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CASE COMMENT

COPYRIGHT LAW: INTELLECTUAL PROPERTY PROTECTION IN CYBERSPACE

A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)

*Stacey N. Penn**

Appellant was a start up company accused of contributory and vicarious copyright infringement.¹ Appellant's file-sharing software, distributed via its Internet website Napster, enabled users to share MP3² files without payment.³ Appellees were record companies and music publishers holding various copyrights in music and sound recordings.⁴ Appellees filed suit in the United States District Court under 17 U.S.C. § 501.⁵ Appellees alleged that appellant was liable for the infringement of Napster users who were downloading and uploading MP3 files of appellees' copyrighted music.⁶ Appellant claimed that it was not liable because Napster users engaged in fair use and substantial non-infringing use of the music files.⁷ The district court found that Napster users engaged in direct infringement and were not fair users.⁸ The U.S. District Court issued a preliminary injunction against

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1. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

2. MP3 is the standard file format for the digital storage of audio recordings. *Id.* Digital MP3 files are created by compressing compact disk (CD) audio information and copying it directly onto a computer hard drive. *Id.* The MP3's compressed format allows for rapid transmission of digital audio files from one computer to another. *Id.*

3. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 901 (N.D. Cal. 2000).

4. *Id.* at 900.

5. *Id.* at 900-01. 17 U.S.C. § 501(a) states that "anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright." 17 U.S.C. § 501(a) (2001).

6. *See A & M Records, Inc.*, 114 F. Supp. 2d at 900-01. Music refers to both musical compositions and sound recordings. *Id.* at 900 n.1.

7. *Id.* Appellant also claimed affirmative defenses of waiver, implied license and misuse, and sought statutory protection in the Digital Millennium Copyright Act, 17 U.S.C. § 512(a), and the Audio Home Recording Act, 17 U.S.C. § 1008. *A & M Records, Inc.*, 239 F.3d at 1024-27. The U.S. District Court conclusively dismissed each of these defenses, and the Ninth Circuit affirmed. *Id.*

8. *A & M Records, Inc.*, 239 F.3d at 1013-14.

appellant.⁹ The Ninth Circuit stayed the injunction pending appeal.¹⁰ Affirming on appeal, the Ninth Circuit HELD appellees demonstrated a likelihood of success on their claims of contributory and vicarious liability and reinstated the injunction.¹¹

Before proceeding on a claim of contributory or vicarious infringement, a plaintiff must first establish direct copyright infringement.¹² Direct copyright infringement is shown by ownership in a valid copyright and proof that the defendant violated one of the exclusive rights¹³ of the copyright holder.¹⁴ Violators of exclusive rights are relieved from infringement liability upon establishing a fair use defense.¹⁵ The four factors that establish fair use are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount of the copyrighted work the defendant used, and (4) the effect of the use on potential market for or value of the copyrighted work.¹⁶ No single factor is determinative in isolation; all factors must be weighed together on a case by case basis.¹⁷

In *Sony Corp. of America v. Universal City Studios, Inc.*,¹⁸ the U.S. Supreme Court related the fair use defense to technological advances.¹⁹ The *Sony* Court found no copyright infringement liability for defendants who manufactured and marketed video tape recorders (VTRs) capable of recording copyrighted works.²⁰ The *Sony* Court reasoned that the first factor, the purpose and use of the VTR, was noncommercial, nonprofit

9. *Id.* at 1015. A preliminary injunction is the proper relief for a party who demonstrates "a combination of probable success on the merits and the possibility of irreparable harm." *A & M Records, Inc.*, 114 F. Supp. 2d at 911 n.1. "In a copyright infringement case, demonstration of a reasonable likelihood of success on the merits creates a presumption of irreparable harm." *Id.* at 911 n.2.

10. *A & M Records, Inc.*, 239 F.3d at 1011.

11. *Id.* at 1022, 1024, 1029.

12. *Id.* at 1020-24.

13. Exclusive rights include the right (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based on the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership; (4) to perform the copyrighted work publicly; (5) to display the copyrighted work publicly; and (6) to perform the copyrighted work publicly by means of audio transmission. 17 U.S.C. § 106 (2001).

14. *Id.* § 501(a).

15. *Id.* § 107.

16. *Id.*

17. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994).

18. 464 U.S. 417 (1984).

19. *See id.* at 447-56.

20. *Id.* at 456. In *Sony*, the plaintiffs asserted that the defendants were liable for VTR users who directly infringed the plaintiffs' copyrights by recording television programs from commercial television. *Id.* at 418.

activity since the VTRs primary use, time-shifting,²¹ was for private home use.²² In addition, the *Sony* Court evaluated the third factor and determined that the defendants reproduced the entire work.²³ Finally, the *Sony* Court found no evidence of actual past or potential future harm to the market for the copyrighted works.²⁴ The *Sony* Court concluded that the noncommercial purpose of the VTR plus the lack of market harm to the copyrighted work demonstrated fair use and defeated the direct infringement claim.²⁵

After *Sony*, courts changed the fair use analysis focusing on concerns raised by the *Sony* dissent.²⁶ In *Campbell v. Acuff-Rose Music, Inc.*,²⁷ the Court analyzed the first factor, focusing not only on whether the use was commercial, but also on whether the new use was transformative.²⁸ In *Campbell*, the plaintiff record company filed suit against the defendant music group and alleged that the defendant's song directly infringed one of the plaintiff's copyrighted songs.²⁹ The *Campbell* Court determined that the more transformative a work, the less significantly the other factors, such as commercialism, would weigh against fair use.³⁰ Upon application of the four fair use factors, the *Campbell* Court found that although the defendant was making commercial use of the copyrighted work, the defendant's new use was transformative, and thus a fair use.³¹

21. "Time-shifting" was the process of using the VTR to record a program that could not be viewed as it was televised, and then watching it at a later time. *Id.* at 421.

22. *Id.* at 449.

23. *Sony Corp. of Am.*, 464 U.S. at 449-50.

24. *Id.* at 451-55.

25. *Id.* at 456.

26. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117-18 (9th Cir. 2000) (focusing on whether or not the new work was transformative of the copyrighted work); see also *Sony Corp. of Am.*, 464 U.S. at 478-81 (Blackmun, J., dissenting) (stating that all recognized fair uses reflected a common theme of productive use of copyrighted works).

27. *Campbell*, 510 U.S. at 569.

28. *Id.* at 579-85. "Transformative" works were those that "add[ed] something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Id.* at 579.

29. *Id.* at 573.

30. *Id.* at 579; but see *Sony Corp. of Am.*, 464 U.S. at 449 (stating that commercial or profit-making purpose holds a presumption of unfair use). According to the *Campbell* Court, transformative works were at the heart of the fair use doctrine's guarantee of breathing space within copyright confines. *Campbell*, 510 U.S. at 579. Transformative works furthered the primary goal of copyright, which was to promote science and the arts. *Id.*

31. See *Campbell*, 510 U.S. at 594.

Following *Sony*, courts also changed the interpretation of commercial use.³² The U.S. Supreme Court moved from its *Sony* interpretation of commercial use where it referred to monetary gain, to finding commercial use when a user stood to profit from exploitation of copyrighted material.³³ The Ninth Circuit took this interpretation so far as to find commercial use by a non-profit organization.³⁴

Once direct copyright infringement is established and the defendant is found not to be a fair user, courts can then determine contributory and vicarious copyright liability.³⁵ The *Sony* Court considered contributory and vicarious liability together as general third party liability.³⁶ The *Sony* Court focused on whether the defendant had control over the infringing use and whether the defendant had constructive knowledge of its customer's infringement.³⁷ The *Sony* Court found that the defendant did not have control over users' infringement since the sale and advertisement of the VTR did not encourage infringing use.³⁸ The *Sony* Court further found that the defendant had no constructive knowledge because the VTR was capable of the substantial non-infringing use³⁹ of time-shifting.⁴⁰ Thus the *Sony* Court concluded that the defendants were not liable for VTR users' infringement.⁴¹

After *Sony*, the Ninth Circuit, in *Fonovisa, Inc. v. Cherry Auction, Inc.*,⁴² distinguished separate elements for contributory and vicarious copyright infringement.⁴³ Contributory infringement occurred when the defendant knew of the infringing conduct and induced, caused, or materially contributed to the infringement.⁴⁴ Vicarious infringement liability existed

32. See *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 562 (1985); *Worldwide Church of God*, 227 F.3d at 1117-18.

33. See *Harper & Row, Publishers, Inc.*, 471 U.S. at 562.

34. See *Worldwide Church of God*, 227 F.3d at 1117-18.

35. See *A & M Records v. Napster, Inc.*, 239 F.3d 1004, 1020-24 (9th Cir. 2001).

36. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434-35 (1984).

37. *Id.* at 437-39.

38. *Id.* at 437-38.

39. "The sale of copying equipment . . . does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes." *Id.* at 442.

40. *Id.* at 439-42. The *Sony* Court concluded that time-shifting was a substantial non-infringing use because the plaintiffs only represented less than 10% of copyrighted programs capable of time shifting and that many other copyright owners authorized and welcomed the practice of time-shifting. *Id.* at 443.

41. *Sony Corp. of Am.*, 464 U.S. at 456.

42. 76 F.3d 259 (9th Cir. 1996).

43. See *id.* at 262-63.

44. *Id.* at 264.

when the defendant had the right and ability to supervise, and had a direct financial interest in the infringing activity.⁴⁵

In *Fonovisa*, the Ninth Circuit found the defendant liable for both contributory and vicarious copyright infringement.⁴⁶ In *Fonovisa*, the plaintiff music company alleged that the defendant, a swap meet owner, was liable because defendant's vendors were directly infringing by selling counterfeit copyrighted recordings.⁴⁷ The *Fonovisa* court found that the defendant was contributorily liable because the defendant had actual knowledge of the infringing activity and materially contributed by providing the site and facility.⁴⁸ The *Fonovisa* court found that the defendant was vicariously liable since they had the right to terminate the vendors for any reason, and through that control had the ability to supervise.⁴⁹ The *Fonovisa* court also found that the defendant reaped financial benefits because the counterfeit recordings acted as a draw for swap meet customers.⁵⁰

In the instant case, the decision of the Ninth Circuit closely follows traditional copyright analysis and subjects intellectual property in cyberspace to the same legal analysis of that in real space.⁵¹ As with all claims of contributory and vicarious liability, the instant court first determined whether appellant's users had directly infringed.⁵² Upon finding direct infringement, the instant court addressed appellant's fair use defense.⁵³

45. *Id.* at 262.

46. *Id.* at 263-64.

47. *Fonovisa*, 76 F.3d at 261.

48. *Id.* at 264. Defendant had knowledge because in 1991 the Swap Meet was raided and 38,000 counterfeit recordings were seized and then two years later an investigator again observed more counterfeit sales. *Id.* at 261. Defendant materially contributed by providing its vendors with support services including, inter alia, space, utilities, parking, advertising, plumbing, and customers.

49. *Id.* at 262-64.

50. *Id.* at 263.

51. Stephanie Greene, *Reconciling Napster with the Sony Decision and Recent Amendments to Copyright Law*, 39 AM. BUS. L.J. 57, 60 (2001).

52. *A & M Records v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001).

53. *Id.* at 1014. The instant court concluded that the appellees had sufficiently demonstrated ownership by producing evidence of copyrights in as much as 87% of the MP3 files available on Napster. *Id.* at 1013. The instant court found that Napster users violated appellees' exclusive rights in two ways. *Id.* at 1014. First, the instant court found that Napster users who uploaded files for others to copy violated appellees' distribution rights. *Id.* at 1014. Second, the instant court found that users who download copyrighted music violated appellees' reproduction rights. *Id.* at 1014.

Appellant alleged that its system had three fair uses: sampling, space-shifting, and permissive distribution by new and established artists.⁵⁴ The instant court found that each factor of the defense weighed against finding fair use.⁵⁵ Evaluating the first factor, the instant court concluded that downloading MP3 files did not transform the work and Napster users were engaged in a commercial use of the copyrighted works.⁵⁶ For the second and third factors the instant court found that musical works were creative in nature and that Napster users were downloading them in their entirety.⁵⁷ Finally, in applying the last factor, the instant court determined Napster harmed the market for appellees' works by reducing CD sales among college students, and by raising barriers to appellees' entry into the digital downloading market.⁵⁸ Thus, the instant court concluded appellant had not satisfactorily presented a fair use defense.⁵⁹

Next, the instant court addressed appellees' contributory infringement claim, applying the elements of knowledge and material contribution.⁶⁰ The instant court determined that appellant had both actual and constructive knowledge of Napster users' direct infringement.⁶¹ The instant court also found that appellant materially contributed to Napster users' infringement by providing the site and facility for infringing activity.⁶² The instant court

54. *Id.* "Sampling" occurs when users make temporary copies of a work before purchasing; "space-shifting" occurs when users access a sound recording that they already own in audio CD format through the Napster system. *Id.* at 1014. "Permissive distribution by new and established artists" was what appellant called its New Artist Program. *Id.* at 1019. The instant court found that the New Artist Program was a non-infringing use and that appellees were not seeking to enjoin this use. *Id.* Thus the instant court did not consider the New Artist Program when it determined appellant's fair use defense. *Id.*

55. *Id.* at 1014-15.

56. *Id.* at 1015.

57. *A & M Records*, 239 F.3d at 1016.

58. *Id.* at 1016.

59. *See id.* at 1017.

60. *Id.* at 1019-22.

61. *Id.* at 1020. The instant court found that appellant had actual knowledge because: (1) a document authored by a Napster, Inc. co-founder mentioned a need to remain ignorant of users' real names and IP addresses because the users were exchanging pirated music; and (2) the Recording Industry Association of America (RIAA) had informed appellant of more than 12,000 infringing files on the Napster system. *Id.* at 1020 n.5. The instant court found that appellant had constructive knowledge of the direct infringement because: (1) appellant's executives had recording industry experience; (2) appellant had enforced intellectual property rights in other instances; (3) appellant's executives had downloaded copyrighted songs by using the Napster system; and (4) appellant had promoted the Napster web site using infringing files. *Id.*

62. *A & M Records*, 239 F.3d at 1022. The instant court affirmed the district court's conclusion that "without the support services [Appellant] provides, Napster users could not find and download the music they want with the ease of which [Appellant] boasts." *Id.*

concluded that appellees had demonstrated a likelihood of success on the merits of the contributory infringement claim.⁶³

Finally, the instant court evaluated appellees' vicarious infringement claim by examining the factors of financial benefit and supervision.⁶⁴ The instant court found that appellant's future revenue was directly dependent on Napster users' infringement of appellees' music.⁶⁵ Thus, the instant court found that appellant received a financial benefit.⁶⁶ The instant court also determined that since appellant had the ability to locate infringing material on the Napster search indices, appellant thus had the ability to supervise its users.⁶⁷ Based on its review, the instant court concluded that appellees demonstrated a likelihood of success on their claim of vicarious liability.⁶⁸ Thus, the instant court found a preliminary injunction was not only warranted, but required.⁶⁹

On appeal, appellant conceded its users were directly infringing appellees' music.⁷⁰ Appellant, however, hoped to find legal refuge in *Sony's* finding of fair use.⁷¹ Unfortunately for appellant, the instant court applied a stricter interpretation when evaluating appellant's fair use defense.⁷²

The purpose and use of the Napster system and the VTR were similar in that both involved mechanical copying.⁷³ In determining purpose and use, the *Sony* Court only focused on whether the use was personal or for profit.⁷⁴ The *Sony* Court found that the time-shifting use of the VTR was personal because most users only enjoyed the copyrighted material at home.⁷⁵ Appellant claimed that the Napster use of space shifting was synonymous with the VTR's time-shifting, and thus demonstrated a fair use

63. *Id.*

64. *See id.* at 1022-24.

65. *Id.* at 1023-24. The instant court found that appellant's future revenue was directly dependent on increases in userbase and that userbase increased as quality and quantity of available music increased. *Id.* at 1023 (indicating that the more copyrighted music that was available for free, the more users would visit and use the Napster site).

66. *Id.* at 1023.

67. *Id.* at 1023-24.

68. *A & M Records*, 239 F.3d at 1024.

69. *Id.* at 1027; *see supra* text accompanying note 9. Despite minor changes to the district court's original injunction, the instant court affirmed that appellant was preliminarily enjoined from engaging in or facilitating others in copying, downloading, uploading, transmitting, or distributing copyrighted music. *See id.* at 1027-29.

70. *See id.* at 1013.

71. *See A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).

72. *See A & M Records, Inc.*, 239 F.3d at 1014-19.

73. *Greene*, *supra* note 51, at 73.

74. *See Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 448-49 (1984).

75. *See id.* at 448.

of the copyrighted music.⁷⁶ The instant court, however, found that space-shifting was not a personal use since Napster users distributed copyrighted music to the general public.⁷⁷

The instant court ultimately followed *Campbell* and later cases' interpretations of the purpose and use factor.⁷⁸ Following the *Campbell* Court, the instant court analyzed the transformative nature of the use of the copyrighted work.⁷⁹ The instant court determined that downloaded MP3 files were not transformative at all since users added no new aesthetics, insights, or understanding to the original.⁸⁰ The instant court then determined that Napster use was commercial.⁸¹ Had the instant court applied the *Sony* Court's profit making interpretation, the purpose and use factor may have weighed in appellant's favor since appellant collected no revenue and charged no fee.⁸² Instead, the instant court followed the later courts' broad interpretations and found commercial use demonstrated by Napster users' exploitation of the copyrighted music.⁸³ The instant court found Napster users profited by the infringement because it saved users the expense of purchasing authorized copies.⁸⁴

The second and third factors⁸⁵ of the defense also weighed against a fair use finding for appellant.⁸⁶ The instant court determined that the copyrighted music was creative in nature, thus closer to the essence of copyright protection.⁸⁷ The instant court also determined that Napster users engaged in wholesale copying of appellee's entire copyrighted work, which weighed against a finding of fair use.⁸⁸ The instant court's finding appeared contrary to the *Sony* Court's fair use finding when similar works were

76. See *A & M Records, Inc.*, 114 F. Supp. 2d at 915.

77. See *A & M Records, Inc.*, 239 F.3d at 1019.

78. See *id.* at 1015-16.

79. *Id.* at 1015.

80. See *id.*

81. *Id.*

82. See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000). Napster users uploaded and downloaded MP3 files without payment to each other, appellant, or appellees. *Id.* at 901.

83. See *A & M Records, Inc.*, 239 F.3d at 1015.

84. See *id.*

85. See *supra* text accompanying note 16.

86. Greene, *supra* note 51, at 70-71.

87. *A & M Records, Inc.*, 239 F.3d at 1016. The primary goal of copyright is to promote science and the arts. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

88. See *A & M Records, Inc.*, 239 F.3d at 1016.

copied in their entirety.⁸⁹ However, the *Sony* Court found that VTR users, unlike Napster users, had been invited by the copyright holder to enjoy the copyrighted works for free prior to copying them.⁹⁰

Once the instant court characterized Napster use as commercial, the *Sony* decision left appellant's fair use defense little chance of surviving the fourth factor analysis.⁹¹ The *Sony* Court held that commercial use is presumptive of the likelihood of market harm.⁹² However, the *Campbell* Court found fair use where there was commercial use of a copyrighted work, thus appellant still had hope following *Campbell*.⁹³

Appellant claimed that Napster's sampling use actually helped the market for appellees by stimulating CD sales.⁹⁴ The instant court, however, found sampling adversely affected the market for appellees' copyrighted works in two ways.⁹⁵ First, the instant court concluded that Napster use reduced CD sales among college students.⁹⁶ The instant court relied on two of appellees' expert reports showing that the more songs Napster users downloaded, the less likely they were to purchase the music.⁹⁷ Second, the instant court found that free sampling of appellees' copyrighted music on Napster adversely affected appellees' actual or planned entry into the digital downloading market.⁹⁸ The instant court found that consumers were more

89. Compare *id.* at 1019 with *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 448 (1984) (finding fair use in *Sony* where a copyrighted work was used in its entirety, and finding no fair use in *Napster* where work used in its entirety).

90. *Sony Corp. of Am.*, 464 U.S. at 449-50; see *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 913 (N.D. Cal. 2000). The district court determined that appellees almost always charged for their downloaded music and they only made promotional downloads available on a highly restricted basis. *Id.*

91. See *Sony Corp. of Am.*, 464 U.S. at 451.

92. See *id.*

93. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994). The *Campbell* Court held that no single factor was determinative in isolation; rather all factors must be weighed together before a determination could be made. See *id.* at 577-78.

94. *A & M Records, Inc.*, 114 F. Supp. 2d at 896. Appellant submitted an expert report (the Fader Report) that, based on an online survey, indicated that Napster use was associated with overall increases in CD purchases. *A & M Records, Inc. v. Napster, Inc.*, 2000 WL 11070106, *7 (N.D. Cal. 2000). However, the instant court agreed with the district court's conclusion that the Fader Report lacked objective data and that its administration had not been properly overseen. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001). Thus, the instant court chose not to rely on the Fader report when it rendered its decision. *Id.*

95. *A & M Records, Inc.*, 239 F.3d at 1016.

96. *Id.*

97. *Id.* at 1016-17.

98. See *id.* at 1016.

likely to choose the free Napster service over appellees' pay-per-download sites.⁹⁹

After the instant court determined that Napster users had no fair use defense, it considered appellant's contributory liability.¹⁰⁰ The instant court applied the *Fonovisa* elements of knowledge and material contribution.¹⁰¹ Appellant again tried to find shelter in *Sony* and claimed a defense of substantial non-infringing use,¹⁰² but the instant court rejected that defense as well.¹⁰³

The instant court found that appellant had actual and constructive knowledge of, and materially contributed to, Napster users' infringement.¹⁰⁴ The instant court distinguished the *Sony* defendant's constructive knowledge of possible infringing use from appellant's actual knowledge.¹⁰⁵ Appellant actually knew of ongoing infringement, as it occurred, thus the instant court found Napster's non-infringing uses were not substantial enough to protect against liability.¹⁰⁶ The instant court also found appellant materially contributed to the infringement in the same way the defendant swap meet had in *Fonovisa*.¹⁰⁷ According to the instant court, the proprietary software, search engines, servers, and means for inter-user computer connections appellant provided were synonymous with the support services like parking, booth space, advertising, and clientele the *Fonovisa* defendant provided.¹⁰⁸

The instant court further followed *Fonovisa*, determining that appellant was vicariously liable.¹⁰⁹ The instant court found that appellant had the discretionary right to terminate user accounts in the same way the *Fonovisa* defendant had the right to terminate its vendors.¹¹⁰ Because appellant had

99. See *id.* at 1017; see *A & M Records, Inc.*, 114 F. Supp. 2d at 910.

100. *A & M Records, Inc.*, 239 F.3d at 1019.

101. See *id.* at 1019-22.

102. See *supra* note 39 and accompanying text.

103. See *A & M Records, Inc.*, 239 F.3d at 1020-22. The instant court found that although the Napster system might be capable of future significant non-infringing uses, the evidence supported that finding that appellant knew or had reason to know of Napster users' infringement. See *id.* at 1021.

104. *Id.* at 1020-22.

105. *Id.* at 1020.

106. *Id.* at 1021-22. The RIAA had informed appellant of over 12,000 infringing files available on the Napster system and the same infringing files were still available on Napster when appellees brought their claim for infringement liability. *Id.* at 1022 n.6.

107. See *id.* at 1022; *A & M Records, Inc.*, 114 F. Supp. 2d 896, 919 (N.D. Cal. 2000).

108. See *A & M Records, Inc.*, 239 F.3d at 1022; *A & M Records, Inc.*, 114 F. Supp. 2d at 919.

109. *A & M Records, Inc.*, 239 F.3d at 1023-24.

110. See *id.* 1023.

the right to terminate accounts, it had control over Napster users.¹¹¹ The instant court also determined that appellant received financial benefit in the same way as the *Fonovisa* defendant.¹¹² Infringing music on Napster enticed Napster users in the same way that counterfeit recordings drew swap meet customers.¹¹³

Enjoining appellant may have been a victory for the appellees, but the battle was not won.¹¹⁴ Napster created an expectation of free music downloads and furthered the attitude that online music should be free.¹¹⁵ With free MP3 music files available elsewhere in cyberspace, appellant might not be the only obstacle to appellees lucrative welcome into the digital downloading market.¹¹⁶

111. *See id.*

112. *See id.*; *Fonovisa, Inc. v. Cherry Auction, Inc.* 76 F.3d 259, 263 (9th Cir. 1996).

113. *See A & M Records, Inc.*, 239 F.3d at 1023; *Fonovisa, Inc.*, 76 F.3d at 263.

114. *See A & M Records, Inc.*, 239 F.3d at 1029; *A & M Records, Inc.*, 114 F. Supp. 2d at 911 n.16.

115. *A & M Records, Inc.*, 114 F. Supp. 2d at 910-11.

116. *See id.* at 910-11, 911 n.16.

