request for a temporary restraining order was successful. The extraordinary nature of an order of this type and the relative brevity of plaintiff's injury before a preliminary injunction can be entered generally suggests that the irreparable harm standard for temporary restraining orders should be more rigorous than the irreparable harm standard for preliminary injunctions. P. Goldstein, Copyright § 11.1.1 (2d ed. 1995). The court here found that after balancing, the defendant could wait for the hearing before starting to sell its player.

[118] *International Jensen v. Metrosound U.S.A.*, 4 F.3d. 819, 822 (9th Cir. 1993) (discussing the balancing test).

[119] *Stanley v. University of Southern California*, 13 F.3d 1313, 1324-25 (9th Cir. 1994).

[120] *Nintendo of America, Inc. v. Lewis Galoob Toys*, 16 F.3d 1032, 1038 (9th Cir. 1994) (emphasis in original).

[121] *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (3d Cir. 1983).

[122] Order, *supra* note 19.

[123] Order, *supra* note 19, at 14 (citing to 17 U.S.C. § 1001(3)).

[124] Order, *supra* note 19, at 16 (emphasis in original).

[125] Order, *supra* note 19, at 16 (discussing S. Rep. No. 102-294, at 26 (1992)).

[126] SCMS only restricts the copying of digital source material that has been encoded to assert its copyright protection. MP3 files do not contain this coding and would therefore not be blocked by SCMS.

[127] Order, *supra* note 19 (emphasis in original).

[128] 17 U.S.C. § 1001(3).

[129] Order, *supra* note 19, at 18.

[130] Order, *supra* note 19, at 18.

[131] *AHRA Unconstitutional, Diamond Says in Countersuing RIAA*, Consumer Multimedia Report, Dec. 14, 1998 [hereinafter *AHRA Unconstitutional*].

[132] *Id*. Diamond claims the RIAA pressured record labels not to cooperate with Diamond thereby intentionally interfering with the company's prospective economic advantage. *Id*.

[133] *Id*. The complaint alleges that the AHRA violates the First Amendment because the law 1) includes within its coverage the lawful and protected dissemination and receipt of musical expression; and 2) does not leave open ample alternative channels of communication. *Id*. The Fifth Amendment claims are based on an argument that the AHRA is impermissibly vague and threatens to "inhibit the exercise of constitutionally protected rights." *Id*.

[134] *See, e.g.*, William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1661 (1988).

[135] Litman, *supra* note 24, at Sec. III.

[136] Arguments of this type have been presented in the discussion of the early regulation of cable television. *See* Litman, *supra* note 24; Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 Buff. L. Rev. 615, 694-700 (1991). Similar criticisms are present in the discussion of the current restrictions placed on satellite broadcasters. *See* Litman, *supra* note 24; Jessica Litman, *Copyright Legislation and Technological Change*, 68 Or. L. Rev. 275, 342-46 (1989).

[137] Nodell, *supra* note 86 (discussing the recent legislative and common law developments in copyright law for cyberspace).

[138] *AHRA Unconstitutional, supra* note 131.