



THE COPYRIGHT WARS

This is a very profound moment historically. This isn't just about a bunch of kids stealing music. It's about an assault on everything that constitutes the cultural expression of our society. If we fail to protect and preserve our intellectual property system, the culture will atrophy. And corporations won't be the only ones hurt. Artists will have no incentive to create. Worst-case scenario: The country will end up in a sort of cultural Dark Ages.

—Richard Parsons, President, Time-Warner¹

A profound moment, indeed. Indeed, it is an assault on everything that has stifled the cultural expression of our society. It's an assault on the system that stole every dime the Chambers Brothers ever made while grotesquely enriching Britney Spears.

—John Perry Barlow²

THE ENACTMENT OF THE DMCA seemed to give the content industries the security they were seeking. So long as they encased their content in technological protection envelopes, they could set and enforce any restrictions they chose on access and use. People would be forbidden to circumvent, and, because of the prohibition of circumvention devices and services, only the most talented teenage hackers would have the capability to circumvent in any event. Motion picture studios and record companies believed that they controlled the rights in content people wanted to see and hear, so they could pretty well write their own technological protection ticket—consumers would have to go along.

Technological protection standards have historically been hammered out in negotiations between representatives of copyright owners and organizations representing consumer electronics manufacturers. Consumer electronics companies are resistant to demands that they disable their machines, or install devices likely to impair viewing, listening, or recording performance. They have, however, been willing to install copy-protection

devices so long as the technology is not too costly and every manufacturer agrees or is legally required to install precisely the same device. This removes the threat to compliant manufacturers that other manufacturers will compete by using less effective devices. It also removes the threat to copyright owners that some consumers will insist on purchasing noncompliant equipment.

Motion picture studios had some experience with technological protection. All of the mainstream studios used copy protection technology to prevent copying of videocassettes. In March of 1997, the digital video disc, or DVD, hit the market. It was slow to catch on. DVDs were themselves protected by a content scrambling system (CSS) that controlled access by restricting the play of all commercially released DVDs to licensed DVD players. The content on DVDs was scrambled, and the studios licensed DVD player manufacturers to build CSS descrambling software into their DVD players. The CSS license incorporated a host of conditions and specifications that the studios wanted to be sure were built into the players, and could easily be modified to mandate additional specifications as technology developed. Some of those specifications involved copy protection; others were attempts to preserve some of the profitable features of the pre-digital distribution market. The studios insisted, for example, that DVD players incorporate hardware or software that disabled them from playing DVDs released in different geographic regions, or that permitted DVD producers to include unskippable commercials. CSS did not prevent copying of DVDs, though, and pirate DVDs hit the market almost immediately. Since CSS operated to restrict access (that is, play), infringers simply copied the DVDs without playing them. The resulting copies worked exactly like the authorized ones, complete with CSS access-protection.

Some studios had been reluctant to release their films on DVD because of the potential for massive unauthorized digital copying, but had endorsed a more secure format, "Digital Video Express," or "Divx," which implemented pay-per-view. Divx discs were encoded to restrict access, and were playable only in Divx-compatible players. Consumers could buy a Divx disc for a small sum, watch it once, and would then be required to pay and gain reauthorization for subsequent viewings. Electronics retailer Circuit City announced the debut of the Divx format in the fall of 1997. Divx discs and players hit the stores in the summer of 1998. Some people bought them, but not many. A year later, Circuit City announced it was abandoning the format entirely.

Meanwhile, consumers had begun to complain about being unable to watch a DVD legally purchased in one country on a DVD player purchased in another country, and about having to watch the commercials every time they watched the feature. The motion picture industry took the position that since it controlled the content, it was entitled to condition access on any terms it chose, and since the new statute prohibited circumvention of access controls, any device or service that permitted consumers to evade those terms, regardless of the reason, violated the law. When a couple of amateurs reverse-engineered CSS in order to write DVD player software for the Linux operating system, and posted a CSS decryption program (dubbed "DeCSS") on the Internet, the motion picture industry filed three different lawsuits against sites posting the code for the utility or linking to sites that posted it, contending that the availability of the program raised a massive piracy threat.³

The DeCSS litigation poses the access question squarely. If "access" means only initial access, then it is clear that DeCSS should not violate the access-control-circumvention provisions of the DMCA. DeCSS is useless to people who do not already have a DVD in hand, and all of those people are authorized to gain access to the content in order to view it. On the other hand, if access means each act of viewing, listening, or using, then use of DeCSS would violate the access-control-circumvention provisions notwithstanding one's reason. It simply wouldn't matter that one wanted to employ a device to play a DVD one had purchased on a computer the Motion Picture Association has not licensed, or to play a DVD purchased in the UK on the DVD player one owned in the United States, or to keep one's six-year-old from seeing a salacious preview. The motion picture industry interpreted the law to bar circumvention of access control for any reason except the narrow and conditional exceptions explicitly enumerated in the statute. In the first judicial decision to interpret the DMCA, a court agreed.⁴ The defendants argued that creating and posting the utility came within the fair use exemption. The motion picture studios responded that fair use was no defense to an anti-circumvention charge, and, again, the court agreed:

The policy concerns raised by defendants were considered by Congress. Having considered them, Congress crafted a statute that, so far as the applicability of the fair use defense to Section 1201(a) claims is concerned is crystal clear. In such circumstances, courts may not undo what Congress

has so plainly done by “construing” the words of the statute to accomplish a result that Congress rejected.⁵

The story involving the music and recording industries is more complicated, in part because of longstanding social attitudes favoring free use of music, attitudes that the law had previously accommodated.⁶ Record companies had not yet developed a copy-protection standard when the DMCA took effect. The recording industry insisted on technology as nearly leak-proof as possible, and had not yet found one. Instead, a variety of software companies had developed their own incompatible, proprietary technologies and were trying to persuade record companies and Web sites to adopt them. In 1998 the recording industry had a lock on most of the recorded music consumers wanted to listen to. All it needed to do was to hang on to consumers’ ears long enough to get its piracy-resistant format up and running. It failed to appreciate how narrow its time window would be in Internet time.

By the time the Digital Millennium Copyright Act took effect in October, a small but significant number of music enthusiasts had discovered music recorded in MP3 format. MP3 is a patented file-compression format that permits near-CD quality recordings to be reproduced in files of manageable size. Freely available software allows consumers to translate the musical recordings on commercial CDs to MP3 files on a computer hard disk, and play the music through the computer’s speakers. Because MP3 files have been compressed, it is feasible to store large numbers of files on a typical computer hard disk, and to transmit high-quality recordings over the Internet. Consumers can download entire music libraries over their telephone lines. By 1998, independent bands had begun to distribute their music directly to consumers in MP3 format, some for free and others for money. Bigger bands posted files containing free samples. Web sites sprung up devoted to MP3 hype and MP3 tips and MP3 files. In the summer of 1998, Diamond Multimedia announced that it would introduce a new portable MP3 player that would allow consumers to carry thirty minutes of music with them.

MP3 is just a file format. It most certainly can be used for unauthorized and infringing recordings; it may also be used for legitimate recordings, and in 1998 it was seeing both sorts of use. From the record companies’ perspective, the problem with the MP3 format was that it was insecure: because the format incorporated no copy-protection standard, files could be copied, and copies could be copied and copied again. (In that respect, it was not

appreciably different from the commercial CD format,⁷ but because MP3 files are smaller than the music data files fixed on a commercial CD, making and trading MP3 files is more convenient than making and trading copies of commercial CDs.) The existence of an insecure digital format threatened the industry's ability to impose its own secure format on consumers and consumer electronics manufacturers. Perhaps even more frighteningly, the digital distribution of MP3 files held the potential for new paradigms for the distribution of music and new possibilities for making money from music. Some of the new paradigms incorporated conventional music publishers and record companies, but others bypassed the conventional business models. If everyone could be her own publisher on the Internet, every musician could be her own record company, and a small group of musicians were trying to do just that.

The recording industry responded to the growing popularity of music in the MP3 format by trying to shut the entire phenomenon down. All of it—the industry was determined to elbow both illegal trafficking in MP3 files and legitimate distribution of music in MP3 format out of the online market.⁸ Record companies insisted that MP3 was a tool for pirates, and that all or at least most of the MP3 files sitting on consumers' hard disks were pirated recordings. Bands who posted MP3 files on their Web pages were ordered to take them down or lose their recording contracts.⁹ When the first portable MP3 player came out, the recording industry filed suit to stop it.¹⁰ The Recording Industry Association used its infringement lawsuit against the manufacturer of the Rio portable MP3 player as a threat against all consumer electronics manufacturers, and demanded that no business market a portable device capable of playing MP3 files. Instead, the Recording Industry Association insisted, portable digital players should be compatible only with secure, encrypted recording formats.

In December of 1998, the recording industry announced that it had formed a consortium of record companies, software companies, and consumer electronics companies to devise a new, secure digital music file format to enable record companies to distribute digital music over the Internet without surrendering control over their copyrighted material. The members of the Secure Digital Music Initiative (SDMI) then got together in secret monthly meetings to talk and talk and talk about what the new secure standard would look like. Companies that had already invested in some proprietary formats understandably pushed their formats. Copyright owners wanted something that was both impregnable and incompatible

with MP3—indeed, they spent more time in the first months of the initiative demanding that devices be unable to play MP3 files than they did focusing on the specifics of a secure format. Consumer electronics manufacturers were unwilling to commit to manufacture equipment unless it seemed likely consumers would buy it. They talked and talked for months—not long in conventional time but an eon in Internet time. Six months later, the SDMI consortium had not yet come up with a secure digital specification. That’s when the U.S. Court of Appeals for the Ninth Circuit ruled that the industry’s lawsuit against the manufacturer of the Rio portable MP3 player was meritless.¹¹ The copyright law, the court held, entitled consumers to make MP3 recordings of their CDs, and it entitled manufacturers to make devices intended to help consumers play these recordings. Other manufacturers announced they would bring out their own portable MP3 players.

By engaging in a scorched-earth campaign, the recording industry squandered some truly awesome assets. If it had managed to keep its audience devoted long enough to get its piracy-resistant format up and running, it might well have been able to build the pay-per-listen world the DMCA seemed to promise it. There were two sensible ways to go about it: one was to rush lots of secure music and portable devices that could play that secure music into the market, and rely on the fact that, by controlling the music that people wanted to hear, conventional record companies were well-positioned to compete with MP3 in a head-to-head battle. There were lots of proprietary secure formats being tested and any one of them would have done for a start. The second possibility was to take more time to design a good secure format, but meanwhile to release product in MP3 format to keep hold of the public’s ears. As business plans go, this one would not have been crazy. Music is still being released on CDs, and CD-to-MP3 is a trivial and legal transformation once one has the necessary software installed on one’s computer. The recording industry, however, was unwilling to subject its current catalog to possible piracy, and was unwilling to commit itself to an insecure digital standard that might become entrenched. Instead, it fought about whose patented security algorithm would become the new standard, and it focused on herding all MP3 music off the Internet.

As the 1999 holiday buying season wound down, there was still no complete SDMI specification, and no SDMI music had been released. Meanwhile, consumers downloaded MP3 software, bought MP3 machines, and collected a slew of MP3 files. The granddaddy of MP3 Web sites was an

MP3 music portal at www.MP3.com. MP3.com, launched in 1996 by entrepreneur Michael Robertson, originally offered free MP3 downloads of non-major label music, MP3-related software, MP3 commentary and how-to articles, and MP3 discussion bulletin boards. The site also offered new bands and those not yet signed to recording contracts an opportunity to reach potential fans. Artists could sign up, upload an MP3 file or several, and any pictures or promotional material they wanted to. MP3.com would announce the artists and songs on its new songs list, and allow individuals to listen to or download a copy of the song. MP3.com also made and marketed CDs. MP3.com would sell consumers a digital audio music (DAM) CD, containing songs in both conventional and MP3 format. A full-length DAM CD went for about half the price of a major label CD, and MP3.com split the price fifty-fifty with the artist. (Contrast that with a typical royalty of 6 percent of the suggested retail price for major label recordings: If a typical CD costs \$15.99, and an MP3.com DAM CD costs \$7.99, then even after earning back any cross-collateralized advances, an artist would earn less than a dollar per CD sold on a major label. She'd earn \$3.99 outright per DAM CD sold via MP3. Of course, major label recordings sell many more CDs than MP3.com will; artists without major label record contracts, however, didn't have that option.)

Despite the legitimate services, the recording and music industries viewed MP3.com as a site that gave aid and comfort to pirates. Robertson received letters from lawyers in response to postings offering links to software enabling consumers to get around copy-protection mechanisms, or analyzing the weaknesses of particular copy-protection schemes, demanding that he remove the offending items from the MP3.com site. Robertson cultivated this "bad boy" image to enhance his site's appeal to an audience of young hacker wanna-bes. Armed with a large audience to sell to potential advertisers, Robertson bought performing rights licenses from ASCAP and BMI, permitting him to play hit songs on his Web site. He then announced an initial public offering, and a host of enhanced services including "MyMP3.com."

Robertson's MyMP3.com service allowed subscribers to listen to (but not save) music cuts copied from any CD in their possession, from any remote location. A subscriber would demonstrate possession of a CD by putting the CD in a computer CD-ROM drive and transmitting the CD's identifying information to MP3.com over the Internet. MP3.com provided a password-protected virtual music "locker" permitting access to exactly the

same music the locker would have contained if the subscriber had translated each cut on the CD to MP3 format and then uploaded the MP3 file over the Internet. Actually uploading the music would have taken hours. By using its own library of MP3 recordings created from CDs it had purchased, and requiring transmission only of proof of consumers' possession of corresponding CDs, MP3.com made the process of assembling a private online music library quick and convenient. Robertson figured that the service was legal: consumers, after all, were legally entitled to make noncommercial recordings of music, and he had licensed from ASCAP and BMI the right to transmit the music over the Internet. The music and recording industries disagreed, and filed several lawsuits.

Although Robertson had negotiated licenses with composers to perform their music, he hadn't obtained licenses from record companies to perform their *recordings* of that music, and he hadn't even thought he might need licenses from record companies or composers' music publishers to *copy* recordings of their music, since he was relying on consumers' legal privileges to make copies for their own personal use. The court refused to permit MP3.com to stand in its subscribers' shoes, noting that MP3.com was a commercial business and made its recordings for purely commercial purposes.¹²

While the MP3.com suit was pending, a college freshman named Shawn Fanning, who enjoyed trading MP3 music files and talking about them with other music fans, invented Napster, designed to make it easier to do both. Napster permitted individuals to locate and share MP3 files across the Internet, and it automated the transfer of files from fans who want to share their music libraries to fans who want to listen to or copy particular recordings.

Fanning posted Napster on the Internet for free download. Millions of consumers installed Napster and began to trade MP3 files with one another. The recording industry filed suit against Napster even before the company could officially launch the product.¹³ If the campaign was meant to chill Napster subscriptions, it didn't work. Within several months, Napster had accumulated twenty million subscribers, and estimated its probable subscriber base at seventy million by the time it reached its first birthday.

As an adjunct to its lawsuit, the RIAA had sent letters to universities urging them to block Napster access from their servers—hundreds complied. The popular rock band Metallica upped the ante by filing its own lawsuit against Napster and three universities. Two of the universities, Yale and the

University of Southern California, had declined to disable Napster access, citing academic freedom. The third defendant, Indiana University, had initially blocked Napster because it consumed too great a share of the system's bandwidth, but had restored access in response to student protests. Yale surrendered first, blocking Napster a week after being served with Metallica's complaint. Indiana caved next, disabling access the next day. The University of Southern California followed suit a few days later. Metallica, meanwhile, had an answer to Napster's insistence that, since it didn't monitor or control its subscribers' downloads, it had no information indicating that any subscriber was infringing the band's copyrights. Metallica hired a consultant to analyze Napster traffic and assemble a list of subscribers trading Metallica songs. It then dumped thirteen boxes full of documents identifying 335,435 individual Napster subscribers who had allegedly downloaded Metallica music. Napster obligingly blocked the accounts.

Napster had a number of more than plausible arguments that it was not liable for copyright infringement. First, it argued, it posted or stored no music on its servers, and had no control over the content traded using its service, but merely facilitated transfers initiated and controlled by its subscribers. Napster provided none of the content; rather it supplied a directory service and assisted its subscribers in making connections between their computers, so that they could transmit material to each other. Therefore, it claimed, it acted as an Internet service provider and was entitled to invoke the service provider and directory service safe harbors in the DMCA. Thus, when Metallica provided it with lists of infringing subscribers, it had followed statutory procedures to cut off their access, and would gladly do so for any other aggrieved copyright owner. The record industry responded that the service provider and directory safe harbors were not intended to protect services like Napster, and were sufficiently narrowly defined to make Napster's activities an awkward fit with the statutory language. Even were that not the case, the record companies insisted, the service provider safe harbors incorporated a variety of conditions and procedural prerequisites that Napster had failed to comply with, so it was not entitled to invoke the safe harbors as a matter of law. The judge sided with the record companies.¹⁴

Second, Napster argued, it shouldn't be liable because the file transfers it facilitated were completely legal—individual consumers were making personal noncommercial copies of music, behavior permitted by the Audio Home Recording Act and by fair use. The judge sided with the record companies.

Finally, Napster argued, it shouldn't be liable because its service had legitimate as well as allegedly infringing uses: many of the music files transferred by its subscribers were authorized or licensed material. The record companies insisted that the chief and perhaps only reason users signed up with Napster was the lure of easy access to free pirate recordings, and that Napster had built its entire business model on promoting copyright infringement. The judge sided with the record companies, and ordered Napster to block access to major label recordings or shut down pending trial.

The court gave Napster two days to comply. Napster announced it would file an emergency appeal, but might have to shut down in order to comply with the judge's decision. In the next forty-eight hours, Napster traffic nearly doubled. Meanwhile, visitors to sites offering Napster-like functionality without the central server (and therefore without some obvious intermediary to sue) increased to the point of server overload. Hours before the deadline, the Court of Appeals for the Ninth Circuit stayed the injunction pending an expedited appeal.

The content industry continued to find new folks to sue. The motion picture industry filed two lawsuits against Web sites that purported to rely on statutory privileges to permit the retransmission of television signals. The recording industry sued a site named MP3board.com, claiming that, while the site hosted no infringing content itself, it posted extensive hyperlinks to sites that did host infringing content. Merely posting hyperlinks, the record companies argued, was itself egregious piracy. Both the motion picture and the recording industry filed a lawsuit against a site named Scour.com. Scour.com was an advertising-supported entertainment portal that included a search engine for music, video, image, and radio material on the Web, and a file-sharing utility that permitted the exchange of music, video, and audio files. Scour's search engine, like other search engines, did not differentiate between files made available on the Web under the authority of the copyright owner and files made available by unauthorized volunteers, and a Scour.com search would typically retrieve links to content of both sorts. That, said the content industry, amounted to promoting and enabling widespread piracy: "This is about stealing, plain and simple."¹⁵

But it wasn't plain or simple. In each of the cases, defendants had appealing arguments that their activities were legal. In each case, analogous behavior in the offline world was permitted by statute or caselaw. MP3.com's archive of recordings, for instance, was functionally indistinguishable from the recordings that television and radio broadcasters make of licensed mate-

rial to facilitate the broadcast. Television and radio stations have never asked permission to make these copies, and in 1976 obtained an express statutory privilege to make “ephemeral” recordings incidental to licensed transmissions. There is no principled reason to distinguish webcasting.

MP3.com had permission from composers to perform their music, but had not secured permission from record companies to perform their recordings. Again, the radio and television analogy is instructive. Television and radio stations have never needed permission from record companies (as distinguished from composers) to perform their recorded music, because the owners of sound recording copyrights had no legal right to control public performances of their recordings. Here there *is* a principled reason to treat Webcasting differently: an Internet transmission could result in a saved digital file. Congress therefore amended the copyright law in 1995 to give record companies exclusive rights over some digital audio transmissions. MP3.com, however, was not engaging in that sort of transmission as part of its MyMP3.com service; instead it was streaming the music in a format that resisted reproduction. The DMCA had included a complicated deal that sought to address audio streaming, but where MyMP3.com’s transmissions fell within the new scheme was far from clear.¹⁶

Napster was not itself actually doing anything that infringed music or record copyrights directly. It made no copies, created no adaptations, distributed no copies, and transmitted no files. Indeed, no MP3 files passed through Napster’s servers. Instead, it distributed software that enabled it to maintain a directory of designated MP3 files on the computers of those of its subscribers who were actually online, that permitted subscribers to use that directory to find MP3 files, and that automated a subscriber-to-subscriber transfer. The suit against Napster sought to hold it liable as a contributory infringer for facilitating widespread unauthorized distribution of files copied from recorded music. Deciding whether contributory liability was warranted required answering the question whether individual consumers could legally engage in noncommercial online exchange of MP3 files. If Napster’s subscribers were not breaking the law, then Napster was not breaking the law either.

Did individuals have a privilege to share MP3 files? No court had yet answered that question. The Ninth Circuit had held that consumers had a legal privilege to *make* MP3 files, just as they had a legal privilege to tape television programs on a VCR. Giving away or loaning legitimately made copies of copyrighted works in the offline world is legal under the first sale

doctrine. Online, however, sharing files involves both transmission and the creation of additional copies. Posting MP3 files for the world to download would clearly violate the copyright owners' rights to control public performances. Was a Napster-mediated one-to-one file transfer a public performance or a private one?

iCraveTV, a Canadian Web site, permitted Canadian browsers to view Webcasts of free Toronto television signals, claiming that its activities were authorized by the Canadian copyright law's license for cable television.¹⁷ In both Canada and the United States, cable television operators have a statutory license to retransmit broadcast programming. The motion picture studios argued that even if iCraveTV's interpretation of Canadian law were sound, the nature of the Internet made it impossible for iCraveTV to prevent viewers who weren't in Canada from gaining access to their site. Since U.S. residents (or Canadians vacationing in the United States) could claim to be in Canada and thus view iCraveTV's transmissions, iCraveTV was illegal in the United States, where Canadian copyright law didn't apply. The court ordered iCraveTV to shut down unless it could guarantee that no individual in the United States could gain access to iCraveTV's programming.¹⁸

David Simon started RecordTV.com, seeking to use the Internet as a virtual VCR, to solve the problem of people's learning they would miss their favorite TV shows at places and times that made it impractical to arrange to record them. Subscribers could log on to their private accounts from any location and place a request to record a particular TV show; after the show aired, they could sign back on within ten days and view (but not save) the show. Like MyMP3.com and iCraveTV, RecordTV tried to capitalize on Internet delivery by offering consumers more flexible and convenient access to works they were already permitted to see and hear. Simon believed that he was entitled to rely on individuals' privilege to record TV shows in order to watch them at different times. His site's performance of a recording of any particular program would be transmitted only to the subscriber who requested the recording. That would make it a private performance rather than a public one, and private performances do not violate the copyright law. The motion picture industry disagreed; twelve motion picture studios filed a lawsuit to shut RecordTV.com down.¹⁹

MP3Board.com deploys an automated search engine that searches the Internet for publicly accessible MP3-related material, and generates hyperlinks to the sites that it finds. The links are displayed on the MP3Board.com web pages. MP3Board does not review or monitor the links or the sites that

they refer to. Hyperlinks are merely coded instructions giving the location of files on the Internet. They make it easy for Web browsing software to find a site on the Web in a way that's analogous to the way footnotes make it easy to find a cited source, or driving directions make it easy to find a street address. Hyperlinks are not copies, adaptations, distributions, performances, or displays of the sites they link to or the content those sites contain, and no court had held that posting a hyperlink constituted copyright infringement. When MP3Board received a letter from the Recording Industry Association of America demanding that MP3Board remove all links to sites containing infringing material or cease its operations, it filed a lawsuit asking the court to declare that its hyperlinks did not infringe RIAA's member copyrights.²⁰ The RIAA filed a counterclaim to shut MP3Board down, insisting that it was "an extensive and egregious link site that facilitates widespread copyright infringement on the Internet."²¹

The spring and summer of 2000 saw an explosion of Internet-related copyright litigation. Some cases involved straightforward piracy, but far fewer than the content industries claimed. Other cases revealed a different pattern: Innovators and upstarts sought to exploit the Internet's potential by creating an online analogue to an offline resource. They set up their sites believing their activities to be legal. Some of them relied on legal privileges that had permitted analogous activity in the offline world. Copyright owners insisted that even long-standing offline privileges didn't extend to online activities, and relied on statutory language drafted so narrowly that it had no elasticity at all. Meanwhile, though, content industries declined to make their material available for licensed download, fearing possible loss of control.

NOTES

1. Quoted in Chuck Philips, *Piracy: Music Giants Miss a Beat on the Web*, Los Angeles Times, July 17, 2000, at A1.

2. E-mail from John Perry Barlow to Dave Winer, July 18, 2000, posted at the Napster Weblog, URL: <[http://napsterdiscuss.weblogs.com/stories/storyReader\\$48](http://napsterdiscuss.weblogs.com/stories/storyReader$48)>.

3. *DVD Copy Control Association v. McLaughlin*, Case No. CV 786804 (Cal Super. Santa Clara, January 20, 2000); *Universal City Studios v. Reimerdes*, 82 F. Supp. 2d 211 (SDNY 2000); *Universal City Studios v. Hughes*, No. 300 CV 72 RNC (D.Conn., filed January 14, 2000). The cases quickly grew ugly. Plaintiffs sought an injunction against anyone who posted the code and anyone who linked to a site

that posted the code. The DVD Copy Control Association at one point amended its trade secrecy complaint to seek an injunction against an organization that sold a protest T-shirt displaying the DeCSS code.

4. *Universal Studios v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000).

5. *Universal Studios v. Reimerdes*, 111 F. Supp. 2d 294, 324 (S.D.N.Y. 2000).

6. The specific statutory exemptions for public performances of music are broader than the exemptions for public performances of dramatic works or films. See 17 U.S.C. § 110. Although the performing rights societies—ASCAP, BMI, and SESAC—enforce composers' rights to license nonexempt public performances, they operate subject to antitrust consent decrees that constrain their ability to refuse to grant licenses or impose unreasonable terms. When Congress granted composers rights to make and license recordings of their music, it subjected those rights to a "compulsory license" that permitted artists to record and publish any previously recorded song upon payment of a statutory fee. 1909 Act § 1(e); 17 U.S.C. § 115. When Congress amended the statute to prohibit record rental, it was careful to leave consumers' rights to loan, give, and resell records undisturbed. Finally, in 1992, Congress enacted a provision exempting consumers from liability for copyright infringement for noncommercial copying of recorded music. 17 U.S.C. § 1008.

7. Although commercial digital recording technology incorporates a copy-protection scheme prescribed by the Audio Home Recording Act, 17 U.S.C. § 1001-1011, the CDs themselves include only identifying information. The serial copy prevention technology is contained in digital audio recorders that meet the act's definition. Computers are excluded from the definition, and do not incorporate SCMS.

8. See *Music Download Debate Continues*, C|Net News.Com, December 16, 1998, at URL: <<http://www.news.com/News/Item/0,4,29980,00.html>>. See also Electronic Frontier Foundation, *Electronic Frontier Foundation Digital Audio and Free Expression Policy Statement*, May 1999, at URL: <http://www.eff.org/cafe/eff_audio_statement.html>.

9. See Neil Strauss, *Free Web Music Spreads from Campus to Office*, New York Times, April 5, 1999, at A1.

10. See *Recording Industry Association v. Diamond Multimedia*, 29 F. Supp. 2d 624 (C.D. CA 1998), *aff'd*, 180 F.3d 1072 (9th Cir. 1999).

11. *Recording Industry Association v. Diamond Multimedia*, 180 F.3d 1072 (9th Cir. 1999), *aff'g* 29 F. Supp. 2d 624 (C.D. CA 1998).

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

13. See *A&M Records v. Napster, Inc.*, 54 U.S.P.Q.2D (BNA) 1746 (N.D. Cal. 2000).

14. See *ibid.* See also *A&M Records v. Napster*, 114 F.Supp. 2d 286 (N.D. Cal. 2000).

15. Jack Valenti, quoted in July 20, 2000, joint MPAA, RIAA, and NMPA press release, online at URL: <<http://www.mpaa.org/Press/ScourPressRelease.htm>>.

16. In November 2000, MP3.com settled the last of the record-company lawsuits, agreeing to pay millions of dollars in damages and license fees. MP3.com announced that it had reconfigured its MyMP3.com "Beam It" service as a paid subscription service, and would henceforth collect information about subscribers' demographics and music-listening preferences to market to its new friends.

17. The license is subject to statutory royalties. iCrave's founder testified before the U.S. Congress that the company had filed a petition with Canada's Copyright Board seeking an official tariff rate. See *Video on the Internet: iCraveTV.com and Other Recent Developments in Webcasting, Hearing Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Commerce Committee*, 106th Cong., 2d sess. (February 16, 2000) (testimony of Ian McCallum, iCraveTV). As part of a settlement of a related lawsuit brought by Canadian broadcasters, iCraveTV reportedly agreed to withdraw the petition and to abandon all efforts to seek any ruling resolving the legality of Internet retransmission of broadcast programming. See Steven Bonisteel, *iCraveTV Settlement Leaves Legal Issues Open*, Newsbytes, February 29, 2000, reprinted in *BizReport*, February 29, 2000, at URL: <<http://www.bizreport.com/news/2000/02/20000229-9.htm>>.

18. *Twentieth Century Fox Film Corp. v. iCraveTV*, 53 U.S.P.Q.2D (BNA) 1831 (W.D. Pa. February 8, 2000).

19. *MGM Studios v. RecordTV.com*, No. CV-DO-06443 (C.D. Cal.).

20. *MP3Board, Inc. v. Recording Industry Association of America*, No. C-00-20606 (N.D. Cal., filed June 1, 2000).

21. RIAA, Press Release: "Important Facts about the Recording Industry's Lawsuit against MP3Board.com," June 28, 2000, online at URL: <http://www.riaa.org/News_Story.cfm?id=292>.