

Panel III: Digital Audio

Moderator: Stanley Rothenberg^{*}
 Panelists: Michael Carlinsky^{**}
 Steven Fabrizio^{***}
 Katherine Forrest^{****}
 Nic Garnett^{*****}
 Hadrian Katz^{*****}
 Robert Silver^{*****}

MR. PENNISI: Welcome back. We are now going to begin our last panel discussion on the application of fair use to the exchange of digital audio files among computer users. This panel discussion will follow the same format as the previous two. It is now my pleasure to introduce to you our digital audio panelists.

Hadrian Katz is a senior litigation partner with the Washington, D.C. office of Arnold & Porter. Mr. Katz's practice includes matters of intellectual property and technology law, general litigation, product liability, and government contracts. He specializes in cases with high-technology content and has been trying computer-related cases since 1976. Mr. Katz has vast experience in issues relating to computer architecture and software, and has represented major computer companies and other high-technology firms in a number of significant litigations. Recently, he served as principal outside

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counsel to the Recording Industry Association of America¹ in *Recording Industry Association of America (RIAA) v. Diamond Multimedia Systems*,² the Diamond Rio case, and as principal outside counsel to most of the record company plaintiffs in *UMG Recordings, Inc. v. MP3.com, Inc.*³

Robert Silver has been a senior partner in the New York office of Boies, Schiller & Flexner since its inception in 1997. With David Boies, Mr. Silver has represented Napster⁴ in the pending litigation in the Central District of California and in this past Wednesday's Ninth Circuit appeal for a preliminary injunction.⁵ Mr. Silver currently represents a broad spectrum of companies, ranging from Fortune 500 to recently formed Internet companies in many types of complex litigation. Mr. Silver also provides corporate law and strategic advice to a similar spectrum of clients.

Katherine Forrest is a litigation partner with Cravath, Swaine & Moore. Ms. Forrest's practice covers all areas of general commercial litigation with a particular focus on intellectual property law and competition law. In the past several years, she has worked on a number of intellectual property ("IP") matters involving the Internet in both music recording and music publishing. In the last year, she has been the Warner Music Group's lead attorney in the *MP3.com*,⁶

¹ The Recording Industry Association of America is a trade group representing the U.S. recording industry. RIAA members create, manufacture, and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. See RIAA/About Us/Who Are We at <http://www.riaa.com/About-Who.cfm> (last visited Mar. 8, 2001).

² 180 F.3d 1072 (9th Cir. 1999).

³ No. 00 Civ. 472 (JSR), 2000 U.S. Dist. LEXIS 13293, at *1 (S.D.N.Y. Sept. 6, 2000).

⁴ Napster is a company based in San Mateo, California. "It distributes proprietary file-sharing software free of charge via its Internet website. People (downloading) software can log-on to the Napster system and share MP3 music files with other users who are logged on to the system." *A & M Records v. Napster*, 114 F. Supp. 2d 896, 901 (N.D.Cal. 2000).

⁵ *A & M Records v. Napster*, 114 F. Supp. 2d 896 (N.D. Cal 2000). Record companies and music publishers sued Napster for copyright infringement committed by Napster users who used Napster's integrated service to download, share and copy music in MP3 format. Plaintiffs successfully enjoined Napster from facilitating others in copying and distributing copyrighted songs and sound recordings without permission, proving a substantial likelihood of future harm. The Court found that Napster use was not a fair use and Napster could not escape liability under the staple article of the commerce doctrine.

⁶ *MP3.com*, 2000 U.S. Dist. LEXIS 13293, at *1.

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MP3Board,⁷ and *Chambers v. Arista* cases.⁸ Ms. Forrest also presently handles Internet access litigation on the West Coast.

Nic Garnett is the Senior Vice President, Trust Utility, for InterTrust Technologies in Santa Clara, California.⁹ Mr. Garnett is responsible for developing and enforcing the standards and specifications of the MetaTrust Utility commerce system through which the InterTrust technologies are deployed. His work also involves promotion of the company's policies and vision for e-commerce on a global basis. Prior to joining InterTrust, Mr. Garnett was Director General of IFPI,¹⁰ the international trade association of the recording industry. He was responsible for transforming the IFPI into a modern multi-disciplined and multinational entity focused on the business needs of its member recording companies.

Stanley Rothenberg, our moderator for this panel, has been a partner with Moses & Singer LLP since 1979, a copyright and entertainment industry lawyer for over thirty years, and an Adjunct Professor of Law at Fordham for five years. He has participated in numerous landmark copyright and entertainment law cases involving well known properties like "The Cosby Show," "Rocky and Bullwinkle," "The Maltese Falcon," "Amos'n Andy," "A Star Is Born," "Nancy Drew," and others. Mr. Rothenberg also represented Paramount Pictures in landmark copyright litigation.¹¹ He counsels a large television syndication company and its producer in connection with the production and distribution of television programming, and frequently advises in copyright and entertainment litigation.

⁷ *Arista Records v. MP3Board, Inc.*, No. 00 Civ. 4660 (S.D.N.Y. filed June 23, 2000).

⁸ *Chambers v. Time Warner, Inc.*, 123 F. Supp. 2d 198 (S.D.N.Y. 2000).

⁹ InterTrust is a provider of digital rights management technology. Its product seeks to ensure that organizations can release digital information and profitably benefit from it throughout the information's full lifecycle by persistently protecting it, implementing a wide variety of business models, and monitoring usage. See Intertrust/Main/The MetaTrust Utility at www.intertrust.com/main/metatrust/index.html (last visited Mar. 8, 2001).

¹⁰ The International Federation of the Phonographic Industry ("IFPI") is an organization representing the international recording industry, comprising a membership of 1400 record producers and distributors in 76 countries. See IFPI at <http://www.ifpi.org> (last visited Mar. 8, 2001).

¹¹ *Paramount Pictures Corp. v. Leslie Rubiowitz*, 217 U.S.P.Q. 48 (E.D.N.Y. June 26, 1981).

Michael Carlinsky is a partner in the Litigation Department of Orrick, Herrington & Sutcliffe L.L.P. He has litigation experience in a wide range of areas, including trade secrets and employee non-competition agreements, copyright and trademark infringement, federal and state securities laws and regulations, complex commercial litigation and arbitration, stock options, corporate governance, and corporate counseling. Mr. Carlinsky regularly represents e-commerce companies¹² and is currently lead counsel for the Internet music company MP3.com in its various copyright litigations pending in New York federal court.¹³

Steven Fabrizio is the Senior Vice President and Director of the Civil Litigation Division for the Recording Industry Association of America (“RIAA”).¹⁴ Mr. Fabrizio’s practice concentrates on litigation of record company and artists’ rights in intellectual property and Internet-related matters. He has served as counsel to the RIAA in its suits against MP3.com, Napster, and Diamond Multimedia, including the *Scour*¹⁵ and *MP3Board*¹⁶ cases, as well as numerous cases against operators of pirate Internet music sites.

With that, I will turn it over to our moderator for his remarks.

PROFESSOR ROTHENBERG: Thank you.

A short while ago, before we had the digital audio cases that we will discuss today, the kind of fair use question a copyright lawyer was likely to receive was a case where a television advertisement would say “Buy our new razor, the MP1, and you will receive a free CD.” The advertiser would have purchased the CD from the special products division of a record company, which would, in turn, have had licenses from the music publishers to include the musical compositions in the CD.

¹² See, e.g., *Tradescape.com v. Shivaram*, 77 F. Supp. 2d 198 (S.D.N.Y. 2000); *Butvin v. Doubleclick, Inc.*, 2000 U.S. Dist. LEXIS 8772 (S.D.N.Y. June 26, 2000).

¹³ See, e.g., *UMG Recordings, Inc. v. MP3.com*, 2000 U.S. Dist. LEXIS 13293; *Chambers v. MP3.com*, 123 F. Supp. 2d 198 (S.D.N.Y. 2000).

¹⁴ See *supra* note 1.

¹⁵ *Twentieth Century Fox Film Corp. v. Scour Inc.*, No. 00 Civ. 5385 (S.D.N.Y. filed July 20, 2000).

¹⁶ *Arista Records v. MP3Board, Inc.*, No. 00 Civ. 4660 (S.D.N.Y. filed June 23, 2000).

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In the television commercial, the advertiser would show thirty-second clips from the music video that the record company had issued, where the record company had given the advertiser permission to use the film clips. These agreements, however, gave no warranties or representations regarding the musical composition contained in the film clip.

So the question would arise: Did the music publisher have the right to stop the advertiser from using thirty seconds of his musical composition in a film clip to advertise the very CD that was authorized, but was being given away in connection with the purchase of this new razor? That was a typical fair use question one could expect to encounter in practice.

Of course, there were other kinds of fair use cases, such as the one involving *Harper & Row*,¹⁷ where 300 words were taken from President Ford's memoirs and included by *The Nation* in an article published before the book's release.¹⁸

And then, we had the case we will hear something about today, the *Sony Betamax* case, which was *Universal City Studios v. Sony*.¹⁹ In that case, the entire motion picture that was telecast was being duplicated in the home of individual users and Sony was charged with contributory copyright infringement for selling the devices that enabled the home users to make duplicates.²⁰

Earlier, we had the CATV cases,²¹ which also went to the Supreme Court. In the CATV cases, the film companies claimed that the CATV companies that were putting up antennas on mountains and

¹⁷ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

¹⁸ *See id.*

¹⁹ *Sony Corp. of Am. v. Univ. City Studios, Inc.*, 480 F. Supp. 429 (C.D. Cal. 1979), *aff'd in part, rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd* 464 U.S. 417 (1983). Copyright holders of television programs sued Sony for copyright infringement allegedly committed by Betamax consumers who used Betamax videotape recorders to record their works ("time-shifting"). Plaintiffs were unsuccessful in enjoining the manufacture and marketing of Betamax recorders because they failed to prove any likelihood of future harm. The Court found that time shifting was a fair use capable of substantially non-infringing uses. *See id.*

²⁰ *See Sony*, 464 U.S. 417.

²¹ *Teleprompter Corp. v. Columbia Broad. Systems*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

then laying cable to transfer signals were violating copyrights owned by film companies in the motion pictures carried on the cable systems.²² In *Teleprompter*, the Supreme Court did not find that this activity amounted to copyright infringement.²³

We have had a history of some earth-shaking technologies that arose and wound up before the Supreme Court.²⁴

It is also interesting to look back at the cases that went to the Supreme Court in the copyright area, most of which were decided one way in the district court, then reversed in the court of appeals, and then reversed again by the Supreme Court. In other words, recent district court opinions, such as *DVD*²⁵ and *Napster*,²⁶ should not be taken for gospel.

I would like to throw out the following question to the panel: was the fair use doctrine made inapplicable to Section 1201 by the Digital Millennium Copyright Act,²⁷ and, if it was not made inapplicable, is there a common law fair use doctrine separate and apart from Title XVII Section 107²⁸ that might have been applicable? Could the plaintiffs have achieved the same result in the *Napster*²⁹ or *DVD* cases³⁰ in the absence of the Digital Millennium Copyright Act?³¹

MR. KATZ: I am never sure what litigators have to contribute to things like this. We do not like to talk about cases that are ongoing, nor do we like to talk about old cases for either we won and it is ungracious, or we lost and we do not want to sound querulous.

²² *See id.*

²³ *See Teleprompter Corp.*, 415 U.S. at 394.

²⁴ *See Sony*, 464 U.S. at 417; *see also Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911) (addressing the use of a published book in a "moving picture film").

²⁵ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

²⁶ *A&M Records, Inc. v. Napster*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

²⁷ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.). The DMCA makes it unlawful to circumvent any technological device designed to protect intellectual property.

²⁸ 17 U.S.C. § 107 (2000) (see Title 17, Copyrights Chapter 1, on fair use and the subject matter and scope of copyright).

²⁹ *Napster*, 114 F. Supp. 2d 896.

³⁰ *Reimerdes*, 111 F. Supp. 2d 294.

³¹ 17 U.S.C. § 1201 (2000).

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However, I can answer the question of whether the digital exchange of copyrighted works should be permitted or prevented: it should be permitted. I have never heard anyone suggest that there should not be digital exchange of copyrighted information. The issue tends to be whether the rights holders should be fairly compensated or whether people should be permitted to steal copyrighted material, and that does not strike me as a difficult question either.

The question for this panel ostensibly is: Is the fair use doctrine applicable to the exchange of digital music over the Internet? Well, of course it is, and I do not think anybody has ever suggested otherwise.

However, there seems to be a flavor here that technology might make a difference. The one thing I will try to do today is put on my non-litigator's hat, as somebody who was a mathematical physicist before I became a lawyer and a computer scientist.

I think that to the extent people perceive difficult legal issues here, it is because they do not comprehend the technology, they have not used the technology, and they do not know the technology. I have been litigating computer-related cases for some twenty-two years now, and I have never been involved in a case where, if we educated the court and the jury as to what the technology is and what it does, the court or the jury had a terribly difficult time reaching a decision. These issues are complex only when we do not understand the technology and find ourselves engaged in theoretical disputes about things that are not really things.

Let me count the house a little bit here. How many people here have actually pirated a DVD?³²

PROFESSOR ROTHENBERG: Is that a loaded question?

MS. FORREST: Some of us will close our eyes.

³² Digital versatile disks ("DVDs") "contain copies of the motion pictures in digital form. They protect those motion pictures from copying by using an encryption system called CSS. CSS-protected motion pictures on DVDs may be viewed only on players and computer drives equipped with licensed technology that permits the devices to decrypt and play - but not to copy - the films." See *Reimerdes*, 111 F. Supp. 2d at 303.

MR. KATZ: Well, let me use an unloaded term. How many here have actually copied a DVD and compressed it and copied it to a CD? I see one. Any others?

Well, I did it for the first time this past weekend and I was stunned at how easy it was. All the tools are readily available over the Internet. It took me less than a minute to find all the tools I needed, although a minute these days is a long time in Internet search terms.

The tools are also remarkably easy to use. The program that will copy the DVD to your hard drive, assuming you have 6 gigabytes of space available, really has a much better user interface than any of the backup software I use, and if it was not for the special-purpose of copying movies, I would probably adopt it as my regular backup program.

It is this difficult to do: there is a tab that says "movie" on it, there is a button that says "backup" on it, and you push that button, and, in a matter of a little less than half-an-hour, there are nine gigabytes of "The Matrix" on your hard drive.

Now, the next step, compressing it and re-synchronizing the sound after compression, because there are different compression algorithms for video and sound, is a little trickier, and that took me most of a couple days. But the result is "The Matrix" on a CD, which you can put in any computer with a CD reader and play in very acceptable quality video.

That, ladies and gentlemen, is the real world. The real world is not computer scientists who cannot talk to one another because of fear of circumvention of the DMCA.³³ In the real world, interesting and creative uses of content are not being precluded because of technologically sophisticated tools: everything is stolen almost immediately.

There is a demonstration that I sometimes do, where I have a script that will move a file very quickly onto anonymous file transfer protocol ("FTP")³⁴ servers, essentially public storage spaces, in

³³ See *supra* note 27.

³⁴ A file transfer protocol ("FTP") is used to transfer files over a TCP/IP network. It includes functions to log onto the network, list directories and copy files. Unlike e-mail

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Russia, China, Iraq, and Libya. I sometimes will browse the directories of these public access servers, most of which contain encrypted files.

But you could also find, for example, all of the content of Madonna's new album available on an anonymous server in Libya before the disc was released, undoubtedly originally emanating from Napster. I do not know — maybe Katherine can tell me — if Warner actually sent a letter to General Qaddafi demanding that it be taken down, but I have real doubts that there is any enforceable copyright protection over material that some Napster user decided to move over to a server in Libya.

That is the real world, and what content owners are doing now is fighting a rear-guard action against the modern criminals of this world who claim that, because of technology, the old rules do not apply anymore, and theft is now permissible, and wholesale misappropriation of people's intellectual property is permitted.

I stand here as somebody who believes that litigation is a useful tool in enforcing the traditional rules in environments in which, if people understand what is going on, they will enforce those rules.

MR. SILVER: Well, I cannot say that I agree with all of that, or even most.

Here is my perspective. I really do not think it has anything to do with particular technologies or the idea that a particular technology is sophisticated or somehow mystifying. To the contrary, the importance of the technology comes from the very fact that it reduces information and transaction costs. That is why it threatens infringed companies. I do not think it has to be sophisticated. If it were, it probably would not be an issue.

More to the point, I do not think that anybody is arguing that because the technology is special, something which would be theft in another context is not theft now. I will try to respond to what I think

programs, in which graphics and program files have to be "attached," FTP is designed to handle binary files directly and does not add the overhead of encoding and decoding the data. See *Techencyclopedia* at www.techweb.com/encyclopedia/defineterm?term=FTP (last visited Mar. 7, 2001).

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is being said, but that is certainly not an argument we are making in defense of Napster.

I do not think that the argument has anything to do with the year 2000 or the technology. Our argument is a stronger version of the argument that Sony used to win when the Betamax³⁵ was just coming out. Whether you want to call that technology misfire or not, it is hard for a lot of us, including me, to figure out how to use it still.

I think that the issue of fair use, however, is a little different in cases where technology is involved for the following reason: as the moderator mentioned, straightforward statutory claims of copyright infringement that involve questions of fair use turn on whether, for example, 300 words is too much.

A claim for contributory infringement is not a statutory claim or a claim Congress has ever authorized. It is the kind of allegation akin to the aiding-and-abetting claim under the Federal Securities Act,³⁶ which Congress did not authorize. The courts created it and used it until the Supreme Court said, "Well, wait a second. No, you cannot do that."

We are not suggesting that the same thing is going to happen to contributory infringement. The first thing to understand about why fair use may be special in cases of technology is that contributory infringement, in contrast to direct infringement, is where you see technology. For instance, the fight between content holders and technology is outside the scope of Congressionally authorized causes of action, which extends the monopoly and raises some questions in doing so. These were concerns pervading the *Sony Betamax* opinion.³⁷

³⁵ "Sony's Betamax VTR is a mechanism consisting of three basic components: (1) a tuner, which receives electromagnetic signals transmitted over the television band of the public airwaves and separates them into audio and visual signals; (2) a recorder, which records such signals on a magnetic tape; and (3) an adapter, which converts the audio and visual signals on the tape into a composite signal that can be received by a television set." *Sony*, 464 U.S. at 422.

³⁶ 15 U.S.C. § 77h-1. See also William H. Kuehnle, "Secondary Liability Under the Federal Securities Laws-Aiding and Abetting Conspiracy, Controlling Person, and Agency: Common-Law Principles and The Statutory Scheme," 14 J. CORP. L. 313, 313 (1989).

³⁷ See *Sony Corp. of Am. v. University City Studios, Inc.*, 464 U.S. 417 (1983).

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Let me step back a second. A claim of contributory infringement against a new technology basically seeks to shut down the technology because some of its uses can be infringing. If all of its uses are infringing, it is a different story — then you lose and *Sony Betamax* does not help you. But if only some of the uses are infringing — and the district court in the *Napster*³⁸ case, for example, found “a lot” of at least one non-infringing fair use called “space shifting,” — then the argument is: “Look, we’ve got a new technology here. You can use it for some legitimate and fair purposes. Some people can use it for illegitimate purposes, depending upon your view of the AHRA,³⁹ but only some illegitimate purposes.”

The defining issue in contributing infringement cases is whether the content owner should be able to just shut the new technology down. The Supreme Court then uses fair use as the bridge to keep the technology alive until it can figure out what is really going to happen.

As the VCR played out, the movie owners’ cries of doom were proven unfounded. Napster will also play out in a way where the right holders will, in all likelihood, get more protection, longer term protection, even absent any deal, than the movie owners did with the VCR — although it is widely agreed that ultimately, they benefited.

The Supreme Court employed a fair use analysis in *Sony Betamax*⁴⁰ and reasoned that “there is a (possibility for) little fair use. Some people use it to tape sports programming that is not copyrighted, but only minimally.” It mentioned one authorized, as opposed to unauthorized, movie, “My Man Godfrey” adding that “there’s a lot of future stuff” and “Sony does not control what people do with a VCR,”⁴¹ just as Napster does not here.

The Court latched on to what, at the time, was really a small amount of fair use — time shifting, where people taped programs so

³⁸ See *A&M Records, Inc. v. Napster*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

³⁹ Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992).

⁴⁰ *Sony*, 464 U.S. 417 (explaining that home time-shifting is fair use, and rejecting the Court of Appeals holding that such use was barred by statute).

⁴¹ *Id.* at 443.

they could watch them later, as opposed to copying programs to put them in a library.⁴² The Court fastened on what was quite a small piece of use to say: “Look, there are some legitimate uses of this technology. Sony has no way of severing them from the illegitimate uses”⁴³ — and we make the same argument in the Napster case — that what the content owners are really saying is that they want to appropriate, kill, or control the technology.

The Court added that in the patent area, where the contributory claim is actually a Congressionally authorized statutory claim, one cannot appropriate unless there are no non-infringing uses, otherwise, we would basically hand the patent holder a new bundle to put in its monopoly and the argument applies equally to the copyright holder.⁴⁴

Fair use is the battleground on which that conflict is fought. But fair use is only one piece of the battle and that is why I think this is a great subject. Regardless of the particular technology, every time there is an innovative technology, it is going to threaten somebody. Sometimes it will threaten content holders and they will try to kill the technology or shut it down. This issue will come up, and the fair use doctrine should stay alive in the Supreme Court.

Now, I would like to mention one other thing, involving the issue of piracy, theft, and the like. Those words are inexplicably bandied about all the time in connection with this conflict, but I can offer an explanation as to why they are commonly used.

As the RIAA knows, we have been trying to give them money. They say, “We want to compensate our artists, we want to protect our artists from getting ripped off,” et cetera, et cetera and we have been trying to negotiate a deal that would ensure a huge amount of money flowing to them for some time now. But when you listen to the RIAA discuss piracy and theft, you have to remember that they do not actually mind, nor do they want their artists to be compensated. What they really want is to kill or control the technology and advance their claim to the limit, which would, by the

⁴² See *id.* at 423.

⁴³ See *id.* at 442.

⁴⁴ See *id.* at 434-35.

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way, not help their artists, but would increase their control over their artists and consumers. One of the things a technology like Napster does is it gives artists an alternative and sometimes people do not like that.

Somebody gets upset whenever you have an innovative technology, like what we had in the *Microsoft*⁴⁵ case.

PROFESSOR ROTHENBERG: The Ninth Circuit may decide the case before we are done here.

MR. KATZ: Before we move on, I have got \$40 here. Would you give me the keys to your car?

MR. SILVER: We could give you half-a-billion dollars in a relatively short period of time but you guys just want to kill or control the technology.

MS. FORREST: Well, it is my turn. I guess I represent one of the killers and controllers of the technology, but Bob and I are old friends, so —

MR. SILVER: It is hard for me to imagine Ms. Forrest in that role, actually.

MS. FORREST: Actually, in listening both to Harry and to Bob now, I am going to stray from what my original remarks were and answer and directly address some of these questions. I feel like I am doing a redirect examination of some sort, or a re-cross.

The first thing I want to say is I do not come at this with a technology background, I do not come at this with a mathematics background or a physics background or a computer background. I was a history major in college. I thought I would be a professor and I ended up as a litigation partner at Cravath. So I come at this in sort of a strange way.

My first point relates to that which I believe to be one of the problems in this area, in terms of understanding the applicable

⁴⁵ *United States v. Microsoft*, 97 F. Supp. 2d 59 (D.D.C. 2000) (ordering the divestiture of software corporation's "operating systems business from its applications business" for violations of the Sherman Antitrust Act).

principles of law, is that practitioners and courts get extremely confused by the lingo — that techno-lingo — and the jargon ends up becoming the tail that wags the dog, and it becomes very easy, I think, for defendants to start throwing around technology and terms that are extraordinarily confusing to judges and to other practitioners who may not have the same background, and to use that as a way of saying: “Look, this technology is so exciting, this technology is different than anything you have ever seen before. There are novel questions posed here, novel questions which you, courts, must understand have never been addressed before.” And the courts are sitting there saying, “Oh my God, it sounds really sort of complicated.”

But when you peel away the technology layer by layer, I submit that you come back to fundamental principles of copyright law.

Now, today we have heard a great deal of discussion about the history of the DMCA and the history and the legislative background for statutory changes, and I do not want to go into any of that, because I believe, that in the cases that I have worked on, you do not have to get in to a lot of these complexities. You can start and stop with the old fair use doctrine as it existed in the statute in Section 107⁴⁶ and as it has been interpreted by the courts.

Let me talk for a moment about some of the points that Bob raised in terms of contributory infringement. I want to say a couple of things.

One, contributory infringement may not be established in a statute, but it is certainly established in the law. There is a large body of common law that recognizes contributory infringement as a bona fide cause of action. That is one thing, just so that we are clear that this is not something that is absolutely novel, only some novel theory that is being presented.

Additionally, contributory infringement is usually not just about the technology. It is not just about who wrote a great computer program that allows you to do things that nobody could do before. It is also usually — not always — about activities placed on top of that,

⁴⁶ 17 U.S.C. § 107 (2000).

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additional ways of facilitating things, additional Web sites that allow users to have an interface. It is about a contribution that goes along with technology.

Now, let me also tell you, since I was on the *MP3.com*⁴⁷ case and I am not a litigator in the *Napster*⁴⁸ case — I am a litigator in a contributory infringement case on the Web, the *MP3Board*⁴⁹ case, but that is under litigation now so I do not want to comment on that — but let me tell you why the *MP3.com*⁵⁰ case, in terms of the fair use doctrine, does not implicate the *Sony Betamax*⁵¹ issues that Bob was just talking about.

In the *MP3.com*⁵² case, let there be no doubt about it, we were not — and by “we” I am talking about my clients — trying to close down the technology. We were not trying to kill the technology. There were uses of the MP3.com, the MyMP3.com service, that may well have been legitimate. Those uses would include the dissemination of material that was by independent artists not under contract who were the copyright holders and where MP3.com’s database was not a database created off of our copyrighted works. It was not about the technology. It was about the utilization of that technology to create a database of our copyrighted works and an economic model that then used that technology to the benefit of MP3.com with no remuneration to us.

Let me give you one more word of background on that, in case you are not familiar with the case. Our allegation in the *MP3.com*⁵³ case, which Judge Rakoff in the Southern District agreed with, was that what MP3.com did was take some number of thousands of CDs and put them onto a server and then did a variety of things thereafter. The majority of the claim, so far as I was concerned, was the copying onto the server of the copyrighted works.⁵⁴ We are not talking about

⁴⁷ UMG Recordings, Inc. v. MP3.com, Inc., No. 00 Civ. 472 (JSR), 2000 U.S. Dist. LEXIS 13293, at *1 (S.D.N.Y. Sept. 6, 2000).

⁴⁸ A&M Records, Inc. v. Napster, 114 F. Supp. 2d 896, (N.D. Cal. 2000).

⁴⁹ Arista Records v. MP3Board, Inc., No. 00 Civ. 4660 (S.D.N.Y. filed June 23, 2000).

⁵⁰ *MP3.com*, 2000 U.S. Dist. LEXIS 13293.

⁵¹ See *Sony*, 464 U.S. at 417.

⁵² See *MP3.com*, 2000 U.S. Dist. LEXIS 13293.

⁵³ *Id.*

⁵⁴ See *id.*

the beautiful technology that may have existed thereafter. Therefore, our case was not about killing the technology.

But let me tell you about one logical extension of what Bob has said. He suggested that they want to give us money, and he suggested a very large amount of money, and half-a-billion dollars sounds like a lot of money, I suppose. But let us take this argument of Napster to a logical conclusion. If you had the ultimate world of Napster, what you would have is one CD. That one CD would be sold and somebody would get it. The wholesale price for the CD, minus whatever discounts and co-op advertising you might have, would end up somewhere around \$9.00, perhaps a little bit less, depending on whether or not it was hot, or how big a release it was. So you would end up with that, and you have got to now deduct all of your costs.

But the problem you have is that with Napster, that one CD may be the last CD you ever sell. That may be it. So I hope that it is more than half-a-billion dollars, because half-a-billion dollars is not going to do it. The logical conclusion is going to be that, at the end of the day, you may never get a second chance with the rest of the CDs.

So again, I am not involved in that litigation, I am not involved in any discussions about the economics. What I am commenting upon is the economic model that Bob has presented, which I suggest to you poses serious concerns, given the ability of digital technologies to disseminate material, sound recordings, in such an extraordinarily quick, complete, and untransformed way.

Let me mention one thing about the economics so that everybody is clear on what the economics are, of the artists and why record companies get money, and why we are attempting to control our copyrights, to hold onto the rights that we are given by statute.

Number one, record companies generally — my clients — like to license. This is not about package CDs only. People talk about whether or not Napster will increase the sales of packaged CDs by giving people sort of a “look-see,” or whether it will cannibalize the sale of packaged CDs. That is only part of the analysis. There are

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also licensing opportunities on the Internet that are part of the array of rights which the copyright holder has. That is one thing.

Some artists will do this for nothing for all their lives, but many artists, if they want to live off of their art, want to get paid for it by somebody, and they need to get paid for it in a way that, hopefully, if they are lucky, will work for them and provide them with a living.

They go to record companies typically, but not always, and record companies, in exchange for a contract for a certain number of sound recordings — it depends on how the contract is written — will give the artists an advance, will give them royalties, and will provide them with a variety of forms of support, related to their music and often to the records that have been contracted for.

What piracy seeks to do — I know Bob does not like the word, but it is theft, piracy, that is what it is — what it seeks to do is to eliminate those economic incentives, and those economic incentives, once eliminated, work not just to the harm of the record companies, which everybody loves to hate, but it can work to the harm of the artists who are attempting to get a return for their art. So I think it is also very useful to think about the economic model of that.

Let me just say one last point, which is also to look at the economic model of the companies which are doing the deeds that we are talking about, because it is important that we do not think that they are simply providing a consumer benefit, sort of just for the good of the people. They are making “gazillions” of dollars. The economic model may not be that they are getting paid directly for the sound recording and they take some comfort in that.

The economic model is one step removed, but is still as insidious and still treads on the rights of the copyright holder. It is often an advertising-based model that will get people to go to their Web site to utilize the Web site, for whatever purpose, to get their money from the advertisers. That I submit is an economic model which treads upon the rights of the copyright holder.

With that, I end.

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PROFESSOR ROTHENBERG: Nic, the same five minutes as your predecessors.

MR. GARNETT: Thank you.

I am not a U.S. Attorney, so I am not qualified to answer the questions that were posed by the moderator at the beginning. I have got a few perspectives that I would like to share with you, though, some from what I used to do and some from what I do now.

I used to be the head of IFPI,⁵⁵ which was the international equivalent of the RIAA,⁵⁶ and for fifteen years or so it was my job to go around the world and try to deal with music piracy, as well as try to improve copyright law for the interests of record producers. Increasingly, that dealt with facing the challenges of new technology in different ways. I would like to share with you three examples of the kind of things that were involved in that effort.

The Audio Home Recording Act⁵⁷ here in the United States owes its origins to some discussions that took place in a very warm hotel room in the Athens Hilton in June 1989. At that time, the recording industry was negotiating with the Japanese hardware industry to try to find some way of dealing with a problem that we called “serial digital copying,” which was the question of using digital audio tape to copy sound recordings.

We had a bit of a problem. The Japanese obviously were very reluctant, as hardware manufacturers, to talk about copyright at all. So we basically invented a problem, called “serial digital copying,” so that the Japanese could invent a solution to it and we could both proclaim victory.

I saw an article recently about the Audio Home Recording Act⁵⁸ and how the U.S. Congress reasoned that through the Act, they would deal with this particular issue. It is very hard to reconcile that write-up with what actually happened in Athens all that time ago.

⁵⁵ See *supra* note 10.

⁵⁶ See *supra* note 1.

⁵⁷ Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (amending 17 U.S.C. by adding a new Chapter 10).

⁵⁸ *Id.*

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It is an interesting process. There really was not much of a meeting of the minds in Athens. Nor was there a few years later in Geneva, when World Intellectual Property Organization (“WIPO”)⁵⁹ was trying to sort out the new copyright treaties. Again, I was involved on behalf of the recording industry. Those treaties are still not enforced. The industry still has not secured, as far as I know, the necessary adherences around the world to actually bring the treaties into effect abroad. They are, of course, applied here in the United States through the DMCA.⁶⁰

The provisions, unless they are clearly stated — and I believe they are, for the most part, here in the United States — are very difficult to fathom as international standards in some respects. And again, that difficulty exists in spite of the efforts of people like Neil Turkewitz at the RIAA and my late colleague at IFPI, Lewis Flacks, who put an enormous amount of content into those treaties one way or another. In my view, the promises leave a great deal to be desired in laying out a copyright agenda for the 21st Century.

A third example — and this all sounds terribly negative; it is not supposed to be, but this is the reality of the context, is China. I spent many, many years talking to the Chinese Government with colleagues from the RIAA, Jay Berman in particular, and again Neil Turkewitz, who both did a tremendous job, trying to persuade the Chinese that copyright was important and that it should be properly legislated and enforced in advance of the U.S. Government delegations.

Well, that was a relatively successful effort. It was less successful in terms of enforcement, and I think that enforcement is one of the key things which we are dealing with in the future of copyright: How do you enforce copyright law when you are faced with infringement

⁵⁹ The World Intellectual Property Organization (“WIPO”) is an international organization dedicated to promoting the use and the protection of works of the human spirit. These works - intellectual property - are expanding the bounds of science and technology and enriching the world of the arts. Through its work, WIPO plays an important role in enhancing the quality and enjoyment of life, as well as creating real wealth for nations. *See* WIPO/About WIPO at <http://www.wipo.org/about-wipo/en/> (last visited Mar. 8, 2001).

⁶⁰ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.).

on a level which really defies any process that we have been able to establish to date?

Let me tell you about one of the last things I did at IFPI, and that was trying to resolve the problem of how you bring a copyright case relating to the seizure of 23 million compact discs. It is rather difficult when you have to prove title to each of them.

I left IFPI about a year ago and joined InterTrust in California. InterTrust is the leading developer of what we call Digital Rights Management (“DRM”) technology. The idea behind DRM technology is relatively straightforward yet the realization is extraordinarily complex.

The idea is to take computing technology and encryption technology, design systems where you can package content, and package rules for the usage of that content. In our case at InterTrust, you actually present that in a structure which supports peer-to-peer management and distribution of content and persistent protection of the content which is designed to stay with the content wherever it goes and for however long it remains as a consumable item within the system. I think one of the speakers on the previous panel referred to that system as the “hermetically sealed system.”

The critical issues in deploying DRM technology are three:

The point was made in the previous panel concerning the incredible challenges with regard to the security of that system, and that if there is any significant leakage, then the proposition is perhaps not quite flawed, but significantly challenged. InterTrust has invested many, many years of research and resources in trying to address such challenges.

Another major problem to be overcome in DRM is the question of inter-operability between all the different services and applications. Inter-operability must be provided on a user-friendly basis to consumers to ensure access to different kinds of content by different kinds of applications or by working off a single and inter-operable platform. That is a vast challenge as well.

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The third thing — and this is actually again a point which was raised in the previous panel — you obviously have to apply this kind of technology to relevant business models. I hope we will hear more discussion this afternoon, not just about Napster, but looking towards the business models that the recording industry will have to adopt to respond to the challenges of technology.

So what are the consequences for copyright? What is the context that I am trying to describe here through historical references and through some speculation about what might happen in the future?

I think it was Mao Tse Tung who, when asked about what he thought about the French Revolution, said “it was far too early to tell.” I think we may well be in that situation concerning the future of copyright law.

I think — and this is my personal view; it does not represent the view of InterTrust; nor does it represent any view I have ever advanced on behalf of IFPI or the recording industry — but I think if you analyze copyright law, certainly in relation to the interests of the recording industry over the last forty years, you will see the encroachment of technology and the encroachment of compromise in relation to activities such as broadcasting, rental, private copying, and royalty systems that do not provide any real compensation to the creators and simply annoy consumers. You will see these compromises creeping in.

I think, and this is a very basic proposition, that DRM technology, which is far from a working reality as I speak, in combination with the appropriate legal texts and protection principles, will enable us to start removing some of those compromises from the copyright structures that have been created over the years.

Question: In this overall context, how relevant are theories of fair use? I do not think they will die, but I think a lot of the areas that they cover at the moment can, with the appropriate application of technology, be resolved.

So, those are the perspectives I would like to put before you as an opening shot. Thank you.

MR. CARLINSKY: I will try to talk a little bit about fair use, because I thought that is what we all had been invited for.

Let me first ask how many people in the audience have ever used MP3.com or visited the site? Raise your hands. Okay, better than I thought.

For those of you who do not know, just so it is absolutely clear as we go forward in this discussion, what MP3.com did was create a system comprised of two services: one was called “Instant Listening;” the other was called “Beam It.” I will very generally describe them for you.

Under the “Instant Listening” service, if a user went to a retail vendor with whom the company had a partnering relationship and purchased music — purchased the CD⁶¹ from that retail vendor rather than waiting four days for it to arrive in the mail — the MP3.com system was able to give the user — that person who just purchased the CD, who definitively, clearly and unmistakably just purchased the music on the CD — access to that music from a database that MP3.com had created.

Now, I will not skirt the issue of the database. I am just going to build up to it. So, immediately you received access to the music that you just lawfully purchased, but you were actually receiving it before the CD arrived in the mail. That is called Instant Listening.

The other service is called Beam It. MP3.com developed a proprietary technology whereby if you already have the CD, you are the lawful owner of the CD, you are able to access the MP3.com site, put your CD into your disk drive, and, through the process of beaming, this proprietary technology comes down and can tell what CD you have just put into the disk drive. The system’s terms of use indicate that you have to be the lawful owner of that CD. As a result, you are given access to the music on the CD which you lawfully own, and you are given access to it so that you can listen to it from the Internet.

⁶¹ Compact Disk.

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In a nutshell, that is what the system does — or did, until it was shut down.

Now, how did it accomplish that objective of giving you access to the music? I think most people in this room would agree that as a consumer, if I go out and buy a CD, I have a right to listen to my music, I have a right to make a copy of my music for my own personal non-commercial use, and I would like to listen to my music from the Internet, but my problem is I have a slow modem and I really am not that technologically conversant.

So, what MP3.com did was try to come up with a way that would facilitate the consumer's right to listen to his or her music through the Internet. The way they did it — and we can debate why it is that they did it this way — I do know the answer to it — but what they did was they went out and they created a database and they bought 70,000 or 80,000 commercial CDs. They paid well over one million dollars to lawfully purchase those CDs, and they took those CDs and they converted the digital music files on those CDs into MP3 files which they put on their database, and then, when the consumer purchases a CD through the retail partners, or has the CD, and goes through the Beam It process, he or she receives access to the music in the database.

What kind of access? You are getting a stream. You are not getting a digital download. You are not getting something that you are going to be able to take away to displace the purchase of music. You are getting a stream. You are getting the right to listen to it, like you would on the radio. That is what the system was created for and that is how the system operated.

So the question really became: Was the creation of the database a fair use? Ms. Forrest and Mr. Cates, my esteemed adversaries in this case, have argued, and convinced the federal judge at the district court level, that it was not a fair use. Why was it not a fair use? Because we took copyrighted music belonging to the labels and we made an unauthorized reproduction — i.e., we created the database. That is where they stopped in the argument. They did not discuss why it was created or the benefits to the consumer. It was simply a function of the following: you created a database, you committed an

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unauthorized reproduction, that is a violation of a copyright holder's rights under 17 U.S.C. § 107.⁶² But we all know that 107 provides for fair use.⁶³

When I was on my way over here, I grabbed the U.S.C.A.⁶⁴ There are two interesting things that I think ought to be —

MR. FABRIZIO: I think they are laughing because you should have grabbed it before your client did this.

MR. CARLINSKY: Probably.

The first thing I think that is important for people here to read is the following statement from the legislative history: "Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible and each case raising the question must be decided on its own facts."⁶⁵

There has been this, I think, judicial attitude that because fair use now appears in 17 U.S.C. § 107, that it has been codified. But the fact is, fair use is a judge-made equitable doctrine. That has been lost in a lot of cases, and I think, frankly, that notion has been lost on the court in this particular case.

The other piece of the legislative history that I think bears repeating is this. It says: "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."⁶⁶

Now, I bring that back because we have to say to ourselves: "Look at the system we created." You have to have the CD. You either buy it from Instant Listening, or you demonstrate you have it. Are CD sales being lost? No way. The evidence that was submitted during the case showed CD sales had been stimulated.

⁶² 17 U.S.C. § 107 (2000).

⁶³ *See id.*

⁶⁴ United States Code Annotated.

⁶⁵ The Copyright Act of 1976, H.R. REP. NO. 94-1476, at 65, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

⁶⁶ H.R. REP. NO. 94-1476, at 5680 (1976).

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This ties back also to an argument that was made earlier for Napster, how Napster threatens to put those poor artists out of business. Well, let's look at reality. Reality tells us that CD sales break records every year, and the most recent statistics prove that.

Okay, back to MP3.com. We do not displace CD sales. So what is the other argument? Because if you really think about fair use, it is supposed to strike a balance between the rights holder and the consumer, and the system is designed to benefit the consumer.

Well, they say, "We also license our music on the Internet." Our position is that we do not affect that market. Factor four under fair use, the most important factor under fair use: "How do we affect that market?"⁶⁷ Our position is we do not. If consumers are going to buy the CD, they are going to buy the CD, and then they are going to be able to access it if they want to listen to it online. If they want to buy a digital download, they should not visit our site, at least not to download the commercial music that is at issue.

So we think that this is fair use. I am encouraged by Stan Rothenberg's initial comments, which were against fair use. If you look at all of the cases that have gone to the Supreme Court, not the least of which is *Sony Betamax*,⁶⁸ it has been reversed at every step of the turn. The district court found fair use, the court of appeals reversed, the Supreme Court found fair use.

PROFESSOR ROTHENBERG: We'll come back to you again.

MR. CARLINSKY: I'll end there.

PROFESSOR ROTHENBERG: Steve?

MR. FABRIZIO: Well, music is at the forefront, and sometimes that is good. There are a lot of opportunities that music online is presenting for many of our clients here. It also creates some challenges and some issues that need to be dealt with.

I am going to resist the urge to litigate the cases here in front of you. They are out there. You guys can read about them. A lot of

⁶⁷ See 17 U.S.C. § 107.

⁶⁸ See *Sony Corp. of Am. v. University City Studios, Inc.*, 464 U.S. 417 (1983).

them are fascinating.

I want to make two points, and then I really just want to get on to the panel discussion, because I think you guys probably have a lot of questions and I know this panel has a lot to say. The first point is about the online music market and the second point is very directly about fair use.

We are, two or three years later, at a very good point, I think, in the online music market in this respect. We are starting to turn a corner. A very clear line between the legitimate market and the pirate market is starting to emerge. We have record companies that have come online with their own music distribution systems and initiatives. There has been endless licensing of Internet companies that want to offer music to fans in new and innovative ways. That, of course, we believe is the great opportunity of the online world.

We believe that one of the problems of the online world is that many companies decide that they want to adopt the philosophy of “take first, ask later,” and we do not think the copyright law allows you to do that. But I think we are today, with this combination of record companies being online and licensing and selling their product online, and in some of the legal precedents that are starting to emerge, we are at a very good point where we are starting to see clearer lines, and I think that is going to help the fair use analysis.

Why is there a relationship between the market for online music and fair use? With all due respect to a lot of really smart lawyers that represent our adversaries — the reason we are seeing fair use being put up as a defense in some of these cases is not because there is a real credible claim that making reproductions of essentially the entirety of modern music for the same purpose as users buy music, to listen to it for their enjoyment — I do not think there is a real, credible argument that that was ever intended to be covered by fair use.

I think companies and smart lawyers are beginning to recognize the value of Internet speed. If Napster can grow from 200,000 users to thirty-two million users between the time a lawsuit is filed and the time a lawsuit is decided, Napster then has incredible leverage. Once

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we start to see more licensing and a clearer line between what is legitimate and what is not legitimate emerge on the Internet, I think we are going to get to what may be some very difficult fair use issues. I just do not think we have gotten to them yet.

The proof may be in two of the companies that are represented up here today. Bob talks about insistence and about offers to license.⁶⁹ I do not want to get into the licensing negotiations. Neither Bob nor I are sitting at those tables, but a lot of people are sitting at those tables, and obviously when credible offers are put out, they will be responded to.

Four record companies have licensed MP3.com, notwithstanding the fact that we had to sue them and take it to judgment in order to prove that we had an entitlement to be licensed.

But the moment Napster is licensed, that very moment, Napster argues that: "Of course it is a copyright infringement for the next person to be doing the same thing. How can I possibly compete with Scour⁷⁰ or IMIS⁷¹ or QDMX⁷² if I just paid half-a-billion dollars for the rights to this music?" And, of course, they will be right when they eventually make that argument.

MR. CARLINSKY: Better hope the Ninth Circuit⁷³ does not make you eat those words.

MR. FABRIZIO: I hope they do not.

Anyway, we should move on with the panel discussion and the questions from the audience?

⁶⁹ See discussion *infra* pp. 114-15.

⁷⁰ Scour Exchange ("SX") is a software program enabling consumers to share music videos and photos with users around the world. See Scour Exchange at <http://sx.scour.com/> (last visited Mar. 8, 2001).

⁷¹ iMIS is a software system which allows organizations to conduct business and disseminate information over the Web while simultaneously automating the organization's back office. See Advanced Solution International, Inc. at <http://www.advsol.com/public/products/iMISWeb/E/index.htm> (last visited Mar. 8, 2001).

⁷² QDMX is an audio software technology created by Creative Labs, Inc. for use with certain types of software applications. See Creative Labs, Inc. at <http://www.soundblaster.com> (last visited Mar. 8, 2001).

⁷³ A & M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

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PROFESSOR ROTHENBERG: Why don't we start with questions from the audience.

PARTICIPANT [Rob Gibbons, Hopgood, Calimafde, Judlowe & Mondolino]: I am Rob Gibbons from the Hopgood firm. I was a panelist earlier this morning.

I have a question, following up on a point that was made earlier with respect to the *Sony Betamax*⁷⁴ case. Paul Goldstein, who is a noted authority on copyright law, wrote an editorial in *The New York Times* recently where he posited that the Napster situation is not unlike the Betamax situation, and suggested that the record companies will end up benefiting from online access through licensing arrangements.⁷⁵ Perhaps, you could speak to that.

MR. SILVER: That is a little bit of a softball for me.

PARTICIPANT [Mr. Gibbons]: Yes, that is for Bob.

MR. SILVER: I do not know. Maybe it is for somebody else. Is that for me?

That is certainly our view. Our view of the evidence is that they are already benefiting. The sales are already going up, they are not going down, so there is no cannibalization. And there are a whole bunch of business models that we can consider and put in place, and would very much like to consider and put in place, which would not only have the same effect of driving the sales up, but also get the record companies a very substantial benefit.

We also do not think that we are going to get down to one CD because of one incentive problem, because why then would CD sales be increasing already, where there is not even a subscription price on Napster? That is certainly our view.

The other issue is the technologies that were referenced today for security. For example, encryption technologies. My understanding is that they are not too far away. People who know more about it can speak to that. But once those things are in play, they also will affect

⁷⁴ *Sony*, 464 U.S. 417.

⁷⁵ See Paul Goldstein, *The Next Napster May Be An Insider*, N.Y. TIMES, July 28, 2000 at A, available at 2000 WL 25026882.

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the business model.

That is what *Sony*⁷⁶ is about. Look out a year or two, what is going to happen? The movie companies thought that because of *Sony*,⁷⁷ that they were going to get killed. They also had collateral license issues of the type that were raised here. But it turns out that they did not get killed and in fact did well, and I am not sure their collateral licensing did not increase.

The last thing, though, about *Sony*,⁷⁸ is that the arguments in that case make our case a lot stronger, in our view, but they are not essential. We think we would win under *Sony*,⁷⁹ as long as we have substantial non-infringing uses that we cannot technologically sever off. We think we would win pretty much without regard.

In *Sony*,⁸⁰ the Ninth Circuit ordered a compulsory license.⁸¹ The Supreme Court took it away.⁸² In the face of the claims made here, basically that — and I understand they are made with all respect, and I take them that way; I really understand the point — the claim made here is that really the fair use is just trumped up. That is the claim being made. That claim could have been made with much greater force in the *Sony*⁸³ case itself than here.

Thank you for that question actually.

MR. KATZ: May I offer a comment?

MR. SILVER: Yes, absolutely.

MR. KATZ: My son just started college. He called me the first week and he was really excited. He said, “Dad, good news and bad news. The good news is that before you can get an account on the UVA server, you have to take a test, and the first question on the test was multiple choice: “Napster is (a) really exciting new technology;

⁷⁶ *Sony*, 464 U.S. 417.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Universal City Studios v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981).

⁸² *Sony*, 464 U.S. 417.

⁸³ *Id.*

(b) a reason why you never have to buy discs anymore; or (c) a violation of federal law and inconsistent with the campus Honor Code and University Standards.” He said, “The bad news is boy, I just installed Napster and it’s great. Nobody here is ever going to buy a CD again.”

Now, that is the real world.

MR. SILVER: Okay, okay, I was wrong then. We lose.

MR. KATZ: Yes, you are.

Let me add something else. I have now spent probably half of my professional time for the last two-and-a-half years on music cases because I love new neat technologies. I buy every new neat technology, I have the Lifetime Achievement Award from the Consumer Electronics Association, I really enjoy, in a litigation, learning about a new technology — there is no new technology in the music infringement world.

There is no technology to Napster, zero. Napster uses a distributed network file system in which the Napster service’s mount has hard drives and the individual local drives of the users on the system. This is a technology generally attributed to Bill Joy, developing Berkeley UNIX in the early 1970s, although some would say it dates all the way back to Ken Thompson and Dennis Ritchie at Bell Laboratories in the 1960s.⁸⁴ That is it. There is no new technology to Napster. Nothing to do with Betamax.

All they have done is taken some old technology and customized it for customers who they characterized in their documents as “pirates.”⁸⁵

MR. SILVER: I’ll speak to that quotation too. Here, let me give you something. You can get the reply brief that we wrote off our Web site. On the issue of their own quotations, take a look at page

⁸⁴ See Dennis M. Ritchie, Dennis Ritchie Home Page (2001), at <http://plan9.bell-labs.com/who/dmr> (last visited Mar. 8, 2001).

⁸⁵ See Notice of Joint Motion and Joint Motion of Plaintiffs for Preliminary Injunction; Memorandum of Points and Authorities at 10, *A & M Records v. Napster*, 114 F. Supp. 2d 896 (N.D. Cal 2000), available at http://www.riaa.org/pdf/napster_brief.pdf (last visited Mar. 8, 2001).

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— because I have never really seen such disingenuous use made of them — take a look at page 24.⁸⁶ Go get it, take a look, and then keep that in mind the next time somebody tells you a quote from Shawn Fanning or somebody else.⁸⁷

MR. FABRIZIO: Which I will do in about thirty seconds.

MR. SILVER: All right, good.

Now, as to whether it is a new technology or not, I do not think the issue is whether somebody in the 1970s who was really smart did something that was the basis for the technology. I do not think that means that it is not new in the relevant sense for *Sony*.⁸⁸ It is just coming out now to be broadly used and society is just about to get access to it on a broad case, and that is what *Sony*⁸⁹ cares about. That is also what NMRC⁹⁰ cares about.

At that point the issue is: How much are we going to let the content owner do to stop that? That is the issue. And it is not an issue if there are only infringing uses, and it is not an issue if the infringing uses can be severed off without basically redesigning the technology. But if that is not true, then that is the issue, and it does not matter if somebody thought of it in the 1970s. The point is, society is just beginning to get the benefit of it, so what do we do? That is the question, as I see it, that is in front of us.

PROFESSOR ROTHENBERG: I would like to just make a comment here, and that is that one that could almost substitute the terms “economic model,” “business model,” “business plan” for this “new technology.” It seems that they have been used interchangeably, and not in any derogatory way, because they have been used for both sides of the argument.

⁸⁶ Reply Brief for Appellant, *A & M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), at <http://dl.napster.com/brief0912.pdf> (last visited Mar. 8, 2001).

⁸⁷ *Id.*

⁸⁸ *Sony*, 464 U.S. 417.

⁸⁹ *Id.*

⁹⁰ The Nomad Mobile Research Centre provides a virtual label and a screen of anonymity to allow members to analyze and investigate computer security and vulnerability issues. See NMRC at <http://www.nmrc.org/about/html> (last visited Mar. 8, 2001).

MR. FABRIZIO: I actually think, Stan, it is dangerous to do that. I think it is really dangerous to talk about business models and technologies in the same breath. Whether people argue that Napster is a new technology, an old technology, an emerging technology, I think it is all irrelevant.

Napster and the case against Napster is not about any technology. It is about a business model. It is about people setting out to make a fortune based on content that they did not own. This case does not involve technology. Peer-to-peer technology is not going to be shut down by this case. It is a business model.

Let me get back to your question, Sir. Napster early on set out its business plan, before a lot of high-paid lawyers and investment bankers and consultants got involved. A couple of people spoke pretty frankly about what their goals were. Here is what they wrote in their documents: "Goal: Death of the CD. . . . Goal: Usurp the digital download market."⁹¹

The question of whether unrestrained Napster will cause harm to the recording industry, I think, is so self-evident. CD sales in general are up, yes — great, thank you. We are in a historic boom economy. But the evidence presented to the district court, and the district court's findings were that when you look at where Napster is being used most heavily — around UVA, where Harry's son is having a field day, and other universities — sales are flat or down.⁹² If you look at national sales, they may be going up. You look at sales around schools where Napster use is highest, that line goes down.

So I do not think there is a credible argument that Napsters are saving us from ourselves because they know better than we do what is good for us.

⁹¹ See Notice of Joint Motion and Joint Motion of Plaintiffs for Preliminary Injunction; Memorandum of Points and Authorities at 26, *A & M Records v. Napster*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), at http://www.riaa.org/pdf/napster_brief.pdf (last visited Mar. 8, 2001).

⁹² See Eric Boehlert, "Napster vs. the Record Stores: Is the File-Sharing Craze Bruising Retailers?" *Salon.com*, (Aug. 7, 2000), at http://www.salon.com/business/feature/2000/08/07/napster_retailers (last visited Mar. 8, 2001).

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There are any number of differences between the Napster service and the VCR as a product, but maybe the one that is most important for this purpose is that Napster is not about home copying; it is about worldwide distribution. I think that makes all the difference in the world.

PROFESSOR ROTHENBERG: There is a question up there, but before he puts his question he has to get the microphone, so I will just comment on a statement that Steve made a little while back. He said that we should read the cases, a lot of them are fascinating. I think he is wrong. I think they are all fascinating.

MR. FABRIZIO: I do not know about that.

PARTICIPANT: My question is this — and it may not exactly be germane to our current panel, but I just wanted to see what your thoughts were on this: Under the U.S. Code for the criminal sanctions for copyright infringement — not on the civil side, not in the Act itself — there are various thresholds concerning the number of times that the infringement has to occur, as well as a dollar value, and also the intent to turn a profit.⁹³ There have also been discussions about doing away with the profit motive, basically doing away with that standard, and having it so that if you actually post a movie on the Internet — not for your own personal gain but you just post it there — then you can be criminally liable, forget the civil side and forget what we are talking about right now. I just wanted to see what your thoughts were on that.

MR. FABRIZIO: I will take a first crack at this, although I do not do a lot of the criminal work, so I may not be very specific.

The statute does exist — I think it is 506 — and it is not an either/or, financial benefit or threshold.⁹⁴ It is not both, not financial benefit or threshold. A lot of people remember the *LaMacchia*⁹⁵ case, where the individual was acquitted because he was not receiving a financial benefit. Congress addressed that, and it

⁹³ See 17 U.S.C. § 506(a)(2); 18 U.S.C. § 2319(a), (c)(1).

⁹⁴ *Id.*

⁹⁵ *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994).

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addressed it with the NET Act.⁹⁶

I will refrain from using the specifics of the numbers, because I will just get it wrong if I do, but there are two thresholds for the imposition of criminal penalties. One is if there is an uploading or a downloading, an exchange of a sufficient level of copyrighted material, regardless of the circumstances in terms of financial benefit.⁹⁷ If you are downloading or if you are distributing at a sufficient level in terms of dollar value of copyrighted material, you could be subject to criminal penalties.⁹⁸

The second has to do with financial benefit.⁹⁹ What Congress did in terms of financial benefit was, I think, probably address the reality of the Internet a little bit better than it had been addressed before. More often than not, when people put up pirate sites, they do not say: "Come to my pirate site and spend \$1.00 and download a song." That is not the way the Internet works, whether it is pirates doing this as a hobby, or commercial businesses that are doing it to make lots of money.

At least in the Internet model that we are seeing today, the most important thing people can do is get you to their site. They will almost pay you to come to their site. They are not charging you for things at their site. So Congress adjusted the definition of financial benefit so that you did not have to receive money; it was a commercial transaction if you were receiving anything of value or expect to receive anything of value in return, including potentially other copyrighted works.¹⁰⁰ So those sites that said "for every five songs you download you have to upload one" could meet this threshold of financial benefit.

PARTICIPANT: Well, there is still always some sort of a problem in these prosecutions where the defense has pled, "I did not receive anything of value, I simply just put this up there." There is talk

⁹⁶ No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended in scattered sections of 17 U.S.C. & 18 U.S.C.).

⁹⁷ 17 U.S.C. § 506 (a)(2).

⁹⁸ *Id.*

⁹⁹ *Id.* at § 506 (a)(1).

¹⁰⁰ 17 U.S.C. § 101 (defining financial gain as including a receipt or expectation of receipt, of anything of value, including the receipt of other copyrighted works).

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about changing the statute so that simply by virtue of posting it — it does not give them that defense of saying, “Well, I did not receive anything of value for it, so therefore I am immune.”

MR. FABRIZIO: I tell you, there are professors in the audience who are probably a little more current on what is happening in Congress, but I am not aware of any effort to change that standard, and I would be surprised if we ended up with a standard where just posting would invoke criminal penalties.

PARTICIPANT: My question is directed toward Mr. Fabrizio. Before Napster came around, I had access to MP3s through the Internet and downloaded them without a problem.

MR. FABRIZIO: Shame on you.

PARTICIPANT: Well, I think I am a good person. I think I am an honest person. I buy a lot of CDs, too many probably.

My question is: what are the future goals of the Recording Industry Association of America, how realistic are your expectations of stopping unlicensed trafficking of MP3s over the Internet. I am not claiming to know what will happen if Napster were to be shut down, but when I think of this issue, I wonder if maybe your side is living in a dream world thinking you can shut this down. I do not know. Maybe you can. Mr. Garnett talked about some of the logistical problems in security and things like that. I just wonder what your expectations are in the future, if you were to shut down Napster, how would you go about stopping this in other places. Like I said, I got MP3s before Napster.

MR. FABRIZIO: Sure, and that is a great question, and frankly sometimes, over the last year or so, it has felt more like a nightmare than a dream world.

But the answer to your question is the objective of the recording industry is to allow music consumers to enjoy music in as many ways as humanly possible, as creatively as the mind can be and as creatively as the technology allows people to be. Our companies want fans to be able to enjoy that music.

However, we want to do it in a way that respects the creators of that music, and we want to try to create an environment where these incredibly innovative businesses and technologies and Internet companies recognize that it needs to be a partnership between those that are supplying the content and those that are supplying the technology. I think that is the most important thing.

And as for the question, which is a real good one — you know, is it your goal to stop every pirated MP3 that is being transferred over the Internet — well, we all know the answer to that. Whether or not it is our goal, it is an unrealistic objective.

But one thing we can do is prevent companies that are really trying to build multibillion-dollar businesses off of the backs of the content community in ways that affect our ability and the recording industry's ability to work with the legitimate Internet companies that want to partner and that want to put these systems out there.

Again, the end result is everybody wants the user to have the best experience possible. Some of the differences between Mr. Carlinsky and I might be how that happens and who gets paid for it.

MR. CARLINSKY: Yes, but the reality is that if we look at what has happened so far, in October 2000, the record labels continue to parrot the *mantra* that you just heard from Mr. Fabrizio about how they want to benefit the user and they want to protect the artist. It is all nonsense, because in reality what they want to do is they want to maintain the stranglehold that they have over these music catalogs.

And they want to have you as the consumers, who have already bought the music, say, through the CD, and you owned it — probably, if you are a little bit older, you owned it maybe on a 45, then you owned it on an LP, then you owned it on an eight-track, then you bought it when the cassette came out, then you bought it again when the CD came out, and now you are going to be forced to buy the same music again.

These labels are saying to the world that they want to benefit the consumer, they want to have music available on the Internet, and that it will be a wonderful experience, but in reality they have done very little to license their content.

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In the *MP3.com*¹⁰¹ case, faced with the prospects of extinction, the company had very little choice but to settle with four of the five plaintiffs, which it has, and there is still a case going with Universal.¹⁰²

But I do not see that what is being said is in fact being carried through. I think it is more rhetoric and lip service than reality.

MR. FABRIZIO: I'll take one second to respond and then we will move on. The recording industry gets some criticism — and maybe some of it deserved. For example, the part about not moving fast enough. But the reality is, it is a lot easier to slap a piece of software on an Internet site and say “come get it, it is all free,” than to work with companies like InterTrust and the others that are out there working on Digital Rights Management technologies to make sure that it can be done in a way that actually creates a legitimate business model. That is a very different story.

It is always funny to hear an adversary talk about the record companies' desire not to license and about how they are just trying to control that distribution channel. Well, when there were five companies suing Mr. Carlinsky's client, he said, “There are five companies and they are a cartel and they are trying to choke off this technology.” Then, when one had settled, he said, “There are four companies and they are a cartel and they are trying to choke off this technology.” And then there were three, and then there were two, and now he is saying it about one. When he settles with that company — and maybe it will happen — he will be saying about the other Internet company that is doing the same thing that his client was, “No, I got it wrong. They are the ones that are violating the law because my client cannot compete with them. The problem with the companies that do not get licenses is that they compete unfairly with companies that do.”

¹⁰¹ UMG Recordings, Inc. v. MP3.com, Inc., No. 00 Civ. 472 (JSR), 2000 U.S. Dist. LEXIS 13293, at *1 (S.D.N.Y. Sept. 6, 2000).

¹⁰² See Amy Harmon, *Deal Settles Suit Against MP3.com*, N.Y. TIMES, Nov. 15, 2000, at C1 (noting that “MP3.com agreed to pay \$53.4 million to the Universal Music Group of Seagram yesterday, in a deal approved by a federal judge minutes before the final phase of their yearlong copyright dispute”).

MR. SILVER: All of those arguments, if accepted, would have meant a different result than the *Sony Betamax*¹⁰³ case, every single one of them.

MR. CARLINSKY: Every one of them.

PROFESSOR ROTHENBERG: Okay, we have another —

MR. GARNETT: I just want to comment on this point, because the week seems to be ending the same way it began, with arguments about who is right and who is wrong in the Napster-type context.

I would like to just come in at this juncture and make one very simple point, that InterTrust has been working for some time with record labels like Universal Music. As I said when I spoke earlier, this is an extraordinarily complex proposition to address. We have not yet been approached by Napster.

PARTICIPANT: You talked about the “big bad record company,” but, at the end of the day, it is their product. Music is never just about music, but about the business of producing and selling the music. Madonna, for instance was mentioned earlier.¹⁰⁴ Marketing a Madonna album is not merely a question of the music, but of her image and the album’s release date among other things. It is in the product manager’s best interest to sell as many records as possible, and record companies must have the power to sell their product. They should be able to choose how to market it. It is not fair that by means of the Internet someone can access the music earlier and can disrupt the marketing process, thereby compromising the record company’s right to control the marketing of their product.

MS. FORREST: I just want to say I agree. Since Bob got a softball before, I thought this one, Bob, was meant for me.

I also want to use it as an opportunity to say that, in response to some earlier comments by Mr. Carlinsky as to whether or not the record companies are attempting not to essentially license their

¹⁰³ *Sony Corp. of Am. v. University City Studios, Inc.*, 464 U.S. 417, 442 (1983) (finding that manufacturers of video recorders, that the consuming public used to record respondent’s programming, were not liable for copyright infringement).

¹⁰⁴ *See infra* page 110-11.

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music anywhere on the Internet, they are active, and they are publicly reported. There are lots of instances where the record companies are attempting to achieve what will be the distribution model online.

I totally agree with you that that is one of the array of rights that we have. But they are active, and there are numerous instances where that is actually occurring. This is not a situation where there is a lot of litigation and the record companies are trying to stay in the brick-and-mortar world. That world is gone. The record companies are in the online environment.

MR. SILVER: Two quick points with respect to both. I agree with you. Here is the only thing. If somebody came up with a technology that was designed to take all of those product development decisions away from the record companies, what are you thinking? Of course. I mean it is theirs.

MR. FABRIZIO: It is called Napster.

MR. SILVER: No, it is not. That is the point. It is not. Leave the AHRA¹⁰⁵ arguments to the side, leave the DMCA¹⁰⁶ arguments, leave all the other arguments besides *Sony*¹⁰⁷ to the side. We do not have time to get into them. If that is all Napster did, then Napster would not be like the VCR in the *Sony Betamax*¹⁰⁸ case and you would be right. But it is not. There are substantial other things that it does.

It may be that the copyright owners legitimately say — in the sense that it is not unreasonable for them to feel — “Well gosh, maybe there is a new technology, maybe society is going to benefit, but I still do not like the fact that there is less control.”

¹⁰⁵ Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (amending 17 U.S.C. by adding a new Chapter 10).

¹⁰⁶ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.).

¹⁰⁷ *Sony*, 464 U.S. 417.

¹⁰⁸ *Id.* at 442 (noting that video recorders were capable of substantial non-infringing uses).

But that decision, we believe, was made by the Supreme Court in *Sony*.¹⁰⁹ In other words, that is what the fair use doctrine does. It strikes a balance in contributory infringement cases, that means that the world will not be entirely the same for the right holder because that technology has been introduced, because the technology has got uses other than infringing ones. I do not know how else you read the decision. There is less non-infringing use there than here, even under the district court's opinion.¹¹⁰

PROFESSOR ROTHENBERG: Let us take that lady's question in the audience.

PARTICIPANT: My question I think goes to all of you. The purpose behind U.S. Copyright Law is not only to protect content owners, but also to promote the useful arts and progress of science.¹¹¹ What I see companies like MP3.com and Napster doing is pushing the technology to its limits before companies like InterTrust can work in Digital Rights Management and licensing schemes can become available so that consumers can get what they want. It seems to me that consumers want digital music, and there are companies putting digital music out there for them, and that consumers would not be opposed to buying a song for an amount of money that would be reasonable. Maybe what this is all about is getting to a reasonable price.

MR. SILVER: We agree with you. We do not think consumers would be opposed. We do think the timing of when encryption technology is available and when Napster appeared — you know, one is ahead of the other. But that is how things happen. I mean, there is not a planned economy.

The point is that they will catch up. If the technology is not killed, the encryption will be available relatively soon and it will move towards a business model that we think will be good for everybody. We think that is why — not to repeat myself endlessly — that is why the fair use doctrine is there, to keep that technology alive while that gets worked out.

¹⁰⁹ *Sony Corp. of Am. v. Univ. City Studios, Inc.*, 464 U.S. 417 (1983).

¹¹⁰ 480 F. Supp. 429 (C.D. Cal. 1979).

¹¹¹ U.S. CONST. art. I, § 8, cl. 8.

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MS. FORREST: Can I reply?

PROFESSOR ROTHENBERG: Yes, your turn.

MS. FORREST: Let me respond very briefly. It is unpopular to say, that is true, but just because consumers like pirated goods, that does not mean that is part of the fair use doctrine. If consumers want to have, for instance, pirated T-shirts or if consumers want to have a variety of types of pirated goods, and there may be a marketplace for them that is quite vibrant, and indeed the price may be well below what they would cost if they were branded and sold in the branded nature, that does not make it something that is acceptable under fair use.

I am not arguing policy. What I am arguing is whether or not, currently under the law, that kind of activity is allowed. Under the law, as it stands now, the answer I think is “no.”

I know you want to respond, but I also want to pose to Bob one question, which is *Sony Betamax*¹¹² was about time shifting, but Napster is about person shifting, and isn't that a distinction?

MR. SILVER: Well no, because Napster is not only about person shifting. Napster is also about, for example, space shifting. Napster is about sampling.

MS. FORREST: But within one person's home.

MR. KATZ: “Space shifting,” I think, is a synonym for copying.

MR. SILVER: No, it is not.

MR. KATZ: It is moving it from one place to another place.

PROFESSOR ROTHENBERG: Let us hold on to that. We have someone in the audience who has a question.

MR. SILVER: Not according to the district judge who slammed us, it is not.

¹¹² *Sony*, 464 U.S. 417.

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PARTICIPANT: We are talking about settlements of \$500 million, addressing companies with business plans and business models. I guess this is addressed more to Ms. Forrest and Mr. Fabrizio. How far will the record companies go when dealing with something like Gnutella¹¹³ or FreeCast, where it is anonymous based peer-to-peer, where it is just the people doing it, there is no company, there is no business model, and it has gone underground? Does American copyright law then go after the people themselves?

MS. FORREST: I cannot comment in terms of what the companies would do. I would not want to comment in terms of what my clients might do. So from a client point of view, the comment I will make will be without any of it being attributed to any view that any of my clients might hold. Is that an acceptable ground rule?

PARTICIPANT: Yes.

MS. FORREST: With that as an acceptable ground rule, I would say that it is obviously neither very desirable nor easy to sue every single person who is making an infringing copy. That does not mean that it cannot be done. Bob carefully avoided the AHRA, which is the Audio Home Recording Act, and as the law currently stands, the Audio Home Recording Act,¹¹⁴ unfortunately, does not.

People are under the common misconception that an individual has a fair use right to create a copy. That is typically not the case. The way that you are able to make a copy from a CD into a cassette is usually under a provision of the AHRA, which has certain home recording devices that allow you a use.¹¹⁵

Now, the companies that have AHRA uses — I mean, there are certain companies that make recording equipment, which is defined under the statute for the AHRA.¹¹⁶ Now, I have to say Harry is an expert in this, much more than I, and so I am giving you sort of the quasi-lay person's view on this.

¹¹³ Gnutella is a fully-distributed information sharing technology. See Gnutella at <http://www.gnutellanet.com> (last visited Mar. 4, 2001).

¹¹⁴ Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (amending 17 U.S.C. by adding a new Chapter 10).

¹¹⁵ See *id.*, § 1001(3).

¹¹⁶ *Id.*

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But those companies actually contribute into what I am going to call, for lack of a better phrase, a royalty pot. That gets paid out on a unit basis to the record companies. And so they receive essentially sort of an equivalent to a royalty.

But that is a very different thing than computers. Computers are not a defined device under the AHRA.¹¹⁷ In other words, to be blunt about it, I do not believe there is a fair use right to create copies on an individual basis, and that is just the bottom line.

MR. KATZ: Can I break the Cravath monopoly here for a second?

MR. CARLINSKY: I do not think that many Senators, though, would agree with that position, and I think that probably the Chair of the Senate Judiciary Committee, Orrin Hatch, would probably take issue with you, as he did at the so-called Napster hearings, where he posed a question to Hilary Rosen or the RIAA and she too stumbled, or took the position at the end that she did not think a consumer had a right to make a personal non-commercial copy of his or her own lawfully purchased music.¹¹⁸ And Hatch's point was "of course that is fair use."¹¹⁹ So, I do not think that one could really dispute that fact, even though I understand why the record labels have to take that position. But I do not think that is the law.

MR. KATZ: Well, Hatch was wrong. Can I get a comment in here?

I would like to put a question to the person who asked the last question, which is: Have you used Gnutella or one of these peer-to-peer services?

PARTICIPANT: Yes, I have.

MR. KATZ: And have you found the performance reasonable?

PARTICIPANT: The performance is slower and it is definitely harder to install. If you do not have a computer background, it may

¹¹⁷ *Id.*

¹¹⁸ See Hilary Rosen, *Hearing of the Senate Commerce, Science and Transportation Committee Subject: Marketing Violence to Children*, FEDERAL NEWS SERVICE, Sept. 13, 2000.

¹¹⁹ *Id.*

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be impossible to install.

MR. KATZ: My experience with Gnutella has been that it is not a threat, that you really cannot scale that thing up to a point where it is really going to be a substantial threat in the way that Napster is.

PARTICIPANT: Based on the nature of it, it is peer-to-peer, it is reaching for the next computer in front of it, what happens with broadband and DSL¹²⁰ and cable when, like in Manhattan alone, with the number of people here, with a Gnutella or something like a FreeCast? Doesn't that raise the numbers towards pre-Napster numbers before the suit?

MR. KATZ: It could be a tremendous problem. But, you know, we are fighting a rear-guard action against the world of today and we do not really have the luxury of worrying about what is going to happen tomorrow. Napster is killing us today. Unless we can win that one.

PARTICIPANT: At least we have the luxury of discussing what could happen when Gnutella is made to scale and logical.

MR. KATZ: The world is going to find new models.

One comment I wanted to make. Warner yesterday put the entire content of Madonna's new album on the Internet free. Not only can you access the music on it, you can remix it and alter it in transformative ways. It is also the most beautiful user interface I have ever seen in a music application. There is more new and real technology — in what Warner put up yesterday for free than in Gnutella and Napster and MP3.com and all these people put together. They have no technology. They bring nothing new. They just take very old, tried-and-true technology and use it in ways to encourage and enable uncontrolled copying of copyrighted material.

PARTICIPANT: But the question remains: What will the recording industry do when a technology like Gnutella is made a

¹²⁰ A Digital Subscriber Line ("DSL") provides high speed internet access to users. "Basically the telecom company splits one of your voice phone lines, sending internet data at high frequencies." Anthony Paonita, *DSL or Cable: A Primer?*, N.Y. L.J., Oct. 10, 2000, at t4.

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little less clunky and there is no centralized Napster to sue?

MR. KATZ: The industry is doing a number of things, including developing new technologies to better protect its content, including developing new and more attractive forms of digital music which people will like.

PROFESSOR ROTHENBERG: I think that when you look at the *Sony Betamax*¹²¹ case, where the Court said that the home recording was a fair use, it reserved on the issue of changing or exchanging VCR videotapes. It seems to me that where you have an exchange of tapes, where I put up mine and you can download from my files and I can do the same from you, then you are doing the very thing that was reserved in the *Sony Betamax*¹²² case.

MR. SILVER: May I respond to that? What we rely on to establish fair use is not the sharing.

PROFESSOR ROTHENBERG: Oh no, I know. You are relying on the fact that —

MR. SILVER: Sampling new artists who authorize their use and use it —

PROFESSOR ROTHENBERG: I am aware of that. I was only directing my comment to that one point, which will be relevant in these other technologies that will be competing with you. There, it seems to me that the exchange of files is the equivalent of barter, and barter is the same as selling or distributing, and therefore I think that may very well rise to an infringement. Then the issue will be: how do you control that mass infringement, and are we going to have to have copyright police?

MR. FABRIZIO: I think the Professor's question is not asking whether it is unlawful, but rather how it can be dealt with practically.

MR. SILVER: But isn't that the technology that was discussed here?

¹²¹ *Sony*, 464 U.S. 417.

¹²² *Id.*

PARTICIPANT: I think that is evading the question of whether that is fair use. I would just ask you to answer the question that you have all been —

MR. SILVER: Isn't that really going to Nic?

PARTICIPANT: — what to do. I think that Nic is right, what his company is doing is technologically very challenging and it will take a lot to get it right, but in the meantime

MR. GARNETT: I can only reiterate the points I have been making earlier, that if we confine our vision to trying to interpret existing copyright norms to solve these problems, it is not going to take us very much farther, in my opinion.

At InterTrust, we spend an enormous amount of time thinking about how this fits into the existing legal framework. Therefore, as a small company trying to face all these incredible technological changes, a host of policy issues exist for us as well.

How do we address the issue of making sure that what is written into the technologically protected packages conforms with the basic principles in the context in which they are going to operate? We spend a lot of time thinking not just about the United States, we think about how we are going to protect this in a manner that is in accordance with the laws of any territory that can be reached using our technology. We have to think about how the systems that we are using to protect music and all the other kinds of content.

We think about how we have to protect the interaction, which our system is based on, with consumers around the world; how do we protect people's privacy in places like Belgium and Australia, wherever. These are vast questions that one small company in California is not going to answer, but we are trying very hard.

I really stress that we have to look at all of these copyright issues in that broad of a context. All the energy that is going into arguing whether Napster is a business model, or a device, or whatever, I hope there is going to be some energy left to actually look at the broader issues that we have all got to struggle with for many years to come.

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PROFESSOR ROTHENBERG: I think the Symposium Editor wants the dais.

PARTICIPANT [Christopher Pennisi, *Fordham Intellectual Property, Media & Entertainment Law Journal*]: Gentlemen and lady, I do not mean to usurp control of this audio content, but I would like to leave off with one final question, because our time is short.

Barring the success of the fair use defense or other defenses that have been levied, is it too late to now go and apply these technologies and take back what may have been taken from the recording industry? I guess this is best addressed to Mr. Garnett.

MR. GARNETT: Restate that again, would you?

PARTICIPANT [Mr. Pennisi]: Basically we have thousands upon thousands of MP3s out there, entire record catalogs. Can we now apply this technology and hope to supplant the alleged pirating of the MP3s?

MR. GARNETT: There is — and Steve will confirm this — at the present time a huge number of transitional issues to be addressed. There is a vast amount of legacy material out there. It is something that the SDMI¹²³ process has been focusing on for some time.

If you are comparing business model against business model, you have to think of the transitional process as well. It is something that has been concerning the recording industry for a long time. When people pay for downloads, they do not do it as much as when they do not have to. The recording industry's business is, therefore, largely still based upon selling CDs around the world.

It is an extraordinarily complex process for an industry to transition from one business model to the next. So, I think these are major problems, but they will be seen in time to be transitional problems.

¹²³ See Hane C. Lee, *SDMI Will Lose Its Director*, THE STANDARD, Jan. 24, 2001, available at <http://www.thestandard.com/article/display/0,1151,21655,00.html> (last visited Mar. 8, 2001) (explaining that the Secure Digital Music Initiative (“SDMI”) “represents a collaborative effort between the recording industry and technology companies aimed at developing a copyright protection standard for digital files”).

There is no magic solution. No, I do not think there is a technological solution that is now going to recapture a lot of material that is already out there, but that is virtually irrelevant in trying to address the problems of how you move forward from here.

MR. FABRIZIO: Maybe I can end this on a more upbeat note. On the question of: "Can we stop all piracy online?" Not anymore than we do offline. But in answering the question can there still be a vibrant, legitimate market where music consumers are able to enjoy listening and using their music in many different ways?

I think the answer is yes, and I think some of the cases that are being decided now will go part of the way towards helping establish the ground rules that will allow that market to exist.

MR. PENNISI: On behalf of the entire *Fordham Intellectual Property, Media & Entertainment Law Journal*, I would just like to extend our heartfelt thanks to all our panelists today. They all took time out of their busy schedules to be here and we appreciate their efforts.

Thank you very much.