



Volume VIII, Issue 2,
Fall 2001

Is the Whole Greater than the Sum of Its Parts? The Applicability of the Fair Use Doctrine to the New Breed of Instant Messaging Software.

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Cite As: Haydn J. Richards, Jr., *Is the Whole Greater than the Sum of Its Parts? The Applicability of the Fair Use Doctrine to the New Breed of Instant Messaging Software*, 8 RICH. J.L. & TECH. 15 (Fall 2001) at <http://www.law.richmond.edu/jolt/v8i2/article3.html>.

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I. INTRODUCTION

{1}Imagine: you are preparing your 15-year high school reunion. When you were in high school, two rival bands played at dances. Everyone at school knew the bands and most students enjoyed the music. Like most music groups, neither band obtained a recording contract with a record label. However, during

a garage practice session, the bands' members recorded some of their songs. Of these recordings, only a few scratchy recordings remain; however, you do not know about them. You decide, however, that you are going to search the Internet to see whether you can find any copies of the songs - songs that would enthuse and delight the audience at your 15-year high school reunion.

{2} You connect to the Internet, start up your favorite instant-messaging program, and simultaneously chat with your friends, in different cities, while searching for these songs. To your delight, you find several copies of songs and download them. A few years ago this scenario existed only in theory; however, that theory is now reality. Today file searching and real-time communication over the Internet is an easy and a widely-accessible reality.

{3} Aimster, a recently released instant-messaging program, incorporates this theory.^[1] Aimster allows a user to establish a "buddy list," which permits a user to chat with those "buddies."^[2] Aimster also allows the user to send any type and number of files to any users on his buddy list.^[3] Finally, the program allows the user to search for different types of files available on third-party networks.^[4]

{4} The features included in Aimster's instant-messaging software present several legal issues that have arisen with recent developments in technology. By providing the means to distribute electronic files, Aimster acts as a resource that, when used inappropriately, may facilitate copyright infringement. Specifically, Aimster allows the user to acquire and distribute files across the Internet. The Aimster software cannot recognize whether a file violates copyright law; consequently, unscrupulous file distribution may violate the distribution, reproduction, and sound recording rights of a copyright owner.^[5] Aimster, however, limits the ability to distribute such files by leaving the user with the ability to choose which users will have access to his computer. In doing so, users have the ability to limit their file distribution to material that is not copyrighted; further, the scope of distribution of such files is limited by the user.^[6] Notwithstanding its own technology, Aimster implements other file distribution services, which gives the user virtually unlimited power to search the Internet for any type of file, including copyrighted files.^[7] Consequently, by implementing this file acquisition technology, Aimster may subject itself to vicarious liability for copyright infringement.

{5} The confluence of technologies joined in Aimster present several legal questions. Those questions will be addressed in separate sections of this note. Part 1 introduces Aimster. Part 2 introduces the applicable technology and services discussed in this note. Part 3 discusses whether Aimster's service has a sufficient fair use to justify any copyright violations that its service allows. Part 4 analyzes whether Aimster subjects itself to vicarious liability because of its service's nature or because it implements third-party networks, such as Gnutella, an ever-changing amorphous network used to distribute files over the Internet. Part 5 posits that the exchange of files across the Internet may be in jeopardy if the Aimster service is found not to constitute a fair use under copyright law.

II. TECHNOLOGY, ITS EVOLUTION, AND THE LAW

A. Introduction to Instant-Messaging

{6} Instant-messaging technology is rapidly becoming an easy and a widely accepted communication method.^[8] Specifically, instant-messaging technology, such as Aimster, allows two or more users to communicate via the Internet in real time.^[9] To use such technology, each user must acquire and install software allowing real-time communication.^[10] A user communicates by selecting a recipient's name

with whom she wishes to chat and then types a message.[11] After clicking the send button, the message travels across the Internet in a fashion similar to electronic mail transfer.[12] Upon receiving the message, the recipient may respond or ignore it.[13] If the recipient chooses to respond, the software establishes a dialogue between each user allowing real-time communication between the pair.[14]

{7}Presently, a state of disorder surrounds the body of instant-messaging software.[15] Although several different programs allow users to communicate with each other, each program uses separate technology to communicate.[16] Consequently, users of one type of instant-messaging software may not communicate with those using another type because instant-messaging technology lacks a universal language.[17] In response, major instant-messaging software developers formed a collaborative effort to create technical specifications that will allow different software programs to communicate.[18]

B. The Development of Electronic File Sharing and its Effect on MP3 Technology

{8}The term "file sharing" is a broad term referring to the distribution of files to other computer users. Several means exist to distribute files to other computers, including, but not limited to, floppy disk, tape media, compact discs, and modem.[19] During the mid-1990's, enhanced technology brought about increased modem speed.[20] Although high-speed modems facilitated communication between networks of computers, communication over telephone lines remained slow due to the dramatic increase in file sizes and the limited space available on telephone lines.[21] In response to cumbersome Internet access, two technologies developed: Digital Subscriber Line ("DSL") and cable modems. These technologies provide home users access to the Internet and World Wide Web at a rate greater than 100 times the speed of today's fastest modems.[22] Furthermore, "broadband" technology, which provides a means to watch seamless audio and video content without flaws or delay, becomes more of a reality each day.[23]

{9}In 1987, a German company developed the algorithm for MPEG-1 Layer 3 ("MP3") technology, which allows digital music to be compressed into an easily transferable format.[24] In general, this technology compresses a song into a smaller file, which may be transferred in a short time period without affecting the song's quality.[25] In doing so, MP3 technology allows users to store songs on their computers in a format that uses minimal space. Furthermore, software programs that implement MP3 technology allow users to "rip" songs from compact discs to create MP3 files, which may be stored on computer hard drives or transferred for use with an MP3 player.[26] Thus, MP3 technology provided users with the ability to create, obtain, and share thousands of songs.[27] As the MP3 format gained widespread distribution and became increasingly attractive, search engines were developed to find such files. However, because MP3 files were available on a wide variety of sites with sporadic availability, users found it difficult to find songs.[28]

C. The Evolution of Napster

{10}The sporadic availability of web sites with MP3 files induced Shawn Fanning to develop a universal software program that would facilitate MP3 file distribution. Available for free download on the Internet,[29] Napster is a networking utility that improves the accessibility of MP3 files by acting like a spider web. Each user represents a separate locus point on that web. Napster represents the interconnected strands holding the spider web together. In principle, Napster is a tool establishing a network of computers for exchanging MP3 audio files.[30] Each Napster user obtains the option to share

his or her files, and the user is logged onto the Napster system once Napster engages its own servers.^[31] Upon completing the logon process, a user can search the entire Napster database directory, and in that instant, the user-defined search analyzes the entire database of users. If the user chooses to download a song, the Napster software facilitates a direct connection between each of the two computers. Napster, however, only provides a means for two computers to network together.^[32] By using a server system that maintains a directory of current users, Napster permits its users to search a constantly changing and updated directory.^[33]

{11} Since Napster's introduction, millions of people have downloaded the software, and several companies introduced other devices for downloading songs.^[34] Most programs, whose sole purpose is directed at sharing MP3 files, are similar to Napster because they act as a mediator allowing users to connect to other computers to obtain files. One such program is Gnutella, and its development has increased the uncertainty of MP3 file downloading.^[35]

{12} Unlike Napster, Gnutella does not use a central server to link users together. Instead, Gnutella creates a direct connection between the users' computers. Gnutella's structure is subtly different from Napster because users of the Gnutella network are not able to determine users that are online. This subtle difference prevents Gnutella's users from being able to immediately search for files. Instead, users must use Gnutella software to compile their own directory of servers and to link to those computers when they are online.^[36] Once the computers are connected, Gnutella acts like a daisy chain and expands its inter-connectivity by providing access to those computers connected through other users' directory lists.^[37]

III. APPLICABILITY OF THE FAIR USE DOCTRINE TO AIMSTER

A. What is the Fair Use Doctrine?

{13} The fair use doctrine is a nineteenth century legal rule with common law roots and codified in Section 107 of the Copyright Act of 1976.^[38] The Copyright Act of 1976 delineates four factors that determine whether fair use of a copyrighted work has occurred. These factors are as follows: "(1) the purpose and character of the use;" "(2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."^[39] In codifying the fair use doctrine, Congress did not intend to "change, narrow, or enlarge" the doctrine in any fashion.^[40] Instead, Congress meant only to "restate the present judicial doctrine of fair use" by codifying it statutorily.^[41] Thus, the fair use doctrine now exists as a statutory rule with common law decisions elucidating the four factors. In essence, the fair use doctrine permits reasonable copyright violations so long as a product may be "capable of substantial noninfringing uses."^[42] Since the test is one based on reasonableness, the fair use doctrine remains a test determined on a case-by-case basis.^[43]

B. Precedent Regarding Aimster

1. The Sony Betamax Case: Time Shifting as a Function of the Fair Use Doctrine

{14} The most important fair use case decided by the U.S. Supreme Court involved the concept of time shifting as a discretionary fair use.^[44] In 1983, Sony released its "Betamax" videocassette recorder,

which allowed users to time-shift programs on television. The Supreme Court, in rendering its decision, first noted that "[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."^[45] The court recognized that copyright law secures a fair return for the copyright holder's labor; however, it stated the sole interest of the United States in conferring copyright monopoly "lie[s] in the general benefits derived by the public from the labors of authors."^[46]

{15}The Court, in evaluating the newly developed Betamax, found that the machine was capable of copying an entire range of televised programs.^[47] Although the machine could be used to violate copyrights, the Court concluded that its authorized bona fide fair uses substantially outweighed its possible violations of copyright.^[48] In doing so, the Court emphasized the numerous benefits to the general public in its justification for allowing potential copyright violations facilitated by the Betamax.^[49] For example, the Court recognized time shifting as a legitimate fair use of the Sony Betamax product.^[50] The Supreme Court concluded that the legitimate fair uses of the Betamax, along with its benefits to the public, justified its distribution despite the potential for copyright violations due to its time shifting functions.

2. *Sega Enterprises Ltd. v. Accolade, Inc.*

{16}In *Sega Enterprises Ltd. v. Accolade, Inc.*,^[51] Accolade, a software development corporation, disassembled a copyrighted video game program in order to gain an understanding of the "unprotected functional elements of the program."^[52] The court applied the *Sony* rationale and emphasized that courts must "keep in mind the public policy underlying the Copyright Act" when evaluating "whether a challenged use of copyrighted material is fair."^[53] Citing *Sony Betamax*, the court concluded that the "ultimate aim is ... to stimulate artistic creativity for the *general public good*."^[54] Thus, whenever technological change renders the Copyright Act ambiguous, the court must construe the act with its ultimate aim in mind, that of providing benefit to the general public.^[55]

3. *A&M Records, Inc. v. Napster, Inc.*

{17}Is the sum of the parts greater than the whole? Clearly, the Northern District Court of California does not think so. In its decision, the district court held that: (1) the record companies who brought suit established a prima facie case of *direct copyright infringement*; (2) the record companies established substantial justification for contributory and vicarious copyright infringement claims; (3) the fair use doctrine did not cover the ability to download and upload files using the Napster service; and (4) the record companies were entitled to injunctive relief against Napster's copyright infringement.^[56] The court's opinion seemingly attempts to establish a clear and convincing standard illustrating infringing electronic and media copyright activity.

{18}The district court dismissed Napster's argument that in providing its users with the ability to download MP3 files from a host of users, Napster provides a bona fide fair use of "space-shifting."^[57] The court rejected this argument and held that "space-shifting accounts for a de minimis portion of Napster use and is not a significant part of [Napster's] business."^[58]

{19}The district court also dismissed several other uses for the Napster software that it chooses not to characterize as fair uses. For example, the Napster software acts as an MP3 media file player, allowing

users to play their own music. [59] It also provides chat room services that allow users to discuss music and MP3 files.[60] In dismissing these uses of the Napster service, the Court seems to indicate that gross copyright violations which were rampant throughout the Napster service were so substantial that legitimate fair uses would not be able to counteract the degree of these violations.

C. The Fair Use Doctrine Applied to Aimster

{20}The fair use doctrine clearly applies to Aimster's instant-messaging software. As previously stated, the four-factor test of the fair use doctrine requires consideration of the following factors: "(1) the purpose and character of the use"; "(2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." [61]

{21}Aimster's principal purpose is to combine file sharing with instant-messaging to allow users to create instant, private networks. [62] The instant-messaging function allows users to identify specific "buddies," which prevents communication with people that the user does not know or with whom the user does not wish to communicate.[63] In addition to the instant-messaging capabilities of Aimster, users also have the ability to send any type of file to any of their buddies. [64] This functionality of the software allows a user to send files in real time. Essentially, the Aimster service can act as an instant e-mail courier for any type of files including text files, images, and sounds. Through the Aimster service, a user is not able to send files to anonymous users.[65] Instead, a user is only able to send files to people who the user has incorporated into his Aimster "buddy list." [66] The functionality of the Aimster software, namely its ability to transmit files in real time, makes it difficult to monitor potential copyright violations. Aimster's inability to monitor the file distribution of its members may serve to limit its liability because vicarious liability for copyright infringement requires a showing of actual knowledge of such violations.

1. Purpose and Nature of Use

{22}Aimster was developed for two purposes: (1) to foster inter-personal communication through instant-messaging, and (2) to allow users to share certain allocated files with other user-specified buddies.[67] Previously in *A&M Records, Inc. v. Napster, Inc.*, the court concluded that "copyrighted musical compositions and sound recordings are creative in nature," and thus, fall under the protection of the Copyright Act.[68] Ultimately, the Ninth Circuit concluded that Napster infringed the record labels' copyright.[69] Consequently, some experts believe it is possible for Aimster's users to act similarly and distribute copyrighted files to other members that they have on their buddy list. For example, a user might send a copyrighted MP3 file, the type of file that is the crux of the Napster litigation. Aimster, however, is clearly distinguishable from Napster in this sense. Napster is primarily associated with the distribution of MP3 files, the vast majority of which are copyrighted.[70] Unlike Napster, Aimster provides a means of distributing files of all different types.[71] Furthermore, file distribution is not the sole goal of Aimster; Aimster was created to merge two useful technologies, instant-messaging and file sharing, in one software product.[72] Consequently, the first factor in the fair use test does not conclusively side with copyright holders. Instead, this factor may favor Aimster because its sole function is not file distribution; rather, it also seeks to foster inter-personal communication through instant messaging.

2. Nature of the Copyrighted Work

{23} Aimster's file distribution system may allow users to impermissibly distribute copyrighted files. The second factor of the fair use doctrine, "the nature of the copyrighted work," focuses on whether the particular work is "the type of material that copyright was designed to stimulate, and whether the secondary use proposed would interfere significantly with the original author's entitlements."^[73] Regarding potential copyright violations, this factor will likely favor a demonstration that Aimster should not be afforded fair use protection. Specifically, any copyrighted files distributed through the Aimster service will likely be used in the exact manner as the original author intended. For example, Aimster users will listen to any copyrighted MP3 files, just as the author intended when he produced the music. Thus, in this sense, the second factor may go against Aimster. However, the Aimster file service is not limited to the distribution of copyrighted files; in fact, the service has a copyright policy that forbids such distribution.^[74] Consequently, although the second factor may disfavor Aimster, it only does so to the extent that Aimster may facilitate the distribution of copyrighted files.

3. Amount and Substantiality of Use

{24} Aimster's file distribution methods have the ability to distribute any type of file. Hence, the Aimster software has the capability to distribute entire songs in MP3 format just as the Napster service does. However, this is where the similarity between Aimster and Napster ends. The third prong of the fair use test is that a court must evaluate "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."^[75] This prong may go against Aimster because courts have previously held that "wholesale copying of copyrighted material precludes application of the fair use doctrine."^[76] However, unlike other software programs that focus *entirely* upon file distribution, Aimster's implementation of instant-messaging and file sharing has limited wholesale copying.^[77] Unlike infringing file distribution services such as Napster, Aimster has a two-fold purpose, to foster inter-personal communication through instant-messaging and to provide the means for users to send all types of files to friends and family with whom they can also communicate.^[78] It remains to be seen whether Aimster's two-fold purposes, file sharing and inter-personal communication, can coexist in a fashion so as to limit copyright violations and maximize the services' bona fide fair uses.

4. Impact on the Market

{25} Aimster, in its present incarnation, will likely not have a significant impact upon the potential market of the record industry. Unlike services dedicated to file distribution, the Aimster interface merges instant-messaging and file sharing. The evidence from the influx of use in services such as Kazaa, MusicCity, and Grokster illustrates that users who intend to focus on acquiring MP3 files instead of focusing on inter-personal communication will likely turn to other forms of software that are more amenable to that purpose.^[79] Furthermore, since Aimster relies on its dual focus of instant-messaging and file sharing, its interface may be better suited for distributing files that tend to be smaller, such as images or documents. Larger files, such as MP3 files, might encumber the real-time capability of Aimster's instant-messaging function. Thus, it might be more suitable by analogizing Aimster to an instant-messaging service combined with e-mail technology rather than an instant-messaging service combined with Napster technology.

IV. AIMSTER AND VICARIOUS LIABILITY

A. The Digital Millennium Copyright Act of 1998

{26}The implementation of the Digital Millennium Copyright Act of 1998 ("DMCA") served to fill holes in existing copyright law and provide recording artists with the right to collect royalties for music disseminated electronically over the Internet.[80] In passing the DMCA, Congress recognized that it was not possible for an Internet Service Provider (ISP) to entirely monitor the vast content that it supported.[81] To qualify for limited liability under the provisions of the DMCA, an ISP must fulfill two requirements.[82] First, an ISP must adopt, inform its subscribers of, and reasonably implement, a termination policy for repeat copyright infringers.[83] Second, the ISP cannot interfere with "standard technical measures" designed to protect or identify copyrighted works, and should accommodate efforts aimed at the safeguarding of copyright.[84] By complying with these requirements, service providers are entitled to limited liability for copyright violations of users of their service.

{27}Even though the DMCA imposes strict liability for copyright infringement, it provides four "safe harbors" restricting the circumstances where an ISP infringes upon an artist's copyrights, thus, violating copyright law.[85] First, the DMCA limits an ISP's liability when it "merely acts as a *data conduit*, transmitting digital information from one point on a network to another at someone else's request." [86] Second, the DMCA protects "caching," when an ISP might retain a duplicate of previously requested information so that it might provide the user with quicker access.[87] Third, in instances where copyrighted material resides on an ISP's network without its knowledge, the ISP is shielded from liability if it expeditiously removes the infringing material when informed of infringement and receives no financial benefit from the existence of the infringing material.[88] Finally, the DMCA limits liability for actions "referring or linking users to a site that contains infringing material by using information location tools." [89]

B. Aimster and the DMCA

{28}To protect itself from liability, Aimster might argue that it is protected as an ISP under the DMCA.[90] The DMCA defines a service provider as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material" chosen by the user, and the ISP does not modify the material's content.[91] Aimster provides users with the ability to communicate between different parties and does not modify any content transferred between users.[92] Furthermore, when users search Gnutella for files, Aimster simply acts as the conduit allowing the user to connect to the Gnutella network.

{29}Aimster also satisfies the two-prong test set forth by Congress to qualify for the limited liability exemption under the DMCA. First, to meet the definition of service provider, an entity must adopt and reasonably implement a termination policy for repeat copyright infringers.[93] Aimster's website states that a zero-tolerance policy exists for copyright infringement.[94] Second, a service provider cannot interfere with measures designed to protect copyrighted works and should assist in efforts to safeguard copyright.[95] Aimster has not interfered with any measures designed to protect such works; further, by strictly complying with its copyright policy, Aimster assists in efforts to safeguard copyright.[96] Thus, so long as a court strictly construes the DMCA, Aimster qualifies for the conduit safe harbor and can claim an exemption from copyright liability due to its status as a conduit between copyright infringers and the third party.[97]

{30}The Ninth Circuit recently exposed Napster to vicarious liability for any copyright infringement that might result from the use of its service.[98] The court concluded that Napster was not entitled to limited liability under the DMCA.[99] Although Napster and Aimster are similar, Aimster is distinguishable for several reasons. First, Aimster maintains a policy that copyright violators will not be able to use the service.[100] Unlike Aimster, Napster did not strictly adhere to a policy that limited copyright violation.[101] Furthermore, unlike Napster, Aimster has two purposes: (1) to foster inter-personal communication through instant messaging and (2) to permit file sharing between legitimate users of the software.[102] Moreover, Aimster's networks make it virtually impossible to monitor copyright infringers due to their real time exchange capabilities.[103] Consequently, the court may be more likely to distinguish the copyright violations that occur with Aimster's services from the widespread copyright violations that occurred with Napster's service.

C. Aimster and its Incorporation of Gnutella

{31}Aimster, however, may be subject to vicarious liability due to secondary copyright infringement. The test for vicarious copyright infringement is that "even in the absence of an employer-employee relationship[,] one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." [104] As noted earlier, the Aimster service is a next-generation instant-messaging program providing the user with the ability to chat and to exchange files with specified users.[105] Furthermore, Aimster users have the opportunity to search for files on the Gnutella and America Online file sharing networks.[106] However, this capability of the Aimster service, its ability to connect with the Gnutella file sharing service, may expose Aimster to vicarious copyright liability.

{32}Any opposition to the Aimster service must prove that Aimster had the right and ability to supervise the infringing activity. In this instance, Gnutella is an amorphous, ever-changing network of computers that allows users to share all different types of files.[107] By allowing its users to link to Gnutella through its service, Aimster gives their users the ability to use this external service and, in turn, acquire materials that potentially violate copyright.[108] Although the primary purpose of the Aimster software is to provide a means of communication along with the ability to send files to specific users, the ability to acquire copyrighted files through the Gnutella network may obscure Aimster's purpose.[109] Clearly, if users of Aimster increasingly use it as a means to acquire files from Gnutella, Aimster might have the duty to remove its capability to search the Gnutella network. However, it will likely be difficult for Aimster to monitor its user's infringing activities because it relies on real time file transfer technology.[110] Since it will be difficult to monitor potential infringing activity, the Aimster service acts like a VCR because it allows users to infringe on copyright but lacks knowledge of such infringement.

{33}The second prong of vicarious liability requires the opposition to demonstrate that Aimster had a bona fide financial interest in copyright-infringing activities. This will likely be difficult to prove. The primary use of Aimster is as an instant-messaging and file sharing suite.[111] Its software is more comprehensive than a standard instant-messaging program because it allows users to transfer and share files with select users.[112] Since this is the thrust of the Aimster marketing, a plaintiff will likely have a difficult time demonstrating that Aimster has a direct financial interest in its inclusion of the Gnutella file searching with its software. However, a plaintiff might be able to contend that the initial Gnutella

software is cumbersome. Consequently, the ease of the Aimster software might provide an alternative to the Gnutella interface because more users would gravitate towards Aimster. However, in all likelihood, any plaintiff will find it difficult to demonstrate a prima facie case for vicarious copyright infringement because Aimster does not have a direct financial interest in allowing searching of the Gnutella database. Although it may not have a direct financial interest in allowing such activity, Aimster has recently implemented advertising services within its software to help offset its costs.^[113] In doing so, Aimster may have increased the likelihood that one would argue that Aimster financially benefits in allowing copyright infringement through its implementation of Gnutella file sharing.

V. SLIPPERY SLOPE

{34}The recent decision to expose Napster to vicarious liability for the copyright infringement of its users presents questions regarding the limited liability protections offered under the DMCA. In particular, services such as Aimster may now be exposed to vicarious liability due to the services they provide. Aimster, as an instant-messaging suite, must not be subject to the same vicarious liability as Napster. Unlike Napster, Aimster is not solely a file sharing utility.^[114] Instead, Aimster combines both instant-messaging, selective file sharing, and incorporates third-party file sharing network technology.^[115] In incorporating these three services, Aimster emphasizes its instant-messaging function while providing file sharing as a convenience for its users.^[116] Since its primary use is personal communication, Aimster has a substantial fair use defense.

{35}If the courts construed a service such as Aimster to violate the fair use doctrine, the courts would effectively eviscerate that doctrine. As demonstrated in this note, Aimster has substantial fair uses. In concluding that its fair uses do not substantially meet the requirements of the fair use doctrine, courts could extend copyright liability to nearly all transfers of material over the Internet. Since instant messages and file transfers on Aimster are limited in scope and analogous to e-mail, an overbroad attempt by courts to limit the Aimster service might effectively destroy the freedoms that the public has come to expect when writing e-mails or with other electronic transfers. Unlike Napster, Aimster has both a large number of substantial fair uses and is not primarily aimed at file distribution. Consequently, if a court were to conclude that the Aimster service violated the fair use doctrine, such a decision would inhibit legitimate electronic communication over the Internet.

VI. CONCLUSION

{36}The newest breed of instant-messaging software has created several questions previously unaddressed. Aimster gives users the capability to communicate and to share files with a specific and limited number of users. Instant-messaging is clearly a fair use of the Aimster software. If courts find such sharing is not a fair use, the distribution of all files on the Internet is put into question. Instead of sliding down a slippery slope, courts must respect the freedom of users to distribute legitimate files. Consequently, despite the recent decision in *A&M Records, Inc. v. Napster, Inc.*, courts will likely conclude that the sharing technology, as incorporated in Aimster, is a legitimate fair use.

ENDNOTES

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[1]. *What is Aimster?*, at <http://www.aimster.com/whatis.phtml> (last visited Oct. 16, 2001).

[2]. *Id.*

[3]. *Id.*

[4]. Aimster allows a user to search for any files shared by his or her buddies. *Id.* Aimster also permits users to access other networks, such as Scour and Gnutella. Jim Lynch, *Napster Alternatives*, at <http://www.stacks.msnbc.com/news/471197.asp> (last visited Oct. 18, 2001).

[5]. John Boreland, *Aimster Sounds Off in Napster's Wake*, at <http://news.cnet.com/news/0-1005-202-5800756> (last visited Oct. 18, 2001).

[6]. *Id.*

[7]. *Id.*

[8]. Alec Klein, *AOL Sends Mixed Signals on Instant-messaging*, WASHINGTON POST, Oct. 21, 2000, at E01.

[9]. *Id.*

[10]. The original and most popular instant-messaging program is America Online's Instant Messenger (IM) software. AOL also offers ICQ, which is an instant-messaging system. Both services allow users to communicate with other AOL customers. Other competitors to AOL include Microsoft's MSN Messenger Service, Prodigy's PIM, and Yahoo Messenger. *Id.*

[11]. Jeff Tyson, *How Instant Messaging Works*, at <http://www.howstuffworks.com/instant-messaging2.htm> (last visited Oct. 18, 2001).

[12]. *Id.*

[13]. *Id.*

[14]. *Id.*

[15]. *Id.*

[16]. The market is dominated by the instant-messaging interface put forth by America Online, which also owns ICQ. Together, both services have over 140 million registered users and control roughly 90 percent of the market. *Id.*

[17]. *IMUnified*, at, <http://www.imunified.org> (last visited Oct. 16, 2001).

[18]. The developers, who represent America Online's largest competitors, include Microsoft, Yahoo, Excite@Home, AT&T, Odigo, Prodigy Communications, and iCast and Tribal Voice. The coalition has been dubbed IMUnified. *Id.*

[19]. Beginning in the decade of the 1980's, home computer users used devices called modems that facilitate electronic communications over telephone lines. As modem use increased, many software companies set up electronic "bulletin boards" that allowed users to download updates and useful programs to supplement software. Similarly, such "bulletin boards" could be set up for the entertainment of computer users. They facilitated electronic communication between computer users and provided a reliable means for the distribution of files. *About BBS's and Computer Modems*, at <http://www.secretstuff.com/Contents/RComputerInfo/BBSs&Modems.htm> (last visited Oct. 16, 2001).

[20]. *The Acceleration of Internet Transmissions: Backbone Bandwidth*, at <http://www.zdnet.com/devhead/stories/articles/0,4413,2216104,00.html> (last visited Nov. 15, 2001).

[21]. *Id.*

[22]. *All You Ever Wanted to Know About Broadband*, at http://www.home.net/about/about_broadband.html (last visited Nov. 15, 2001).

[23]. The advent of broadband technology allows the transfer of audio and video at a nearly instant rate of speed with virtually no degradation of quality. Such audio and video quality would resemble the quality of television video. *Id.*

[24]. Marshall Brain, et al., *How MP3 Players Work*, at <http://www.howstuffworks.com/mp2-player9.htm> (last visited Oct. 19, 2001).

[25]. *Id.*

[26]. *Id.*

[27]. *Id.*

[28]. Karl Taro Greenfeld, *Meet the Napster*, TIME, October 2, 2000, at 63.

[29]. Tim Blangger, *Napster Shakes 'Em Up Computer Program Has Colleges and Music Industry In a Tizzy*, ALLENTOWN MORNING CALL, Apr. 11, 2000, at D01.

[30]. *Id.*

[31]. Jim Rossman, *You Don't Have to Stay Married to Your E-mail Identity*, THE DALLAS MORNING NEWS, June 8, 2000, at 4F.

[32]. Napster simply facilitates inter-communication between two computers. The servers employed by the Napster service do not ever acquire any data from either of the two computers. *Id.*

[33]. *Id.*

[34]. Ron Harris, *Rivals Vie to Replace Napster*, TULSA WORLD (OKLA.), July 28, 2001, at 3.

[35]. Dwight Silverman, *Napster's Fate Is in the Hands of Appellate Court*, HOUS. CHRON., July 28, 2000, available at 2000 WL 24499674.

[36]. *Id.*

[37]. Willie Jefferson Jr., THE SUN HERALD, July 22, 2000, *available at* 2000 WL 24232446.

[38]. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901); *see also* 17 U.S.C. § 107 (1994).

[39]. Section 107 of the Copyright Act of 1976 reads:

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

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. *Id.*

[40]. H.R. REP. NO. 94-1476, at 66 (1976).

[41]. *Id.*

[42]. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

[43]. *See generally Folsom*, 9 F. Cas. at 345 ("A wide interval might, of course, exist between these two extremes, calling for great caution and involving great difficulty, where the court is approaching the dividing line.").

[44]. Time shifting refers to instances where a user records a program, regardless of copyright, to view or to make use of it at a later time. *Sony*, 464 U.S. at 449-50.

[45]. *Id.* at 432 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

[46]. *Id.* (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1923)).

[47]. The court notes that the Betamax is capable of copying programs "that are uncopyrighted, those that are copyrighted but may be copied without objection from the copyright holder, and those that the copyright holder would prefer not to have copied." *Sony*, 464 at 436.

[48]. The court's decision demonstrates the acceptance of Justice Stewart's conclusion in *Twentieth Century Music Corp. v. Aiken* that in the face of technological change, courts should construe the Copyright Act with the interest of the general public in mind. *Sony*, 464 at 432 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

- [49]. *Sony*, 464 at 442-50.
- [50]. *Id.* at 449-450.
- [51]. 977 F.2d 1510 (9th Cir. 1992).
- [52]. *Id.* at 1514.
- [53]. *Id.* at 1527.
- [54]. *Id.* (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984))(emphasis added).
- [55]. *Id.*
- [56]. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp.2d 896, 900-01 (N.D. Cal. 2000) ("Napster I").
- [57]. *Id.* at 915. This argument may be analogous to the "time-shifting" concept established in the *Sony Betamax* case. *See supra* note 44 and discussion.
- [58]. In reaching to its conclusion, the court notes that it understood "space-shifting" to require a user to keep his home computer online and then download the file from it when at work or at another computer. *Id.* at 904.
- [59]. *Id.* at 905 n10.
- [60]. *Id.* at 913.
- [61]. 17 U.S.C. § 107 (1994).
- [62]. *See Aimster Press Release, Revolutionary Napster-Like Application Unveiled Features File Sharing Integrated with AOL Instant Messaging*, at <http://www.aimster.com/press/phtml> (last visited Aug. 13, 2001).
- [63]. *What is Aimster?*, *supra* note 1.
- [64]. *Id.*
- [65]. *Aimster Help*, at <http://www5.aimster.com/tutfirstlogin.phtml> (last visited Nov. 8, 2001).
- [66]. *Id.*
- [67]. *What is Aimster*, *supra* note 1.
- [68]. *Napster I*, 114 F. Supp. 2d at 913.
- [69]. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) ("*Napster II*").
- [70]. *Napster I*, 114 F. Supp.2d at 903.
- [71]. *What Is Aimster?*, *supra* note 1.

[72]. *Id.*

[73]. Rebecca Morris, *When is a CD Factory Not like a Dance Hall?: The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 CARDOZO ARTS & ENT. L.J. 257, 278 (2000).

[74]. *What Is Aimster?*, *supra* note 1.

[75]. 17 U.S.C. § 107 (1994).

[76]. *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983).

[77]. *Webnoize Estimates Nearly Two Billion Files Downloaded Using the Kazaa, MusicCity and Grokster File-Sharing Applications in October*, at <http://www.webnoize.com/item.rs?ID=14652> (last visited Nov. 8, 2001).

[78]. *What is Aimster*, *supra* note 1.

[79]. *Webnoize*, *supra* note 83.

[80]. David Balaban, *Music in the Digital Millennium: The Effects of the Digital Millennium Copyright Act of 1998*, 7 UCLA ENT. L. REV. 311, 312 (2000).

[81]. *Id.* at 318.

[82]. *Id.* at 320.

[83]. *Id.*

[84]. *Id.* at 320-21.

[85]. *Id.* at 318.

[86]. Carolyn Andrepont, *The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary*, Dec. 1998, at 10 (emphasis added).

[87]. *Id.* at 10.

[88]. *Id.* at 11.

[89]. *Id.* at 12.

[90]. As a fledgling software program, Aimster has not reported any problems with violation of copyright. However, Aimster has a termination policy for repeat copyright infringers but has noted no such infringement to date. Furthermore, Aimster has not interfered with any attempts to protect copyrighted works. Consequently, it can be assumed that Aimster has a right to claim limited liability under the DMCA if it is able to demonstrate that it is an ISP.

[91]. 17 U.S.C. § 512(k)(1)(A) (1994).

- [92]. *What is Aimster*, at <http://www.4aimster.com/copyright.phtml> (last visited Oct. 18, 2001).
- [93]. Balaban, *supra* note 81, at 320.
- [94]. *What is Aimster*, *supra* note 94.
- [95]. Balaban, *supra* note 81, at 321.
- [96]. *Aimster Copyright Notice*, at <http://www5.aimster.com/copyright.phtml> (last visited Nov. 8, 2001).
- [97]. In *Napster I*, the District Court did not take a similar constructionist approach to the DMCA. Had it taken such an interpretation, Napster would have likely been exempted from copyright infringement under the DMCA.
- [98]. *Napster II*, 239 F.3d 1004, 1024 (9th Cir. 2001).
- [99]. *Id.*
- [100]. *What is Aimster*, *supra* note 1.
- [101]. *Napster II*, 239 F.3d at 1023-34.
- [102]. *What is Aimster*, *supra* note 1.
- [103]. *See* John Boreland, *supra* note 5.
- [104]. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996) (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).
- [105]. *What is Aimster*, *supra* note 1.
- [106]. *Id.*
- [107]. Lev Grossman, *A Peer-to-Peer Primer*, TIME, Oct. 2, 2000, at 62-3.
- [108]. John Boreland, *supra* note 5.
- [109]. *Id.*
- [110]. *See* John Boreland, *supra* note 5.
- [111]. *What is Aimster*, *supra* note 1.
- [112]. *Id.*
- [113]. *Aimster Help*, at <http://www5.aimster.com/faq.phtml#a18> (last visited Nov. 8, 2001).
- [114]. *Id.*
- [115]. *Id.*

Related Browsing

- (1) <http://news.cnet.com/news/0-1005-201-5006958-0.html> Provides a news article discussing how Aimster is attempting to avoid the legal liability imposed on Napster.
- (2) http://news.bbc.co.uk/1/hi/english/sci/tech/newsid_906000/906638.stm A discussion of the emergence of Aimster and any legal consequences that stem from its use.
- (3) <http://www.mp3newswire.net/stories/2000/aimster.html> This article discusses Aimster's move to fill any vacancy left by restrictions on Napster.
- (4) <http://seattlep-i.nwsource.com/business/aims29.shtml> A discussion of the beginnings of Aimster and the procedure it uses to share files.
- (5) <http://www.wired.com/news/technology/0,1282,42105,00.html> An article discussing how Aimster is attempting to avoid liability under the Digital Millennium Copyright Act and the nuances of the program.
- (6) <http://www.mp3newswire.net/stories/2001/aimstersue.html> A news article detailing Aimster's legal action to avoid liability under the Digital Millennium Copyright Act.