THE NINTH CIRCUIT TAKES A WALK ON THE WILD SIDE

by

Lee B. Burgunder*

"Purple Haze, all in my brain; Lately, things just don't seem the same"[1]

On February 12, 2001, the Ninth Circuit Court of Appeals filed its much-anticipated opinion in *A&M Records, Inc. v. Napster, Inc.*[2] The basic conclusion that Napster is liable for the copyright infringements of its users came as little surprise to legal experts. The opinion, though, mixes clarity with confusion, and maintains much of the fog overhanging the digital arena. This paper discusses many of the important points and defects of the landmark Napster case.

The Basic Facts

"Ch - Ch - Changes, Oh, look out you rock 'n rollers"[3]

Napster is a Web service that enables users to find audio MP3 files on the hard drives of other participants and then download selected files from the remote hard drives to their own computers. Napster provides the necessary software. It also posts a directory containing the names of MP3 files stored in the hard drives of users that are on-line. Napster does not determine the names of the files posted on its directory; rather the users make those designations.

Napster does not directly copy or distribute copyrighted material. However, customers who use its service allow the public to make copies of copyrighted material in remote locations. In this way, Napster users engage in public distributions of copyrighted material without permission. In addition, those customers who download selected copyrighted songs make reproductions of copyrighted materials without permission. Thus, the behavior of Napster participants is only lawful if it may be defended as a fair use or is protected by some other legislative provision. These individuals were not the subject of the lawsuit, however, due to the economics and practical realities of enforcement. Instead, the music industry sued Napster, hoping to cut off the air supply for the entire pirating effort. Thus, the question in the Napster litigation is whether Napster should be held responsible for the copyright violations of its users since it provides the means for its users to conduct their unlawful acts.

The Court Confuses *Sony*

"Girls will be boys, and boys will be girls. It's a mixed up, muddled up, shook up world."[4]

In *Sony Corp. of America v. Universal City Studios. Inc.*[5], the Supreme Court determined that Sony could not be held liable for copyright infringement simply because it sold a machine that might be used to infringe copyrights. After all, every article of commerce may be used for unlawful activities. For instance, a hammer might be used as a tool for criminal behavior, such as burglary or murder. Nevertheless, it would be socially undesirable to hold the hammer manufacturer liable for these unlawful acts simply because it provided the instrumentality to conduct them. Otherwise, the price of hammers might become prohibitively expensive for all the lawful users, thereby reducing the hammer's total utility to the public at large. On the other hand, if there were not any substantial lawful uses of hammers, then holding the manufacturer liable would not be socially harmful since few socially desirable uses would be deterred. The manufacturer does not know for sure how its hammers will be used, and has no way to stop its customers from engaging in unlawful acts once the hammers have been sold. Nonetheless, if the hammer, for the most part, only may be used for unlawful activity, then the manufacturer has constructive knowledge that it will be so used for illegal acts. Thus, *Sony* held that if there were no substantially noninfringing uses of the VCR, then the seller has constructive notice that its customers will engage in unlawful acts, and so can be held liable for "vicarious" copyright liability.

The Ninth Circuit in one breath seems to say that *Sony* is not relevant to Napster's situation, but in another says that it is. For instance, it says "We are bound to follow *Sony*, and will not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights."[6] However, it also said,

* Professor of Technology Law and Public Policy, California Polytechnic State University, San Luis Obispo, CA.

"Regardless of the number of Napster's infringing versus noninfringing uses . . . plaintiffs would likely prevail in establishing that Napster knew or had reason to know of its users' infringement of plaintiffs' copyrights."[7]

The root of the court's problem in addressing *Sony* is that it insists on classifying *Sony* as a situation involving constructive notice while distinguishing Napster because it involves actual notice. The court indicates that Napster may not have constructive knowledge of infringement because there may be substantial non-infringing uses. In this way, Napster is just like the Betamax, and under *Sony*, should not be held liable. However, the Court implies that Napster should be treated differently -- and then measures its responsibility under the rubric of a different case, *Religious Technology Center v. Netcom On-Line Communication Services, Inc*.[8]

The Ninth Circuit is correct; Napster should not be treated like a VCR. The problem is that the court never directly states why. The difference regards the degree or control that the defendant has over the behavior of its customers. After Sony sells a VCR, it relinquishes all control over how its buyers will use the machine. Even if Sony were informed that one of its buyers were making copies of rented movies with the VCR, Sony could do nothing to stop the unlawful activity. For this reason, the Supreme Court refused to hold the Sony responsible unless there were few socially desirable uses of the machine. Napster, on the other hand, may have a continuing ability to prevent unlawful uses of its system by its customers. That is, if Napster were to learn that one of its customers were engaging in unlawful activity, it might be able to do something about it. For this reason, different principles should apply to Napster, but not due to notions of knowledge, but rather due to the degree of control that it has over unlawful activity. Unfortunately, the Ninth Circuit never really says this.

The Ninth Circuit makes an interesting observation about *Sony*, although in the end, it did not affect its conclusions. Napster had argued in its defense that it should not be liable because there are substantial noninfringing uses of the service. The district court found that there were few *current* noninfringing uses, and so found Napster liable under *Sony*'s standards. The Ninth Circuit stated that if *Sony* were to apply, then it would be a mistake to focus narrowly on current uses. Rather, the evaluation would have to consider not only current uses, but potential *future* uses as well. In other situations where the defendant does not control the actions of its customers, the inclusion of potential uses may be a substantial shield to liability.

The Court Confuses the Subject of the Fair Use Defense

"The head nurse spoke up, and she said leave this one alone.
She could tell right away that I was bad to the bone."[9]

The court performed a general fair use analysis of the Napster system, and then also analyzed certain specific customer uses in terms of fair use. It is not clear why the court did this, however. Since Napster does not directly engage in copyright infringement, it makes little sense to address whether *its* actions nonetheless might be a fair use. Given that it is only the customers who potentially may be violating specific copyright privileges, fair use only is relevant in terms of their conduct.[10] Also, the court states that *Sony*'s principles do not apply. Thus, it seems incongruous to evaluate whether certain specific customer practices are fair uses, since the number or substantiality of noninfringing uses really does not matter. The end result is that the court spends a large portion of the opinion evaluating fair use, but its purpose for undertaking the analysis is murky at best.

Nonetheless, the Ninth Circuit probably was not wrong to evaluate fair use. The problem, again, is that it did not clearly state why its analysis mattered. One might explain the fair use linkage in the following manner. Based on *Netcom*, the court determined that Napster is liable only if it knows or has reason to know that infringing files are listed on its directory. If the recording industry were to notify Napster that a customer had made a copyrighted file available on its service, how would Napster know that the customer was not engaging in fair use? This answer might pose a problem unless there were no possible fair use explanations for what any customer was doing. Thus, the court may be saying that in general, Napster users are not engaged in fair use. Even those customers that have particular rationales, such as sampling or space-shifting, do not engage in fair use, according to the court. Therefore, if the recording industry were able to show that a customer listed a copyrighted song, Napster would know that the posting infringes since fair use is not a possibility. Assuming Napster had enough control to block the copyrighted song from the system, one thus could hold the company liable under the *Netcom* principles.

Evaluation of Fair Use Factors

"Money, so they say, is the root
of all evil today."[11]

Fair use involves a balancing of four factors: (1) purpose and character of the use; (2) Nature of the work; (3) the amount used; and (4) market effect. The songs copied by Napster users are creative and within the core of copyright protection. Also, people who use Napster download entire songs. Thus, factors 2 and 3 weigh heavily against those using Napster. Nonetheless, the Supreme Court made it clear in *Sony* and *Campbell v. Acuff-Rose Music, Inc.*[12] that no factor is

dispositive, and that one might make a fair use even when copying an entire creative work. Thus, as is often the case in technology disputes, the purpose and market effect are the most important determinants in the analysis.

Purpose and Character of the Use

Napster argued that its users are engaged in personal use and do not have commercial motivations when using the system. The Ninth Circuit correctly disagreed, but its analysis raises some interesting questions.

The court first focused on the character of the use, and noted that transformative uses have a greater claim to fair use. The court rightfully disregarded Napster's claim that its users somehow use the system to transform CDs into MP3 form. Clearly this is not what the courts have meant by transformation in such cases as *Sega Enterprises, Ltd. v. Accolade, Inc*.[13] and *Acuff-Rose*. "Transformation" means to alter a copyrighted work into a new creative work; not simply to change the medium in which it appears.[14]

Napster noted that its users do not make a commercial use of the copyrighted songs since they make copies only for their private listening and do not sell the copies or otherwise make money with their activities. The Ninth Circuit agreed with the district court that those involved with Napster do make a commercial use because they "get for free something that they would ordinarily have to buy."[15] In other words, a commercial use is one that brings monetary benefit to the duplicator -- which can result from a cash inflow or a reduction in an outflow.

Based on this theory, individuals who use Napster merely to sample songs make a commercial use. This is because they otherwise might have to pay the record companies to download the samples. The court stated that this is true even though the record companies often do not charge for samples, since the free samples consist only of song snippets or only are playable for a short period of time. Presumably, downloading samples might not be commercial if the samples were downloaded under the same conditions as offered by the record companies for free, since there then would be no reduction in the cash outflow.

Although there is symmetry to the argument that a commercial use can be achieved by making money or saving money, the conclusion does not necessarily conform to every situation. For instance, one might argue that a person makes a commercial use by copying the contents of a purchased CD to a computer and/or to a personal MP3 music player because the record companies otherwise could have licensed the right to download the MP3 copy. Similarly, one who copies a CD to a traditional analog tape cassette so that it might be played in an automobile tape deck, is engaged in a commercial use since that person otherwise would have to buy a prerecorded tape at a store. However, the Ninth Circuit in its previous decision about the Rio, stated that space-shifting of this kind is "paradigmatic noncommercial personal use."[16]

One might try to explain this conclusion with the following theory. If one possesses a lawful copy of a copyrighted work, then one has a right to listen to that work in different locations. As a corollary, this person also has a fair use right to make copies to facilitate the personal enjoyment of the work in other locations. This seems to be what the Ninth Circuit meant by space-shifting in *Recording Industry Association of America v. Diamond Multimedia Systems, Inc*.[17] It also somewhat explains *Sony*, which allowed VCR users to view lawfully received television programs at a different time (which, in effect, is a different place). Nonetheless, the standard has problems. For instance, suppose I buy a painting and it looks good in my bedroom. I decide that I also would like to view it while I am in the kitchen. Would I be allowed to make a copy of the painting to hang in my kitchen? Or should I have to buy another copy from the artist? Similarly, why is there an exception allowing copyright owners of computer programs to make back-up copies or to make copies in RAM? If personal space-shifting is a fair use, then these actions should be lawful without the need for special legislation.

So, what we are left with is a lot of confusion. The Ninth Circuit seems to imply that a use is commercial whenever it potentially causes the copyright owner to lose money. In effect, a negative market effect means that the use is commercial. This, of course, renders the first factor meaningless since it is derived from the last factor. At the same time, the court indicates that space-shifting is noncommercial; however there are circumstances when space-shifting might have a negative market effect. Perhaps the court should have addressed commercial as the Supreme Court specified in *Sony*; that is, commercial is simply for-profit and noncommercial is not-for-profit.

Defining commercial as for-profit would mean that the use of Napster is not commercial. However, one should not therefore conclude that the first factor favors Napster. The factor requires an evaluation of the purpose, including whether the use is of a commercial nature or for nonprofit educational reasons. The use of Napster may not be of a commercial nature, but it also is not used for educational reasons either. Also, as the court properly found, the purpose of using Napster is not solely personal. Rather, when one enters the system and lists a file on the hard drive, that file is available for anyone on the system to download for free. Thus, Napster is not analogous to the Betamax or the Rio, which involved space- or time-shifting solely for personal uses. Indeed, the Ninth Circuit would have been well-advised to have evaluated the first factor primarily on the lack of transformation and the public distribution of copies. This would have led to far more coherence than its tortured reading of the word "commercial."

Market Effect

The Supreme Court in *Acuff-Rose* made it clear that market effect is the watchdog for fair use, and is by far the major determinant of whether a use is fair. Much of the Ninth Circuit's concern regarding the so-called commercial use by Napster customers really was driven by its recognition that these users might cause negative market effects on the copyright owners.

Thus, the court's opinion would have been less confusing and more straightforward had it simply addressed potential customer savings in terms of negative market effects rather than in terms of commerciality.

The Ninth Circuit had little trouble finding that access to free copies over Napster likely causes users to purchase fewer CDs. Napster argued that many customers download simply to sample particular songs, and that they end up buying more CDs because these experiences pique their interest enough to buy the full recording. The court clearly doubted this conclusion. Nevertheless, the court ruled that it did not matter, because Napster, by allowing customers to download copyrighted works for free, hurts the ability of the recording companies to enter the digital download market for a fee. Thus, one may not argue that a use does not affect the copyright owner's market simply because the copyright owner is not yet involved in that market. In addition, a positive effect in one market is immaterial if there is a negative effect in another market.

These conclusions provide some disappointing news to professors who like to copy articles and put them in a reading packet. How many professors have argued that placing copies of Wall Street Journal articles in a packet is a fair use because it exposes students to the newspaper, and likely increases sales of journal subscriptions. Although this likely is true, it does not matter, since the practice hurts the paper's ability to license single articles for a fee. Seemingly, this market effect is still negative even if the particular publisher does not yet license individual articles. If professors were to make copies and offer them with no copyright charge, then the publishers would have a harder time entering the market later for a fee.

Although this point was not discussed in the Ninth Circuit opinion, some people argue that Napster is no different than recording off the radio, since the music is received and copied for free. This, of course, is incorrect for several reasons. First, analog recordings are far inferior to digital, and thus the market effect is significantly less. Second, due to special legislation, the recording industry receives royalties on the sale of digital recorders and digital recording media.[18] Third, the recording industry is entitled to royalties from Internet stations that stream recordings.[19] And fourth, Napster allows one to select desired songs -- a pull privilege instead of push. Analogous interactive Internet radio stations must negotiate royalties with the recording industry. Thus, the market effects from Napster should not be compared to those from radio stations without scrutinizing the facts.

Confusion Over Contributory and Vicarious Liability

"I am he as you are he as you are me
and we are all together"[20]

As previously noted, the court mishandles the analysis of contributory liability in its treatment of *Sony*. In the end, though, the court correctly addresses Napster's liability for contributory infringement in terms of the principles applied to the Internet service provider in *Netcom.* Following this approach, Napster is responsible for copyright infringements on the system after it receives reasonable knowledge of infringement and if it has the capacity to stop them.

The major question in this regards how extensively Napster must respond to the notice. For instance, in *Netcom*, the ISP was notified that Religious Technology Center owned the copyrights to specified L. Ron Hubbard works, and that a particular customer was violating those copyrights by posting them without permission. An important focus of the opinion was whether the ISP had sufficient information to judge that the customer infringed the copyrights, thereby requiring that customer's postings to be blocked. Similarly, the Digital Millennium Copyright Act (DMCA), which provides procedures to comply with the *Netcom* principles, applies notice-and-take-down procedures regarding particular infringement by specified individuals. The Ninth Circuit, though, when discussing contributory infringement, states that the Napster's duty may be much greater after receiving notice. According to the court, Napster has liability when it knows that infringing material is on the system and it fails to block access to the system by suppliers of the infringing material. This implies that Napster may have the duty to not just block the material from a specified user, but must seek out other users who also post the same infringing material. The preliminary injunction order bears this out, although it is not totally clear whether it is to remedy contributory liability, vicarious liability, or both. By analogy, Netcom, once notified, should have had the responsibility to police all its other users to see if they too posted the works of L. Ron Hubbard. Such a duty, though, exceeds the requirements of *Netcom.*

Napster has vicarious liability if (1) it has the right and ability to control (or supervise) the act of its customers and (2) if it receives direct financial benefits from their infringements. The court determined that the ability to block access is tantamount to the right to control. The more intriguing issue regards direct financial benefit. In *Netcom*, the court determined that the ISP did not receive a direct financial benefit from the allegedly infringing posting. The court analogized the situation to a landlord that receives a fixed rent. However, the court also noted that there was no evidence that the general existence of infringing materials on the system increased the value of the system to subscribers. The Ninth Circuit viewed Napster somewhat differently, finding that the existence of illegal materials "acts as a draw" for customers. Both decisions are probably correct -- the only problem is where the line demarcating direct financial benefit should be drawn between these two extremes. After all, the potential availability of illegal material will always be somewhat of a draw to users on the Internet. Thus, there ultimately may have to be a test based on the primary purpose or use of the system.

The Court Clarifies Its Mess About the AHRA

"I can see clearly now the rain is gone.
I can see all obstacles in my way."[21]

In its previous opinion regarding the Rio, the Ninth Circuit claimed that the main purpose of the Audio Home Recording Act (AHRA) is "to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private noncommercial use."[22] Napster claimed that its users are protected by the AHRA, based on this interpretation by the court.

The court might have addressed this narrowly, sticking to the statement, but claiming that Napster users are not making recordings for their private use. However, the statement had the potential to cause greater problems, since it implied that one lawfully could download or duplicate musical recordings on a computer --- as long as they were not then made available to the public. This clearly was an incorrect interpretation of the AHRA, and the Ninth Circuit made that clear in the Napster opinion.

Essentially, the AHRA was a bargain that solved looming concerns about digital audio tape recorders and other forms of digital audio recording devices. At the time, there were concerns that digital media would be used to copy recordings, and that the copies might be used as source materials for further copies. Thus, by a Malthusian explosion, the recording industry could lose control over its revenue stream. The AHRA required digital audio recording devices to have a copy control system. In addition, sellers of digital audio recording devices and digital media had to pay royalties based on their revenues. In exchange, the Act provided that users of digital and analog and digital audio recording devices could not be sued for copyright infringement. The Act also made it clear that computers are not digital audio recording devices.

Since computers are not digital audio recording devices, those that use them to copy musical recordings are not protected by the Act. This makes sense, since they do not have to incorporate copy protection nor must their sellers pay royalties to copyright owners. Yet, the Ninth Circuit in the Rio case implied that the AHRA's protections might extend to any noncommercial copying. Thankfully, the court slammed the door on the improper impressions that it had given with the Rio.

Continuing Confusion Over the Application of the DMCA

"Fa fa fa fa fa fa fa fa fa far better
run run run run away."[23]

The Ninth Circuit did not address the potential application of the Digital Millennium Copyright Act outside of saying that the issues must be determined at trial. The DMCA has formal procedures that provide ISPs a mechanized format for dealing with alleged infringements on their systems. Napster claims protection from section 512(d), which deals with Internet service providers that link users to infringing materials through information location tools, such as directories. The Ninth Circuit claimed that there were significant questions about (1) whether Napster is an ISP under the Act, (2) the form of notice that it must receive under the Act, and (3) whether Napster properly has an appropriate compliance policy under the Act. Nevertheless, the court approved of the preliminary injunction, based on its balancing of hardships.

One important issue that the court skirts is whether the Act protects contributory and/or vicarious infringers. Since the Act was passed in part as a response to *Netcom*, it clearly does provide some protection for contributory infringement. The basic notice-and-take-down procedures cures the perceived problems that *Netcom* created for ISPs regarding the suitability of notice and its impact on "knowledge." However, the Act also makes it clear that there is no protection for vicarious liability.[24] Nonetheless, the Ninth Circuit was not willing to make these conclusions without a more complete record at trial.

Misuse and the Issue of Copyright Control

"You used me and abused me til I felt like I wanted to die.
You created a need in me that only you can satisfy."[25]

Napster claimed that the recording industry is using its copyrights in music to control online distributions. The company argued that this amounts to copyright misuse, based on the arguments that were successful in *Lasercomb America, Inc. v. Reynolds*.[26] Misuse often occurs when there also is an antitrust violation, but it may independently arise when intellectual property owners use their power to exercise greater control than the intellectual property laws allow. This doctrine does not apply to members of the recording industry, however, because they are not demanding greater protection for their property than what the copyright laws provide.[27]

Even though Napster's concern does not amount to misuse, the use of software to control hardware is becoming a pervasive issue with new technologies. For instance, reverse engineering of copyrighted video games has been considered a

fair use, notwithstanding a potential negative market effect on sales of game players, because the copyright privilege does not extend to the market for the players.[28] This same controversy has also arisen in the DeCSS litigation, wherein the defendants have argued that the movie industry is trying to control the market for DVD players.[29] Thus, Napster's arguments are not novel. However, the recording industry's actions can be distinguished from these other situations, and the Ninth Circuit, therefore, was right to dismiss Napster's claims. For instance, in the video game cases, the plaintiffs argued that their games could not be copied because it affected their revenues from selling machines. By contrast, the recording industry only argues that its songs should not be copied because it reduces revenues from those songs. As for DeCSS, special legislation supports the allegations of the movie industry.

The Requirements of the Injunction Has Everybody Confused

"Always look at the bright side of life
(whistle, whistle, whistle, whistle)"[30]

The Ninth Circuit put the burden on the recording industry to notify Napster of the songs and files that violated its copyrights, but put the burden on Napster to police the system and to disable access to the offending content. The major problem that the parties are encountering is that the users make up the file names. Thus, if the recording industry provides the name of a copyrighted song, and Napster removes it from the directory, users easily can evade the sweep by using simple misspellings that confound a computerized search, but still may be recognized by humans. Indeed, users have become increasingly clever, developing special codes and encryption that they transmit among themselves, but that cannot be discerned easily by search algorithms. Perhaps gaining the most attention is a program distributed via Aimster called the Aimster Pig Encoder that uses a form of pig Latin to disguise file names.[31] The trial court judge, in fashioning the injunction, essentially placed the burden jointly on Napster and the recording industry to use reasonable measures to identify filename variations.[32] However, this is proving to be very frustrating, leading both parties to claim that the other is not doing enough.[33]

Conclusion: Ball of Confusion

"Ball of confusion, ball of confusion.
That's what your world today."[34]

The Ninth Circuit's Napster opinion reached the correct conclusion, but not with great clarity. The problem is that Napster is just the tip of the iceberg, so decisive well-reasoned opinions are needed to lay the foundation for future battles. The distributors of Aimster, for instance, may not have the power to police the files of users because the communications among buddy groups are encrypted.[35] If this is true, then perhaps Aimster should be evaluated like the Sony Betamax. The problem is that the Ninth Circuit now has garbled what *Sony* says. In addition, its application of the fair use defense was not exceedingly coherent. This is a shame, since fair use is proving to be critical in almost all modern technological contexts. The Napster litigation has caught the public's eye because it illustrates so well how much the public likes the ability to make acquisitions for free once they get a taste of it. It just goes to show that the kids were alright when they claimed that freedom tastes of reality.

Footnotes

[1] Purple Haze, by Jimi Hendrix, performed by The Jimi Hendrix Experience.
[2] 239 F. 3d 1004 (9th Cir. 2001).
[3] Changes, written and performed by David Bowie.
[4] Lola, by Raymond Davies, performed by The Kinks.
[5] 464 U.S. 417 (1985).
[6] 239 F. 3d at 1020-21.
[7] 239 F. 3d at 1021.
[8] 907 F. Supp. 1361 (N.D. Cal. 1995).
[9] Bad to the Bone, by George Thorogood, performed by George Thorogood and the Delaware Destroyers.
[10] The District Court performed the same analysis in *Netcom.* It first concluded that Netcom might have contributory liability, and then analyzed whether Netcom's actions nonetheless might qualify as a fair use. Again, this approach is awkward, which is aptly demonstrated by the court's tortured analysis. Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361, 1378-81 (N.D. CA, 1995).
[11] Money, written and performed by Pink Floyd.
[12] 510 U.S. 569 (1994).
[13] 977 F. 2d 1510 (9th Cir. 1992).

[14] *But see* Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F. 3d 596 (9th Cir. 2000) (A product that creates a new platform to play games is modestly transformative. However, the court made this determination because the final product did not contain any copyrighted expression).
[15] 239 F. 3d at 1015.
[16] Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F. 3d 1072, 1079 (9th Cir. 1999).
[17] 180 F. 3d 1072 (9th Cir. 1999).
[18] Audio Home Recording Act, Pub. Law No. 102-563 (Oct. 28 1992), *codified at* 17 U.S.C. §§1001-10010 (1992).
[19] Digital Performance Right in Sound Recording Act, Pub. Law No. 104-39 (1995), *amended by* Digital Millennium Copyright Act, Pub. Law No. 105-304 (Aug. 5. 1999); Copyright Office, Public Performance of Sound Recordings: Definition of a Service, 37 C.F.R. 201, 65 Fed. Reg. 77292 (Dec. 11, 2000).
[20] I Am the Walrus, by John Lennon and Paul McCartney, performed by The Beatles.
[21] I Can See Clearly Now, written and performed by Jimmy Cliff.
[22] RIAA v. Diamo nd, 180 F. 3d at 1079.
[23] Psycho Killer, by David Byrne, performed by Talking Heads.
[24] Section 512(d)(2) of the DMCA states that a service provider linking users by information location tools is not liable if it "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."
[25] Surrender, by Nickolas Ashford and Valerie Simpson, performed by Diana Ross.
[26] 911 F.2d 970 (4th Cir. 1990).
[27] *See* L.L.C. v. Xerox Corp., 203 F.3d (1322, 1327-29 (Fed. Cir. 2000).
[28] Sony Corp. Entertainment, Inc. v. Connectix Corp., 203 F. 3d. 596 (9th Cir. 2000); Sega Enterprises, Ltd. v. Accolade, Inc., 977 F. 2d 1510 (9th Cir, 1992).
[29] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D. NY 2000).
[30] Bright Side of Life, by Eric Idle, performed by Eric Idle with Monty Python.
[31] See, e.g., T. Smith, "Aimster Tells Napster File Filter to 'Pig Off'," The Register (3/7/01), www.theregister.co.uk/content/417409.html; L. Gomes, "Napster's Cleanup Faces Tricky Test; Song-Title Variants," Wall St. J. (3/6/01) at B6.
[32] A & M Records, Inc. v. Napster, Inc., 2001 U.S. Dist. LEXIS 2186 (N.D. CA 2001).
[33] See, e.g., M. Richtel, "Music Industry and Napster Still at Odds," N.Y. Times (3/21/01) at Business 1. Both sides appealed Judge Patel's modified injunction order in May, 2001.
[34] Ball of Confusion, by Norman Whitfield and Barrett Strong, performed by the Temptations and Duran Duran.
[35] In May, 2001, Aimster filed a declaratory judgment suit in the Northern District of New York, requesting a ruling that it does not violate copyrights. See "Aimster Sues the Recording Industry," The Standard (May 2, 2001), at www.thestandard.com/article/0,1902,24170,00.html.