

2009

## How Streaming Audio and Video Change the Playing Field for Copyright Claims

Melissa L. Morris

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

---

### Recommended Citation

Melissa L. Morris, *How Streaming Audio and Video Change the Playing Field for Copyright Claims*, 18 J. L. & Pol'y (2009).  
Available at: <https://brooklynworks.brooklaw.edu/jlp/vol18/iss1/9>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

## HOW STREAMING AUDIO AND VIDEO CHANGE THE PLAYING FIELD FOR COPYRIGHT CLAIMS

*Melissa L. Morris\**

### INTRODUCTION

From reel-to-reel tape recorders to recordable compact discs (CDs), and from BetaMax tapes to writeable DVDs, technologically-savvy customers have always clamored for the newest technologies to record their favorite music and television shows for personal use.<sup>1</sup> The omnipresence of the Internet has provided users and entrepreneurs with an exciting yet sometimes confusing forum through which this accumulation of data can subject parties to liability for copyright infringement.<sup>2</sup>

As digital music and videos have become smaller and easier

---

\* J.D. Candidate, Brooklyn Law School, June 2010; B.A., Psychology and Italian, University of Texas, 2005. I would like to thank Joseph Cizmar, Allison Romosarek, and my parents, brother, grandparents, aunts, uncles, and cousins for all their support over the years. Without you all, I would not be where I am today and I cannot thank you all enough. Additionally, I would like to thank Vicky Lee for her invaluable help in the editing process.

<sup>1</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 423 (1984) (finding that owners of BetaMax Video Recorders engaged in widespread television recording).

<sup>2</sup> See Katie Allen, *Survey Finds Pirate Downloads at All-Time High and Set to Rise*, GUARDIAN, July 30, 2007, <http://www.guardian.co.uk/business/2007/jul/30/newmedia.musicnews>; see also W. David Gardner, *Top Cyberspace Lawyer Challenges RIAA's Music-Sharing Lawsuits*, INFORMATION WEEK, Nov. 18, 2008, <http://www.informationweek.com/story/showArticle.jhtml?articleID=212100538>.

to transfer, illegal downloading through peer-to-peer services<sup>3</sup> has steadily increased.<sup>4</sup> In response to this trend, music and video copyright holders have utilized new and existing technology in an effort to combat widespread copyright infringement.<sup>5</sup> One of the most promising technologies is the use of digital streaming.<sup>6</sup> Through digital streaming, copyright owners can control access to their copyrighted material by deciding when and how the consumer accesses the audio and video content. Record companies have jumped at the chance to utilize such services as Pandora<sup>7</sup> and Lala<sup>8</sup> to allow users to “test” music before they buy it.<sup>9</sup> Similarly, television companies, even non-broadcast television companies, have also utilized free, streaming services on their websites in order to provide users an avenue through which to see television shows in a controlled environment—often one laden with

---

<sup>3</sup> Peer-to-peer (P2P) file sharing is a system whereby one user directly shares his or her files with another user, without the use of an intermediary. What is P2P File Sharing?, <http://www.tech-faq.com/p2p-peer-to-peer-file-sharing.shtml> (last visited Oct. 3, 2009). Popular P2P systems formerly included “big names” such as, KaZaA, Morpheus, Grokster, and Napster.

<sup>4</sup> See Patrick Foster, *Young People Ignoring Attempts to Combat Illegal Music Downloading*, TIMES ONLINE (London), Aug. 10, 2009, [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/the\\_web/article6789409.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article6789409.ece).

<sup>5</sup> See generally John Borland, *Sony CD Protection Sparks Security Concerns*, CNET, Nov. 17, 2005, [http://news.cnet.com/Sony-CD-protection-sparks-security-concerns/2100-7355\\_3-5926657.html](http://news.cnet.com/Sony-CD-protection-sparks-security-concerns/2100-7355_3-5926657.html) (using CD copy protection to prevent users from copying their CDs onto their computers); Peter Cohen, *iTunes Store Goes DRM-Free*, MACWORLD, Jan. 6, 2009 (using Digital Rights Management (DRM) as a way to prevent iTunes and Amazon users from playing—and thus sharing—songs on more than five computers).

<sup>6</sup> For a discussion on streaming, see text accompanying notes 58–59.

<sup>7</sup> About Pandora, <http://www.pandora.com/corporate> (last visited Oct. 3, 2009).

<sup>8</sup> Lala, <http://www.lala.com> (last visited Oct. 3, 2009).

<sup>9</sup> See, e.g., Anthony Ha, *Internet Radio Reaches Deal with Record Industry, Pandora Saved*, DIGITALBEAT, July 7, 2009, <http://digital.venturebeat.com/2009/07/07/internet-radio-reaches-deal-with-record-industry-pandora-saved/>.

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 421

advertisements—before the shows come out on DVD.<sup>10</sup>

However, although streaming music and video are cheap and pervasive, many consumers still want to “own” copyrighted materials.<sup>11</sup> Record companies and television studios have been so successful at shutting down many popular free peer-to-peer services that consumers are using streaming feeds to obtain copies of copyrighted works at no cost.<sup>12</sup> As a result, a host of programs have developed to allow a consumer to download streaming audio or visual works onto their computer for permanent use.<sup>13</sup>

This Note examines the various copyright implications for individuals who use programs to download streaming audio and video. Part I details the creation and development of the Internet and discusses how the music industry and its consumers have utilized technology to make music more accessible. Part II explains the copyright landscape in which both holders and potential infringers currently find themselves. This section outlines the rights of copyright holders and how they are most commonly protected and licensed. Part III surveys the potential liability for the developers of programs that allow users to download streaming audio and video. This section looks at previous litigation and examines potential liabilities in light of the unique developmental characteristics of the programs. Lastly, Part IV focuses on the potential liabilities of the end user of a program that allows the user to download streaming audio or video. This section analyzes prior litigation and examines whether a “fair use” argument justifies streaming audio and video. Ultimately, I propose that through careful crafting, software developers who create software that allows users to

---

<sup>10</sup> See generally Louis Hau, *Hulu's Here*, FORBES, Oct. 29, 2007, [http://www.forbes.com/2007/10/28/hulu-online-video-biz-media-cx\\_lh\\_1029\\_bizhulu.html](http://www.forbes.com/2007/10/28/hulu-online-video-biz-media-cx_lh_1029_bizhulu.html) (stating that several television companies have gotten together to put much of their content on a single website); see also, e.g., NBC, [www.nbc.com](http://www.nbc.com) (last visited Oct. 3, 2009).

<sup>11</sup> See generally Roy Furchgott, *Free Music Downloads Without the Legal Peril*, N.Y. TIMES, Sept. 3, 2008 at C6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

download streaming audio and video can avoid both direct liability and secondary liability for the infringement of their users. However, software users will continue to be liable for their direct infringement claims and will find themselves unable to escape liability by claiming they were using the music legally within the confines of copyright law.

#### I. THE INTERNET AND MUSIC: THEN AND NOW

Since its shadowy beginnings, the Internet has long been a mysterious place for the common user.<sup>14</sup> The Internet began in 1969 as a project started by the U.S. Department of Defense.<sup>15</sup> The Advanced Research Projects Agency Network (ARPANET) was created to keep military facilities in metropolitan areas operational and in communication with each other in the event of a nuclear attack.<sup>16</sup> Over the next ten years, researchers at universities across the country devoted significant time and resources to developing an operational system through the use of radio waves, telephone lines, satellite communications, and Ethernet.<sup>17</sup> From this work was born the Internet, a synthesis of ARPANET and the National Science Foundation's network (NSFNET).<sup>18</sup>

Early public Internet Providers, known as online electronic information services, provided modem owners with the means to communicate with each other through a small group of computer servers.<sup>19</sup> Through this system, users sent digital information

---

<sup>14</sup> Mark Ward, *How Well Can You Use the Web?*, BBC NEWS, Mar. 29, 2004, <http://news.bbc.co.uk/2/hi/technology/3578149.stm>.

<sup>15</sup> AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 1263 (3d ed. 2002).

<sup>16</sup> *Id.* The ARPANET was in operation until 1989 and served as a primary testing site for many networking ideas, such as email and instant messaging. J.R. OKIN, *THE INTERNET REVOLUTION: THE NOT-FOR-DUMMIES GUIDE TO THE HISTORY, TECHNOLOGY, AND USE OF THE INTERNET* 53 (2005).

<sup>17</sup> KOHN & KOHN, *supra* note 15, at 1264.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1261–62. Examples of early electronic information services are America Online (AOL), Prodigy, Microsoft Networks (MSN), and

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 423

(encoded as bytes in binary form) to a modem, which then converted it to an analog format that could be transmitted to another modem on the system operator's server that reversed the process.<sup>20</sup> By dialing the system operator's specific Internet Protocol (IP) address, users could connect with each other, send emails, and communicate in real-time.<sup>21</sup> In a process known as uploading, a user could send any type of computer file to the server of the system operator, where it would immediately be available to another user for download, or copying, onto the second user's personal computer.<sup>22</sup>

The Internet, as it exists today, is a product of improvements to both the ARPANET system and the early electronic information services.<sup>23</sup> In 1989, a computer scientist<sup>24</sup> working at CERN (the European Organization for Nuclear Research) in Switzerland developed a new system that used hypertext to make information-sharing easier.<sup>25</sup> This system came to be known as the World Wide Web and it enabled users to access documents on other computers by pointing and clicking on certain words or phrases of text, called hyperlinks.<sup>26</sup> In 1993, computer

---

CompuServe. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* "Real-time" is a term describing communication that is instantaneous. What is Real Time?, [http://www.webopedia.com/TERM/r/real\\_time.html](http://www.webopedia.com/TERM/r/real_time.html) (last visited Dec. 3, 2008). Under such an operating system, the user will input data and the system will respond immediately. *Id.*

<sup>22</sup> KOHN & KOHN, *supra* note 15, at 1262.

<sup>23</sup> *See id.* at 1261-68.

<sup>24</sup> Tim Berners-Lee is a British computer scientist who completed the first successful communication between an http client and a server. OKIN, *supra* note 16, at 109. He is currently the director of the World Wide Web Consortium, a company that oversees the continual development of the Internet, and is involved in a myriad of other projects. Tim Berners-Lee, <http://www.w3.org/People/Berners-Lee/> (last visited Nov. 30, 2008). In 2007, he was named Telegraph Magazine's greatest living genius, along with Albert Hoffman, the creator of LSD. *Top 100 Living Geniuses*, TELEGRAPH, Oct. 30, 2007, <http://www.telegraph.co.uk/news/uknews/1567544/Top-100-living-geniuses.html>.

<sup>25</sup> OKIN, *supra* note 16, at 100-01.

<sup>26</sup> KOHN & KOHN, *supra* note 15, at 1264-65.

programmers at the University of Illinois developed the first “browser” software, a graphical user interface that navigated the World Wide Web.<sup>27</sup> This program was known as Mosaic, and later became commercially available to the public as early versions of Netscape Navigator and Microsoft Internet Explorer.<sup>28</sup>

The creation of Mosaic, and others like it,<sup>29</sup> have made the Internet accessible beyond its intended use of communication between researchers and military bases.<sup>30</sup> Each website is now the functional equivalent of an early America Online (AOL) or Prodigy, enabling users to get more information from a wider number of sources.<sup>31</sup> This has also meant astronomical developments in electronic commerce in the form of advertisements, retail, electronic publishing, financial services, music, and videos.<sup>32</sup> The Internet has become more pervasive than ever before, and with this has come increased digital transmission of music.<sup>33</sup>

The earliest digital music files were large compared to today’s standards, with the average three-and-one-half minute song being approximately forty megabytes in size.<sup>34</sup> However, in

---

<sup>27</sup> OKIN, *supra* note 16, at 110.

<sup>28</sup> KOHN & KOHN, *supra* note 15, at 1265.

<sup>29</sup> Today, there are a number of Internet web browsers, such as Microsoft’s Internet Explorer (used by 39.6% of users), Mozilla’s Firefox (46.6%), Google’s Chrome (7.1%), Apple’s Safari (3.6%), and Opera (2.2%). W3Schools, Browser Statistics, [http://www.w3schools.com/browsers/browsers\\_stats.asp](http://www.w3schools.com/browsers/browsers_stats.asp) (last visited Oct. 19, 2009).

<sup>30</sup> KOHN & KOHN, *supra* note 15, at 1265.

<sup>31</sup> *Id.* at 1266.

<sup>32</sup> *Id.*

<sup>33</sup> In its 2009 report, the International Federation of the Phonographic Industry (IFPI) estimates that over one trillion songs are downloaded worldwide. INT’L FED. OF THE PHONOGRAPHIC INDUS., DIGITAL MUSIC REPORT 2009 (2009). The IFPI similarly estimates that over 95% of these downloads are illegal. *Id.* at 3. However, other studies have shown that, at least in the United Kingdom, the rate of legal downloads is almost equal to that of illegal downloads. Marc Beja, *New Study Shows Decrease in Illegal Music Downloading*, CHRONICLE OF HIGHER EDUC., July 13, 2009.

<sup>34</sup> KOHN & KOHN, *supra* note 15, at 1269. Today, that same three-and-

*AUDIO AND VIDEO COPYRIGHT CLAIMS*      425

1996 a group of college students began to develop computer technology that took the large files from a CD and converted them into smaller, more accessible MP3 files.<sup>35</sup> This new technology cut the time necessary to send and download a file using a fifty-six kilobyte modem<sup>36</sup> from three hours to less than one hour.<sup>37</sup> Software developers and entrepreneurs quickly created programs and websites to accommodate a growing demand for MP3 software and files.<sup>38</sup> As this software became more widely distributed, the number of MP3s available worldwide grew, and most popular songs became available through servers, websites, and other programs.<sup>39</sup> Users also began to use email programs and FTP<sup>40</sup> servers to share music

---

one-half minute song is a little over three megabytes, or about ninety percent smaller than its earlier counterpart. *Id.*

<sup>35</sup> *Id.* at 1268. MP3 is short for Motion Pictures Experts Group 1, Audio Layer 3. *Id.* at 1269. It was created by the Motion Pictures Experts Group and the Fraunhofer-Gesellschaft Group as a way to compress audio and visual files. *Id.* The idea is that an MP3 file represents a filtered version of the larger file, with all of the inaudible binary information removed. *Id.* This results in a file size ninety percent smaller than the original. *Id.*

<sup>36</sup> A fifty-six kilobyte modem is a modem that can send information at a maximum of 57,600 bits per second (bps). What is modem? <http://www.webopedia.com/TERM/m/modem.html> (last visited Dec. 3, 2008). These modems, and those with slower speeds, were originally the only modems through which an early Internet (AOL) user could access the operating system. KOHN & KOHN, *supra* note 15, at 1269.

<sup>37</sup> KOHN & KOHN, *supra* note 15, at 1269–70. Now that most computers access the Internet using faster connections, the download time for an MP3 can be just a few minutes. I. Fred Koenigsberg et al., *Music, the Internet, and the Music Industry*, in 1 MUSIC ON THE INTERNET: UNDERSTANDING THE NEW RIGHTS & SOLVING NEW PROBLEMS 11, 12–13 (2001).

<sup>38</sup> KOHN & KOHN, *supra* note 15, at 1270.

<sup>39</sup> *Id.* at 1270–71.

<sup>40</sup> FTP is short for File Transfer Protocol. DOUGLAS COMER, INTERNETWORKING WITH TCP/IP: PRINCIPLES, PROTOCOLS, AND ARCHITECTURES 499 (4th ed. 2005). Through FTP, a user could turn his computer into a server for files, instead of uploading them onto a third party's server. *Id.* at 500–02. FTP servers can be dangerous, because although there are some protections, such as requiring passwords to access the server, a user running an FTP server that allows others to contribute files cannot control what files others put onto the server, including viruses. *See id.*



with each other for no more than the cost of their internet service.<sup>41</sup>

As a way to save time and money, college students began developing programs that would search files available on different university networks and link a user to the file for download.<sup>42</sup> The larger public demand for MP3s led to the creation of Napster, one of the earliest and arguably most pervasive programs to facilitate file sharing.<sup>43</sup> The original version<sup>44</sup> of Napster allowed users to share the MP3s available on their hard drives (regardless of how they were obtained) with users on other computers.<sup>45</sup> Napster's MusicShare software allowed each user to access an index of the files shared by all users connected at any given time, which could then be used to search for a specific title, artist, or keyword encoded in any of the original file names.<sup>46</sup> The program would then connect to a server and pull up a list of matching results found on every other user's computer, allowing a user to select a file to download.<sup>47</sup> Users could use the results to connect to the computer of the file's owner and download the file from his or her computer without paying a penny to either Napster or the copyright owner.<sup>48</sup>

It was not long before a group of nine record labels sued

---

at 500-04.

<sup>41</sup> KOHN & KOHN, *supra* note 15, at 1270.

<sup>42</sup> *Id.* at 1270-71.

<sup>43</sup> *Id.*

<sup>44</sup> This paragraph describes the features of the original Napster program. Napster was forced to drastically change its business model after the Ninth Circuit issued an injunction against the company in *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001). The current version of Napster functions more as a subscription service, where users pay a fee per month for unlimited access to streaming music and can download selected songs for an additional fee. See Napster, [www.napster.com](http://www.napster.com) (last visited Dec. 2, 2008).

<sup>45</sup> PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 165-66 (Stanford Univ. Press 2003) (1995).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> KOHN & KOHN, *supra* note 15, at 1272. For more on copyright ownership see *infra*, Part II.

*AUDIO AND VIDEO COPYRIGHT CLAIMS*      427

Napster for copyright infringement,<sup>49</sup> and after an injunction shut Napster down, a host of similar programs were developed to replace it.<sup>50</sup> Programs such as Grokster and Morpheus subjected users and their creators to liability for copyright infringement claims from large companies, such as Elektra Records<sup>51</sup> and Capitol Records,<sup>52</sup> and from even some small, independent recording labels.<sup>53</sup>

The large potential for, and incidence of, copyright infringement has led many audio and video copyright holders to utilize streaming technology in an effort to allow users to enjoy the content in a protected environment and to prevent them from obtaining exact digital copies of their works.<sup>54</sup> Companies such as NBC, ABC, and Viacom have turned to streaming and have made much of their television content available without cost on their respective websites.<sup>55</sup> In fact, large television companies

---

<sup>49</sup> A&M Records, Inc., Geffen Records, Inc., Interscope Records, Sony Music Entertainment, Inc., MCA Records, Inc., Atlantic Recording Corp., Island Records, Inc., Motown Record Co., and Capitol Records, Inc. brought suit against Napster. *Napster*, 239 F.3d 1004.

<sup>50</sup> Almost immediately after Napster shut down, Grokster and Morpheus were created in its stead. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923–24 (2005). Later, other programs such as KaZaA and LimeWire were also developed to help fill the demand for MP3s. *Kazaa 3.0 vs. LimeWire 4.8.1*, <http://www.cdrinfo.com/Sections/Reviews/Specific.aspx?ArticleId=15064> (last visited Nov. 13, 2009).

<sup>51</sup> See *Elektra Entm't Group, Inc. v. Santangelo*, No. 06-CV-11520, 2008 WL 4452393 (S.D.N.Y. Oct. 1, 2008).

<sup>52</sup> See *Capitol Records, Inc. v. Foster*, No. 04-CV-1569, 2007 WL 1223826 (W.D. Okla. Apr. 23, 2007).

<sup>53</sup> See e.g., Nicolas Jondet, *French Independent Music Labels Sue Morpheus Azureus*, FRENCHLAW.NET, June 16, 2007, <http://french-law.net/french-independent-music-labels-sue-morpheus-azureus.html>; *Yahoo! Settles Copyright Infringement Suit with EMI Music*, BUSINESS WIRE, Oct. 2, 2003, <http://www.allbusiness.com/media-telecommunications/movies-sound-recording/5763733-1.html>.

<sup>54</sup> *Real Networks, Inc. v. Streambox, Inc.*, No. 2:99-CV-02070, 2000 WL 127311, at \*2 (W.D. Wash. Jan. 18, 2000).

<sup>55</sup> NBC's list of streaming television shows are listed on its website and are free of cost. NBC, Video Library, <http://www.nbc.com/Video/library/> (last visited Sept. 6, 2009). Similarly, ABC also has streaming shows

have even begun to team up with each other to create streaming media conglomerates, like Hulu,<sup>56</sup> in an effort to guarantee that users are watching the television companies' versions of their copyrighted works.<sup>57</sup>

Streaming, an alternative to downloading, is accomplished by subdividing a file (usually an audio or video file) into small packets of information that each travel to a user's computer.<sup>58</sup> These small packets travel through different pathways and are placed in a temporary holding place, or "buffer," which allows the user to listen or watch the file while his or her computer continues to retrieve packets of information.<sup>59</sup> This differs from downloading, in that once a packet has been heard or viewed, it is erased from the buffer and replaced with a new packet of information.<sup>60</sup> By the end of the file, there is nothing left in the buffer and all traces of the file have been removed from the computer.<sup>61</sup> Through streaming, companies can control what content is available, whether consumers pay a fee to access the content, and the amount of advertising a consumer sees.<sup>62</sup>

Even with the proliferation of streaming and encryption technology, computer programmers have worked to develop programs that can be used to circumvent encryption protections in order to help users retain personal copies of copyrighted material.<sup>63</sup> A simple Google search for "download streaming

---

available on its website. ABC, Shows, <http://abc.go.com/watch> (last visited Sept. 6, 2009). Lastly, most of Viacom's various television stations—such as Comedy Central and MTV—also stream full episodes of popular television shows on their websites. See Comedy Central, Exclusive Videos and Show Clips, [http://www.comedycentral.com/funny\\_videos/index.jhtml](http://www.comedycentral.com/funny_videos/index.jhtml) (last visited Sept. 6, 2009); MTV, Free Music, Show and Movie Videos, <http://www.mtv.com/videos/home.jhtml> (last visited Sept. 6, 2009).

<sup>56</sup> Hulu, <http://www.hulu.com> (last visited Nov. 13, 2009).

<sup>57</sup> Hau, *supra* note 10.

<sup>58</sup> W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 860–61 (2007).

<sup>59</sup> *Id.* at 861.

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See* KOHN & KOHN, *supra* note 15, at 1258.

<sup>63</sup> *See* Furchgott, *supra* note 11.

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 429

audio” yields over eighteen million results<sup>64</sup> and the results for “download streaming video” were almost twice as large.<sup>65</sup> Free programs—like OrbitDownloader, KeepVid, and Audacity—and paid programs—like WM Capture—allow users to permanently record audio and/or video content while it is simultaneously being streamed to their computers.<sup>66</sup> For copyright holders, this means that despite their best efforts to protect their works from infringement, any audio or video stream is permanently available, at the click of a button, to anyone with enough free time to learn to use the program.<sup>67</sup> This accessibility could result in personal ownership of not only television shows with limited broadcast distribution, but also web content never meant for widespread release.<sup>68</sup>

---

<sup>64</sup> A search was conducted using [www.google.com](http://www.google.com) for “download+streaming+audio” on Oct. 26, 2009 and retrieved over 18,400,000 results.

<sup>65</sup> A search was conducted using [www.google.com](http://www.google.com) for “download+streaming+video” on Oct. 26, 2009 and retrieved over 29,400,000 results.

<sup>66</sup> See, e.g., Audacity, <http://audacity.sourceforge.net/> (last visited Oct. 24, 2009); KeepVid, <http://keepvid.com/> (last visited Oct. 24, 2009); Orbit Downloader 2.0, <http://www.orbitdownloader.com/> (last visited Oct. 24, 2009); WM Capture, [http://www.wmrecorder.com/wm\\_capture.php](http://www.wmrecorder.com/wm_capture.php) (last visited Oct. 24, 2009).

<sup>67</sup> See Furchgott, *supra* note 11.

<sup>68</sup> This could include features like “The Office” webisodes, currently available through the NBC website, at [http://www.nbc.com/The\\_Office/episodes/](http://www.nbc.com/The_Office/episodes/). However, much of this content has not made it to DVD yet, likely because NBC has been hesitant to give the writers money for these shorts. Liz Gannes, *Strike Really Over: The Office Webisodes Come Back*, NEWTEEVEE, July 8, 2008, <http://newteevee.com/2008/07/08/strike-really-over-the-office-webisodes-come-back/>.

II. "MODERN"<sup>69</sup> COPYRIGHT LAW

Every song embodies two copyrightable works: a musical work and a sound recording.<sup>70</sup> The "musical work" aspect of a song is the musical score and any written words.<sup>71</sup> The songwriter is generally the copyright holder of the musical work, and he usually exercises his rights by assigning them to a music publisher<sup>72</sup> or other group that issues such licenses.<sup>73</sup> The "sound recording" aspect of a song is embodied in a particular artist's version of that song.<sup>74</sup> So, when Don Henley wrote<sup>75</sup> and recorded "The Boys of Summer" in 1984,<sup>76</sup> it embodied both a musical work and sound recording.<sup>77</sup> The Ataris's cover of "The

---

<sup>69</sup> Many commentators have expressed distaste for modern copyright law as an outdated and outmoded regulatory regime. See Cardi, *supra* note 58, at 837; R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 238–40 (2001).

<sup>70</sup> Reese, *supra* note 69, at 240.

<sup>71</sup> *Id.*

<sup>72</sup> Music publishers historically functioned to connect song composers with artists, to secure recording deals, and to promote their writers' songs. Cardi, *supra* note 58, at 840. However, modern music publishers are the primary contact when one is looking to obtain various licenses, including mechanical licenses among others. *Id.* at 841.

<sup>73</sup> *Id.* at 841. The Harry Fox agency, which was established in 1927, is "the foremost mechanical licensing, collection, and distribution agency for U.S. music publishers." Harry Fox Agency, About HFA, <http://www.harryfox.com/public/HFAHome.jsp> (last visited Nov. 13, 2009). It acts as the licensing arm for the National Music Publishers Association and wields great power in the musical industry. See Cardi, *supra* note 58, at 841; Reese, *supra* note 69, at 243 n.18.

<sup>74</sup> Reese, *supra* note 69, at 241.

<sup>75</sup> "Boys of Summer" was actually co-written by Don Henley and Mike Campbell, but in the name of simplicity, I will treat the song as if it were written by Henley alone. DON HENLEY, *The Boys of Summer*, on BUILDING THE PERFECT BEAST (Geffen Records 1984).

<sup>76</sup> "The Boys of Summer" can be found on Don Henley's 1984 album entitled *Building the Perfect Beast*. HENLEY, *supra* note 75.

<sup>77</sup> Reese, *supra* note 69, at 240.

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 431

Boys of Summer” in 2003,<sup>78</sup> then, represented simply a new sound recording of Henley’s original musical work.<sup>79</sup> This important distinction lays the groundwork for the exercise of each copyright holder’s rights in relation to the work.<sup>80</sup>

The Copyright Act,<sup>81</sup> and its subsequent amendments,<sup>82</sup> gives owners of a copyrighted work several general rights.<sup>83</sup> These rights allow an owner to protect the work from theft, to protect from changes in technology, and to collect royalties on any uses of the work.<sup>84</sup> The owner of a copyright enjoys a variety of rights, most importantly: to reproduce the work in phonorecords, to distribute copies of the work, to perform the works publicly, and to perform the work by means of digital audio transmission.<sup>85</sup>

---

<sup>78</sup> “The Boys of Summer” can be found on The Ataris’s 2003 album entitled *So Long, Astoria*. THE ATARIS, *The Boys of Summer, on SO LONG, ASTORIA* (Sony 2003).

<sup>79</sup> This is because instead of making a new and original musical work, The Ataris used the musical score and words of Henley’s version and created their own distinct sound recording. *See generally* Reese, *supra* note 69, at 240–42.

<sup>80</sup> The same distinction holds true for television shows or movies. When a writer pens a screenplay or a television show, he—or his employer—owns the copyright to the script. STEPHEN BREIMER, *THE SCREENWRITER’S LEGAL GUIDE* 21 (Allworth Press, 3d ed. 2004). The writer can then assign his rights under copyright law to various people or companies. *Id.* at 22. For example, the writer of a screenplay can assign his right of adaptation to another screenwriter who wants to make a sequel to the first movie. *Id.* at 21. Additionally, he could assign his performance right to a motion picture company in order to make a movie from the original screenplay. *Id.* at 21–22. The same writer would also be able to assign the right to public display of the work to the actors and actresses in the production, as they will be in the individual frames of the work. *Id.* at 22.

<sup>81</sup> 17 U.S.C.A. §§ 101–1332 (West 2009).

<sup>82</sup> The Copyright Act was originally enacted in 1790 to protect books, maps, and charts. U.S. Copyright Office, Information Circular, <http://www.copyright.gov/circs/circ1a.html> (last visited Nov. 13, 2009). The Act has been overhauled and amended several times throughout history, most notably in 1831, 1909, and 1978. *Id.*

<sup>83</sup> *See generally* 17 U.S.C.A. §§ 101–1332 (West 2009).

<sup>84</sup> GOLDSTEIN, *supra* note 45, at 4, 26.

<sup>85</sup> 17 U.S.C. § 106(1), (3)–(4), (6) (2006). The right to perform the

First, the right to reproduce gives a copyright owner the ability to produce and reproduce his original work.<sup>86</sup> Thus in the case of Don Henley's "The Boys of Summer," Henley has the exclusive ability to reproduce his musical work and sound recording.<sup>87</sup> Before the Ataris recorded their 2003 version, they had to obtain a mechanical license from Henley.<sup>88</sup> Such a license permits the group to reproduce Henley's original musical work and to create a new sound recording of the piece, of which they were the sole copyright owners.<sup>89</sup> Such mechanical licenses are compulsory, meaning that the fees to obtain licenses are fixed.<sup>90</sup> Once a copyright holder has authorized distribution, a user may use the song without obtaining permission from the holder, provided that the user puts the copyright holder on notice of his or her use and pays the statutory royalty.<sup>91</sup> Conversely, a copyright holder, or his or her assignee, has complete discretion in deciding whether to authorize reproduction of a sound recording and in deciding how much to charge for the license, given that it is not subject to compulsory licensing.<sup>92</sup>

Second, the right to distribute copies of a work allows a copyright owner to profit from, and to control, the distribution of his or her original work.<sup>93</sup> A copyright owner can issue a distribution license to authorize someone else to distribute the copyrighted work on his or her behalf.<sup>94</sup> Generally, a copyright owner assigns ownership of his or her copyright to a music

---

work publicly via digital transmission was added in 1995 through the Digital Performance Right in Sound Recordings Act of 1995. Cardi, *supra* note 58, at 849-50.

<sup>86</sup> *Id.* at 839.

<sup>87</sup> *See* 17 U.S.C. § 106(1).

<sup>88</sup> Most likely, they had to obtain the license from the Harry Fox Agency, or another group, to which he assigned his right. *See supra* notes 72-73.

<sup>89</sup> Cardi, *supra* note 58, at 839.

<sup>90</sup> The fee is currently fixed at 9.1 cents per song, or 1.75 cents for each minute of playing time, whichever is larger. 37 C.F.R. § 255.3 (2009).

<sup>91</sup> Reese, *supra* note 69, at 242.

<sup>92</sup> *Id.* at 243.

<sup>93</sup> *See* Cardi, *supra* note 58, at 839.

<sup>94</sup> *Id.* at 840.

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 433

publisher who then contracts with a distributor for distribution of the work.<sup>95</sup> The right of distribution is similarly subject to a compulsory licensing scheme.<sup>96</sup> This means that after a user has authorized distribution, a potential distributor need only pay the statutory royalty<sup>97</sup> and notify the owner before exercising unfettered access.<sup>98</sup>

Third, copyright owners are also given the exclusive right to perform the work publicly.<sup>99</sup> For the copyright holder of a musical work or sound recording, this allows him or her to authorize or license another to perform the work publicly in a variety of contexts.<sup>100</sup> This not only includes the ability to perform the song live in concert, but also the ability to play a recording of it in public, perhaps at a restaurant or bar.<sup>101</sup> Unlike the rights of reproduction and distribution, performance rights are not subject to compulsory licenses.<sup>102</sup> This means that for someone interested in performing a musical work or sound recording publicly, he or she cannot simply pay a royalty and put the owner on notice.<sup>103</sup> In fact, the copyright holder decides what fee to charge (if any) and whether to even grant a license.<sup>104</sup> Generally, performing-rights organizations (PROs)<sup>105</sup> control the distribution of performance licenses.<sup>106</sup> These PROs

---

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 843.

<sup>97</sup> This royalty is also determined by 37 C.F.R. § 255.3.

<sup>98</sup> *Cardi, supra* note 58, at 843.

<sup>99</sup> 17 U.S.C. § 106(4) (2006).

<sup>100</sup> *See KOHN & KOHN, supra* note 15, at 908.

<sup>101</sup> *Id.*

<sup>102</sup> *See Cardi, supra* note 58, at 843.

<sup>103</sup> *Reese, supra* note 69, at 245.

<sup>104</sup> *Cardi, supra* note 58, at 845.

<sup>105</sup> PROs are non-profit organizations (or very low profit companies) composed of copyright holders. *KOHN & KOHN, supra* note 15, at 905–07. These groups—the largest of which are the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Incorporated (BMI) and Society of European State Authors and Composers (SESAC)—formed to protect their members’ public performance rights from rampant infringement. *Id.*

<sup>106</sup> *Cardi, supra* note 58, at 843.



have been avid enforcers of copyright infringement on behalf of the copyright holders they represent.<sup>107</sup> Through the years, these organizations have shown up at small restaurants and even at Boy Scout campouts to enforce the holder's right to public performance.<sup>108</sup>

For a potential licensee looking to obtain a public performance license for a musical work from a PRO, he or she will often be given only one option: purchasing a blanket license.<sup>109</sup> A blanket license gives the licensee the entitlement to publicly perform any sound recording assigned to the PRO.<sup>110</sup> With their large market shares,<sup>111</sup> PROs provide radio stations with easy access to licenses allowing them to play a wide variety of music.<sup>112</sup> However, this arrangement can cost as much as two percent of a station's gross receipts.<sup>113</sup> For smaller businesses, many PROs offer annual flat fees, which can also be costly.<sup>114</sup>

Lastly, copyright owners are given the right to perform the work digitally.<sup>115</sup> This relatively new right arose out of concerns from the music industry about the ever-increasing ability of radio stations and other users to perform copyrighted music over the Internet without paying royalties to the copyright owner.<sup>116</sup> Congress responded by passing the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA), which gave copyright owners the right to perform their works digitally.<sup>117</sup> Digital performance rights give the copyright holder the

---

<sup>107</sup> *Id.* at 844.

<sup>108</sup> Noah W. Bailey, *ASCAP Can Cripple Small Venues*, DALLAS OBSERVER, Jan. 9, 2008.

<sup>109</sup> Cardi, *supra* note 58, at 845.

<sup>110</sup> *Id.*

<sup>111</sup> ASCAP represents fifty-four percent of the market, BMI represents forty-three percent of the market, and SESAC represents an additional three percent. *Id.* at 843-44.

<sup>112</sup> *Id.* at 849.

<sup>113</sup> *Id.*

<sup>114</sup> KOHN & KOHN, *supra* note 15, at 1307.

<sup>115</sup> 17 U.S.C. § 106(6) (2006).

<sup>116</sup> Cardi, *supra* note 58, at 850.

<sup>117</sup> KOHN & KOHN, *supra* note 15, at 1256.

*AUDIO AND VIDEO COPYRIGHT CLAIMS*      435

exclusive right “to perform [or authorize performance of] the copyrighted work publicly by means of a digital audio transmission.”<sup>118</sup> Unlike reproduction and distribution licensing, this right is not subject to compulsory licensing regulations.<sup>119</sup> Some publishing companies—including the Harry Fox Agency<sup>120</sup>—have interpreted this to mean that streaming services are now subject to licensing requirements and therefore have begun to charge large royalties.<sup>121</sup> In fact, the Harry Fox Agency has taken the position that royalties should be paid for each packet of information that is retained in the buffer during a streaming audio or video transmission.<sup>122</sup>

### III. LIABILITY OF SOFTWARE COMPANIES

#### *A. Direct Liability*

Under the Copyright Act,<sup>123</sup> copyright infringement occurs if: (1) the work is original, sufficiently creative, and within the subject matter of copyright;<sup>124</sup> (2) the plaintiff is the registered owner of a valid copyright;<sup>125</sup> and (3) the defendant has copied

---

<sup>118</sup> 17 U.S.C. § 106(6).

<sup>119</sup> See 17 U.S.C.A. §§ 114–15 (West 2009).

<sup>120</sup> For more information on the Harry Fox Agency, see *supra* note 73.

<sup>121</sup> Cardi, *supra* note 58, at 862.

<sup>122</sup> Harry Fox Agency, Licensee Digital Licensing, <http://www.harryfox.com/public/licenseeServicesDigital.jsp> (last visited Nov. 13, 2009). The Harry Fox Agency currently distributes mechanical licenses for various digital formats, including permanent digital downloads, limited use downloads (i.e. those that can be played 10 times and then no longer work), and streaming music. *Id.*

<sup>123</sup> 17 U.S.C.A. §§ 101–1332 (West 2009).

<sup>124</sup> 17 U.S.C. § 102 dictates which works are copyrightable—in that “original work[s] of authorship, fixed in a tangible form, [that] come within the subject matter of copyright law” are copyrightable. 17 U.S.C. § 102 (2006). There must be some form of creativity on the part of the author, although the threshold is low and the copyrighted work need not be novel. *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>125</sup> *Feist*, 499 U.S. at 361.

constituent elements of the work that are copyrightable.<sup>126</sup> The third element, copying, is established if the owner can show: (1) direct copying of the work; (2) access to the copyrighted work and substantial similarity between the plaintiff's work and the defendant's work; or (3) striking similarity of the works.<sup>127</sup> However, programs and devices that allow users to infringe on copyrighted works cannot be held directly liable under a theory of copyright infringement for those infringing activities.<sup>128</sup>

In 1999, Congress passed the Digital Millennium Copyright Act (DMCA)<sup>129</sup> to combat the growing problem of copyright infringement and the growing number of computer programs facilitating this infringement.<sup>130</sup> The DMCA prohibits persons from "circumvent[ing] a technological measure that effectively controls access to a work . . . ."<sup>131</sup> The statute was initially used to prevent modifications to Sony PlayStations that allowed users to modify the rules of a game and to play unauthorized copies of video games.<sup>132</sup> It has also been used to combat a decryption program that allowed users to circumvent encryption protection on DVDs, thereby enabling them to copy the content of their DVDs onto their computer hard drive.<sup>133</sup>

The DMCA does not hold such "persons" liable for their circumvention of technological measures under a traditional copyright infringement theory.<sup>134</sup> Instead, a "person" may be

---

<sup>126</sup> *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56 (1st Cir. 2000); *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964). These rights are granted to him under 17 U.S.C. § 106.

<sup>127</sup> *Towler v. Sayles*, 76 F.3d 579 (4th Cir. 1996); *Robert R. Jones Assoc. v. Nino Homes*, 858 F.2d 274 (6th Cir. 1988).

<sup>128</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984).

<sup>129</sup> 17 U.S.C. § 1201 (2008).

<sup>130</sup> KOHN & KOHN, *supra* note 15, at 1256.

<sup>131</sup> 17 U.S.C. §1201(a) (2008).

<sup>132</sup> *Sony Computer Entm't Am. Inc. v. Gamemasters*, 87 F. Supp. 2d 976, 987-88 (N.D. Cal. 1999).

<sup>133</sup> *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000).

<sup>134</sup> 17 U.S.C. § 1201(a) (2006).

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 437

found to have violated the statute if they (1) have circumvented a technological measure (2) that effectively worked to control access to (3) a work protected under the Copyright Act.<sup>135</sup> A “person” circumvents a technological measure when he works to “descramble a scrambled work, to decrypt an encrypted work, or otherwise avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”<sup>136</sup> Further, a technological measure “‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”<sup>137</sup>

For programs that are designed to allow their users to obtain copies of streaming audio or video, liability under the DMCA will rest with how the program and its advertising are designed.<sup>138</sup> *Real Networks, Inc. v. Streambox, Inc.*<sup>139</sup> was one of the first cases involving liability under the DMCA. *Real Networks* concerned an early program that allowed users to directly download streaming audio or video from Real Player.<sup>140</sup> That program was named StreamboxVCR,<sup>141</sup> and it worked by tapping into the information stream and circumventing specific encryption measures instituted by Real Player to protect copyrighted material.<sup>142</sup> More specifically, StreamboxVCR “spoke” to Real Player’s encryption mechanism, thereby allowing its users to download previously protected streaming

---

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* § 1201(a)(3)(A).

<sup>137</sup> *Id.* § 1201(a)(3)(B).

<sup>138</sup> *See, e.g.,* *Real Networks, Inc. v. Streambox, Inc.*, No. 99-CV-2070, 2000 WL 127311 (W.D. Wash. Jan. 18, 2000).

<sup>139</sup> *Id.*

<sup>140</sup> Real Player is a media player developed by Real Networks, Inc. and introduced in 1995 to play a variety of audio and video files on multiple operating systems. Real Networks, About Us, <http://realnetworks.com/about-us/index.aspx> (last visited Oct. 25, 2009).

<sup>141</sup> StreamboxVCR was a program created by Streambox, Inc. to allow its users to circumvent protective features of Real Player and to download videos from a streaming feed. *Real Networks*, 2000 WL 127311 at \*4.

<sup>142</sup> *Id.* at \*4.

files.<sup>143</sup> Real Networks, Inc. maintained that this feature of StreamboxVCR subjected the program to liability under the DMCA.<sup>144</sup> The Western District of Washington agreed and found that these features circumvented technological measures of Real Networks, Inc. that were designed to control access to copyrighted works, thereby subjecting Streambox, Inc. to liability.<sup>145</sup>

Since *Real Networks*, programs have developed to avoid the problems faced by StreamboxVCR.<sup>146</sup> Instead of piggybacking onto or circumventing encrypted streaming audio or video, many new programs operate differently by acting like a tape recorder or VCR.<sup>147</sup> For example, programs like WM Capture<sup>148</sup> and CamStudio<sup>149</sup> allow users to record whatever is playing over the speakers or on the screen at any particular moment.<sup>150</sup> While seemingly more primitive, these programs often allow users to modify the settings of the program to maximize the quality of the finished download.<sup>151</sup> Some audio programs, such as Audacity,<sup>152</sup> allow a user to control the amount of outside noise recorded and the amount of noise that is recorded from computer-generated sounds, thus easily minimizing external noises and allowing the program to record only internal noises.<sup>153</sup> Further, video programs—like WM Capture—go as far as to actually allow the user to select the exact window they wish to record, thus avoiding a border of non-video content.<sup>154</sup>

---

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at \*9.

<sup>146</sup> See Furchgott, *supra* note 11.

<sup>147</sup> See Audacity, *supra* note 66; CamStudio Suite, <http://camstudio.org/> (last visited Nov. 13, 2009); WM Capture, *supra* note 66.

<sup>148</sup> WM Capture, *supra* note 66.

<sup>149</sup> CamStudio Suite, *supra* note 147.

<sup>150</sup> WM Capture, *supra* note 66; CamStudio *supra* note 147.

<sup>151</sup> See, e.g., Audacity: Features, <http://audacity.sourceforge.net/about/features> (last visited Sept. 30, 2009).

<sup>152</sup> Audacity, *supra* note 66.

<sup>153</sup> *Id.*

<sup>154</sup> WM Capture, *supra* note 66.

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 439

While courts have not decided issues related to whether the new generation of programs would be directly liable under the DMCA, it is unlikely that they will be held liable. Even a broad reading of the DMCA that is consistent with case law—such as *Real Networks, Inc. v. Streambox, Inc.*—indicates that these programs do not violate the statute because they do not interfere with the data stream, but rather copy it: an activity not prohibited by the DMCA as currently written.<sup>155</sup>

Many copyright holders have attempted to remedy illegal downloading of their copyrighted works by making them available for little or no cost through their own protected services.<sup>156</sup> Consequently, copyright holders have put in place technological measures that would effectively control access to a work, such as developing encryption software that prevents a user from downloading the stream directly from the host site.<sup>157</sup> The copyright holders do not flout their security measures.<sup>158</sup> Instead, NBC and other networks offer users some downloadable content, but require users to stream the larger body of works that are unavailable for download.<sup>159</sup> For this reason, courts will find that any such copyright holder will have made out the second and third elements of a claim under the DMCA.<sup>160</sup>

---

<sup>155</sup> See *supra* notes 147–154 and accompanying text.

<sup>156</sup> See, e.g., The Complete List of Sites to Stream TV From, <http://www.random3ss.com/the-complete-list-of-websites-to-stream-full-tv-shows-and-movies-from/> (last visited Sept. 7, 2009).

<sup>157</sup> The concept is similar to that of Real Player, given that they specifically developed a “Copy Switch” that allowed the original copyright owner to determine whether to allow the user to download the stream or to simply watch the stream through Real Player. *Real Networks, Inc. v. Streambox, Inc.*, No. 99-CV-02070, 2000 WL 127311, at \*2 (W.D. Wash. Jan. 18, 2000).

<sup>158</sup> See Jacqui Cheng, *Hulu Tries HTML Encoding Trick to Protect Streaming Content*, ARS TECHNICA, Apr. 2, 2009, <http://arstechnica.com/media/news/2009/04/hulu-tries-html-encoding-trick-to-protect-streaming-content.ars>.

<sup>159</sup> NBC, Frequently Asked Questions, <http://www.nbc.com/frequently-asked-questions/?section=video#video> (last visited Nov. 13, 2009).

<sup>160</sup> The second and third elements of a DMCA claim are (1) that the “person” (2) effectively worked to control access (3) to a work protected

However, the copyright holder must still show that the program acted to circumvent a technological measure.<sup>161</sup>

As defined by statute, in order to “circumvent a technological measure,” the program must work to “descramble a scrambled work, to decrypt an encrypted work, or otherwise avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”<sup>162</sup> Programs with features similar to WM Capture, which allow users to record what they see on their computer screens, do not work by descrambling a scrambled work or decrypting an encrypted work, as did StreamboxVCR.<sup>163</sup> Further, they are specifically crafted not to remove, deactivate, or impair a technological measure put in place by a copyright holder.<sup>164</sup> Thus, a court would turn to whether such programs act to “avoid, bypass, remove, deactivate, or impair a technological measure” put in place by the copyright holder.

Given that these programs do not work to remove, deactivate, or impair any technological measures, courts will focus solely on whether they act to “avoid” or “bypass” a technological measure.<sup>165</sup> Courts that have reached the issue have routinely found the technological measures are only “avoided” or “bypassed” when the allegedly infringing programs act to tell the technological measures not to function.<sup>166</sup> WM Capture does

---

under the Copyright Act. 17 U.S.C. § 1201(a) (2006). It is clear that programs such as Audacity and WM Capture function in a way to download (or “control access”) to copyrighted audio and video (or, “works protected under the Copyright Act”). *See* Audacity Features, *supra* note 151; WM Capture, *supra* note 66.

<sup>161</sup> 17 U.S.C. § 1201(a).

<sup>162</sup> *Id.* § 1201(a)(3)(A).

<sup>163</sup> *See* WM Capture, *supra* note 66.

<sup>164</sup> The makers of Audacity and WM Capture have designed their programs so that they do not specifically tamper with any encryption technology or other technological measure put in place by the copyright holder to protect their work from infringement. *See generally* Audacity, *supra* note 66; WM Capture, *supra* note 66.

<sup>165</sup> *See* 17 U.S.C. § 1201(a)(3)(A).

<sup>166</sup> *See, e.g.,* 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 441

not work to tell the technological measures not to function, but instead works alongside the technological measures to produce a copy of the work. For this reason, without legislative intervention, carefully designed programs can likely avoid liability under the DMCA. In fact, some count on it.<sup>167</sup>

*B. Secondary Liability*

Under copyright law, programs and devices that allow users to infringe on copyrighted works cannot be held directly liable under a traditional theory of copyright infringement for those infringing activities.<sup>168</sup> Therefore, courts have traditionally found programs or machines facilitating copyright infringement to be liable for the actions of their users under a theory of secondary liability.<sup>169</sup> Under a secondary liability theory, programs that allow users to download streaming audio or video can be held liable under theories of contributory or inducement liability.<sup>170</sup>

*1. Contributory Liability*

Contributory liability occurs when one intentionally induces or encourages the direct infringement of another.<sup>171</sup> Unlike its counterpart, the Patent Act,<sup>172</sup> the Copyright Act does not have a specific provision to punish contributory infringers.<sup>173</sup> In *Sony Corporation of America v. Universal City Studios, Inc.*, the

---

<sup>167</sup> WM Capture claims on its website to be “100% legal worldwide.” WM Capture, *supra* note 66.

<sup>168</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929–30 (2005) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434–86 (1984)).

<sup>169</sup> *Grokster*, 545 U.S. at 930.

<sup>170</sup> *See id.* at 930, 935.

<sup>171</sup> *Id.* at 930 (citing *Gershwin Pub. Corp. v. Columbia Artists Mgmt Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

<sup>172</sup> The Patent Act provides for a specific cause of action against those who actively induce infringement of a patent as an infringer himself. 35 U.S.C. § 271 (2006).

<sup>173</sup> *Sony*, 464 U.S. at 435.



Supreme Court found that because there was a close relationship between copyright and patent law, and because vicarious liability is found in nearly every area of the law, it was proper for the Court to “develop” a cause of action for contributory copyright infringement in absence of a statute.<sup>174</sup>

In *Sony*, Universal City Studios, Inc.—representing a conglomerate of television and movie copyright owners—brought suit against Sony to enjoin Sony’s sale and distribution of the BetaMax VTR (“BetaMax”).<sup>175</sup> Sony manufactured and advertised BetaMax as a home recording device.<sup>176</sup> An overwhelming majority of BetaMax owners reported using the machine to “time-shift,” or to record television programs for viewing again, or for the first time, at a later date.<sup>177</sup> The Supreme Court held that a manufacturer could be held liable under a theory of contributory infringement if it was “in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner.”<sup>178</sup>

Further, the Court found that in patent law, contributory liability was confined to the knowing sale of an item that was specifically made for use to infringe on the patent.<sup>179</sup> Analogizing to contributory liability, the Court found that an object could not contributorily infringe on the copyright of another if it was “capable of substantial non-infringing uses.”<sup>180</sup>

In *Sony*, the Court found that the BetaMax was capable of “substantially non-infringing uses” because it could be used to record programs without copyrights or programs whose owners freely authorized recording.<sup>181</sup> Under this standard, many of the programs today would avoid liability, as long as they are

---

<sup>174</sup> *See id.*

<sup>175</sup> *Id.* at 420.

<sup>176</sup> *Id.* at 419–20.

<sup>177</sup> *Id.* at 424 n.4.

<sup>178</sup> *Id.* at 437–38.

<sup>179</sup> *Id.* at 440.

<sup>180</sup> *Id.* at 442.

<sup>181</sup> *Id.*

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 443

capable of substantially non-infringing uses.<sup>182</sup>

Indeed, many recording programs are capable of such uses.<sup>183</sup> Programs used to record streaming audio could be used to record class lectures, personal audio recordings, copyrighted audio for which the user has permission, or to record uncopyrighted audio. The same can be said for programs that allow the user to record streaming video. Coaches and teachers can use the feature to record for educational purposes; families can use the programs to edit their family videos; or users can record non-copyrighted materials or materials for which there is authorization. If a court could be persuaded that these uses are substantial, it would find that these programs are also not contributorily liable for the infringement of their users.

## 2. *Inducement Liability*

Inducement liability occurs “when one induces commission of infringement by another, or ‘entic[es] or persuad[es] another’ to infringe.”<sup>184</sup> The “classic” case of inducement liability is when a program or device advertises its infringing uses and thereby encourages others to commit violations.<sup>185</sup> To be found liable through inducement theory, there must be clear evidence that the distributor of the product intended and encouraged it to be used to infringe on copyrights.<sup>186</sup> In addition, the distributor must have knowledge that the product was used to infringe on the copyrights of others.<sup>187</sup> In *MGM v. Grokster*, the Court found that Grokster, Inc. and StreamNetworks, Inc. distributed their programs (Grokster and Morpheus, respectively) with the intent that they be used to download copyrighted materials, in violation of the rights of the copyright holders.<sup>188</sup> In addition, through

---

<sup>182</sup> *Id.*

<sup>183</sup> *See, e.g.,* Audacity, *supra* note 66; WM Capture, *supra* note 66.

<sup>184</sup> Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 935 (2005) (quoting BLACK’S LAW DICTIONARY 790 (8th ed. 2004)).

<sup>185</sup> *Id.* at 937.

<sup>186</sup> *Id.* at 936–37.

<sup>187</sup> *See id.* at 937.

<sup>188</sup> *Id.* at 939–40.

advertisements and interoffice memoranda, the companies were found to have openly encouraged their users to infringe, even profiting through the use of streaming advertisements.<sup>189</sup> Although Grokster and Morpheus had potentially non-infringing uses, it was clear that not only were they aware that users were downloading files illegally, but that ninety percent of files available through either program were available in violation of copyright laws.<sup>190</sup>

Newer programs, like Audacity and WM Capture, have developed in the wake of *Grokster* and have carefully crafted their programs to avoid the same problems faced by Morpheus and Grokster.<sup>191</sup> Both Audacity, which advertises itself exclusively as sound editing software,<sup>192</sup> and WM Capture, which advertises itself as a way to “record video from ANY web site . . . [and] DVD[] playing on your [computer,]”<sup>193</sup> are cautious not to promote or encourage copyright infringement.<sup>194</sup> There is no suggestion on the Audacity website or in the help section that the program could be used for infringing uses.<sup>195</sup> In fact, WM Capture has a section that explicitly encourages users *not* to use its software for infringing purposes.<sup>196</sup> Therefore, courts would be hard-pressed to find that these programs induced their users to use them in an illegal manner.

However, if a program blatantly advertises its infringing uses, as did both Morpheus and Grokster,<sup>197</sup> it is more likely to

---

<sup>189</sup> *Id.* at 924–26.

<sup>190</sup> *Id.* at 922.

<sup>191</sup> See Furchgott, *supra* note 11.

<sup>192</sup> About Audacity, <http://audacity.sourceforge.net/about> (last visited Dec. 2, 2008).

<sup>193</sup> WM Capture, *supra* note 66.

<sup>194</sup> See About Audacity, *supra* note 192; WM Capture, *supra* note 66.

<sup>195</sup> See Audacity, *supra* note 66; Audacity: Documentation and Support, <http://audacity.sourceforge.net/help/> (last visited Nov. 13, 2009).

<sup>196</sup> WM Capture, Legal Note, [http://www.wmrecorder.com/wm\\_capture.php#legal](http://www.wmrecorder.com/wm_capture.php#legal) (last visited Nov. 13, 2009).

<sup>197</sup> Both Morpheus and Grokster not only advertised themselves as Napster replacements, but they also actively encouraged copyright infringement through their websites and web forums. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939–40 (2005).

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 445

be found liable for vicarious infringement.<sup>198</sup> The more blatant the encouragement, the more likely the programmers will be found liable for the infringing uses of its users.<sup>199</sup>

#### IV. LIABILITY OF USERS

##### *A. Direct Liability*

Although the recording and television/movie industries have instituted lawsuits against individual copyright infringers,<sup>200</sup> they have focused mainly on college-aged students.<sup>201</sup> Even now that the media industries have begun to work with Internet Service Providers (ISPs) to catch those who download illegally,<sup>202</sup> pursuing litigation may prove to be unwise. On the one hand, most owners or assignees of audio or video copyrights could easily obtain a *per se* judgment in their favor against an alleged downloader.<sup>203</sup> Record companies could and do subpoena records from ISPs in order to prove the necessary elements of a

---

<sup>198</sup> *Id.* at 939–40.

<sup>199</sup> *See generally id.* (finding intent to promote copyright infringement through marketing directed toward previous users of Napster and the failure to develop “filtering tools” to reduce infringing activity).

<sup>200</sup> *See generally* Elektra Entm’t Group, Inc. v. Santangelo, No. 06-CV-11520, 2008 WL 4452393 (S.D.N.Y. Oct. 1, 2008); Capitol Records, Inc. v. Foster, No. 04-CV-1569, 2007 WL 1223826 (W.D. Okla. Apr. 23, 2007); Chris Gaither, *Group Sues 261 Over Music-Sharing 46 are Accused in Boston Area*, BOSTON GLOBE, Sept. 9, 2003, at A1; Kevin Maney, *Music Industry Doesn’t Know What Else to Do As It Lashes Out at File Sharing*, USA TODAY, Sept. 10, 2003 at 3B.

<sup>201</sup> *See* Gardner, *supra* note 2.

<sup>202</sup> Nate Anderson, *No More Lawsuits: ISPs to Work with RIAA, Cut off P2P Users*, ARS TECHNICA, Dec. 19, 2008, <http://arstechnica.com/tech-policy/news/2008/12/no-more-lawsuits-isps-to-work-with-riaa-cut-off-p2p-users.ars>.

<sup>203</sup> The music industry has successfully brought suit against many alleged infringers, although most victories were by way of settlement or summary judgment. *See* John Borland, *RIAA Sues 261 File Swappers*, CNET NEWS, Sept. 8, 2003, [http://news.cnet.com/2100-1023\\_3-5072564.html](http://news.cnet.com/2100-1023_3-5072564.html); David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, WIRED, Sept. 4, 2008.

copyright infringement claim, namely: the user had access and the file on the defendant's computer was an exact copy of the original.<sup>204</sup> Although there are defenses that may be effectively used to insulate the user from liability,<sup>205</sup> it is unlikely that these defenses would help defendants in these lawsuits.<sup>206</sup> Such lawsuits would allow the copyright owner to vindicate his ownership rights and would likely deter similarly situated users from infringing on the copyrights of others.<sup>207</sup>

On the other hand, such lawsuits garner enormous ill will toward the recording and film industries.<sup>208</sup> Potential buyers will feel betrayed regardless of whether they routinely purchase copyrighted works, thus causing the recording and film industries to lose customers, especially young customers with years of consumer purchases ahead of them.<sup>209</sup> Often, users and buyers use downloading as a way to "preview" songs and CDs,<sup>210</sup> and if recording companies intend to prosecute indiscriminately,<sup>211</sup> many customers will be even more hesitant to

---

<sup>204</sup> See *supra* notes 124–25. The last element of a valid copyright, whether the holder had a valid copyright, should likewise not be difficult for a record company to prove. See *supra* text accompanying note 126.

<sup>205</sup> See *infra* Part IV(B).

<sup>206</sup> See *id.*

<sup>207</sup> Infringement theory dictates that a user is likely to evaluate his or her illegal behavior in light of the relative risks of getting caught and the strength of the punishment. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 56 (Paperback ed., 2006). Therefore, if the recording industry makes people believe that they are more likely to be caught, many users should—at least in theory—discontinue their illegal downloading. *Id.*

<sup>208</sup> Alvin Chan, *The Chronicles of Grokster: Who Is the Biggest Threat In the P2P Battle?*, 15 *UCLA ENT. L. REV.* 291, 318–19 (2008).

<sup>209</sup> *Id.*

<sup>210</sup> There are a large amount of users who use downloading as a way to listen to music before they purchase a CD. *File Swappers Buy More Music*, BBC NEWS, July 9, 2003, <http://news.bbc.co.uk/1/hi/entertainment/music/3052145.stm>. This seems to make sense considering that the price of a CD can approach \$15–\$18 and that sometimes only one or two songs are "singles" that play on the radio. See *id.*

<sup>211</sup> The Recording Industry Association of America (RIAA) brought suit against thousands of individuals across the country, mostly college students and others who did not have the resources to properly defend themselves.

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 447

pay for a CD with fifteen songs they have never heard before.

*B. Fair Use and Why It Would Not Protect Users*

Users that would otherwise be held liable for direct copyright infringement may sometimes escape liability by invoking the defense of “fair use.”<sup>212</sup> The doctrine of fair use protects those from direct infringement liability who, in theory, do not harm a copyright owner by using the work for “fair” reasons, such as photocopying educational materials.<sup>213</sup> The fair use doctrine was codified by Congress in 1976<sup>214</sup> and was at issue in the landmark case of *Sony Corporation of America v. Universal City Studios, Inc.*<sup>215</sup> In *Sony*, the Supreme Court balanced four factors to hold that “time-shifting”—using the BetaMax to record copyrighted shows for later, private viewing—constituted a fair use of a copyrighted work.<sup>216</sup> In order for a court to find an infringing use to be a fair use, it must balance four factors: (1) the purpose and character of the use; (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.<sup>217</sup>

---

Gardner, *supra* note 2. However, the RIAA has not stopped with college students and has brought copyright infringement charges against many others, including a grandmother, Rhonda Crain, for rap and hip-hop songs a grandchild downloaded onto her computer. Eric Bangeman, *RIAA v. Grandma, Part II: The Showdown That Wasn't*, ARS TECHNICA, Dec. 16, 2007. Ms. Crain has since settled. *Id.*

<sup>212</sup> Charles B. Vincent, *BitTorrent, Grokster, and Why Entertainment and Internet Lawyers Need to Prepare for the Fair Use Argument for Downloading TV Shows*, 10 J. INTERNET L. 1, 11 (2007).

<sup>213</sup> See Paul Goldstein, *Symposium: Fair Use: “Incredibly Shrinking” or Extraordinarily Expanding?*, 31 COLUM. J.L. & ARTS 433, 434 (2008).

<sup>214</sup> 17 U.S.C. § 107 (2006).

<sup>215</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454–55 (1984).

<sup>216</sup> See *id.* at 450–56.

<sup>217</sup> 17 U.S.C. § 107.

*Factor 1: Purpose and Character of Use*

When examining the purpose and character of the infringing use, a court will focus on (1) whether the use simply replaces the original or transforms the original into a new work; and (2) whether the use is commercial or non-commercial.<sup>218</sup> In *A&M v. Napster*, the Northern District of California found that downloading an audio or video file did not transform the work.<sup>219</sup> The Ninth Circuit upheld this finding, in light of the reluctance of courts to find fair use when the original work is simply “transform[ed]” into the same work on another medium.<sup>220</sup> The proper inquiry is whether the work is transformed by infusing it with new meaning or new understandings.<sup>221</sup> That inquiry is not modified just because a user is downloading a streaming video or song instead of downloading a video or song from another user.<sup>222</sup> Simply transforming the media from one format into another—such as transforming streaming bits of information into a single file—does not transform the work.<sup>223</sup>

A court will turn its attention next to whether the allegedly

---

<sup>218</sup> 17 U.S.C. § 107(1); *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>219</sup> *See A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000), *aff'd* 239 F.3d 1004, 1015 (9th Cir. 2000).

<sup>220</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2000); *see also* *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (finding that reproduction of a CD into MP3 format does not constitute sufficient transformation to find fair use).

<sup>221</sup> *See Acuff-Rose*, 510 U.S. at 579.

<sup>222</sup> This would be because the ultimate product is still a perfect digital copy of the original work, just downloaded from another source. KOHN & KOHN, *supra* note 15, at 1245.

<sup>223</sup> *See A&M Records*, 239 F.3d at 1015; *see also* *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1994) (finding that simply transmitting a former radio broadcast of a telephone line is not transformative); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (finding that a song available on a CD was not transformed simply because it was also available on a website).

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 449

infringing use is commercial or non-commercial.<sup>224</sup> While language in *Sony* suggests that a commercial user may never obtain fair use protection,<sup>225</sup> courts have since found that commercial use weighs heavily against fair use, but is not dispositive.<sup>226</sup> Courts consider financially motivated transactions, like a transaction to avoid paying the purchase price of a copyrighted item, to be a commercial use.<sup>227</sup> The benefit from such a transaction need not be direct economic benefit, such as the saving of money or earning money from illegally distributing copyrighted works, but can be trade or other non-economic transaction benefits.<sup>228</sup> In *Napster*, the Ninth Circuit found that both Napster and its users were commercially using the program by avoiding paying royalties to music companies in the form of record sales.<sup>229</sup> However, in *Sony*, the Supreme Court found that users engaging in time-shifting of a broadcast program were non-commercial users.<sup>230</sup>

Commentators who suggest that downloading television shows is analogous to time-shifting using a BetaMax VTR<sup>231</sup> not only neglect to take into account the key developments in technology,<sup>232</sup> but also key aspects of the *Sony* holding. When a

---

<sup>224</sup> 17 U.S.C. § 107(1) (2006); *see also* *Acuff-Rose*, 510 U.S. at 578.

<sup>225</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (“[E]very commercial use of copyrighted material is presumptively . . . unfair . . .”).

<sup>226</sup> *Acuff-Rose*, 510 U.S. at 584; *see also* *A&M Records*, 239 F.3d at 1015.

<sup>227</sup> *See* *A&M Records*, 239 F.3d at 1015.

<sup>228</sup> *See id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Sony*, 464 U.S. at 449–50.

<sup>231</sup> Vincent, *supra* note 212, at 12; *see also* Sheila Zoe Lofgren Collins, *Sharing Television Through the Internet: Why the Courts Should Find Fair Use and Why It May Be a Moot Point*, 7 TEX. REV. ENT. & SPORTS L. 79, 86 (2006).

<sup>232</sup> Developments, such as the ability to watch television on the Internet, to record television onto a computer, to record using a Digital Video Recorder (DVR), or even to record television using a DVD recordable disc (DVD-R), have changed the way many television watchers view their televisions. *See generally* Intel, *The Changing TV Experience*,



copyright holder allows their copyrighted works to stream over the Internet, they are, in effect, giving anyone with a computer and Internet connection continuous, uninterrupted access to their work until it is taken down.<sup>233</sup> Even when the work is taken down, users are almost guaranteed that even the least successful television show will come out on DVD.<sup>234</sup> A user in 1984 had a larger necessity to “time-shift” a particular program—i.e. to record it for later viewing—because there was a significant chance he or she would never see that program again. Now a television watcher may purchase a DVD of virtually any program at a later date if he or she is patient enough.<sup>235</sup> Allowing a user to download a streaming file would permit the user to completely circumvent the copyright holder’s wishes when choosing to restrict access to the public until the public release of the DVD.<sup>236</sup>

Further, the key to unlocking the *Sony* holding could be its focus on advertising and the revenues broadcast television earn as a result of making a quality television show.<sup>237</sup> In 1984, BetaMax allowed its users to pause a recording in order to skip over advertising, but only if they were physically present to press the button.<sup>238</sup> However, most BetaMax users actually

---

<http://www.intelconsumerelectronics.com/Consumer-Electronics-3.0/The-Changing-TV-Experience.aspx> (last visited Oct. 3, 2009) (outlining the various ways in which television users utilize DVR and other television features).

<sup>233</sup> This is generally true, although it is conceivable that a company could limit the viewing periods to certain times of certain days.

<sup>234</sup> See generally Mike Snider, *Old TV Shows Never Die . . . They Grow More Popular on DVD*, USA TODAY, Oct. 19, 2004, available at [http://www.usatoday.com/life/television/news/2004-10-17-tv-dvds-main\\_x.htm](http://www.usatoday.com/life/television/news/2004-10-17-tv-dvds-main_x.htm).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> This argument is less applicable for radio stations, which are generally not owned by recording companies. However, television companies generally own the television stations on which they play their copyrighted works and therefore earn advertising that is directly correlated with the failure or success of the copyrighted work itself.

<sup>238</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417,

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 451

utilized its time-shifting functions when they were not at home, were occupied with other tasks or were viewing another program at the time of broadcast, and therefore they were unable to skip the commercials.<sup>239</sup> Although the BetaMax was equipped with a fast forward function that allowed users to skip past commercials, the Court noted that seventy-five percent of BetaMax users chose not to skip the advertisements.<sup>240</sup> This likely meant that the targets of the advertising were actually watching it.<sup>241</sup>

Modern technology has far surpassed the BetaMax.<sup>242</sup> Although streaming video on NBC's website has commercials,<sup>243</sup> almost all programs allow for pausing or later editing of the file to remove the commercials.<sup>244</sup> This means that even less users will actually see the advertisements, thus circumventing the process by which television broadcast companies "receive" royalties.<sup>245</sup> This is essentially the same conduct *Napster* found to be commercial: a complete circumvention of paying royalties.<sup>246</sup> Thus, a court would likely find that a user of a program allowing him or her to download streaming audio or video is a

---

423 (1984).

<sup>239</sup> *Id.* at 424.

<sup>240</sup> *Id.* at 453 n.36.

<sup>241</sup> *See id.*

<sup>242</sup> DVD Players and Recorders not only display movies at a better quality, but they also allow for more content than did BetaMax or VCRs. DVD Demystified, DVD FAQ, <http://www.dvddemystified.com/dvdfaq.html#1> (last visited Oct. 25, 2009).

<sup>243</sup> *See generally* NBC Video Library, <http://www.nbc.com/Video/library/> (last visited Oct. 26, 2009)

<sup>244</sup> *See e.g.*, Audacity, *supra* note 66; KeepVid, *supra* note 66; Orbit Downloader 2.0, *supra* note 66; WM Capture, *supra* note 66.

<sup>245</sup> The idea is that although the user does not pay directly for broadcast television, he or she does pay for the television show through the imposition of advertising. Vincent, *supra* note 212, at 13. The less users that watch the show legitimately, the less broadcast companies make. *Id.* This is because the amount of money a television company can charge an advertiser is based primarily on the popularity of the program. *Id.*

<sup>246</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1018 (9th Cir. 2000).

commercial user. Although the user may not be selling his copy for profit, he is still participating in a financially motivated transaction in so far as he can trade his newly recorded show for others through programs that allow end users to share potentially infringing videos with each other. Courts have not hesitated to find that this behavior tips heavily against fair use.<sup>247</sup>

*Factor 2: The Nature of the Copyrighted Work*

When looking at the nature of use, a court will examine whether the works are creative or factual in nature.<sup>248</sup> Those that are inherently more creative are closer to the core of intended copyright protection, and therefore, would likely not be found to be fair use.<sup>249</sup> Both audio and video files represent intrinsically creative works and both represent the unique product of a creative mind.<sup>250</sup> Thus, a court would find that this factor weighs against a finding of fair use.

However, if a user could show that he would have been able to view the show without cost, he or she could tip the balance in favor of fair use, claiming that “the product has not changed[, but] rather[,] downloads of broadcast shows are merely delivered in a different medium.”<sup>251</sup> However, it seems illogical that a court would find that just because a user could watch a television show on broadcast television or through a website without paying a premium, downloading the show from a streaming source would favor fair use. Especially because a show is available to stream through the broadcast network’s website for several weeks after it originally airs, but it will rarely be available again until the company releases the DVD of the entire season.<sup>252</sup>

---

<sup>247</sup> See, e.g., *id.* at 1015.

<sup>248</sup> 17 U.S.C. § 107(2) (2008); see also *Napster*, 239 F.3d at 1016.

<sup>249</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

<sup>250</sup> See generally *id.*

<sup>251</sup> Vincent, *supra* note 212, at 12.

<sup>252</sup> See generally ABC, FAQ, <http://www.abc.go.com/site/faq> (last visited Sept. 7, 2009).

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 453

*Factor 3: The Portion Used in Relation to the Whole*

Similar to commercial use, copying the entirety of a copyrighted work does not preclude a user from claiming fair use, but it certainly weighs heavily in finding against fair use.<sup>253</sup> Streaming users typically copy the entirety of the copyrighted work.<sup>254</sup>

Although time-shifting of movies is one of the rare instances of wholesale copying that is also fair use, courts will draw a distinction between time-shifting using VHS tapes and using personal computers. Such a finding will be influenced by the easy transferability of computer files. Whereas VHS tapes required a purchase and money to share (i.e., postage), computer files can be easily transferred from one computer to another within minutes. A user who downloads a streaming feed therefore retains an entire work for repeated use and easy distribution, thus tipping against a finding of fair use.

*Factor 4: The Effect of Use Upon the Market*

Lastly, fair use will only be found when copying the work does not materially impair its marketability.<sup>255</sup> Similar to the other factors in the fair use analysis, a finding of market impairment is not dispositive of fair use.<sup>256</sup> However, a court will rarely find fair use when the copying impairs the marketability of the original, unless the other three factors weigh very heavily in favor of fair use.<sup>257</sup> For a commercial user,<sup>258</sup>

---

<sup>253</sup> A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2000); Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110, 1118 (9th Cir. 2000).

<sup>254</sup> See Vincent, *supra* note 212, at 12.

<sup>255</sup> *Napster*, 239 F.3d at 1016.

<sup>256</sup> Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

<sup>257</sup> See *generally id.* at 591.

<sup>258</sup> Even though I previously concluded that the courts would find users of these programs to be commercial users, for the sake of argument, I will presume that the end user is not considered a commercial user.

market impairment is presumed.<sup>259</sup>

One commentator has argued that downloading streaming files actually *increases* the marketability of broadcast television shows.<sup>260</sup> Somehow, despite precedent to the contrary,<sup>261</sup> some believe that because downloading increases a show's exposure, a court would be willing to dismiss the act of infringement.<sup>262</sup> However, in *Napster*, the Ninth Circuit explicitly rejected this idea in reference to music downloads.<sup>263</sup> The court reasoned that even if all users who downloaded a song on Napster eventually bought the CDs from which they came, fair use would not tip conclusively in favor of a potential infringer.<sup>264</sup> Most courts would agree that increased sales should not deprive a copyright holder of the right to license his material.<sup>265</sup>

A court would not find that users who downloaded and retained files actually contributed to the marketability of the file. Logic dictates that most users are markedly less likely to buy a DVD or watch a streaming, advertisement-laden broadcast over the Internet when they could simply watch the copy they have expertly procured on their computer.<sup>266</sup> Furthermore, even if users did eventually erase the files they had taken great pains to obtain, technology, such as writable DVD drives, has made it unnecessary for a user to purchase the official DVD distributed by the copyright owner.<sup>267</sup> By writing the files to a DVD, a user

---

<sup>259</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

<sup>260</sup> Vincent, *supra* note 212, at 13.

<sup>261</sup> See, e.g., *Napster*, 239 F.3d at 1016–17.

<sup>262</sup> Vincent, *supra* note 212, at 13.

<sup>263</sup> *Napster*, 239 F.3d at 1018.

<sup>264</sup> *Id.*; see *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 914 (N.D. Cal. 2000), *aff'd* 239 F.3d 1004, 1018 (9th Cir. 2000).

<sup>265</sup> See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1018 (9th Cir. 2000); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

<sup>266</sup> Studies have shown that people, especially the upper middle class, are very skeptical of advertising. SIDNEY J. LEVY, BRANDS, CONSUMERS, SYMBOLS, & RESEARCH 304 (1999). If people are already skeptical of advertising, putting even more advertising into a streaming television show may make viewing it unpleasant. See *generally id.*

<sup>267</sup> Users are able to buy and use DVD-Recordable Discs to make copies

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 455

can completely circumvent the copyright holder's legitimate market.<sup>268</sup>

Further, there is much to consider with respect to a user's purposeful circumvention of advertisements. Most television viewers and streaming audio and video users view advertising as a nuisance<sup>269</sup> and may not be aware of the very specific purpose advertising plays in the availability of broadcast television. Simply put, without advertising, users would be required to pay a subscription fee to see any show.<sup>270</sup>

Every time a fan of a television show chooses to watch a downloaded version of that program in lieu of watching a rerun or the streaming copy available on the websites of most broadcast channels,<sup>271</sup> the broadcast channel is deprived of advertising revenue.<sup>272</sup> This could have a potentially devastating effect on the market for television shows. Depriving broadcast companies of this revenue could put television shows in danger because advertising companies may be unwilling to advertise

---

of a show. How Do I Burn a DVD?, <http://www.tech-faq.com/burn-dvd.shtml> (last visited Sept. 7, 2009). Users can download episodes of a television series onto their computer and use this technology to make their own full-season DVD sets that will play on any DVD player. *Id.*

<sup>268</sup> If a user is simply interested in having a portable copy of a television series, a user who has made his or her own full-season DVD has no financial incentive to purchase a DVD released by the copyright holder. *Id.*

<sup>269</sup> Marketing Vox, Our Challenge, [http://www.marketingvox.com/our\\_challenge\\_43\\_say\\_online\\_advertising\\_is\\_a\\_nuisance-012302/](http://www.marketingvox.com/our_challenge_43_say_online_advertising_is_a_nuisance-012302/) (last visited Sept. 7, 2009). Marketing Vox found that in 2003, 53% of Americans found online advertising a nuisance and 65% found television advertising to be a nuisance. *Id.*

<sup>270</sup> Vincent, *supra* note 212, at 13.

<sup>271</sup> NBC, ABC, Fox, and CBS all have a majority of their shows available for streaming on their websites. *See* NBC, Video Library, <http://www.nbc.com/Video/library/> (last visited Sept. 6, 2009); ABC, Shows, <http://abc.go.com/watch> (last visited Sept. 6, 2009); FOX, On Demand, [http://www.fox.com/fod/index.htm?src=menu\\_item\\_full\\_episodes](http://www.fox.com/fod/index.htm?src=menu_item_full_episodes) (last visited Sept. 6, 2009); CBS, All Videos, <http://www.cbs.com/video/> (last visited Sept. 6, 2009).

<sup>272</sup> Liz Gannes, *Streaming TV on ABC and MTV is Profitable*, NEWTEEVEE, Mar. 18, 2009, <http://newteevee.com/2009/03/18/streaming-tv-on-abc-and-mtv-is-profitable/>.

during shows that are popular among people who watch the show from their personal file.<sup>273</sup> Given the huge impact, courts would not find “time-shifting” vis-à-vis downloading streaming audio or video to be a “fair use.”

#### CONCLUSION

The world of copyright is continuously changing and Congress—as well as other international legislative bodies—constantly revisits copyright law to accommodate evolving technology and to protect copyright holders from infringement.<sup>274</sup> Copyright holders have a large number of solutions before them to help combat infringement, but with every potential solution a new problem is created.

First, television companies could choose not to pursue infringers and to instead recoup lost revenue by reducing the average length of television shows and replace that time with additional advertisements. Similarly, record and movie companies could simply increase the amount of advertising that comes along with streaming audio and video. This, however, could lead to even less patronage and even less revenue, as viewers’ least favorite part about watching television or listening to music would become even more prominent.<sup>275</sup> This might be difficult for audio copyright owners, given that they can only insert advertising before or after a song, as a song should not be broken up to accommodate for additional advertising.

Alternatively, broadcast companies could increase product placement in television shows to make up for lost revenues. However, television shows with high rates of product placement might be onerous to watch—even for those who view them without commercials—and such nuisance may not do much to

---

<sup>273</sup> How Does Television Advertising Work?, <http://www.marketingminefield.co.uk/traditional-marketing/television-advertising/1-overview.html> (last visited Oct. 3, 2009).

<sup>274</sup> See generally *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928–29 (2005) (finding it necessary to balance the interests of advancing technology with those of the copyright holder).

<sup>275</sup> See *supra* note 269.

*AUDIO AND VIDEO COPYRIGHT CLAIMS* 457

foster legitimate viewership.<sup>276</sup>

Third, absent zealous prosecution of copyright infringers, copyright holders are forced to constantly modify their encryption technology to stay ahead of software developers looking to exploit their vulnerabilities. This means millions of dollars constantly spent on research and development could be better spent on improving the creative quality of music, television, and movies.

The goal of the copyright holder should be to flood the market with widely available free and low cost streaming content in order to prevent users from downloading and infringing on their copyrighted works. This might be difficult to achieve, given that software producers have carefully crafted their programs to avoid liability under the DMCA and to avoid secondary liability under traditional copyright principles.<sup>277</sup> Software producers, although generally not charging for their programs, have enough of a financial incentive to continue to make software and actively market and encourage users to use it to infringe on copyrights. However, if the copyright holder can convince the individual user that it is both cost-effective and safe to utilize a myriad of legal alternatives, the copyright holder can shift the user from illegal activity, for which he may be liable, to legal viewing activities in order to protect their copyright from active infringement.

---

<sup>276</sup> See *supra* note 269 and accompanying text.

<sup>277</sup> See *supra* Part III.