

MP3 Blogs : A Silver Bullet for the Music Industry or a Smoking Gun for Copyright Infringement?

By Andrew Goldstone

There is no doubt that the emergence of the “blog” as a significant and powerful force medium occurred during the 2004 Presidential election.¹ Numerous bloggers, each with their own devoted and partisan constituencies, stoked the fires for their party and fed the public a steady stream of (dis)information that they would not and could not have gotten elsewhere.² Political blogs were both so influential and so ubiquitous that Merriam-Webster chose “blog” as the top word of 2004.³ As a result, it should not be surprising that another type of blog has since emerged to capture the attention of a very different, yet similarly passionate and devoted audience, the music fan. In the last two years the MP3 blog has developed into a very powerful marketing and promotion tool for music both new and old.⁴ Most MP3 blogs consist of numerous posts, each of which contains one or more hyperlinks to MP3 files (which reside on the server for that site or on a third party hosting site) along with a paragraph’s worth of commentary written by the blog’s editor/proprietor.⁵ The majority of these blogs are started by people who want to introduce and educate their peers, other music fans, about music they otherwise might never have heard.⁶ While the average MP3 blog does post a fair number of files,

¹ ‘Blog’ picked as word of the year, BBC NEWS, Dec. 1, 2004, at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/4059291.htm>.

² *Id.*

³ *Id.*

⁴ Brian Garrity, *Labels Tap Promo Power of Online Commentaries, But Sites Linking to MP3’s Cause Concern*, BILLBOARD, Aug. 21, 2004, at 1.

⁵ *Id.*

⁶ E-mail Interview with Travis Heynen, Editor, *bigstereo* (<http://this.bigstereo.net/>) (Apr. 10, 2006).

any and all of which visitors can download and save to their hard drive, they are often very conscientious about posting corresponding links to iTunes or Amazon while actively encouraging their readers to purchase any music they like.⁷ In part because of this respectful approach to both the music and the musicians, many record labels now actively seek to incorporate this community into the initial phase of their marketing plans for new bands.⁸ The tangible and quantifiable influence of certain blogs has become such that record labels of all sizes target and seed these blogs with pre-release music, hoping it will get posted on the site and any subsequent positive response will spread virally throughout this community and into the mainstream.⁹

It is a testament both to the power of these blogs and to their reader's passion for music that the same industry that continues to bring copyright infringement suits against tens of thousands of file sharers is also desperate to provide MP3 blogs with the music that may very well go on to seed the same file sharing community the labels are fighting against. Within the last year there have been numerous bands, including Clap Your Hands Say Yeah and the National, both of whom are on small labels, that were championed by many blogs and their readers. As a direct consequence of this exposure, these bands have gone on to sell ten times the number of albums their labels expected them to and are now playing concerts for thousands of people rather than the hundred they used to.¹⁰ A recent article in the London Observer listed the

⁷ E-mail Interview with Matthew Perpetua, Editor/Founder, *Fluxblog* (<http://www.fluxblog.org>) (Apr. 10, 2006); Garrity, *supra* note 4, at 2; Chris Alden, *The Internet DJ*, *GUARDIAN* (UK), Apr. 14, 2005, at <http://www.guardian.co.uk/print/0,3858,5169794-110428,00.html>.

⁸ David F. Gallagher, *Warner's Tryst with Bloggers Hits Sour Note*, *N. Y. TIMES*, Aug. 16, 2004 at C1.

⁹ Interview with Matthew Perpetua, *supra* note 7; Interview with Travis, *supra* note 6; Email Interview with Dodge Mokh, Editor/Founder, *My Old Kentucky Blog* (<http://myoldkyblog.com>) (Apr. 10, 2006).

¹⁰ Alex Hanley Bemis, *Busking For Stardom*, *LA WEEKLY*, Dec. 2, 2005, at <http://www.laweekly.com/ink/primetime.php?eid=70558>.

twenty five best music sites on the web and while iTunes, MySpace, and YouTube were ahead of it, number six was an MP3 blog aggregator called the ‘The Hype Machine’.¹¹

The other main reason that many editors created their blogs was because the country’s radio stations, music press, and MTV were no longer interested in playing their traditional role as the providers and presenters of new, exciting, and different music.¹² Today, the throng of MP3 blogs have stepped in to fill that gap and in the process of doing so, demonstrated the power and potential of the blog platform. In general, the proliferation of weblog software has enabled thousands of people with very little computer experience to create websites with the potential for a global audience.¹³ In addition to exposing the public to this vast number of new voices, the technology has altered long held beliefs about the most effective and efficient ways to distribute content. Having discovered and embraced MP3 blogs, there is a crucial segment of the entertainment industry’s audience that trusts and actually prefers to have a select group of amateurs and outsiders select and promote content (of every kind) to them rather than having the traditional segments of the main stream media perform that role.¹⁴ This is partly because most MP3 blogs focus on specific genres of music which means that when the reader/listener finds a blog that caters to their niche, they will be significantly more responsive and enthusiastic to the recommendations and commentary contained within than they would be for Entertainment Weekly.¹⁵ While it has not yet been perceived as such, this new medium is the latest in a growing line of threats to the status quo of the content industries.¹⁶ For the most part, the

¹¹ *Site and Sound*, GUARDIAN OBSERVER (UK), Mar. 19, 2006, at <http://observer.guardian.co.uk/print/0,,329433120-111639,00.html>.

¹² Adam Pasick, *MP3 Blogs Serve Rare Songs, Dusty Grooves*, USA TODAY, July 8, 2004 at http://www.usatoday.com/tech/webguide/music/2004-07-08-mp3blogs_x.htm.

¹³ Attiya Malik, *Are You Content with the Content? Intellectual Property Implications of Weblog Publishing*, 21 J. MARSHALL J. COMPUTER & INFO. L. 439, 440 (2003).

¹⁴ Dan Hunter & F. Gregory Lastowka, *Amateur-To-Amateur*, 46 WM AND MARY L. REV. 951, 1009-12 (2004).

¹⁵ *Id.* at 1012

¹⁶ *Id.*

average MP3 blog does not involve anything close to the scale and volume of infringement that exists in file sharing. The rapid spread and continued growth of content filled blogs has resulted in the subtle but well established shift in the most effective and efficient distribution and promotion of content from that performed by the professional to the more honest approach of the amateur.¹⁷ As it continues to replace the traditional methods and means for delivering, producing and distributing information, it seems certain that the content industries will soon raise their sights at this growing and powerful, but ultimately unorganized, movement.¹⁸

This paper will consider various types of copyright infringement and their applicability to MP3 blog. In addition, should these theories be applied to MP3 blogs, an explanation of how the court might proceed with an analysis will be included. In addition, I will discuss the fair use defense, its applicability to the actions of MP3 bloggers, and various factors that might cause the court to view the position of MP3 blogs more favorably than it has peer-to-peer networks.

I. COPYRIGHT INFRINGEMENT

A. Elements

To make an initial showing in a case of copyright infringement, the plaintiff must prove two elements: ownership of the copyright and copying by the defendant.¹⁹ A valid copyright registration certificate constitutes prima facie evidence of ownership of the copyright.²⁰ In the case where a blogger has posted or linked to an MP3 file on their blog without the permission of the copyright holder, actual copying in combination with the improper appropriation of that song

¹⁷ *Id.*

¹⁸ *Id.* at 1027

¹⁹ 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (2005)

²⁰ *Id.*

will be sufficient to prove copying by the defendant.²¹ These two elements provide the basis upon which direct liability and both third party liabilities, vicarious and contributory, are based.

B. Direct Infringement

For the plaintiff to establish direct copyright infringement, two elements must again be proven. While the first element, valid ownership, has already been established, the plaintiff must also prove that the defendant has violated one of the exclusive rights granted to the copyright holder in 17 U.S.C. §106.²² The right that a plaintiff record label would most likely claim had been violated as a result of its being posted on a blog would be the distribution right. This raises the frequently litigated and continuously controversial issue of whether posting or “making files available” on the internet is an action which is sufficient to constitute distribution under 17 U.S.C. § 106(3).²³

In her opinion from *In re Napster, Inc. Copyright Litigation*, Judge Patel denied the record label’s argument that “listing a copyrighted musical composition or sound recording in an index of available files” was sufficient to constitute a violation of the distribution right.²⁴ Judge Patel distinguishes the type of indexing present in Napster from plaintiff’s assertion that *Hotaling v. Church of Jesus Christ of Latter-Day Saints*²⁵ establishes that distribution of a copyrighted work occurs whenever it is made available to the public.²⁶ Unlike the unauthorized copies in the church library in *Hotaling*, the works listed on Napster’s index did not reside on

²¹ *Id.* at ¶ 13.01[B].

²² *Perfect 10 v. Google, Inc.*, No. CV04-9484 AHM (SHx), 2006 U.S. Dist. LEXIS 6664, at *21 (C.D. Cal. Feb. 21, 2006).

²³ NIMMER, *supra* note 19, ¶ 4.07[B]

²⁴ *In re Napster, Inc. Copyright Litigation*, 377 F. Supp 2d 796, 802 (N.D. Cal. 2005).

²⁵ *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997).

²⁶ *In re Napster*, 377 F. Supp 2d at 802

their system.²⁷ Infringement cannot be based on “the mere fact that the names of the copyrighted musical compositions and sound recordings appeared in Napster’s index of available files.”²⁸ It is important to note however, that those blogs that host files on their own server create a situation much closer to that in *Hotaling* than to *Napster*, and as a result it is much more likely to create liability for the blogger. In denying their indexing theory, the court held that to establish a distribution violation, the plaintiff must prove that defendant either “(1) actually disseminated one or more copies of the work to members of the public or (2) offered to distribute copies of that work for purposes of further distribution....”²⁹ The court in *Perfect 10 v. Google, Inc.*, further clarifies what plaintiff must prove, stating that a violation of the distribution right requires that copies be actually disseminated.³⁰ Further, it found that actual dissemination in the internet context occurs when a file is transferred from one computer to another.³¹

While the preceding discussion shows that this issue has been firmly settled in the District Courts of California, it not only remains open elsewhere but is being actively litigated in several districts across the country. The case of *Elektra Entertainment Group Inc., v. Barker*, from the Southern District of New York, is the most prominent one where the R.I.A.A. is again advancing this argument. This case involves a woman accused of copyright infringement through file sharing on a peer-to-peer network.³² The R.I.A.A. contends that because Ms. Barker had a “shared file” folder containing numerous copyrighted works and the contents of that folder are made available to other users of the network that she violated the distribution right of 17 U.S.C. § 106(3). Thus far, the Electronic Frontier Foundation and the Computer & Communications

²⁷ *Id.*

²⁸ *Id.* at 803

²⁹ *Id.* at 805

³⁰ *Perfect 10*, 2006 U.S. Dist. LEXIS 6664 at *41.

³¹ *Id.*

³² Plaintiff’s Complaint, *Elektra Entertainment Group, et al. v. Denise Barker*, (S.D.N.Y. 2006) (No. 05CV7340 (KMK) (THK)) at <http://recordingindustryvspeople.blogspot.com/2006/04/index-of-litigation-documents.html>

Industry Association and U.S. Internet Industry Association have filed Amicus Briefs in support of the Defendant. They argue that the plain language of the statute militates against finding that a “shared file” folder constitutes a distribution in violation of section 106(3). “The presence of recordings in the ‘shared file’ folder, however, amounts to no more than a potential for a transmission or an offer to transmit the files,” and “the mere availability or offer of files for potential upload to a network...is not a “sale or other transfer of ownership, or...rental, lease, or lending.”³³ As a result, they assert that it cannot constitute a violation of section 106(3).³⁴ In addition, they argue that if the court adopted such an expanded reading of the distribution right, then things that make content available, such as internet access and hyperlinks, would plausibly fall within this right, creating confusion and harming commerce.³⁵

On the other side, the Motion Picture Association of America has recently filed an Amicus Brief opposing the defendant and supporting the R.I.A.A.’s “making available” theory.³⁶ They employ an argument of statutory construction to support their position. They concede that section 101 does not specifically define “distribution”, so they look instead to the definition of “publication” within which, they claim, is a definition of “distribution”.³⁷ Relying on the legislative history of the 1976 revision to the Copyright Act in which the right of publication is equated with the right of distribution, they conclude that “making available” is an exclusive right belonging to the copyright owner.³⁸ The most recent development in this case and on this issue is

³³ Brief of Amici Curiae Computer & Communications Industry Association and U.S. Internet Industry Association in connection with Defendant’s Motion to Dismiss the Complaint at 7-8, *Elektra v. Barker*, (S.D.N.Y. 2006) (No. 05CV7340 (KMK) (THK)) at <http://recordingindustryvspeople.blogspot.com/2006/04/index-of-litigation-documents.html>.

³⁴ *Id.*

³⁵ *Id.* at 10-11.

³⁶ Brief of Amicus Curiae Motion Picture Association of America, Inc. (MPAA) in connection with Defendant’s Motion to Dismiss the Complaint, *Elektra v. Barker*, (S.D.N.Y. 2006) (No. 05CV7340 (KMK) (THK)) at <http://recordingindustryvspeople.blogspot.com/2006/04/index-of-litigation-documents.html>.

³⁷ *Id.* at 7.

³⁸ *Id.*

that at the beginning of April, the Department of Justice sent a letter to the judge advising him that they were considering filing “a Statement of Interest to express the views of the United States regarding the scope of the distribution right embodied in §106(3) of the Copyright Act.”³⁹ In whose favor this issue is decided will be of enormous importance to the people who run MP3 blogs, particularly those who live in New York. If the court were to agree with the R.I.A.A. and find that making files available was sufficient in and of itself to find infringement, it would impose direct liability on anyone hosting infringing files on their site or linking to sites where infringing files were available. Unlike in Napster where links to infringing material were not sufficient to support a finding of infringement, if this decision expanded the distribution right then it would almost certainly encompass links of that sort.

C. Vicarious Liability

The tort doctrine of *respondeat superior* is the basis for the common law doctrine of vicarious liability, which imposes liability on the defendant for the actions of third parties when the plaintiff is able to establish the presence of two independent conditions.⁴⁰ The first element is that the defendant possesses the right and ability to supervise the infringing conduct, and the second is that the defendant must receive a direct financial benefit from the infringing conduct.⁴¹ In the case of MP3 blogs, the editor would be the direct infringer, and the issue for the court to determine would be whether they could be found vicariously liable for the infringing conduct that occurs when people download files from the blog and make copies them onto their hard

³⁹ Letter of Assistant U.S. Attorney Rebecca C. Martin, *Elektra v. Barker*, (S.D.N.Y. 2006) (No. 05CV7340 (KMK) (THK)) at <http://recordingindustryvspeople.blogspot.com/2006/04/index-of-litigation-documents.html>.

⁴⁰ 3 NIMMER, *supra* note 19, at 12.04[A][[1].

⁴¹ *Id.*

drive. The actions of downloading and then storing the file would be violations of both the distribution right and the reproduction right.

The degree of control required for a finding of liability under the right and ability to supervise element is currently in a state of flux and is evaluated under two different standards, “actual” control and “legal” control.⁴² The courts that have evaluated the element under the “actual” control standard, require a showing of control that goes beyond possession of the legal right and into the actual ongoing exercise of that control.⁴³ In general, courts that employ the much less stringent standard of “legal” control will accept any evidence of legal control, such as a contract, lease, or agency agreement as sufficient to establish the degree of control sufficient to find vicarious liability.⁴⁴ For the majority of cases involving online infringement, courts have applied an “actual” control standard to determine whether the conduct in question met the requirements of the first element of vicarious liability.⁴⁵ In *Arista Records v. MP3Board*, the court found that because MP3Board had “the right and ability to police those who posted links to the site, as well as the ability to delete the links themselves from being displayed to users”, they met the first prong of the standard for vicarious liability.⁴⁶ In *Perfect 10*, the court found that Google did not possess the relevant type of control over the infringing content to constitute a right and ability to supervise.⁴⁷ Google was able to block or remove links to infringing content from its search index.⁴⁸ However, the act of denying its users access to the infringing content solely through its own site does not demonstrate any degree of control over the content itself. *Id.*

⁴² Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998*, 75 WASH. L. REV. 1005, 1012 (2000).

⁴³ Robert A. Gilmore, *Peer-To-Peer: Copyright Jurisprudence in the New File-Sharing World, the Post Grokster Landscape of Indirect Copyright Infringement and the Digital Millennium Copyright Act*, 5 FL. COASTAL L.J. 85, 93 (2004).

⁴⁴ *Id.*

⁴⁵ *Id.* at 107

⁴⁶ *Arista Records, Inc. v. MP3Board, Inc.*, U.S. Dist. LEXIS 16165 at *34 (S.D.N.Y. 2002).

⁴⁷ *Perfect 10*, 2006 U.S. Dist. LEXIS 6664 at *80-83.

⁴⁸ *Id.*

Again, the level of control that can be exercised by a blogger over the content hosted on the blog or linked to through an upload site is more than sufficient to meet the standards advanced in the previous cases. In the abstract, a decentralized peer-to-peer network run by a large corporation is not very comparable to a blog which has been created and maintained by an individual.

However, upon further examination, the difference is largely one of scale. While a blogger may not have the ability to block users from accessing his site, he does retain the ability to remove files, add and remove links, limit the number of times a file is downloaded, and limit the amount of time a file remains available for downloading. While the creation and operation of a personal site would surely be sufficient to establish “legal” control, it seems very likely that the exercise of any control over the content of the site by the defendant infringer would also lead to a finding of “actual” control.

The second element required to establish liability for vicarious infringement is a direct financial benefit to the defendant resulting from the infringing conduct.⁴⁹ As this judicial doctrine evolved over time, the relationship between the financial benefit and the infringing conduct has become less and less direct.⁵⁰ In *MP3Board*, the court stated that when infringement acts as a draw and increases the user base of the website, there is sufficient evidence to find a direct financial benefit.⁵¹ The rationale behind that finding is that when user traffic to sites like MP3Board, Napster, and Grokster increased, their advertising revenue would increase in direct proportion to the increased traffic.⁵² The court went on to say that the “MP3Board site is exclusively and consciously devoted to locating audio files, and its financial interest in the locating and copying of music files is thus far more substantial and direct than the general

⁴⁹ Gilmore, *supra* note 43, at 89.

⁵⁰ 3 NIMMER, *supra* note 19, at § 12.04[A][1]

⁵¹ *Arista Records*, U.S. Dist. LEXIS 16165 at *35.

⁵² Gilmore, *supra* note 43, at 111.

interest...search engines...which MP3 wishes to compare itself.”⁵³ Similarly, the court in *Perfect 10* made the connection between traffic and revenue but extended the benefit further. Discussing this nexus, the court said that “any increase in Google’s web traffic leads to increased advertising revenue, brand awareness, and market clout for Google.”⁵⁴ The courts’ findings in these cases illustrate the potential problem that arises for websites that carry advertising and derive an amount of revenue from that advertising which is tied to the volume of people who visit their site. While the majority of MP3 blogs do not carry advertising that is partially due to the extremely low volume of traffic on most blogs and the essentially nonexistent revenue that would be generated. However, there is at least one very prominent blog in the community, Fluxblog, that does not carry advertising precisely because of the potential liability that it can generate.⁵⁵ However, the fiscal reality of operating a website means that many bloggers are forced to carry advertising simply to break even.⁵⁶ Unfortunately, it would be very unlikely that a judge would permit a ‘just making ends meet’ defense to mitigate fact findings that would otherwise satisfy the second prong of vicarious liability.

D. Contributory Liability

The common law doctrine of contributory liability has been extracted from the tort concept of enterprise liability.⁵⁷ After showing direct infringement of copyrighted material by users of the site or service, the actions of defendant who plays a role in the infringement can

⁵³ *Arista Records*, 2002 U.S. Dist. LEXIS 16165 at *35-6.

⁵⁴ *Perfect 10*, 2006 U.S. Dist. LEXIS 6664 at *78.

⁵⁵ Interview with Matthew Perpetua, *supra* note 8.

⁵⁶ E-mail Interview with Anthony Volodkin, Founder, The Hype Machine (<http://hype.non-standard.net>) (Apr. 10, 2006)

⁵⁷ 3 NIMMER, *supra* note 19, at § 12.04[A][2]

impose an additional finding of contributory liability.⁵⁸ This type of liability requires the defendant to have knowledge of the infringing activity and to some way induce, cause, or materially contribute to the infringing conduct of another.⁵⁹ The defendant is not required to possess actual knowledge of the infringement.⁶⁰ Simply having reason to know of the infringing activity is sufficient to meet the knowledge requirement.⁶¹ While the court in *A&M v. Napster* implies that it was likely that defendants possessed actual knowledge of the illegal conduct of its users, the evidence was found to be sufficient to show that defendants had constructive knowledge of the illegal activity.⁶² Not only had numerous Napster executives previously worked in the music business but they were also using the service themselves to download infringing material on to their own computers.⁶³ In *MP3Board*, the court had to determine whether the contents of a letter from the R.I.A.A., sent pursuant to the notice provisions contained in the Digital Millennium Copyright Act (“DMCA”), included identification and information regarding the infringing files that was specific enough to be sufficient to constitute notice.⁶⁴ A proper infringement notification letter imposes actual knowledge on the recipient defendant. Infringement letters are effective pursuant to the DMCA when they provide “identification of the reference or link, to material or activity claimed to be infringing...and information reasonably sufficient to permit the service provider to locate that reference or link.”⁶⁵ The DMCA standards for imposing knowledge of the infringing activity on the defendant are created by statute and state a specific standard that must be met.⁶⁶ Infringement

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *A&M Records, Inc., et al. v. Napster, Inc.*, 114 F.Supp 2d 896, 919 (2000).

⁶¹ *Id.*

⁶² *Id.* at 919

⁶³ *Id.*

⁶⁴ *MP3 Board*, 2002 U.S. Dist. LEXIS 16165 at *25.

⁶⁵ 17 U.S.C. § 512(d)(3) (2006).

⁶⁶ *MP3 Board*, 2002 U.S. Dist. LEXIS 16165 at *25-7.

cases that are not based on DMCA violations permit the court greater leeway in determining what evidence will be sufficient to meet the knowledge element of contributory liability. It is highly unlikely that an infringement claim brought against an MP3 blog would invoke the DMCA, however bloggers should be aware that a notice of infringement containing the file's specific location on the site, whether sent by the R.I.A.A. or a member of a band, will impute constructive, if not actual, knowledge of the infringement to the defendant. While it has not been specifically litigated, I would argue that placing a liability disclaimer on a blog could be used against the defendant as evidence of knowledge that copyrighted material was being infringed by the blog's users.

The other element necessary to substantiate a claim of contributory liability against an infringing defendant can be proved by showing that the defendant contributed in some way to the infringing activity of a third party.⁶⁷ “[I]n order to be deemed a contributory infringer, the authorization or assistance must bear some direct relationship to the infringing acts, and the person rendering such assistance or giving such authorization must be acting in concert with the infringer.”⁶⁸ In *Perfect 10*, the plaintiff had argued that Google's actions satisfied the material contribution element because it supplied the infringing websites with an audience because its search engine provided its users with the ability to locate those sites, which in turn increased the ad revenue of those sites as a result of the increase in site traffic.⁶⁹ The court found that a general search engine which only provided links to infringing sites could not be found to possess the requisite level of assistance and relationship to the infringing activity.⁷⁰ The *Napster* decision presents a factual situation more analogous to that of an MP3 blog. Initially analogizing

⁶⁷ 3 NIMMER, *supra* note 19, at § 12.04[2][a].

⁶⁸ *Id.*

⁶⁹ *Perfect 10*, 2006 U.S. Dist. LEXIS 6664 at *71-2.

⁷⁰ *Id.* at 72-7.

the Napster network to an online swap meet, the court found the system provided the technology and means through which its users could engage in infringing activity, much like the operators of a swap meet provide the services and venue.⁷¹ But for the service provided by Napster, its users would be unable to find and download music.⁷² Lastly, *Sega Enterprises v. MAPHIA* involved an electronic bulletin board service (BBS) which acted as “central depository site for the unauthorized copies of games, and allowed subsequent distribution of the games by user downloads.”⁷³ The court found that by providing the facilities and means for copying the games by creating, maintaining and operating the site, the defendants actions were more than sufficient to meet the material contribution standard.⁷⁴ The facts and analysis in *Sega* appear to show that a court would be very likely to find that the actions of an MP3 blog’s operator and the activities that occur on its site would be found to satisfy both elements required for imposing contributory liability. Given both the technology and means by which an MP3 blog is constructed and operated, it would be impossible to deny knowledge that infringing activity was occurring or materially contributing to the infringement activities of the site’s users.

E. Linking

MP3 blogs provide hyperlinks to other sites for a number of different reasons. The most benign links on these sites are contained in what is often called a ‘blogroll’, which is simply a list of other blogs that the operator chooses to link to because they are fans of the site, friends with

⁷¹ *Napster*, 114 F.Supp 2d at 919-20.

⁷² *Id.*

⁷³ *Sega Enterprises Ltd., v. MAPHIA*, 948 F. Supp. 923, 933 (1996).

⁷⁴ *Id.*

the operator, the site is informative, etc.⁷⁵ Rather than linking to content, some MP3 blogs have sufficient bandwidth available and host files on their own server.⁷⁶ Other blogs, like Digital Eargasm⁷⁷, do not have the ability to host files on their own site so they provide links to ‘hosting’ sites where the editor of the blog has uploaded files. Another type of blog, called an ‘aggregator’, compiles and lists all the files currently being hosted or linked to on hundreds of different MP3 blogs.⁷⁸ Aggregator sites do not host any files themselves but provide links to large numbers of blogs where files can be found.⁷⁹ The variety of legal implications that follow from the kind of links used by the last two types of the blogs needs to be examined in further depth. As the discussion of both contributory and vicarious liability illustrated, blogs that host files on their own server (except possibly those without advertising) would satisfy each of the elements necessary to impose liability.

Because most individuals do not have the kind of hardware needed to host the content and handle the level of site traffic that a popular blog can generate, the majority of MP3 blogs are composed of links to content which resides on a third party ‘hosting’ website. These sites create and provide a specific location on the web (url) from which large files can be stored and then downloaded by the site’s users. Other bloggers use ‘hosting’ sites either because they believe that if the files do not reside on their server then their exposure to liability is somehow more limited. Hosting sites such as ‘YouSendIt’, ‘Megaupload’, and ‘Rapidshare’ are some of the most common and well known, but hundreds exist. Under the DMCA, sites such as these would qualify as ‘service providers’ under 17 U.S.C. §512(k)(1)(B). To protect themselves from third party liability, these sites strictly comply with the safe harbor provisions of 17 U.S.C.

⁷⁵ Wikipedia at <http://en.wikipedia.org/wiki/Blogroll>.

⁷⁶ Interview with Matthew Perpetua, *supra* note 8.

⁷⁷ <http://digitaleargasm.blogspot.com/>

⁷⁸ Interview with Anthony Volodkin, *supra* note 56.

⁷⁹ *Id.*

§512(c)&(d). Compliance with these requirements will immunize ‘service providers’ from liability from any infringement that occurs on their system or network. The requirements include things like lacking knowledge of the infringing activity, only transmitting and distributing material at the user’s direction, and other actions which demonstrate the service provider’s lack of control over and awareness of the content that resides on their network. These sites don’t ask users about the content being hosted, police any of the content being uploaded and downloaded, and the service is free (no direct financial benefit).⁸⁰ The one thing that all these sites do have are ‘terms of service’ which forbid the uploading of content that infringes copyright.⁸¹

Many bloggers chose to use a ‘hosting’ site in an attempt to distance themselves from liability for the infringing activities of third parties. It is not illogical for a blogger to assume that because they are only providing a link to a third party location where a file can be downloaded, the distance (literally and figuratively) between acts of infringement should reduce or remove their own liability for any infringing activity that subsequently occurs. However, contributory liability remains just as applicable to them as it does to the bloggers who host files on their own server. The dual elements of knowledge and material contribution are satisfied in both situations. Each blogger has constructive, if not actual, knowledge that by posting the link to a file, whether located on their own server or elsewhere, the posted content will be infringed by users of their site. As a result, the blogger is contributorily liable for the actions of the user whose subsequently infringes the content of the file.

The short history of cases regarding copyright infringement claims based on links to infringing content has shown that the facts and specifics of aspects like who created the links, the defendant’s relationship to the site he is linking to, and whether the defendant has any control

⁸⁰ See <http://www.megaupload.com/terms/>

⁸¹ *Id.*

over where the content resides. In the case of *Intellectual Reserve v. Utah Lighthouse Ministry*, the defendants directly infringed the church's Handbook by posting significant portions of it on their website.⁸² After the plaintiff ordered the defendant's to remove the Handbook from their site, the defendants posted a notice on their site alerting visitors to three sites that contained the Handbook and encouraged people to visit those sites, print copies of the Handbook and send it out to people.⁸³ To find the defendants were contributory liable, it was necessary for the court to first determine whether the people who browsed those three sites were actually infringing the copyright.⁸⁴ Finding "copying" to include the copy made in a computer's RAM when someone browses the site, the court found that the people who browsed those three sites were infringing the Church's copyright.⁸⁵ The court also found that the links, notices, and request to copy the Handbook from the other sites constituted actively encouraging infringement.⁸⁶ As we will see, subsequent decisions have viewed linking and its consequences quite differently. Though the main issues in the case relate to violations of the DMCA, the opinion from *Universal City Studios v. Reimerdes* is instructive for its discussion of several different types of links and the varying potential of each kind to impose liability on the party responsible for creating the link.⁸⁷ The defendants had been enjoined from posting a program that circumvented the copy protection system used on DVDs making it possible to produce perfect copies of movies.⁸⁸ Barred from posting the program, the defendants posted links to numerous other sites where the program could be downloaded.⁸⁹ The court outlines three different kinds of links contained on the

⁸² *Intellectual Reserve, Inc., v. Utah Lighthouse Ministry*, 75 F. Supp. 2d 1290, 1292 (1999).

⁸³ *Id.*

⁸⁴ *Id.* at 1294.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1295.

⁸⁷ *Universal City Studios, Inc., v. Shawn C. Reimerdes*, 111 F.Supp. 2d 294, 324 (S.D.N.Y. 2000).

⁸⁸ *Id.* at 303.

⁸⁹ *Id.* at 324

defendant's site.⁹⁰ The first type of link transferred the user to an outside web site which did not have a link to the program but contained other link(s) that led to another page within the site where the program was posted.⁹¹ This type of link required the user to expend some effort in locating the page from which the program could be downloaded.⁹² The second type of link took the user to a page on an outside website on which there was a direct link to the program which could be downloaded by simply clicking on the link. In this case, the connection between originating site and download link was nearly direct.⁹³ By clicking on the last type of link, the user triggered a file contained in the outside website which initiated an automatic download of the program to the user's computer.⁹⁴ Here, the link and the downloading were directly connected.⁹⁵ Not surprisingly, the court found that the last type of link was the functional equivalent of the downloading the program from defendants' site.⁹⁶ It found the second type of link to be nearly identical to the last one.⁹⁷ The only real difference between the two was that the second link caused the download to originate from the "transferee site" rather than defendants.⁹⁸ In addition, the court stated that because the defendants had encouraged others to post the program and provided direct, or nearly direct, links to the sites where it could be downloaded, they "offered, provided or otherwise trafficked" in this program.⁹⁹ It is important to note that this decision is not binding authority on a court deciding whether linking, and what type, is sufficient to meet the material contribution prong of contributory liability. However, it is persuasive authority and serves to illustrate the important role of "the nature, purpose, and effect

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 325

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

of a defendant's behavior" in determining the type of conduct that will be found to meet either the control element of vicarious liability or the material contribution element of contributory liability.¹⁰⁰ It is very evident that the defendants in *Reimerdes* went looking for trouble and the court was not going to allow them to make an end run around the injunction. Similarly, the blogger who uses a hosting site (for practical or legal reasons) for all of his files occupies a position nearly identical to the blogger whose files reside on his server. A direct link to a file maintained on a hosting site is no different to a direct link to a file maintained on the blogger's server. When a blogger has taken affirmative steps to upload a file and make it available by posting a hyperlink to it on their blog, it seems certain that the blogger will be found contributorily liable for any subsequent infringement of the reproduction and distribution right that occurs when the site's users download the file and place a copy on their hard drive.

An issue which is directly related to link liability but requires a more detailed analysis is whether a 'blogroll' could be used by a plaintiff to prove the elements of contributory liability against a defendant blogger. The people who create and maintain MP3 blogs are as aware as anyone (including the R.I.A.A.) that some percentage (between 0% and 100%) of the content of their site is infringing the copyrights of others. In addition, many of the people who run these sites are friends with and fans of each other. A brief scan of the comments field on any blog will usually yield a handful of comments posted by a few fellow bloggers. As such, it seems safe to assert that these facts would be sufficient to find that bloggers have constructive knowledge (or possibly actual knowledge if they had recently visited the site and were aware of the files currently posted) that the sites on the 'blogroll' contain infringing material. The question that remains is whether providing a link to these sites and using the 'blogroll' to encourage their users

¹⁰⁰ Stacey L. Dogan, *Infringement Once Removed: The Perils of Hyperlinking to Infringing Content*, 87 IOWA L. REV. 829, 881 (2002).

to visit those specific sites would constitute a material contribution by the linker to the infringement occurring at the site of the linkee. Contrasting the kind of conduct which created liability for the defendant in *Intellectual Reserve* and denied liability for Google in *Perfect 10* with the relatively benign conduct of the ‘blogroll’ blogger helps illustrate the broad spectrum of actions within which judges and juries must make determinations of liability. While this blogger’s actions are low on the material contribution scale, there are other reasons not to impose liability in this type of situation. By creating liability for infringing activity that is once or twice removed from the defendant would have broad implications for the structure of the internet and its ability to facilitate the spread of information and foster people’s desire to engage in the spread of ideas with others. In addition, finding liability for simply providing a link to infringing material does not advance the goals of copyright law. The linker does not directly benefit from the link nor has he participated in either the direct or the secondary infringement.¹⁰¹ As a result, the copyright owner should not be entitled to recover anything from the linker.¹⁰² Liability is appropriate when the copyright owner has been injured and the subsequent redress should only be obtained from those who are directly or secondarily responsible for the acts which created the harm.¹⁰³

F. Criminal Infringement

Over the last fifteen years, copyright owners have gone to congress numerous times to request their help in addressing and combating various new technologies, each of the which the

¹⁰¹ *Id.* at 884.

¹⁰² *Id.*

¹⁰³ *Id.* at 884-5.

owners perceived to be more devastating than the next.¹⁰⁴ As a result, there have been several major expansions of the Copyright Act, including the Sonny Bono Copyright Term Extension Act, the Digital Millennium Copyright Act, the No Electronic Theft Act (“NET”), and the Family Entertainment and Copyright Act (“FECA”). By producing legislation that provided the owners with the protection that they had requested and more, Congress has proven itself to be a strong ally of copyright owners. Conversely, these acts have broadened the protections and scope of the Copyright Act beyond what would seem to have been sufficient to reduce any alleged harms while limiting the rights and freedoms of everyday citizens. The two acts which are most relevant to this discussion are NET and FECA because both of them criminalize infringement and impose serious prison time for those convicted.

i. No Electronic Theft Act

Both the 1909 and the 1976 Acts have provisions which provide for treating infringement as a criminal act when it was “undertaken willfully and for profit.”¹⁰⁵ In 1997, Congress amended the Copyright Act with the NET Act.¹⁰⁶ As a result, both of the prerequisites for criminal copyright infringement have been modified. Prior to the NET Act, the willfulness standard for criminal infringement had not been enunciated by the Copyright Act. The NET Act provided some clarification, stating that “evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement.”¹⁰⁷ Without a clear statutory standard, the determination of what conduct constitutes willfulness must be made on a case by case basis.¹⁰⁸ However, the view that most courts have taken is that “willfulness

¹⁰⁴ Eric Goldman, *A Road to Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369 (2003).

¹⁰⁵ 4 NIMMER, *supra* note 19, at § 15.01[A][1].

¹⁰⁶ *Id.*

¹⁰⁷ 17 U.S.C. § 506(a)(2) (2005).

¹⁰⁸ 4 NIMMER, *supra* note 19, at § 15.01[A][2].

requires the government to prove that the defendant specifically intended to infringe such that the infringement was a voluntary, intentional volition of a known legal duty.”¹⁰⁹

The amendments contained in the NET Act limited and modified the element of “financial benefit”. Subsequently, financial benefit was no longer an element necessary to prove the crime.¹¹⁰ The addition of section 506(a)(1)(B) established an alternate element through which the prosecutor could prove the crime. As a result, the crime now included actions of infringement committed “by reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1000.”¹¹¹ It is clear from the House Report that the purpose of the act was to criminalize “computer theft of copyrighted works, whether or not the defendant derives a direct financial benefit from the act(s) of misappropriation, thereby preventing such willful conduct from destroying businesses, especially small businesses, that depend on licensing agreements and royalties for survival.”¹¹² In addition, Congress amended the definition of “financial gain” in section 101 to encompass the “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.”¹¹³ By expanding the definition of financial gain, Congress gave prosecutors the ability to pursue individuals who engaged in infringement for the sole purpose of trading files or programs with others who would respond in kind, whether at the time of the infringement or at a later date.¹¹⁴

While there have been nearly one hundred convictions under the Act, two cases merit further discussion. In 1999, Jeffrey Levy became the first person convicted under the NET

¹⁰⁹ Goldman, *supra* note 104, at 420.

¹¹⁰ 4 NIMMER, *supra* note 19, at § 15.01[B][2].

¹¹¹ 17 U.S.C. § 506 (a)(1)(B).

¹¹² H.R. Rep. No. 105-339, 105th Cong., 1st Sess. 7 (1997).

¹¹³ 17 U.S.C. §101.

¹¹⁴ 4 NIMMER, *supra* note 19, at § 15.01[B][2].

Act.¹¹⁵ While a senior at the University of Oregon, he maintained a personal website on which he posted software, music, games, and movies, “allowing the general public to download and copy these copyrighted products.”¹¹⁶ He was sentenced to two years probation with conditions.¹¹⁷ Under the United States Sentencing Guidelines, the sentence for criminal infringement of a copyright is based largely upon the retail value of pirated software which was distributed.¹¹⁸ While the court determined that the retail value of the software alone was at least \$70,000, it was impossible to determine the value of the software that was actually distributed. Levy agreed to a value of \$5,000, which then dictated the length of the sentence that could be imposed.¹¹⁹ The result in this case makes it clear that the Act was not going to be as effective as had been hoped.

The second case involves a ‘warez’ group called Pirates With Attitude (“PWA”). Warez are copies of infringed works that have been stripped of copy protection technology.¹²⁰ People who trade warez are primarily engaged in the wholesale copying and distributing of copyright works for their own entertainment.¹²¹ The general goal of a warez trader is to accumulate as many pirated works as possible and create the biggest library of titles.¹²² Seventeen members of PWA were indicted for conspiracy to infringe copyrights.¹²³ They maintained numerous File Transfer Protocol (FTP) sites that were only accessible to authorized users who entered “through known Internet Protocol addresses.”¹²⁴ At any given time the sites maintained by PWA

¹¹⁵ Goldman, *supra* note 104, at 381.

¹¹⁶ Press Release, U.S. Department of Justice, United States Attorney’s Office, District of Oregon, Defendant Sentenced for First Criminal Copyright Conviction under the “No Electronic Theft” Act (Nov. 23, 1999) at <http://www.cybercrime.gov/levy2rls.htm>.

¹¹⁷ *Id.*

¹¹⁸ Goldman, *supra* note 104, at 380.

¹¹⁹ *Id.*

¹²⁰ Goldman, *supra* note 104, at 370.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Press Release, U.S. Department of Justice, United States Attorney’s Office, Northern District of Illinois, U.S. Indicts 17 in Alleged International Software Piracy Conspiracy (May 4, 2000) at <http://www.usdoj.gov/criminal/cybercrime/pirates.htm>.

contained over 5000 copyrighted works, mainly computer software programs, estimated to have a retail value of more than \$1,000,000.¹²⁵ Over the course of the conspiracy more than 100 people were found to have downloaded over 30,000 programs.¹²⁶ The defendants stated that the purpose of the conspiracy was fun and entertainment and no money ever changed hands.¹²⁷ Fourteen of the defendants plead guilty, one was convicted of conspiracy after a jury trial, and two defendants fled the country.¹²⁸ After initially setting the retail value for the infringed software at \$10,000,000, a group of defendants successfully petitioned for a lower value, subsequently set at \$1,424,640.¹²⁹ The defendants received sentences ranging from three years probation to eight months in prison with five years probation to eighteen months in prison to two years in prison (for defendant who went to trial).¹³⁰ In addition most were also fined several thousand dollars.¹³¹

As these cases illustrate, the NET Act expanded and added to the elements of criminal copyright infringement, enhancing the ability of a prosecutor to deal with people who were exploiting various new technologies to make infringed content more quickly and widely available. The quantity and scope of infringed content that was distributed in both the Levy case and the PWA case bears no resemblance to the content on the hard drive of an average kid in high school. In regards to the NET Act, it is crucial for bloggers to be aware of the amount of content that they post over the course of 180 days, as per § 506(a)(1)(B). It seems probable that most serious bloggers would post enough content in six months to reach the \$1000 retail value,

¹²⁵ *Id.*

¹²⁶ Goldman, *supra* note 104, at 384.

¹²⁷ *Id.*

¹²⁸ *Id.* at 386.

¹²⁹ *Id.*

¹³⁰ Press Release, U.S. Department of Justice, United States Attorney's Office, Northern District of Illinois, Leader of Software Piracy Sentenced to 18 Months in Prison (May 15, 2002) *at* http://www.usdoj.gov/criminal/cybercrime/rothbergSent_pirates.htm.

¹³¹ *Id.*

after which they become criminal liable. However, there is a loophole for bloggers. With the advent of digital downloads and online sales of music for \$.99 per song, a strong argument could be made that each song's retail value is just that, and not the retail value of the full album that it comes from. Using that valuation, only an extremely persistent blogger would reach the \$1000 trigger. While less likely to be used against a blogger than the retail value element, the financial gain element contained in § 506 (a)(1)(A) and as defined in §101 would not present any significant obstacles to a prosecutor trying a case against a blogger whose site contains advertising which generates revenue.

ii. Artists' Rights and Theft Prevention Act of 2005

The most recent amendment to the Copyright Act was contained in the Family Entertainment and Copyright Act of 2005.¹³² The unseen force behind the provisions contained in the "Artists' Rights and Theft Prevention Act of 2005" ("ART Act") was the movie industry.¹³³ The movie studios were furious about the proliferation of bootlegged movies and their alleged affect on ticket sales.¹³⁴ Bootleg movies are made by using a camcorder to film the movie as it plays in the theatre and as a result are often for sale on the street before the movie debuts in the theatre.¹³⁵ In addition, the increasing speed with which files are transmitted over the internet was causing a sharp rise in the numbers of people who engaged in sharing movie files.¹³⁶ To combat the first problem, the ART Act made it a crime to use a camcorder in a movie theatre for the purpose of recording a movie.¹³⁷ It is the next section of the ART Act that is of enormous impact to bloggers. It criminalizes copyright infringement committed "by the

¹³² 4 NIMMER, *supra* note 19, at § 15.06.

¹³³ H.R. Rep No. 109-33, pt. I, at 2.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 4 NIMMER, *supra* note 19, at § 15.06[A][1].

distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.”¹³⁸ The statute further defines “work being prepared for commercial distribution” as “a computer program, a musical work, a motion picture or other audiovisual work, or a sound recording, if, at the time of unauthorized distribution (i) the copyright owner has a reasonable expectation of commercial distribution; and (ii) the copies or phonorecords of the work have not been commercially distributed....”¹³⁹

If this section is enforced with more regularity than the NET Act, the implications for anyone who downloads or shares files with any regularity are broad and serious. One of the reasons that MP3 blogs have become so popular is that many sites regularly post songs from albums that have not yet been released, or not yet released in the U.S.¹⁴⁰ English bands like the Arctic Monkeys and The Streets were well known and popular among music fans long before their albums were released in America.¹⁴¹ The only place most people could find and hear the music was on their favorite MP3 blog.

The penalties imposed for convictions under the NET Act were subject to certain sentencing guidelines that allowed infringers to get highly reduced, insignificant jail time.¹⁴² The problem was severe enough that for the D.O.J. eventually refused to bring any more criminal infringement cases.¹⁴³ Wanting to rectify that situation, Congress used the ART Act to completely revise the penalties originally included in the NET Act.¹⁴⁴ Currently, there are three different series of penalties corresponding to the three types of conduct that create liability. For

¹³⁸ 17 U.S.C. § 506(a)(1)(C).

¹³⁹ 17 U.S.C. § 506(a)(3)(A).

¹⁴⁰ Garrity, *supra* note 4, at 1-2.

¹⁴¹ Interview with Anthony Volodkin, *supra* note 56.

¹⁴² 4 NIMMER, *supra* note 19, at § 15.01[B][3].

¹⁴³ *Id.*

¹⁴⁴ *Id.*

offenses under section 506(a)(1)(A) the prison terms range from one year to ten years dependant on whether additional requirements of conduct and total retail value are met.¹⁴⁵ An infringement under section 506(a)(1)(B) imposes prison terms ranging from one to six years dependant on conditions similar to those in the first statute but with different threshold levels.¹⁴⁶ Lastly, convictions under section 506(a)(1)(C) carry the largest prison terms, ranging between three and ten years.¹⁴⁷

The Department of Justice recently announced its first indictments under the ART Act . On March 9th, the U.S. Attorney for the Middle District of Tennessee indicted two men for criminal copyright infringement under section 506(a)(1)(C).¹⁴⁸ (N). One month before it was commercially released, these men obtained a copy of the “Jacksonville City Nights” album by Ryan Adams & the Cardinals.¹⁴⁹ They subsequently posted several songs on a Ryan Adams fan site which was accessible to the public.¹⁵⁰ According to the indictment, if convicted on all counts, the men face a maximum of 11 years in prison.¹⁵¹ At this point there are only questions and no answers. Among the things that are unclear is why this particular posting was targeted, whether Ryan Adams’ record label or the R.I.A.A. played any role, and whether this indictment is a harbinger of things to come. What this event does make clear is that if the D.O.J. decided that the first indictment and possible trial under the ART Act would be for posting a handful of songs on one site, then any blogger who posts songs before they’re released does so at their own risk.

¹⁴⁵ 18 U.S.C. § 2319(b) (2005).

¹⁴⁶ 18 U.S.C. § 2319(c) (2005).

¹⁴⁷ 18 U.S.C. § 2319(d) (2005).

¹⁴⁸ Press Release, U.S. Department of Justice, United States Attorney’s Office, Middle District of Tennessee, Internet Posting of Copyrighted Music Leads to Federal Indictment of Two Men (Mar. 9, 2006) at http://www.usdoj.gov/usao/tnm/press_releases/2006/3_9_06.htm.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

II. DEFENSE TO INFRINGEMENT – FAIR USE

A. Factors

Despite the presence of all the elements necessary to prove infringement (whether direct, contributory, or vicarious), the Copyright Act offers protection to certain types of uses through the affirmative defense of “fair use”.¹⁵² This defense acts as a limitation on the exclusive rights granted to the copyright owner in section 106 and 106A.¹⁵³ To determine whether the use in question is permitted as a “fair use”, the statute lists four factors for the court to consider in assessing the benefits or detriments of the use in relation to the purposes of copyright protection.¹⁵⁴ In its opinions dealing with fair use, the Supreme Court has counseled that one factor should not be weighted more heavily than the others, none of the factors alone should be considered to be dispositive, and lastly, the factors should be evaluated separately but the results should be weighed together.¹⁵⁵ “Because fair use is an affirmative defense to a claim of infringement, defendants carry the burden of proof on the issue.”¹⁵⁶ As both the language of the statute and Supreme Court precedence emphasize the need to evaluate each case on its facts, I will not attempt a “fair use” analysis of every kind of MP3 blog. Instead, I will explore each factor in depth, examining the role of that factor in several different cases and what result it might imply in the case of an average MP3 blogger.

¹⁵² 4 NIMMER, *supra* note 19, at § 13.05.

¹⁵³ 17 U.S.C. §107 (2005).

¹⁵⁴ 4 NIMMER, *supra* note 19, at § 13.05[A].

¹⁵⁵ *Id.*

¹⁵⁶ *Los Angeles Times v. Free Republic Electronic Orchard*, 2000 U.S. Dist. LEXIS 5669 at *21 (C.D. Cal. Apr. 5, 2000).

i. The Purpose and Character of the Use

By its plain language, evaluation of the first factor requires an inquiry into “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹⁵⁷ In addition, the preamble of the section lists several uses, such as “criticism, comment, news reporting, teaching, scholarship or research”¹⁵⁸ which are most appropriate for a finding of fair use, though the fact that the use may fall into one of those categories should not be considered dispositive.¹⁵⁹ The starting point in the inquiry for this factor is to assess whether the use is more commercial or more non-commercial. In general, the decisions of the Court has found that any commercial use cuts against a fair use defense but still has left a wide latitude for considering all the other factors that could, in some situations, outweigh this one factor.¹⁶⁰ The types of commercial uses that exist are extremely broad. Things like the use of plaintiff’s entire work in a for profit situation will weigh heavily against the defendant. Even when the purpose of defendant’s use is news reporting, the presence of “profit motivation may negate the fairness of its use under this factor.”¹⁶¹ Conversely, the fact that a use is for a non profit, educational purpose does not require a finding that the use is fair.¹⁶² Some courts have taken the Supreme Court’s validation of home taping in Sony implies a presumption that noncommercial and nonprofit activity undertaken at home for private enjoyment is presumptively fair, absent plaintiff’s proof of direct injury.¹⁶³ However, that is not the majority view and home taping is sufficiently different from MP3 blogs that that reasoning would be very difficult to apply. In addition, a court has found that a commercial use may be of such limited

¹⁵⁷ 17 U.S.C. § 107(1) (2005).

¹⁵⁸ 17 U.S.C. § 107 (2005).

¹⁵⁹ 4 NIMMER, *supra* note 19, at B 13.05[A][1][a].

¹⁶⁰ *Id.* at B 13.05[A][1][c].

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

duration, or otherwise so insignificant as to justify holding for the defendant under the principle of *de minimis non curat lex*.¹⁶⁴

The other inquiry required by this factor is whether the use can be considered transformative or consumptive. The concept of transformation was advanced by the Court in *Campbell v Acuff-Rose Music, Inc.*, in which the court focused on whether the “new work merely supersedes the objects” of the original, or actively contributes something new.¹⁶⁵ The Court found that the more transformative the new use was found to be, the less significant the other factors would be in weighing against fair use.¹⁶⁶ When the original work is taken and its parts are used to create a parody or satire, then the original work has been significantly transformed and the new work, while still resembling the original, is sufficiently changed to weigh towards a finding of fair use.¹⁶⁷

An additional factor which has been considered is the characterization of the defendant’s conduct. “Defendant’s unjustified denial of its use of the plaintiff’s work is a factor militating against permitting defendant to claim a fair use defense,” while “attributing a usage of plaintiff’s work to plaintiff can the increase the fairness of defendant’s utilization.”¹⁶⁸ Under this factor, blogs that link to sites where music can be purchased would receive a more beneficial assessment than those that don’t. This factor is a minor aspect of the general purpose and character of the use and would not weigh too heavily for or against a specific use.¹⁶⁹

¹⁶⁴ *Id.* at Footnote 91.

¹⁶⁵ *Campbell v Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁶⁶ 4 NIMMER, *supra* note 19, at § 13.05[A][1][b].

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at § 13.05[A][1][d].

¹⁶⁹ *Id.*

ii. The Nature of the Copyrighted Work

The main purpose of this factor is to determine the level of creativity present in the underlying work. “The more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff’s work, the broader should be the scope of the fair use defense.”¹⁷⁰ Works such as songs and fiction are accorded more weight than things like a catalog or index of facts or products.¹⁷¹ However, this factor is the least significant of the four and is generally accorded the least weight in the overall calculation.¹⁷²

iii. The Amount and Substantiality of the Portion Used

The third factor determines “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁷³ A traditional analysis “includes a determination of not just quantitative, but also qualitative substantiality.”¹⁷⁴ However, a reproduction of the entire work is generally not considered a fair use, though some exceptions exist.¹⁷⁵

iv. The Effect upon the Plaintiff’s Potential Market

The fourth factor in the fair use analysis is “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁷⁶ This factor has been characterized as calling for a balance to be struck between “the benefit the public will derive if the use is permitted and the

¹⁷⁰ *Id.* at B 13.05[A][2][a].

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ 17 U.S.C. § 107(3) (2005).

¹⁷⁴ 4 NIMMER, *supra* note 19, at B 13.05[A][3]

¹⁷⁵ *Id.*

¹⁷⁶ 17 U.S.C. §107(4) (2005).

personal gain the copyright owner will receive if the use is denied.”¹⁷⁷ “The less adverse effect that an alleged infringing use has on the copyright owner’s expectation of gain, the less public benefit need be shown to justify the use.”¹⁷⁸ This is generally considered to be the most important of the factors and, often, the most central factor to a fair use analysis.¹⁷⁹ The focus of this factor is not solely the damages to plaintiff as a result of defendant’s activities, but “whether unrestricted and widespread conduct of the sort engaged in by defendant... would result in a substantially adverse impact on the potential market for, or value of the plaintiff’s present work.”¹⁸⁰ It is important to look beyond the infringing use at issue and examine the big picture. In the case of an MP3 blog, the question could be framed as whether the site’s use of a song, if similarly posted and downloaded by a large number of blogs, result in a significantly reduced market for that song. It is difficult to come up with an answer, as it remains unclear what the benefits of being posted on a blog and then downloaded, would be for any song with popular appeal.

v. Cases

In the recent case of *Perfect 10 v. Google*, in which Google was sued for copyright infringement for displaying “thumbnail” copies in responses to image searches and for linking to third party websites which hosted and served infringing full size images, the court found that it was unlikely that Google’s use would fall within the fair use exception.¹⁸¹ The court reached “this conclusion despite the enormous public benefit that search engines such as Google provide.”¹⁸² The court found the first factor to weigh slightly in favor of Perfect 10, due to the

¹⁷⁷ MCA, Inc. v. Wilson, 677 F.2d 180 (2nd Cir. 1981).

¹⁷⁸ *Id.*

¹⁷⁹ 4 NIMMER, *supra* note 19, at § 13.05[A][4].

¹⁸⁰ *Id.*

¹⁸¹ *Perfect 10*, U.S. Dist. LEXIS 6664 at *41.

¹⁸² *Id.*

commercial aspects of Google's use, the second factor also slightly favored Perfect 10 because of the creativity of the photographs at issue, the third factor favored neither party because it was necessary for Google to use the entire image, and the fourth factor weighed against Google because of the effect it would have on the market for Perfect 10's cell phone images.¹⁸³

In another recent case, *BMG v. Gonzalez*, which involved peer-to-peer file sharing, the defendant made a fair use defense to the claim of copyright infringement.¹⁸⁴ She claimed that she used the file sharing program to sample songs to determine whether to purchase them at retail.¹⁸⁵ The court quickly deals with the first three factors, finding that she was not engaged in a non profit use, and downloaded and kept full songs.¹⁸⁶ The defendant's argument for the fourth factor was that "downloading on a try-before-you-buy basis is good advertising for copyright proprietors, expanding the value of their inventory."¹⁸⁷ The court dismissed this claim, citing to the Supreme Court's opinion in *MGM Studios, Inc. v. Grokster, Ltd.*, which found that studies on the effect of peer-to-peer file sharing showed otherwise.¹⁸⁸ Stating that "music downloaded for free from the Internet is a close substitute for purchased music" which leads most people not to buy the original, the court found that defendant's claim of fair use failed.¹⁸⁹

In *L.A. Times v. Free Republic*, a case with facts that can be analogized to those of an MP3 blog, the vehicle of infringement is a bulletin board website, on which members would post the entire text of articles from the L.A. Times and then discuss their contents.¹⁹⁰ Regarding the first factor, the use was found not to be transformative because, even though its purpose was

¹⁸³ *Id.* at *44-61.

¹⁸⁴ *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005).

¹⁸⁵ *Id.* at 890.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 891.

¹⁸⁸ *Id.* at 890.

¹⁸⁹ *Id.*

¹⁹⁰ *L.A. Times*, U.S. Dist. LEXIS 5669 at *1.

criticism, articles were posted in their entirety, rather than just restating the facts.¹⁹¹ On the issue of commerciality, the court found the use was not strictly commercial, but did allow defendants to avoid paying the price charged for the works.¹⁹² Thus, the first factor weighed against defendant.¹⁹³ Due to the “predominantly factual” content of the news articles, the second factor was found to weigh in favor of the defendants’ use.¹⁹⁴ Because they were unable to advance a persuasive reason for the use of entire articles, the third factor weighed against a finding of fair use.¹⁹⁵ The court’s analysis of the fourth factor makes it easy to analogize to the position of an MP3 blog . The court first stated that Free Republic has 20,000 registered users, got up to 100,000 hits a day and had between 25 and 50 million page views each month.¹⁹⁶ The court then refuted defendants’ claim that the impact of their site was trivial based on the volume of traffic visiting both sites, because it was the plaintiffs, as copyright holders, who “have the right to control access to the articles, and defendants’ activities affect a market plaintiffs currently seek to exploit.”¹⁹⁷ Responding to one of defendants’ additional claims, that the “referral hits demonstrate that Free Republic is creating a demand for plaintiffs’ works”, the court stated that claims that “a use is fair because it increases demand for the plaintiff’s copyrighted work” are routinely rejected by courts.¹⁹⁸ Because plaintiffs showed that they were “attempting to exploit the market for viewing their articles online, for selling copies of archived articles, and for licensing others to display or sell the articles”, and that the availability of copies on Free Republic had the potential to interfere with these markets, the fourth factor weighed in favor of

¹⁹¹ *Id.* at *23-41.

¹⁹² *Id.* at *51.

¹⁹³ *Id.* at *54.

¹⁹⁴ *Id.* at *56.

¹⁹⁵ *Id.* at *60.

¹⁹⁶ *Id.* at *63.

¹⁹⁷ *Id.* at *67-8.

¹⁹⁸ *Id.* at *72-3.

plaintiffs.¹⁹⁹ In balancing the factors, the court found that the three factors in plaintiffs favor were not significantly displaced by the one factor that weighed in defendants' favor so they denied the fair use defense.²⁰⁰

The last fair use case to be examined is the seminal case involving the Napster file sharing system. In its fair use analysis, the court dove quickly into the first factor and agreed with the plaintiff, finding that “downloading MP3 files does not transform the copyrighted music”, and that the use, though not traditionally commercial, had commercial benefits for its participants.²⁰¹ The second factor was quickly resolved as the court found that songs are creative and constitute entertainment, weighing against a finding of fair use.²⁰² On the third factor, the court found that “wholesale copying for private home use tips the fair use analysis in plaintiffs' favor if such copying is likely to adversely affect the market for the copyrighted material.”²⁰³ The last factor weighed against a finding of fair use for two reasons. The court found that Napster “use harms the market for their copyrighted musical compositions and sound recordings” by reducing CD sales among college students and because “it raises barriers to plaintiffs' entry into the market for the digital downloading of music.”²⁰⁴ In making these findings, the court refuted defendants' principal argument that “using Napster to sample music is akin to visiting a free listening station in a record store, or listening to song samples on a retail website.”²⁰⁵ This argument fails primarily because users can always decide not to buy the CD while still keeping the download.²⁰⁶ Defendants' additional claim that plaintiffs' sales are

¹⁹⁹ *Id.* at *74.

²⁰⁰ *Id.* at *75.

²⁰¹ *Napster, Inc.*, 114 F. Supp. 2d at 912.

²⁰² *Id.* at 913

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 913-4.

²⁰⁶ *Id.*

enhanced by this use was not sufficient to tip the balance in favor of defendants.²⁰⁷ In conclusion, the court stated that “even assuming the sampling alleged in this case is a non-commercial use, the record company plaintiffs have demonstrated a meaningful likelihood that it would adversely affect their entry into the online market if it became widespread.”²⁰⁸ Having balanced the factors and found that the majority weighed against fair use, the court found the defense was unapplicable.

III. CONCLUSION

The main conclusion to be drawn is that no matter what the intent or purpose behind the creation of an MP3 blog, it is possible for law enforcement, the copyright holder, and the courts to view its effects in a variety of different ways. Given the (current) low profile of these sites, they may not be seen as sufficiently diverting sales for any relevant parties to bring suit. However, it is best that the operators of these sites be aware of their legal standing in order to change or conform any existing behavior to behavior that would cause any third parties to change the way they view the site and the effect it may have on their rights. This paper makes no judgment as to the legality of these sites, rather its purpose is to present the current law and recent case law to allow readers to make their own conclusions.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 915.