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Napster: Facilitation of Sharing, or Contributory and Vicarious Copyright Infringement?

Sue Ann Mota*

INTRODUCTION

From childhood, we are taught to share. But may we share, peer-to-peer, copyrighted music through Napster.com? Record companies argue that Napster users are direct copyright infringers,¹ and that Napster itself is a vicarious and contributory copyright infringer.² The Court of Appeals for the Ninth Circuit agreed on February 12, 2001,³ and on March 5, 2001 Napster was preliminarily enjoined from “engaging in, or facilitating others in, copying, downloading, uploading, transmitting, or distributing” copyrighted sound recordings.⁴ The March 5, 2001 injunction further ordered Napster to prevent the downloading, uploading, transmitting, or distributing copyrighted sound recordings within three business days of receipt of reasonable notice of infringing files.⁵

This article will examine the Napster litigation through the March 5, 2001 preliminary injunction. The article will conclude with implications for other file-sharing and data transmission technologies.

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1. See Brief for Plaintiffs/Appellees at 25, *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401, 00-16403).

2. See *id.*

3. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1029 (9th Cir. 2001). See *infra* notes 32-68 and accompanying text.

4. *A & M Records, Inc. v. Napster, Inc.*, No. C99-05183 MHP, MDL, No. C00-1369 MHP, 2001 U.S. Dist. LEXIS 2186, at *3 (N.D. Cal. March 5, 2001). See *infra* notes 68-69 and accompanying text.

5. See *Napster*, 2001 U.S. Dist. LEXIS 2186, at *7.

A & M RECORDS, INCORPORATED V. NAPSTER, INCORPORATED

Napster, “the brainchild of a college student who wanted to facilitate music-swapping by his roommate,”⁶ began operations on June 1, 1999.⁷ Napster, an Internet start-up, distributes its proprietary file sharing software, MusicShare, free at its Web site, and users then log on to Napster and share MP3 music files with other users.⁸ Napster users use this peer-to-peer file sharing system to upload and download MP3 files without payment to Napster, each other, or copyright owners.

Napster did not obtain licenses to distribute, download, or facilitate others to do so.⁹ Napster claims that it had a copyright compliance policy as early as October 1999,¹⁰ but admits that it did not document or notify users of this policy until February 7, 2000.¹¹ Napster is a free service, and according to plaintiffs, virtually all Napster users download or upload some copyrighted files, according to plaintiffs.¹² According to an expert for the plaintiffs, 87% of Napster files exchanged belong to a copyright holder, and over seventy percent are copyrighted and owned by the plaintiffs.¹³

On December 6, 1999, plaintiffs, eighteen copyright holders including A & M Records, MCA Records, Sony Music

6. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000).

7. See Spencer E. Ante, *Inside Napster*, BUSINESS WEEK, Aug. 14, 2000, at 113.

8. See *Napster*, 114 F. Supp.2d at 901. MP3 Expert or Motion Picture Group 1, Audio Layer 3, is a standard format to store compressed audio files. See *id.* MP3 is an algorithm that compresses a digital music file by a ratio of approximately 12:1, thereby reducing the size of the file so that it can be more easily and quickly copied, transmitted and downloaded over the Internet. See *A & M Records, Inc. v. Napster, Inc.*, 54 U.S.P.Q.2d (BNA) 1746, 1747 n.1 (N.D. Cal. 2000). See generally *Recording Indus. Ass’n. of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1073-74 (9th Cir. 1999).

9. See *Napster*, 114 F. Supp. 2d at 903.

10. See *Napster*, 54 U.S.P.Q.2d (BNA) at 1748. This policy reads as follows:

Napster will terminate the accounts of users who are repeat infringers of the copyrights, or other intellectual property rights, of others. In addition, Napster reserves the right to terminate the account of a user upon any single infringement of the rights of others in conjunction with use of the Napster service.

Id.

11. See *id.*

12. See *Napster*, 114 F. Supp. 2d at 902-03.

13. *Id.* at 903.

Entertainment, Atlantic Recording Corporation, Capitol Records, and other leading manufacturers and distributors of sound recordings, filed a complaint against Napster for contributory and vicarious copyright infringement.¹⁴ Some plaintiffs also alleged related violations of the California Civil Code¹⁵ and unfair competition.¹⁶ According to the plaintiffs, Napster is an online bazaar devoted to the piracy of music, and is created and is operating a haven for music on an unprecedented scale.¹⁷ For the alleged contributory and vicarious copyright infringements, the plaintiffs requested damages and profits,¹⁸ or statutory damages of \$100,000 for each work infringed.¹⁹ The plaintiffs also requested preliminary and permanent injunctions against further contributory and vicarious infringements.²⁰

Napster requested summary adjudication,²¹ claiming that its activities fell within the safe harbor provision of the Digital Millennium Copyright Act (DMCA).²² The district court declined to grant the motion for summary adjudication, however, ruling that Napster did not qualify for the safe harbor because it did not transmit, route, or provide connections through its service.²³ Even if Napster had met these conditions, however, the safe harbor provisions require a service provider to have a policy to terminate subscribers who are repeat

14. See *Napster*, 54 U.S.P.Q.2d (BNA) 1746, 1747 n.1 (N.D. Cal. 2000) (including Counts I and II of the complaint which cite violations of 17 U.S.C. §§ 106, 115, and 501 (1999)); 17 U.S.C. §§ 106, 115 (a), (d), and 501 (a). See *infra* note 47 and accompanying text (describing contributory copyright infringement) and note 46 and accompanying text (describing vicarious copyright infringement).

15. See *Napster*, 54 U.S.P.Q.2d (BNA) at 1747 (describing Count III of the complaint which cites California Civil Code § 980 (a) (2)).

16. See *id.* (describing Count IV of the complaint which cites California Business and Professions Code § 17200).

17. See *id.* at ¶ 1.

18. See 17 U.S.C. § 504(b) (2001).

19. See 17 U.S.C. § 504(c) (2001). At the time the complaint was filed, § 504 (c)(2)'s limit was \$100,000. It was amended to increase to \$150,000 by the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 2, 113 Stat. 1774 (1999).

20. See 17 U.S.C. § 502(a) (2001) (authorizing injunctions).

21. Summary adjudication may be granted under the same standards as summary judgment. Summary judgment shall be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See *Napster*, 54 U.S.P.Q.2d at 1748.

22. See 17 U.S.C. § 512(a) (2001); *Napster*, 54 U.S.P.Q.2d at 1748-49.

23. See 17 U.S.C. § 512(g)(2) (2001); *Napster*, 54 U.S.P.Q.2d at 1752.

infringers.²⁴ Napster did not give users notice of such a written policy until two months after this suit was filed.²⁵

On July 26, 2000, District Court Judge Marilyn Patel held a hearing on the plaintiffs' motion for a preliminary injunction, and on that day granted the preliminary injunction and ordered Napster to comply with the order by midnight, July 28, 2000.²⁶ The district court preliminarily enjoined Napster "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner."²⁷ In the district court's findings of fact, the court found that Napster use was likely to reduce CD purchases by college students, heavy users of Napster.²⁸ In the findings of law, the judge did not allow Napster to expand the fair use doctrine to protect its activities.²⁹ On July 28, however, the Court of Appeals for the Ninth Circuit stayed the injunction.³⁰

24. 17 U.S.C. § 512(i) (2001).

25. See *Napster*, 54 U.S.P.Q.D.2d at 1752; *supra* notes 10-11 and accompanying text.

26. See *Napster*, 114 F. Supp.2d at 927 n.32. The plaintiffs argued that they were likely to succeed on the merits, as Napster was liable for contributory and vicarious copyright infringement and argued that Napster's defenses were meritless. The plaintiffs stated that absent an injunction, they would suffer substantial and irreparable harm, and an injunction would serve the public interest. Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, A & M Records, Inc. v. Napster, Inc. (No. C-99-5183 MHP).

27. *Id.* at 927.

28. See *id.* at 909.

29. See *id.* at 901. The statute provides the following non-exhaustive list of fair use factors:

(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 (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. §107 (2001).

Under the first factor, the court found that the purpose and character of the use militates against fair use, and the use was not private. See *Napster*, 114 F. Supp. 2d at 912-13. The nature of the use went against the finding of fair use under the second factor. See *id.* Under the third factor, the entire copyrighted work was copied. See *id.* The fourth factor also weighed against a fair use since CD sales to college students were reduced and barriers to plaintiffs' entry into the market for digital downloading were raised. See *id.* Thus, a fair use was not present. See *id.*

30. See *id.* at 927 n.32. On July 28, 2000, the plaintiffs posted a bond for

On October 11, 2000, five actions against Napster were centralized in the district court for the Northern District of California.³¹

On Feb. 12, 2001, the Court of Appeals for the Ninth Circuit held that the recording companies substantially and primarily prevailed on appeal, and partially remanded the case to the district court to modify the preliminary injunction.³² On appeal, the Ninth Circuit reviewed whether the district court used appropriate legal standards when issuing the preliminary injunction and whether the district court applied the law correctly to the underlying issues of the case, or whether “the district court got the law right.”³³

Because Napster could not commit vicarious or contributory copyright infringement without direct copyright infringement by a third party,³⁴ the appeals court stated that “[p]laintiffs must satisfy two requirements to present a prima facie case of direct infringement: (1) they must show ownership of the allegedly infringed material and (2) they must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders.”³⁵ The district court concluded that the plaintiffs made a prima facie case of direct infringement by Napster users, under 17 U.S.C. § 106, and this was not appealed by Napster.³⁶ Napster claimed, however, that its users had a fair use defense to direct copyright infringement.³⁷ A Napster user’s fair uses included sampling, or making temporary copies of a work before purchasing it; space-shifting, or accessing a work through Napster that the user already owns; and distributing recordings by artists who allow users to access the work.³⁸ The

five million dollars to compensate Napster for losses if the injunction was reversed or vacated. *See id.*

31. *In re Napster*, No. 1369, 2000 U.S. Dist. LEXIS 15493, at *1 (J.P.M.L. Oct. 11, 2000) (listing the actions).

32. *See Napster, Inc.*, 239 F.3d at 1029.

33. *Id.* at *12. “Preliminary injunctive relief is available to a party who demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor.” *Id.* (citing *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000)).

34. *See id.* at 1013 n.2 (citing *Religious Tech. Ctr. v. Net Com On-line Communication Serv., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995)).

35. *Id.* at 1013.

36. *Id.* *See supra* notes 12-13 and accompanying text.

37. *Napster*, 239 F.3d at 1014. *See supra* note 29.

38. *Napster*, 239 F.3d at 1014. *See generally*, Ruth Okediji, *Givers*,

Ninth Circuit stated that the district court correctly determined that the plaintiffs would likely prevail in establishing that both sampling and space-shifting are not fair uses.³⁹ Sampling is a commercial use that adversely affects the markets for both audio CD's and online distribution.⁴⁰ Similarly, the district court did not err in finding that the plaintiffs would likely prevail in establishing that space-shifting is not a fair use.⁴¹ When a user lists a copy of a recording that he or she owns on the Napster system so that the recording can be accessed from another location, that recording becomes available to millions of other users.⁴² Finally, permissive distribution of works, along with other noninfringing uses of Napster such as chat rooms and message boards, were not challenged by the plaintiffs on appeal. Having found no error by the district court on the fair use issue, the Ninth Circuit addressed Napster's secondary liability for its users' direct infringement.

Contributory copyright infringement occurs when one induces, causes, or materially contributes to the infringing

Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace, 53 FLA. L. REV. 107 (2001); Wendy M. Pollack, Note, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445 (2000).

39. See *Napster*, 239 F.3d at 1019.

40. See *id.* at 1018.

41. See *id.* at 1019. The district court did not err in refusing to apply the shifting analysis of *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 423 (1984), and *Recording Indus. Ass'n. of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999). In *Sony*, the majority of VCR purchasers did not distribute taped television shows, but viewed them at home. In *Diamond*, the users transferred a copyrighted work from their hard drives to portable MP3 players. *Napster*, 239 F.3d at 1019. See generally Jayne A. Pemberton, Note, *UPDATE: RIAA v. Diamond Multimedia Systems - Napster and MP3.com*, 7 RICH. J.L. & TECH. 1 (Fall 2000) <<http://www.richmond.edu/jolt/v7il/note3.html>>; Stephen W. Webb, Note, *RIAA v. Diamond Multimedia Systems; The Recording Industry Attempts to Slow the MP3 Revolution, Taking Aim at the Jogger Friendly Diamond Rio*, 7 RICH. J.L. & TECH. 5 (Fall 2000) <<http://www.richmond.edu/jolt/v7il/note2.html>>; Elizabeth R. Gosse, Note, *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.: The RIAA Could Not Stop the Rio - MP3 Files and the Audio Home Recording Act*, 34 U.S.F. L. REV. 575 (2000); Alex Alleman, Note, *Manifestation of an AHRA Malfunction: The Uncertain Status of MP3 Under Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 79 TEX. L. REV. 189 (2000); Lisa M. Needham, Comment, *A Day in the Life of the Digital Music Wars: The RIAA v. Diamond Multimedia*, 26 W. MITCHELL L. REV. 1135 (2000).

42. See *Napster*, 239 F.3d at 1019.

conduct of another, by one who knows or has reason to know of the direct infringement.⁴³ According to the Ninth Circuit, the district court did not err in finding that Napster both actively and constructively knew that its users exchanged copyrighted music which was sufficient to impose contributory liability.⁴⁴ The Ninth Circuit also ruled that the district court properly found that Napster materially contributed to direct infringement.⁴⁵ Thus, according to the Ninth Circuit, the plaintiffs demonstrated a likelihood of success on the merits of the contributory copyright infringement claim.⁴⁶

Vicarious copyright infringement, an outgrowth of respondeat superior, extends beyond employment relationships to instances where the defendant both has the right and ability to supervise the infringing activity, and has a direct financial interest in the infringing activities.⁴⁷ The district court did not err in finding that Napster had a direct financial interest in the infringing activity.⁴⁸ The Ninth Circuit also found that Napster had the right and ability to supervise its users' conduct and therefore the district court's conclusion that the plaintiffs demonstrated a likelihood of success on the merits of the vicarious copyright infringement claim was proper.⁴⁹

43. *Id.* In other words, contributory infringement occurs when one engages in personal conduct that encourages or assists the infringement. *See id.*

44. *Id.* at 1020. The district court found actual knowledge because a document by a Napster co-founder mentioned the need to remain ignorant of users' real names and IP addresses since they were exchanging pirated music, and RIAA informed Napster of more than 12,000 infringement files. The district court found constructive knowledge because Napster executives had the following: recording industry experience; intellectual property enforcement experience; downloading experience involving copyrighted music; and promotion experience of the site listing infringing files. *See id.* at 1020 n.5. The appeals court did depart from the reasoning of the district court in that the district court improperly confined the analysis of knowledge to current users and ignored the system's capabilities. *See id.* at 1021.

45. *See id.* at 1022.

46. *See id.* The district court concluded that Napster users could find and download copyrighted music with ease and without the service that Napster provides. *Id.* at 1022 n.6.

47. *See id.* at 1022.

48. *Id.* at 1023. Financial benefit exists where the availability of infringing material acts as a draw for customers, and Napster's revenue is directly dependent on increases in users. *Id.*

49. *See id.* at 1023-24. Napster's admission about that improved methods of blocking users shows that Napster can and does supervise its service. Napster's own express reservation of rights policy posted on its website shows Napster's right to control its site. *Id.* at 1023.

Napster then asserted that two statutes, the Audio Home Recording Act⁵⁰ and the Digital Millennium Copyright Act (DMCA),⁵¹ to protect it and preclude the issuance of a preliminary injunction.⁵² Napster claimed that its users were noncommercial users within the meaning of the Audio Home Recording Act, so Napster itself could not be secondarily liable. The Ninth Circuit, however, agreed with the district court that the Audio Home Recording Act does not cover the downloading of MP3 files to computer hard drives for two reasons. Computers are not digital audio recording devices under the statute, and computers do not make digital music recordings defined by the statute.⁵³ Napster also argued that the DMCA's safe harbor from copyright infringement suits for Internet service providers gives it immunity from suit.⁵⁴ Plaintiffs raised significant questions about the safe harbor which will be more fully developed at trial,⁵⁵ but the district court properly concluded that ample evidence showed that the balance of hardships weighed in the plaintiffs' favor.⁵⁶

Napster then contended that it had the valid affirmative defenses of waiver, implied license, and copyright misuse, which had been improperly rejected by the district court.⁵⁷ Concerning waiver or abandonment of copyright, which occurs only if there is an intent by the copyright owner to surrender rights in the copyrighted work, the Ninth Circuit held that the district court did not err in finding that the plaintiffs did not waive any legal authority to exercise exclusive control over

50. See 17 U.S.C. § 1008 (2001).

51. 17 USC § 512 (2001).

52. See *Napster*, 239 F.3d at 1024.

53. *Id.*

54. See *id.* at 1025.

55. See *id.* The plaintiffs raised issues of whether Napster is an ISP under the statute, whether copyright owners must give an ISP official notice of infringing activity, and whether Napster complies with the statute that requires an ISP to timely establish a detailed copyright policy. On the DMCA's safe harbor, the appeals court cited S. Rep. 105-190, at 40 (1998) and Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement Into the Digital Millennium Copyright Act of 1998*, 75 WASH. L. REV. 1005, 1028-30 (2000). The Wright article advocates reading actual control into the DMCA's safe harbor under 17 USC § 512(c) (1)(B) as technology challenges conventional definitions of control, and the sheer volume of transactions over a web site makes such control difficult. See *id.* at 1036.

56. See *Napster*, 239 F.3d at 1025.

57. See *id.* at 1025-26.

creation and distribution of MP3 files.⁵⁸ Concerning the implied license, which is found only in narrow circumstances where one party creates a work at the other's request and intends the other to copy and distribute it, the appellate court similarly held that the record supports the conclusion that there is no evidence to support this defense either.⁵⁹ Similarly, there was no error in rejecting the affirmative defense of copyright misuse, which prohibits a copyright owner from securing an exclusive right not granted by the Copyright Office.⁶⁰

Napster also argued that the preliminary injunction violates the First Amendment because it is broader than necessary.⁶¹ The Ninth Circuit held that the injunction was proper.⁶² The five million dollar bond posted by the plaintiffs was not increased on appeal, despite requests by Napster.⁶³ The court also rejected Napster's request for a compulsory royalty instead of an injunction, as the Copyright Act provides various sanctions for infringers, and would force the plaintiffs to do business with Napster as well as lose control both over their ability to negotiate and to control their intellectual property.⁶⁴

The Ninth Circuit thus agreed with the district court that a preliminary injunction against Napster was not only warranted, but required.⁶⁵ The scope of the preliminary injunction needed to be modified on remand, however.⁶⁶ The burden of protecting copyrighted works on Napster should be shared by the parties. The burden should be placed on the plaintiffs to provide notice of copyrighted files on Napster before Napster has the duty to disable access to the copyrighted material; Napster also bears the burden of policing its system.⁶⁷

On March 5, 2001 the district court preliminarily enjoined Napster from engaging in, or facilitating others in, copying,

58. *See id.* at 1026.

59. *See id.*

60. *See id.* The plaintiffs seek to control the exclusive rights of reproduction and distribution, and do not seek to control rights beyond their exclusive rights. *See id.* at 1027.

61. *See id.* at 1027-28.

62. *See Napster*, 239 F.3d at 1028.

63. *See id.*; *supra* note 30.

64. *See Napster*, 239 F.3d at 1028-29.

65. *Id.* at 1027.

66. *See id.*

67. *See id.*

uploading, transmitting, or distributing copyrighted sound recordings.⁶⁸ When Napster receives reasonable knowledge of specific infringing files containing copyrighted recordings, Napster has three business days to prevent the files from being included in the Napster index, which would prevent access to these files.⁶⁹

CONCLUSION

Napster has been preliminarily enjoined from facilitating copyright infringement, and copyright infringement damages are pending. Napster, one of the largest peer-to-peer file-sharing services, estimated that it had over 75 million users by the end of 2000.⁷⁰ Napster now has three days to block copyrighted music after notice is received.⁷¹ If a user supplies a Counter Notification, Napster will send a copy of that Counter Notification to the copyright right's holder making the allegation of infringement. Napster will restore access to the user's account within 10 to 14 business days thereafter, unless during that time Napster's Designated Copyright Agent

68. *A & M Records, Inc. v. Napster, Inc.*, No. C99-05183 MHP, MDL, No. C00-1369 MHP, U.S. Dist. LEXIS 2186, at *3 (N.D. Cal. Mar. 5, 2001).

69. *See id.* at 7. Plaintiffs may also provide to Napster works in advance of release, if there is a substantial likelihood that the work will be infringed on the Napster site. *See id.*

70. *See A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000).

71. A notice given by Napster.com to a user who is a former student of this author (March 9, 2001) states in pertinent part:

Notice of Blocked Access! Please read this entire notice carefully. If you were redirected to this page by the Napster client, the reason is because Napster has received an allegation from or on behalf of a copyright rights holder under the Digital Millennium Copyright Act ("DMCA"). The allegation is that material that you have made available through the Napster service is copyrighted and that your making it available infringes the notifier's copyright. In response, we have blocked you from access to your Napster account. Your account will remain blocked unless you provide us with a completed copy of the "Counter Notification" form below to the "Designated Copyright Agent," all as covered by the DMCA law. In order to submit a counter notification, you must certify, under penalty of perjury that you have a good faith belief that you were blocked as a result of the notifier's mistake or misidentification of the material you were sharing. This form must, as you will see, include your full real name, complete address, your Napster user name (i.e., the user name which you were using at the time we received the notice and had to block your account), and your consent to being sued in the federal court where you reside by the copyright holder.

receives notice from the copyright right's holder that it has filed a legal action against the user seeking a court order to restrain the user from engaging in illegal activity relating to material made available through the Napster service. This author believes that this preliminary injunction, as modified, will help prevent copyright infringement, yet will allow the sharing of non-protected files. While Napster and its partner, Bertelsmann AG, may stay in business by licensing music for a fee to its customers,⁷² other companies such as Gnutella and Freenet still allow file sharing anonymously.⁷³ Servers and companies operating offshore are also very difficult to shut down.⁷⁴ Napster has sparked new peer-to-peer applications for the PC, and is going to spark a new breed of data transmission, and the law is struggling to keep up with these technological changes.⁷⁵ A balance will have to be maintained between the free sharing of ideas and public domain materials, and intellectual property rights.

72. See Lee Gomes, *Judge Starts Process of Silencing Napster*, WALL ST. J., March 5, 2001, at B6.

73. See Dennis K. Berman, *With Technology Like This, Who Needs Napster?*, BUSINESS WEEK, Aug. 17, 2000, at 121.

74. See, Lee Gomes, *"Open Napster" Clones Feel Industry Heat*, WALL ST. J., Feb. 23, 2001, at B9.

75. E-mail from Lindahl Burkhart, attorney at Jones, Day, Reavis and Pogue, to this author (on file with author).

