

THE RIAA'S CASE AGAINST RIPPING CDs: WHEN ENOUGH IS ENOUGH

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I. INTRODUCTION

In 1962, Bob Dylan sang that "some people rob you with a fountain pen," an assertion that could easily apply to some of the arguments that the Recording Industry Association of America (RIAA) is advancing in its battle against music piracy.¹ During recent lawsuits, the RIAA argued that "ripping" compact disks (CDs) is an illegal activity.² This aggressive new stance proposes that copying a CD onto a computer hard drive to copy onto a blank CD or for later use in an MP3 player should be illegal.³ Courts have not yet addressed this proposition.⁴ However, given the growth of the market for MP3 players, such as Apple's iPod, a decision in favor of the RIAA on this issue could create deep implications for music fans.⁵

This paper will explore some of the issues surrounding the RIAA's new, aggressive stance regarding MP3 ripping. I will discuss the reasons why the RIAA's claim is not supported by applicable laws on a number of fronts, including how existing copyright law should be interpreted, if a ban on CD ripping is consistent with fair use, if analogies may be drawn to the ban on DVD ripping, and how closely related CD ripping is to online piracy. Before addressing any of these issues, however, one must understand the history of MP3 ripping and why the RIAA would want to suppress this form of music technology.

II. HISTORY OF MP3 RIPPING AND PIRACY: THE ROOT OF THE TROUBLE

The RIAA's current battle with music fans began two decades ago. In 1987, the MP3 format arose as a means of

1. BOB DYLAN, *Talkin' New York*, on BOB DYLAN (Sony Records 2005) (1962).

2. See Mark Fisher, *Download Uproar: Music Record Industry Goes After Personal Use*, WASH. POST, Dec. 30, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/28/AR2007122800693.html>; see also RIAA, *Clear Victory for Recording Industry in Napster Case*, RIAA, Feb. 13, 2001, http://www.riaa.com/newsitem.php?content_selector=newsandviews&news_month_filter=2&news_year_filter=2001&id=EA742466-C6DB-1D28-CF94-411172C649C7&searchterms=Search%20RIAA%20Clear%20Victory%20for%20Recording%20Industry%20in%20Napster%20Case&terminclude=&termexact= (last visited Oct. 17, 2009) (asserting the RIAA's official position regarding CD ripping).

3. See RIAA, *The Law*, RIAA, Mar. 3, 2001, http://www.riaa.com/physicalpiracy.php?content_selector=The_Law_Physical_&searchterms=copying%20a%20CD%20onto%20a%20computer%20hard%20drive%20for%20later%20use%20in%20an%20MP3%20player%20or%20to%20copy%20onto%20a%20blank%20CD%20would%20be%20illegal&terminclude=&termexact= (last visited Oct. 17, 2009).

4. See Fisher, *supra* note 2.

5. *Id.*

compressing digital sound files.⁶ This technology provided a feasible method of taking sizeable digital files and compressing them to a smaller size so that they could be stored on a medium with limited space, such as a computer hard drive.⁷ All of this could be done without sacrificing sound quality.⁸ Of course, the uses for such technology are widespread and tremendous. In 2001, Apple Computers released their first generation iPod, a portable media player that could "hold roughly 1,000 songs encoded in MP3 format."⁹ For music fans, the advent of the MP3 format meant they could carry hundreds of albums of music at one time without having to bring their entire music collections or change CDs.¹⁰

On the other hand, MP3 technology also opened up the music industry to exploitation by those who do not respect the intellectual property rights of musicians. Several factors have caused this: First, the fact that MP3 technology is all-digital facilitates making an unlimited number of identical MP3 files.¹¹ While music copying is certainly not a new idea for music fans, copying music in the past involved analog technology, which caused successive copies of musical works to progressively degrade in quality.¹² This is not the case with MP3s, which can be copied virally and perpetually.¹³ An even more serious threat regarding the use of MP3 technology, however, is that MP3 files are small enough to be shared over the internet.¹⁴

6. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

7. See *id.*; see also Kimberly D. Simon, *Establishing Accountability on the Digital Frontier: Liability for Third Party Copyright Infringement Extends to Manufacturers of Audio Compression Software*, 52 SYRACUSE L. REV. 921, 924-25 (2002); *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1074 (9th Cir. 1999) (noting that "the compression [that the MP3 format] provides makes an audio file 'smaller' by a factor of twelve to one").

8. *Recording Indus. Ass'n of Am.*, 180 F.3d at 1074.

9. Jonathan Seff, *First look at Apple's iPod*, CNN.COM/SCI-TECH, Oct. 31, 2001, <http://archives.cnn.com/2001/TECH/ptech/10/31/iPod.review.idg/index.htm>.

10. See Ida Shum, *Getting "Ripped" Off by Copy-Protected CDs*, 29 J. LEGIS. 125, 126 (2002).

11. See *Recording Indus. Ass'n of Am.*, 180 F.3d at 1073.

12. See *id.* Early pre-MP3 forms of digital audio that were capable of making exact copies were subject to a number of safeguards, including a Serial Copying Management System that limited the number of times that a work could be copied and royalties that could be paid to the recording industry for every unit of digital recording media, such as blank tapes. Shum, *supra* note 10, at 142.

13. See *Recording Indus. Ass'n of Am.*, 180 F.3d at 1073.

14. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001); see also *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1212-13 (D. Minn. 2008) (discussing claim that defendant swapped music over the internet).

The worst fears of the music industry came true with the advent of the Peer to Peer File Sharing Network.¹⁵ Beginning with Napster in 2000, services began materializing that facilitated MP3 trading between individual users.¹⁶ Essentially, these services work by networking two computers together through a central server; once the computers are networked, files such as MP3s can be freely shared between the two.¹⁷ The obvious problem with this type of program is that the subscribers to these services are free to trade music without providing any type of payment to the holders of the music copyrights.¹⁸ The proliferation of these services deeply affected the music industry.¹⁹ The industry claims that its revenues have dropped from 13.5 billion dollars in the year 1999 to 11.5 billion dollars in the year 2005.²⁰

As a result of the rising specter of piracy in the digital age, the music industry, under the lead of the RIAA, enacted a series of retaliatory actions designed to deter people from pirating music.²¹ The RIAA attempted to nip the problem in the bud by suing Napster.²² Ultimately the RIAA found success in its attempt to gain a temporary restraining order so that Napster could not continue operations with its current model.²³ However, the temporary restraining order arrived too late; other services, such as Kazaa, had sprung up in the place of Napster, and music fans simply migrated to these similar services to continue downloading MP3 files without paying for them.²⁴ In response,

15. See *A&M Records, Inc.*, 239 F.3d at 1004; *Capitol Records, Inc.*, 579 F. Supp. 2d at 1212-13.

16. See *A&M Records, Inc.*, 239 F.3d at 1011; see also *Capitol Records, Inc.*, 579 F. Supp. 2d at 1212-13.

17. See *A&M Records, Inc.*, 239 F.3d at 1012.

18. See Jeffrey L. Dodes, *Beyond Napster, Beyond the United States: The Technical and International Legal Barriers to On-Line Copyright Enforcement*, 46 N.Y.L. SCH. L. REV. 279, 279 (2002).

19. See Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 133, 135 (2006).

20. *Id.*

21. See *A&M Records, Inc.*, 239 F.3d at 1010-11.

22. See *id.* at 1011.

23. See *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098-99 (9th Cir. 2002).

24. See *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1212-13 (D. Minn. 2008); see also *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA-051, 2006 WL 2844415, at *1 (W.D. Tex. July 17, 2006) (suing defendant for listing sound recordings on a peer-to-peer site); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008); Greg Sandoval, *Kazaa to Return as Subscription Service*, CNET NEWS, July 17, 2009, http://news.cnet.com/8301-1023_3-10289985-93.html (stating that "[Kazaa] rose to prominence following the first wave of peer-to-peer networks . . . [and] is joining the

the RIAA began implementing more proactive measures to curb piracy.²⁵ On its website's homepage, the RIAA began issuing stern warnings to individuals who may have been tempted to infringe music copyrights.²⁶ These warnings focused on several major areas of growing piracy; however, the bulk of the warnings targeted those who may have participated in online copyright infringement.²⁷ The RIAA claimed that swapping protected music on a peer-to-peer network was a crime, and could be punishable in both civil and criminal court with penalties of up to five years in prison, a \$250,000 fine for criminal liability, and civil punitive fines of up to \$150,000 for each work that was illegitimately copied.²⁸

The RIAA then took enforcement to the next level by filing lawsuits against individuals who had used the peer-to-peer networks and had downloaded copyright-protected music.²⁹ Over time, these lawsuits grew and eventually affected some 20,000 alleged music pirates.³⁰ However, even with the specter of legal action looming over consumers who were using pirated software, the peer-to-peer lawsuits failed to curtail piracy.³¹ In 2005, a year after the lawsuits had been initiated, the music industry still weathered a 7% decline in sales of music albums in the United States, 4% of which was allegedly attributable to online music piracy.³²

In the course of the peer-to-peer lawsuits, the RIAA decided that it would change its tactics and give itself further protections against piracy. The RIAA won most of its peer-to-peer lawsuits based on the idea that copyright laws were broken when people

growing number of former rogue file-sharing applications and services whose names are now being used for legal operations").

25. See RIAA Home Page, http://www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_law (last visited Oct. 31, 2009).

26. See *id.*

27. See *id.*

28. See *id.*

29. See Jen Rogers, *Music Industry Suing 532 Song Swappers*, CNN.COM/TECHNOLOGY, Jan. 26, 2004, <http://www.cnn.com/2004/TECH/internet/01/22/online.music/index.html>; see also *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 976 (D. Ariz. 2008); *Warner Bros. Records, Inc. v. Payne*, 2006 WL 2844415, at *1 (W.D. Tex. July 17, 2006). Judges have called the RIAA's system too harsh on the end consumer due to what they have seen as excessive damages levied against individual fans not participating in commercial activities. See *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008).

30. See Sag, *supra* note 19, at 133.

31. See *id.* at 135-36.

32. *Id.*

accessed or distributed an illegitimate copy of a protected work.³³ However, starting in 2008, the RIAA began claiming that copyright infringement occurs well before an MP3 is actually disseminated on a peer-to-peer network.³⁴ Starting with the case *Atlantic Recording Corp. v. Howell*, the RIAA began asserting that "it is illegal for someone who has *legally* purchased a CD to transfer that music into his computer."³⁵ The RIAA also brought this theory up during the *Capitol Records, Inc. v. Thomas* case, in which Sony BMG's chief of litigation claimed that "when an individual makes a copy of the song for himself, I suppose we can say he stole a song. Copying a song you bought is a nice way of saying 'steals just one copy'..."³⁶ For some time, various commentators advanced this theory as a good way to stop piracy.³⁷ However, these cases marked the first time that this bold new theory was ever presented before a court.³⁸ Perhaps somewhat wisely, the courts declined to comment on the RIAA's new assertions and instead ruled that the defendants broke copyright law by participating in peer-to-peer networks rather than just by merely ripping their music CDs onto their computer hard drives.³⁹ However, the courts noted that, while they intend to proceed carefully, they are dealing with an open area of

33. See *Capitol Records Inc.*, 579 F. Supp. 2d at 1225 (claiming that the Defendant's wrong was accessing the illegitimate material through a peer-to-peer site); *Warner Bros. Records, Inc.*, 2006 WL 2844415, at *3 (explaining that "[l]isting unauthorized copies of sound recordings using an online file-sharing system constitutes an offer to distribute those works, thereby violating a copyright owner's exclusive right to distribution"); see also Fisher, *supra* note 2 (stating that an attorney with experience in peer-to-peer suits thought that the law was only violated when physical copies were distributed).

34. See Fisher, *supra* note 2.

35. *Id.* (emphasis added).

36. *Id.* (internal quotation marks omitted). The RIAA's website claims that "there is no legal 'right' to copy the copyrighted music on a CD onto a CD-R. However, burning a copy of the CD onto a CD-R, or transferring a copy onto your computer hard drive or portable music player, won't usually raise concerns so long as [it is from a CD you own that is not copy-protected and is for your personal use]." See RIAA, http://www.riaa.com/physicalpiracy.php?contentselector=piracy_online_the_law (last visited Oct. 31, 2009).

37. See Simon, *supra* note 7, at 940 (pointing out that "[w]ithout the process of ripping and encoding, a user would be unable to convert CD tracks into MP3 files, and would therefore be unable to upload MP3 files onto trading services such as Napster"). Simon advances several theories on how the RIAA could argue that ripping tracks from CD onto MP3 is an illegal practice. *Id.* at 941-42; see also Dodes, *supra* note 18, at 313 (arguing that "[w]here one digital file can be exponentially duplicated on the Internet in a short amount of time, the balance tips toward allowing some form of copy protection").

38. See Fisher, *supra* note 2.

39. See *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008) (emphasizing that "[t]he general rule, supported by the great weight of authority, is that 'infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords'); see also *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008) (warning that "[t]he end user who downloads the unauthorized copy or phonorecord may be liable for direct infringement, depending on the facts of the case").

copyright law in which they must make decisions without any guidance from Congress.⁴⁰

The implications of this undecided issue are potentially huge for music fans. To date, millions of music fans have purchased MP3 players, such as iPods.⁴¹ These music fans could lose a major benefit in using their existing library of CDs for their MP3 players, and will have to essentially restart their music libraries.⁴² As a result, it is absolutely critical that if the courts ever choose to rule on this issue, they rule carefully.

III. ANALYSIS: CD RIPPING AND THE LAW

An understanding of current copyright law is essential in order to predict how the courts may rule if presented with the issue of whether ripping CDs is lawful activity. There are three main areas of interest within copyright law that shed light on the question as to whether ripping is legal. These areas include the doctrine of fair use and its implications regarding CD ripping, analogies to the Digital Millennium Copyright Act and its ban on DVD ripping, and analogies to the peer-to-peer cases and how the legality of ripping may affect this area of the law. Luckily for music fans, these areas, upon inspection, all favor the legality of CD ripping.

A. *Rights of Copyright Owners and the Doctrine of Fair Use: 17 U.S.C. § 106 and its Case Law Implications*

The rights of copyright owners for various media forms, including those in the music industry, are statutorily protected.⁴³ However, another statute protecting the rights of the consumer who happens to own the media immediately follows the statute protecting the copyright holder.⁴⁴ Consequentially, an area of

40. See *Atl. Recording Corp.*, 554 F. Supp. 2d at 987 (clarifying, "in a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests").

41. See *Apple Reports Fourth Quarter Results: Most Profitable Quarter Ever; Record Mac and iPhone Sales*, <http://www.apple.com/pr/library/2009/10/19results.html> (last visited Nov. 13, 2009) "The company sold 10.2 million iPods during the quarter, representing an eight percent unit decline from the year-ago quarter." *Id.*

42. See *Dodes*, *supra* note 18, at 313 (stating that consumers should be allowed to copy MP3 files, as an extension of CD use, onto an MP3 player).

43. 17 U.S.C. § 106 (2006); see also *Simon*, *supra* note 7, at 938 (stating that the copyright owner has a right to the reproduction of the work under 17 U.S.C. § 106(1)).

44. 17 U.S.C. § 107 (2006); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (affirming that 17 U.S.C. § 107 protects a number of rights of the consumer who possesses the media).

copyright law called fair use arose around these two seemingly contradictory statutes.⁴⁵ The courts have heavily relied on case law to flesh out the details between these two statutes and to determine how this area of the law works.⁴⁶ However, this area of the law remains notoriously underdeveloped.⁴⁷ Of course, the courts have yet to directly address the question of whether ripping a CD is protected under the fair use doctrine. However, if the development of the statutory law and the trends in the case law are of any indication, the courts will probably find that CD ripping is protected under fair use if they are ever forced to directly rule on this issue.

1. 17 U.S.C §§ 106-107: Statutory Fair Use

Statutory law explicitly deals with the doctrine of fair use.⁴⁸ These statutes are rather vague and open-ended.⁴⁹ This open-endedness enables these statutes to endure over time, but at the cost of specificity and predictability.⁵⁰ However, a consensus of court opinions on these statutes indicates that there are some definite rights that belong to the copyright holder, and some other definite rights that belong to the consumer of the music.⁵¹

The first statute, 17 U.S.C. § 106, gives a copyright owner, such as a musician, a number of exclusive rights.⁵² The rights listed include the right to reproduce the work, the right to prepare derivative works, the right to distribute copies of the work to the public, the right to perform the work in public, the right to display the work in public, and the right to transmit the

45. See *Sony Corp.*, 464 U.S. at 433.

46. See, e.g., *id.* at 456 (expanding the fair use to include time-shifting as a valid right of the consumer).

47. See RIAA, http://www.riaa.com/physicalpiracy.Php?content_selector=piracy_online_the_law (last visited Oct. 17, 2009) (stating that while "there's no legal 'right' to copy the copyrighted music on a CD onto a CD-R," this activity "won't usually raise concerns" in many circumstances). The RIAA homepage also reveals that some select CD-Rs include prepaid royalties to copyright holders; copying to these CD-Rs is therefore legally less dubious in the eyes of the RIAA than copying to a regular CD-R. See *id.*

48. See 17 U.S.C. §§ 106-107 (2006).

49. See Dodes, *supra* note 18, at 282-83 (explaining that "[i]n granting and enforcing these rights [of title 17], Congress and the courts must balance the law's objectives of promoting widespread distribution of creative works, while providing incentives to authors and owners to create such works").

50. See *id.*

51. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (noting "[a]ll reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain").

52. 17 U.S.C. § 106 (2006).

work.⁵³ Commentators note that this section of Title 17 has granted the copyright owner many far-reaching rights to protect their works.⁵⁴ Read alone, 17 U.S.C. § 106 strongly suggests that the copyright holder dominates copyright law, and that the consumer has no rights to participate in activities not expressly authorized by the copyright holder, including CD ripping.⁵⁵

Congress, however, counteracted the potency of 17 U.S.C. § 106 with another statute that protects various rights of the music consumer, section 107.⁵⁶ Section 107 states that, "[n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."⁵⁷

Section 107 continues by setting forth a balancing system to determine if the use of the copyrighted material is, in fact, fair use.⁵⁸ The first factor in determining if the work is fair use calls for the court to examine "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."⁵⁹ The second, third, and fourth factors are "the nature of the copyrighted work," "the amount and sustainability of the portion used in relation to the copyrighted work as a whole," and "effect of the use upon the potential market or for value of the copyrighted work."⁶⁰ The case law reveals that the purpose of section 107 is to balance the demands of section 106 and to give the copyright holder a decidedly limited monopoly over the work, while protecting the respective rights of the consumer.⁶¹

These statutes and their accompanying tests succeeded in giving the courts some guidance regarding how they should approach cases involving questions about copyright law.⁶² However, these statutes are notorious for being vague and

53. *Id.*

54. *See* Shum, *supra* note 10, at 137 (noting that the copyright holder has near limitless control and protection over the copyrighted work).

55. *See id.*

56. *See* 17 U.S.C. § 107.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984).

62. *See, e.g., id.* (listing the factors in section 106 for use in deciding the issues present within the case).

inconclusive in and of themselves.⁶³ The statutes state that each party is to have certain rights in regards to the media, but the statutes themselves do not really detail the line where section 106 ends and section 107 begins.⁶⁴ In addition, because information technology is constantly advancing, the vagueness of these laws has become particularly strongly felt over time, as new technologies, such as MP3 encoding, have given the courts new problems to sort out.⁶⁵ Luckily, the courts decided a large number of cases on the subject of fair use, and in doing so filled in the gaps in the substantive law. These cases, likewise, are very helpful in showing that MP3 ripping is, indeed, legal activity.

2. The Case Law on Fair Use: the Doctrine of Time and Space Shifting and its Limits

A whole body of law evolved out of the fair use doctrine as outlined in 17 U.S.C. § 106 and 17 U.S.C. § 107.⁶⁶ The case law, in particular, rose to the very forefront of this developing area of the law.⁶⁷ Through the case law, the courts introduced the doctrine of "time shifting," which authorizes certain copying of copyrighted media for personal, noncommercial purposes.⁶⁸ This doctrine evolved into "space shifting," or the ability of a consumer to transfer media that he has already bought from one format to another in order to more fully enjoy it.⁶⁹ A close analysis of the case law reveals that the mere act of ripping CDs is very similar in nature to these behaviors, which the courts determined are lawful through a number of cases.

B. *Time Shifting, Space Shifting, and their Implications*

Regarding questions involving the legality of MP3 ripping, perhaps the most significant development in the case law

63. See Dodes, *supra* note 18, at 283 (explaining "[i]n keeping with this 'balancing act' Congress has amended Title 17 many times since it was enacted to keep pace with technological advances").

64. Compare 17 U.S.C. § 106 (vaguely describing the rights of the copyright holder) with 17 U.S.C. § 107 (vaguely describing the rights of the consumer).

65. See Dodes, *supra* note 18, at 283 (claiming that "[c]urrent advances in technology continue to put pressure on this balance by allowing works to be easily copied without permission from copyright owners and thereby requiring another reevaluation of copyright law").

66. See, e.g., *Sony Corp.*, 464 U.S. at 451 (deciding that peer-to-peer networks do not fall into the fair use exception).

67. See *id.*

68. See *id.* (approving of time shifting for noncommercial uses).

69. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).

involves the doctrine of time shifting.⁷⁰ This doctrine appeared as a result of the landmark case, *Sony Corp. of America v. Universal City Studios, Inc.*, commonly known as the "Betamax Decision."⁷¹ A close examination of this decision reveals it to be entirely relevant to questions regarding the legality of MP3 ripping.

Sony Corp. of America revolved around the introduction of a then-new technology, the VTR, which could produce copies of copyrighted television programs so that the viewer could later watch the program at their convenience.⁷² Various copyright holders sued Sony, the manufacturer of the VTR units, claiming that Sony was liable for allowing consumers to violate copyright laws through the taping.⁷³ The case eventually made its way to the Supreme Court.⁷⁴ There, the Court closely examined 17 U.S.C. §§ 106-107.⁷⁵ The Supreme Court paid particular attention to the "effect upon the market" prong of Section 107, stating that "[a] challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."⁷⁶ In addition to finding that few copyright owners really cared about the taping (which the Court had dubbed to be "time shifting" because it functioned to allow viewers to see the program at a different time from the broadcast), the Court held that time shifting was legitimate under section 107 fair use because, according to the Court, the activity did not commercially threaten copyright holders.⁷⁷ This decision, over time, proved its significance as it was used to justify fair use for consumers in a

70. See, e.g., *id.* (citing *Sony Corp.* to legitimize the legality of portable MP3 players).

71. See *Sony Corp.*, 464 U.S. at 423, 456 (approving of time shifting as falling within fair use). The court also noted that, although some users of VTR machines had accumulated large libraries of tapes, the primary use of the machines was for time shifting. *Id.* at 423. See also John Borland, *FAQ: Betamax – Tech's Favorite Ruling*, CNET NEWS, Mar. 25, 2005, http://news.cnet.com/FAQ-Betamax—techs-favorite-ruling/2100-1027_3-5637912.html (calling the *Sony Corp.* decision the "Betamax Decision").

72. *Sony Corp.*, 464 U.S. at 423.

73. *Id.* at 417.

74. *Id.*

75. *Id.* at 433, 450.

76. *Id.* at 451.

77. *Id.* at 445, 456. Mr. Rogers, a famous children's television personality, helped the Court come to its conclusion by testifying that "[s]ome public stations, as well as commercial stations, program the 'Neighborhood' at hours when some children cannot use it. I think that it's a real service to families to be able to record such programs and show them at appropriate times." *Id.* at 446, n.27.

variety of media forms, including VCRs and even computers.⁷⁸ One can easily see why the Betamax Decision would play such an important role in legitimizing CD ripping.⁷⁹

The courts later expanded time shifting to another concept, known as space shifting, which is perhaps even more relevant to CD ripping than time shifting.⁸⁰ This doctrine came about in the case *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.*, in response to the RIAA's efforts to enjoin the sale and use of the first MP3 players.⁸¹ The RIAA opposed the players on the grounds that they "[did] not meet the requirements of the Audio Home Recording Act of 1992" by enabling consumers to import digital copies of songs stored on hard drives onto the players without various protections contained in the Act.⁸² The court eventually ruled in favor of the manufacturers of MP3 players.⁸³ As a part of the court's reasoning, Justice Blackmun cited the *Sony Corp.* decision and claimed that the use of MP3 players was a case of lawful "space shifting," as compared to time shifting.⁸⁴ "Space shifting" was the court's term for when a consumer transferred a music file from a hard drive to an MP3 player for portable use.⁸⁵

The space shifting doctrine quickly rose to prominence in cases and commentary concerning music copyright law. Court opinions often cited the doctrine as a benchmark standard while attempting to decide if something should be considered fair use.⁸⁶ This held particularly true for the case opinions regarding peer-to-peer networks, where the courts contrasted the legalities of space shifting with the illegalities of the peer-to-peer networks.⁸⁷

78. See also Borland, *supra* note 71 (discussing the effects of the Betamax Decision).

79. See *id.*

80. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999). The RIAA also had issues with the player because it perceived that the MP3 player would primarily be used to play pirated music from online internet piracy. *Id.* at 1074-75.

81. *Id.* at 1075-76.

82. *Id.*

83. *Id.* at 1078.

84. *Id.* at 1079. While the major issue in the case revolved around whether MP3 players were governed by the Audio Home Recording Act, the court cited space shifting in support of its decision and therefore affirmed its legitimacy. See *Id.* at 1075, 1079.

85. *Id.* at 1079.

86. See *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217, 220-21 (D. Mass. 2009) (noting, in a file-sharing case, that "file sharing for the purposes of . . . space shifting to store music more efficiently might offer a compelling case for fair use").

87. See *id.*; see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1093, 1095 (9th Cir. 2001) (holding that Napster's peer-to-peer network sharing does not fall under space shifting); *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 649 (N.D. Ill. 2002) (stating that legal space shifting is factually distinct from peer-to-peer operations); Realnetworks,

The doctrine became so prominent that the courts nearly always addressed it.⁸⁸ While the doctrine was technically only adopted by the Ninth Circuit in *Diamond Multimedia Systems, Inc.*, it is assumed to be the law in virtually all jurisdictions, and it enabled the promulgation of portable MP3 players.⁸⁹ The doctrine is regarded as an important protection for consumers, and many commentators suggest that it is worth defending from erosion.⁹⁰

The space shifting doctrine, as applied in *Diamond Multimedia Systems, Inc.*, focuses primarily on the rights of consumers to copy music files stored on a hard drive to a portable MP3 player, as opposed to the rights to rip a CD onto a hard drive.⁹¹

However, the doctrine strengthens *Sony Corp.* and reveals that the courts are willing to apply the consumer rights outlined in *Sony Corp.* to digital music.⁹² In this sense, the doctrine is a bridge by which the doctrines present in *Sony Corp.* may be applied to controversies such as CD ripping.⁹³ Consequentially, space shifting is a strong support for those who would support noncommercial reproduction of digital music in general, including CD ripping.⁹⁴

The case law regarding fair use reveals that the courts desire to strike a balance between the seemingly contradictory sections 106 and 107.⁹⁵ Yet, some commentators still insist that consumers are explicitly barred from reproducing media that is under their control by 17 U.S.C. § 106, and therefore CD ripping

Inc. v. DVD Copy Control Ass'n, Inc., 641 F. Supp. 2d 913, 941-42 (N.D. Cal. 2009) (stating that space shifting does not allow for DVDs to be copied due to the prohibitions of the DMCA).

88. See, e.g., *In re Aimster*, 252 F. Supp. 2d at 649 (admitting the validity of space shifting before distinguishing it from the case at hand).

89. See Andrew William Bagley, *Fair Use Rights in a World of the Broadcast Flag and Digital Rights Management: Do Consumers Have a Chance?*, 18 U. FLA. J.L. & PUB. POL'Y 115, 128 (2007). Bagley notes that space shifting is widely assumed to be good law, and that "it is unlikely that a lawsuit would prevail against the manufacturer of a device with similar freedoms to the Rio." *Id.*

90. See *id.* at 128, 135.

91. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999).

92. See *id.* at 1079; see also 17 U.S.C. § 1008 (2006) (prohibiting lawsuits of copyright infringement "based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings").

93. See *Recording Indus. Ass'n of Am.*, 180 F.3d at 1079.

94. See *id.*

95. See *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 941 (N.D. Cal. 2009); 17 U.S.C. § 106 (2006); 17 U.S.C. § 107 (2006).

should be barred as a violation of the right to reproduce a work.⁹⁶ These commentators cite the fact that this statute lists the right to reproduction as one of the copyright holder's exclusive rights.⁹⁷ However, such commentators may benefit from a close reading of 17 U.S.C. § 106, which states that "*subject to sections 107 through 122*, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords".⁹⁸ The language of the statute says that 17 U.S.C. § 106 is subject to section 107, and by extension fair use.⁹⁹ The case law involving fair use reveals an understanding that the protections of section 107 persist and that consumers have the rights to do some copying, despite the fact that section 106 talks about exclusive rights to reproduce a work belonging to the copyright holder.¹⁰⁰ Because *Sony Corp.* is widely accepted as an authoritative interpretation of 17 U.S.C. §§ 106-107, these critics' arguments are little more than theoretical debate, as the law developed around *Sony Corp.*¹⁰¹

Some critics attempt to draw analogies between the rights of the private consumer and court holdings that forbid entities from making copies of recordings for commercial purposes.¹⁰² These critics often cite the case *UMG Recordings, Inc. v. MP3.Com, Inc.*, as support for the proposition that the courts really have condemned CD ripping in a round-about way.¹⁰³ *UMG* involved a case where an online music service ripped CDs and stored the resulting MP3s on an online server.¹⁰⁴ A consumer could then access these MP3s by either inserting a physical copy of the CD into their computer or by buying the CD from a company aligned with MP3.com.¹⁰⁵ After reviewing the four criteria regarding fair use, the court concluded that MP3.Com's method was outside of

96. See Simon, *supra* note 7, at 938.

97. See *id.* at 937-38; see also 17 U.S.C. § 106.

98. 17 U.S.C. § 106 (emphasis added).

99. Compare *id.* (stating that section 106 is subject to section 107) with 17 U.S.C. § 107 (granting free use rights).

100. Compare 17 U.S.C. § 106 (stating that the copyright holder has the exclusive right to reproduce the work) with *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (stating that there is no exclusive right to reproduce within fair use).

101. Compare *Sony Corp.*, 464 U.S. at 433 (interpreting 17 U.S.C. §§ 106-107 to sanction fair use) with *Borland*, *supra* note 71 (noting the wide range of technologies sanctioned due to *Sony Corp.*).

102. See Simon, *supra* note 7, at 938.

103. See *id.*; see also *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

104. *UMG Recordings*, 92 F. Supp. at 350.

105. *Id.*

fair use and a violation of the copyright holder's exclusive right to reproduction.¹⁰⁶ Critics often attempt to cite this holding as proof that the courts really do not approve of CD ripping by consumers.¹⁰⁷ These critics, however, miss the point of *UMG*.¹⁰⁸ The court ruled against MP3.Com primarily due to the fact that MP3.Com threatened to "usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works" in a scheme that involved copying works for an obviously commercial purpose.¹⁰⁹ *Sony Corp.* explicitly stated that "although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of a copyright, noncommercial uses are a different matter."¹¹⁰ In other words, the law prescribes differential treatment in regards to fair use between commercial and noncommercial reproduction of copyrighted works.¹¹¹ In *UMG*, MP3.Com "[sought] to attract a sufficiently large subscription base to draw advertising and otherwise make a profit," which the court noted is indisputably commercial in nature.¹¹² Basically, while *UMG* may be useful precedent regarding the reproduction of copyrighted works for commercial purposes, it is irrelevant as precedent for noncommercial purposes.¹¹³ Consequentially, any notions that commercial cases such as *UMG* can be used to prove that CD ripping is illegal are fundamentally flawed, poorly supported, and fail to seriously challenge the legality of ripping CDs.

Sony Corp. greatly expanded and protected the rights of consumers to make copies of their media for their own personal use.¹¹⁴ Today, *Sony Corp.* surfaces in almost every case involving

106. See *id.* at 352-53.

107. See Simon, *supra* note 7, at 938 (claiming that, since the court ruled against MP3.Com, "converting a CD track to an MP3 file through the use of CD ripping and MP3 encoding software violates the copyright holder's right to reproduction").

108. See *UMG Recordings, Inc.*, 92 F. Supp. 2d at 352.

109. *Id.* (claiming that MP3.Com's argument "amounts to nothing more than a bald claim that defendant should be able to misappropriate plaintiff's property simply because there is a consumer demand for it" and that it "hardly appeals to the conscience of equity").

110. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 451 (1984).

111. See *id.*

112. *UMG Recordings, Inc.*, 92 F. Supp. 2d at 351.

113. Compare *Sony Corp.*, 464 U.S. at 451 (setting differential treatment between commercial and noncommercial reproduction of a copyrighted work) with *UMG Recordings, Inc.*, 92 F. Supp. 2d at 351 (noting that the *UMG* case is definitely commercial in nature).

114. See *Sony Corp.*, 464 U.S. at 456; see also *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 940-43 (N.D. Cal. 2009) (holding that ripping DVDs to

questions of fair use and the rights of consumers to copy media that they already own.¹¹⁵ Commentators who argue in favor of allowing CD ripping and copying in its various forms to remain legal commonly cite fair use as the basis for their arguments.¹¹⁶ Fair use thereby remains foundational in its role regarding examining the legality of MP3 ripping and similar activities.¹¹⁷

C. *The DAT Compromise and its Effects on Questions Regarding the Legality of CD Ripping*

On occasion, the fair use rights of consumers have been limited with subsequent legislation from Congress.¹¹⁸ In the case of digital audio tapes, Congress passed the Audio Home Recording Act of 1992 (AHRA) to regulate the usage of digital audio tapes (DAT) by consumers.¹¹⁹ This Act has not been treated by the courts as being dispositive regarding questions on the legality of CD ripping.¹²⁰ However, even critics of CD ripping note that this act could possibly provide some sort of blueprint for a compromise between the rights of copyright holders and consumers.¹²¹

Congress codified the Audio Home Recording Act of 1992 as 17 U.S.C. §§ 1001-1010.¹²² While the language of these statutes claims to broadly regulate digital audio recordings and digital audio recording devices, the statutes themselves primarily apply to DAT in practice.¹²³ The Act protects the copyright holder by requiring recorders of digital audio tapes to contain a Serial Copy

computer hard drives is legitimate under fair use but is barred due to other considerations).

115. *Realnetworks*, 641 F. Supp. 2d at 940-43; *see also* *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)(examining and rejecting the proposition that the *Sony* decision legitimizes the peer-to-peer networks).

116. *See* Dodes, *supra* note 18, at 313 (arguing that "[b]arring all copying would clearly violate fair use").

117. *See id.*; *see also* *Realnetworks, Inc.*, 641 F. Supp. 2d at 940-43.

118. *See* Dodes, *supra* note 18, at 313 (detailing the Audio Home Recording Act).

119. *See* Simon, *supra* note 7, at 931.

120. *See* *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1078 (9th Cir. 1999) (holding that hard drives fall outside of the AHRA).

121. *See* Simon, *supra* note 7, at 931 (claiming that the AHRA would solve many potential problems if it were applied to CD ripping).

122. *See* Tia Hall, *Music Piracy and the Audio Home Recording Act*, 2002 DUKE L. & TECH. REV. 23, ¶10 (2002), available at <http://www.law.duke.edu/journals/dltr/articles/2002dltr0023.html>.

123. *Compare* 17 U.S.C. § 1001 (2006) (noting that a "digital audio copied recording" refers broadly to a "reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission"), *with* Simon, *supra* note 7, at 931 (stating that the AHRA controls digital audio tapes); *see* *Recording Indus. Ass'n of Am.*, 180 F.3d at 1078 (noting that the AHRA does not govern computer hard drives and MP3 players).

Management System, which "allows for the production of a first generation copy of an original work, but prevents the production of second-generation copies."¹²⁴ In addition, the Act requires manufacturers and importers of "any digital audio recording device or digital audio recording medium" to make royalty payments to the RIAA.¹²⁵ In turn, the act protects the rights of consumers to use DAT recording equipment through statute.¹²⁶ In essence, the compromise furthers courts' ideals of maintaining a balance between the copyright holder and the consumer.¹²⁷

While the Audio Home Recording Act may be invaluable in balancing competing objectives regarding DATs, it currently does not apply to CD ripping and MP3 technology.¹²⁸ The courts discussed the issue of whether the Act applied to MP3 players and computer hard drives in *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.*, when they ruled on the legality of portable MP3 players.¹²⁹ The court found that hard drives from computers are exempt because, unlike the definition of digital music recording devices found in the Audio Home Recording Act, computer hard drives "contain much more than 'only sounds.'"¹³⁰ In other words, the court chose not to include hard drives, and by extension, MP3 players, under the scope of the act on a mere technicality.¹³¹ Because CD ripping requires a computer hard drive, CD ripping also escaped regulation under the AHRA due to this ruling.¹³²

However, many commentators, some of whom are vocal opponents of the legality of CD ripping, see the expansion of the AHRA as a possible compromise that would protect the rights of both the copyright holder and the consumer.¹³³ One critic of CD ripping noted that "[i]f the AHRA was revised and updated to

124. Simon, *supra* note 7, at 931. See also 17 U.S.C. § 1002 (2006).

125. 17 U.S.C. §§ 1003-1004 (2006). Some CD-R manufacturers have actually taken the initiative and have secured their legal status by paying royalties to the RIAA in similar fashion. See RIAA Home Page, http://www.riaa.com/physicalpiracy.php?content_select=piracy_online_the_law (last visited Oct. 17, 2009).

126. 17 U.S.C. § 1008 (2006); see also Simon, *supra* note 7, at 931 (stating "[the statute] shields consumers from infringement actions if they use recording equipment for 'noncommercial use'").

127. See *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 943 (N.D. Cal. 2009) (noting the goal of Congress to balance the needs of consumers and copyright holders).

128. See *Recording Indus. Ass'n of Am.*, 180 F.3d at 1078-79.

129. *Id.* at 1072-74, 1078.

130. *Id.* at 1076.

131. *Id.* The court went so far as to claim that "the [Audio Home Recording] Act seems to have been expressly designed to create this loophole." *Id.* at 1078.

132. See Simon, *supra* note 7, at 931-32, 945.

133. See *id.* at 949; see also Shum, *supra* note 10, at 142.

include recent developments in digital recording technology," then several problems occurring with CD ripping would be solved.¹³⁴ A revised statute would not only prevent unregulated copying through the serial copy management system, but would allow the record companies to be compensated for copying through royalties while still allowing consumers to engage in space shifting.¹³⁵ Another claimed that "[t]he music industry should be allowed to take advantage of copy protection technology that protects its rights in the most consumer friendly method possible."¹³⁶ However, some commentators warn that the erosion of fair use in any form places the law on a slippery slope that could threaten both free speech and eventually threaten *any* use by the consumer.¹³⁷ In other words, these critics argue that fair use is a right that should not be infringed in any form.¹³⁸ Even these critics acknowledge that the AHRA protects consumers by ensuring their continued right to make personal copies.¹³⁹

Based on case law, the courts do not currently apply the AHRA to CD ripping.¹⁴⁰ However, if the RIAA further presses the question about the legality of CD ripping and successfully changes the law, the implementation of the AHRA could be a more reasonable compromise than an outright ban on CD ripping, considering the AHRA seeks to protect both the rights of the consumer and the copyright holder.¹⁴¹ If the RIAA continues to press the legality of CD ripping, and if the need for additional tempering of fair use copyright law is shown, Congress and the courts may be wise to closely examine the Audio Home Recording Act and adapt it to govern the rights of CD burning.¹⁴²

Whether the RIAA likes it or not, the doctrine of fair use finds great support in both statutory and case law.¹⁴³ Congress

134. Simon, *supra* note 7, at 949.

135. *Id.*

136. Dodes, *supra* note 18, at 313.

137. *Cf.* Shum, *supra* note 10, at 143-46 (arguing that the threat to traditional fair use could lead to pay-for-content libraries and urging Congress to solidify the doctrine of fair use before "all access to information is irreversibly proscribed"). Regarding the AHRA specifically, Shum notes that "[t]he AHRA did not acknowledge that private use was fair use, but it reflected a concession by copyright holders to accept royalties in exchange for home copying." *Id.* at 142.

138. *See* Shum, *supra* note 10, at 143-46.

139. *See id.* at 142.

140. *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078-79 (9th Cir. 1999).

141. *See* Simon, *supra* note 7, at 949.

142. *See id.*

143. *See* 17 U.S.C. § 107 (2006); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, (1984); *Recording Indus. Ass'n of Am.*, 180 F.3d 1072.

occasionally limits fair use rights in some new technologies, but when it does, it finds some sort of middle ground between the consumer and the RIAA.¹⁴⁴ In addition, with regards to simple time and space shifting, many courts take a very protective approach to consumer rights.¹⁴⁵ In sum, there are far more reasonable alternatives to balancing the needs of consumers and copyright holders than the RIAA's proposed blanket ban on CD ripping.¹⁴⁶ Therefore, one must conclude that the RIAA's campaign to illegalize CD ripping is, at best, a poorly thought out theoretical argument with little support in the law and low chances of being championed by the courts. At worst, the RIAA's campaign is a malicious attack on fair use that should be quashed by the courts immediately.

D. *The Ban on DVD Ripping: Implications on the Rights of Consumers to Rip CDs*

Inevitably, there is a temptation to consider the legality of ripping CDs in comparison to the current legal ban on ripping DVDs to computer hard drives.¹⁴⁷ On the surface, the two situations seem very similar.¹⁴⁸ Indeed, the ban on DVD ripping arose from many of the same issues that concern those who support a ban on CD ripping.¹⁴⁹ However, several factors make the two situations legally distinct from one another. In addition, several key issues become distinct when one compares and contrasts the legal development of DVD ripping and CD ripping in terms of the Digital Millennium Copyright Act, its impact on fair use, and possible repercussions if the RIAA were to try to revive their experiment with write-protected CDs.

1. The Digital Millennium Copyright Act and its Effects

The key factor that distinguishes CD ripping from DVD ripping lies in a piece of legislation known as the Digital

144. See, e.g., 17 U.S.C. §§ 1001-1010 (2006).

145. See *Sony Corp.*, 464 U.S. 417; *Recording Indus. Ass'n of Am.*, 180 F.3d 1072.

146. See Simon, *supra* note 7, at 949.

147. See Jon Jacobi, Don Labriola, & Justin Jaffe, *Can You Legally Copy DVDs?*, CNET, Apr. 6, 2004, http://reviews.cnet.com/4520-3513_7-5128652-1.html (noting that DVD copying is illegal due to the Digital Millennium Copyright Act).

148. See *id.*

149. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 315 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2nd Cir. 2001) (noting that internet piracy is a major concern behind the ban).

Millennium Copyright Act ("DMCA").¹⁵⁰ The DMCA was "Congress' attempt at a balance to preserve ownership rights protection for companies and artists in the face of the modern reality of a digital world with an increasingly technologically-savvy population."¹⁵¹ Courts warn that this compromise, "depending upon future technological and commercial developments, may or may not prove ideal."¹⁵² The discrepancy in the treatment of CDs and DVDs largely flows from the DMCA.¹⁵³

The provision of the DMCA concerning DVD ripping is 17 U.S.C. § 1201.¹⁵⁴ The text of this section states that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title."¹⁵⁵ Unfortunately for many movie fans, the manufacturers of DVDs "protect those motion pictures [contained on the DVD] from copying by using an encryption system called CSS."¹⁵⁶ The widespread presence of CSS coding on DVDs physically prevents users from making copies and brings DVDs under the protection of the DMCA.¹⁵⁷ The effective result of this law bars consumers from ripping DVDs the way that they may rip a CD.¹⁵⁸ The case law on the subject reveals that, while ripping DVDs may fall into traditional notions of fair use within copyright law, the activity is prohibited strictly on the basis that it is in conflict with the DMCA.¹⁵⁹

150. See 17 U.S.C. § 1201 (2006); see also *Universal City Studios*, 111 F. Supp. 2d at 303-04 (providing general background on the DMCA); Jacobi, *supra* note 147.

151. *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 944 (N.D. Cal. 2009).

152. *Universal City Studios, Inc.*, 111 F. Supp. 2d at 304. See also Dodes, *supra* note 18, at 283 (stating that Congress passed the DMCA in October of 1998).

153. See *Universal City Studios, Inc.*, 111 F. Supp. 2d at 338.

154. 17 U.S.C. § 1201 (2006); see also *Universal City Studios, Inc.*, 111 F. Supp. 2d at 315-316 (providing general background on the DMCA).

155. 17 U.S.C. § 1201(a)(1)(A).

156. *Universal City Studios, Inc.*, 111 F. Supp. 2d at 303.

157. See *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 919, 933 (N.D. Cal. 2009) (noting that CSS is the standard encryption for DVDs and that the DMCA prohibits circumvention of CSS and other encoding schemes).

158. See *Universal City Studios, Inc.*, 111 F. Supp. 2d at 338; but see *Realnetworks*, 641 F. Supp. 2d at 923 (noting narrow exception to the rule for computer playback through "buffering" because "playback of a DVD on a computer requires making a temporary copy of a few seconds of DVD content in the computer's memory").

159. *Realnetworks*, 641 F. Supp. 2d at 941 (noting "Sony involved video cassette recorders and copyrighted television broadcasts in a pre-digital era and its 'substantial noninfringing use' reasoning has no application to DMCA claims"). The court went on to say that "while it may be well fair use for an individual consumer to store a backup copy of a personally-owned DVD on that individual's computer, a federal law has nonetheless made it illegal to manufacture or traffic in a device or tool that permits a consumer to make such copies." *Id.* at 942; see also Jacobi, *supra* note 147 (explaining "[b]ut when a San Francisco federal judge ruled that 321 Studios' [DVD ripping] products were illegal

By contrast, the majority of CDs contain no encoding that prevents consumers from ripping or copying them.¹⁶⁰ Therefore, because current CDs lack encoding to protect them from unauthorized copying, they do not fall under 17 U.S.C. § 1201.¹⁶¹ While one may think that CDs and DVDs, being similar media forms, should be treated identically, they are different in the eyes of the law. Therefore, the ban on DVD ripping is irrelevant and should not be cited in support of a proposed ban on CD ripping.

2. The Case for Copy-Protected CDs

A very small exception exists to the above general rule, in the form of Copy Protected CDs. These CDs, which first appeared in 2001, are very similar to normal music CDs, except for the fact that they contain technology that "prevents consumers from burning the CD or ripping tracks and compressing music into digital audio formats such as MP3."¹⁶² Only a small percentage of total CD releases contain copy protection measures.¹⁶³ However, the idea has never really gone away, and companies continue experimenting with various schemes that would allow them to have some sort of copy protection on their audio CDs.¹⁶⁴

Copy protected CDs have several advantages that make them an attractive choice in the eyes of the RIAA.¹⁶⁵ In and of themselves, the copy protected CDs cannot be ripped, and therefore they are much more difficult to use with peer-to-peer

because they circumvented commercial DVDs' antipiracy technology- *not* because it's illegal to make copies, mind you- the party was over").

160. Compare Shum, *supra* note 10, at 132 (noting "[t]he first CD released in the United States with such protections was the Charley Pride CD in May 2001"), with Catherine Holahan, *Sony BMG Plans to Drop DRM*, BUSINESSWEEK, Jan. 4, 2008, available at http://www.businessweek.com/technology/content/jan2008/tc2008013_398775.htm (stating "Sony BMG would become the last of the top four major music labels to drop DRM").

161. Compare 17 U.S.C. § 1201 (enjoining activity to attempt to circumvent copy-control technology), with Shum, *supra* note 10, at 132 (implying that most CDs do not contain copy protection).

162. Shum, *supra* note 10, at 125.

163. See Scarlet Pruitt, *Consumers Shun Copy-Protected CDs: Study Finds Music Fans Support Copying for Personal Use, Backup*, PC WORLD, Oct. 25, 2002, available at http://www.pcworld.com/article/106368/consumers_shun_copyprotected_cds.html.

164. See *Copy-protected CDs: Rearview Reality*, <http://www.macworld.com/article/45250/2005/06/rearviewreality.html> (last visited Jan. 14, 2010) (detailing a copy protection scheme where copy-protected software is contained alongside music on the disc, and the consumer must install the software onto their PC before they are able to listen to the music).

165. See, e.g., Dodes, *supra* note 18, at 312 (noting that copy protection on CDs is a step towards thwarting peer-to-peer networks).

networks and other similar, largely infringing programs.¹⁶⁶ In addition, the DMCA compounds this advantage in several respects.¹⁶⁷ One commentator noted that, as is the case with DVDs, "[t]he DMCA's provision against anti-circumvention of copy protection implies that copy protection is legal," even in the face of fair use concerns.¹⁶⁸ Consequentially, the DMCA makes challenges to the legality of copy-protected CDs very difficult.¹⁶⁹ In addition, inclusion of copy protection software brings CDs under the protections of the DMCA.¹⁷⁰ This means that, because copy-protected CDs contain coding that prevents them from being copied, consumers "cannot circumvent access controls on the technology unless the user has permission to access the work."¹⁷¹ As is the case with DVDs, even technology that would enable consumers to circumvent the copy-protection would be barred if music CDs were to fall under the DMCA through copy-protection software.¹⁷² These prohibitions would give the RIAA more layers of protection against piracy.¹⁷³ Indeed, if the RIAA were to completely switch to solely manufacturing copy-protected CDs, it could effectively dodge all questions about the legality of ripping CDs, since measures to circumvent copy protection are strictly prohibited under the DMCA.¹⁷⁴

Despite all of the advantages of copy-protected CDs, however, they never became the standard.¹⁷⁵ The format "created a strong backlash from the public and strong fair use arguments from the legal community against anti-copy technology."¹⁷⁶ For consumers, current copy-protected CDs will

166. Compare Shum, *supra* note 10, at 125 (explaining "[c]opy-protected CDs utilize technology aimed at protecting copyrights by disabling the burning and ripping of CDs"), with Dodes, *supra* note 18, at 312 (stating that copy protected CDs are nearly impossible to use with peer-to-peer networks).

167. See 17 U.S.C. § 1201 (2006).

168. Dodes, *supra* note 18, at 313; see also *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 941 (N.D. Cal. 2009) (stating that the DMCA, when applied, trumps usual fair use considerations).

169. See Dodes, *supra* note 18, at 313.

170. See Shum, *supra* note 10, at 145.

171. *Id.* See also 17 U.S.C. § 1201 (2006).

172. Compare Shum, *supra* note 10, at 145 (noting "[i]t is impossible for the user to gain access [legally, to a copy-protected CD] because the trafficking of a circumvention device is illegal"), with *Realnetworks*, 641 F. Supp. 2d at 942 (holding that even manufacturing a device that "permits a consumer to make such [illegitimate] copies" of protected DVDs is illegal).

173. See Simon, *supra* note 7, at 949 (arguing that the peer-to-peer network problems are directly related to the ease at which consumers can copy their music CDs).

174. See Shum, *supra* note 10, at 145; see also 17 U.S.C. § 1201.

175. See Pruitt, *supra* note 163.

176. Dodes, *supra* note 18, at 313. At least some of these sentiments exist among people who are dissatisfied with current law regarding DVD ripping. See Jacobi, *supra*

not play with every type of CD player, including "car CD players, DVD players, or certain brands of standard CD players."¹⁷⁷ In addition, the legal community continues debating the legality of such discs, with some commentators claiming that this type of regulation violates the fair use rights of consumers.¹⁷⁸ As a consequence, traditional CDs remain the standard, and the RIAA continues to confront questions regarding the legality of ripping CDs.¹⁷⁹

At the same time, however, copy-protected CDs present the music industry with an important alternative regarding their options towards ripping music.¹⁸⁰ The music industry never fully gave up on the idea of copy-protected music, and it continues to experiment with the concept in some form or another.¹⁸¹ More importantly, copy-protected CDs provide the RIAA with an alternate solution to curb consumer copying, even if the courts someday directly rule in favor of consumers regarding CD ripping.¹⁸²

As a result, the issue of copy-protected CDs retains special relevance in regards to questions about whether CD ripping is legal. In the future, as courts continue to be confronted with questions from the RIAA regarding the legality of CD ripping, copy-protected CDs may increase in prominence and significance as the RIAA seeks to achieve its goals of maintaining control over copyrighted works through more subtle means.¹⁸³

However, the fact still remains that, for the most part, CDs and DVDs remain legally very distinct from one another.¹⁸⁴ Though there may be insightful comparisons between the two, the media forms simply are not equivalents in the sight of the

note 147 (stating "[m]ost fair-use advocates say that the policy [barring DVD ripping] directly contradicts U.S. copyright law We assume that fair use will eventually catch up and be established as a safety valve for consumers (which has been the pattern with previous technologies, such as VHS).").

177. Dodes, *supra* note 18, at 312.

178. See Shum, *supra* note 10, at 145 (claiming that these policies are "shutting the door on fair use"). Shum goes so far to claim that the advent of copy-protected CDs sets dangerous precedent and could possibly spill over and threaten fair use for the consumer in a wide variety of situations involving other types of media. *Id.* at 146.

179. See Fisher, *supra* note 2.

180. See Shum, *supra* note 10, at 145.

181. See *Copy-protected CDs*, *supra* note 164.

182. See Shum, *supra* note 10, at 145.

183. See *id.*

184. Compare *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322-23 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2nd Cir. 2001) (noting that DVDs are barred from copying because of DMCA), with Shum, *supra* note 10, at 132 (noting that copy-protected CDs are relatively recent).

law.¹⁸⁵ Therefore, proponents of a ban on CD ripping should not attempt to cite the ban on DVD ripping as support for their position, as comparisons to the DVD ban do little to support arguments that CDs should be treated in the same manner.

E. *The Connection Between CD Ripping and Piracy and its Effects*

Perhaps one of the biggest concerns for those who support illegalizing CD ripping is the perception that allowing CD ripping to continue facilitates peer-to-peer network piracy.¹⁸⁶ Indeed, online piracy remains a very real problem that has deeply impacted the music industry.¹⁸⁷ It may be true that a ban on CD ripping could hamper online piracy.¹⁸⁸ However, such a ban is incompatible with current law, which forbids actual commercial activity with copied MP3 files.¹⁸⁹ Opponents of CD ripping claim, nevertheless, that CD ripping is a gateway activity that may lead towards participation in peer-to-peer networks.¹⁹⁰ However, because CD ripping has many legitimate uses not involving copyright infringement, such arguments fail to take the rights of the consumer into consideration.¹⁹¹

1. The Commerce Requirement: the Current Law Regarding When Fair Use has been Exceeded

Through a number of cases, the courts determined that fair use is exceeded not when the consumer makes a copy of media for personal use, but rather when the consumer uses the copy for commercial purposes.¹⁹² An understanding of exactly what activity the law does and does not sanction is essential to see why a ban on CD ripping is not a viable solution for preventing piracy.

The plethora of peer-to-peer lawsuits gave the courts a chance to draw the line between legitimate and illegitimate activity.¹⁹³ The cases share some common traits. They all

185. See sources cited *supra* note 184.

186. See, e.g., Simon, *supra* note 7, at 949.

187. See Sag, *supra* note 19, at 135 (attributing up to \$2 billion in lost revenues to online piracy).

188. See Simon, *supra* note 7, at 949.

189. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

190. See, e.g., Simon, *supra* note 7, at 949.

191. See Dodes, *supra* note 18, at 313.

192. See *A&M Records, Inc.*, 239 F.3d at 1015.

193. See *id.*; see also *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008) (stating that "infringement of the [distribution right] requires an actual dissemination of either copies or phonorecords"); *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA-051, 2006 WL 2844415, at *3 (W.D. Tex. July 17, 2006) (stating that the

revolve around users exchanging MP3 files with each other over some kind of central network.¹⁹⁴ Of course, such an arrangement completely bypasses control of the copyright owners, allowing users to swap music without paying the copyright owners.¹⁹⁵ The courts held that "a host sending a file cannot be said to engage in personal use when distributing that file to an anonymous requester," and therefore the usage of peer-to-peer networks falls well outside the traditional boundaries of fair use.¹⁹⁶ Consequently, the courts consistently ruled for the copyright owners in the peer-to-peer cases.¹⁹⁷

The case law also provides guidance for the exact moment when a consumer has crossed the line and has placed himself in violation of the law.¹⁹⁸ Essentially, the courts noted that, regarding fair use, "[t]he general rule, supported by the great weight of authority, is that 'infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.'"¹⁹⁹ The courts defined distribution expansively, and ruled that "[l]isting unauthorized copies of sound recordings using an online file-sharing system constitutes an offer to distribute those works, thereby violating a copyright owner's exclusive right of distribution."²⁰⁰ However, the courts' collective intent is clear: an action for copyright infringement against a consumer of a sound recording will not hold unless there is some sort of illegitimate distribution of that recording.²⁰¹ The courts

Supreme Court has equated distribution with publication, which includes the offering of copies to persons for further distribution); *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216-20 (D. Minn. 2008) (discussing more on intent to distribute).

194. See, e.g., *A&M Records, Inc.*, 239 F.3d at 1012.

195. See Dodes, *supra* note 18, at 279-80; see also *A&M Records, Inc.*, 239 F.3d at 1015 (stating "Napster users get for free something that they would ordinarily have to buy").

196. *A&M Records, Inc.*, 239 F.3d at 1015. The Napster court also described the activity on the peer-to-peer servers as being outside of fair use on the basis of being commercial use by claiming that "[d]irect economic benefit is not required to demonstrate a commercial use." *Id.* at 1015. Rather, "repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use." *Id.* See also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (stating that copying for commercial purposes is against the law, but noncommercial copying is sanctioned).

197. See, e.g., *Capitol Records*, 579 F. Supp. 2d at 1227 (discussing the ruling against defendant for participating in a peer-to-peer network).

198. Cf. *Atlantic Recording*, 554 F. Supp. 2d at 981 (defining the line that should not be crossed as "actual dissemination").

199. *Id.*; see also Fisher, *supra* note 2 (quoting an attorney fighting the RIAA peer-to-peer lawsuits as saying that "[t]he basic principle in the law is that you have to distribute actual physical copies to be guilty of violating copyright").

200. *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA-051, 2006 WL 2844415, at *3 (W.D. Tex. July 17, 2006).

201. See *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008).

looked for this necessary element in the peer-to-peer cases that they considered.²⁰²

The emphasis of the courts during the peer-to-peer lawsuits on the element of distribution, combined with the courts' traditional protectionism of fair use, implies that there is a definite legal line between ripping one's CDs onto a computer hard drive and distributing them over a peer-to-peer network.²⁰³ A consumer remains well within his or her rights when he or she rips a CD that he or she owns.²⁰⁴ The RIAA's claim that merely ripping a CD is illegitimate behavior therefore has no current legal grounds and is little more than a policy suggestion.²⁰⁵

2. CD Ripping as a Gateway Activity: the Arguments of Opponents and the Need to Protect the Rights of the Consumer

Opponents of CD ripping often suggest that the law should change and either outright abolish CD ripping or regulate it more heavily.²⁰⁶ Some arguments include suggestions that CD rippers primarily function to enable piracy, and are therefore illegitimate from the beginning.²⁰⁷ Other arguments claim that the use of CD rippers by consumers directly leads to participation in peer-to-peer networks.²⁰⁸ These arguments may look good on paper, but they do not acknowledge the fact that the consumer does have fair use rights that must be respected, and therefore attempts at regulation should be carefully considered.²⁰⁹

One of the most blatant arguments that opponents of CD ripping make is the idea that CD ripping primarily functions to facilitate piracy.²¹⁰

202. See *id.*; see also *Warner Bros. Records, Inc.*, 2006 WL 2844415, at *3 (discussing offers to distribute copies); *Capitol Records Inc.*, 579 F. Supp. 2d at 1216-20 (discussing more on intent to distribute); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (focusing on the act of distribution as grounds for an action).

203. Compare *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (championing fair use rights), with *A&M Records, Inc.*, 239 F.3d at 1015 (stating that the distribution of a copied work in return for another is outside of fair use).

204. See *Sony Corp.*, 464 U.S. at 451.

205. See *id.*

206. See, e.g., Simon, *supra* note 7, at 949 (arguing that CD rippers should be more heavily regulated).

207. *Id.* at 940-41.

208. *Id.* at 940; see also Dodes, *supra* note 18, at 312.

209. See *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 987 (D. Ariz. 2008) (explaining "[i]n a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests").

210. See Simon, *supra* note 7, at 941.

One critic noted that "[r]ippers and encoders are not made for any substantial noninfringing use."²¹¹ As good as such an argument sounds, it simply cannot hold up in the modern world.²¹² One commentator stated that "a laptop holding over 100 CDs worth of music in MP3 format is far more easily organized and less cumbersome than carrying over 100 CDs coupled with the inconvenience of switching CDs."²¹³ In the age of the iPod, millions of people realize this advantage and carry their whole music libraries in their pockets wherever they go.²¹⁴ Thanks to fair use that has been sanctioned by the courts, these consumers can enjoy these benefits.²¹⁵ Banning CD ripping would severely hamper the abilities of these consumers to enjoy the benefits of their iPods.²¹⁶ Given that the courts are decidedly protective about the rights of consumers to enjoy fair use regarding space shifting, arguments that there are no legitimate uses for CD ripping are legally unsound.²¹⁷ Unless the courts radically change the course of their decisions regarding the rights of consumers and fair use, portable MP3 player use will likely remain a legitimate use for CD ripping for a long time to come.²¹⁸

A less extreme argument that opponents of CD ripping make is that CD rippers lead consumers directly to participation on peer-to-peer networks, where they engage in copyright infringement.²¹⁹ These arguments cite the fact that CDs can be ripped and compressed into a small size, and then disseminated freely on the internet.²²⁰ The case law generally acknowledges this problem with CD ripping and the fact that CD ripping

211. *Id.* (internal quotation marks omitted). Simon's main contentions, as previously discussed, lie in the idea that CD ripping may violate the copyright holder's exclusive right to reproduction. *See supra* note 97 and accompanying text.

212. *See* Shum, *supra* note 10, at 126.

213. *Id.*

214. *Compare* Seff, *supra* note 9 (stating that the iPod can hold 1,000 songs), with Press Release, Apple, Inc., Apple Reports Fourth Quarter Results: Most Profitable Quarter Ever; Record Mac and iPhone Sales (Oct. 19, 2009) (stating that iPod sales are in the millions).

215. *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999) (defending space shifting as fair use).

216. *See* Shum, *supra* note 10, at 132 (noting that "[c]onsumers will be faced with the prospect that not all CDs can be . . . format-shifted for personal use").

217. *See* Recording Indus. Ass'n of Am., 180 F.3d at 1079.

218. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984), *superseded by statute*, Digital Millennium Copyright Act, Pub.L. No. 105-304, 112 Stat. 2860; Recording Indus. Ass'n of Am., 180 F.3d at 1079.

219. *See* Simon, *supra* note 7, at 926.

220. *Id.* *See also* Recording Indus. Ass'n of Am., 180 F.3d at 1073 (reminding consumers that "[d]igital copying . . . allows thousands of perfect or near perfect copies (and copies of copies) to be made from a single original recording"); Dodes, *supra* note 18, at 313.

indeed facilitates internet piracy.²²¹ However, given the fact that the consumer has the right to engage in fair use of the media, perhaps a flat ban on CD ripping is not the best way to go about solving the internet piracy problem.²²² Because CD ripping software figures into many legitimate uses, banning it because the software can be put to illegitimate uses could be extreme enough to be an affront to all fair use.²²³ In essence, the mere existence of information alone that the public can use is a threat to the owner's rights as a copyright holder.²²⁴ Perhaps this is why Congress attempted to "strike a balance" between the copyright holder and the consumer in its various stances regarding copyright law.²²⁵ Likewise, the courts remain careful not to "tip the balance" too much regarding fair use in their own music piracy rulings.²²⁶ With the interests of so many MP3 users on the line, a flat ban on CD ripping may disrupt that balance.²²⁷

The RIAA has several solutions available that could enable it to protect its own interests from internet piracy without infringing the consumer's fair use rights through an outright ban on CD ripping. First, the RIAA retains the option of publicizing the fact that the courts have clearly sided with the RIAA concerning piracy, and have sometimes awarded massive damages to the RIAA for copyright infringement.²²⁸ The RIAA

221. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001).

222. See Dodes, *supra* note 18, at 313 (arguing that copy protection technology should be further developed to protect both the interests of the consumer and the copyright owner).

223. Compare Shum, *supra* note 10, at 145 (warning that "[t]he emerging threat to traditionally accepted fair uses will soon create a world where content is no longer freely available at a library"), with *Recording Indus. Ass'n of Am.*, 180 F.3d at 1079 (stating space shifting is legitimate fair use).

224. See Shum, *supra* note 10, at 141.

225. *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 943 (N.D. Cal. 2009).

226. Cf. *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 985 (D. Ariz. 2008) (calling for care to be taken regarding peer-to-peer cases). This case also echoes the common rule that actual dissemination of a copyrighted work is required (which confines the cases squarely to clear-cut piracy). See *id.* at 981.

227. See Shum, *supra* note 10, at 132, 147-48.

228. See Greg Sandoval, *Bankruptcy Could Protect Jammie Thomas*, CNET, June 19, 2009, http://news.cnet.com/8301-1023_3-10269251-93.html (last visited Jan. 19, 2010) (stating that Jammie Thomas owes \$80,000 *per song* for 24 songs that she downloaded illegally). Commentators have stated that this "decision [has] sent a strong message." *Id.* (internal quotation marks omitted). Later, a judge reduced the damages to a lump sum of \$54,000, with a possible further appeal by Thomas pending. Greg Sandoval, *Judge Lowers Jammie Thomas' Piracy Penalty*, CNET, Jan. 22, 2010, http://news.cnet.com/8301-31001_3-10439636-261.html.

has been more than happy to notify readers of the court's decisions as a deterrent to would-be pirates.²²⁹

Another solution the RIAA recently expressed interest in is working with internet service providers to "deter illegal downloading and enable legal music services to flourish."²³⁰ In addition, as described previously, Congress could amend the Audio Home Recording Act to regulate CD ripping, which would further aid in keeping the balance between copyright holder and fair use intact.²³¹ Additional technology in the future could possibly help find a solution that protects the interests of all parties.²³²

Although online piracy is a very real concern that continues to threaten the music industry, a ban on CD ripping is not the ideal means by which to solve the problem.²³³ An ideal solution must take into account the fair use concerns of the consumer.²³⁴ Luckily, the courts understand this problem, and approach piracy cases with great care.²³⁵ The RIAA should therefore stop pursuing its unreasonable and unhelpful argument that CD ripping should be outright banned and look into a more constructive solution that would protect the rights of both the consumer and the copyright holder.

229. See *Piracy: Online and on the Street*, http://www.riaa.com/physicalpiracy.php?content_Selector=piracy_online_the_law (last visited Oct. 17, 2009) (noting the civil and criminal penalties that could result from participation in piracy).

230. *RIAA Calls upon FCC to Endorse ISP Adoption of Network Management Policies that Unleash Full Potential of Legitimate Online Music Services, Deter Illegal Downloading with Flexible, Transparent Anti-Piracy Programs*, http://www.riaa.com/newsitem.php?news_month_filter=&news_year_filter=&Resultpage=&id=8722BE0A-AD2A-FFAE-E4A1-BFD273C025EB (last visited Jan. 19, 2010).

231. See Simon, *supra* note 7, at 949.

232. See Dodes, *supra* note 18, at 289-90 (noting that MP3s purchased online have included new anti-piracy technologies, including digital rights management—which limit the uses of a copyrighted work—and watermarking, which allows copyright infringers to be easily traced).

233. *Compare* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001) (acknowledging the problem of online piracy), *with* Shum, *supra* note 10, at 145-46 (warning of the dangers of overreaction regarding information protection).

234. See Dodes, *supra* note 18, at 313.

235. *Cf.* Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976, 981, 986 (D. Ariz. 2008) (stating that "[t]he recording companies' motion for summary judgment also fails because they have not proved that a KaZaA user who places a copyrighted work into the shared folder distributes a copy of that work when a third-party downloads it").

IV. CONCLUSION

Some ten years after the rise of Napster, the RIAA finds itself confronted with a choice.²³⁶ It has weathered ten years of sharp declines in revenues, and is desperate to curtail piracy.²³⁷ To fight piracy, the RIAA could choose to continue pushing for a ban on CD ripping, despite the fact that statutory law, case law, and public policy call for a protection of the consumer's fair use rights.²³⁸ On the other hand, the RIAA also has many compromises and options to choose from in addressing piracy, such as those discussed above, and perhaps these measures could be effective. However, no matter what course the RIAA chooses to follow in the future, it must consider the fact that the law strongly implies that CD ripping is protected activity, and that the courts will probably continue to see CD ripping as protected activity for the foreseeable future. Thanks to the intervention of the courts, the RIAA may find it impossible to rob the music consumer with a "fountain pen."²³⁹

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236. See *A&M Records, Inc.*, 239 F.3d at 1004 (stating time period of Napster).

237. Compare *id.* at 1016 (stating dangers of piracy), with *Sag*, *supra* note 19, at 135 (attributing up to \$2 billion in lost revenues to online piracy).

238. Cf. *Fisher*, *supra* note 2 (noting that "lawyers for consumers point to a series of court rulings over the last few decades that found no violation of copyright law in the use of VCRs and other devices to time-shift TV programs; that is, to make personal copies for the purpose of making portable a legally obtained recording").

239. BOB DYLAN, *Talkin' New York*, on BOB DYLAN (Sony Records 2005) (1962).