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AMAZON CLOUD PLAYER: THE LATEST FRONT IN THE COPYRIGHT COLD WAR

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"These are going to replace CDs soon. I guess I'll have to buy 'The White Album' again." - MEN IN BLACK (Columbia Pictures 1997).

I. INTRODUCTION

This Article addresses a concern over the emerging use of cloud-based services for the storage and enjoyment of copyrighted music without the copyright holder granting the cloud-based service a license to copy or play back the music. Specifically, the Amazon Cloud Player[1] will be examined with an eye toward the question of whether Amazon.com needs a license in order for users who have legally purchased copyright protected music to store and enjoy that music on the Amazon Cloud Player.

The implications of the questions raised in this Article cannot be

1. For purposes of this Article, Amazon Cloud Player will be used to refer to the service that combines the Amazon Cloud Drive to store music and the Amazon Cloud Player which streams music to the users.

understated. More and more content is being stored in the cloud for various purposes. Not only is it being stored in the cloud, it is being enjoyed in the cloud without the need to transfer the file to a local computer. Storage and access to copyrighted works in the cloud raises legitimate questions as to how this new technology intersects with existing laws. Without a clear set of rules, companies and users will not know what they can and cannot do in the cloud with copyright protected works.

It should be understood that this discussion of the Amazon Cloud Player will require the resolution of two separate questions. First, may copyright protected content be stored in the cloud in the Amazon Cloud Player without a license? Secondly, does content stored in the cloud require a specific license granted by the copyright holder to play back that content directly from the cloud?

Part II of this Article discusses the background of the technology at issue in this situation, specifically the development of analogous technology and the classification of the intellectual property rights. Part III of this Article examines the appropriate statutory law and case law. Part IV discusses the issues raised, while Part V provides the analysis. Part VI is the conclusion.

II. BACKGROUND

It is necessary to understand certain basics before these issues may be properly analyzed. First, the relevant technology must be examined. Next the issue of what is owned by whom needs to be addressed. Finally, an explanation of Amazon Cloud Player is required before any discussion can begin.

A. *Technology*

1. Physical Technology

It seems that as long as there has been copyrighted expression there has been a technology that threatens to make copies beyond the control of the copyright holder. Many forms of technology have been feared as potentially destroying the value of a copyrighted work in the past. Before the 1970s, it was the piano roll and the photocopier. In the 1970s, it was the video cassette recorder (VCR), which was one of the first items that could conceivably record any program broadcast on television. VCRs were found legal under *Sony Corporation of America v. Universal City Studios, Inc.*,[2] and the entertainment industry

2. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

developed a new business model around the technology.[3]

The follow on to the VCR was the DVR, which is still in use today. DVRs were originally sold as stand-alone units, although today many are provided as part of a television service package. DVRs accomplish substantially the same function as VCRs by recording television broadcasts at the user's home. The primary difference between the VCR and the DVR is that the recordings in DVRs are made on a computer drive in the DVR as opposed to a videocassette used in the VCR. Just like with the VCR, all actions with the DVR occur at the user's home.

As high speed Internet over cable lines became prevalent, the Remote Storage DVR (RS-DVR) was created. As will be discussed later, the RS-DVR allows a user to record a program at a central server and then have the program streamed to him on command.[4] From the user's perspective, the RS-DVR functions no differently from a DVR.

Technology has also changed the way people enjoy (and potentially infringe) music as well.[5] The Walkman and Discman are portable music players that allowed users to enjoy music without the need of a large stereo system. These players require the media to be on an audio cassette or on a compact disc (CD).

As the follow on to the VCR is the DVR, the MP3 player is the follow on to the Walkman and Discman.[6] MP3 players play compressed audio files that allow users to store multiple songs on a portable device. These devices can play back music without the need for physical media like cassettes or CDs.

The first mass-produced MP3 player was released commercially in 1998.[7] When MP3 players were first released, digital music was in its infancy, leading consumers to create their own digital music from otherwise legally obtained copies. The digital music could then be played on computers or MP3 players. This led to the Recording Industry Association of America (RIAA) filing a lawsuit against an MP3 player manufacturer on the basis of a law to be discussed later that was designed to address the concerns of the music industry.[8] These devices were ruled legal based on precedent in *Sony*.[9]

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3. *See* Dan Ackman, *Movie Studios Get Hip With the Future*, FORBES, (Aug. 17, 2001), http://www.forbes.com/2001/08/17/0817topnews.html.

4. *See infra* Part III.B.

5. *See infra* Part II.C.

6. For the purposes of this Article, MP3 player will mean any portable device capable of storing and playing music files in any recognized digital audio file format. MP3 will mean any digital audio file format.

7. Eliot Van Buskirk, *Introducing the World's First MP3 Player*, CNET (Jan. 21, 2005), http://reviews.cnet.com/4520-6450_7-5622055-1.html.

8. *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1074 (9th Cir. 1999).

9. *See id.* at 1079.

2. Computer Technology

Another major change in technology that has led to copyright issues is the rise of the peer-to-peer file-sharing networks, of which Napster is arguably the most well-known example.[10] While these were found illegal per copyright infringement,[11] they proved that music could quickly be disseminated over the Internet. Peer-to-peer networks, combined with the MP3 file format, came together and created an environment where music piracy flourished to a previously unknown scale. It took years for the courts to shut down peer-to-peer networks used in copyright infringement, but the damage was done as the music industry lost a significant percentage of revenue due to illegally copied music.[12]

Peer-to-peer networks are not the only innovation in computer technology to have an impact on copyrighted works. A new technology that has taken hold since the last update to copyright law is cloud computing. Cloud computing may be the most significant advance for the Internet with respect to copyright law since the perfect storm following the creation of the MP3 file format coinciding with the release of high speed Internet. Many experts agree that cloud computing will change the way people use computers.[13]

Cloud computing can best be analogized by saying that traditional personal computing was based on a physical device, whereas cloud computing functions more as a service. Users log onto the cloud-based system and have access to the cloud-based resources remotely, but communications between users and the cloud are so quick that the delay time between user command and execution of that command is minimal from the user's perspective. There is no need for the user to have direct access to the cloud-based components, as the user's own computer can

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10. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011–12 (9th Cir. 2001) (explanation of peer-to-peer architecture).

11. *Id.*

12. *See generally id.* at 1004; MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

13.

> A solid majority of technology experts and stakeholders participating in the fourth Future of the Internet survey expect that by 2020 most people will access software applications online and share and access information through the use of remote server networks, rather than depending primarily on tools and information housed on their individual, personal computers. They say that cloud computing will become more dominant than the desktop in the next decade. In other words, most users will perform most computing and communicating activities through connections to servers operated by outside firms.

Janna Anderson & Lee Rainie, *The Future of Cloud Computing*, PEW INTERNET (June 11, 2010), http://www.pewinternet.org/Reports/2010/The-future-of-cloud-computing/Overview.aspx.

manage all the needed cloud-based components remotely.[14] Cloud computing allows both the storage of data and the execution of programs to occur in a location physically separate from the user's computer.[15]

With the increase in computer communication speeds over the Internet, users now have access to large amounts of computer storage space, which they can access remotely from their home or business with no delay. As a result, users are beginning to back up their files remotely, and in some cases use remote storage as the primary residence of some of their files. This is known as "space shifting," which is analogous to "time shifting" discussed in *Sony*. While time shifting allows users to access a file at any time they choose, space shifting allows users to store their files anywhere for recall later at a place of their choosing. An example of space shifting in music is copying music from computer and transferring it to an MP3 player.[16] That example is from one local device to another local device. An example of a remote device to a local device, a television program may be recorded at a remote location to be played back on command in the RS-DVR. It is logical that a similar argument would work for a user's recall of music via a cloud-based player.

B. *What is Owned by Whom*

Users purchase intellectual property products every day, from books, to movies, to music. The question in this context is what actually has been purchased. Traditionally users have purchased a physical product, such as a CD, with copyright protected content on it. When a user purchases a CD, they are not purchasing the intellectual property of the music. They are purchasing the chattel property of the CD, which has value due to the intellectual property of the music attached to the CD.[17] By purchasing the CD, the user is not given *carte blanche* to transfer the music as he sees fit. He has the right to enjoy the music, but the Copyright Act of 1976 (Copyright Act) specifies that the copyright holder retains certain rights, including the right to make copies of the music.[18]

There has been a question as to whether the restriction on copying in

14. *See* Erica Naone, *Conjuring Clouds: How Engineers are Making On-Demand Computing a Reality*, TECH. REV. (July/Aug. 2009), http://www.technologyreview.com/computing/22606.

15. *Id.*

16. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999).

17. Craig Joyce, *A Curious Chapter in the History of Judicature:* Wheaton v. Peters *and the Rest of the Story*, 42 HOUS. L. REV. 325, 329 (2005).

18. *See infra* Part III.A.

the Copyright Act means that no copies may be made at all, or if this merely restricts copying in a manner that would otherwise adversely impact the market for the copyrighted work.[19] Attorneys for the music industry have stated in open court that they believe that copies of music made by the legal owner of the chattel property are illegal.[20] While it is a common practice to make digital copies of music from a CD, this does not make it a legal practice, and the industry may choose to have this issue settled in the future if other arguments for their position fail.

Alternatively, it may be argued that anything may be done with the intellectual property on the CD as long as specific enumerated rights conferred by copyright law are not violated. CDs may be enjoyed by a small group at a private home,[21] a friend may borrow the CD temporarily,[22] or it may be (arguably) copied (or "ripped") to a computer for personal use per the defense of fair use to be discussed later.[23]

The issue is simultaneously more and less complicated when music is purchased and downloaded online. With an MP3 file, the user has not received any physical product, but a copy of a protected expression. Many of these sales include language that labels the MP3 file as a license to enjoy the music as opposed to a purchase. When a consumer

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19. *See generally* C.T. Drechsler, *Extent of Doctrine of "Fair Use" Under Federal Copyright Act*, 23 A.L.R.3d 139 (1969) (examining the nature and extent of the concept of "fair use" as a defense to copyright infringement).

20.

> Pariser has a very broad definition of "stealing." When questioned by Richard Gabriel, lead counsel for the record labels, Pariser suggested that what millions of music fans do is actually theft. The dirty deed? Ripping your own CDs or downloading songs you already own.
>
> Gabriel asked if it was wrong for consumers to make copies of music which they have purchased, even just one copy. Pariser replied, "When an individual makes a copy of a song for himself, I suppose we can say he stole a song." Making "a copy" of a purchased song is just "a nice way of saying 'steals just one copy,'" she said.

Eric Bangeman, *Sony BMG's Chief Anti-piracy Lawyer: "Copying" Music You Own Is "Stealing,"* ARS TECHNICA (Oct. 2, 2007 10:12 PM), http://arstechnica.com/tech-policy/news/2007/10/sony-bmgs-chief-anti-piracy-lawyer-copying-music-you-own-is-stealing.ars (testimony from Sony Chief Counsel Jennifer Praiser, Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008)).

21. 17 U.S.C. § 101 (2011) (stating two definitions for public performance, with one being, "to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered").

22. *See id.* § 109 (articulating the first sale doctrine).

23. *See id.* § 107 (articulating the fair use doctrine).

purchases an MP3 file, there is a question if, regardless of their trappings of a license, users are purchasing a license or making an actual purchase as if it were a physical CD.

C. *Amazon Cloud Player*

1. What is it?

As Napster and similar services shut down, entrepreneurs saw a potential for a legitimate business with Internet-based services providing music to users. They saw the ability to store music on the Internet with systems called "digital music lockers." The concept of the digital music locker is over a decade old. By 2000, MP3.com offered a service where users could access their music online. RIAA filed suit against MP3.com alleging copyright infringement.[24] The court found against MP3.com saying that they did not have a fair use defense.[25]

The Amazon Cloud Player is a digital music locker, but it is not the only one available.[26] However, given the scale of the operation, Amazon Cloud Player is potentially one of the biggest digital music locker services, so the entertainment industry has taken notice.

Unlike other services, Amazon Cloud Player did not receive licensing from the music industry prior to launch. Amazon.com has defended this position in a letter to the studios saying that such licenses are unnecessary.[27] One spokesman for the music industry has been

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24. Courtney Macavinta, *RIAA Sues MP3.com, Alleges Copyright Violations*, CNET (Jan. 21, 2000, 8:25 PM), http://news.cnet.com/2100-1023-235953.html.

25. UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350–53 (S.D.N.Y. 2000).

26. *See infra* Part II.C.3.

27.

> Our launch of Cloud Drive and Cloud Player last week garnered lots of attention and excitement. We thought we'd follow up with you to let you know that customer response has been terrific. Customers have embraced Cloud Drive, uploading photos, documents, music and other digital files and thanking us for providing an easy way for them to keep their files safe.
>
> And, as we expected, by removing the friction associated with managing your personal music files, our launch of Cloud Player has boosted Amazon MP3 sales.
>
> There has been a lot of discussion as to whether Cloud Drive and Cloud Player require licenses from content owners. Here's why they do not:
>
> Cloud Drive is a general online storage service for all digital files, not unlike Google Docs, Microsoft SkyDrive and any number of other internet file back-up services. It's your external hard-drive in the cloud. It requires a license from

widely quoted as saying the industry may take legal action in the future.[28] Amazon.com has responded to these statements by reiterating the substance of their letter.[29] One executive in the field has suggested that any licensing agreements with the copyright holders would have required onerous terms on what Amazon.com would need to do to secure licensing.[30]

Amazon Cloud Player allows users to place MP3 files in a digital

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> content owners no more than those other internet file back-up services do and no more than makers of external hard drives for PCs do.
>
> Cloud Player is a media management and play-back application not unlike Windows Media Player and any number of other media management applications that let customers manage and play their music. It requires a license from content owners no more than those applications do.
>
> It really is that simple.
>
> There has also been speculation that we are looking for licenses for Cloud Drive and Cloud Player. We are not looking for licenses for Cloud Drive or Cloud Player as they exist today – as no licensees are required. There are, however, potential enhancements to Cloud Drive and Cloud Player that would require licenses and that we are interested in – like the ability to replace multiple copies of the same music track uploaded by different customers with a single server copy that could be used for all customers with the same track. Licenses permitting us to do that would save storage costs and would be good for customers because they would reduce the number of tracks customers need to upload to Cloud Drive themselves.
>
> Expect to hear more from us on potential licensing in the near future – and please let us know if you have any questions in the meantime.

Bruce Houghton, *Full Text of Amazon's Cloud Music Email to Labels*, HYPERBOT.COM (Apr. 12, 2011), http://www.hypebot.com/hypebot/2011/04/full-text-of-amazons-cloud-music-email-to-labels.html.

28. Phil Wahba & Paul Thomasch, *Amazon Faces Backlash Over "Music Locker" Service*, REUTERS (Mar. 29, 2011, 4:38 PM), http://www.reuters.com/article/2011/03/29/amazon-idUSL3E7ET0TS20110329 (quoting Sony Spokeswoman Liz Young, "We hope that they'll reach a new license deal, but we're keeping all of our legal options open").

29. Jacqui Cheng, *Amazon on Cloud Player: We Don't Need No Stinkin' Licenses*, ARS TECHNICA (Mar. 29, 2011, 9:50 PM), http://arstechnica.com/media/news/2011/03/amazon-on-cloud-player-we-dont-need-no-stinkin-licenses.ars (quoting Amazon spokesperson Cat Griffin, "Cloud Player is an application that lets customers manage and play their own music. It's like any number of existing media management applications. We do not need a license to make Cloud Player available").

30. *See* Michael Arrington, *Behind The Scenes: Record Label Demands From Amazon*, TECHCRUNCH (Apr. 29, 2011), http://techcrunch.com/2011/04/29/behind-the-scenes-record-labels-demands-from-amazon (alleging that such terms would include: 1) only allowing files with digital receipts to avoid previously illegally copied files being used as a proof of purchase, 2) restrict loading to a single computer, 3) allowing only one emergency download, and 4) demanding each locker be tied to a verified identity).

music locker on the Amazon Cloud Player for both space shifting and playback. Users may place MP3 files in their digital music locker in one of two ways. First, users may purchase music directly from Amazon.com, which then allows the user to listen to the music. Second, the user may upload any MP3 file to the Amazon Cloud Player. Regardless of how the music gets to Amazon Cloud Player, the user may then play back his music from any supported device, including a home computer, a work computer, a tablet, a smartphone, or other device connected to the Internet, allowing a user to listen to music he has legally purchased on a platform of his choice.

Each user has a personal allocation of memory on Amazon Cloud Player where they can store music. Amazon Cloud Player allows users to only access music on the Amazon Cloud Player they have uploaded or purchased at Amazon.com, preventing users from listening to music from others. This memory allocation may be increased at the user's request for an additional subscription charge. While each user having his own memory allocation makes sure the user may only listen to songs he has purchased or uploaded, this does lead to a problem of storing multiple copies of the same file by Amazon.com on the Amazon Cloud Player for each unique user. For example, assume that there are one million customers for Amazon Cloud Player, and all of them want to load "All Along the Watchtower" onto their individual Amazon Cloud Player accounts. Assuming each one of these files is five megabytes, for each user to have a copy of "All Along the Watchtower" on Amazon Cloud Player would take five million megabytes (approximately five thousand gigabytes or five terabytes). To put that in perspective, the Hubble Space Telescope took approximately two years to accumulate as much information as would be used for "All Along the Watchtower" in this scenario.[31] While this may be redundant use of memory, it helps ensure that users are only listening to music they have uploaded themselves.

2. How does Amazon Cloud Player Differ from Licensed Services?

Amazon Cloud Player is not the only provider of cloud-based services where users may access their personal music collections.[32] In order to evaluate the legality of Amazon Cloud Player, it may be examined in light of rival services. The main licensed competitor is Apple's iCloud, which offers a superficially similar service where users may access music they own from any device synchronized to iCloud. While Amazon Cloud Player has no licensing agreement with major

31. *Cf. The Hubble Story*, NASA.GOV, http://www.nasa.gov/mission_pages/hubble/story/index.html (last visited Nov. 11, 2012).

32. *See infra* Part II.C.3.

studio labels, Apple has long standing licensing agreements to sell and distribute music for copyright holders.

Apple's service utilizes a different storage scheme than Amazon Cloud Player's system of each user uploading his individual copy of a file. For Amazon Cloud Player, file upload times vary based on the speed of the Internet connection and the size of the file. Estimates of several days to upload an entire music library to Amazon Cloud Player have been quoted.[33] Apple's iCloud accomplishes substantially the same objective of allowing users to enjoy music they own on multiple platforms in a fraction of the time. Instead of a user uploading his library to iCloud, iCloud looks at the listing of songs on the user's computer, and then allows user to access the same music already loaded at iTunes. This process takes a very short amount of time, on the order of seconds and not days.

Due to the licensing agreements with major record labels, iCloud accomplishes the service with substantially less memory requirements.[34] Instead of a copy of a song for every individual user, there is a single copy that all users may access once iCloud scans the user's library. In the event that iCloud does not have a song from the user's computer in their catalog, then the user may upload the song themselves. Once a user has the music on their iCloud account, the music may then be uploaded (or synched) to every other device on his iCloud account. As a result, iCloud stores and copies, but does not provide the streaming services that Amazon Cloud Player does.

3. Other Services

Amazon Cloud Player and iCloud are not the only cloud-based digital music locker services at this time. Most of these, like Amazon Cloud Player, are unlicensed. A non-exhaustive list of these services includes: Google Play,[35] Dropbox,[36] Hotfile,[37] MP3Tunes,[38]

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33. *Importing Music into Cloud Player*, AMAZON.COM HELP, http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-1?ie=UTF8&nodeId=200593730&qid=1352655472&sr=1-1 (last visited Nov. 11, 2012).

34. *See* Greg Sandoval, *Apple's iCloud Launch Portends Music*, CNET (May 21, 2011, 9:05 AM), http://news.cnet.com/8301-31001_3-20067487-261.html.

35. *See Google Play*, GOOGLE, http://play.google.com/about/overview/index.html (last visited Nov. 11, 2012) (offering a service substantially similar to Amazon Cloud Player, including the ability to purchase music online).

36. *See Droptunes: Dropbox Music Player*, DROPBOX FORUMS, http://forums.dropbox.com/topic.php?id=34115 (last visited Nov. 11, 2012) (providing a service where users may store any file in their Dropbox account (pictures, music, and documents) and users can listen to their music via a player application called Droptunes).

37. *See* HOTFILE.COM, http://hotfile.com (last visited Nov. 11, 2012) (providing a service where the uploaded files, including MP3 files, may then be accessed by anyone with an Internet

Grooveshark,[39] and Murfie.[40] How courts evaluate Amazon Cloud Player could impact all of these services.

III. LAW/RULE

As with most laws, copyright law is governed by statutory law and case law. The primary statutory laws are the Copyright Act and the Digital Millennium Copyright Act (DMCA). While there are multiple relevant cases, the two that will most directly impact the analysis will be the Supreme Court's *Sony* decision[41] along with the Second Circuit's decision in *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*.[42]

A. *Legislation*

The purpose of copyright law is to provide "a fair return for an 'author's' creative labor."[43] The Copyright Act enumerates multiple rights exclusive to the owner of a copyright.[44] One of these rights is the

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browser though use of a URL address assigned by Hotfile to that file).

38. *See About MP3Tunes*, MP3TUNES.COM, http://www.mp3tunes.com/cb/about/ (last visited Nov. 11, 2012) (allowing both streaming and downloaded content along with radio on multiple platforms).

39. *See* Janko Roettgers, *Grooveshark is Relaunching as a Social Music Network*, GIGAOM (Nov. 11, 2011, 7:00 PM), http://gigaom.com/2011/11/11/grooveshark-is-relaunching-as-a-social-music-network (explaining that Grooveshark lets users listen to music uploaded by any other user and allows searches by users to locate music other users have uploaded).

40. *See Features Overview*, MURFIE, https://www.murfie.com/features (last visited Nov. 11, 2012) (explaining that users send their CDs to Murfie and Murfie rips the CDs to let users access digital music remotely while storing the physical CDs on behalf of the user).

41. *See generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (holding that selling video tape recorders was not contributory copyright infringement).

42. *See generally* Cartoon Network v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009) (holding that storage of digital video recordings at a remote site for later playback was not direct copyright infringement).

43. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

44. 17 U.S.C. § 106 (2011) provides:

> Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works,

restriction on making copies or phonorecords.[45] The violation of this right is typically referred to as either direct infringement or indirect infringement.[46]

Another one of these rights conferred by the Copyright Act is the right of public performance.[47] This allows the user to enjoy the expression as long as he is not broadcasting it to a wide audience.[48] Prohibited public performance is found in either of two situations. First, prohibited public performance may be found if the user is performing the work in a place beyond a small group of people (family gatherings or social acquaintances). Second, prohibited public performance may be found if the user is transmitting the protected expression.[49] However, there are exceptions to this limitation. A user blasting his stereo at maximum volume is not a public performance if there is no commercial advantage and no charge for admission.[50] Secondary transmission, which exempts television stations, is allowed without the need for a separate license subject to a set of enumerated restrictions.[51]

Congress has attempted to keep some flexibility in the law by

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> pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2011).

45. *Id.*
46. *See id.*
47. *Id.* § 106(4).
48. *Id.* § 501.
49. To perform or display a work "publicly" means—

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id. § 101.

50. *See id.* § 110(4).
51. *See id.* §§ 111, 119.

leaving the language in the Copyright Act technology neutral in order to encompass emerging technologies not known at the time of the law's passage.[52] The latest wholesale revision to these rules was in 1976, although it has been supplemented by the DMCA. The DMCA contains several provisions that address technological advancements made since the Copyright Act was signed into law. For example, Internet Service Providers (ISPs), who provide a gateway to the Internet, are immunized from liability for copyright infringement if they meet certain statutory requirements.[53] These are known as the "safe harbor" provisions.

1. Infringement

This discussion will need to clearly point out what types of infringement are possible. The first is direct infringement. This occurs when someone other than the copyright holder commits an act enumerated in the list of rights exclusive to the copyright holder of a protected work.[54] Indirect infringement may be classified as contributory infringement, vicarious infringement, or inducement. Contributory infringement occurs when the defendant knows there is direct infringement and provides substantial assistance.[55] Vicarious infringement occurs when the defendant can stop or control the acts of the direct infringer and gets a financial benefit from the infringement.[56] Inducement is a newer form of indirect infringement based on *MGM Studios, Inc. v. Grokster, Ltd.* Under *Grokster*, inducement is found if the defendant helped to promote an act of infringement.[57]

2. Sale Versus License

The user's purchase of a CD or an MP3 file grants the user certain rights. However, the question becomes whether the purchase constitutes

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52. *See* H.R. REP. NO. 94-1476 (1976). For example, legislative intent to keep the statute flexible is detectible in Congress's statements regarding Section 102. *Id.* at 51 ("This bill does not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology . . . ."). 17 U.S.C. § 106; H.R. REP. NO. 94-1476 at 63 ("The exclusive right of public performance is expanded to include not only motion pictures, including works recorded on film, videotape and video disks, but also audiovisual works such as filmstrips and sets of slides."). 17 U.S.C. § 107; H.R. REP. NO. 94-1476 at 66 ("The bill includes fair use, . . . but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.").

53. 17 U.S.C. § 512(c) (2011).

54. *Id.* § 501.

55. *See* Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

56. *See id.*

57. *See* MGM Studios, Inc. v. Grokster, Ltd. 545 U.S. 913, 936–41 (2005).

a sale or a license.[58] This distinction triggers not only questions about rights held by the user, but also rights granted by contract to the artist from the copyright holder.[59] The distinction between sale and licenses has taken a role in the allocation of money in the music industry in the past few years. Traditionally, artists received a royalty when their music was sold to consumers on physical media.[60] For every Bob Dylan CD sold, he would earn a percentage of the sale.[61] However, if a song was placed in a commercial, television show, or a movie, he received a licensing fee.[62] This fee typically is substantially higher than those possible under a royalty agreement.[63] The rationale for the difference is that a sale involves creation of physical products, distribution, and other incremental costs, while licensing is simply making a copy from the master.[64]

As digital media began to be sold, the question of classification became an issue. If music was sold to a person, it was usually sold on a CD, and a royalty was paid. Digital media had no physical component, much like when it was licensed to movies, suggesting it was in fact a license to enjoy the music.[65] This led to several lawsuits on behalf of artists who believed they were entitled to an increase of payments based on licensing of their music as opposed to a standard royalty payment per sale.[66] While most music contracts today address this distinction, at least one court has found that digital sales qualify as a license in the absence of a specific contract provision to the contrary.[67] After the Supreme Court denied review of the case, the artist reached a settlement with the production company for an undisclosed amount.[68]

If appellate courts agree with this ruling that MP3 files are a license, the question becomes the scope of such a license. Even if the music industry says the license is limited in scope on the part of the user, at what point does the user actually give consent to such a license? There are no license agreements on CDs for users to show consent. This could

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58. *See* Melissa Block, *Download Sales: Will Money Stay With the Labels or Go to the Musicians?*, NPR.ORG, THE RECORD (May 4, 2011, 3:00 PM), http://www.npr.org/blogs/therecord/2011/05/04/135714914/download-sales-will-money-stay-with-labels-or-go-to-musicians.

59. *Id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *Id.*

65. *See id.*

66. *See id.*

67. *Id.*

68. Bruce Houghton, *Eminem vs. UMG Digital Music Court Battle Ends With Secret Settlement*, HYPERBOT.COM (Oct. 31, 2011), http://www.hypebot.com/hypebot/2012/10/eminem-vs-umg-digtal-music-court-battle-ends-with-secret-settlement.html.

lead to a separate regime where music ripped from CDs is protected as a sale while MP3 files downloaded over the Internet are a license.

The issue of sale verses license is still evolving. There are multiple ways of looking at such a distinction between license and sale, and the outcome of this debate is still not clear.[69]

3. First Sale

Copyright holders traditionally do not have authority over the resale of copies of their expressions.[70] It has long been accepted that once the copyright holder releases a copy into the stream of commerce through a legal purchase that he is no longer entitled to control over that copy.[71] This idea is called the first sale doctrine, or exhaustion.[72] This idea also turns on the idea of whether a purchase is being characterized as a sale or a license. If it is a sale, then the copyright holder has no rights.[73] However, if the purchase is a license, then the copyright holder is granting only certain rights to the user while retaining others for himself.[74] For example, the copyright holder may retain rights that would restrict use of the music in the cloud.

4. Fair Use

Prior to the Copyright Act, the common law doctrine of fair use was recognized. Congress codified the doctrine of fair use in the Copyright Act, which provides a defense for users to make a copy of a copyrighted expression based on four factors.[75] The first factor, purpose and

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69. *See generally* Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1888 (2010).

70. 17 U.S.C. § 109 (2011).

71. *See id.*

72. Carver, *supra* note 69, at 1891.

73. *See id.*

74. *Id.* at 1892–95.

75. Notwithstanding the provisions of sections 106 and 106A,

> the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;

character of use, has been summed up as, "characteristically involv[ing] situation[s] in which the social, political and cultural benefits of the use will outweigh any consequent loss to the copyright proprietor."[76] The second factor taken into consideration is the nature of the expression, which stands for the premise that some expressions by their very nature deserve more protection.[77] The third factor is the amount and substantiality of the copyrighted expression taken. Finally, the effect on the market of the copy is considered.[78]

While traditional questions that arise under this defense are based on derivative works, the question here is whether loading protected music on Amazon Cloud Player for subsequent playback qualifies as fair use. Factor one may go for or against Amazon Cloud Player depending on if the use of the music is considered commercial. Factor two and factor three work against the Amazon Cloud Player, because the expressions are protected materials which are copied in their entirety. Factor four, like factor one, may work in either direction based on the question of whether users should repurchase music they have previously purchased.

B. *Case Law*

A substantial body of case law has developed under the Copyright Act. A brief overview of case law will assist in our legal analysis. Any discussion of technology used for potential copyright infringement typically begins with *Sony*. For the layperson, *Sony* has long stood for the premise that a technology capable of substantial non-infringing use is legal. This is a misconception. What *Sony* stands for is the premise that a manufacturer is not liable for contributory infringement if the item has substantial non-infringing uses[79] and is a staple item of commerce.[80] This argument was interpreted broadly until the Ninth

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> (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.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (2011).

76. ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS 218 (2003) (citing PAUL GOLDSTEIN, COPYRIGHT § 10.2.1, at 10:19–10:20 (1996)).

77. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

78. 17 U.S.C. § 107(3)–(4) (2011).

79. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442, 456 (1984).

80. *Id.* at 442.

Circuit ruled in *A&M Records, Inc. v. Napster, Inc.* that a peer-to-peer file-sharing network could be held liable for indirect infringement.[81] Later, the Supreme Court in *Grokster* found that a business predicated on ease of copyright violation and inducement cannot be legal.[82] These cases show that the non-infringing use element is insufficient to protect ISPs if there is intent to induce infringement or there is some ongoing relationship between the ISP and the alleged infringer.

While some concerns of piracy over the Internet have been resolved, the legal landscape in regards to non-piracy Internet-based technologies is not clear yet. While *Sony* is often cited as a basis for providing immunity to technology developers as long as there is a non-infringing purpose, no reported case supports the proposition that *Sony* defends against accusations of indirect infringement.[83]

Additionally, judges since *Napster* have been concerned that the intersection of law and new technologies may lead to unplanned results. Even before *Napster*, it had been suggested that copyright protection may be a hollow promise if it may be avoided by a clever legal argument.[84]

Even though courts have been skeptical to provide protection to technologies that are neutral yet allow piracy, some courts have not been hesitant to protect services that provide a service that is equivalent to a known legal service. The Court of Appeals for the Second Circuit decided the *Cablevision* case after the Supreme Court's ruling in *Grokster*. *Cablevision* involved the use of an RS-DVR, which allowed a user to record a program via a RS-DVR unit in his home.[85] The user selected the program to record, and then the cable provider recorded the program at a central server.[86] Once the user wanted to watch the program, the server played back the program to the user's RS-DVR at his home.[87] Copyright holders sued Cablevision based on multiple issues, including direct infringement and public performance violation.[88] The Second Circuit denied the claims and found for Cablevision, and the Supreme Court has denied review of the case.[89]

While *Cablevision* has been widely touted as a possible defense to

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81. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021–22 (9th Cir. 2001).

82. *See* MGM Studios, Inc. v. Grokster, Ltd. 545 U.S. 913, 934–37 (2005).

83. Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's De Facto Demise*, 55 UCLA L. REV. 143, 144–45 (2007).

84. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557 (1985).

85. Cartoon Network v. CSC Holdings, Inc., 536 F.3d 121, 123 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009).

86. *Id.*

87. *Id.* at 124.

88. *Id.* at 123.

89. *Id.* at 140.

infringement claims on the part of technology and service providers, it should be noted that the court did not rule on the issue of contributory infringement or the fair use defense as those were specifically omitted by mutual agreement from both sides in the case.[90] All that was settled in the ruling was that Cablevision was not a direct infringer under these circumstances.[91] The court specifically noted that the scheme of each unique user having access to a unique copy associated with the unique user may not be sufficient to avoid liability for infringement in other situations.[92]

IV. ISSUES

Given the current state of copyright law with respect to emerging technologies, five issues become apparent. First is the fundamental issue of whether copying music from legally purchased physical copies is legal. Next we will address the issue of infringing, starting with direct infringement. Then indirect infringement will be examined. Rebroadcasting will also be examined. Later we will look at issues raised related to reproduction and distribution. After these issues are addressed, multiple defense and analogous laws will be reviewed.

A. *Legality of Copies Originating from Legal Users*

An issue that has not been directly addressed is the fundamental question of whether it is legal for a user who legally purchased a physical recording of music to convert the music into a different format. The primary example is converting music stored on CDs to MP3 files. This issue is further complicated by the fact that there are multiple theories of how licensing of tangible objects with copyright protected works are applicable.[93]

While this is a fundamental issue, this may not be brought up during

90. *Id.* at 124.

91. *Id.* at 139–40.

92.

> This holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies. We do not address whether such a network operator would be able to escape any other form of copyright liability, such as liability for unauthorized reproductions or liability for contributory infringement.

Id.

93. *See* Carver, *supra* note 69.

potential litigation for several reasons. First, this argument may not be necessary if infringement arguments prove fruitful. Second, if this issue is addressed, it could potentially lead to multiple schemes of classification of MP3 files. It is conceivable that, taken to an absurd extreme, there could be separate rules for MP3s with a watermark from licensed distributors, MP3s without watermarks from licensed distributors, MP3s ripped from otherwise legally owned copies, and MP3s for those that do not fit the preceding three categories. This would be unwieldy and could lead to confusion.

1. Illegal

While there are not many cases, if any, regarding the rights to copy music from CDs, there is an analogy in the realm of computer software distributed on physical media, like CDs. Courts have found in the past that the act of a computer program being loaded from a CD into a computer's RAM was sufficient to infringe on copyright in *MAI Systems Corp. v. Peak Computer, Inc.*[94] While courts previously found that such copies were in violation of copyright law, Congress has amended the law to permit such copying.[95] Presumably the court's reasoning would be the same with music played from a CD. It would be necessary to use a computer or a computer-based device to listen to a CD, but there is no need for the data to remain in the computer once the CD is removed. This could lead to a finding that ripping a CD is illegal.

Given the rise of MP3 players, the only way to load music in the device involves either the purchase of MP3 files or the ripping of other music media to MP3 format, potentially violating the prohibition on reproduction.[96] While the music industry has not taken any action against those who do so for their exclusive home use, the potential for abuse of these copies has been apparent since *Napster*.

2. Legal

In *Sony*, the Court found that the use of a VCR to "time shift" a recording was a fair use.[97] Since *Sony*, no case has addressed the legality of personal copies of music as a viable ground for a case of copyright infringement. This may be because other causes of action, such as indirect infringement, are more effective. Another possibility is that both the music industry and technology industries do not want to risk a definitive answer to this issue because an adverse answer could

94. 991 F.2d 511, 517–19 (9th Cir. 1993).
95. *See* 17 U.S.C. § 117 (2011).
96. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).
97. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442–56 (1984).

have repercussions far beyond the immediate issue of a single technology in the case.

Curiously, the RIAA has tacitly given users permission to make copies for personal use.[98] It would be difficult for RIAA to say that making a copy for personal use is allowed, but it has to be on your local personal computer and cannot be space shifted to the cloud. Accordingly, it appears that this grant of permission should allow users to upload protected music into their personal clouds for personal use.

B. *Infringement*

Infringement is found when any of the enumerated rights exclusive to copyright holders listed in the Copyright Act are violated.[99] These will be discussed in turn.

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98. The RIAA provides the following guidance:

> Copying CDs
>
> - It's okay to copy music onto an analog cassette, but not for commercial purposes.
> - It's also okay to copy music onto special Audio CD-R's, mini-discs, and digital tapes (because royalties have been paid on them) – but, again, not for commercial purposes.
> - Beyond that, there's no legal "right" to transfer the copyrighted music contained on a CD onto a CD-R without permission. However, burning a copy of CD onto a CD-R, or transferring a copy onto your computer hard drive or your portable music player, will usually not raise concerns so long as:
> - The copy is made from an authorized original CD that you legitimately own, and
> - The copy is just for your personal use. It is not a personal use – in fact, it is illegal – to give the copy [a]way or lend it to others for copying.
> - The owners of copyrighted music have the right to use protection technology to allow or prevent copying.
> - Remember, it is never okay to sell or make commercial use of a copy that you make.

The Law, RIAA.COM, http://riaa.org/physicalpiracy.php?content_selector=The_Law_Physical_ (last visited Nov. 11, 2012).

99. CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 549 (4th Cir. 2004).

1. Direct Infringement for Copy Residing on Amazon Cloud Player

A direct infringer is the party that commits the act that allows the infringement to occur.[100] In order to prove direct infringement, the copyright holder must show that the user copied a copyrighted expression.[101] To find that Amazon Cloud Player commits an act of direct infringement, Amazon Cloud Player must be the party who makes the copy of the protected expression. The question is one of control. While a copy of the music is made to Amazon Cloud Player when the music is loaded, the question is who made the copy: Amazon Cloud Player or the user?

a. Infringing

Amazon Cloud Player is not a simple stand-alone piece of technology like the VCR. Amazon Cloud Player is an exceedingly complex system that requires a dedicated team of technicians to maintain. This is a service that was created for the exclusive purpose of copying music from a user's computer or from a copy at Amazon.com. Loading of an MP3 file to Amazon Cloud Player may be seen as reproduction for purposes of the Copyright Act. The question becomes how is Amazon Cloud Player fundamentally different from the VCR at issue in *Sony*?

One of the elements in the *Sony* decision that protected Sony from direct infringement claims was that Sony had no contact with the potentially infringing user once the user purchased the VCR.[102] The ongoing contact between the users and Napster is what lead to the Ninth Circuit decision coming down against Napster.[103] There was no break in contact between the users and Napster. In order to utilize Amazon Cloud Player, users must log in and connect to Amazon Cloud Player, which creates an ongoing relationship not present in *Sony*. While the user selects the music to copy, it does not change the fact that Amazon Cloud Player executes commands received from the user.

The only way that Amazon Cloud Player is commercially viable is if users load music to Amazon Cloud Player or access copies purchased from Amazon.com. Given the ongoing nature of the relationship, combined with the obvious purpose of utilizing copyrighted expressions without a license calls into question whether Amazon Cloud Player could be liable for direct infringement.

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100. *See id.* at 550.

101. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 817 (9th Cir. 2002).

102. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 437–38 (1984).

103. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020–22 (9th Cir. 2001).

b. Non-Infringing

While Amazon Cloud Player provides the technology, there is no protected expression manipulated by Amazon Cloud Player until the user loads or purchases music to be stored in the Amazon Cloud Player. Amazon Cloud Player is automated so that no technician at Amazon Cloud Player is directly involved in the upload of copyrighted music. Amazon Cloud Player does store a copy of music, but without the user to initiate the act of copying, Amazon Cloud Player remains passive, showing that Amazon Cloud Player is not a direct infringer. Further, it is long established that if Amazon Cloud Player is merely an automated conduit, then it is not responsible for infringement occurring on Amazon Cloud Player.[104]

The issue of control may be illustrated with an analogy that was cited to in the case of university copy centers. If a copyrighted expression is photocopied by a copy center, where copy center employees manipulate the machines to create a copy, then the copy center is a direct infringer.[105] This is not the case with Amazon Cloud Player, as Amazon Cloud Player does not need human operators. With Amazon Cloud Player, the user is needed before any alleged violation occurs, thus absolving Amazon Cloud Player of direct infringement. Amazon Cloud Player is more analogous to a user walking into a copy center and making a copy himself, which has not been found as implicating the copy center as a direct infringer.[106]

An additional analogy may help illustrate this point by adding an element of remote access. Replace MP3 files with text documents, and use a fax machine instead of Amazon Cloud Player. When a user sends a fax of a copyrighted document from a copy center, this act can be analogous to uploading an MP3 file. Assume that the receiving fax machine has an auto forward feature where it receives the fax, then resends it to the user. Now the user has two copies of his document. The fax machine has effectively become a photocopier. No one would say the copy center was making the copy. This can be taken a step further. The fax may be stored at a remote location, and the user can go to another office, call a number, and have the fax sent to him at the new location. This would be no different from a user loading an MP3 file to Amazon Cloud Player and then downloading it back on a smartphone. If

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104. *See* Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1369–70 (N.D. Cal. 1995); *see also* CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 555 (4th Cir. 2004).

105. *See* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1383 (6th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997).

106. *See* Cartoon Network v. CSC Holdings, Inc., 536 F.3d 121, 132 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009).

a user sends a fax to himself, then views the document using a cloud function, has the copy center committed copyright infringement? If the user controls everything and the copy center is automated, then the answer is no.

2. Indirect Infringement for Copies Residing on Amazon Cloud Player

In the event Amazon Cloud Player is not found directly infringing, there is a much stronger argument for indirect infringement. In order to prove indirect infringement, at least one of contributory infringement, vicarious infringement, or inducement needs to be proven.[107] The problem with proving indirect infringement will be that copyright holders need a direct infringer to make an allegation of indirect infringement, and no court has found that ripping music or space shifting is an act of direct infringement.

a. Infringing

The Court in *Sony* declined to find indirect infringement since the only interaction Sony had with the infringing activity was the sale of the equipment that was capable of substantial non-infringing uses.[108] Examples of non-infringing uses would be recording the news or something not otherwise commercially available.[109] It is unlikely that Amazon Cloud Player will be used to store anything other than copyright protected works.

Assuming that ripping a song is an act of direct infringement, Amazon.com would presumably know that a significant percentage of the music uploaded to Amazon Cloud Player would be directly infringing. We can also assume that Amazon is receiving a benefit in the fact that people pay for Amazon Cloud Player and Amazon.com encourages people to upload MP3 files to Amazon Cloud Player, satisfying the elements of vicarious infringement. If direct infringement is found on the part of the user, and Amazon Cloud Player induced this infringement by offering a service users want that requires direct infringement, then inducement may be found as well. With these elements, a case may be brought for indirect infringement as one or more indirect infringement categories have been satisfied.

b. Non-Infringing

In order to prove that Amazon Cloud Player is liable for indirect

107. *See Sony Corp.*, 464 U.S. at 434–42 (1984).
108. *See id.* at 435, 437–42.
109. *Id.* at 477–79.

infringement, a direct infringer will need to be identified.[110] This requires an answer to the question as to whether direct infringement has occurred. Further, there is the fair use defense, elaborated on below. If the user has a fair use defense, this may be able to shield Amazon Cloud Player from an indirect infringement charge.[111] With a successful fair use defense on the part of the direct infringer, there is no infringement and Amazon Cloud Player's actions do not constitute indirect infringement.

In the event an inducement claim is raised, Amazon.com should look to see if a refinement of the *Grokster* decision is necessary. In *Grokster*, it was accepted that files were illegally being traded between users who did not legally own copies of these works.[112] Amazon Cloud Player does not facilitate such transfers. Each user has a unique memory location available only to that specific user. If Amazon Cloud Player induces a user to upload music, it is only to upload his own music to enjoy themselves. Hence, *Grokster* should stand for inducement of copyright infringement only when copyright infringement occurs as a result of files being transferred from one user to another user.

3. Rebroadcasting

The Copyright Act specifically grants the holder of the copyright the right to public performance.[113] Rebroadcasting is a type of public performance. Courts have found that if multiple people see the same broadcast, but in series such that only one person gets to see the broadcast at a time, then it is still a rebroadcast to the public.[114]

There are two ways a user can perceive a media file stored at a remote location. First, they may download the file, where a complete copy is loaded onto the user's computer. The Supreme Court has recently denied *certiorari* on a Second Circuit case that found the act of downloading a song does not lead to a public performance infringement claim.[115]

The alternative to downloading is streaming. Streaming is distinguishable from downloading with respect to the performance right.[116] Rebroadcasting, such as streaming, must be contemporaneously

110. *See* MGM Studios, Inc. v. Grokster, Ltd. 545 U.S. 913, 930 (2005).

111. *See Sony Corp.*, 464 U.S. at 432–33.

112. *Grokster*, 545 U.S. at 948.

113. 17 U.S.C. § 106(4) (2011).

114. *See* Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 568 F. Supp. 494, 500 (W.D. Pa. 1983), *aff'd*, 749 F.2d 154 (3d Cir. 1984).

115. United States v. Am. Soc'y of Composers, Authors & Publishers, 627 F.3d 64, 73 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 366 (2011).

116. *Id.*

perceptible to be considered a performance.[117] If Amazon Cloud Player is in fact streaming, then there is no delay, but immediate playback. What Amazon Cloud Player is proposing is no different than an MP3 player connected by a very long cable to a user's computer.

a. Infringing

Courts have previously held that rebroadcasting to a limited audience counts as rebroadcast and as such is a copyright violation.[118] The phrase "to the public" does not necessarily mean to a wide audience. The Third Circuit has found that a single person can be considered "the public."[119] It is important to remember that, per the Copyright Act, the question is not whether someone saw the performance by Amazon Cloud Player. The relevant action is did Amazon Cloud Player transmit the performance, which has been satisfied.[120]

b. Non-Infringing

Transmission alone does not render a defendant liable for infringement based on rebroadcasting.[121] While the Second Circuit had previously found that any element of the broadcasting process could be an act of infringement,[122] the Second Circuit amended their ruling in *Cablevision* to find that while previous cases involving large scale broadcasts were infringing, transmissions to individual users who requested the recording were not infringing.[123] If a broadcast to a single

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117. *See id.*

118. *Columbia Pictures*, 568 F. Supp. at 500.

119. *See* Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 299 (3d Cir. 1991), *cert. denied.*, 112 S. Ct. 373 (1991).

120.

> To perform or display a work "publicly" means—
>
> . . . .
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101 (2011).

121. *See* CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 555 (4th Cir. 2004).

122. *See* Nat'l Football League v. PrimeTime 24 Joint Venture, 211 F.3d 10, 13 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001).

123. Cartoon Network v. CSC Holdings, Inc., 536 F.3d 121, 138 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009).

person were to constitute a public performance, then the phrase "to the public" would be redundant.[124] In the case of Amazon Cloud Player, as in *Cablevision*, each copy has an audience of one user. Cablevision later submitted an *amicus curie* brief in a separate case where they promoted the idea that the issue should be the potential audience, which still favors Amazon Cloud Player.[125]

Another example of this issue of transmitting involves ringtones for cell phones. Customized ringtones for cell phones are popular due to the ubiquity of cell phones and the fact that many standard ringtones sound similar. One popular alternative to a traditional ringtone is to use a brief portion of a copyrighted song. These ringtones are licensed to the mobile phone providers from the copyright holders. As a result, a user may have a ringtone that plays the first twelve bars of "Rainy Day Women #12 & 35." Courts have found that despite the fact that others could hear a ringtone, it did not constitute a public performance on the part of the cell phone carrier as they did not initiate the public performance, just like Amazon Cloud Player does not initiate the performance to the user.[126]

4. Reproduction and Distribution

The question of how the music is streamed to users may lead to additional issues based on the exclusive rights of reproduction and distribution. Of key importance in copyright law is the fixation element. Fixation has two major elements. First, the copy must be capable of being perceived, reproduced, or otherwise communicated. Second, the copy must last longer than a transitory time.[127] The *Cablevision* case

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124. *Id.* at 139.

125. *See* John Eggerton, *Cablevision Draws Distinction Between Zediva and Its Remote DVR Service*, BROADCAST & CABLE (July 19, 2011, 2:14 PM), http://www.broadcastingcable.com/article/471223-Cablevision_Draws_Distinction_Between_Zediva_and_Its_Remote_DVR_Service.php.

126. *Cf. In re* Cellco P'ship, 663 F. Supp. 2d 363, 374–79 (S.D.N.Y. 2009).

127.

> "Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.
>
> . . . .
>
> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of

discussed the issue of a copy of a copyright protected work in the RAM buffer as a possible infringement. In the case of Amazon Cloud Player, this has not been examined in depth because in *Cablevision* the cable provider was recording the cable television broadcast in a buffer that was overwritten every few seconds. In *Cablevision*, those copies were found to be transitory. However, while in *Cablevision* the buffering was occurring at the central server, buffering in the case of the Amazon Cloud Player would occur at the user's location.

Streaming media is typically divided into one of two categories: on demand streaming and live streaming. Live streams, also called true streaming, sends the media straight to the user's interface without storage or buffering. Live streams are only available at the time they are streaming. For example, once a live concert ends, you cannot go back and replay it. On demand streaming (also called progressive streaming) saves the file to a local buffer and then plays the file to the user from the buffer. On demand copies remain in the buffer for varying degrees of time.[128]

a. Infringing

Progressive streaming stores the stream in a buffer to be played on the computer system being used. There are multiple factors that could impact the time this buffered file stays in the computer's memory, but it is possible it will stay in the active RAM until the device is turned off. Such situations have been found to be more than a transitory duration.[129] While *Cablevision* found the buffered information was not sufficiently fixed, it specifically notes that the file was in the buffer for no more than 1.2 seconds.[130] The question becomes how long does it take for a copy to be considered fixed? Is it long enough to replay the song? Is it long enough to allow automatic replay? Is it 30 seconds? Is it enough if there is an automatic buffer purge every hour? In the case of *Cablevision*, the answer was simplified because there never was a complete TV show loaded in the buffer. Because there was no way to have a complete show in the buffer, it would be difficult to say anything perceptible was fixed. However, MP3 files are much shorter than a

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> this title if a fixation of the work is being made simultaneously with its transmission.

17 U.S.C. § 101 (2011).

128. *Streaming Media*, WIKIPEDIA, http://en.wikipedia.org/wiki/Streaming_media n.7 (citing GRANT & MEADOWS, COMMUNICATION TECHNOLOGY UPDATE AND FUNDAMENTALS 114 (11th ed. 2009)) (last visited Nov. 11, 2012).

129. *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518–19 (9th Cir. 1993).

130. Cartoon Network v. CSC Holdings, Inc., 536 F.3d 121, 129–30 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009).

television show and it may be possible to have the entire file stored in the buffer.

Assuming that the streamed copy is not immediately overwritten in the computer memory, the streamed copy may exist on the computer for a more than transitory duration. At that point, the act of copyright infringement including reproduction has occurred because the copy is now fixed in a tangible medium. Given that the music played may not have previously been on the device used, distribution has occurred. Some courts have further found that access to the file equates to distribution.[131] In that case, once the user accessed Amazon Cloud Player, infringement may be found.

b. Non-Infringing

The issue of reproduction and distribution depends on if the copy is fixed. Specifically it depends on how much of the file exists after it is needed and for how long. It is possible that the file is fragmented in such a manner that there is not enough of the file accessible to give the partial copies any value. Even if a partial file remains for an extended period of time, if it cannot be perceived, the fixation requirement may be moot. In *Cablevision*, the file was found not to be fixed because it contained only 1.2 seconds of a program and was immediately overwritten.[132] While courts have been reluctant to give a bright line rule, future courts may have to provide some articulation as to what is needed in this instance. Additionally, courts have found that in addition to the transitory time element, immunity may be found if the copying and retention in memory is needed as a necessary part of transmission.[133]

C. *Defenses Against Infringement*

In the event that Amazon Cloud Player is found to have met the requirements to show infringement on any ground, there are multiple defenses available to them. While some are affirmative defenses that require Amazon Cloud Player to show they acted properly, other defenses shield Amazon Cloud Player on policy grounds.

1. Fair Use

As previously discussed, the Copyright Act allows for the defense of

131. *See* Capitol Records, Inc. v. Thomas, 799 F. Supp. 2d 999 (D. Minn. 2011).

132. *Cartoon Network*, 536 F.3d at 129–30.

133. *See* CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 555 (4th Cir. 2004).

fair use, which requires an analysis of four factors.[134] The applicability of fair use turns on whether Amazon Cloud Player is a direct infringer or an indirect infringer.

a. Infringing

Fair use is not a viable option to Amazon Cloud Player in this situation. The fair use argument here would be similar to the argument used in *Napster*. The Ninth Circuit found that all four fair use factors worked in favor of an infringement finding.[135] Three elements work against Amazon Cloud Player because there appears to be no social benefit, the expression itself does not need more or less protection, and (presumably) an entire copyrighted expression is copied. Even if the fourth element of minimal market impact is found, it may not be enough to trigger a fair use defense.

b. Non-Infringing

If the user is a direct infringer and has a fair use defense, then Amazon Cloud Player may be able to use that defense to show no direct infringement has occurred, and therefore Amazon Cloud Player did not commit indirect infringement. While it is not an absolute defense, the user would have a fair use argument because the effect on the market is insignificant. Specifically, the Amazon Cloud Player merely enables a user to avoid paying for an MP3 file he previously paid for via physical media. If the copying does not impact the market adversely, then the copying should be allowed. Accordingly, there is no indirect infringement by Amazon Cloud Player.

2. DCMA

While the DMCA provides restrictions of certain copyright related technology, it also creates affirmative defenses. One of these defenses, known as the "safe harbor" provision, shields ISPs as passive providers from liability for copyright infringement.[136]

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134. 17 U.S.C. § 107 (2011).

135. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–17 (9th Cir. 2001).

136.

> (1) In general.— A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

a. Infringing

Amazon Cloud Player cannot escape liability under the DMCA because certain statutory conditions are not satisfied.[137] First, Amazon Cloud Player is not a passive provider as they provide content.[138] This would be a logical expansion of the red flags knowledge established in other cases.[139] Amazon.com cannot claim they do not know what is on the site if an element of their business is selling music to place on Amazon Cloud Player. Second, even if the music industry somehow were able to determine what infringing music was on Amazon Cloud Player and sent take down notices to Amazon Cloud Player, it is unlikely that Amazon Cloud Player would remove the music as it is an essential element of Amazon Cloud Player's function.

Additionally, if the copyright holders can prove reproduction and/or duplication occurs in the use of the Amazon Cloud Player, they may have an alternative way of defeating the safe harbor provisions. The safe harbor provisions protect ISPs for, among other things, "transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider . . . ."[140] The question would be what counts as the network? If the network includes a smartphone that is logged into Amazon Cloud

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> (A)
>
> (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
>
> (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
>
> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
>
> (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
>
> (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

17 U.S.C. § 512(c) (2011).

137. *Id.*

138. *See Getting Started with the Amazon MP3 Store & Cloud Player*, AMAZON.COM, http://www.amazon.com/b?ie=UTF8&node=2658409011 (last visited Nov. 11, 2012).

139. *See* Columbia Pictures Indus., Inc. v. Fung, No. CV 06-5578, 2009 WL 6355911, at *16–17 (C.D. Cal. Dec. 21, 2009).

140. 17 U.S.C. § 512(a) (2011).

Player, then the safe harbor provisions are relevant. However, if a smartphone, or another device that is logged into Amazon Cloud Player is not part of the system, and the music is fixed on that portable device, then the safe harbor provisions are not applicable as reproduction and duplication have occurred.

b. Non-Infringing

Amazon Cloud Player may still make an argument that they are passive providers. While Amazon Cloud Player does sell music, Amazon.com has been providing MP3 files of music for years. Per space shifting, transferring music from Amazon.com to Amazon Cloud Player is no different than transferring music from Amazon.com to a user's home computer. Secondly, it has not yet been conclusively established that legally purchased music converted into an MP3 file or purchased from an online digital seller is in fact unlicensed if placed in a user's private digital music locker, requiring compliance with a DMCA takedown notice.

In regards to potentially infringing files not specifically referenced in a DMCA take down notice, ISPs must have a red-flag indicator to know to remove content without the copyright holder alerting them to the infringing files, but at the same time they are not required to monitor their sites.[141] If an investigation is needed to determine if an MP3 file infringes copyright, then it does not rise to the level of being a red-flag.[142] Only truly egregious cases of infringement can lead to a defeat of the no monitoring provision.[143] Courts have found that it is impractical for an ISP to actively monitor all files to determine which ones are infringing on copyright protections.[144]

As for rebroadcasting, the DMCA also protects those who play back stored content.[145] It has been accepted that once an ISP has been found to fit within the DMCA safe harbor for containing copyrighted work that it is also immune to violations based on the broadcast of such a work. It has been noted that if the only way to access the content protected by the DMCA is from a broadcast, it is allowed as well.[146]

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141. *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 709 (2007).

142. *Cf. id.* at 1114.

143. *See Columbia Pictures*, 2009 WL 6355911, at *17–18.

144. *See* Viacom Int'l., Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 523–24 (S.D.N.Y. 2010).

145. "[O]nline storage system utilizes automatic and passive software to play back content stored at the direction of users. That is precisely the type of system routinely protected by the DMCA safe harbor." Capitol Records, Inc. v. MP3tunes LLC, 821 F. Supp. 2d 627, 649 (S.D.N.Y. 2011).

146. UMG Recordings, Inc. v. Veoh Networks, Inc., 620 F. Supp. 2d 1081, 1088 (C.D.

3. First Sale Doctrine/Digital Exhaustion

The first sale doctrine stands for the proposition that once a legal copy of an expression is sold, the copyright holder, with limited exceptions, cannot control how the copy is later used.[147] The question becomes how does this doctrine apply to digital copies, if it may apply at all? Physical copies of copyrighted expressions are clearly alienable and copies made from them are of lower quality, whereas digital copies are perfect and may be made *ad infinitum*.[148] Also, how would this doctrine apply to MP3 files purchased over the Internet as opposed to music copied from CDs?

a. Infringing

The first sale doctrine has not been extended to the realm of MP3 files.[149] Even if it had been, it would not allow the user make a digital copy of the expression and then sell a copy to another user. With digital technology, it is possible to make perfect copies of expressions whereas copies made by older technologies had noticeable defects.[150] This logic holds to Amazon Cloud Player. If a user purchases a legal copy of a Cowboy Mouth CD, he has the right to listen to it all day long.[151] Under the first sale doctrine, users would be required to delete any digital copies of music the user made if the physical CD was sold.[152] Even then, technically a new copy is always made, making the first sale doctrine problematic as it would still implicate the public distribution right.[153] After the new copy is distributed to the new user, there is no system or check in place to confirm the copy has been deleted from the prior user's computer.

While users who ripped music from CDs can attempt to defend themselves by the first sale doctrine, that argument cannot apply to MP3

Cal. 2008).

147. 17 U.S.C. § 109 (2011).

148. Orit Fischman Afori, *Implied License: An Emerging New Standard In Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH L.J. 275, 322–23 (2009); *see also* 17 U.S.C. § 117(b).

149. *See* William Sloan Coats et al., *Streaming into the Future: Music and Video Online*, 20 LOY. L.A. ENT. L. REV. 285, 295 (2000).

150. Afori, *supra* note 148, at 322–23.

151. *See* 17 U.S.C. § 106 (2011).

152. Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 935 (2011).

153. Nakimuli Davis, *Reselling Digital Music: Is There A Digital First Sale Doctrine?*, 29 LOY. L.A. ENT. L. REV. 363, 371 (2009) (citing 17 U.S.C. § 109(a) (2006)).

files. The first sale doctrine applies to sales, not licenses to music.[154] Courts have found that MP3 files may be considered licenses from the music industry in regards to payments to artists.[155] As a licensed work, copyright holders may take steps to limit the use of the MP3 file by users. Additionally, the U.S. Copyright Office has issued a report which renders the opinion that digital copies should not be covered by the first sale doctrine.[156] While this is not binding on the court, it is persuasive.

b. Non-Infringing

The Copyright Act allows users to make copies of their legally purchased music.[157] In the context of software, the Final Report of the *Commission on New Technological Uses* of Copyrighted Works (CONTU) shows how copyright law may be applied to computer programs.[158] Users are allowed to make copies of a computer program as long as users do not retain and alienate copies.[159] Given current trends in how music is being used and distributed, it is not a stretch to extend this logic to MP3 files such that users may make copies of music as long as they do not retain a copy while alienating other copies. This would be an affirmative defense that the user could assert in these instances.

Additionally, if copyright holders were to find a way to limit a user's rights to digital media to the first piece of technology loaded, users would be restricted to a potentially dated piece of technology.[160] Courts have looked to patent law for guidance in this area. In the patent law context, first sale rights include not just the patented invention, but also the reasonable use of the patented invention.[161] Continued enjoyment of the expression is a reasonable use.[162]

Assume a user bought a copy of the complete works of Bob Dylan on CD in 1990. This would be multiple disks and would presumably sell

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154. *See* UMB Recordings, Inc. v. Augusto, 628 F.3d 1175, 1179 (9th Cir. 2011); Quality King Distribs., Inc. v. L'anza Research Int'l, Inc., 523 U.S. 135, 135–36 (1998); Vernor v. Autodesk, Inc., 621 F.3d 1102, 1111–12 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 105 (2011).

155. F.B.T. Prods. LLC v. Aftermath Records, 621 F.3d 958, 965–66 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1677 (2011).

156. Afori, *supra* note 148, at 322 (citing 1 U.S. COPYRIGHT OFFICE, DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 104 REPORT xviii–xix (2001)).

157. 17 U.S.C. § 109(a) (2011).

158. Perzanowski & Schultz, *supra* note 152, at 923 (citing NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REP. 12–13 (1979)).

159. *See* 17 U.S.C. § 117(b) (2011). *But see* Perzanowski & Schultz, *supra* note 152, at 935.

160. *See* Perzanowski & Schultz, *supra* note 152, at 900–01.

161. Afori, *supra* note 148, at 282–83.

162. *Id.* at 282.

for hundreds of dollars. If the user wanted to listen to these on his MP3 player, should copyright law prevent him from transferring those legally purchased songs into a new format? The conversion of CDs to MP3s creates an MP3 file under the ownership of the user, which allows him the continued enjoyment of the music he purchased.[163]

Turning to downloaded music, while a clear license agreement may prevent application of the first sale doctrine,[164] courts are not uniform in finding that downloaded music qualifies as a license. In order to find a license, there must be some affirmative act on the part of the user.[165] The question becomes if a simple clickwrap agreement is sufficient, is a clickwrap enough if it follows all the other trappings of an actual sale? Further, can an agreement be found if it is buried in an extended license agreement? A recent television program showed a comedic exaggeration of how typical users do not review the entire service agreement when purchasing MP3 files.[166]

Regardless of how the MP3 file gets on the user's computer, it comes under the user's control when it arrives. The question then becomes does the copyright holder have the right to dictate what may be done with the legally purchased music, or are the copyright holder's rights exhausted once the purchase is complete?

Additionally, a spokesman for the music industry has stated publically that just because the digital purchase was a license does not mean all digital sales are licenses, as a court case has ruled.[167] If the music industry insists that MP3 files are in fact sales, then the first sale doctrine has to apply. Some businesses are already proceeding in that manner, selling "used" MP3 files.[168]

Because MP3 files may not apply to the classic first sale doctrine, some articles note the idea of "digital exhaustion" as the follow on to the first sale doctrine.[169] Copyright holders have attempted to use

163. *See* Sara Steetle, UMB Recordings, Inc., v. MP3.com, Inc.: *Signaling the Need for a Deeper Analysis of Copyright Infringement of Digital Recordings*, 21 LOY. L.A. ENT. L. REV. 31, 34–36 (2000).

164. *See* Vernor v. Autodesk, Inc., 621 F.3d 1102, 1111–12 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 105 (2011).

165. UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1182 (9th Cir. 2011) (citing the RESTATEMENT (SECOND) OF CONTRACTS § 69 cmts. a, c (1979)).

166. *South Park: Human CentiPad* (Comedy Central television broadcast Apr. 27, 2011), *available at* http://www.southpark studios.com/full-episodes/s15e01-humancentipad (depicting when a character did not review a terms of service agreement with an online music provider and inadvertently agreed to be used for an experiment).

167. *See* Block, *supra* note 58.

168. REDIGI, https://www.redigi.com/home.html (last visited Nov. 11, 2012).

169. Perzanowski & Schultz, *supra* note 152, at 935–37.

licenses to restrict sales, with only limited success.[170] Such a digital exhaustion doctrine would provide structure in these situations and eliminate potential confusion.

Digital exhaustion acts as an alternative to fair use or implied license.[171] Digital exhaustion could be used as an affirmative defense where the user must show that he divested himself of all copies when he sold the music.[172] Such an example would be proof that once a digital copy was sold to another user, the original user deleted all copies he had.[173]

Digital exhaustion, if found, assumes that the creation of the digital copy is implicit in the purchase, without a fair use analysis.[174] As with all affirmative defenses, it is something the user must prove.[175] This burden of proof is no different than that of a person who purchases software, uses it, then deletes the program and sells the software to a third party.

4. Implied License

Another avenue that has been considered is the idea of an implied license. The idea stems from the question of whether enforcement of copyright in this instance promotes progress or just looks for another way to get money off something already sold.[176] Traditionally, implied licenses have been in one of two categories.[177] First, there are issues that parties knew about and intended to address without placing them in the contract.[178] Second, there are issues that would have been addressed if brought to a party's attention at the time of the contract.[179] Some have suggested that a third type of implied license may be needed to reflect equity.[180]

Courts have found that there is no definitive test to differentiate

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170. *Id.* at 901–02 (citing David Nimmer et al., *The Metamorphosis of Contract to Expand*, 87 CALIF. L. REV. 17, 36–40 (1999); John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 31–33 (2004); *see also, e.g.*, UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1180 (9th Cir. 2011); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 938 (2008)).

171. See *id.* at 941–42.

172. *Id.* at 938–39.

173. *Id.*

174. *Id.* at 942.

175. *See id.*

176. Michael Grynberg, *Property Is a Two Way Street: Personal Copyright Use and Implied Authorization*, 79 FORDHAM L. REV. 435, 446 (2001) (citing MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 7 (2008)).

177. Afori, *supra* note 148, at 290 (citations omitted).

178. *Id.*

179. *Id.*

180. *Id.* (citing KIM LEWISON, THE INTERPRETATION OF CONTRACTS 152 (3d ed. 2004)).

between a license versus a sale.[181] Looking to patent law, a license may be found through the patent owner's conduct and the user's expectations based on the patent owner's conduct.[182] The implied license doctrine was later incorporated into copyright.[183] Presumably the ideas in patent law for licenses would translate into copyright law when there is a question of whether a license is in fact a sale.[184] The circumstances of the purchase can lead to a determination if the purchase should have an implied license and therefore impact the analysis of the Amazon Cloud Player.[185]

a. Infringing

The prevailing rule is that a license outside the agreement is not recognized when there is an agreement between two parties. There is no implied license recognized by the courts at this time beyond the accepted first sale doctrine to augment another formal agreement.[186] Further, implied licenses may be expressly disavowed by the copyright holder.[187]

b. Non-Infringing

The Copyright Act requires copies to be authorized, but does not specify how copyright authorization should occur.[188] When looking for authorization, courts should look if there is an objectively reasonable expectation to the use of a copy of the music even if the copyright

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181. Vernor v. Autodesk, Inc., 555 F. Supp. 2d 1164, 1168–69 (W.D. Wash. 2008).

182. Afori, *supra* note 148, at 280–81 (citing 6 DONALD S. CHISUM, CHISUM ON PATENTS, § 19.05(3)(c) (2007)).

183. *Id.* at 281.

184. *Id.*

185. *Id.* at 282–83.

186. *Id.* at 281.

187. Perfect 10, Inc., v. Amazon.com, Inc., 487 F.3d 701, 726–29 (9th Cir. 2007), *opinion amended on reh'g*, 508 F.3d 1146 (9th Cir. 2007), *cert. denied*, Perfect 10, Inc. v. Google, Inc., 132 S. Ct. 1713 (2012); *see also* Joseph Liu, *Owning Digital Copies, Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1268 (2001) (citing *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 567 (1997)).

188.

> Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

17 U.S.C. § 109(c) (2011).

holder now challenges it.[189] An implied license may help resolve the tension between copyright holders and the expectations of users.[190]

Assuming for a moment that there is in fact a "contract" between the user and the copyright holder, it would only be recently that these contracts explicitly cover digital media as MP3 is a relatively new format.[191] If a contract did exist, then courts may find that, in addition to the rights in the contract, users may need supplemental rights in order to enjoy the product.[192]

Further, there is a question as to whether a simple statement of notice would be sufficient to disavow a possible implied license in a time where physical ownership is not necessary to enjoy a copyright protected work.[193] An implied license may also be found even in the presence of an explicit licensing agreement.[194] If the economic reality of the situation is a sale, then the copyright holder cannot disguise the sale as a license by merely stating there is a licensing agreement.[195] Courts may find an implied license to give the purchase the effect of a sale.

Even if there is a licensing agreement found for MP3 files, there are no licensing agreements when CDs are sold. If there is no contract, then courts could find an implied license is needed to resolve these issues. However, this could lead to a confusing set of rights in the future based on different categories of MP3 files.

D. *Analogous Laws*

A law currently in effect that may provide guidance in this developing area of law is the Audio Home Recording Act (AHRA),[196] which was passed in 1992 with an eye to digital tape recorders.[197] This law has fallen into near obscurity due to the focus on digital tape, which

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189. *See* Grynberg, *supra* note 176, at 476.

190. *Id.* at 454–55 (citing *e.g.*, Afori, *supra* note 148, at 290; Raghu Seshadri, *Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap*, 2007 UCLA J.L. & TECH. 3; John S. Sieman, *Comment, Using the Implied License to Inject Common Sense Into Digital Copyright*, 85 N.C. L. REV. 885, 921 (2007)).

191. *See* Block, *supra* note 58.

192. Afori, *supra* note 148, at 285 (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 10.10(c) (2008)).

193. *Cf.* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350–51 (1908) (holding that copyright owner who sold books could not dictate the future sale price of books).

194. *See* Grynberg, *supra* note 176.

195. *See, e.g.*, SoftMan Prod. Co. v Adobe Sys., Inc., 171 F. Supp. 2d 1075, 1084 (C.D. Cal. 2001) (describing the process of looking to the "economic realities of the exchange" to determine the true nature of a transaction).

196. 17 U.S.C. § 1008 (2012) (prohibiting actions for consumer recording).

197. *See, e.g.*, Robert L. Masterson, Comment, *Converting Obsolete Musical Media to Current Formats: A Copyright Infringement Defense Arising from the Right to Repair and Implied Warranty of Fitness*, 82 TEMP. L. REV. 281, 289–90 (2009).

never caught on as a format. However, this law may be used as a template to draft new legislation or to interpret existing laws.

Before the advent of commercially available digital audio recording devices, music copying was widespread, but there was a notable degradation in quality between the original purchased copy and subsequent copies.[198] With digital technology, the unauthorized copy is virtually identical to the original, no matter how many steps removed the copy is from the original. Copyright holders were concerned that piracy would skyrocket if digital audio recorders were available in the United States.[199] Digital audio recorder manufactures were also concerned, as they feared that they would not be able to enter the U.S. market without the support of the music industry, as CDs were becoming the new standard.[200]

The AHRA drafted a compromise between the manufacturers and the copyright holders.[201] Digital audio recording devices would have to contain serial copy management system (SCMS) technology to prevent copies being made from anything other than a legally produced copy.[202] Also, a royalty would be paid on every digital audio recorder.[203] The AHRA also specifically immunized home recordings from infringement.[204] If we assume for a moment that if Congress were to update this law to account for current technology, it would also immunize home recordings before they were uploaded to Amazon Cloud Player, which would make them non-infringing.

One of the principle reasons the AHRA has almost fallen into obscurity is the narrow definition of the digital audio recording

198. *See, e.g.*, Joel L. McKuin, *Home Audio Taping of Copyrighted Works and the Audio Home Recording Act of 1992: A Critical Analysis*, 16 HASTINGS COMM. & ENT. L.J. 311, 329 (1994).

199. *See* S. 506, 100th Cong., 1st Sess. (1987); H.R. 1384, 100th Cong., 1st Sess. (1987); *see also Hearing on S. 2358 before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci. & Transp.*, 101st Cong. 2d Sess., 10 (1990).

200. S. REP. NO. 102-294 (1992).

201. *See* 17 U.S.C. §§ 1001–10 (2012).

202. *Id.*

203. *Id.*

204.

> No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

Id. § 1008.

devices.[205] This definition was restricted to devices that solely functioned as a digital audio recorder for music.[206] Computers with CD drives were exempted because they have more than one function.[207] MP3 players were found legal under the AHRA as they received their copies from general purpose computers, which were specifically exempted by the AHRA.[208]

If the AHRA was to be used as a guide, new legislation could be drafted to address these issues. If the requirements of the AHRA were applied to the Amazon Cloud Player, then Amazon Cloud Player could be forced to pay a royalty, albeit one that the copyright holder may find inadequate. Further, if the ARHA was followed, dicta in the court's decision suggests that space shifting is allowed under the provisions of the AHRA.[209] Assuming all other things being equal, an updated law based on AHRA would presumably allow space shifting.

205.

> A "digital audio recording device" is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use . . . .

Id. § 1001(3).

206. *See id.* § 1001(4).

207. *See id.* § 1001(3)(A)–(B).

208. *Id.*

209.

> In fact, the Rio's operation is entirely consistent with the Act's main purpose — the facilitation of personal use. As the Senate Report explains, "[t]he purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their *private, noncommercial use*." S. Rep. 102-294, at *86 (emphasis added). The Act does so through its home taping exemption, *see* 17 U.S.C. S 1008, which "protects all noncommercial copying by consumers of digital and analog musical recordings," H.R. Rep. 102-873(I), at *59. The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. *Cf.* Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 455, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (holding that "time-shifting" of copyrighted television shows with VCR's constitutes fair use under the Copyright Act, and thus is not an infringement). Such copying is paradigmatic non-commercial personal use entirely consistent with the purposes of the Act.

Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999).

V. ANALYSIS

A. *Recent Developments*

Courts are currently struggling with how to reconcile technological advances with copyright law and are having mixed results.

1. YouTube

For a case involving infringement allegations in general in respect to the Internet, a recent case involving YouTube provides some indication as to where courts are headed.[210] Viacom and others had brought suit against YouTube for allegedly infringing their copyrights by allowing users to upload vast amounts of copyright protected materials.[211]

The judge found that YouTube had complied with DMCA requirements for safe harbor.[212] While the owners of YouTube may have suspected infringing materials were being uploaded, they were under no affirmative duty to inspect which files were infringing.[213] When YouTube received notice of infringing files, they promptly removed those files to maintain DMCA compliance.[214] Additionally, the court rejected the idea that YouTube was similar to Grokster and other services, which are now synonymous with piracy.[215]

It should be noted that in this case, YouTube has a search function that easily allows users, and copyright holders, to search the entire site to locate potentially infringing materials. This feature is absent from other situations generally where the ISP does not provide a way for users to search for possibly infringing content.

2. Hotfile

For a case involving the space shifting issues raised in this Article, the case against Hotfile may provide some guidance. A Federal District Court has dismissed charges against the Hotfile digital locker service for direct infringement for storing copies of files that may be accessed remotely.[216] It remains to be seen if indirect infringement will be found.[217]

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210. *See* Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010).
211. *Id.* at 518–19.
212. *Id.* at 528–29.
213. *Id.* at 525.
214. *Id.* at 524.
215. *Id.* at 525–26.
216. *See* Disney Enters., Inc. v. Hotfile Corp., 798 F. Supp. 2d 1303, 1311 (S.D. Fla. 2011).
217. *Id.*

There are several key differences between Amazon Cloud Player and Hotfile. First, an MP3 file on Hotfile has to be downloaded before it can be played, negating the rebroadcasting issue.[218] Additionally, Hotfile is set up so that others besides the uploading user may access the file.[219] Under the current Hotfile operating agreement, if a user's file is accessed repeatedly, the user will be rewarded monetarily.[220] Some suggest that such an arrangement may be an inducement to infringement.[221] However, Hotfile does not tell users what files are loaded on Hotfile. In order to locate a file to download from Hotfile, someone outside of Hotfile must tell potential infringers what files are located on the Hotfile website.[222]

Hotfile has taken steps to remove copyright protected material per the DMCA.[223] It has even gone so far as to allow copyright holders access to Hotfile so that they may delete the infringing content without the assistance of Hotfile.[224] This is now being reconsidered as Hotfile has sued a copyright holder on the basis the owner deleted files the copyright holder did not have a right to delete.[225]

While Hotfile was found not liable for direct infringement, other services that allow users to upload files for others to download have been found liable for infringement. In *Arista Records LLC v. Usenet.com*, Usenet.com offered users the ability to upload files for others to download.[226] The Court ruled Usenet.com to be directly infringing, indirectly infringing, and inducing infringement.[227] The Court found that Usenet.com was aware of the infringing files and interacted with the infringers to a level that made them active participants in the infringement.[228] Further, Usenet.com was found vicariously liable as they profited from the infringement.[229] While Usenet.com asserted a DMCA safe harbor defense, this was rejected as

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218. *See Hotfile*, WIKIPEDIA, http://en.wikipedia.org/wiki/Hotfile (last visited Nov. 11, 2012).

219. *See FAQ*, HOTFILE, http://hotfile.com/faq.html (last visited Nov. 11, 2012).

220. *See Affiliate*, HOTFILE, http://hotfile.com/affiliate.html (last visited Nov. 11, 2012).

221. *See* Timothy B. Lee, *Judge Rules "Locker" Site is not Direct Copyright Infringer*, ARS TECHNICA (July 11, 2011, 6:16 PM), http://arstechnica.com/tech-policy/news/2011/07/judge-rules-locker-site-is-not-direct-copyright-infringer.ars.

222. *See FAQ*, HOTFILE, http://hotfile.com/faq.html (last visited Nov. 11, 2012).

223. *See* Timothy B. Lee, *Hotfile Turns Tables, Accuses Warner Brothers of DMCA Abuse*, ARS TECHNICA (Sept. 13, 2011, 6:31 PM), http://arstechnica.com/tech-policy/news/2011/09/hotfile-turns-tables-accusing-warner-brothers-of-dmca-abuse.ars.

224. *Id.*

225. *Id.*

226. Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 131–32 (S.D.N.Y. 2009).

227. *Id.* at 146–58.

228. *Id.* at 155.

229. *Id.* at 158–59.

the judge found Usenet.com had destroyed evidence, showing bad faith on the part of Usenet.com.[230]

Another on-line file storage site that has been accused of infringement was MegaUpload. The owners of MegaUpload have been indicted in Federal Court on multiple counts of copyright infringement based on the theory that MegaUpload was used primarily for copyright infringement purposes.[231] MegaUpload has asserted the DMCA safe harbor provision as a defense.[232] The case is currently pending.

Soon after MegaUpload was shut down, film studios asked for summary judgment against Hotfile on the belief that Hotfile operates in the same manner as MegaUpload.[233] Warner Brothers has alleged that Hotfile has acted as an indirect infringer.[234]

While Hotfile has removed files in compliance with the take down notices, Warner Brothers alleges that several acts of Hotfile vitiate the DMCA protections, including failure to register an agent for process,[235] a lack of an effective policy to prevent repeat infringers,[236] constructive knowledge of infringing activities,[237] and inducement.[238]

In response to the latest summary judgment request, Google filed an *amicus* brief in Hotfile's defense showing how DMCA requirements have been satisfied, entitling Hotfile to safe harbor protections.[239] In the brief, Google contends that the DMCA is applicable in this case and is necessary for the protection of Internet-based services against infringement claims.[240] Google presents an argument reminding the

230. *Id.* at 140–41.

231. *See* Indictment, United States v. Kim Dotcom, No. 1:12CR3 (E.D. Va. Jan. 5, 2012).

232. John Campbell, *Kim Dotcom's First TV Interview: 'I'm No Piracy King,'* 3NEWS (Mar. 1, 2012, 7:30 PM), http://www.3news.co.nz/Kim-Dotcoms-first-TV-interview-Im-no-piracyking/tabid/817/articleID/244830/Default.aspx.

233. Plaintiffs' Motion and Memorandum of Law in Support of Summary Judgment Against Defendants Hotfile Corp. & Anton Titov, Hotfile Corp. v. Warner Bros. Entm't, Inc., No. 11-20427 (S.D. Fla. Mar. 5, 2012) [hereinafter Plaintiffs' Motion]; *see also* Jon Brodkin, *Emboldened by Megaupload Shutdown, Hollywood Targets Hotfile*, ARS TECHNICA (Mar. 8, 2012, 11:56 AM), http://arstechnica.com/tech-policy/2012/03/emboldened-by-megaupload-shutdown-hollywood-targets-hotfile; Eriq Gardner, *MPAA on Hotfile: More Egregious Than Grokster, Indistinguishable From Megaupload*, HOLLYWOOD REPORTER (Mar. 8, 2012 12:44PM), http://www.hollywoodreporter.com/thr-esq/mpaa-hotfile-grokster-megaupload-297672.

234. Plaintiffs' Motion, *supra* note 233, at 29–35.

235. *Id.* at 22–23.

236. *Id.* at 19–22.

237. *Id.* at 24–27.

238. *Id.* at 27–29.

239. Brief of Amicus Curiae Google Inc., Hotfile Corp. v. Warner Bros. Entm't, Inc., No. 11-20427 (S.D. Fla. Mar. 12, 2012); *see also* Paul Sloan, *Google Defends Hosting Site Under Attack by MPAA*, CNET (Mar. 19, 2012, 3:27 PM), http://news.cnet.com/8301-1023_3-57400361-93/google-defends-hosting-site-under-attack-by-mpaa.

240. Brief of Amicus Curiae Google Inc., *supra* note 239, at 2–5.

court that the copyright holder bears the burden of informing the service provider (in this case Hotfile) as to the presence of infringing materials and then allow Hotfile time to remove them.[241] Google then argues that the DMCA safe harbor provides protection from all infringement claims.[242]

The Hotfile case is still pending. This case's impact on the Amazon Cloud Player may be based on whether the court finds a distinction between the user having exclusive access to a file or the ability of other users to access a file.

3. Zediva

For issues of how courts address public performances, a recent example comes from Zediva, which operated a service that worked in many ways like a streaming video service. Unlike Amazon Cloud Player, Zediva actually had legally purchased physical copies of movies on DVD that were streamed to the user. With Zediva, users rented both a DVD and a DVD player remotely. The Zediva system allowed the user to control the DVD player from his computer, the effect being similar to a DVD player in the user's own home.[243] Copyright holders accused Zediva of transmitting their works to the public without a license.[244] Zediva has discontinued operations due to the litigation.[245]

The decisions of the courts are currently in conflict as to whether services like Zediva qualify as infringement.[246] These conflicts tend to be based on notions of whether the user's viewing location was private and also upon the physical proximity between the viewer and the

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241. *Id.* at 5–15.

242. *Id.* at 15–17.

243. *See* Ryan Singel, *Is Zediva's New-Release Movie Streaming Service Legal?*, WIRED (Mar. 23, 2011, 12:08 PM), http://www.wired.com/threatlevel/2011/03/zediva-copyright.

244. Warner Bros. Entm't, Inc. v. WTV Sys., Inc., 824 F. Supp. 2d 1003, 1007 (C.D. Cal. Aug. 01, 2011).

245. Ryan Singel, *Streaming Movie Service Zediva Pays Hollywood $1.8M, Shuts Down*, WIRED (Oct. 31, 2011, 8:18 PM), http://www.wired.com/threatlevel/2011/10/streaming-movie-service-zediva-pays-hollywood-1-8m-shuts-down.

246. *See* Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 568 F. Supp. 494, 500 (W.D. Pa. 1983), *aff'd*, 749 F.2d 154 (3d Cir. 1984) (ruling that a booth in a video store is a public performance); *see also* On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 789–90 (N.D. Cal. 1991) (finding that if a guest in a hotel room receives video from the front desk, that is a public performance); Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59, 62–63 (3d Cir. 1986) (ruling that if the customer takes the tape into the rented room it is a public performance). *But see* Columbia Pictures Indus. v. Prof'l Real Estate Investors, 866 F.2d 278, 280–82 (9th Cir. 1989) (finding that if the customer takes the tape into the hotel room it is not a public performance because hotel rooms are "places where individuals enjoy a substantial degree of privacy, not unlike their own homes").

broadcaster.[247] Another potential conflict recognized by one commentator is that unlike *Cablevision*, where each user has an individual copy, Zediva presented a single copy to multiple users over time.[248]

4. Aereo

Courts also now have to look at online services that were created specifically to conform to the *Cablevision* decision with respect to copyright protected works that users can otherwise enjoy for free. One of these is Aereo, which provides users with the ability to watch a limited number of television stations over the Internet.[249] Aereo receives traditional broadcast television signals that are freely broadcast to the public and converts those signals into an Internet compatible format which users may view in near real time or may store like the previously mentioned RS-DVR.[250] Aereo currently provides these services in the New York City area.[251]

Aereo bears similarities to previous over the Internet broadcast television providers iCraveTV, ivi, and FilmOn. ICraveTV was a Canadian-based service that provided users with uncut television programs from broadcast television.[252] ICraveTV was sued by various interests, and it ceased operations in 2000.[253] FilmOn's over the Internet television services were enjoined by a court order in 2010[254] and agreed to a permanent injunction in 2012.[255] An injunction against ivi's streaming broadcast television services was upheld by the Second

247. *See supra* note 246.

248. *See supra* note 246; James Grimmelmann, *Why Johnny Can't Stream: How Video Copyright Went Insane*, ARS TECHNICA (Aug. 20, 2012, 8:00 AM), http://arstechnica.com/tech-policy/2012/08/ why-johnny-cant-stream-how-video-copyright-went-insane.

249. *See* Available Channels, AEREO, https://aereo.com/channels (last visited Nov. 23, 2012).

250. FAQ: Support Center, How does Aereo work?, AEREO, http://support.aereo.com/customer/portal/articles/580124-how-does-aereo-work (last visited Nov. 23, 2012).

251. FAQ: Support Center, Do I need to live in New York City to join Aereo?, AEREO, http://support.aereo.com/customer/portal/articles/382679-do-i-need-to-live-in-new-york-city-to-join-aereo (last visited Nov. 23, 2012).

252. John Borland, *Broadcasters Win Battle Against iCraveTV.com*, CNET (Jan. 28, 2000, 5:50 PM), http://news.cnet.com/2100-1033-236255.html.

253. John Borland, *iCraveTV.com Exec Discusses His Start-up's Short Life*, CNET (Feb. 29, 2000, 5:15 PM), http://news.cnet.com/2100-1033-237450.html.

254. Peter Kafka, *Goodbye, Free TV on Your iPad. For Now . . .*, ALL THINGS D (Nov. 22, 2010, 6:05 PM), http://allthingsd.com/20101122/goodbye-free-tv-on-your-ipad-for-now.

255. Eriq Gardner, *TV Broadcasters Settle Digital Lawsuit, But 'Aereo-Like' Service Won't Die*, HOLLYWOOD REPORTER (Aug. 1, 2012, 1:13PM), http://www.hollywoodreporter.com/thr-esq/lawsuit-alki-david-barry-diller-filmon-357288.

Circuit.[256]

Aereo tries to resolve the impediments faced by previous over-the-Internet broadcast television providers by adopting a model based on *Cablevision*. The unique feature of this service is that there is an individual television antenna assigned to each user.[257] As the subtitle of a news article recently said, "Deploying 10,000 tiny antennas makes no technical sense- but the law demands it."[258] In a manner similar to Zediva's system where the user rents a DVD player, Aereo claims that each user is renting an antenna. In effect, the user's antenna is simply connected to the user's computer by a very long cable much like the storage in *Cablevision* was connected to the user.[259] Each individual antenna is going to an individual user, making the transmission non-public per *Cablevision*.[260] Some have noticed that Aereo may be needed to enjoy broadcast television in the New York City area due to the large number of tall buildings blocking the signal.[261]

Two lawsuits have been filed in the Southern District of New York alleging that Aereo violates copyright law.[262] Motions for injunction against Aereo have been denied, and the case is set for trial.[263] Aereo has filed an appeal directly to the Second Circuit, which decided the *Cablevision* case. Aereo's contention is that *Cablevision* immunizes them from suit, and that the Second Circuit would have to overturn the *Cablevision* decision in order to find Aereo liable for copyright

256. Doug Halonen, *Ivi TV Loses Bid to Get Back into Online Rebroadcasting Business*, YAHOO TV (Aug. 27, 2012, 6:21 PM), http://tv.yahoo.com/news/ivi-tv-loses-bid-back-online-rebroadcasting-business-211622339.html.

257. Roger Parloff, *Aereo is Leaving the Courts Dazed and Confused*, CNN MONEY (May 21, 2012, 5:00 AM), http://tech.fortune.cnn.com/2012/05/21/aereo; Erick Schonfeld, *Barry Diller Wants To "Transform Television" With Aereo, A DVR in the Cloud*, TECH CRUNCH (Feb. 14, 2012), http://techcrunch.com/2012/02/14/diller-aereo-dvr-cloud.

258. James Grimmelmann, *Why Johnny Can't Stream: How Video Copyright Went Insane*, ARS TECHNICA (Aug. 20, 2012, 8:00 AM), http://arstechnica.com/tech-policy/2012/08/why-johnny-cant-stream-how-video-copyright-went-insane.

259. Michelle Clancy, *In Latest Legal Move, Aereo Says It Complies with Cablevision Settlement*, RAPID TV NEWS (Oct. 23, 2012), http://www.rapidtvnews.com/index.php/24634/in-latest-legal-move-aereo-says-it-complies-with-cablevision-settlement.html.

260. *See* Cartoon Network v. CSC Holdings, Inc., 536 F.3d 121, 139 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009).

261. John Moe, *Aereo May Never Get the Chance to Revolutionize TV*, MARKETPLACE (Mar. 14, 2012), http://www.marketplace.org/topics/tech/aereo-may-never-get-chance-revolutionize-tv.

262. Complaint, Am. Broad. Co., Inc. v. Aereo, No. 12 Civ. 1540 (S.D.N.Y. Mar. 1, 2012), 2012 WL 676194; Complaint, WNET v. Aereo, No. 12 Civ. 1543 (S.D.N.Y. Mar. 1, 2012), *2012 WL 870296.*

263. Am. Broad. Co., Inc. v. Aereo, 2012 WL 284158 at *29 (S.D.N.Y. July 11, 2012); *see also* Ryan Lawler, *Judge Sides With Diller-Backed Streaming TV Startup Aereo Over Broadcasters on Injunction*, TECH CRUNCH (July 11, 2012), http://techcrunch.com/2012/07/11/aereo-wins-injuction.

infringement.[264] Aereo creates individual, unique copies for users to access, in compliance with *Cablevision*.[265] Aereo also believes that the rebroadcasting licensing issue is not applicable as each antenna feed or recording is going to a single unique user in accordance with established case law.[266] Aereo also asserts that *Cablevision* allows real-time streaming.[267]

Curiously, Cablevision has filed an *amicus* brief against Aereo saying that *Cablevision* is not applicable in this matter. Cablevision's *amicus* brief points out that Cablevision is a cable television provider, and therefore pays retransmission fees.[268] Cablevision also says Aereo fails under the transmit clause[269] and violates the reproduction right.[270] Aereo has received supporting *amici* from the Electronic Frontier Foundation[271] and a brief jointly file by the Computer and Communications Industry Association (CCIA) (made up of Microsoft, Google, DISH, and Sprint) and the Internet Association (made up of Amazon.com, Facebook, and IAC).[272] These briefs state that various companies have invested in cloud computing based on *Cablevision*, and any change would seriously impact the cloud computing industry.[273] Further, they advance the premise that Congress should be the ones to make any further decision in this area since Congress can make a wholesale change and not a series of decisions over time, leading to

264. Consol. Brief of Defendant, Counter Claimant, Appellee Aereo, Inc. at 8–9, WNET v. Aereo, Nos. 12-2786 & 12-2807 (2d. Cir. Oct. 19, 2012) [hereinafter Aereo Consolidated Brief]; *see also* Jordan Crook, *Streaming TV Startup Aereo Files Appeal In Network Case, Cites Cablevision Precedent*, TECH CRUNCH (Oct. 22, 2012), http://techcrunch.com/2012/10/22/streaming-tv-startup-aereo-files-appeal-in-network-case-cites-cablevision-precedent.

265. Aereo Consolidated Brief, *supra* note 264, at 32–38.

266. *Id.* at 42–53.

267. *Id.* at 60–63.

268. Brief for Amicus Curiae Cablevision Sys. Corp. in Support of Reversal at 3-6, WNET v. Aereo, Nos. 12-2786 & 12-2807 (2d. Cir. Sept. 21, 2012) [hereinafter Brief of Amicus Curiae Cablevision]; *see also* Joe Flint, *Cablevision Takes Side of Broadcasters in Fight Against Aereo*, L.A. TIMES (Sept. 24, 2012), http://articles.latimes.com/2012/sep/24/ entertainment/la-et-ct-cablevision-aereo-20120924; 17 U.S.C. § 111 (2011).

269. Brief of Amicus Curiae Cablevision, *supra* note 268, at 6–26.

270. *Id.* at 26–29.

271. Amici Curiae Brief of the Elec. Frontier Found., Pub. Knowledge & Consumer Elecs. Ass'n in Support of Appellee & Affirmance, WNET v. Aereo, No. 12-2786 (2d Cir. Oct. 26, 2012); *see also* Michael Grotticelli, *Aereo Gets Support in Legal Case Against Broadcasters*, BROADCAST ENGINEERING (Oct. 31, 2012), http://broadcastengineering.com/company-news/aereo-gets-support-legal-case-against-broadcasters.

272. Brief Amici Curiae of the Computer & Commc'ns Indus. Ass'n & Internet Ass'n in Support of Affirmance, WNET v. Aereo, No. 12-2786 (2d Cir. Oct. 25, 2012) [hereinafter Brief of Amicus Curiae CCIA]; *see also* Grotticelli, *supra* note 271.

273. Brief of Amicus Curiae CCIA, *supra* note 272, at 5–8; *see also* Grotticelli, *supra* note 271.

uncertainty and conflicting court decisions.[274]

An issue in these cases involves the rebroadcasting right, specifically the right over secondary transmission of broadcasted works.[275] The Copyright Act provides that cable and satellite television providers are protected subject to a licensing scheme.[276] As a result, cable and satellite providers pay a licensing fee for signals they receive and then retransmit to users. Aereo says that their business model does not require a retransmission fee as they are simply relaying something the users had access to due to the nature of the broadcast.[277] Further, Aereo contends that Cablevision's argument is incorrect because that argument contradicts Cablevision's own argument in the *Cablevision* case.[278]

While the Second Circuit could find completely in favor of Aereo, it is also possible they could differentiate *Cablevision* based on the fact Cablevision originally held a license to transmit the copyright protected shows. Such a distinction could impact the analysis of the Amazon Cloud Player. If the Second Circuit does differentiate Aereo from *Cablevision* based on the fact that Cablevision is a licensed rebroadcaster, then any issue of rebroadcasting will be tied into a licensing analysis, regardless of how the copyright protected work was originally distributed. Another issue is that the Second Circuit in *Cablevision* specifically stated that simply giving each user a unique copy of a file to access did not absolve them of liability in the future and that infringement may be found with a slightly different fact pattern.[279]

The issue of Internet-based services giving users access to broadcast television over the Internet has already been addressed outside of the United States. In Australia, a court found that it was acceptable for an Internet provider to stream broadcast television, citing a time shifting statute of the Australian Copyright Act (most recently updated in 2006).[280]

While Aereo may be impacted by the complexities of a television rebroadcasting license analysis and Amazon Cloud Player is not, a ruling that providing access to content that is otherwise free to the user (be it broadcast television or MP3 files) is subject to control by the

274. Brief of Amicus Curiae CCIA, *supra* note 272, at 12–14; *see also* Grotticelli, *supra* note 271.

275. 17 U.S.C. §§ 111, 119 (2011).

276. *Id.*

277. Aereo Consolidated Brief, *supra* note 264, at 58–60.

278. *Id.* at 55–58.

279. Cartoon Network v. CSC Holdings, Inc., 536 F.3d 121, 139–40 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009).

280. Singtel Optus Pty, Ltd. v. Nat'l Rugby League Invs. Pty, Ltd. (No. 2) [2012] FCR 34 (Austl.); *see also* Jamelle Wells, *Optus Wins Landmark TV Rights Case*, ABC NEWS (Feb. 2, 2012), http://www.abc.net.au/news/2012-02-01/optus-wins-landmark-footy-copyright-case/3805306.

content provider could have an unpredictable impact against the Amazon Cloud Player.

5. MP3Tunes

In a matter involving public performance and space shifting, an almost decade-long legal battle that began with MP3.com has recently been resolved. MP3.com was founded in 2000 and offered an early version of a digital music locker. MP3.com was created during a time when high speed Internet was not widely available. In order to work around the problem of extended upload times, MP3.com would direct the user to place a CD in his computer to verify the user owned the CD. Once MP3.com had proof of ownership, they would allow users to access the copy of the music stored at MP3.com. MP3.com in many ways is set up like Apple's iCloud remote service with the distinct difference of not having obtained licenses from copyright holders. A lawsuit was filed by against MP3.com by RIAA.[281] The MP3.com lawsuit was later settled.[282]

The owner of MP3.com later created MP3Tunes.com. Like Amazon Cloud Player, MP3Tunes.com allowed users to store their music in digital music lockers and stream the music back to the users. Copyright holders sent DMCA take down notices demanding, among several issues, that copies of songs they could prove were obtained illegally be deleted from digital music lockers. MP3Tunes.com took steps to prevent future songs from being illegally loaded, but those already in the digital music lockers were not deleted. Copyright holders quickly filed suit against MP3Tunes.com alleging that MP3Tunes.com was infringing their copyright by storing files on the MP3Tunes.com server and publicly performing music.[283] MP3Tunes.com claimed immunity under the DMCA safe harbor provisions.[284]

The court examined the DMCA safe harbor provisions and found them satisfied for the most part.[285] MP3Tunes.com had a system to respond to takedown notices, did not interfere with the copyright holder's ability to issues the notices, and terminated repeat infringers.[286] The court also reiterated that MP3Tunes.com was under no affirmative obligation to police the site absent clearly egregious evidence of

281. *See generally* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

282. Amy Harmon, *Deal Settles Suit Against MP3.com*, N.Y. TIMES, Nov. 15, 2000, *available at* http://www.nytimes.com/2000/11/15/business/technology-deal-settles-suit-against-mp3com.html?pagewanted=all&src=pm.

283. *See* Capitol Records, Inc. v. MP3tunes LLC, 821 F. Supp. 2d 627 (S.D.N.Y. 2011).

284. *Id.* at 636–37.

285. *Id.* at 645–46.

286. *Id.* at 638–39.

copyright violation.[287] The court found that, if an investigation was needed to determine if a copy was unauthorized, by definition it cannot be egregious.[288] The court found MP3Tunes.com liable since it needed to remove files it knew about, but it otherwise qualified for safe harbor.[289] The court also ruled that users, not MP3Tunes, were the parties who placed items in the digital lockers.[290]

As an added note, space shifting is not mentioned anywhere in the opinion.[291] The entire case was based on existing interpretations of the DMCA. Therefore, space shifting has not yet been found legal under the DMCA, but the mechanism by which space shifting occurred in this case has been found legal as long as it complied with the DMCA safe harbor provisions.

As an additional finding, the Court addressed the issue of all users being able to access a single uploaded copy of a file (unlike Amazon Cloud Player which each user loads his own copy of the file to the server). The Court found that deduplication is allowed.[292] This is significant as it allows the service to keep one copy of a file as opposed to copies for each individual user, reducing memory costs.

In a letter to the music industry, Amazon.com suggested they may seek licenses in the future to allow deduplication.[293] If this ruling stands, one of the only areas that Amazon.com considers a legitimate licensing requirement will become moot. However, deduplication must only be for identical files. If one copy of "All Along the Watchtower" is 3:30, and another user's copy is 3:31, then deduplication is not allowed as the files are not identical.

6. Dropbox

While there is no case currently pending against Dropbox, their use of deduplication does lead to some possible piracy issues. Dropbox uses deduplication in their service, so when a computer prepares to upload an MP3 file, Dropbox searches for identifying information in the MP3 file. Dropbox officials have noted that there is a potential for abuse with this system.[294] A savvy user may take an MP3 file and change the

287. *Id.* at 638–40.

288. *Id.* at 644.

289. *Id.* at 645–46.

290. *See id.*

291. *Id.*

292. *Id.* at 634, 649–50 (Deduplication is a data reduction algorithm where multiple copies of the same file are deleted in order to reduce memory costs.).

293. Houghton, *supra* note 27.

294. *See* Mark Milian, *Court Clears Cloud Music Providers to Expand Features*, CNN (Aug. 23, 2011), http://articles.cnn.com/2011-08-23/tech/cloud.music_1_arash-ferdowsi-google-s-music-music-beta?_s=PM:TECH.

identifying information of the song. As a result, a copy of "Moonlight Sonata" that the user legally paid for could be replaced with "Anarchy in the UK" on the Dropbox system. Given the possibility of abuse in this situation, Dropbox may be next on the list of targets for copyright holders to sue in court.

7. ReDigi

The question of what a user can do with a legally purchased MP3 has been around for almost a decade.[295] This question has taken on new importance with the creation of ReDigi, an online version of a used CD store. ReDigi allows users a way to remonetize their purchase of an MP3 file. As the owner of ReDigi states, "Most lawful users of music and books have hundreds of dollars of lawfully obtained things on their computers and right now the value of that is zero dollars."[296] ReDigi may give an insight into what courts think is allowed with legally purchased MP3s.

Users wanting to sell their used MP3s must download ReDigi software to their computer, which scans the computer for MP3 files. Once the files are identified, the user may select which ones are to be sold. When the MP3 is sold, the software uploads the MP3 file to the ReDigi server. The software then deletes the MP3 file from the user's computer and prevents the user from loading an archived copy back onto the computer.[297] ReDigi also offers a digital locker service.[298] ReDigi at this time is available only for MP3 files originally purchased via the iTunes store.[299] At this time, iTunes does not prohibit such sales via their terms of service.[300]

Capitol Records has sued ReDigi for copyright infringement.[301] ReDigi asserts various affirmative defenses, including the first sale doctrine, in defense of their business model.[302] Capitol Records says

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295. Evan Hansen, *Apple Customer Resells iTunes Song*, CNET (Sept. 10, 2003), http://news.cnet.com/2100-1027_3-5074086.html.

296. Kim Gittleson, *US Court to Rule on ReDigi's MP3 Digital Music Resales*, BBC NEWS (Oct. 5, 2012, 8:25 AM), http://www.bbc.co.uk/news/technology-19842851 (quoting ReDigi's chief executive John Ossenmacher).

297. *Id.*

298. REDIGI, https://www.redigi.com (last visited Nov. 23, 2012).

299. Matt Peckham, *ReDigi Lets You Resell Used Digital Music, But Is It Legal?*, TIME (June 26, 2012), http://techland.time.com/2012/06/26/redigi-lets-you-resell-used-digital-music-but-is-it-legal.

300. Amanda Foong, *Selling Second Hand Music: Not Music to Record Companies' Ears*, LEXOLOGY (Oct. 26, 2012), http://www.lexology.com/library/detail.aspx?g=b070120f-2db3-4c0d-8792-6b4d715c97b1.

301. Complaint, Capitol Records LLC v. ReDigi, Inc., No. 12 Civ. 95 (S.D.N.Y. Jan. 6, 2012) [hereinafter Capitol Records Complaint].

302. Answer at 10–12, Capitol Records LLC v. ReDigi, Inc., No. 12 Civ. 95 (S.D.N.Y.

that the first sale doctrine is completely inapplicable since the sale of an MP3 file does not vest the user with the ability to reproduce and redistribute an MP3.[303] When ReDigi makes a sale, a copy is made at the ReDigi server and then again onto the purchaser's computer. According to Capitol, the purchaser has acquired an unauthorized copy of an otherwise legally bought MP3 file.[304] Capitol contends that in order to be a true first sale issue, then the original file that was on the user's computer would have to be sold.[305] By this analogy, if a user wanted to sell an MP3 file, he has to sell the physical memory. Capitol's implicit position is the only way to legally sell an MP3 file is for the license to transfer.

A motion for injunction against ReDigi to suspend operations has been denied by the trial court, allowing ReDigi to operate until the trial.[306] However, the judge has said on the record that Capitol is likely to win at trial.[307]

Given the potential impact of this trial, Google petitioned the court to file an *amicus* brief to cover various issues, such as service provider liability, copies with respect to the public performance right, fair use, and the distribution right versus the first sale doctrine.[308] The court denied the motion.[309] Regardless of the outcome, this case may be appealed to the Second Circuit. In the event that the Second Circuit decides that MP3 files are covered by the first sale doctrine, then it could lead to a circuit split.[310]

The question that may be raised in this case is the license versus sale

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Jan. 19, 2012); *see also* Gittleson, *supra* note 296.

303. Capitol Records Complaint, *supra* note 301, at 9; *see also* Gittleson, *supra* note 296.

304. Capitol Records Complaint, *supra* note 301, at 6–7; *see also* Greg Sanoval, *EMI Sues MP3 Reseller ReDigi*, CNET (Jan. 6, 2012 12:38 PM), http://news.cnet.com/8301-31001_3-57354089-261/emi-sues-mp3-reseller-redigi.

305. Capitol Records Complaint, *supra* note 301, at 9; *see also* Sanoval, *supra* note 304.

306. Transcript of Record at 5, Capitol Records LLC, v. ReDigi, Inc., No. 12 Civ. 95 (S.D.N.Y. Feb. 6, 2012), *available at* http://beckermanlegal.com/Lawyer_Copyright_Internet_Law/capitol_redigi_120206Transcript.pdf [hereinafter Transcript]; *see also* David Kravets, *Judge Refuses to Shut Down Online Market for Used MP3s*, WIRED (Feb. 7, 2012, 2:34PM), http://www.wired.com/threatlevel/2012/02/pre-owned-music-lawsuit-2.

307. Transcript, *supra* note 306, at 4; *see also* Kravets, *supra* note 306.

308. Letter from Kathryn J. Fritz to Hon. Richard J. Sullivan, U.S. District Court for the Southern District of New York (Feb. 1, 2012), *available at* http://beckermanlegal.com/Lawyer_Copyright_Internet_Law/capitol_redigi_120201GoogleLetterReAmicusBrief.pdf; *see also* Eriq Gardner, *Google Jumps Into Escalating Debate Over Legality of Selling 'Used' Digital Music*, HOLLYWOOD REPORTER (Feb. 2, 2012, 10:00AM), http://www.hollywoodreporter.com/thr-esq/google-used-music-redigi-illegal-286620.

309. Order, Capitol Records LLC, v. ReDigi, Inc., No. 12 Civ. 95 (S.D.N.Y. Feb. 1, 2012); *see also* Gardner, *supra* note 308.

310. *See* Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 105 (2011).

debate. Both sides are treating the used MP3 sale as a purchase, not as a license. If this is a true purchase, then this issue will be does the physical memory have to be transferred in order to sell an MP3 file. Most likely the courts would find this cumbersome. The court may consider digital exhaustion in this case if ReDigi raises this point.[311]

In the alternative, the court may find that this is in fact a licensing issue. All of the MP3s in question originated on iTunes, and presumably are still governed by the iTunes agreement.[312] The question becomes can someone sell or otherwise transfer their license. Some people are already looking into ways to transfer licensed music to their families as they would a physical music collection.[313] In Europe, a court found that used license may be transferred.[314] It is only a matter of time before these transfers are decided by a court in the United States.

Another possibility is that ReDigi may be able to shield itself from contributory infringement under the Second Circuit's *Tiffany v. eBay* decision.[315] The Second Circuit found in *Tiffany* that eBay had taken sufficient steps to prevent counterfeit goods from being sold on their site to avoid contributory liability for trademark infringement.[316] The law of contributory liability referenced in *Tiffany* required the accused to "intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the [accused contributory infringer] is contributorially responsible for any harm done as a result of the deceit."[317] In that case, the court found that eBay had implemented sufficient safeguards to prevent, or at least severely curtail, trademark infringement on their website.[318] General awareness of trademark infringement did not make eBay liable for contributory infringement.[319]

While *Tiffany* is not directly on point, it may be relevant when comparing the law of contributory liability for trademark infringement along with contributory liability for copyright infringement. The standard for contributory infringement is "with knowledge of the infringing activity, induces, causes or materially contributes to the

311. *See supra* Part IV.C.3.a.

312. Foong, *supra* note 300.

313. Leo Hickman, Bruce Willis v. Apple*: Who Actually 'Owns' the Music on an iPod?*, GUARDIAN (Sept. 3, 2012, 3:00 PM), http://www.guardian.co.uk/technology/shortcuts/2012/sep/03/bruce-willis-v-apple-owns-music-ipod.

314. Press Release, Court of Justice of the European Union, Case C-128/11, UsedSoft GmbH v. Oracle International Corp., *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-07/cp120094en.pdf; *see also* Gittleson, *supra* note 296.

315. Tiffany (NJ), Inc. v. eBay, 600 F.3d 93 (2d. Cir. 2010).

316. *Id.* at 109.

317. *Id.* at 104 (citing Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844 (1982)).

318. *Id.* at 104–09.

319. *Id.*

infringing conduct of another."[320] Given the similarities in the tests for contributory infringement in copyright law and trademark law, the Second Circuit may be inclined to extend their trademark reasoning into the copyright context. If that occurs, then Amazon Cloud Player's policy of only allowing users to access MP3 files they have uploaded may be enough to convince the court that Amazon Cloud Player is making a good faith effort to prevent copyright infringement.

While Amazon Cloud Player does not offer the ability to sell used MP3 files, some issues raised by this case may have an impact on Amazon Cloud Player and the first sale doctrine. As with ReDigi, one of the steps necessary for the Amazon Cloud Player to be viable is copying an MP3 file onto the Amazon Cloud Player from the user's computer.[321] Additionally, this case may provide more insight into how courts perceive downloaded MP3 files as licenses or sales.

B. *The Times They are A-Changin'*

The primary copyright laws in the United States were written to be interpreted as technology developed, but the problem, to borrow a Malthusian analogy, is that technology grows exponentially while the law grows arithmetically. For every innovation in technology, law changes incrementally. A decade ago, high speed Internet was only available in selected areas. Today people in rural communities have connections that would put high-tech offices from 2001 to shame. In 2002, the largest capacity for a hard disk was 137 gigabytes. In 2011, the record for hard disk storage was 4 terabytes.[322] That makes the maximum capacity for hard disks in 2002 approximately two percent of the maximum capacity of hard disks in 2011. There is no indication this trend of technological advancement will end in the future.

Even before the DMCA was enacted, courts realized that there needed to be a way to immunize ISPs when used by a direct infringer.[323] Among other elements, the DMCA provided a safe harbor provision to allow the ISPs to grow without fear of liability if certain procedures were followed. These early ISPs only provided the conduit, not the content which was supplied by content providers. Now that content providers and service providers are becoming more entwined, the safe

320. Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc. 443 F.2d 1159, 1162 (2d. Cir. 1971).

321. Importing Music into Cloud Player, AMAZON.COM HELP, http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-1?ie=UTF8&nodeId=200593730&qid=1352655472&sr=1-1 (last visited Nov. 11, 2012).

322. *History of Hard Disk Drives*, WIKIPEDIA, http://en.wikipedia.org/wiki/History_of_hard_disk_drives (last visited Nov. 11, 2012).

323. *See* Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995).

harbor issue may be more difficult to apply.

Another change has been the cycle of computer philosophy. Until the 1970s, most computer work was done on mainframes that people logged into from remote "dumb" terminals that did not store or process information. With the creation of PCs that could store and process information without the need for a mainframe, people could have the entire computer at their home or office, thus removing the need for mainframe access and a modem to enjoy a computer. With the rise of high speed Internet, users have required more connectivity in their computers. The speed of communication increased by orders of magnitude as the Internet developed. In the time it took to transfer a large text file in the early days of the Internet would be enough time today to transfer a complete movie.

Cloud computing has brought mainframe styled operations back into fashion.[324] The first thing the average user does when he opens up a laptop is search for an Internet signal. Why would a user store information on a single physical computer when he can load it to the cloud and access it anywhere he logs into the Internet? While users may want to keep programs and other functional aspects of their computer on home systems, they may enjoy the flexibility of storing music, movies, and photos online for access anywhere.

As the cloud becomes more prevalent in usage, space shifting is the inevitable result. While the judge in *Napster* rejected the space shifting justification since the files were available to millions, as was the case with both Grokster and Napster, technology has advanced where such an argument for space shifting is viable as the only person who accesses the file remotely from Amazon Cloud Player or similar services is the original user.

C. *Plan of Attack*

Unlike previous "large targets," such as Napster, Grokster, YouTube, and most recently Limewire, Amazon Cloud Player is configured such that only the individual user may access copyright protected materials uploaded by the user. However, simply allowing copyright protected materials to be uploaded and enjoyed does not automatically mean the Internet-based service will be found guilty of copyright infringement. YouTube allows anyone to view potentially

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324. Erica Naone, *Conjuring Clouds: How Engineers Are Making On-Demand Computing a Reality*, TECH. REV. (July/Aug. 2009), http://www.technologyreview.com/computing/22606 ("'Cloud computing is a reincarnation of the computing utility of the 1960s but is substantially more flexible and larger scale than the [systems] of the past,' says Google executive and Internet pioneer Vint Cerf.").

infringing materials, not just the user who uploaded them.[325] YouTube has been found immunized per the DMCA safe harbor.[326] Limewire, which in many ways is an updated version of Grokster, has been found liable for indirect infringement, but it too allows multiple users to access the files of another user.[327]

As the law stands today, Amazon Cloud Player is vulnerable to legal action, but attacking Amazon Cloud Player will have consequences. Assuming the Court found some forms of infringement, Amazon.com would use the DMCA as a shield to find itself immune from infringement claims. Once Amazon Cloud Player is found to have complied with the DMCA for storage, they can then expand that coverage to protect their performance functions. In the alternative, Amazon Cloud Player may rely on *Cablevision* and other court cases to defend their actions.

Based on the known facts at this time, a finding of direct infringement seems unlikely as Amazon Cloud Player may qualify for DMCA safe harbor protections. Additionally, the automated nature of Amazon Cloud Player makes it a passive component of any potential infringement providing some cover under *Cablevision* and the case cited therein, which would protect Amazon Cloud Player from direct infringement.

These facts do not preclude the possibility of a finding of indirect infringement. However, in order to find indirect infringement, it will presuppose a direct infringer is located. This would not be difficult since all copyright holders would have to do is find an unnamed John Doe defendant to be the direct infringer and then sue for indirect infringement. However, any alleged direct infringer would have a fair use defense, which could immunize Amazon Cloud Player.

There may be consequences in a copyright holder victory based on a finding of indirect infringement. The primary story in the blogs the next day would read, "Amazon Cloud Player Violates Copyright." After the initial shock wore off, the next headline would read "Making copies of music for personal use is illegal." While the music industry has a powerful influence in the U.S. Congress, the question is whether they are powerful enough to stand up to the torrent of users, who are registered voters, who would demand they not be found infringing for ripping their favorite music. This will be unlike the congressional hearings where musicians and music executives were extolling the dangers of Napster and other services. This time the users will not be college kids or people who cannot afford to purchase the music. This

325. YOUTUBE.COM, http://www.youtube.com (last visited Nov. 11, 2012).

326. Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 526 (S.D.N.Y. 2001).

327. *See* Arista Records LLC v. Lime Grp. LLC, 784 F. Supp. 2d 398 (S.D.N.Y. 2011).

time the alleged infringers will be people who legally purchased the music and will not stand by and pay for something they believe they already have a right to enjoy.

Additionally, it is unlikely that copyright holders would go after another John Doe as they have stepped away from suing individuals and in exchange are now working with ISPs.[328] While Amazon Cloud Player would not be inclined to cooperate to locate infringers, the decision not to go after John Does may stem from the cost benefit analysis of such litigation.

A more viable course of action for copyright holders may be to limit the attack to the rebroadcasting function. There is no need to establish whether the copying itself is illegal with rebroadcasting. Those who upload the music will not be accused. This strategy would not adversely impact space shifting, which is gaining wider acceptance. This tactic will allow space shifting sites to operate without fear of infringement, assuming they do not add a broadcasting function. If a copy is loaded on Amazon Cloud Player, it does the user no good unless it is rebroadcast back to them. By attacking rebroadcast alone, copyright holders will effectively hold Amazon Cloud Player hostage without having to address space shifting.

There will be two competing arguments for addressing rebroadcasting. First, rebroadcasting may still be protected if the rebroadcasting is the only way to use the MP3 file stored in the Amazon Cloud Player, which is protected by the DMCA. Conversely, copyright holders may advance the position that rebroadcasting is not necessary to enjoy the MP3 file anymore. Given the increase in Internet connection speeds and the memory available in most portable devices, copyright holders may argue that downloading also allows users the ability to enjoy the MP3 file stored in the cloud, which negates Amazon Cloud Player's DMCA defense but opens up new issues of reproduction and distribution.

Alternatively, the music industry may take a compromise position with regards to licensing. If they cannot get Amazon.com to pay the full licensing fee, maybe Amazon.com would pay something similar to the compulsory licensing fees charged to radio stations. American Society of Composers, Authors and Publishers (ASCAP) was created to provide compensation in such a licensing scheme.[329] Otherwise, Amazon.com may voluntarily disclose how much storage space is used by Amazon Cloud Player and ask for a royalty similar to that assessed to DAT

328. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008), *available at* http://online.wsj.com/article/SB122966038836021137.html.

329. *History of ASCAP*, ASCAP, http://www.ascap.com/about/history (last visited Nov. 11, 2012).

tapes.[330] Courts have also recently suggested a licensing structure for streaming fees.[331]

Another alternative may be for copyright holders to simply wait until it comes time to renegotiate with Amazon.com for licensing their catalog of music. Presumably the copyright holders have licensing agreements that have renegotiation provisions or that expire at a predetermined time. When the licenses come up for renewal, the copyright holder may demand licensing for issues related to Amazon Cloud Player as part of an overall licensing package. If Amazon.com does not agree, then the copyright holder may put in the agreement a strict directive that Amazon.com may not store or broadcast any of the music purchased to the Amazon Cloud Player. If Amazon.com refuses, the copyright holders can simply decide not to renew the license. Presumably they would only do this if they felt they could withstand the potential loss of revenue. At that point, Amazon.com would have to stop selling the licensed music and potentially lose customers. From that moment forward, there may then be an argument that any licensed music sold by Amazon.com and stored on Amazon Cloud Player is unlicensed, making the DMCA safe harbor inapplicable.

Copyright holders could also attempt a new form of aggressive licensing on physical products. They could create CDs that cannot be ripped without accepting a clickwrap agreement. MP3 files could be similarly modified. Some digital and physical content capable of digital conversion today already come with license agreements.[332] The Supreme Court has said in the past that copyright law does not preempt contract law, so that may work.[333] However, courts may be inclined to see the license agreement as a hollow effort to circumvent the first sale doctrine.[334]

There is also the business aspect to consider if any of these defenses exist. There are multiple services that currently have content licensed from copyright holders. These licensed content providers presumably have differing levels of sophistication and capacity. If complete automation is all that is required in order to avoid the need for licensing,

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330. 17 U.S.C. §§ 1003–1007 (2011).

331. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, 627 F.3d 64, 81–85 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 366 (2011).

332. Perzanowski & Schultz, *supra* note 152, at 901–02 (citing David Nimmer et al., *The Metamorphosis of Contract to Expand*, 87 CALIF. L. REV. 17, 36–40 (1999); John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 31–33 (2004); *see also, e.g.*, UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1180 (9th Cir. 2011); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 938 (2008)).

333. ProCD, Inc. v. Matthew Zeidenberg, 86 F.3d 1447, 1454–55 (7th Cir. 1996).

334. *See* SoftMan Prod. Co. v. Adobe Sys., Inc., 171 F. Supp. 2d 1083, 1085–86 (C.D. Cal. 2001).

there is nothing to stop currently licensed Internet-based music providers from discontinuing their licensing once their current contracts are complete and adopt a model similar to Amazon Cloud Player.[335]

D. *If You Can't Beat Them, Vertically Integrate*

Another idea may be to attach the rights to a digital copy of the music with any physical purchase. For example, movie studios recently released the Ultraviolet DVD system. By purchasing a physical DVD, the user is given access to a cloud-based copy of the movie that is viewable from any media device.[336] The right to access the cloud copy may be wrapped up in the price of the physical unit. Alternatively, the purchase of the DVD today typically comes with a premade digital copy for use on a computer with only a marginal increase in the cost per unit. Perhaps the approach to take is accepting that the cloud will be used for storage, but make the user's access the cloud on terms set by the copyright holder by offering pre-ripped music or access to cloud copies.

E. *What Does the Future Hold?*

An analogy in a different copyright regime would be helpful to see where this progress in technology may be going. Currently there are three formats in which movies are sold to the public. First is the DVD, which has been around since the 1990s. Blu-Ray discs are the successor to DVDs, offering substantially improved audio and video quality. Third, there are digital movies that are either downloaded or streamed depending on how they are purchased. While most people have purchased a song once and stay with the format they bought it on, videophiles are suckers for buying upgrades. For this example, *Star Wars* will be used as it has gone through multiple home video releases. Since 1995, *Star Wars* has had the Original VHS release, the Special Edition VHS release, the DVD release, and now the Blu-Ray Disc release. With some minor changes in the background and some additional scenes, *Star Wars* has not changed fundamentally since it was shown in 1977. As a result, owners of the Original VHS release purchased in 1996 can still enjoy the story as much as the owner who bought the Blu-Ray disc in 2011. But what if one day VHS players are no longer made or repaired? Should the owner of the VHS copy be

335. *See* Brief for Sony BMG Music Entm't, as Amici Curiae supporting Petitioners, Cable News Network, Inc. v. CSC Holdings, Inc., 129 S. Ct. 2890 (2009) (No. 08-448), 2008 WL 4843620, at *12.

336. Steven James Snyder, *Dawn of the 'UltraViolet' DVD: Will the Cloud Doom Cinema?*, TIME (Oct. 16, 2011), http://entertainment.time.com/2011/10/16/dawn-of-the-ultraviolet-dvd-will-the-cloud-doom-cinema.

forced to buy a new copy of *Star Wars* simply because a technology has reached obsolesce, or should he be allowed to transfer the movie he legally purchased for his enjoyment? No one questions the user's right to enjoy *Star Wars*, but will the user have the right to do what is necessary to continue enjoying *Star Wars* after he has purchased it once? This analogy may be extended into the realm of music. Should a user be restricted to only his physical copy of music he purchased when it is conceivable that one day physical media will no longer be supported?

Other issues are relevant in this situation. There is the question of motivation behind these allegations of infringement. Are they based on the premise that these activities run counter to the intent of copyright law, or are they just a way to increase profits without the copyright holder having to take any actions?[337] Copyright holders say they want digital copies to be licensed, but this is a disingenuous position. They wanted to have digital purchases treated as a sale in regards to the payment of artists, but wanted them treated as a license in order to regulate the market. After the music industry lost a case where a judge ruled that MP3 files are to be treated as licenses for the purposes of calculation of artist payments, a spokesman for the copyright holder said that the case was only for this one limited case, suggesting copyright holders would advance the position that digital purchases should be considered sales for royalties in the future. The music industry wants to treat digital music like a license to protect their rights, yet treat it as a purchase when it comes to paying the artists, essentially creating a hybrid status for their copyright protected properties. In order for the law to be fairly applied, the music industry cannot choose the law to apply *a la carte*; the menu must be fixed. The industry should pick its poison and move on.

There is the additional issue of the differentiation in rules applied to copyrighted expressions sold digitally versus those sold on a physical media. It seems unlikely that public policy would be served by having the copyright laws depend on how the copy was purchased, as doing so would lead to chaos.[338] There is also the practical matter of how such identification would occur. Would users be required to show the providence of all their MP3 files? MP3 files purchased with a digital watermark may be traceable, but what about music without a watermark or other digital rights management features. What about music ripped directly from a CD with no watermark information? If courts start requiring users to justify all their music, it could lead to undue stress on

337. Grynberg, *supra* note 176, at 446 (citing MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 7 (2008)).

338. *See* Afori, *supra* note 148, at 324.

users who enjoy their music purchased in good faith.

VI. CONCLUSION

A. *Access Versus Ownership*

The policy question that has begun to coalesce around Amazon Cloud Player and similar technologies is the evolving nature of how copyright protected works are now enjoyed by users. Until recently, the only way to enjoy a copyright protected work was to have ownership to the physical copy, be it a novel, CD, or DVD. While the physical copy can be loaned, sold, or rented, there still needed to be an alienable physical copy. The implicit premise was that if a user owned a legal copy, he had also purchased the right to enjoy it and take steps needed to enjoy it.

Currently, it is possible to enjoy a protected expression without a physical product. It is possible to experience these works remotely with virtually no delay via modern communication technology. Users do not need to own the physical copy; they just need to be able to access what was contained in the physical copy. The question is whether they need to pay again for accessing something they have already purchased, either physically or digitally.

This change toward access is a fundamental shift in how works are enjoyed today. If a user wants to watch a season of the latest TV show, should he pay $50 for the entire season and be limited to one show, or does he pay $100 and have access to any show on demand from Amazon.com? It is only a matter of time before Amazon.com or a similar company offers something comparable for music. Why would a user pay $100 for an anthology when he can pay that much, not have to purchase a CD again for a year, and listen to whatever he wants? This shift in expectation is a consequence of the user really paying to enjoy the work (which previously was only possible through physical ownership), not own a copy of the work.

B. *Effects of Decision on the Cloud*

If storage on the cloud is found illegal, then services that hold ANY copyright protected work will potentially be illegal. Not just Amazon Cloud Player, but Dropbox, Hotfile, or any other service that allows users to store files remotely. While this is a possible interpretation of the law, it is likely that Congress would promptly address this issue as was done in *MAI*.[339] Regardless, given the momentum toward cloud-based

339. *See* Joseph Liu, *Owning Digital Copies, Copyright Law and the Incidents of Copy*

remote storage, this aspect should be safe as long as reasonable steps are taken to prevent others from enjoying copyright protected works they do not have a right to enjoy.

Rebroadcasting is going to be tricky as this is where the copyright holders have a stronger policy stance. Until the user presses "Play" on Amazon Cloud Player or similar services, the copyrighted expression is isolated from the user. When "Play" is pressed, the MP3 file becomes an expression, and that falls into the realm of public performance. The question will be whether the music industry gets around DMCA protections and other potential defenses raised by Amazon.com.

Amazon.com has alluded to the possibility that a future iteration of Amazon Cloud Player will include features where Amazon.com will seek licenses from the music industry.[340] It may be possible that this new service would be online before this case reaches an appellate court. It may even be in operation before the case reaches trial. Regardless of whether this reaches trial, the fundamental questions will linger if not resolved by Congress or the courts.

C. *Closing Thoughts*

These advances in technology combined with the Copyright Act itself show why the law should remain stable but never static. Innovations lead to questions faster than we can agree on answers. MP3 files and the associated questions have perplexed lawyers and business people for over a decade.[341] If these issues are avoided by Amazon.com bringing a new licensing system online or through some other mechanism, the fundamental questions of infringement and

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Ownership, 42 WM. & MARY L. REV. 1251, 1262 (2001).

340. *See* Houghton, *supra* note 27.

341.

> The vagaries and gray areas tested by the last decade of technology is proving to be a significant challenge to the courts themselves, especially to lawyers and Judges who are novices to it.
>
> To make matters worse, the speed of technological innovation and the potential impact it can have on our analog world can incite panic within the traditional businesses that Net companies are now challenging. Here, billions of dollars and control of the future of the music industry is involved, no small stakes. The panic comes in the form of these legal challenges that are expensive and draining for both sides, but whose effect is most felt by the less financially endowed tech startups.

Richard Menta, *The Merits in the MP3.com Lawsuit*, MP3NEWSWIRE.NET (May 8, 2000), *available at* http://web.archive.org/web/20041024235112/http://www.mp3newswire.net/stories/2000/mp3courtpoint.html.

performance of works previously purchased by users will remain. Before the technology jumps again, it may be best to go ahead and come up with an answer, either by statutory law or case law, so we will not be as far behind the next time technology bounds ahead of the law.