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## Digital Music: Educational Issues

John Faust

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# DIGITAL MUSIC: EDUCATIONAL ISSUES

## I. INTRODUCTION

In the past five years, the Internet has been a major cause of the technological revolution and has become a mainstay in society as Americans use it to conduct business, obtain information for educational purposes, participate in commerce, and access entertainment. Educational institutions have benefited from this technology because it allows information to be transmitted in an efficient and inexpensive way. Most schools provide access to the Internet and offer classes on effective Internet use to their students. As students increasingly access the Internet, many educational organizations are concerned about and have researched their possible legal liabilities due to student use of school computers. Accessing digital music is one of the most popular activities that occurs on educational computers and Internet services.<sup>1</sup> New technology allows students to download songs of their favorite artists from the Internet, often without cost. Some educational institutions are concerned about subjecting themselves to legal liabilities and ethical obligations because they cannot prohibit students from accessing music through Internet sites such as Napster, Inc.<sup>2</sup>

In April 2000,<sup>3</sup> the rock group Metallica sued Napster, Inc. and three universities<sup>4</sup> for allowing students to download copyrighted music through the Napster software.<sup>5</sup> These

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1. Digital music as used in this paper is copyrighted music that has been compressed into a digital format that can be transmitted through the Internet.

2. Napster is a software program that allows users to share and download music files. In 1998, 17-year-old Northwestern student, Shawn Fanning, created the program in his dorm room, and soon after left the university to devote time to his business. Napster has been the subject of copyrights' violations lawsuits involving the rock group Metallica, Dr. Dre, and the Recording Industry Association of America.

3. Since that time a number of rock groups have filed similar lawsuits.

4. The three universities are the University of Southern California, Yale University, and Indiana University.

5. Lisa Bowman, *Metallica's Napster Hit: 'Enter Lawman'* (Apr. 13, 2000) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2543398,00.html>>.

universities were dropped from the suit when they banned Napster access from their campus computers even though legal liabilities were not the primary reason for the ban. Yale University and Indiana University cited network resource use and cloudy legal issues as the reasons for banning Napster.<sup>6</sup> Many other universities banned Napster from their university networks in order to analyze any potential liability. Recently, the legal counsel for Metallica and rap star Dr. Dre sent letters to more than a dozen universities requesting a Napster ban.<sup>7</sup> Most of these universities refused to comply with the request and did not ban Napster. They justified this decision in light of "the need to ensure academic freedom."<sup>8</sup>

Educational institutions responses to musical artists have significant impact considering that thirty-two million students use Napster to download MP3s.<sup>9</sup> Further, huge amounts of educational institutions broadband network is being engaged for the acquisition of music.<sup>10</sup> Some musical artists believe that downloading copyrighted digital music violates the law. However, downloading digital music for personal noncommercial use by students is protected under the law. The fair use doctrine protects educational institutions from legal liability. Ethically, educational institutions should continue to allow access to Napster because new technology facilitates improved pedagogy and learning.

The purpose of this paper is to discuss the legal implications for students and educational institutions for downloading digital music. Intellectual property or protection of creative work drives the discussion of issues that educational institutions face when students download digital music. Some claim that allowing students or individual consumers to download free digital music is a violation of copyright because they are not paying for the right to listen to the music. This paper will not address the issues surrounding legal liabilities for providing methods of downloading music for profit because

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6. Giancarlo Varanini, *The End of the Road for Napster?* (Apr. 21, 2000) <[http://music.zdnet.com/news/2000\\_04\\_21\\_uni.html](http://music.zdnet.com/news/2000_04_21_uni.html)>.

7. Richard Stenger, *Some Major Universities Reject Ban on Napster* (Sept. 22, 2000) <<http://www.cnn.com/2000/TECH/computing/09/22/schools.napster/>>.

8. *Id.*

9. MP3 stands for Motion Picture Experts Group Layer Three.

10. Vince Horiuchi, *'The Napster' Testifies Before Hatch Panel*, (Oct.10, 2000) <<http://www.sltribune.com/2000/oct/10102000/business/31884.htm>>.

both MP3.com and Napster are companies that have been faced with the legality of free digital music, and this paper will avoid analysis of the legalities for similar companies and instead focus on educational institutions' legal issues.

Few cases have reached the courts concerning the intellectual property issues of digital music or the claim of the right to distribute it. In addition, Congress has passed legislation concerning the Internet but not specifically relating to digital music. Hence, the law on intellectual property rights in digital music has yet to be established. This paper will show that, at present, downloading a song from the Internet is not an infringement of copyright law.

## II. BACKGROUND: HOW DIGITAL MUSIC WORKS

### *A. MP3 Technology*

Digital music is formatted and compressed for transmission over the Internet. Early compression formats such as Musical Instrument Digital Interface (MIDI) made music obtainable over the Internet but took hours to download and required the use of many floppy disks due to the size of the compressed music file. Other compression formats for music exist today on the Internet such as RealAudio, but the dominant format is MP3.<sup>11</sup> MP3 is a file format that compresses an audio file into a manageable file size. The format employs an algorithm that compresses the music file retaining "near" CD-quality sound.<sup>12</sup> MP3 technology compresses music files at a twelve-to-one ratio. For example, a three-minute song requiring thirty-two megabytes of disk space in its original form can be compressed with MP3 technology into a file of about three megabytes.<sup>13</sup> The development of MP3 technology has made it possible to post digital music on the Internet and allows fast downloading.

### *B. Download Process*

MP3 files can be downloaded over the Internet from a

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

12. *Id.*

13. See *Signal or Noise: The Future of Music on the Net*, (Feb. 25, 2000) <<http://cyber.law.harvard.edu/events/netmusic.html>>.

variety of free sources. Most students have access to the Internet through their school's servers. Often, students must log into a computer in order to gain access, but this is not always the case. For example, most on-campus housing at universities and colleges do not require students to log in. Even without logging in, the servers used to access the Internet are owned and operated by the educational organization. Many educational organizations have filters or devices to ban content or access to certain sites. Napster could be banned by educational organizations at this point.

At first, MP3s and other forms of data compression had to be uploaded to websites. Search engines designed to find MP3s popped up all over the Internet. In fact, Lycos, a major search engine on the Internet, created a search engine just for MP3s, showing the popularity of these searches. In fact, MP3s are the most frequently used search term on the Internet along with pornography.<sup>14</sup> The popularity of these websites grew as individual consumers downloaded MP3 files for free. Due to MP3 popularity, there was pressure from parties such as the Recording Industry Association of America (RIAA) to close the websites. Many recording companies and the RIAA threatened the owners of these websites, often individuals and not businesses, with lawsuits if they did not remove the MP3 files. Due to the fact that these individuals did not want to take on the large RIAA in court, the MP3s were removed from the websites. In fact, a student at Indiana University had his computer seized by IU Police in order to investigate the use of Napster on his computer and possible profit based file-sharing activities.<sup>15</sup> However, the University did not prosecute the student because of the lack of illegal activity. Later, the computer was returned to the student.<sup>16</sup>

While the threats deterred some individuals and businesses, others, including universities, continued to allow digital music access. For example, MP3.com established its website on a business plan that would allow MP3s to be on the site from artists that wished to promote and market their unpublished music. Often, MP3s came from artists that had

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14. J.D Biersdorfer, *Trapped in the Web Without an Exit*, N.Y. TIMES, Oct. 7, 1999, at G1.

15. Cecily Barnes, *Student's PC Seized After Record Industry Complaint*, CNET NEWS, (Sept. 15, 2000) <<http://news.cnet.com/news/0-1005-200-2783386.html>>.

16. *Id.*

not been published by record companies but wanted to reach masses of people. The digital music based strategy was successful for some artists who became popular in the MP3 realm due to the existence of MP3.com. However, MP3.com ran into legal problems when they decided to allow individuals to share MP3 files of music that the individuals already owned. MP3.com stored over 45,000 MP3 files on their servers without copyright permission for the music.<sup>17</sup> The MP3.com case will be discussed later in Part III.

In response to the difficulty of finding MP3s, Napster was created. Napster uses a file sharing system. When you use a file-sharing program to download music, the computer becomes both a client and a server.<sup>18</sup> The Napster interface that appears on the web page is the client side, which allows you to download music from other people's hard drives when they are connected to the Internet.<sup>19</sup> The server side opens the individual's computer behind the scenes in order for other people to download music from it.<sup>20</sup> Napster servers connect users and allow people to share files. File sharing programs are common and are at the root of legal and non-legal debates.

Another method of downloading MP3s is client-to-client file trading. This method uses almost the same technology as Napster but does not employ a common server that links users.<sup>21</sup> This is important because this method makes it almost impossible to find the users downloading digital music. The technology allows users to link to other computers directly and not through a server. Hence, it would be more difficult to find users and prosecute them for violations of copyright law.

While the methods of downloading have improved, the connection speeds to the Internet have also become faster, improving the download process. In the past three years, connections to the Internet have gone from 28K modems to digital subscriber lines or cable modems. Using a 28K modem, a three-megabyte MP3 file could take up to one hour to download. But, using a digital subscriber line that downloads

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17. Courtney Macavinta, *MP3.com's Move to Copy CDs Stirs Debate*, CNET NEWS, (Jan. 28, 2000) <<http://news.cnet.com/news/0-1005-200-1535035.html>>.

18. *How File Sharing Works*, ZDNET MUSIC <<http://music.zdnet.com/features/napsterclone/sidebar.html>>.

19. *Id.*

20. *Id.*

21. *Id.*

at 400K, MP3s can be downloaded in minutes if not seconds. Downloading digital music has become easier due to the MP3 format, the file trading technology, and the increased speeds of Internet connections. University broadband connections make downloading fast and easy for students. This causes additional traffic on the university systems and often creates problems.

### *C. Usage of Digital Music*

MP3 technology is the newest way to compress data to minimize its size for easier downloading, uploading, and computer storing. Certain MP3 uses are controversial. For instance, the least controversial usage of digital music occurs when free digital music is stored on a computer and listened to while surfing the Net, playing solitaire, or writing a law review. However, MP3s can be downloaded onto an electronic portable-playing device. This allows an individual consumer to listen to the music anywhere they want, thus becoming readily accessible. Furthermore, MP3s can be copied onto a CD using "ripping" software and CD-writers. MP3 files can be "ripped" into WAV files<sup>22</sup> and then "burned" or copied to a CD using a CD-writer.<sup>23</sup> Again, digital music becomes portable as individual consumers can listen to their downloads on a normal CD player and give the downloaded music to friends in CD format. Some of these methods for listening to MP3s have been the subject of court debates. The legality of these methods used by individual consumers will be discussed next.

## III. LEGAL ANALYSIS

Under copyright law, statutory and constitutional provisions limit the exclusive rights granted by the Copyright Act. Also, the fair use doctrine (a subsection of the Copyright Act) is a well-known and powerful authority, which supports free digital music downloading. This section will give a brief explanation about copyright law, show examples of the fair use doctrine by examining statutory authority and common law,

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22. A WAV file is the original format that is contained on a CD bought from a store and that can be played on any CD player.

23. Many computer systems today have a CD-writer embedded in the system. A CD-writer has become a popular way of storing lots of data on one piece of a writeable medium.

and then apply the fair use doctrine to the issue of this paper.

### A. Copyright Law

Copyright law started in England with the Statute of Anne in 1709 that stated in its preamble that its purpose is "the Encouragement of Learned Men to compose and write useful Books."<sup>24</sup> The United States Constitution adopted a similar provision in article I, section 8, clause 8 which states:

"The Congress shall have Power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The goal of the copyright clause is to preserve the intellectual property right of the author in order to promote the creation of new ideas and not to impede the creation of new works. It also assures artists a fair return on their labors.

Aside from the Copyright Clause, no other copyright statutes existed until Congress passed the Copyright Act in 1790. The law has developed over time, and the Copyright Act of 1790 was amended in 1950 and in 1976. Today, we use the 1976 version of the Copyright Act.

In general, copyright law allows for a monopolistic protection by allowing the copyright owner exclusive rights to all the proceeds of the work. However, this protection is limited; in order to allow public use of music, the law balances public use protection against certain restrictions in the copyright law that encourage artists to create music.<sup>25</sup> Copyright duration is complicated, but generally continues seventy years after the author's death or one hundred twenty years from the year of its creation if the work was for hire.<sup>26</sup> Among other things, copyright law covers artists' works such as musical works (including any accompanying words) and sound recordings.<sup>27</sup>

The copyright owner has exclusive rights to do and to authorize any of the following:

- 1) to reproduce the copyrighted work in copies or phonorecords;

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24. See Statute of Anne, 8 Anne, ch. 19 (1709).

25. See The Copyright Act of 1976, 17 U.S.C. §102a

26. *Id.* at § 302a.

27. *Id.*



2) to prepare derivative works based upon the copyrighted work;

3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>28</sup>

Any infringement of these exclusive rights is a violation of the copyright act and subject to remedies. But, there are exceptions to these exclusive rights, such as the fair use doctrine.

### *B. Fair Use Doctrine*

The doctrine of fair use has evolved over the years as courts have tried to balance the rights of the copyright owner with society's interest in using copyrighted property in limited circumstances. The first case to introduce the fair use doctrine was *Folson v. Marsh*<sup>29</sup> in 1841. In the *Marsh* case, the plaintiff alleged that the defendant violated the plaintiff's copyright by publishing, verbatim, copies of President George Washington's letters. The *Marsh* court ruled that the defendant violated copyright because the publication "was not a fair and bona fide abridgment of an original work."<sup>30</sup> But the *Marsh* court did mention that if the publication was a fair and bona fide abridgment, it would *not* be a copyright violation. The *Marsh* court used the following balancing test to determine fair use: 1) the nature and objectives of the selections made; 2) the

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28. See The Copyright Act of 1976, 17 U.S.C. §106.

29. *Folson v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

30. *Id.* at 349.

quantity and value (quality) of materials used; and 3) the degree to which the use may prejudice the sale by the plaintiff or diminish the plaintiff's profits.<sup>31</sup> Congress later codified the factors of the *Marsh* test and added another factor in the 1976 Copyright Act. The codified version of the *Marsh* test reads as follows:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>32</sup>

When Congress codified the fair use doctrine in 1976, they intended “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”<sup>33</sup> Congress also intended that courts continue the common law tradition of fair use adjudication.<sup>34</sup> The fair use doctrine thus “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>35</sup> Courts have decided cases involving fair use as a defense on a case-by-case basis.

The fair use doctrine statute contains terms that allow certain acts to be considered fair use. The statute does not limit

31. *Id.*

32. 17 U.S.C. § 107 (1988 ed. and Supp. IV).

33. H.R.REP. NO. 94-1476, p. 66 (1976).

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

35. See *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

fair use to these acts, but rather these acts serve as guidance. There is no limitation as to which acts constitute fair use. The four-part test codified in section 107 helps determine the availability of fair use. The Supreme Court has stated that the four factors of the fair use test shall not “be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”<sup>36</sup>

The First Amendment of the United States Constitution allows for the fair use doctrine as a defense to copyright infringement. Although courts have not strongly relied on the First Amendment to support the fair use doctrine, they have implied that the amendment may support this doctrine. Courts rely on the fair use doctrine so long as the use of copyrighted material meets the four part fair use balancing test and is not contrary to the purpose of copyright.

### C. *Fair Use Caselaw*

The United States Supreme Court has not ruled on the fair use of digital music by individual consumers nor has Congress enacted legislation. As mentioned above, there has been some court cases dealing with digital music. Napster has been sued by RIAA and other record companies for contributory copyright infringement of digital music. Thus far, Napster has not been afforded the fair use safe harbor that has been given to students,<sup>37</sup> but it has claimed another safe harbor defense under the Digital Millennium Copyright Act (DMCA).<sup>38</sup> Since this note does not deal with individual consumers and the fair use doctrine, this is not part of the analysis.

*RIAA v. Diamond*<sup>39</sup> addressed the issue of a device that

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36. See Pierre N. Leval, Comment, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) [hereinafter Leval].

37. See *A & M Records v. Napster*, 2000 U.S. Dist. LEXIS 6243 (May 5, 2000).

38. The DMCA of 1998 has been incorporated under section 512 of the Copyright Act. This Act implements some WIPO treaties; creates limitations on liability of online service providers for copyright infringement; creates an exemption for making a copy of a computer program by activating a computer for purposes of maintenance and repair; and contains six miscellaneous provisions dealing with the functions of the Copyright Office, distance education, the exceptions in the Copyright Act for libraries and form making ephemeral recordings, “webcasting” of sound recordings on the Internet, and the applicability of collective bargaining agreement obligations in case of transfers of rights in motion pictures.

39. See *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1079 (9<sup>th</sup> Cir. 1999).

stores digital music and whether digital music loaded into this device constitutes copyright infringement under the Audio Home Recording Act (AHRA).<sup>40</sup> In this case, the Court found that the Diamond's digital music device did not fit within the AHRA. But it did fit under the fair use doctrine exception to copyright law. The court reasoned that although the digital music device did not fall under the AHRA, Diamond's operation "[was] consistent with the [AHRA] Act's main purpose – the facilitation of personal use."<sup>41</sup> The Act provides a home copying exception which "protects all noncommercial copying by consumers of digital and analog musical recordings."<sup>42</sup> This is another potential defense that individual consumers and students can use against copyright infringement claims. The court went further to use the *Sony* case<sup>43</sup> (discussed in detail later) to prove that copying for noncommercial personal use is entirely consistent with the fair use doctrine.<sup>44</sup> Therefore, Diamond was not found liable under copyright laws for its usage of digital music.

Another recent case involves MP3.com and the RIAA. In this case, RIAA sued MP3.com for copyright infringement. MP3.com attempted to use the fair use defense but failed. The court reasoned, using the four-step test, that the way MP3.com used digital music did not constitute fair use under the Copyright Act. This case was decided by a district court but the case was settled before any appeal was taken. MP3.com settled the case by paying the plaintiffs but MP3.com still has MP3s on its site. The MP3.com case does not hold much precedent for several reasons. First, the judgment was given by a district court. Second, the case was settled after the district court's original ruling and MP3.com still allowed users to download

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40. See generally Audio Home Recording Act of 1992, Pub. L. No. 102-563 (1992). The AHRA exempts consumers from lawsuits for copyright violations when they record music for private, noncommercial use. It also covers devices that are designed or marketed for the primary purpose of making digital music recordings. It should be noted that the AHRA does exempt individual consumers from lawsuits covering copyright violations if the music is for private and noncommercial use. This is just one other defense that individual consumers can use for downloading digital music. The AHRA will not be discussed further in the paper because this paper only addresses the fair use defense.

41. *Id.*

42. *Id.*

43. See *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417 (1984).

44. See *A & M Records v. Napster*, 2000 U.S. Dist. LEXIS 6243 (May 5, 2000).

MP3s. Third, MP3.com was using MP3s for commercial purposes, while a different standard will likely be applied to individual consumers. Fourth, MP3.com had a huge library of over 45,000 songs, compared to an individual consumer's limited musical library. Finally, the Supreme Court has never addressed the issue of individual consumers obtaining digital music over the Internet. Therefore, higher authority does not bind various circuits faced with digital music copyright issues. For example, the district court in the MP3.com case only addressed the issue of a company using digital music as a form of commercial use and did not address student use for noncommercial usage. The fair use doctrine for digital music dealing with individual consumers has yet to be established.

Due to the lack of digital music cases on point, this paper will analogize digital music to video recording technology using the U.S. Supreme Court case *Sony Corporation of America v. Universal City Studios, Inc.*<sup>45</sup> This case focuses on individual fair use and states that individual consumers may be permitted to tape television shows for viewing at a different time. Hence, this case relates to digital music in that it addresses the issue of copyright infringement involving consumer-recording technology that facilitates the consumer's enjoyment of creative works. This case will be examined and used to legally analyze digital music.

The Supreme Court addressed the fair use doctrine and its relation to recording technology in *Sony Corporation of America v. Universal City Studios, Inc.*<sup>46</sup> This closely relates to the music recording technology of digital music because the issue was whether a new technology fell under the fair use doctrine. The plaintiffs, Universal Studios, brought a copyright infringement lawsuit against Sony, the manufacturer of the Betamax, alleging that the sale of the Video Tape Recorder (VTR) permitted users to record television programs broadcasted on public airwaves and therefore constituted contributory copyright infringement.<sup>47</sup> The plaintiffs also argued that consumers could record or copy television programs free without obtaining rights from the copyright owners. Sony, the defendant, claimed that recording television

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45. 464 U.S. 417 (1984).

46. *Id.*

47. *Id.*

programs constituted a fair use under the Copyright Act.<sup>48</sup> The Court agreed with Sony and held that recording television programs by individual consumers was a fair use under the Copyright Act.<sup>49</sup> Before going to the four-part fair use test, the Court noted several characteristics of the Betamax technology. First, the Betamax allowed users to record one program while watching another program.<sup>50</sup> Second, the videotapes used to record the programs could later be reused or erased.<sup>51</sup> Third, the VTR could function on a timer system so users could record programs while they were away from home.<sup>52</sup> Lastly, the VTR use of a pause and fast-forward control allowed users to omit commercial advertisements from the recorder.<sup>53</sup> Justice Stevens, who authored the opinion, concluded that the primary purpose of the VTR was "time-shifting" or the practice of recording a program to view it once at a later time, and thereafter erasing it.<sup>54</sup>

It is important to note two facts. First, the Court discovered that many people recorded programs, never erased them, and kept a library of tapes. Second, surveys showed that VTR users increased their television viewing. In light of these factors, one which supports the application of fair use doctrine and the other that rejects the doctrine, the Court ruled that the VTR is not a copyright infringement.

The first factor of the test articulated by the Court in the *Sony* case focused on determining the purpose and character of the use. The Court ruled that recording programs to view later in the privacy of the user's home was a noncommercial use. Additionally, the Court determined that this use "[increased] access to television programming," following the First Amendment's goal of disseminating information fully.<sup>55</sup>

The second factor requires analysis of the copyrighted work's nature in order to determine whether the work is the type of material that copyright stimulates and whether the secondary use proposed would interfere significantly with the

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 425.

original author's entitlements.<sup>56</sup> The Court held that many copyright holders would not object to the Betamax users taping programs for home viewing at a later time.<sup>57</sup> The new VTR technology would allow television viewers an increased opportunity to watch the holder's programs. The third factor articulated by the Court analyzes the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The Court explained that although users taped entire programs rather than only portions of the work, it was fair use because for the program to be meaningful the user would have to record the entire program.<sup>58</sup>

Lastly, the Court included a fourth factor determining the effect on the value or marketability of copyrighted material. The Court found that there was not a significant effect on the value or marketability of copyrighted programs due to the use of the VTR. The Court based its reasoning on the fact that there was no significant decrease in regular television viewing with the introduction of the VTR and Universal's inability to demonstrate the likelihood of harm. It went further to say that time-shifting enlarges the television viewing audience.<sup>59</sup>

The Court further pointed out four important facts:

(1) Universal broadcast the televised material free of charge to viewers; (2) users recorded the material for noncommercial purposes; (3) users conducted the infringing activity solely within the privacy of their homes; and (4) users could employ the Betamax for a number of non-infringing purposes, including the authorized use of copyrighted works or creation of new works.<sup>60</sup>

The *Sony* case demonstrates that when copies of copyrighted materials are made for commercial or profit-making purpose it is almost certainly not fair use. However, when copies are made for purely non-commercial uses, it is generally considered fair use. Plaintiffs suing non-commercial users must prove either that the particular use was harmful, or that it could adversely affect the potential market for the copyrighted work.<sup>61</sup>

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56. See *Leval* supra note 36, at 1119.

57. See *Sony Corp. of Am. v. Universal City Studios Inc.*, 464 U.S. 417, 424 (1984).

58. *Id.* at 425-26.

59. *Id.* at 454.

60. *Id.* at 425.

61. *Id.* at 451.

#### *D. Application of Fair Use Doctrine to Students*

The authority and case law strongly favors students or individual consumers who obtain digital music for free without violating copyright law under the fair use doctrine. In order to support this, the reasoning by the Supreme Court in the *Sony* case along with other aspects of statutory and common fair use doctrine law will be analogized to student and individual consumer usage.

The *Sony* case is applicable as an analogy because of the similarities to the digital music copyright infringement issue. First, both uses involve new technology whose effects on the industry are difficult to predict. Second, both uses involve copying of copyrighted works. Third, both uses involve the fair use doctrine as a defense to copyright infringement. Fourth, the four-factor test is used to determine the applicability of the fair use doctrine. Lastly, both uses address the defense of fair use for individual consumers. In addition to the similarities, the *Sony* case is one of the closest cases to the issues presented in this paper handed down by the Supreme Court.

##### *1. The Four-Factor Test*

Using the four-factor fair use doctrine test established in the Copyright Act and used in the *Sony* case, fair use is allowed for a defense to copyright infringement by students or individual consumers. The first factor, the purpose and character of the use, deals with commercial usage of digital music. As in the *Sony* case students or individual consumers for the most part, do not obtain digital music for the purpose of commercial use. However, it should be noted that some individual consumers might use digital music for commercial use. This is why the student at Indiana University had his computer seized by IU Police. For example, a person may download certain copyrighted music, record them onto a CD, and sell the CD. In this circumstance, the student does not have the fair use exception available and is committing piracy because the student is distributing the music in a commercial manner and not a personal manner. As with all other types of art, infringement exists and should be discouraged. In addition to the noncommercial usage by students or individual consumers, digital music also provides a way to increase access to music in both lyrical and non-lyrical forms. Students can



now download music to their PCs at home or at work and listen to music when other access to music is not available; such as lack of a radio or CD player. Digital music is another way to access music, which furthers the First Amendment's goal of disseminating information fully. Under the first factor, fair use is allowed as a defense.

Under the second factor, the nature or value of the copyrighted work, digital music as a form of fair use is uncertain. The *Sony* Court looked to see if the copyright holders of the programs would object to the copying of the program on tape. On one hand, many copyright holders, such as Chuck D and Sheryl Crow, have stated to the media that they do not object to their music being compressed and accessed as digital music. On the other hand, many copyright holders, such as Metallica and Dr. Dre have voiced their opinion that they would not wish to have their music accessed through the Internet as digital music. By looking at this factor the way the *Sony* Court, as explained earlier, it seems unclear whether digital music falls under the fair use doctrine.

In order to determine if this factor favors fair use, the decisive factor is whether digital music is of the nature that will encourage copyright or if it would harm copyright. Established artists might argue that digital music is a method of stealing music or not paying for it. Thus, it would go against the purpose of copyright and not fall under fair use protection. But, arguably, only 2% of the artists receive this status<sup>62</sup> as an established artist because of the way record companies strike deals with musicians. Therefore, most artists could profit from technology like Napster, where they do not have the chance to profit from the status quo method of record company label distribution.

Most musicians struggle to build their careers. It is difficult to promote or market themselves, record a CD, and distribute their works. Recording a CD with a major record company costs hundreds of thousands of dollars. The only way musicians can afford the recording is to sign away their copyrights to the record company in return for the amount required to record and promote the CD. Further, musician's first CDs are rarely profitable. Companies end up taking 70% of each CD sold,

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62. See *Napster's Side of the Story: A Q&A With Laurence Pulgram*, (visited March 26, 2001) <[http://writ.news.findlaw.com/commentary/20000501\\_napster.html](http://writ.news.findlaw.com/commentary/20000501_napster.html)>.

while the artist gets around 10%.<sup>63</sup> Then, if the artist received an advance to record the music, the artist does not get any remuneration until the song has earned back that advance.<sup>64</sup>

The Copyright Clause in the U. S. Constitution was written to provide financial incentives for authors to create art. The existing system in the record industry, without digital music, promotes only 2% of artists. That means 98% of all artists are trying to promote, record, and distribute their art without the help of record companies. It is logical that the nature of digital music fosters creation of art because it allows the remaining 98% of musicians an affordable way to promote, record, and distribute their music. Conclusively, the nature of digital music is such that if it were used by students under noncommercial situations, it would fall under fair use because it promotes the arts by giving society the chance of hearing 98% of the artists that are not able to widely distribute their music.

The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, looks at the possibility of substitution due to the amount and substantiality of the copy. The fear is that copied music is a substitute for the real art and not a fair use exception. Most MP3s come with the entire copyrighted song. This constitutes a complete substitute for not buying the copyrighted song. The *Sony* case supports copying work in its entirety in order to preserve meaning. However, television programs differ from music because meaning can be derived from partial songs, where meaning is difficult to derive from partial television programs. Consumers or students do not have to listen to the whole song to get the meaning of it. However, taking a look at the music industry, only certain songs are sold separately as singles and most songs are sold together with other songs on a CD. Record companies only release a few songs as singles. Therefore, downloading a song does not get the entire CD album and is not a substitute for buying the CD. Most students or individual consumers do not download all of the songs from an artist's CD using digital music. The majority assumedly is not downloading complete CDs. Further, many individuals only want one or two songs from a CD. Hence, digital music may be

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63. See Desiree Cooper, "Music on Web isn't Piracy - It's Promotion." DETROIT FREE PRESS, July 12, 2000.

64. *Id.*

viewed as a substitute for buying the CD. Predictive outcome effects about the amount of music an individual consumer should be able to download are both negative and positive. However, the *Sony* Court afforded little weight to the amount of copied creative work and hence this factor is not considered at length in regards to downloading music.

The last factor, the effect of the use upon the potential market for or value of the copyrighted work, supports the availability of the fair use exception. The *Sony* case analysis presumes that if a work is noncommercial, the particular use must not be harmful or adversely affect the potential market for the copyrighted work.<sup>65</sup> It has been established that individual consumers who download digital music do it for noncommercial uses. The *Sony* test "harm" factor also favors the fair use exception because digital music is not adversely effecting the record industry and market.

According to the Federal Trade Commission, the recorded music industry is a \$15 billion a year industry.<sup>66</sup> The record industry claims that digital music is taking away from the market size. This is not true. Last year, the industry increased over ten percent in revenue.<sup>67</sup> That is a large growth number considering that inflation over that past year has been very low, 2-3%.<sup>68</sup> In addition, the music industry is not an emerging market, it has been established for a long time. Most established markets would love to grow 10% during one year.

A recent study, supervised by the digital trade association in conjunction with a U.S. House of Representatives subcommittee hearing on digital music, showed how digital music has helped the industry grow.<sup>69</sup> Of all consumers polled, 66% said that listening to a song online has at least once prompted them to later buy a CD or cassette featuring the song.<sup>70</sup> Digital music is not taking away from the market but is bringing more people into the market. The number of visitors

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65. See *Sony* at 451.

66. See Chuck Philips, *Agency Assailed Over Claims on CD Pricing*, L.A. TIMES, June 2, 2000, at A1.

67. See Stephanie Cook, *Audio Revolution Blasts Record Companies*, CHRISTIAN SCIENCE MONITOR, Apr. 29, 1999, at 17.

68. *U.S. Economy*, THE FIN. TIMES, Oct. 30, 2000 at Weekend Newspaper Digest.

69. Anna Mathews, *Sampling Free Music Over the Internet Often Leads to a Sale*, WALL ST. J., June 15, 2000.

70. *Id.*

to the top Internet music sites grew 19% between November 1999 and April 2000, reaching an all-time high of 22.8 million in April.<sup>71</sup> Digital music will add to the revenue stream of the recording industry. Paid digital music downloading is expected to hit \$1.1 billion in sales by 2003.<sup>72</sup> More than a third of those polled said that they are more likely to buy music from a store when they download digital music.<sup>73</sup> Sales have increased as more people download digital music. Only 6% said that listening to downloaded digital music makes them less likely to buy CDs.<sup>74</sup> In fact, digital music is expanding the market and increasing music listening. It seems that people are spending more time at their computers than ever before and digital music is bringing music to these people. Of those who were downloading music, 92% listen to it on their desktop computer, while just 10% used a portable device, and 14% used their home stereo.<sup>75</sup> By using the *Sony* test for this last factor, digital music is not posing a potential harm to the music industry. Those downloading digital music are not purchasing less music. Also, digital music enlarges the music audience. Under this test, digital music usage by individual consumers falls under the fair use doctrine.

By examining the four factors, students that download digital music, and arguably educational institutions that allow such downloading, can use the fair use doctrine as a defense against copyright infringement. But courts have said that these factors must not be the only factors examined.

## 2. Other Factors

Other issues besides the four factors need to be considered for analysis. First, the *Sony* Court impliedly ruled that individual consumers could copy or record television programs even when people have established a library of programs and never erase them. Just like *Sony*, digital music is downloaded and individuals create a library while never deleting all the songs. According to the *Sony* court, this seems to indicate that even though people have libraries of digital music, it does not

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

mean that digital music is out of the fair use exception.

Second, the issue of where the infringement occurs has some importance. In the *Sony* case, the infringement occurred mostly in the privacy of a consumer's home. Today, digital music is often downloaded within the privacy of individual's homes. But, more people download digital music at their offices than VTR users who record programs at work. However, although downloads occur at home or at work, they are still primarily for personal noncommercial usage. Commercial usage of digital music is not fair use. However, the main purpose of digital music is to facilitate personal use, which follows the purpose of the First Amendment and the fair use doctrine.

Third, many uses for digital music do not infringe on copyright law. The Court in *Sony* said that users could employ the Betamax for authorized usages. Digital music is also used for authorized usage as musicians grant copyrights to the digital music websites authorizing downloading of digital music and use of uncopyrighted music. Hence, digital music by individual consumers falls under the fair use doctrine.

Fourth, music can be copied from the radio free as long as it is for noncommercial use. Many people copy or record certain songs they like off the radio. These songs are free to students. Through a process, these songs can be digitized, inserted into a computer, and become digital music. Digital music can be obtained free from several sources. This is another reason why digital music downloaded by individual consumers does not violate copyright law.

Lastly and most importantly, the use of digital music by students or individual consumers promotes the purpose of copyright law. Digital music promotes the sciences and arts by enhancing the music industry. It provides many musicians with a better opportunity to be noticed, and it encourages musicians to continue creating music. The four-factor test and these other considerations show that students are most likely protected from copyright infringement accusations.

#### IV. EDUCATIONAL INSTITUTION'S ISSUES

Educational institutions may face some technical, legal, and administrative issues when their students download digital music from their servers. This section will focus on presenting

rather than solving the issues educational institutions may face when students download digital music. Some educational institutions have already faced some of these issues. For example, the rock band Metallica filed suit against Yale University, Indiana University, the University of Southern California, and five additional unnamed universities alleging that they failed to block access to Napster, which made them liable for contributory and vicarious copyright infringement.<sup>76</sup> The four issues addressed in this article are increased bandwidth, vicarious liability, contributory liability, and administrative burden.

### *A. Increased Bandwidth*

Some schools have blocked access to digital music but not for legal liability reasons. Schools limit access to digital music programs such as Napster because of the bandwidth use associated with searching for and transferring large files.<sup>77</sup> The universities' computer networks get clogged up with these large files in the system. The excuse of excessive bandwidth may not be valid for long as universities are providing greater bandwidth as technology advances. Increased bandwidth is the first issue that educational institutions must deal with when their networks allow students to download digital music. How much do educational institutions invest in bandwidth, and what are the costs associated with the investment? Are the universities' networks slowed down by digital music so that they cannot function efficiently for the educational usage? These questions need to be examined when looking at the issue of increased bandwidth.

### *B. Vicarious Liability*

The second issue is that of vicarious liability for copyright infringers.<sup>78</sup> Universities can be held vicariously liable for students that download digital music from their networks. As this paper has indicated, most students that download digital music are protected by the fair use doctrine. But, this safe harbor only applies to noncommercial uses. If a student

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76. Georgia Harper, *University Liability for Student Infringements*, (Last Modified May 22, 2000) <<http://www.utsystem.edu/ogc/intellectualproperty/napster.htm>>.

77. *Id.*

78. *Id.*

downloads music for commercial purposes, the student might be liable for copyright infringement, and the university may be vicariously liable if the student uses the university's network to obtain the digital music. In order for a university to be found vicariously liable, the plaintiff must allege that the university has the right and the ability to control and derive a financial benefit from student infringements.<sup>79</sup> These first two parts of the test, the right and ability to control the student infringements, would be easy to prove. The last part, that the university derives a financial benefit from student infringements, seems more difficult to prove. Most students do not pay tuition and fees just so they can download digital music for free. The university will receive tuition and fees regardless if students access digital music through the university's network. This supports finding that Universities would not be held vicariously liable for students' use of network computers to obtain digital music.

### *C. Contributory Liability*

Universities can be found contributorily liable for knowingly contributing to unauthorized reproductions or distributions of illegal digital music. The test for contributory liability is 1) direct infringement and 2) a knowing and material contribution to it.<sup>80</sup> In order for educational institutions to be found contributorily liable, the students downloading digital music must infringe copyright law in some way. This could or could not be hard to satisfy depending on the usage. The second part of the test could be satisfied if the university knew what Napster or another digital music search engine was, how it works, and knew that students' use is illegal and yet did nothing to stop the infringements on their own networks.<sup>81</sup> While easier to prove than vicarious liability, contributory liability may not be so easy to prove because there is no clear law on the usage of digital music in common or statutory law that the university should know.

### *D. Administrative Burden*

By banning digital music from their networks, educational

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79. *Id.*

80. *Id.*

81. *Id.*

institutions face a large administrative burden. First, enforcement must take place. With the large number of students searching for digital music, enforcement could be a costly process to find the infringers, detain them, and go through the legal process with the vast number of infringers. Second, the educational institution must inform the students of the ban by posting notices and requiring students to remove the infringing files from the educational institution's servers.<sup>82</sup> Lastly, the university also opens itself a huge legal and administrative problem if its employees are downloading illegal digital music.

This is only the beginning of a list of legal and non-legal issues that a university faces when concerned with network usage by students to obtain digital music. Each university must look at these issues and make a decision whether to forbid digital music on their networks.

## V. CONCLUSION

Students who download digital music are not violating laws because of the fair use exception. Thus, universities and educational institutions should not be forced to end student procurement of digital music from their network. Many other factors positively contribute to this conclusion, including debunking the loss of revenues of popular artists, and promoting creativity and unrestrained use of the Internet.

Finally, technology will continue to advance as quickly if not more quickly, than it has been in the past twenty years. Educational institutions should continue to adopt many of these new technologies to facilitate and improve the pedagogy of their students. Legal or any other issues concerning new technology should not scare them. Copyright issues will continue to arise with new technology no matter if it is the VTR or digital music. Educational institutions should take an in-depth look at the new technology, spot all the potential issues, and make a wise and informed decision on the usage of new

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82. *Id.*



technologies. By doing this, educational institutions will be able to produce students who use new technology to benefit society.

*John Faust*