Session 601

# The Digital Millennium Copyright Act and Other Hot IP Topics

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# STREAMING INTO THE FUTURE: MUSIC AND VIDEO ONLINE

**by Heather D. Rafter, William Sloan Coats, Vickie L. Feeman and John G. Given**[1]

## I. INTRODUCTION

The Internet is beginning to transform the music industry in much the same way the Internet's influence is being felt in other areas, such as the purchase of books and software. The Internet's influence on the music business is different, however, because it has the potential to change an industry that has kept control in the hands of a few record labels and sustained high profit margins for a long period of time. Until the advent of the Internet, those few companies seemed invincible. This is due in part to protection by a strong legislative scheme and statutory provisions as well as a solid, tightly-controlled method of distribution. Digital distribution, the delivery of downloaded music off of the Internet, is threatening to change this well-established system.

The battle for control within the music industry is interesting not only because it pits traditional distribution channels against an entirely new system but also because of the nature of the war itself. The forces on each side cast the current battle as somewhat of a holy war. Those in favor of digital distribution of music present the new trend as a move in favor of the artists that will open up and democratize the music industry, and thus make more music available to the public and permit a more equitable distribution of profits. The established recording industry, on the other hand, characterizes the issues entirely differently. From the perspective of the record labels, those promoting the distribution of music online are threatening to destroy the music industry, undercut the profits of all involved and promote music piracy.

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A few things are certain. First, there is a large amount of money at stake for whoever wins the current battle, whether it is the fledgling online music companies or the existing record labels. Total revenues for the music industry in the U.S. were $12.5 billion in 1997 and $12.3 billion in 1998.[2] It is anticipated that the advent of Internet music distribution, both online sales of CDs and tapes, together with the direct online distribution of music, will increase these numbers even further. Second, there is no doubt that web-based music commerce will become viable and mainstream in the near future. Third, the traditional channels of music distribution will remain strong and dominant for quite some time, in part because they will obtain control over some of the digital distribution pie. The question, then, is not whether digital distribution of music will impact the storefront model. The answer to that question is yes. Rather, the real uncertainties are: who will win the battle to control the dissemination of music online, what legal and technological forces will shape the future of music distribution, and how quickly will music proliferate and be sold legally and profitably over the Internet? [3]

The outcome of the battle for power in the music industry will no doubt be a precursor to the same struggle that will occur with the distribution of video online. Currently, the bandwidth does not exist to make direct video distribution, the downloading of video online, commercially feasible. In the next five years, however, technology will likely evolve to the point where video will also be easily distributed and downloaded from the Internet directly to a user's home. All that is required to make online video distribution a commercial reality is a cable modem, large storage capacity (on the hard drive or through another media management system), and an easy method of playing the downloaded content. Once the technology has evolved sufficiently, the

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[2] See Jupiter Communications, Music Industry and the Internet: Usage, Retail and Digital Distribution Projections (1998) (hereafter "The Jupiter Report"), at 2. On a worldwide basis, the music industry is considered to be a $40 billion industry. See Barry Evangelista, "Bay Area Firms Turn Up the Volume with MP3," San Francisco Chronicle, Jan. 11, 1999, reprinted at www.sfgate.com.

[3] For an interesting discussion of the future of music online, see the comments of Don Rose, President of RykoDisc and other music industry executives in Transcript Excerpts from Jupiter's Plug.In 98 Conference, Executive Roundtable, "New Music Meets New Technology," in the Jupiter Report, at 117-134.

downloading of digital video will offer many of the same opportunities and pose many of the same legal challenges as the distribution of music online.

## II. THE TRADITIONAL MUSIC CHANNELS

The traditional sale of music to consumers has been dominated by a small group of large record labels that sell directly to large retailers or through large distributors to a vast array of local retailers. There are five record companies – BMG Entertainment, Sony Music, Warner Music Group, EMI Recorded Music and Universal Music Group – which control about eighty percent of the popular music industry.[4] These large labels have the money and marketing capability to promote established talent and to introduce new artists to the marketplace. However, even the largest record label has practical limits on its ability to find and support new artists, with the end result that many talented musicians never get a chance to have their music published and promoted by an established record company. So-called "independent" record labels, or "Indies," have provided an alternate way for new artists to record and distribute albums. However, due to the high costs associated with promotion and distribution through traditional retail channels, only the most successful of the independent labels are able to reach large audiences and make their label commercially viable. Moreover, once a smaller record company achieves some level of success, it is often acquired by one of the large labels.

Another noteworthy fact about the traditional music industry is that the recording artist receives a relatively small percentage of revenues earned on an album. Even if an artist is one of the chosen few to get a record deal, he or she might earn less than ten percent of all net revenue generated on an album (assuming any profit is made at all). Of course, well-known bands such as U2, REM, Garth Brooks and Puff Daddy are able to achieve large profits, but that is due to their unique leverage over the record labels, combined with their substantial touring proceeds.

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[4] "Bay Area Firms Turn Up the Volume with MP3," supra, note 2.

## III. THE CHANGING FACE OF MUSIC ONLINE

In 1993, a group of college buddies founded the first high fidelity site on the World Wide Web, known as IUMA (www.iuma.com).[5] The idea underlying IUMA, and the subsequent sites that proliferated over the Internet, is to use web-technology to supply artists with a cheap and easy way to get their music heard and distributed. Unlike traditional avenues of distribution, the Internet offers a low-cost way of uploading music files and disseminating them instantaneously worldwide. Any artist can create his or her own site on IUMA by simply paying a subscription fee of $240 for one year. The site includes the capability to sell albums and other merchandise online. Equally significant from the artist's perspective, IUMA retains only 25% of the revenue generated by album sales, passing on the balance to the artist.

Today there are dozens of other online storefronts, including www.goodnoise.com, www.musicboulevard.com, www.amazon.com, www.mp3.com, www.towerrecords.com and www.cdnow.com. Similar to IUMA, those easy to access sites offer numerous advantages to users, including the ability to hear music samples, obtain information about the artist such as touring schedules and other recorded music, and instantaneously order music of the listener's choice.[6] It is precisely these advantages that guarantee that music distribution will continue to grow and increase online, just as it has to date. In 1996, for example, U.S. online sales of prerecorded music totaled $14 million. In 1998, online sales of prerecorded music are projected to total $88 million.[7] Still, the current numbers are miniscule compared to the total U.S. sales of music, according to the Recording Industry of America (RIAA.) Currently, Internet music sales account for just .03% of total revenue.[8] The expectation, though, is that the distribution and sale of music online will continue to grow and expand at a rapid rate. The Jupiter Report, for

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[5] J. Anderman, "Wired for Sound," The Boston Globe, Friday, Aug. 21, at D-1.

[6] The amount of information on each site varies and some, like www.cdnow.com and www.amazon.com, do not yet offer the ability to download digitally the product itself.

[7] Jupiter Report, at 5.

[8] P. Keegan, "Making (and selling) beautiful music on the Net," Upside, Sept. 1998, p. 83.

example, estimates that sales of prerecorded music online will reach nearly $1.4 billion, or at least 8% of all U.S. sales of music.[9]

Not every music site is dedicated to the sale of prerecorded music online. Many sites are devoted to streaming audio over the net, essentially Internet radio broadcasting (or webcasting, as it is sometimes called). Others are fan sites set up by aspiring musicians and prominent bands. It is estimated that there are over 80,000 music sites on the Internet.[10]

*A. Streaming and Digital Downloading*

The Web offers a variety of technologies for disseminating music and video online. One type of technology is *streaming media*, which is the live distribution of music or video online in which no permanent copy is made on the downloader's system. The quality of this music is lower than that on a CD. Most web sites selling music online offer a potential customer the opportunity to preview clips from an artist in real time, which is one example of audio streaming technology. See, for example, www.iuma.com, www.goodnoise.com or www.cdnow.com. Additionally, there are sites such as www.mtv.com, www.cnn.com, www.killpopradio.com and www.broadcast.com that offer examples of streaming media.

The other type of technology is known as *digital distribution*, the downloading of a complete audio content file, usually of a much higher CD quality sound. Once downloaded, the file can be stored locally (i.e. retained by the customer) and played on demand.[11] Some sites that allow digital distribution of audio content, at least of individual songs, are www.iuma.com, www.goodnoise.com, and www.mp3.com.

*B. The Controversy over MP3*

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[9] Jupiter Report, at 5.

[10] "Making (and selling) beautiful music on the Net," *supra* note 8, at 84.

[11] Digital distribution is a phrase coined in the Jupiter Report and not the only possible term to use to define the downloading of music from the Internet onto a computer hard drive. Nonetheless, both the terms "streaming media" and "digital downloading" are a good way to differentiate the difference between streaming and digital downloading.

There are several formats that are competing to become the standard for digital downloading of music. Those formats include *a2b* (www.a2bmusic.com), *realaudio* (www.realnetworks.com), *liquidaudio* (www.liquidaudio.com), and *MP3*. Of all those formats, MP3 is gaining the most popularity among consumers and causing the greatest uproar in traditional music circles and with the RIAA. MP3 stands for Motion Picture Experts Group ("MPEG") 1 layer 3, which is a method of compressing audio files into digital format that takes up only one-tenth of the computer memory used by previous technologies.[12] As an example, where it used to take ten hours to download a record album in a WAV file format, an earlier technology, with MP3 a user can now download the same amount of music in ten minutes. MP3 (as with other digital formats) also permits the downloading of near perfect digital copies of music, with no deterioration in quality.

Moreover, not only can existing songs be downloaded over the Internet using MP3 technology, they can also be sent quickly to a friend. A user only needs to pop a CD into their computer, copy a song onto their hard drive and then transmit the song over a standard Internet connection or post it to a public Usenet group site. The whole process takes about twenty minutes. Sending the same uncompressed song would take more than three hours.[13] Additionally, MP3 software applications for playing MP3 files, "ripping" audio data from commercial CDs, and encoding songs in MP3 format are available widely on the Internet free of charge.

MP3's ability to allow the quick and inexpensive distribution of near-perfect copies that occupy minimal hard drive space constitutes a threat to many in the established music industry because it poses an increased risk of music piracy. These concerns were recently heightened by

[12] See R. Harris, "New Technology Could Change the Music Industry, Consumer Habits," Associated Press, Dec. 11, 1998, downloaded from www.foxnews.com/news/wires2/1211/n_ap_1211212.sml. For further information on MP3 technology and related legal issues, see www.mp3.com/faq/.

[13] For further information, see "The Record Industry's Digital Daze," Rolling Stone, Nov. 26, 1998. Note that the scenario described above would be a violation of the copyright laws, but is nonetheless a common practice among MP3 users. Copyright issues underlying the distribution of digital audio online are discussed further in this article.

the advent in late 1998 of Diamond Multimedia's "Rio", a Walkman-like music player that permits the downloading and storage of MP3 music files on a computer chip. The Rio player can store about an hour's worth of CD-quality MP3 music and currently sells for $199.[14] Therefore, the technology has evolved to the point where CD-quality music can not only be downloaded quickly and efficiently off the Internet, but also recorded onto a portable player and transported anywhere. This evolution in technology is a major change and has caused great anxiety in the record industry. In the words of one writer:

> So far, regular use of MP3 has been limited to the kind of people likely to have the patience to do much of their music listening through a pair of computer speakers – principally hard-core hardware freaks and college students with high-bandwidth Net connections. But now, with the sexy, Walkman-esque Rio scheduled to hit stores this month at prices under $200, that could change. Plug the Rio into your computer, copy a load of MP3 files into its memory and go. It's a no-brainer for consumers and a nightmare for record executives.[15]

Despite the ability of the Rio player to be used to copy music illegally, that is not its purpose according to Diamond Multimedia, the Rio's manufacturer. According to Diamond's vice president of corporate marketing, Ken Wirt, "[w]e understand there is some pirating of music by MP3s, which we do not condone, promote or endorse."[16] Instead, Diamond Multimedia has stated that the Rio's intended purpose is a legitimate one: to permit users to acquire tunes legally from the Net or to convert music from a user's own CD collections. The record industry, however, is unpersuaded by Diamond's statements. "The Rio, to me, is like walking into a head shop and buying a bong, and it says, 'For use with tobacco products only,'"

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[14] See http://www.diamondmm.com/.

[15] Id.

[16] Id.

says Jim McDermott, vice president of new media technology at Polygram Group Distribution. "They . . . know it's going to be used for piracy."[17]

In response to the record industry's concerns over the Rio player, the RIAA, which represents the major record labels, filed suit against Diamond on October 9, 1998, alleging that the Rio player violates the Audio Home Recording Act by enabling serial copying of digital works. Diamond countersued, accusing the RIAA of conspiring to stifle the sale of MP3 music over the Internet. The Diamond Multimedia case and related statutes governing music and video distribution online are discussed below.

## IV. THE COPYRIGHT ACT

The distribution of sound recordings on the Internet is governed by the U.S. Copyright Act (Title 17 of the United States Code), as is the distribution of music through more traditional channels. Regardless whether a sound recording is streamed in real time (using compression technology such as RealAudio), downloaded for future use, arranged as a MIDI file,[18] or attached as a soundtrack to a video clip, the website owner who offers music online must obtain one or more licenses from the copyright holder. In most cases, there are multiple copyright holders for a single musical work.

### A. *The Composition/Sound Recording Dichotomy*

The seemingly simple act of offering music to consumers online is complicated by the variety of distinct ownership rights granted by the Copyright Act. Every piece of prerecorded music implicates at least two separate copyrights: one in the sound recording as it is heard and performed, and one in the musical composition that underlies the recording.[19] Obtaining a license

[17] Id.

[18] MIDI stands for Musical Instrument Digital Interface. MIDI is the standard computer format or protocol for transmitting music data electronically. MIDI permits compact storage of music, known as MIDI files, on computer disks, which can be copied or manipulated using digital audio technology. See Al Kohn & Bob Kohn, Kohn on Music Licensing 1240 (2nd ed. 1996) (hereafter "Kohn on Music Licensing"). Kohn on Music Licensing at 1093.

[19] See Al Kohn & Bob Kohn, Kohn on Music Licensing 1240 (2nd ed. Supp. 1998) (hereafter "Kohn on Music Licensing Supp"), at 10.

in the musical composition would authorize a web site owner to record her own "cover" version of a popular song, but would be insufficient to allow her to webcast the song as recorded. Webcasting a song in which the web site owner has a sound recording license, but not a license in the composition, is also an infringing action. Permission from both copyright holders is required.[20]

The dichotomy of ownership rights in copyrighted works is further complicated by the *range* of rights granted to copyright holders of both sound recordings and musical compositions. These rights include the exclusive right to publicly perform, display, reproduce in copies, distribute, publish, and transmit.[21] Rights under the Copyright Act are interpreted differently in digital audio transmissions on the Internet than in more traditional media.

B. *The Interplay Between Copyright Law And Audio on the Internet*

1. Exclusive Right of Public Performance

Owners of copyrights in musical compositions have the exclusive right to perform their work publicly. Under the Copyright Act, the right of public performance covers not only a live rendition of a composition on a stage, but the playing of the composition in any form on the Internet, radio, television, or any other medium on which sound can be heard. Playing a CD or other sound recording in the privacy of one's own home constitutes a private performance, while a radio broadcast or even a telephone "on-hold" recording is considered a public performance. Unlike a radio transmission, an Internet audio webcast may not result in the immediate performance of a musical work on the receiver's end, because the receiver may opt only to store

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[20] The U.S. Copyright Office has useful information on the distinction, for copyright purposes, between musical compositions and sound recordings and the procedures for registering both musical works and sound recordings. See U.S. Copyright Office's Circular 56a ("Distinction Between Copyright Registration of Musical Compositions and Sound Recordings"), available from the Copyright Office's web site located at: http://lcweb.loc.gov/copyright/circs. See also U.S.Copyright Office's Circular 50 ("Copyright Registration of Musical Compositions") and Circular 56 ("Copyright Registration of Sound Recordings") also available on the Copyright Office's web site, Copyright application forms and circulars are also available upon request by telephoning the Copyright Office at (202) 707-9100.

[21] Kohn on Music Licensing at 1198.

the audio data for use at a future time.[22] When the receiver of a digital transmission chooses to listen to the song at some later time, arguably only a private performance takes place, which the copyright owner has no exclusive right to control. The major performance rights societies, however, currently assert that a performance license is required regardless of whether audio transmission is played immediately or stored for later use.[23]

Unlike copyright holders in musical compositions, owners of sound recordings generally have no right to control public performance. The rationale for this disparity of treatment may be that when a sound recording is broadcast over the airwaves, the physical manifestation of the sound recording (i.e. the C.D., record, tape, etc.) itself in no way comes under the listener's control or possession.[24] Not so with digital transmissions via the Internet which, however briefly, may be captured and saved at the user's end. Perhaps in recognition of this difference, Congress enacted the Digital Performance Right in Sound Recordings Act ("DPRSA") in 1995, which amended 17 U.S.C. § 106 to grant performance rights in sound recordings for works performed by means of digital audio transmission.[25]

Not every delivery of music online is considered a performance under the act, however. Streaming broadcast transmissions, analogous to traditional radio station broadcasts, are not subject to the performance right. Subscription and on-demand transmissions (transmissions through which the recipient may dictate how and when she receives the music, as well as choose the particular content) are subject to the right.

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[22] The storage of audio is, in fact, the typical scenario. As technology progresses, real-time streaming of audio is becoming more common, but the sound quality is less than perfect over typical modem lines. Direct download is, at the moment, still the preferred method for those who value high-quality sound.

[23] See Kohn on Music Licensing, Supp., supra n. 19, at 129.

[24] See Kohn on Music Licensing, supra n. 18, at 120.

[25] The Digital Millennium Copyright Act ("DMCA") subsequently amended the DPRSA on October 12, 1998. The DMCA creates stricter procedures for licensing digital audio transmission of sound recordings. As a result of these amendments, web site owners must transmit identifying data, e.g., such as a copyright notice, along with the digital audio content. See 17 U.S.C. §§ 114(d)(2)(A, C) (1998). The DMCA also imposes other technical requirements affecting the transmission of digital images, archiving of programs, and ephemeral recordings.

2. Exclusive Right of Reproduction

The Copyright Act grants the copyright holder the exclusive right to reproduce a sound recording. A mechanical license is generally required to reproduce any prerecorded piece of music. If a sound recording is audio format only (as opposed to sound synchronized with video or film), a statutory license, that is, one that cannot be denied, is available for a set fee.[26] This is the so-called "compulsory license." The DPRSA has expanded the scope of the mechanical license to make it available for the reproduction and delivery of musical works by digital transmission.

As described above, Copyright holders in sound recordings are already entitled to performance royalties in digital audio transmissions by virtue of the DPRSA. It has yet to be determined whether this right to perform a digitally transmitted sound recording is distinct from the right to collect mechanical royalties for the creation of phonorecords by digital transmission.[27] If so, Copyright holders in sound recordings may be entitled for double royalties in some situations: one for the digital phonorecord delivery (the performance), and one for the creation of the phonorecord by digital transmission (the reproduction.)

3. Other Exclusive Rights: Right of Distribution and Right to Make Derivatives

Another exclusive right is that of the right of distribution. Both owners of musical compositions and owners of sound recording have the exclusive right to control the distribution of their works. The right of distribution under copyright law has a specific meaning, namely, the right to "to distribute. . . to the public by sale or other transfer of ownership, or by rental, lease or lending."[28] In essence, this means that copyright holders can control the commercial exploitation of their work.

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[26] 17 U.S.C. § 115a(1).

[27] See Kohn on Music Licensing Supp. at 110.

[28] 17 U.S.C. § 106(3).

One noteworthy limitation on this right is the so-called "first sale doctrine." This doctrine, codified in the Copyright Act, states that:

> Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.[29]

In terms of music on the Internet, the first sale doctrine, for example, would permit someone to buy a song from the Internet, such as a song downloaded in MP3 format, and then sell or give that same copy of the song to a friend. It would not permit, however, a person to sell or otherwise transfer possession of a song obtained unlawfully, such as a pirated version. Likewise, the first sale doctrine would not allow a person to sell or give away a reproduction of a MP3 file if that same person only paid for one copy and was keeping the original download on his or her own computer.

A copyright owner of musical compositions and sound recordings also has the exclusive right "to prepare derivative works."[30] This right is sometimes referred to as the adaptation right. The right to prepare derivative works gives the owner of a copyright the right to control the making of adaptations of works.[31] In terms of music on the Internet, the right to prepare derivative works is consistent with traditional copyright law: webcasters or web sites cannot distribute or reproduce music which is considered to infringe on the exclusive right of a copyright holder nor make adaptations of the musical composition or rearrangements of the sound recording.

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[29] 17 U.S.C. § 109(a).

[30] 17 U.S.C. § 106(2).

[31] The Copyright Act distinguishes between the exclusive rights of owners in sound recordings to prepare derivative works and other types of copyright owners. In some ways it appears more protective, giving the owner of rights in sound recordings the exclusive right to prepare a derivative work "in which the actual sounds fixed in the sound recording are rearranged, remixed or otherwise altered in sequence in quality." On the other hand, other language in the Copyright Act, 17 U.S.C. § 114(b), makes it clear that this exclusive right does not prevent the making of sound-alike recordings. See generally Kohn on Music Licensing Supp. at 237-238.

C. *Copyrights in Video, Motion Pictures, and Other Media*

Internet technology has progressed to the point where computer users may easily capture and transmit not only music, but moving images as well. Like digital audio, digital video may be streamed in real-time, or downloaded for future viewing. If music accompanies the video transmission, musical reproduction and public performance, as well as motion picture and synchronization licenses, may all be required. The display of song lyrics also requires a separate display license. While copyright holders generally have not been quick to enforce their rights in the display of song lyrics on the Internet, the Harry Fox Agency recently took legal action against the Online Guitar Archives (OLGA), a BBS service where music enthusiasts could exchange guitar tablature and lyrics to popular songs.[32]

D. *Obtaining a License*

Obtaining and enforcing the variety of licenses necessary to offer music online would be impractical, if not impossible, for both the copyright holder and the licensee if licensing was performed on a song-by-song basis and there was no established procedures for obtaining the requisite licenses. Fortunately, the process of obtaining licenses is relatively efficient and established, and most of the procedures available to the traditional media also work for music distributed over the Internet.

In order to perform musical compositions publicly (arguably required of all works transmitted over the Internet, whether streamed or downloaded), web site owners can obtain blanket performance licenses from ASCAP, BMI, or SESAC,[33] just as radio stations and music venues do. A blanket license enables a licensee to pay a periodic fee established as a percentage

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[32] See http://www.harmony-central.com/Guitar/tab.html.

[33] Virtually all performance licenses are issued by music performance rights societies. In the United States, two of the largest performance rights societies are ASCAP and BMI. A third performance rights society is SESAC. All three music publishers provide useful web sites with licensing information and rate schedules. ASCAP's site is located at www.ascap.com, BMI's site is located at www.bmi.com, and SESAC's site is located at www.sesac.com. If music is not licensed through one of these performance rights societies, it is necessary to obtain written permission to distribute or perform the music directly from the copyright holders before using the copyrighted material

of the user's revenues attributable to music from the repertory of the performance rights societies.

In addition, under many scenarios, a web site owner may be required to obtain a license to cover the public performance or reproduction of a sound recording. As part of the DPRSA, discussed previously in this Section IV, Congress amended the compulsory mechanical provision of the Copyright Act to cover "those who make phonorecords or digital phonorecord deliveries."[34] The new Act specifically defined "digital phonorecord delivery" as:

> each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.[35]

Simply put, this provision means that all licenses for the reproduction and distribution of audio only recordings are governed by the compulsory license provision of the copyright law. Thus, the web site owners must pay the statutory fee, and also the copyright owner cannot refuse to grant a license, nor may the copyright holder set a different rate.[36] For phonorecords (i.e. recordings) made and distributed after January 1, 1998, the statutory rate is 7.1 cents for songs under 5 minutes. For songs over five minutes, the rate is 1.35 cents per minute. The Harry Fox Agency administers mechanical license fees for many music publishers in the United States.[37]

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[34] See 17 U.S.C. § 115(a)(1), as amended in 1995.

[35] Id.

[36] For further discussion, see Kohn on Music Licensing Supp, at 3 – 10 and 133 – 138.

[37] The Harry Fox Agency, part of the National Music Publisher's Association, can be located at www.nmpa.org. According to Harry Fox's site, it "now represents more than 19,000 American music publishers and license a large percentage of the uses of music in the United States on records, tapes CDs and imported phonorecords." The site provides good information on mechanical license fees and the process for paying such fees.

As noted earlier in this Section, other types of licenses may be required in addition to the performance or mechanical licenses. Other licenses include synchronization licenses and radio synchronization licenses, which may be obtained from the Harry Fox Agency or other music publishers. In addition, the Recording Industry of America is one possible source of information about licenses involving sound recordings.[38] ASCAP's web site also includes a powerful search engine, known as "ACE on the Web," for locating information about the writers, publishers and performers for a wide variety of songs in ASCAP's repertoire.[39] Beyond ASCAP, BMI, SESAC, Harry Fox and the RIAA, another good source of general information on music licensing can be found in the treatise *Kohn on Music Licensing*, cited throughout this section, as well as the web site, www.kohnmusic.com. In addition, the U.S. Copyright Office can assist in searches of the Copyright Office records to find owners of rights in musical works and sound recordings. If all else fails, section 115 of the Copyright Act sets forth a procedure for providing notice when a licensee cannot identify the copyright owner of a sound recording through a search of Copyright Office records or other procedures.[40]

## V. THE AUDIO HOME RECORDING ACT

The Audio Home Recording Act of 1992 ("AHRA") added Chapter 10 to the Copyright Act to govern audio recording. Chapter 10 applies only to recording of audio works and is not intended to establish general principals applicable to other types of copyrighted works.

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[38] See www.riaa.com. The RIAA is the trade group representing most of the recording industry in the United States. The RIAA's members include over 500 record companies and 90% of "all legitimate sound recordings produced and sold in the United States." Id.

[39] See www.ascap.com.

[40] A licensee in such an instance would record with the Licensing Division of the Copyright Office a "Notice of Intention to obtain a Compulsory License for Making and Distributing Phonorecords." For additional information, see 17 U.S.C. § 115 and the Copyright Office Circular 75 (available at http://lcweb.loc.gov/copyright/circs or by calling the Copyright Office at (202) 707-9100). For further information on the services provided by the Licensing Division of the Copyright Office, call (202) 707-8150.

The AHRA resolved the longstanding debate between the music industry, consumer electronic manufacturers and consumers over the legality of home audio recording. Prior to passage of the AHRA, neither the legislature nor the courts had definitively resolved this debate. Until the advent of digital recording technology in the late 1980's, the degraded sound quality of home tapes assured a substantial market for original audio recordings. The development of digital audio tape ("DAT") technology in 1987 shifted the balance by enabling perfect fidelity copies, regardless of the generation of the copy. The pyramid effect enabled by perfect digital copying (i.e., a purchaser of a recording could make three copies and give them to three friends, who in turn could each make three copies and give them to three friends, and so on) threatened to supplant a substantial number of factory sales.

To deal with the changing environment of audio recording enabled by DAT technology, the record companies and hardware manufacturers engaged in worldwide negotiations and came to an accord on July 28, 1989. It took two more years, until June 1991, to get other factions of the record industry, such as music publishers, song writers and performing rights societies to sign on to an agreement, which was then presented to Congress. Although the bill had the support of the industry, the Copyright Office, the consumers and the administration, it took numerous hearings and revisions before Congress passed the AHRA on October 28, 1992. As enacted, the AHRA, which arguably applies to all forms of digital to digital copying, benefits all interested parties. The AHRA allows consumer electronics manufacturers to sell digital audio recorders and recording medium, and allows consumers to use the recorders for home taping. It also compensates affected parties, such as record companies, songwriters and music publishers, for revenues lost due to such home taping.

The AHRA provides manufacturers and distributors of digital or analog audio recording devices and digital or analog audio recording media immunity from copyright infringement actions.[41] 17 U.S.C. § 1008. In exchange for this immunity, the AHRA requires manufacturers

[41] The AHRA defines digital audio recording device as "any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the

and distributors to contribute royalties for all digital recording devices and recording media imported or distributed in the United States. 17 U.S.C. §§ 1003-1004. The royalties are then distributed to the recording artists, copyright owners, music publishers and music writers. 17 U.S.C. § 1006.

The AHRA also requires that digital recording devices comply with one of three copy protection provisions:

> (1) the Serial Copy Management System ("SCMS");
>
> (2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system's method of serial copying regulation and devices using the Serial Copy Management System; or
>
> (3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

17 U.S.C. §§ 1002 (a)(1-3). Failure to comply with either the royalty or copy protection requirements subjects a manufacturer or distributor to potential civil liability under the AHRA. 17 U.S.C. § 1009.

The AHRA further provides immunity from copyright infringement actions to consumers who use digital or analog recording devices or mediums to make home audio recordings. 17 U.S.C. § 1008. It thus puts to rest the debate over the legality of home recording of both analog and digital audio works.

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digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use." 17 U.S.C. § 1001(3). The AHRA sets forth two explicit exceptions to this definition. The first is for professional model products. 17 U.S.C. § 1001(3)(A). The second is for dictation machines, answering machines, and other audio recording equipment designed and marketed for the creation of sound recordings from the fixation of nonmusical sounds. 17 U.S.C. § 1001(3)(B). The AHRA further defines digital audio recording medium as "any material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device." 17 U.S.C. § 1001(4)(A).

## VI. THE DIAMOND MULTIMEDIA CASE

On October 9, 1998, the RIAA filed suit against Diamond Multimedia in the U.S. District Court for the Central District of California, alleging that its manufacture and sale of its Rio player violates the AHRA. The RIAA asserted that Diamond fails to comply with the requirements of the AHRA because its Rio player enables serial copying. The RIAA contended that the Rio player enables users to make serial copies of CDs by making a first generation copy on their hard drive and then a second generation copy to their Rio player.[42] The Rio also enables users to make second or higher generation copies of Internet MP3 files. These MP3 files may be legitimate first generation copies or may themselves be illicit serial copies.

In reply, Diamond argued that its Rio player is not covered by the AHRA. Diamond asserted that the Rio requires a personal computer to record music and thus is exempt from the AHRA.[43] Diamond argued first that the Rio is not a "digital audio recording device" because the source of the copy, the computer hard drive, is not a "digital musical recording." Section 1001(5)(B)(ii) of the AHRA excludes from the definition of "digital musical recordings" material objects "in which one or more computer programs are fixed." Diamond contended that the Rio gets the music it records from a computer hard drive, which also stores computer programs, and thus does not make a "digital audio copied recording" within the meaning of the statute. In the alternative, Diamond argued that the Rio player complies with the serial copy management system requirements of the AHRA. The Rio player has no digital output and thus prevents serial copying of files stored in the Rio or on its flash memory.[44]

Although the District Court initially granted the RIAA's application for a temporary restraining order, the Court subsequently concluded that the RIAA failed to demonstrate that

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[42] RIAA's Reply Memorandum of Points and Authorities in Support of Order to Show Cause Re Preliminary Injunction, filed October 22, 1998.

[43] Diamond Multimedia Systems' Memorandum of Points and Authorities in Opposition to Preliminary Injunction, filed October 20, 1998.

[44] Diamond has since altered its software that enables a PC to record compressed MP3 files onto a hard disc to include SCMS. AHRA Unconstitutional, Diamond Says in Countersuing RIAA, Audio Week, December 7, 1998.

Diamond's sales of the Rio player would cause it irreparable harm.[45] The Court thus refused to enter a preliminary injunction barring sale of the Rio player. On appeal, this ruling was affirmed by the Ninth Circuit.

The District Court rejected Diamond's argument that the Rio player is not covered by the AHRA and concluded that the Rio enables serial copying within the meaning of the Act.[46] However, the Court noted that adding SCMS to the Rio would be an "exercise in futility" because the copyright and generation status information is not contained in the MP3 files on the computer's hard drive.[47] Moreover, Rio has no digital output capability and does not enable further copies of information stored in its memory. Thus SCMS information cannot be sent or received between devices.[48] The Court concluded that a Rio player without SCMS is therefore functionally equivalent to a Rio player with SCMS.[49] The Court further concluded the Secretary of Commerce would likely determine that the Rio adequately prohibits unauthorized serial copying and thus that Diamond is at most violating § 1002(a) only in a technical sense – by failing to acquire a certificate from the Secretary of Commerce.[50]

On appeal, the Ninth Circuit affirmed the District Court's denial of a preliminary injunction. However, contrary to the District Court, the Ninth Circuit accepted Diamond's argument that Rio is not a "digital audio recording device" subject to the AHRA. The Ninth Circuit found that there is no basis in the plain language or the legislative history of the AHRA to interpret the term "digital musical recording" to include songs fixed on computer hard drives.[51]

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45 Recording Industry Assoc. of Am. V. Diamond Multimedia Sys. Inc., 29 F. Supp. 2d 624, 626, 633 (C.D. Calif. 1988)

46 Id. at 628-31.

47 Id. at 632

48 Id.

49 Id.

50 Id.

51 Recording Indus. Assoc. of Am. v. Diamond Multimedia Sys. Inc., 1999 U.S. App. LEXIS 13131, 14 (9th Cir. 1999).

Further, the Ninth Circuit found that Rio cannot make copies from "transmissions" of digital musical recordings, rather it can only make copies from computer hard drives.[52] Thus, because the Rio does not constitute a digital audio recording device, it is not subject to the requirements of the AHRA.

On the surface, the Ninth Circuit's decision is favorable to the online music industry. Indeed, manufacturers and distributors of technology allowing the download of music through personal computers may avoid the royalty payments and serial copy protection requirements imposed by the AHRA. However, on the other hand, these manufacturers and distributors will not enjoy the immunity from copyright infringement actions that is also provided by the AHRA. The Ninth Circuit's decision may thus open the door to actions against technologies like Rio based on direct, contributory or vicarious copyright infringement theories.

It is unlikely, however, that the decision represents decisive approval of such actions. Rather, the Ninth Circuit indicated that devices like Rio merely "space-shift" files that already reside on the user's computer. This kind of copying, the Court concluded, "is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act."[53] Space-shifting, then, is likely a fair use analogous to "time-shifting" of television programming in the home video context. See Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 455 (1984). The Ninth Circuit's suggestion of this fair use argument may indicate a ready defense to potential claims of direct, contributory or vicarious infringement.

However, while the Rio and similar devices may facilitate personal use and potentially benefit from a fair use argument, it is unclear how technological change will affect this digital music scenario. Indeed, as new devices offer flexible output functionality similar to those devices covered by the AHRA, it is likely that a "space-shifting" argument will lose some of its force, and the threat of various infringement claims will become more real. Also, the development of

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[52] Id. at 26.

[53] Id. at 21.

competing watermarking and encryption technologies to protect online content will further complicate the issues. These kinds of technological developments raise many of the same issues that were thought resolved by the AHRA. No doubt, parties on all sides of the debate will advance new legislative initiatives to clarify the open questions and provide some order in this rapidly changing context.

## VII. THE FUTURE OF AUDIO AND VIDEO CONTENT ONLINE

In light of Diamond Multimedia, it may appear that the differences in position between the recording industry and the Internet audio community are irreconcilable. The recording industry often portrays the emerging availability of audio content on the Internet as a threat to copyright protection and an invitation to piracy. Proponents of online digital audio and video transmissions frequently accuse the recording industry of stifling creativity and technological advancement, and seeking to maintain their protected position in the entertainment market.

Still there is hope that the two factions – the big record labels and the music online community – will not remain at odds indefinitely. Michael Robertson, president of MP3.com, recently reported on what he sees as an indication that the two sides are moving closer together. In December of 1998, the RIAA held the Secure Digital Music Initiative ("SDMI", known to its detractors as the Strategic Defense of The Music Industry Initiative) press conference in New York. At that conference, some record company executives downplayed piracy and instead focused on the potential for increased sales on the Internet. Robertson also saw significance in the fact that the press conference was broadcast over the Internet using the latest streaming audio and video technology.[54] Other evidence exists that most of the big labels, despite their concern over the effects of piracy, are joining the rush to open new markets online.[55]

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[54] Michael Robertson, "RIAA moves towards MP3," located at www.mp3.com/news/147.html.

[55] There is even evidence that the major record labels are considering selling MP3-formatted songs. Three companies that sell MP3-formatted songs, Audio Explosion, AudioSoft and MCY, each say they are negotiating with some of the big five record labels on the side. See Rob Kenner, "The Top 5 Countdown: Charting The

The SDMI has announced its Phase I standard (the SDMI Portable Device Specification - Part 1, Version 1.0) and is waiting to see if its new proposed limitations will be adopted by either the industry or consumers. Visit the SDMI website at www.sdmi.org for more details. During Phase I, SDMI compliant devices may accept music in all current formats, whether protected or unprotected. SDMI will also produce a more restrictive Phase II standard that is still under discussion and will not be released until the second quarter of 2000.

Moreover, various companies are hard at work finding technological solutions to protecting online content, such as through the use of watermarking and encryption technologies. Several new companies also are offering technologies specifically designed to prevent illegal copying of MP3 files. One such company is Audio Explosion (www.audioexplosion.com), which sells copyright-protected MP3-formatted songs for use with digital players such as the Rio.[56] Technology also exists to enable copyright owners to track down pirated music on the Internet through intelligent search software.[57]

It is clear that there is enough momentum to ensure that music online will continue advancing at a rapid rate.[58] It also seems equally certain that the Internet will provide an attractive vehicle for the distribution of video content, assuming that the bandwidth issues can be resolved in the not too distant future. Although there are some important hurdles left to overcome, including the need to protect the rights of copyright owners, both the online

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Recording Industry's Digital Game Plans," Wired 7.08, August 1999, at 134; Barry Evangelista, "Bay Area Firms Turn Up the Volume with MP3," San Francisco Chronicle, Jan. 11, 1999, reprinted at www.sfgate.com.

[56] Id.

[57] Once a site is located containing illegal content, that site can often be easily shut down by contacting the local Internet service provider, or "ISP." The ISP has a legal obligation under the copyright law to keep their server free of infringing materials. If an ISP fails to act, the ISP may find itself at risk for a contributory copyright infringement claim.

[58] Indeed, on the heels of the Diamond Multimedia decision, a number of MP3 playback devices have been or will soon be introduced to the market. Devices have been announced by Creative Labs (www.nomadworld.com); Pontis (www.mplayer3.com); Saehan (www.mpman.com); Samsung (yepp.co.kr); Lydstrøm (www.lydstrom.com); Indigita (www.indigita.com) and Empeg (www.empeg.com). See Jesse Freund, "The MP3 Players," Wired 7.08, August 1999, at 136.

community and the traditional labels are working to find solutions. As a practical matter, companies have just now begun to tap the potential of the Internet as a vehicle for offering low cost and efficient distribution of music and video. As the technology continues to evolve, and the legal issues get resolved, the Internet will become increasingly important as a distribution channel.

*DIGITAL MILLENNIUM COPYRIGHT ACT*

## *SEC. 202. LIMITATIONS ON LIABILITY FOR COPYRIGHT INFRINGEMENT.*

*(a) IN GENERAL- Chapter 5 of title 17, United States Code, is amended by adding after section 511 the following new section:*

***`Sec. 512. Limitations on liability relating to material online***

*`(a) TRANSITORY DIGITAL NETWORK COMMUNICATIONS- A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if--*

*`(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;*

*`(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;*

*`(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;*

*`(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and*

*`(5) the material is transmitted through the system or network without modification of its content.*

*`(b) SYSTEM CACHING-*

*`(1) LIMITATION ON LIABILITY- A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which--*

*`(A) the material is made available online by a person other than the service provider,*

*`(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person, and*

*`(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is*

*transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),*

*if the conditions set forth in paragraph (2) are met.*

*(2) CONDITIONS- The conditions referred to in paragraph (1) are that--*

*`(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);*

*`(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;*

*`(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users*

*described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology--*

*`(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;*

*`(ii) is consistent with generally accepted industry standard communications protocols; and*

*`(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;*

*`(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and*

*`(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if--*

*`(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and*

*`(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.*

*`(c) INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT DIRECTION OF USERS-*

*`(1) IN GENERAL- A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--*

*`(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;*

*`(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or*

*`(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;*

*`(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and*

*`(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.*

*`(2) DESIGNATED AGENT- The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:*

*`(A) the name, address, phone number, and electronic mail address of the agent.*

*`(B) other contact information which the Register of Copyrights may deem appropriate.*

*The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.*

*`(3) ELEMENTS OF NOTIFICATION-*

*`(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:*

*`(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.*

*`(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.*

*`(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.*

*`(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.*

*`(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.*

*`(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.*

*`(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.*

*`(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).*

*`(d) INFORMATION LOCATION TOOLS- A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider--*

*`(1)(A) does not have actual knowledge that the material or activity is infringing;*

*`(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or*

*`(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;*

*`(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and*

*`(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.*

*`(e) LIMITATION ON LIABILITY OF NONPROFIT EDUCATIONAL INSTITUTIONS- (1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if--*

*`(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;*

*`(B) the institution has not, within the preceding 3-year period, received more than 2 notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and*

*`(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.*

*`(2) INJUNCTIONS- For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.*

*`(f) MISREPRESENTATIONS- Any person who knowingly materially misrepresents under this section--*

*`(1) that material or activity is infringing, or*

*`(2) that material or activity was removed or disabled by mistake or misidentification,*

*shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.*

*`(g) REPLACEMENT OF REMOVED OR DISABLED MATERIAL AND LIMITATION ON OTHER LIABILITY-*

*`(1) NO LIABILITY FOR TAKING DOWN GENERALLY- Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.*

*`(2) EXCEPTION- Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider--*

*`(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;*

*`(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and*

*`(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who*

*submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.*

*`(3) CONTENTS OF COUNTER NOTIFICATION- To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:*

*`(A) A physical or electronic signature of the subscriber.*

*`(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.*

*`(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.*

*`(D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.*

*`(4) LIMITATION ON OTHER LIABILITY- A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).*

*`(h) SUBPOENA TO IDENTIFY INFRINGER-*

*`(1) REQUEST- A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.*

*`(2) CONTENTS OF REQUEST- The request may be made by filing with the clerk--*

*`(A) a copy of a notification described in subsection (c)(3)(A);*

*`(B) a proposed subpoena; and*

*`(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.*

*`(3) CONTENTS OF SUBPOENA- The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.*

*`(4) BASIS FOR GRANTING SUBPOENA- If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.*

*`(5) ACTIONS OF SERVICE PROVIDER RECEIVING SUBPOENA- Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.*

*`(6) RULES APPLICABLE TO SUBPOENA- Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.*

*`(i) CONDITIONS FOR ELIGIBILITY-*

*`(1) ACCOMMODATION OF TECHNOLOGY- The limitations on liability established by this section shall apply to a service provider only if the service provider--*

*`(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and*

*`(B) accommodates and does not interfere with standard technical measures.*

*`(2) DEFINITION- As used in this subsection, the term `standard technical measures' means technical measures that are used by copyright owners to identify or protect copyrighted works and--*

*`(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;*

*`(B) are available to any person on reasonable and nondiscriminatory terms; and*

*`(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.*

*`(j) INJUNCTIONS- The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:*

*`(1) SCOPE OF RELIEF- (A) With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:*

*`(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.*

*`(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.*

*`(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a*

*particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.*

*`(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:*

*`(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.*

*`(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.*

*`(2) CONSIDERATIONS- The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider--*

*`(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;*

*`(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;*

*`(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and*

*`(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.*

*`(3) NOTICE AND EX PARTE ORDERS- Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.*

*`(k) DEFINITIONS-*

*`(1) SERVICE PROVIDER- (A) As used in subsection (a), the term `service provider' means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.*

*`(B) As used in this section, other than subsection (a), the term `service provider' means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).*

*`(2) MONETARY RELIEF- As used in this section, the term `monetary relief' means damages, costs, attorneys' fees, and any other form of monetary payment.*

*`(l) OTHER DEFENSES NOT AFFECTED- The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.*

*`(m) PROTECTION OF PRIVACY- Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on--*

*`(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or*

*`(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.*

*`(n) CONSTRUCTION- Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.'.*

*(b) CONFORMING AMENDMENT- The table of sections for chapter 5 of title 17, United States Code, is amended by adding at the end the following:*

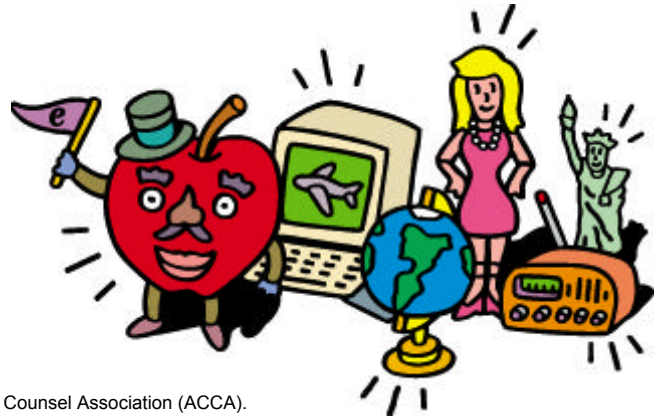
| |
|---|
| `512. Limitations on liability relating to material online.'. |

# American Corporate Counsel Association

## 1999 Annual Meeting

## November 5, 1999

## San Diego, CA



# eBay's Business

## The world's largest online person-to-person trading community

eBay™

# eBay's Mission

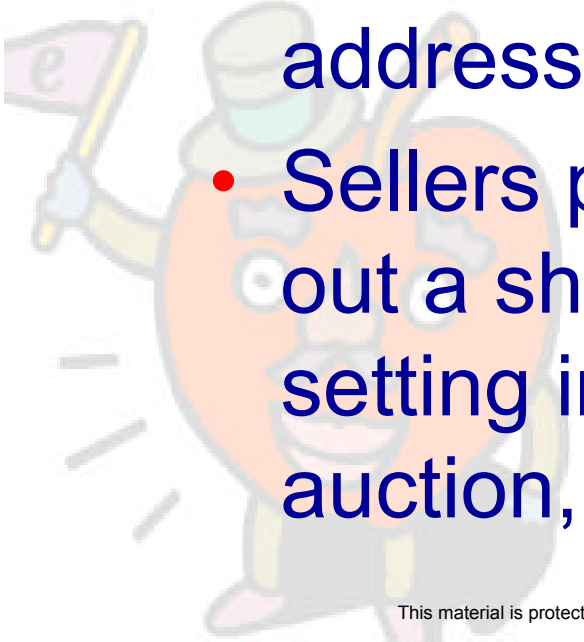
**To help people trade practically anything on earth in an auction format**

eBay™

# Welcome to the Community

# How Does eBay Work?

- Potential buyers and sellers from all over the world go to the Internet and register on eBay, providing name, address, phone number and email addresses
- Sellers place an item for sale by filling out a short form describing the item, setting initial price and length of auction, and often adding a photo



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# How Does eBay Work?

- Item is displayed on eBay for a set period of time (3-10 days). During this time, any user can bid on the item over the Internet. The current high bid and bid history is constantly updated and displayed
- Bidding is often intense (Pager notification, sniping)

# Item 122135864 - M. Jordan Memorabilia

Home Listings Buyers Sellers Search Help News/Chat Site Map

Subscribe now! Get your charter subscription to eBay magazine.

**Michael Jordan Game Used Home Jersey 1992/93**

**Item #122135864**

Sports Memorabilia:Memorabilia:Basketball

Description

Bid!

| | | | |
|---|---|---|---|
| Currently | **$8,201.00** (reserve not yet met) | First bid | **$23.00** |
| Quantity | **1** | # of bids | **35** (bid history) (with emails) |
| Time left | **4 days, 6 hours +** | Location | **Stamford, CT** |
| Started | 06/23/99, 19:52:39 PDT | (mail this auction to a friend) | |
| Ends | 07/03/99, 19:52:39 PDT | (request a gift alert) | |
| | | **Featured & Featured Category Auction** | |

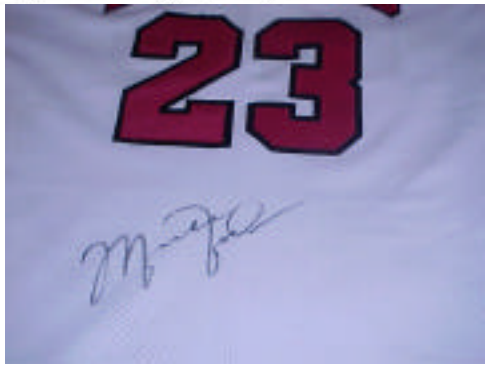
Seller **thebbckid** (230) me

(view comments in seller's Feedback Profile) (view seller's other auctions) (ask seller a question)

High bid **sdb23** (2)

Payment See item description for payment methods accepted

Shipping See item description for shipping charges

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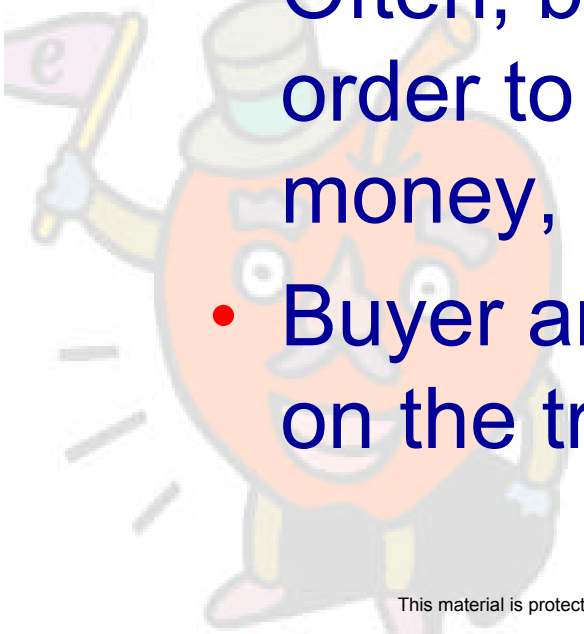
122135864.html

# How Does eBay Work?

- At designated moment, auction ends
- High bidder and seller contact each other, arrange details
- Often, buyer sends check or money order to seller. Upon receiving money, seller sends goods by mail
- Buyer and seller "grade" each other on the transaction: feedback forum



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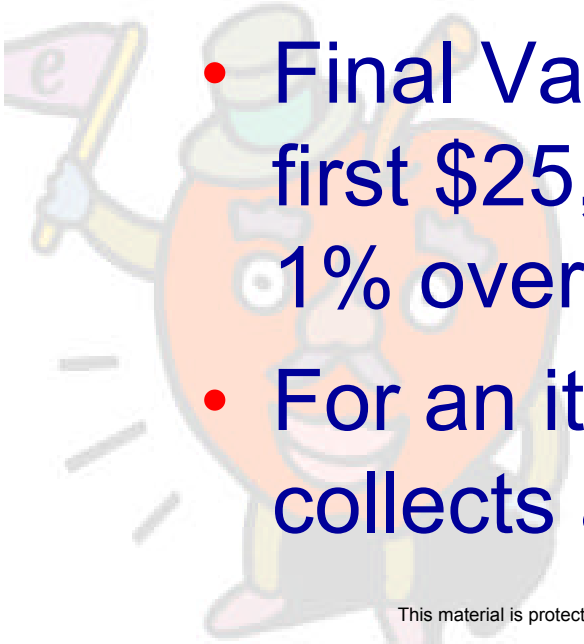
# How Does eBay Get Paid?

- Only the seller pays
- Billed to credit card OR collect checks
- Listing Fee of .25 to $2 an item
- Final Value Fee if Item Sells of 5% of first $25, 2.5% of remainder to $1000, 1% over $1,000
- For an item that sells for $100, eBay collects about $4



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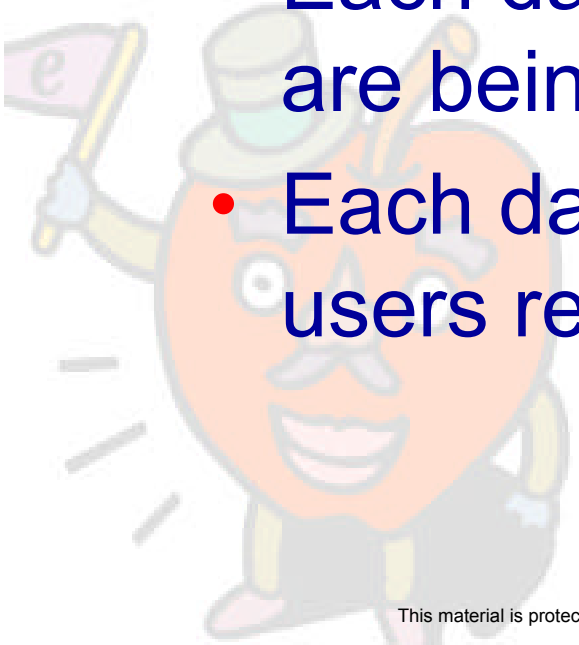
# Does it Work?

- Today, there are over 3.0 million items on the site being auctioned. Over 60% will sell
- Each day, over 350,000 new items are being added
- Each day, more than 25,000 new users register with eBay



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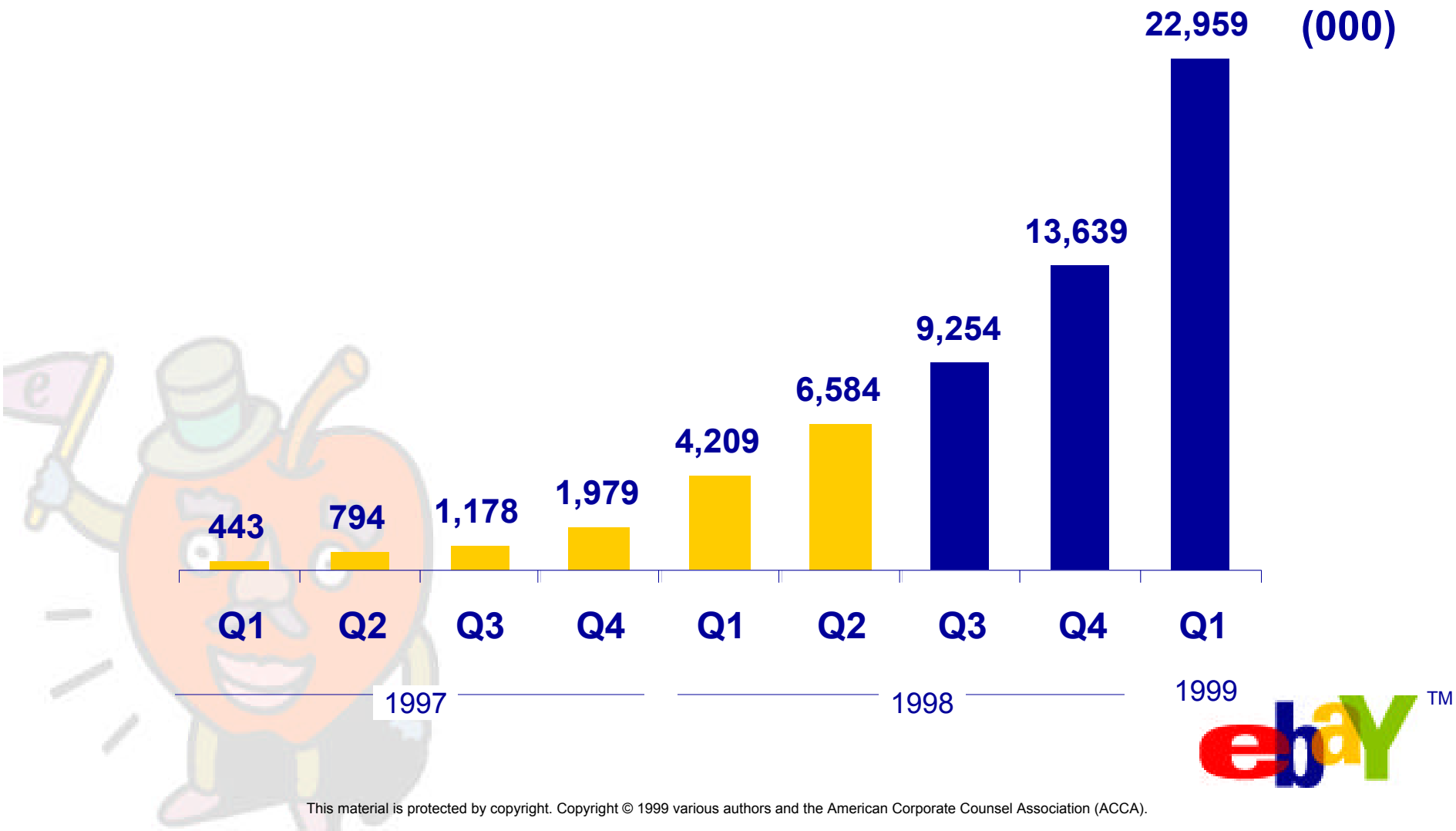
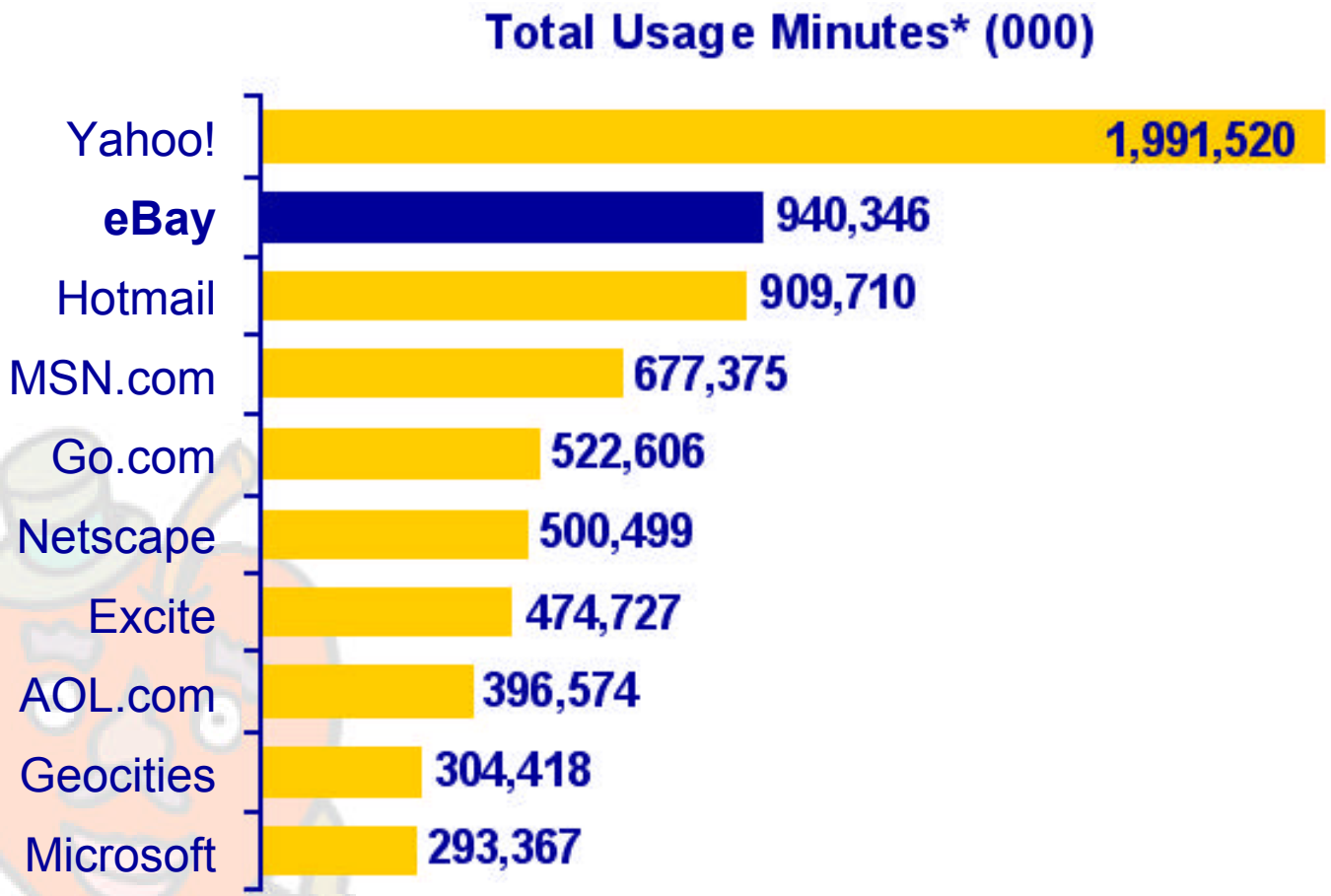
# Explosive Growth—Listed Items



# A Part of People's Lives




*Source: MediaMetrix, May 1999; includes home and work usage

# What Can you List on eBay?

- Just about anything

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# Number 1 Item--Beanie Babies

Home Listings Buyers Sellers Search Help News/Chat Site Map

Subscribe now! Get your charter subscription to eBay magazine.

**Humphrey the Camel-Retired Beanie Baby 1993**

**Item #122926127**

Toys & Beanies Plush:Beanies Plush:Ty Retired Beanies:General

Description

| | | | |
|---|---|---|---|
| Currently | $310.00 (reserve not yet met) | First bid | $200.00 |
| Quantity | 1 | # of bids | 2 (bid history) (with emails) |
| Time left | 3 days, 3 hours + | Location | AZ |
| Started | 06/25/99, 16:48:00 PDT | (mail this auction to a friend) | |
| Ends | 07/02/99, 16:48:00 PDT | (request a gift alert) | |
| | | Featured Category Auction | |

Bid!

Seller kats13 (29)

(view comments in seller's Feedback Profile) (view seller's other auctions) (ask seller a question)

High bid irishsyr@aol.com (0)

122926127.html

# Practicals




# Premiums





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# Are Infringing Goods Listed on eBay?

- eBay rules forbid the listing of pirated, counterfeit or infringing goods
- People do it anyway
- eBay is committed to making site a clean and safe place to trade

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# Practical Realities

- With over 350,000 new items each day, and 3.0 million listed items we cannot monitor all listings and successfully weed out infringing items
- eBay cannot be an "expert" in all fields, and recognize what is real and what is fake, authorized or not...

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# Digital Millennium Copyright Act

- Recognizes that ISPs are "stuck" between users and rights owners
- Created notice based regime -- burden on content owner to find and report infringing items
- Once put on notice, ISP must remove the infringing item or potentially face liability

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# Definition of "Service Provider"

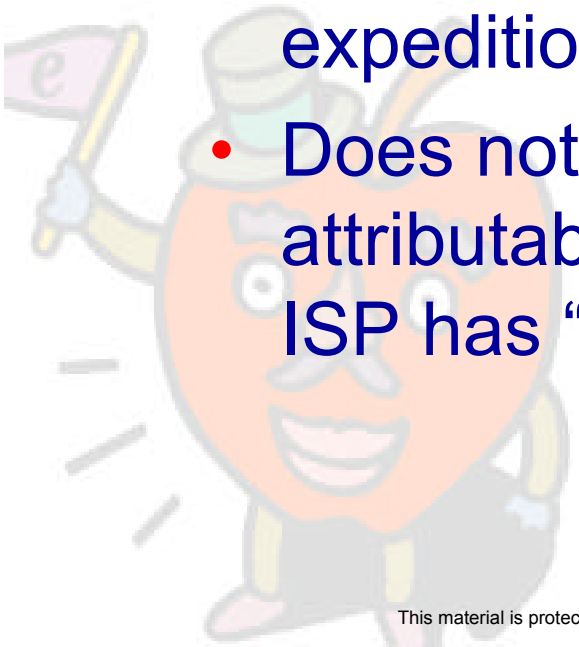
- A provider of online services or network access
- Different definition for transitory storage

# DMCA: Safe Harbor Provisions

- Service Provider not liable for monetary relief or injunction for infringement of copyright by reason of storage at direction of user of material that resides on a system or network controlled or operated by or for the service provider, if:

# DMCA: Safe Harbor Provisions

- No actual knowledge
- Not aware of facts or circumstances from which infringing activity is "apparent"
- Once obtaining knowledge, acts expeditiously to remove/disable content
- Does not receive a financial benefit directly attributable to the infringing activity, where ISP has "right" and "ability" to control

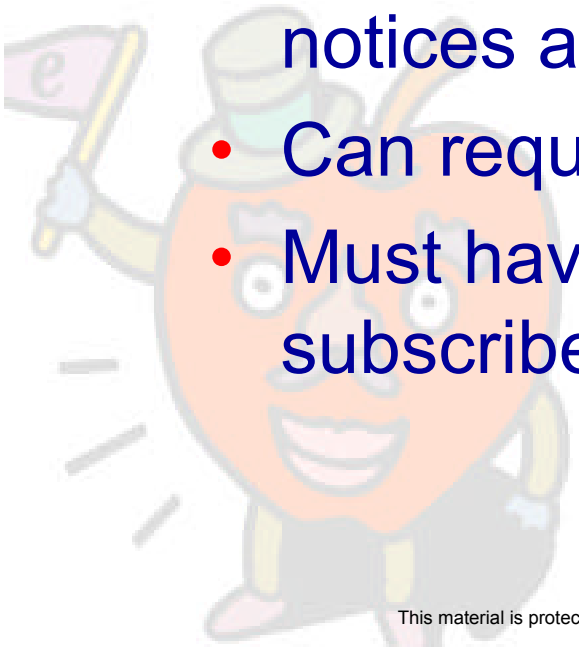


# DMCA Counter-Notice Procedures

- Entitles users to file sworn notice of non-infringement
- Material re-listed if lawsuit not filed by rights owner within 14 days (seeking court order to restrain infringing activity)
- TRO necessary?

# Other DMCA Issues

- Designated Agent Notice with Copyright Office
- Elements of proper notice defined
- Knowing material misrepresentations in notices are actionable
- Can require subpoena to identify infringer
- Must have policy for termination of subscribers who are "repeat offenders"



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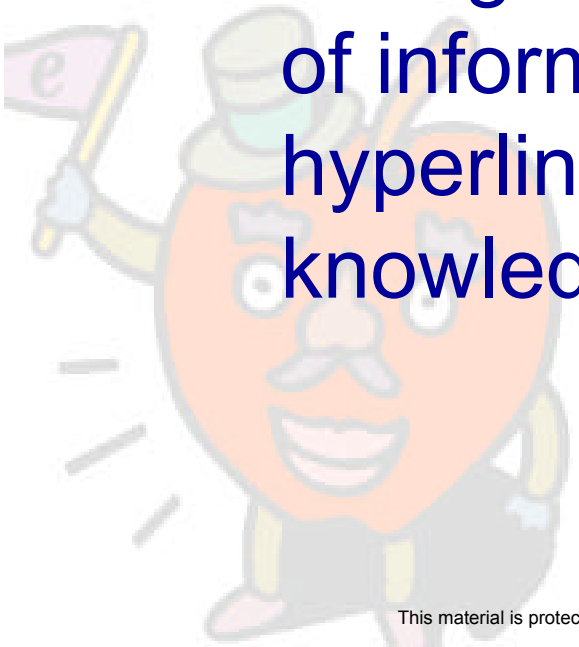
# Other DMCA Issues

- Also applies to information location tools where provider refers or links to an online location containing infringing material or activity, by use of information location tools, like hyperlinks, if no actual or constructive knowledge by ISP



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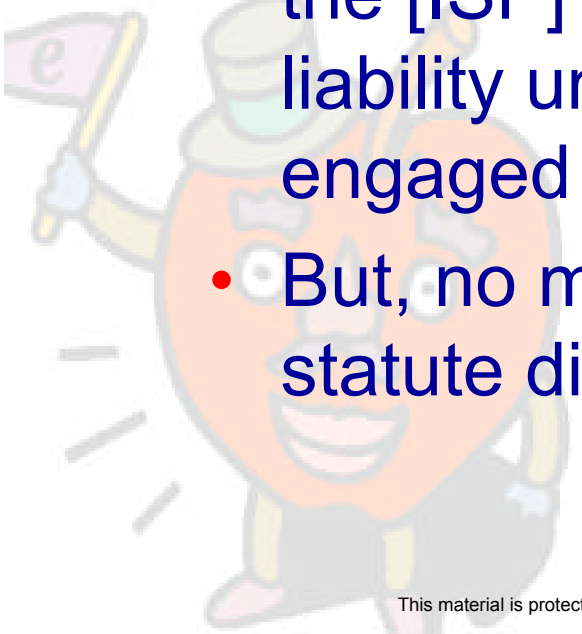
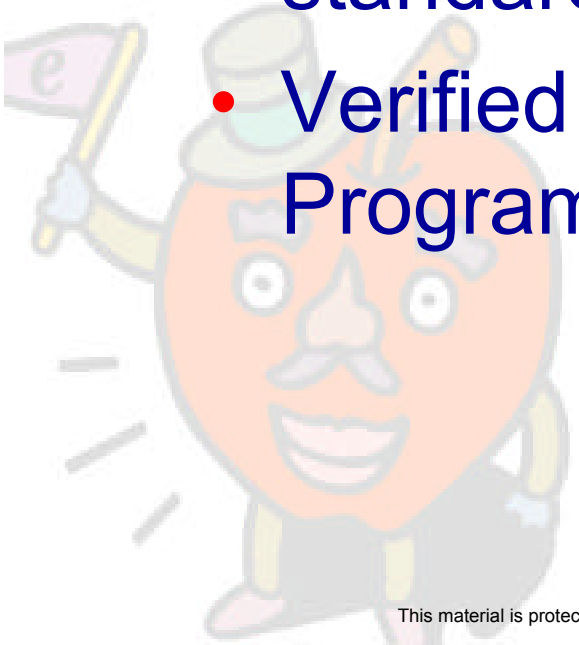
# Monitoring Discouraged

- Legislative history: "This legislation is not intended to discourage the [ISP] from monitoring its service for infringing material. Courts should not conclude that the [ISP] loses eligibility for limitations on liability under section 512 solely because it engaged in a monitoring program."
- But, no mention in statute--as written, statute discourages proactive efforts



# What Does eBay Do?

- No monitoring for infringing items
- Third party reports (non-rights holders)--"apparent" infringement standard. Four corners rule.
- Verified Rights Owner (VeRO) Program



# Trademark Procedures

- Absent any clearer guidance, we follow wisdom of DMCA procedures
- Trademark laws construed more strictly than copyright

# Good Samaritan Statute Needed

- We don't monitor site for infringing items due to concerns over potential liability
- "Good Samaritan Statute" would state monitoring won't be used to show "right and ability to control"
- Would allow/encourage selective proactive monitoring