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### New Laws, New Technology: Copyright Law Struggles with Change

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# New Laws, New Technology: Copyright Law Struggles with Change

By Mary LaFrance

In the last eighteen months, we have witnessed some remarkable developments in the field of copyright law.

## Liability for Unauthorized Digital Reproduction and Distribution

In *A&M Records, Inc. v. Napster, Inc.*,<sup>i</sup> the Ninth Circuit Court of Appeals agreed with District Judge Marilyn Hall Patel that the major record labels were likely to succeed in their infringement claims where Napster's file-swapping software and search mechanisms facilitated the unauthorized copying and distribution of copyrighted musical recordings. The appellate court agreed that Napster should be enjoined from engaging in, or facilitating, the unauthorized copying, downloading, uploading, transmission, or distribution of copyrighted sound recordings. The Ninth Circuit rejected Napster's arguments that the copying, which Napster facilitated, was permitted under either the Audio Home Recording Act<sup>ii</sup> or the "fair use" privilege.<sup>iii</sup>

In the aftermath of this injunction, Napster has been forced to block users' access to unauthorized copies of sound recordings that previously had been accessible through its file-sharing system. This has essentially decimated the inventory, which attracted users in the first place. Napster has now suspended its users' file-swapping activities while it restructures its operation to become a membership service, and while it negotiates licenses with record labels and music publishers in order to ensure that copyright owners will be compensated for copying of their works. Napster's users, in the meantime, have flocked to other peer-to-peer file-sharing systems. At this time, most major record labels seem disinclined to negotiate with Napster, which has not yet settled the infringement lawsuit and which no

longer has a significant userbase to use as a bargaining tool. Instead, the labels appear to be exploring alternate routes to electronic distribution of their recordings.

## Old Contracts, New Technology

In *New York Times Co., Inc. v. Tasini*,<sup>iv</sup> the Supreme Court held that a freelance writer's copyright was infringed where the defendant republished in an electronic database an individual article that the plaintiff writer had licensed for inclusion in the defendant's print periodical.

The *Tasini* plaintiffs were freelance writers who had contributed articles to various print periodicals during the early 1990s. The writers retained their copyrights, and the licenses they granted to the publishers did not include the right to reproduce the individual articles in electronic media. Nonetheless, the publishers later licensed the defendants to reproduce these articles in electronic databases, including LEXIS/NEXIS and various CD-ROM compilations. Users of any one of these databases could search for and read the individual articles contained in that database. They could not, however, view articles or other materials that had appeared elsewhere in the original periodical unless they conducted a separate search in the database.

When the writers sued for the infringing reproduction and distribution of their individual articles, the defendants argued that their electronic republication was privileged by 17 U.S.C. § 201(c), which provides:

In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the

contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

In a 7-2 decision, the Supreme Court upheld the Second Circuit's ruling in favor of the writers, holding that section 201(c) did not authorize the reproduction or distribution of the individual articles in the defendants' electronic databases. Specifically, the Court held that the manner in which each article appeared in these databases constituted neither a reproduction of the original print compilations nor a "revision" of those compilations. Instead, the Court held, the articles appeared in the databases simply as individual articles "standing alone." The Court distinguished microfilm and microfiche reproductions, on the ground that these formats involve a perceptible reproduction of the entire compilation in which an article appears.<sup>v</sup>

*Tasini* will have a significant effect on electronic re-publishers of collective works. In the past, many contributions to print periodicals have been prepared under licensing agreements that did not expressly grant the right to republish in a searchable electronic database. Yet many such works have already been republished in searchable electronic databases such as NEXIS. Unless Congress provides a legislative solution, electronic republishers of such works must now decide whether to (a) negotiate separate licensing agreements with the authors of each individual article, (b) delete those articles from their databases, or (c) take a wait-and-see attitude that could eventually lead to damages liability. With respect to new publication contracts, of course, it has become standard to address electronic publication rights at the outset, thus

*continued on page 16*

## **New Laws, New Technology: Copyright Law Struggles with Change**

*continued from page 15*

avoiding future *Tasini* problems with respect to those works.

### **Sound Recordings: Works Made For Hire? No, Yes, and now Maybe.**

In the late 1990s, several federal courts ruled that sound recordings do not qualify as "works made for hire" for copyright purposes unless the creative participants are bona fide employees of the party claiming authorship.<sup>vi</sup> These decisions raised concerns in the recording industry, which had assumed, until then, that record labels were the "authors" of their recordings, rather than mere copyright assignees.

In a bizarre flip-flop, Congress legislatively overruled these holdings in 1999, and then retroactively repealed this legislation in 2000, leaving the status of sound recordings even less certain than it was before the federal court decisions.

The saga began when Congress acceded to a request from the Recording Industry Association of America ("RIAA") to add a "technical amendment" to the Intellectual Property and Omnibus Communications Reform Act of 1999, adding sound recordings to the list of works eligible for contractual work-made-for-hire status under paragraph two of the statutory definition of "works made for hire."<sup>vii</sup> This amendment would, at least prospectively, have permitted record companies to eliminate the unwaivable termination rights which would otherwise have entitled the authors of sound recordings (typically musicians, producers, and possibly sound engineers) to reclaim the copyright in their recordings after a statutorily defined term of years, notwithstanding any copyright license or assignment they might have executed in favor of the record label.<sup>viii</sup>

When recording artists and copyright scholars learned that this legislation had been acted virtually overnight, with no Congressional hearings or debate, and no opportunity for public comment, their resulting

outrage led to the retroactive repeal of this amendment in the year 2000. Thus, sound recordings are once again conspicuously absent from the list of eligible works in paragraph two of the "work made for hire" definition. However, in an apparent effort to placate the RIAA, Congress added new language to the end of the "work made for hire" definition to dispel any inference that the repeal of the 1999 amendment signaled a decision that sound recordings are *not* eligible for work-made-for-hire status. This highly unusual statutory language expressly disclaims any congressional intent to resolve the status of sound recordings as works made for hire.<sup>ix</sup> Thus, Congress has, for now, chosen to leave the status of sound recordings uncertain, with the matter ultimately to be resolved by the federal courts.

### **Expanded Public Performance Privilege Violates International Law**

In the 1998 Fairness in Music Licensing Act, Congress revised the old "homestyle exemption" of 17 U.S.C. § 110(5) (1994), which granted businesses in certain circumstances a limited privilege to publicly perform copyrighted works by making radio or television broadcasts of those works available to their customers at no charge.<sup>x</sup> The amendment, which appears at 17 U.S.C. § 110(5)(B) (and redesignates the old section 110(5) homestyle exemption as new section 110(5)(A)), creates a safe harbor for audio or audiovisual public performances of nondramatic musical works at commercial establishments based on specific guidelines addressing the size of the establishment and the nature of the equipment used.<sup>xi</sup> According to one study, the safe harbor has the effect of exempting the vast majority of bars and restaurants in the United States from liability for such performances.<sup>xii</sup>

In the summer of 2000, a World Trade Organization (WTO) Dispute Panel ruled that section 110(5)(B) violates Articles 9.1 and 13 of the TRIPs

(Trade-Related Aspects of Intellectual Property) provisions of the WTO Agreement (previously known as the General Agreement on Tariffs and Trade, or "GATT"), because it creates too broad an exception to the public performance right in musical compositions.<sup>xiii</sup> The requirements of Article 9.1 are subject to exceptions only in "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder,"<sup>xiv</sup> and the Panel found that section 110(5)(B) exceeded the scope of this exception.

The Panel rejected a similar challenge to the newly amended section 110(5)(A), concluding that the scope of the section 110(5)(A) privilege was sufficiently narrow that it did not unreasonably prejudice the rights of copyright holders. However, in the pursuit of this favorable ruling, the United States' representatives advanced a narrow interpretation of section 110(5)(A), suggesting that the enactment of new subsection (B) in 1998 (together with the addition to subsection (A) of the prefatory phrase "except as provided in subparagraph (B)"), had the effect of narrowing the scope of subsection (A) so that it applies only to works *other than* nondramatic musical works.<sup>xv</sup>

Thus, the "homestyle exemption" which the WTO Dispute Panel upheld in section 110(5)(A) is far narrower than the original section 110(5) homestyle exemption. Pre-1998 case law had routinely applied that exemption to transmissions of nondramatic musical works, and, indeed, such works were the subject of the vast majority of the reported cases.<sup>xvi</sup> However, after the 1998 amendments, the insertion of the prefatory "except as" language in subsection (A), coupled with the broad safe harbor in subsection (B), does seem to make subsection (A) largely irrelevant for establishments that perform nondramatic musical works, since it appears that the vast majority of

public musical performances that would be exempt under subsection (A) would also be exempt under the safe harbor of subsection (B). Thus, if the subsection (B) safe harbor were to remain in effect, only in unusual situations would a potential defendant wish to invoke subsection (A) with respect to unauthorized performances of nondramatic musical works. If the newly narrowed interpretation of subsection (A) were correct, of course, that defendant would be unsuccessful.

If Congress does not repeal or amend section 110(5)(B) in order to bring the United States into compliance with TRIPs, the WTO will authorize trade sanctions. Although the WTO originally imposed a deadline of July 27, 2001, for the United States to make this change,<sup>xvii</sup> it later extended that deadline until the end of the current session of Congress or December 31, 2001, whichever is earlier.<sup>xviii</sup> In light of recent events, it seems unlikely that Congress will meet the extended deadline.

### Anti-Circumvention Provisions of 17 U.S.C. § 1201

Controversy continues to surround the anti-circumvention rules of the Digital Millennium Copyright Act (DMCA),<sup>xix</sup> which have significant effects on the public's ability to access and use copyrighted works as permitted by fair use<sup>xx</sup> and the First Amendment.<sup>xxi</sup>

The anti-circumvention provisions of 17 U.S.C. § 1201 give copyright owners a cause of action against persons who circumvent, or offer to others the means to circumvent, the technological measures (such as encryption) that copyright owners have begun to utilize to control access to their works that are fixed in electronic media. Section 1201 recognizes only certain narrow exceptions to these rules -- for example, for certain activities related to law enforcement, encryption research, and reverse engineering.<sup>xxii</sup> In addition to these exceptions, the United States Copyright Office has issued regulations exempting two narrowly-defined classes

of works: (1) compilations of website lists that are blocked by filtering software, and (2) literary works with malfunctioning access control mechanisms.<sup>xxiii</sup>

To the extent the statutory and regulatory exemptions apply in any given case, they will preclude a cause of action against one who circumvents technological protections in order to access copyrighted works. However, as a practical matter, a user's ability to make non-infringing use of such works in the first place will still be hampered by the need to circumvent the anti-copying technology in the first place.

More important from a legal perspective, however, is the fact that the scope of both the statutory and regulatory exemptions under section 1201 is significantly narrower than the scope of the fair use doctrine. Thus, certain fair uses of copyrighted works which would be exempt from a section 106 infringement claim will nonetheless be actionable under section 1201 if the works in question are accessed through prohibited circumvention. Criminal as well as civil penalties are possible,<sup>xxiv</sup> and already a federal grand jury has indicted a "hacker" who allegedly wrote and offered for sale a program for de-encrypting electronic books.<sup>xxv</sup>

The technological ability of copyright owners to foreclose public access to their works, together with the additional legal protection afforded by section 1201, raises significant questions about the future of public access to copyrighted works. As digital communications technologies replace print publications, and as electronic libraries replace physical libraries, what is the future of fair use? How can the public make fair use of materials to which they are denied access? Is the fair use of copyrighted materials a right, the exercise of which copyright owners should not be permitted to impede through copy-protection technology? Or is it merely a privilege, which insulates the user of copyrighted material from liability, but does not guarantee that the user will have access to that material in the first place? Will section 1201 and

the use of encryption technology and similar access-control devices, combined with the gradual demise of print publication as a significant mode of dissemination, effectively eliminate the public's ability to make fair use of copyrighted materials, or even their right to read copyrighted works? These questions ultimately will have to be addressed by Congress.

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### ENDNOTES

<sup>i</sup> 239 F.3d 1004 (9th Cir. 2001).

<sup>ii</sup> 17 U.S.C. § 1008 *et seq.* (2001).

<sup>iii</sup> 17 U.S.C. § 107 (2001).

<sup>iv</sup> \_\_ U.S. \_\_, 121 S.Ct. 2381, 150 L.Ed.2d 500 (June 25, 2001) (affirming 206 F.3d 161 (2d Cir. 2000)).

<sup>v</sup> 121 S.Ct. at 2384, 2391-92. Shortly before the Supreme Court decided *Tasini*, the Eleventh Circuit reached a similar conclusion in *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001), cert. denied, 2001 WL 914313, 70 USLW 3092 (U.S. Oct. 9, 2001).

<sup>vi</sup> *Lulirama, Ltd. v. Access Broadcasting Services, Inc.*, 128 F.3d 872 (5th Cir. 1997); *Ballas v. Tedesco*, 41 F. Supp. 2d 531 (D.N.J. 1999); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57 (D.D.C. 1999).

<sup>vii</sup> Satellite Home Viewer Improvement Act of 1999, sec. 1011(d), Title I of S. 1948, Intellectual Property and Communications Omnibus Reform Act (IPCOR), Pub. L. No. 106-113, 106th Cong., 1st Sess., 113 Stat. 1536 (1999) (amending 17 U.S.C. § 101). Only certain categories of copyrightable works -- motion pictures, for example -- are eligible for contractual work-made-for-hire status under paragraph 2 of the work-made-for-hire definition. 17 U.S.C. § 101 (2001). When a person creates a copyrightable work under a work-made-for-hire contract with the party commissioning the work, the latter, rather than the former, is considered the author and copyright owner. *Id.* §§ 101, 201 (b). The actual creator of the work enjoys only such rights as are specifically granted in the contract -- typically, a right to compensation. Prior to 1999, sound recordings had never been explicitly included in the list of eligible works in the "work made for hire" definition.

<sup>viii</sup> 17 U.S.C. §§ 203, 304(c) (2001) (allowing author to terminate grant, subject to grantee's right to continue exploiting derivative works created prior to termination). Uncertainty over the copyright status of sound recordings affects not only termination rights, but also the duration of copyright. *See* 17 U.S.C. §§ 302(b)-(c) (2001)

*continued on page 30*

## Copyright Law

continued from page 17

(assigning different copyright terms to works made for hire than to other works).

<sup>ix</sup>The new language reads:

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment -

(a) shall be considered or otherwise given any legal significance, or

(b) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,

by the courts or the copyright office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made for Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

17 U.S.C. § 101 (2000), as amended by Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, Sec. 2(a), 106th Cong., 2d Sess., 114 Stat. 1444 (2000). For a more detailed examination of this problem, and a proposed solution, see Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 SO. CALIF. L. REV. \_\_\_ (forthcoming 2002).

<sup>x</sup>Prior to the 1998 amendments, 17 U.S.C. § 110(5) (1994) exempted "communication of a transmission embodying a performance or display or a work by the public reception on a single receiving apparatus of a kind commonly used in private homes," unless admission was charged or a further public transmission occurred.

<sup>xi</sup>The 1998 amendments, and subsequent technical amendments in 1999, revised section 110 by redesignating the existing language (quoted *supra* note 10) as section 110(5)(A), inserting at the beginning of that provision the phrase "except as provided in subparagraph (B)," redesignating old subsections (A) and (B) as (i) and (ii), and adding a new (and lengthy) subsection (B), which exempts public performances of licensed transmissions of nondramatic musical works, if there is no direct charge or further transmission, *provided* that the establishment conforms to certain statutory square footage restrictions or to certain statutory restrictions on the number and size of performance devices (loudspeakers or audiovisual devices). See 17 U.S.C. § 110(5)(B) (2001) (setting forth those statutory restrictions in detail), as amended by Pub. L. No. 105-298, Title II, § 202, 105th Cong., 2d Sess., 112 Stat. 2830 (1998), and Pub. L. No. 106-44, § 1(a), 106th Cong.,

continued on page 34

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**For Consideration:** Mail to Rob Bare, Bar Counsel, State Bar of Nevada, 600 E. Charleston Blvd., Las Vegas, NV 89104, or fax: (702) 382-8747.

## Copyright Law

continued from page 30

1st Sess., 113 Stat. 221 (1999) (technical amendments).

xiiA 1999 study by Dun & Bradstreet (commissioned by the American Society of Composers, Authors and Publishers (ASCAP)) estimated that 70% of bars and restaurants qualify for the safe harbor, as do 45% of retail establishments. *WTO Adopts Ruling that U.S. Law on Music Licensing Violates TRIPS*, Patent, Trademark and Copyright Journal (BNA), vol. 60, no. 1485, at 282 (Aug. 4, 2000).

xiiiWTO, *Report of the Panel, United States - Section 110(5) of the U.S. Copyright Act*, WT/DS160/R, 2000 WL 816081 (June 15, 2000) (adopted by WTO Dispute Settlement Body on July 27, 2000) (hereinafter Panel Report). Article 9.1 of TRIPs incorporates most of the 1971 Berne Copyright Convention, which requires member countries to protect, *inter alia*, public performance rights in musical compositions.

xivTRIPs, Art. 13.

xvPanel Report, *supra* note 13, at \*39.\*40.

xviE.g., *Cass County Music Co. v. Muedini*, 55 F.3d 263, 265 n.5 (7th Cir. 1995) (listing various pop tunes allegedly infringed by the defendant restaurant); *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482, 1484 n.2 (7th Cir. 1991) (similar), *cert. denied*, 504 U.S. 911, 112 S.Ct. 1942, 118 L.Ed.2d 547 (1992).

xviiWTO, *Award of the Arbitrator, United States - Section 110(5) of the U.S. Copyright Act*, WT/DS160/12, 2001 WL 32556 (Jan. 15, 2001).

xviiiWTO, *Action by the Dispute Settlement Body*, WT/DSB/M/107 (July 24, 2001) (adopting U.S. proposal contained in WT/DS160/14, 2001 WL 810146 (July 18, 2001)). For further discussion of the issues related to this ruling, see Mary LaFrance, *Congress TRIPs Over International Law: WTO Finds Unfairness in Music Licensing Act*, 11 DEPAUL-LCA J. ART & ENT. L. \_\_\_ (forthcoming 2001).

xix17 U.S.C. § 1201 *et seq.* (2001), Pub. L. No. 105-304, 105th Cong., 2d Sess., 112 Stat. 2860 (1998).

xx17 U.S.C. § 107 (2001)

xxiSee *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (permanently enjoining defendant from posting on the Internet a copy of decryption software--DeCSS-- that permits copying of movies on DVD). On appeal, the Second Circuit rejected the argument that section 1201 is an unconstitutional burden on speech. *Universal City Studios, Inc. v. Corley*, \_\_\_ F.3d \_\_\_, 2001 WL 1505495 (2d Cir. Nov. 28, 2001) (affirming *Reimerdes*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000)).

xxii17 U.S.C. § 1201 (d)-(j) (2001).

xxiii65 Fed. Reg. 64556 (Oct. 27, 2000).

xxiv17 U.S.C. §§ 1203-04 (2001).

xxv*Accused Hacker Sklyarov Indicted on Five Counts of DMCA Violations*, Patent, Trademark & Copyright J., vol. 62, no. 1538 (Aug. 31, 2001).

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