



As Online Music Turns to Gold, Who will Control the Goldmine?

by Karen E. Daily
and John B. Farmer

In the music business, a superior distribution network can mean business victory.

In 1966, Frank Sinatra hired Jimmy Bowen, a record producer, to revitalize Sinatra's career. Sinatra had been losing ground to rising pop radio for several years. Bowen searched for the right song to modernize Sinatra and found one called "Strangers in the Night."

But before Sinatra had recorded the song, Bowen discovered that another artist, Jack Jones, had just recorded and shipped the song. Bowen didn't back down—he went into overdrive instead. Sinatra recorded the song, and Bowen cut the record immediately. Bowen gave copies of the new release and a stack of twenty-dollar bills to eight runners who Bowen had placed on standby. The runners sped to the airport and doled out twenties to friendly stewardesses, asking them to deliver the new release to record promoters in important destination cities. The promoters then delivered the tune to disc jockeys at local radio stations and arranged for prompt airplay, beating Jones' cut to the turntables. Sinatra's

recording became an instant hit, knocking a Beatles tune ("Paperback Writer") off the top of the charts. Jack Jones faded into oblivion.¹

Online Music—The Rebels Rise and Battle for Control

Until the rise of the Web, the record labels maintained control over music distribution in a way that should make OPEC jealous. The five major labels had almost all significant talent under contract. They chose what music to distribute and when. They hired freelance promoters to obtain scarce, crucial radio airplay for the songs they were pushing. They controlled distribution networks into music stores. They still do,

but such control is becoming akin to controlling the milk home-delivery business. Upstart music on the Web is taking over their market in the same way Wal-Mart drained the life from many small-town merchants—with better prices, vast selection and convenience.

Online music offers a spectrum of musical choices that didn't exist five years ago—a spectrum ranging from user passivity to total user control. At one end of the spectrum, a Web surfer can listen to non-interactive "Web radio stations," which play a stream of music just as traditional stations do. But the lack of radio spectrum scarcity and distance limitations make the number of available Web stations boundless and

allow such stations to cater to particular tastes. Want to hear only acid jazz? Try Live365.com.

In the middle of the spectrum are interactive services such as Mediamazing.com. These Web radio stations give the user input into what's played. In some instances, the user can influence the playlist of a station available to many listeners. In others, the user can create an individual Web radio broadcast and post it for others to enjoy. For those who have tired of their MP3 collections and want to be surprised, but not too surprised, this interactive zone may scratch the music itch.

At the far end of the spectrum are music download services—the late Napster and its second- and third-generation successors (Gnutella and FastTrack, respectively). These services allow the user to locate and download from a comprehensive selection of tunes spread across networks of millions of individual PCs. If you've got the time, you can find, download and play whatever you want, whenever you want.

Like other empires that have declined before them, the record labels have reacted slowly to these new competitors' threats and have concentrated on trying to unplug their new rivals over co-opting them. Of course, one rarely feels cooperative toward a competitor who builds its business by giving away your property for free.

Presently, the record labels and the music rebels are engaged in legal and technological battles that will determine the control of modern music distribution. In the Web radio area, the two sides are fighting over what constitutes "interactive" Web radio (If you become too interactive, you have no hope of staying legal.) and over what level of royalties Web radio stations should pay to copyright owners. In the music download realm, the record labels are winning the legal battles but are having a hard time stamping out the myriad of domestic and foreign-based download sites. At the same time, the record labels are attempting to gain a following for their own online music ventures but are finding it hard to peel surfers away from free, albeit illegal, alternatives.

Welcome to the online music wars.

Web Radio— What's Out There

Until RealNetworks introduced the first audio streaming software in 1995, users could obtain (low quality) music files only by downloading them into their computers, then a time-consuming process due to low bandwidth.² RealNetworks' software allowed users to listen to music while it was delivered to their computer, a process known as "streaming."³ In the years since, operating on streaming technology, upstart Web radio stations have sprouted in various forms.

Users who want to listen to music passively can tune into non-interactive Web radio stations. These stations do not allow users to influence or customize the playlist.⁴ Many conventional radio stations simulcast their programming over the Web. For example, a London radio station, JazzFM, is both a popular conventional radio station and Web radio site (www.jazzfm.com).⁵

Many Web-only stations also offer non-interactive broadcasts and often cater to narrow interests. Beethoven.com plays only mainline classical music (but not only Beethoven). You can guess what Cinemascores.com plays.

Some offer a broad menu including eccentric choices. CyberRadio2000.com offers a selection of niche genres, such as beach music (the shagging variety, not the Beach Boys kind), '70s teen idols, TV tunes and Cajun Zydeco.

Some Web radio stations permit the user to obtain a stream of music customized for his tastes, such as Mediamazing (mediamazing.com) or Yahoo!'s Launchcast (<http://launch.yahoo.com/launchcast>). With such services, the user can choose the genres of music that will be played (e.g., '80s or big band), and can influence the playlist within such genres by rating various songs and artists and even by submitting song requests. Still, the user does not control the ultimate selection and arrangement of songs.

Going even deeper into interactivity, at least one Web radio portal, Live365, provides software allowing users to create and post their own personal radio station for enjoyment by other Live365 users.⁶ Live365 claims to carry more than 40,000 personal

"stations" of amazing variety, including 76 "Goth" stations, as of this writing.

The record labels have responded to these waves of Web radio stations with late-arriving, fee-based alternatives: pressplay (a joint venture of Sony and Universal, and includes EMI music) and MusicNet (a joint venture of RealNetworks, EMI, Warner and BMG). Each service offers both music streaming and limited downloading rights. For a monthly fee of \$9.95, pressplay (pressplay.com) permits the user to stream 500 songs per month, plus more limited music download and CD burning rights. MusicNet (musicnet.com) permits users to listen to 100 streams per month (and download 100 songs) for a monthly fee of \$9.95.⁷

In addition, the Recording Industry Association of America (RIAA) signed a license with RadioMX (part of the MusicMatch online music service—either musicmatch.com or radiomx.com) authorizing RadioMX to stream without the unresolved license fee or other legal issues facing other Webcasters (as described below). RadioMX allows users to designate their favorite artists (up to 25) and receive streams of those artists' music, plus music from various preprogrammed stations, for \$39.95 a year.⁸

The Legal Battles over Webcasting

The (now shrinking) legion of Webcasters and the record labels have been fighting two major battles in the war for control over Web radio—battles over the level of license fees that Webcasters must pay to the record labels, and over what's too "interactive."

As for the fees, Webcasters must pay two, separate groups for the right to do what they do—one to the owners of the copyrights to the song as written, and the other to owners of the copyright to the particular performance of the song. For example, anyone wanting to Webcast James Taylor's recording of "You've Got a Friend" would have to pay both Carole King (the writer) and James Taylor (the performer). (Both King and Taylor certainly have assigned their copyrights to others, but don't worry about that.)

For the writer's royalty, one can purchase licenses from the two major music-licens-

ing societies—BMI and ASCAP. Doing so is easy and not expensive. Any legitimate Webcaster will have done so.

Things get hairy when trying to pay the owner of the copyright to the performance of the song. While the recording industry resisted, Congress amended our copyright

Already, in the wake the CARP ruling, some Web radio stations have reinkered their business models and now offer a pay-to-listen service, such as MediaAmazing and Listen.com, rather than the free streams they previously offered. Other Web radio stations have ceased Web operations, such as Cablemusic.com.⁹

of years without paying any royalties to music performers. Some Webcasters have become so interactive that users eventually could lose the will to buy new music at all.

File-Sharing Services

We've seen three generations of online, file-sharing services: Napster, then Gnutella, then FastTrack.

Everyone knows of the late, great Napster. Napster essentially was a centralized directory of music files located in the computers of Napster users who were connected to the Internet. Napster created software that individuals could download to read the Napster directory, to post songs to the directory and to download songs listed there. Napster didn't store the music files themselves.

When an individual chose a song from the directory for downloading, the download occurred directly between that user and the other computer where the music files existed (a "peer-to-peer" transaction). Still, making this download connection required the Napster directory to connect users.

While the record labels persuaded a federal court to unplug Napster, Napster's successors, Gnutella and FastTrack, are allowing more music and other files to be exchanged online than Napster achieved at its high point.

Like Napster, the Gnutella network enables its users to download files directly from each other. (While most folks use Gnutella to find music, it can swap many kinds of files.) Unlike Napster, no central directory exists. Instead, each user queries other computers found on the Internet for whether they have Gnutella software and whether they have files to share. This inquiry spreads in a viral manner across the Internet.

Various companies have acquired the Gnutella software and posted it for download under different names, such as Gnucleus, Bearshare, LimeWire, and now Morpheus. These systems all tap into the same network of Gnutella users.

Gnutella has unsatisfying characteristics. File searches don't reach extensively through its network, and downloads can be slow and often disconnect mid-download. The third generation—

Until the rise of the Web, the record labels maintained control over music distribution in a way that should make OPEC jealous.

laws in 1998 to force record labels to accept non-interactive Webcasting.

Congress created a "compulsory license" for these Webcasters. In essence, these Webcasters can pay a license fee to a central organization to cover all of their royalty obligations to record labels—the usual owners of copyrights to musical recordings. The record labels cannot refuse to allow these Webcasters to play their songs.

Still, will Webcasters be able to afford their victory? Because Congress didn't set the royalty rate for using the compulsory license, the record labels and Webcasters arbitrated the fee amount in the U.S. Copyright Office before a special body called the Copyright Arbitration Royalty Panel ("CARP").

On February 20 of this year, the CARP ruled that Webcasters should pay \$.0014 per song per listener. Most commentators view the rates set as more favorable to the record labels than to Webcasters. Many Webcasters claim they cannot afford to stay in business, especially because they must pay royalties retroactive to 1998 if they have been Webcasting that long.

In a surprise decision, the Librarian of Congress ruled on May 21 that the CARP recommendation "must be rejected" but didn't state why. The Webcasting community lobbied hard against the CARP-set rate, and many speculate that the Librarian of Congress will lower the rate. Yet, the rate could go up or down. The Librarian of Congress had to issue a final decision by June 20, 2002.

The second battleground is more interesting—interactivity. Here the record labels have the advantage. Congress excluded "interactive" Webcasters from its compulsory license. If a Webcaster is "interactive," the record labels will crush it, eventually, because a Webcaster cannot possibly negotiate individual licenses with the performance copyright owner of each song it wants to play. These Webcasters' only hope is to shimmy into the compulsory license's requirements. Most likely, they will fail.

Federal law defines an interactive program as one "specially created for the recipient."¹⁰ That describes exactly what Webcasters such as Yahoo!'s Launchcast do. In fact, although the U.S. Copyright Office officially ducked getting involved in this issue, it hinted that services like Launchcast have a weak legal argument. Thus, one can see how the battle for control of Web radio is playing out. From the view of the Webcasting community, the record labels are trying to have compulsory license rates set so high that no one can afford to compete with their own Webcast ventures (pressplay and MusicNet) and those with which they negotiate deals, such as RadioMX. They also want to block any competitors from offering interactive Webcasting, which should beat non-interactive Webcasting for market appeal, so that their own interactive (and fee-based) services will prevail in the marketplace.

The record labels view the battle as merely one to gain compensation for use of their intellectual property. Multitudes of Webcasters have been on the "air" and perhaps dampening CD sales for a couple

FastTrack—attempts to overcome these problems by moving back partially to a centralized system.

Presently, FastTrack is available under two brands—KaZaA and Grokster. Morpheus was part of the FastTrack network until recently. Morpheus had a dispute with FastTrack and converted to Gnutella.

FastTrack has a network of regional directories called “supernodes.” FastTrack designates some users as supernodes—regional hubs for looking for files on computers running FastTrack.

Submit a file query to the FastTrack network, and your request asks the nearest supernodes whether they have certain songs, and these supernodes, in turn, query both the computers within their domain and other supernodes. Thus, a search for a file reaches farther through the network. In addition, FastTrack software enables users to download the same file in from multiple sources and to resume failed downloads.

The Legal Battles over File-Sharing

The record companies contend that all three generations of file-swapping services are merely massive cesspools of copyright infringement. On the end-user level, they are undeniably correct.

Almost all users of such online systems search for music still under copyright and without charge. A copyright concept called “fair use” protects some copying of copyrighted material for purposes such as criticism, comment, news reporting and teaching.¹¹ No reasonable person can characterize Napster or its brethren as vehicles for fair use.

Also, the federal Audio Home Recording Act (AHRA) protects individuals from copyright infringement liability if they make limited copies, for personal use, of music they have purchased. But the AHRA does not create any right to copy music. While many otherwise law-abiding Americans download tunes with moral indifference, they are copyright infringers. The conventional wisdom has been that the music industry won't sue its potential customers, the end-users of Napster and its successors. But physical stores push

criminal prosecution of shoplifters. As CD sales continue to decline, the recording industry may get aggressive.

The record labels prefer to attack these systems at their source. The record companies argue that the file-sharing services are liable for their users' copyright infringement under two theories: contributory copyright infringement and vicarious liability. Contributory infringement requires the copyright owner to show that someone committed copyright infringement, that the defendant knew or had reason to know of the infringement and that the defendant induced, caused, or materially contributed to the infringement.¹² Vicarious liability requires the copyright owner to show the operator enjoys a financial benefit, and possesses the ability to monitor and control the activity causing the direct infringement.

The file-sharing services do not have a solid argument against either theory of liability. They easily satisfy the tests for both vicarious and contributory liability.

Using both theories, the RIAA has successfully attacked Napster. The RIAA won a preliminary injunction, which the Ninth U.S. Circuit Court of Appeals affirmed. The RIAA persuaded a federal court that Napster knew of the extensive use of Napster's network to commit copyright infringement, that it could have done something to stop it and that Napster did nothing (until it was too late) to cut off the law-breakers. This knowledge and failure to act stripped Napster of a shield, contained in the Digital Millennium Copyright Act, that protects online service providers from liability for the copyright infringement being committed by its users. While this litigation isn't over, the old Napster has almost no chance of legal validation.

Presently, the record labels and the music rebels are engaged in legal and technological battles that will determine the control of modern music distribution.

With Gnutella, it's irrelevant whether the creators of the Gnutella software are liable for vicarious or contributory copyright infringement. They have no control over the monster they unleashed. Because the

Gnutella network has no central directory, there is no central point to sue. Even if the recording industry could sue all of the sites now offering the Gnutella software for download, two new ones probably would pop up for every one dispatched. Because the Gnutella network consists of each computer running the software, this hydra won't die from lawsuits.

This leaves the recording industry two risky options. The recording industry could start suing end-users in hopes of scaring others. It could launch counter-technology to overwhelm the Gnutella network with numerous download requests, flood the network with bad files or even post harmful files to scare off users. I doubt any lawyer would recommend this route because of potential counter-suits and damage to computer systems.

Is FastTrack vulnerable to the legal attack that decked Napster?

FastTrack might duck the RIAA's punch, not because it does better under U.S. copyright law, but because it may be beyond the reach of U.S. law.

Grokster and KaZaA operate outside the U.S. Grokster is based on the island of Nevis in the West Indies. (Ironically, America's most entrepreneurial founding father, Alexander Hamilton, was born on Nevis.) KaZaA is headquartered in Australia. If the heat gets too hot at home, these networks could be based in any third-world outpost.

Nonetheless, the record companies are trying to win through U.S. litigation. The RIAA has sued Consumer Empowerment BV (the former operator of KaZaA) and Grokster Ltd. (the operator of Grokster) in

federal court in Tennessee. The labels allege that all three companies engage, facilitate and contribute to copyright infringement through their systems. In February, the three file-sharing services

filed a motion asking for summary judgment on the basis that their services were capable of significant noninfringing uses, also called the ‘Betamax’ defense to vicarious and contributory copyright infringement liability.¹³ The court refused to grant this motion on February 25, 2002, (after the court test-drove the FastTrack software) and scheduled the trial to begin on October 1, 2002.¹⁴

The Napster Counterpunch—Antitrust

Aside from the technological and jurisdictional issues the recording industry faces in trying to shut down file-sharing networks, the industry finds itself snagged by antitrust concerns. Napster filed counterclaims asserting that the record labels have engaged in copyright misuse and that they were using their collective market power to monopolize online music.¹⁵ The district court rejected the record labels’ efforts to dismiss these counterclaims on summary judgment.¹⁶

Napster’s counterclaims focus on the recording industry’s joint ventures into online music—MusicNet (owned by three major labels) and pressplay (owned by the other two). Essentially, Napster contends that the license agreement it signed with MusicNet forces it to go through MusicNet in order to license music from other sources. Napster entered into this agreement, after the RIAA shut Napster down, as part of Napster’s plans for eventual revival as a legal, fee-based service. Napster contends that MusicNet is trying to force it and all other online music ventures to work through MusicNet for licensing, and that the recording industry also is going slow with such negotiations while speeding its own online services.

Most, if not all, of Napster’s officers have resigned after acquisition talks with Bertelsmann failed. Napster reportedly will enter Chapter 7 bankruptcy soon.¹⁷ While such liquidation might moot the Napster litigation, any other music service sued by the recording industry probably will assert the antitrust and misuse claims asserted by Napster. Somewhere, someday, the recording industry will have to resolve these copyright misuse and attempted monopolization claims.

Copyright misuse occurs when a copyright owner attempts to leverage its limited

copyright monopoly into areas beyond that copyright’s coverage. The trial court in the *Napster* case has recognized that copyright misuse by the recording industry, if proven, would bar the industry from receiving damages for the time when the misuse was occurring.¹⁸ The Ninth Circuit has noted in the *Napster* litigation that a unilateral refusal of a copyright owner to grant a copyright license might be misuse, although it will presume that any refusal to deal is backed by a legitimate business reason until the converse is proven.¹⁹ In addition, the *Napster* trial court appears concerned that a provision of the Napster-MusicNet license agreement requiring Napster and others to work through the MusicNet service (whose joint venturers represent three major labels) to get to music from any other labels could be misuse.

Napster’s antitrust theory is that the five major music labels have attempted, collectively, to utilize their massive market share in the music production marketplace to monopolize the downstream and nascent online music distribution marketplace. Napster contends that they have done so by conspiring to go slow or balk at licensing their content to Napster and other Web upstarts while promoting their own music services, MusicNet and pressplay, and by seeking pricing that would keep Napster and its brethren from being competitive. Because the five primary record labels are supposed to be competitors, they have thorny collective action issues to consider when pursuing such ventures. Their antitrust attorneys are busy.

The *Napster* court gave Napster until January 10, 2003, to pursue discovery on its misuse and antitrust theories. The court also gave Napster access to broad groups of documents that the recording industry did not want discovered, including hundreds of thousands of pages gathered by the Department of Justice in its own investigation of the industry due to antitrust concerns.²⁰

The conventional wisdom has been that the Napster counterclaims are mere speed-bumps on the road to an RIAA victory. Yet, in denying the recording industry’s motion for summary judgment, this *Napster* district court stated that it didn’t view Napster’s counterclaims as “merely a fishing expedition.” The court noted the parallel investigation by the DOJ. The court stated that the music industry joint ventures,

MusicNet and pressplay “bear the indicia of entities designed to allow plaintiffs to use their copyrights and extensive market-power to dominate the market for digital music distribution.”²¹ The court added that, “[e]ven on the undeveloped record before the court, these joint ventures look bad, sound bad and smell bad.”²²

So Where Does this Long and Winding Road Go?

The battlefronts in the online music wars change daily. By the time this article is published, some of the ventures mentioned in it may have failed or changed business models. And the fight for control is moving quickly in Congress, at the Copyright Office, in the courts and on the Web—through technological moves and countermoves. Thus, any prediction of the future is nearly a wild guess.

Here are our wild guesses: First, recognize that these battles are all about money and nothing more. Napster, its file-sharing brothers and its Webcasting first cousins may have a subversive, anti-capitalistic appeal, but they exist to make money. For example, Napster raised \$2 million in seed capital from venture capitalists, and those folks bet on big returns.²³ The big-five music labels apparently want to maximize their share of the revenue from online music by giving their joint ventures, MusicNet and pressplay, advantages and by using them to maximize revenue from upstart competitors who will be forced to license music through them. The upstarts want cheaper, if not free, access to music inventory.

The recording industry appears poised to win the most valuable ground in the Webcasting battle. Even if the Webcasters can afford the royalty rates that will be set by arbitration, the law makes it difficult for these Webcasters to offer interactive services—ones where the user chooses what’s played. Because many listeners turn to online “radio” to get selection not available over the airwaves, this interactivity means a lot. Score a point for the RIAA.

Also, if the recording industry can win the battle for control of Webcasting, it could parlay that win into business victory in the music downloading battle. Both industry joint ventures, MusicNet and pressplay, offer streaming and downloading. That makes sense—listen on demand and

download what you like the most. In fact, perhaps downloading will disappear as bandwidth and mobile access to the Web increase. Why go through the hassle to find, download and organize your tunes if you can get them wirelessly anywhere at anytime? Advantage RIAA.

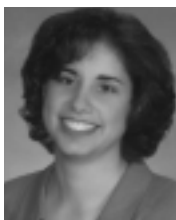
But the record labels apparently must change their ways to absolve themselves of copyright misuse and related antitrust problems. The *Napster* trial court takes these claims seriously and the Ninth Circuit appears receptive to them. Even if the *Napster* litigation peters out because of a *Napster* liquidation, the same claims will resurface in the next lawsuit. The Department of Justice is working over the same material and many in Congress are perturbed. Whether or not the misuse and antitrust claims are winners, they will not blow over soon. To move forward, the recording industry needs to get these structural issues resolved, quickly. Thus, the upstarts have forced the match back to deuce.

And what about music consumers? First, they must realize that online music cannot continue to be free. *Napster* was a blatantly illegal enterprise and rightfully shuddered. Gnutella is no more legal and only a technological challenge to the music industry, not a legal one. And one can't assume that the record labels will forever abstain from suing individuals who illegally file-swap music.

Consumers want their online music available everywhere, with a wide selection and as cheaply as possible. The battles between the upstarts and the recording industry could produce that much more quickly than would have occurred if *Napster* had continued unfettered or, alternatively, if the recording industry had pre-empted all competing online ventures. *Napster* and its ilk have stirred things up in the courts, Congress and the marketplace. They have created great demand for user-friendly online music. Antitrust and copyright misuse theories may force this market into competitiveness. We could be in for great musical experiences. ☺

Endnotes

- 1 Jimmy Bowen and Jim Jerome, *Rough Mix* 97-100 (1997).
- 2 Ernest A. Jasmin, *Webworks on the Net Broadcasting Via Personal Computer Bypasses*



Karen E. Daily graduated from James Madison University in 1997 with a Bachelor of Music. She graduated from the T.C. Williams School of Law at the University of Richmond in May 2002. While at T.C. Williams, Daily served on the *Journal of Law and Technology* as the manuscripts editor in 2001–02 and as the associate solicitations editor in 2000–01. She has served as the intellectual property intern for John Farmer since the winter of 2000–2001. She is currently studying for the July 2002 Virginia Bar and hopes to work as an intellectual property attorney, specializing in the music industry.



John B. Farmer is a co-founder and member of the Leading-Edge Law Group, P.L.C., a law firm specializing in intellectual property and e-commerce matters. He served as the 2001–02 president of the Greater Richmond Intellectual Property Law Association and is the vice chair of the board of governors of the intellectual property section of the Virginia State Bar. For over four years, Farmer has written "Leading-Edge Law," a column focusing on legal issues in the intellectual property and technology realm; presently, the *Richmond Times-Dispatch* carries this column. Farmer was graduated from the University of Virginia in 1985 and from its School of Law in 1988. He served in several judicial clerkships after graduating from law school, including for the Honorable Donald S. Russell for the United States Court of Appeals for the Fourth Circuit and for the Honorable James C. Cacheris for the United States District Court for the Eastern District of Virginia.

- 3 *Id.*
- 4 John Borland, *Putting a Price on Net Music*, July 29, 2001, available at <http://news.cnet.com/news/0-1005-202-670029.html> (last visited Sept. 25, 2001).
- 5 *Measure Cast Reports Internet Radio Listening Up 83 Percent This Year*, Apr. 22, 2002, available at <http://www.measurecast.com/news/pr/2002/pr2002415.html> (last visited Apr. 27, 2002).
- 6 Broadcast Services, (<http://store01.live.365.com/orders/orderform.live?1019935664620>) (last visited Apr. 27, 2002).
- 7 *Consumer Reports*, "Locating Music on the Internet," *Times Union*, Jan. 26, 2002, at D5.
- 8 www.radiomx.com (last visited Apr. 26, 2002).
- 9 Ryan Narain, *CARP 'Sound of Silence' Ruling Under Fire*, *E-Commerce News*, Apr. 15, 2002, available at http://www.internetnews.com/ec-news/article/0,,4_1000981,00.html (last visited Apr. 25, 2002).
- 10 17 U.S.C. § 114(j)(7) (2000).
- 11 17 U.S.C. § 107 (2000).
- 12 *A&M Records v. Napster*, 253 F.3d 1004, 1019-22 (9th Cir. 1999).
- 13 *Judge Allows Grokster Suit*, *Television Digest*, Mar. 11, 2002, available at 2002 WL 9694481. For the "Betamax" defense, see *Sony Corp. v. Universal City Studios Inc.*, 464 U.S. 417 (1984).
- 14 *Judge Allows Grokster Suit*, *Television Digest*, Mar. 11, 2002, available at 2002 WL 9694481.
- 15 Steven Bonisteel, *Napster Gets a Year to Build Antitrust Case Against Labels*, *WashingtonPost.com*, Mar. 26, 2002, available at <http://www.newsbytes.com/news/02/175483.html> (last visited May 18, 2002).
- 16 *In re Napster, Inc. Copyright Litigation*, 191 F.Supp.2d 1087 (N.D.Cal. 2002).
- 17 Matt Richtel, *Turmoil at Napster Moves the Service Closer to Bankruptcy*, *N.Y. Times on the Web*, May 15, 2002, available at <http://www.nytimes.com/2002/05/15/technology/15MUSI.html> (last visited May 19, 2002). In fact, Bertelsmann AG, a German media giant, has agreed to buy *Napster* for \$8 million. The Associated Press, *Bertelsmann to Acquire Napster*, *N.Y. Times on the Web*, May 19, 2002, available at <http://www.nytimes.com/aponline/technology/AP-Napster.html> (last visited May 19, 2002).
- 18 *Id.*
- 19 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).
- 20 *Napster Gets 10 Months to Prove Claim*, *Los Angeles Times*, Mar. 27, 2002, available at 2002 WL 2464009.
- 21 *In re Napster, Inc. Copyright Litigation*, 191 F.Supp.2d 1087, 1109 (N.D. Cal. 2002).
- 22 *Id.*
- 23 Stefanie Olsen, *Venture Capitalists Wary as Napster Lawsuits Loom*, Apr. 21, 2000, available at <http://news.com.com/2100-1023-239573.html?legacy=cnet> (last visited May 18, 2002).