AFTERWORD

In February 2001, the Court of Appeals for the Ninth Circuit issued its decision in the *Napster* case.[1] It agreed with the trial judge that Napster's operation was probably infringing. It dismissed all of Napster's arguments that individuals could lawfully exchange digital music files over the Internet. The court concluded that Napster had raised defenses that were not frivolous, and the company should be entitled to try to prove them at trial. Because of the extent of the potential damage to copyright owners' interests, however, the court held that it was appropriate to subject Napster to an injunction requiring it to block copying of particular music recordings identified by plaintiffs while the case remained in the courts.

That trial never took place. Napster's legal fees ate up all of its capital, and it was forced to declare bankruptcy in June 2002. Copyright owners rebuffed Napster's attempts to seek licenses to cover file sharing and successfully opposed Napster's efforts to arrange for its purchase as a going concern. The company was liquidated that autumn. Its most valuable asset was the Napster name, which software company Roxio bought, along with Napster's domain name, trademark, and patent, for $5,300,000. Roxio then paid $39,500,000 to buy PressPlay, an unsuccessful licensed music download service operated by two of the major record labels, and rebranded it with the Napster name. The name now adorns a licensed online music service that makes audio streams available for a monthly payment of $9.95 and permits subscribers to download copy-protected files containing individual songs for an additional per-song fee. The company proudly advertises that "Napster is the world's most recognized brand in online music."

MP3.com settled the original copyright infringement lawsuits by agreeing to pay millions of dollars in licensing fees and then sold itself to Vivendi, one of the companies that had sued it. Scenting an infusion of cash, copyright owners who had not initially sued MP3.com decided to file their own copyright infringement suits. Vivendi ultimately sold MP3.com's

assets to online publisher C|NET, which dismantled the company, discarded its massive database of participating musicians' music files, and used the MP3.com trademark and domain name as a brand for a Web site featuring music news.

Scour.com, iCraveTV, and RecordTV shut their operations down. MP3Board.com continued to pursue vindication in the copyright infringement litigation, but meanwhile it revamped its site to feature news items about music and intellectual property law. The motion picture industry sued Sonic Blue for marketing ReplayTV, a digital video recorder with commercial-skipping and recording-sharing capabilities. Sonic Blue was the successor to Diamond Multimedia, the company that had marketed the first portable MP3 recorder and successfully defended a recording industry lawsuit to enjoin it. It knew what it would be getting into. It filed for bankruptcy and sold off its assets. The purchaser of its ReplayTV business promptly settled the suit by eliminating the features the motion picture industry objected to.

Reassured by their successes in suing upstart new businesses into bankruptcy, the recording, music publishing, and motion picture industries filed new infringement lawsuits against peer-to-peer software companies Aimster, Grokster, Streamcast, and KaZaA. Aimster declared bankruptcy and ceased operations. In April 2003, however, U.S. courts handed copyright owners their first defeat. District Court Judge Stephen Wilson ruled that Grokster and Streamcast were not liable to the motion picture and recording industries for copyright infringement. Despite the fact that at least some users of Grokster and Streamcast's Morpheus software engaged in massive copyright infringement, the court concluded, defendants Grokster and Streamcast had no control over that infringement and were not liable for it.[2] Copyright owners appealed the decision and sought to reverse it in Congress. The recording industry, meanwhile, readied its Plan B.

In July, the Recording Industry Association of America (RIAA) announced it would begin gathering information to sue individuals who used peer-to-peer file-sharing software. In September, the recording industry filed lawsuits against 261 individual file sharers. Later in the year, it filed more. As of this writing, the recording industry has sued more than fifteen thousand individuals and has settled into a pattern of filing hundreds of new lawsuits every month. The suits would be expensive to defend, but the recording industry has offered to settle each suit cheaply—so cheaply that it makes little economic sense for a sued file sharer to seek a

lawyer's representation, although not so cheaply that the settlements haven't generated a small income stream more than sufficient to pay for the RIAA's legal costs. At least so far, the RIAA has declined to pay any portion of that money to the artists and musicians it is claiming to protect.

The following year, the motion picture industry decided to follow the recording industry's example and file copyright infringement lawsuits against individual file sharers. The recording and motion picture industries describe the lawsuits as part of their effort to educate consumers about copyright law. As a result, they insist, most Americans now realize that peer-to-peer file sharing is illegal. According to businesses that monitor traffic over peer-to-peer networks for the benefit of entertainment industry clients, who use them in much the same way they use Nielsen ratings, though, that awareness has not yet manifested itself in a reduction in the number of people engaging in peer-to-peer file sharing or in the volume of files they trade.

Meanwhile, the entertainment industries struggle to adapt their business models to an online world. Apple Computer launched the iTunes music store, designed to enable consumers to purchase copy-protected downloads of individual songs to be played on Apple's iPod MP3 player. Rather than following a subscription model, Apple priced each song at ninety-nine cents. The price point and marketing strategy succeeded: Apple soon led the market in both online music services and portable MP3 players. Its competitors revised their consumer subscriptions services along the lines of the iTunes model, permitting copy-protected downloads for something in the neighborhood of one dollar per song. The difficulty in negotiating licenses with all copyright owners for extant recordings, however, limited online services' repertoires. Consumers complained about selection and continued to use peer-to-peer for music not available on licensed services. Services seeking to expand their selection beyond their current inventory find themselves stymied by the same unwieldy statutory provisions they used to run MP3.com out of business. The Copyright Office has tried to broker negotiations to revise sections of the copyright statute that govern the licensing of recorded music. Industry representatives on all sides of the bargaining table agree that the current statutory provisions have become completely unworkable. So far, those negotiations have been unsuccessful; there are simply too many disputes over who gets what share of the pie.

On June 28, 2005, the United States Supreme Court decided *MGM v. Grokster* and gave the motion picture and recording industries much of what they had sought.[3] Grokster and Streamcast, a unanimous Court

explained, had intended their software to be used to commit copyright infringement and had actively induced individuals to use it in infringing ways. Under those circumstances, it was appropriate to hold the peer-to-peer software companies liable for their users' infringement.

Shortly after the *Grokster* decision, motion picture and recording company lawyers began sending cease and desist letters to businesses distributing peer-to-peer file-sharing software or operating Web sites designed as adjuncts to peer-to-peer networks. A succession of recipients agreed to suspend operations or to seek financing to allow them to reposition themselves as commercial distributors of licensed, copy-protected material. Alternative peer-to-peer software programs sprang up, though, many of them noncommercial efforts written by volunteers. The new software applications allowed individuals to trade music and movie files over the same networks used by Grokster, Morpheus and eDonkey, and over other networks created using different protocols. Overall peer-to-peer file sharing continues unabated.

In November 2005, Grokster threw in the towel. It agreed to pay motion picture and recording studios $50,000,000 it didn't have, and ceased operations. It replaced its Web site with a page bearing the following message:

> **The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners.**
>
> **There are legal services for downloading music and movies.**
>
> **This service is not one of them.**

© © ©

Five years after the initial publication of this book, the conflicts it describes have evolved into what representatives on all sides of the controversy describe without intended irony as a "copyright war."[4] There are hopeful signs. General public awareness of copyright law is much higher. Local newspapers publish copyright stories. Open-source software is making modest headway against its proprietary competitors. The Creative Commons, a copyright reform organization founded by Stanford law professor Larry Lessig, has popularized copyright skepticism by developing alternative licenses for authors. Creative Commons licenses allow authors to permit their works to be distributed with "some rights reserved," rather

than "all rights reserved."[5] Google and Yahoo have facilitated searches for online material released under Creative Commons licenses. College students have established campus "free culture" groups. The recording industry and motion picture industry suits against individual peer-to-peer file sharers have inspired conversations about what copyright law ought to look like. Many of the participants in these conversations are people who previously paid copyright little attention. Some copyright owners outside of the recording and film industries have begun to voice doubts over whether the scorched-earth tactics may be harming the long-term legitimacy of copyright law, rather than shoring it up.

There are also ominous signs. Copyright owners continue to pursue the digital rights management grail. Record labels have begun to release their recordings in copy-protected formats. The RIAA is seeking legislation that would require digital radio broadcasts to be encrypted to curtail home copying. The motion picture industry is pushing a bill that would empower the FCC to require televisions to implement copy-protection technology. The copy-protection technology already deployed has introduced maddening incompatibilities. Music downloaded from the iTunes music store can be played only on Apple iPods. Consumers who own Rio MP3 players must instead get their music from Rhapsody, Napster, or one of their competitors. Music fans who purchase music files from multiple online services cannot combine their downloads on a single device. Newer copy-protection technology appearing in the market promises to be more intrusive, incorporating monitoring and reporting functions as well as copy controls.

Copyright owners continue to insist that the law does and should give them the right to control the making of every copy, especially every digital copy. For some, that claim seems to have ascended to almost religious significance. When Google announced a project to index the contents of five university libraries, authors and publishers objected. The project involved scanning the text of books in the library in order to create a digital index of the books' contents. Google promised that it would not put the text of any book online, but would make available a searchable index that would display very short snippets with links to sites from which the books could be purchased. It offered to forgo indexing any book whose copyright owner objected. It declared a moratorium on scanning books to give copyright owners an opportunity to notify Google that they wanted it to exclude their books. It promised to withdraw books from the index if the copyright owner later objected. Authors and publishers filed separate lawsuits seeking to enjoin the

project because its scheme, while unlikely to harm any author or copyright owner, violated the principle that the copyright owner controls the making of copies. It is, they insisted, illegal to make even an intermediate index copy of any book without first having secured the permission of the book's copyright owner. Offering to exclude a book if the owner objects, copyright owners claimed, is not good enough. Rather, the law prohibits copying at all unless the copyright owner has first agreed to license the copy.

The Google lawsuits remind us that networked digital technology constrained by a copyright law that is both spare and sensible can expand our access to knowledge enormously. If, instead, our copyright law takes the form that the entertainment and information industries seem determined to purchase from the United States Congress, access to knowledge and the ability to make use of it may become subject to ever-more draconian controls. In addition, the new regime will nibble away at our liberty until the only way to read, listen to, or view a work in secret is to track down an old analog copy in the bowels of some brick-and-mortar library.[6] We can choose which of these two futures we find more appealing, or we can leave the choice to the lobbyists for copyright-affected industries.

Ann Arbor
November 2005

NOTES

1. *A&M v. Napster*, 284 F.3d 1091 (9th Cir. 2001).

2. *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), aff'd, 380 F.3d 1154 (9th Cir. 2004), rev'd ___U.S. ___, 125 S. Ct. 2764 (2005).

3. *MGM v. Grokster*, 125 S. Ct. 2764 (2005).

4. *See* Jessica Litman, *War and Peace: The 34th Annual Donald C. Brace Lecture*, 53 Journal of the Copyright Society 1 (2005); Jessica Litman, *War Stories*, 20 Cardozo Arts & Entertainment Law Journal 337 (2002).

5. *See* Creative Commons, at http://www.creativecommons.org.

6. And perhaps not even then. A number of library systems have recently deployed radio frequency identification, or RFID, systems that enable them to improve their ability to track books in their collections by inserting an RFID tag in every book. *See* American Library Association, RFID: Radio Frequency Identification Chips and Systems, URL: <http://www.ala.org/ala/oif/ifissues/rfid.htm>.

GLOSSARY

ADHESION CONTRACT. Standardized form contract offered to consumers on a take-it-or-leave it basis, without the opportunity to negotiate terms.

ANALOG. Conventional recording technology records sound and pictures by continuous measurement of its properties. Analog recordings of music, for example, translate the sound waves into electrical signals of the same frequency. Analog data cannot be processed by computers unless it is first translated into **digital** form. As analog data is transmitted over distances or rerecorded, it is subject to degradation in the quality of sound and picture.

ASSIGNMENT. In copyright law, an assignment is the transfer of one or more exclusive rights. Assignments must be accompanied by a signed, written document. All other transfers are considered to be **licenses**.

COMPULSORY LICENSE. A **license** prescribed by law. Compulsory licenses are an exception to the general rule requiring the copyright owner's permission in order to reproduce, adapt, distribute, publicly perform, or publicly display a protected work. The copyright statute includes several compulsory licenses, all of which require the payment of money to the copyright owner in return for automatic permission to engage in specific limited uses. The mechanical license allows recording artists to record previously released songs in return for a statutory fee paid directly to the copyright owner. The cable TV license permits cable systems to transmit broadcast signals to cable subscribers in return for a statutory royalty that is paid into a pool divided among copyright owners in an annual arbitration proceeding. The satellite TV license is narrower, but operates similarly. Some digital public performances of **sound recordings** are covered by a compulsory license (analog public performances of sound recordings are wholly exempt). The statute contains a backup compulsory license for the benefit

of public broadcasting in the event that public broadcasters and copyright owners are unable to negotiate terms.

COPY. The statute defines "copies" as tangible things (such as books, CDs, floppy disks, or statues), in which a work is embodied (or "fixed") in permanent form. Copying a work, therefore, means making a copy: One copies a work when one reproduces it in fixed, tangible form. That can happen when one makes a verbatim copy, or when one creates a new work containing expression copied from the old work. Performing or displaying a work does not, without more, create a "copy" of it, although it may under some circumstances infringe the copyright owner's independent exclusive rights to publicly **perform** or **display** the work.

COPYRIGHT. Copyright is a bundle of exclusive rights to permit or forbid particular specific uses of a work. In the United States, copyright is defined by statute: Congress has granted copyright to authors of works. The copyright gives the author, the author's employer, or anyone to whom the author transfers her rights the legal ability to control who may **copy**, adapt ("create **derivative works**"), **distribute**, publicly **perform** or publicly **display** her work, subject to particular legal exceptions. Under the U.S. Constitution, copyrights may last only for limited times.

DECOMPILE. Decompilation involves the use of computer software tools to **reverse-engineer** a computer program by mechanically translating the machine-readable code into language that's comprehensible to people. Computer programs are initially written in "source code," which is a language intelligible to people, expressing the tasks and routines that make up the program. A "compiler" program is then used to translate the program into code that will run on a computer. Thus, *de*compilation is an attempt to reverse that translation process.

DECRYPTION. Decoding data that has been **encrypted**, i.e., translated into a secret code.

DERIVATIVE WORK. A derivative work is a new work that incorporates protectable expression from an underlying work. Films are often derivative works based on stories or books—they incorporate protected plot, character, and dialogue elements from the stories. **Sound recordings** are usu-

ally based on (and incorporate) musical works. Translating a book into a different language or writing a musical arrangement for a song is creating a derivative work. The U.S. copyright statute gives the copyright owner control over the creation of derivative works.

Digital. Information recorded in the form of numbers, especially 0 and 1, so that it can be processed electronically.

Display. To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or computer image. The U.S. copyright statute gives the copyright owner control over some but not all public displays. It does not give the copyright owner control over private displays.

Distribute. To distribute copies of a work means to transfer tangible copies from one person to another. The statutory **publication** right is in fact a right to distribute copies to the public by sale, gift, rental, lease, or lending.

Encryption. Translating data into a secret code, so that it cannot be read without a password or key.

Fair Use. Fair use is a long-standing legal privilege to make unauthorized use of a copyrighted work for a good reason. Claims of fair use are evaluated by courts on a case-by-case basis. There is no hard and fast rule setting forth how much of a work may be used—despite popular perceptions, there has never been any magic number of words one may quote or notes one may copy.

File-sharing utility. A computer program that facilitates the exchange of computer files among different computers. File-sharing utilities are key to the operation of computer networks, from LANs to the Internet.

Fixed. The copyright statute deems a work to be "fixed" when it is embodied in a material object with sufficient permanence that it can be perceived or communicated for a period of more than transitory duration.

Formalities. Until 1989, the United States conditioned copyright on complying with a variety of formal requirements. One of the most familiar for-

malities was the requirement for copyright **notice**. From 1909 until 1978, publishing a work with the required copyright notice (the word "copyright" or the symbol ©, the name of the copyright owner, and the date of first publication) was in most cases necessary for federal copyright protection. Publishing a work without the required notice thrust it into the public domain. In 1976, Congress enacted a new copyright law that, effective 1978, made copyright protection automatic for all works, whether published or not. Even under the new law, however, distributing copies of the work without the prescribed copyright notice could dump the work into the public domain. Other formalities included requirements that copyrights be registered, that the person designated by the statute as the proper claimant for the copyright renewal term apply for renewal within a twelve-month window, and that certain texts be printed from type set in the United States. In 1989, the United States abandoned formal prerequisites to copyright protection when it ratified the Berne Convention.

Hyperlink. A string of code in an electronic document that links to another electronic document or to another location in the same document. People using the World Wide Web commonly encounter hyperlinks embedded in Web pages; by clicking on the links, they can follow them to new Web pages or resources.

Hypertext. A language permitting nonlinear association of data. Related pieces of information are connected by links that allow the author of a hypertext document to combine multiple sources of data in a single document, and to allow a user to follow associative trails to different documents and data. The linked data may be text, pictures, sound, or executable computer programs.

Infringement. An invasion of legal rights. Copyright infringement consists of reproducing, adapting, distributing, publicly performing, or publicly displaying a work protected by copyright without either a legal privilege or the permission of the copyright owner.

License. Permission to reproduce, adapt, distribute, perform, or display a work. Licenses need not be in writing; they may be granted orally or inferred from circumstances. When someone sends a letter to the editor of a newspaper, for instance, that behavior supports an inference that the

writer intended to grant the newspaper a license to print the letter in the "Letters to the editor" section of the paper, and to edit the letter for length. It does not, however, support a conclusion that the writer transferred the copyright to the newspaper, since the copyright law requires all **assignments** or transfers of ownership to be in writing.

Literary works. The copyright statute defines literary works to include any works expressed in words, numbers, or other verbal or numerical symbols or indicia. Novels, essays, and grocery shopping lists are literary works under the statutory definition. So are databases and computer programs.

Notice. Copyright notice is now optional; until 1989, U.S. law required that any publicly distributed copy bear a notice consisting of the word "copyright" or the symbol ©, the name of the copyright owner, and the date of first publication. This book, for example, bears the copyright notice "© 2001 Jessica Litman." Commercially released recorded music often bears two copyright notices: a © notice covering the artwork and any lyrics and a ℗ notice covering the performance of the music and the dubbing and mixing of recorded sound. Through an accident of history, it has never been necessary to affix © notice to sound recordings to preserve the copyright in the songs on the recording.

Patent. A patent is an exclusive right to make, use, or sell an invention for a period of twenty years.

Perform. The statutory definition of perform says: "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." Singing a song is performing it; turning on the radio in your car is performing the music being played on the radio; playing a prerecorded tape or watching television are performances. The copyright statute gives copyright owners control over most public performances, but not over private performances.

Portal. A portal is a site on the Internet designed to lead to other sites.

Privity. The relationship between two parties to a contract, or between two people whose interests are sufficiently congruent that the law will treat an agreement by one as binding the other.

Public domain. Material not subject to copyright protection, either because the material is not protectable by copyright (e.g., ideas, facts, processes, systems) or because copyright protection has expired (e.g., Mark Twain's *Tom Sawyer*) or been forfeited by failure to comply with a statutory condition for copyright. The public domain comprises material that the public is free to use in any way it pleases.

Publication. The distribution of copies of a work by sale, rental, loan, or gift. A public performance or display of a work does not constitute publication.

Register of Copyrights. The Register (not "Registrar") of Copyrights is the head of the Copyright Office, which is a department of the Library of Congress. The Copyright Office is responsible for registering claims to copyright (hence the title "Register"), promulgating copyright regulations, advising Congress and the executive branch on copyright law, and managing the statutory **compulsory licenses**.

Registration. A work attains copyright protection independently of any registration of the copyright. Until 1978, however, registration of copyright protection was mandatory, and failure to register could ultimately result in forfeiture of the copyright. In the 1976 Copyright Act, effective January 1, 1978, registration was made optional. U.S. citizens must register their copyrights before suing for copyright infringement, but registration may occur at any time during the copyright term.

Reverse engineering. Analyzing a product by taking it apart in order to reconstruct its design.

Royalty. The term "royalty" is used generally to describe money paid in return for the use of property. In the copyright context, it means money paid in return for copying, adapting, distributing, performing, or displaying a copyrighted work.

Search engine. A computer program that searches documents for specified keywords or symbols and returns a list of documents where the keywords or symbols were found. Search engines combine search algorithms with a database of documents to be searched. Search engines that locate documents on the World Wide Web do not, typically, execute the computer program on the Web at the time that the user types in a query. Rather, the search is run on a database assembled by sending a computer program (called a spider) to follow links to Web pages and record the content and location of each Web page it finds, and then indexing the resulting records. The copies made in that process are **copies** within the scope of the copyright owner's reproduction right, and may infringe the copyright, except to the extent that they fall within a statutory privilege, such as **fair use**.

Sound recording. A sound recording is a copyrightable work of authorship comprising the performance, recording, dubbing, and mixing of sounds. The copyright in a sound recording is independent of the copyright in a musical work that might be recorded. Industry practice calls for sound-recording copyrights to be controlled by record companies. If Clara Composer writes a song and Sam Singer records it under a contract with Retro Records, whose technicians mix the vocal track with an instrumental accompaniment played by Big Band, then the copyright in the song is owned by Clara, while the copyright in the work created by combining Sam's performance, Big Band's performance, and Retro Records' mixing of the tracks is separate from Clara's copyright and owned by Retro Records.

Streaming. Streaming is the continuous transmission of digital information. Streaming audio and video transmits content to consumers in a stream that permits them to watch or listen as the data is transferred. This has three principal advantages. First, streaming avoids overwhelming constrained resources (slow modems, congested networks, limited computer memory) by transferring data a little bit at a time. Second, consumers can view or listen to streamed material immediately, without waiting for the download of an entire file. Finally, because the entire file is not transferred as a unit, streamed content cannot easily be saved by the recipient. Copyright owners have therefore been more willing to make their content available over the Internet in streamed format than to release it in downloadable format.

TRADEMARK. A word or symbol used to distinguish one business's product from products of other businesses.

URL. "Uniform Resource Locator," the global address of documents and other material on the Internet.

USENET NEWS. A free-floating collection of more than twenty thousand subject-specific online discussion groups, offering virtual conversation on any imaginable topic. Usenet preceded the World Wide Web, and was one of the most popular recreational uses of the Internet in the late 1980s and early 1990s. It is entirely text-based. Although it has been eclipsed by the World Wide Web, it continues robust operation despite the fact that nobody "owns" it and it doesn't easily lend itself to moneymaking. To sample Usenet news, visit deja.com's Usenet archive at <http://www.deja.com/usenet>.

INDEX