NOS. 00-16401 & 00-16403

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A&M RECORDS, INC., et al.

Plaintiffs-Appellants,

v.

NAPSTER, INC.,

Defendant-Appellant.

JERRY LEIBER, individually and d/b/a JERRY LEIBER MUSIC, et al.,

Plaintiffs-Appellants,

v.

NAPSTER, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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The United States submits this brief as an *amicus curiae*, pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, to address the effect of the immunity provision of the Audio Home Recording Act of 1992, 17 U.S.C. § 1008.

STATEMENT OF INTEREST

The United States Copyright Office is charged by statute with the responsibility to provide Congress, federal agencies, and the courts with "information and assistance * * * on national and international issues relating to copyright * * * ." 17 U.S.C. § 701(b)(1)-(2). The United States Patent and Trademark Office is charged with advising the President and all federal agencies "on matters of intellectual property policy in the United States * * * ." 35 U.S.C. § 2(b). Consistent with these statutory provisions, the United States participates as an *amicus curiae* to provide courts with the views of the federal government, including the Copyright Office and the Patent and Trademark Office, regarding significant copyright and other intellectual property issues.

Although this case presents a number of important issues, one issue in particular implicates the roles of the Copyright Office and the Patent and Trademark Office - the operation and effect of the Audio Home Recording Act of 1992 ("AHRA" or "Act"). The Copyright Office plays a central role in the administration of the Act. See 17 U.S.C. §§ 1003(b)-(c), 1005, 1007, 1009(e). Moreover, the Copyright Office and the Patent and Trademark Office provided Congress with advice and assistance during the legislative deliberations leading to the enactment of the Act. For these reasons, the United States believes that the government's views regarding the scope and application of the Act's immunity provision may assist the Court in the resolution of that issue.

STATEMENT OF ISSUES

Whether Section 1008 of the Audio Home Recording Act of 1992, 17 U.S.C. § 1008, excuses Napster from liability for copyright infringement.

STATEMENT OF THE CASE

A. The Audio Home Recording Act of 1992

The Audio Home Recording Act is Congress's response to a controversy between the music industry and the consumer electronics industry regarding the introduction of digital audio recording technology into the domestic consumer market. The Act represents an effort to resolve that controversy through a carefully developed and finely balanced legislative compromise. See generally H.R. Rep. No. 873(I), 102d Cong., 2d Sess. 11-13 (1992) ("House Report"), reprinted in 1992 U.S. Code Cong. & Admin. News ("USCCAN") 3581-3583; S. Rep. No. 294, 102d Cong., 2d Sess. 30-45 (1992) ("Senate Report").

Beginning in the 1980s, consumer electronics firms began to develop tape recorders and other consumer recording devices that employ digital audio recording technology. Unlike traditional analog recording technology, which results in perceptible differences between the source material and the copy, digital recording technology permits consumers to make copies of recorded music that are identical to the original recording. Moreover, a digital copy can itself be copied without any degradation of sound quality, opening the door to so-called "serial copying" - making multiple generations of copies, each identical to the original source.

The capability of digital audio recording technology to produce perfect copies of recorded music made the technology attractive to the consumer electronics industry, which anticipated substantial consumer demand for tape recorders and other recording devices equipped with digital recording technology. However, the same capability was a source of concern to the music industry, which feared that the introduction of digital audio recording technology would lead to a vast expansion of "home taping" of copyrighted sound recordings and a corresponding loss of sales.

When digital audio recording technology first became available for the consumer market, the legality of home taping of copyrighted sound recordings was a subject of ongoing controversy between the music industry and the consumer electronics industry. See House Report at 11-12, reprinted in 1992 USCCAN at 3581-3582; Senate Report at 31. In *Sony Corp. v. Universal City Studios, Inc*., 464 U.S. 417 (1984), the Supreme Court held that the use of VCR recording technology by consumers to make home copies of broadcast programs for viewing at another time("time-shifting") constituted a non-infringing "fair use" of the copyrighted material. The consumer electronics industry, together with consumer groups, argued that *Sony* recognized a general right to engage in home taping of copyrighted materials for personal use; the music industry argued that *Sony* was decided on narrow grounds and did not give the Court's general imprimatur to home taping.

In 1990, music publishers and songwriters filed a class action suit for copyright infringement against Sony Corporation, which had begun to market DAT (Digital Audio Tape) recorders. During the course of the litigation, negotiations were undertaken to develop a general non-

judicial solution to the digital audio recording controversy. The recording industry, recording artists, songwriters, music publishers, the consumer electronics industry, and consumer groups all participated in the negotiations. Senate Report at 33 & n.16.

The negotiations culminated in 1991 in a compromise agreement among the interested parties, which was presented to Congress as the basis for legislation. The AHRA embodies the essential terms of that compromise. See House Report at 13, reprinted in 1992 USCCAN at 3583; Senate Report at 33-34. The compromise involves a basic *quid pro quo* between the music industry on the one hand and the consumer electronics industry and consumers on the other.

The AHRA provides the music industry with two principal benefits relating to digital audio recording technology. First, the Act requires manufacturers of "digital audio recording devices" to incorporate circuitry that prevents serial copying. 17 U.S.C. §§ 1001(11), 1002. Second, the Act requires manufacturers of "digital audio recording devices" and "digital audio recording media" to pay prescribed royalties into a fund that is distributed to copyright holders. *Id*. §§ 1003-1007. The royalty payment system is administered by the Copyright Office. *Id.* §§ 1005, 1007.

In exchange for these benefits, the AHRA provides manufacturers and consumers with prescribed statutory immunity from suits for copyright infringement. This immunity is contained in Section 1008 of the Act, 17 U.S.C. § 1008, which provides:

No action may be brought under this title alleging infringement of copyright [1] based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or [2] based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

By its terms, Section 1008 disallows two kinds of actions for copyright infringement. The first are actions "based on the manufacture, importation, or distribution" of the specified recording devices and recording media. The second are actions "based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings." Section 1008 bars any action for copyright infringement "under this title" - Title 17 of the United States Code - based on these activities.

B. The Present Litigation

In December 1999, the plaintiffs brought this action for copyright infringement against Napster in the Northern District of California. Napster is a centralized service that greatly simplifies and expands the ability of Internet users to copy MP3 music files from other persons' computers. It does so by providing a "virtual meeting place" where an individual user of the Napster system can find MP3 music files on the hard drive of other computers participating, at that moment, in the Napster "community." Napster then facilities the direct "peer-to-peer" copying and transfer of those files.

In general terms, the plaintiffs asserted that consumers who use Napster's Internet-based service and software to exchange sound files containing copyrighted musical recordings are engaged in

copyright infringement and that Napster is liable for contributory infringement and vicarious infringement.

Napster denied that its users are engaged in infringement or that its own actions make it liable for contributory or vicarious infringement. In addition, Napster asserted a number of affirmative defenses. Among those is a defense based on Section 1008 of the AHRA. Napster argued that the activities of its users are immunized by Section 1008 and that, as a consequence, Napster itself cannot be held liable for contributory or vicarious infringement.

On July 26, 2000, the district court issued an opinion and order granting a preliminary injunction against Napster. The district court concluded, *inter alia*, that Napster's users are engaged in extensive copyright infringement and that Napster is contributorily and vicariously liablefor their actions. The district court dismissed Section 1008 as "irrelevant to the instant action" because the plaintiffs were not seeking relief under the AHRA. ER 04266 (Opinion p. 42 n.19).

SUMMARY OF ARGUMENT

Section 1008 of the Audio Home Recording Act does not protect Napster from the plaintiffs' claims of copyright infringement. Section 1008 was adopted to address a very different phenomenon - the noncommercial consumer use of digital audio recording devices, such as DAT tape decks, to perform "home taping" of musical recordings. Napster's effort to bring itself within the ambit of Section 1008 flouts the terms of the statute and conflicts with the basic policies of the Act.

1. Section 1008 prohibits actions for copyright infringement based on: (1) the manufacture, importation, or distribution of "a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium"; or (2) "the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings." Although Napster insists that the activities of its users are protected by Section 1008, and that it therefore cannot be held accountable for contributory or vicarious infringement based on those activities, Napster's defense cannot possibly be squared with the actual terms of Section 1008.

First, it is undisputed that Napster's users are not using any "device" or "medium" specified in Section 1008, and Section 1008 applies only to consumer use of "such a device or medium." Second, when Napster's users create and store copies of music files on their computers' hard disks, they are not making "digital musical recordings or analog musical recordings" as those terms are defined in the Act. Third, Napster's users are engaged not only in copying musical recordings, but also in distributing such recordings to the public, and Section 1008 immunizes only noncommercial copying ("noncommercial use * * * for making digital musical recordings or analog musical recordings"), not public distribution. Fourth, unlike such copyright provisions as the fair use provision (17 U.S.C. § 107), Section 1008 does not designate any use of copyrighted works as non-infringing; it merely bars "action[s] * * * alleging infringement" based on such uses. Assuming *arguendo* that Napster's users are otherwise engaged in acts of copyright infringement, nothing in Section 1008 purports to render those actions non-infringing, and hence

the claims against Napster for contributory and vicarious infringement would remain unaffected even if Section 1008 did apply to Napster's users.

2. The AHRA was intended by Congress to embody a compromise between the music industry on the one hand and the consumer electronics industry and consumer groups on the other. At the heart of that compromise is a *quid pro quo*: in exchange for allowing noncommercial consumer use of digital audio recording technology (Section 1008), the music industry receives financial compensation (Sections 1003-1007) and protection against serial copying (Section 1002). Permitting Napster to shelter itself behind Section 1008 would defeat this basic statutory *quid pro quo*: Napster's users would be permitted to engage in digital copying and public distribution of copyrighted works on a scale beggaring anything Congress could have imagined when it enacted the Act, yet the music industry would receive nothing in return because the products used by Napster and its users (computers and hard drives) are unquestionably not subject to the Act's royalty and serial copying provisions.

Napster asserts that, despite the precision of the language in Section 1008, Congress actually meant to provide immunity for all noncommercial consumer copying of music in digital or analog form, whether or not the copying fits within the terms of Section 1008. Nothing in the legislative history of the Act supports that argument. And nothing in *RIAA v. Diamond Multimedia Systems Inc.*, 180 F.3d 1072 (9th Cir. 1999), the decision on which Napster places principal reliance, supports the argument either. Section 1008 was not at issue in *Diamond Multimedia*, and nowhere does the case hold that Section 1008 provides the kind of omnibus immunity for digital copying that Napster invokes here.

ARGUMENT
SECTION 1008 OF THE AUDIO HOME RECORDING ACT OF 1992 DOES NOT EXCUSE NAPSTER FROM LIABILITY FOR COPYRIGHT INFRINGEMENT

Napster asserts that Section 1008 of the Audio Home Recording Act provides its users with immunity from liability for copyright infringement and, in so doing, relieves Napster itself from any derivative liability for contributory or vicarious infringement. The district court was correct to reject that defense. Napster's invocation of Section 1008 is flatly inconsistent with the terms of the statute and the legislative policies that underlie the AHRA. Accordingly, if Napster is otherwise liable under the copyright laws, Section 1008 does not relieve Napster of liability. (1)

A. Napster's Immunity Defense Is Foreclosed by the Plain Language of Section 1008

"The 'starting point for interpreting a statute is the language of the statute itself.'" *Exxon Mobil Corp. v. United States Environmental ProtectionAgency*, 217 F.3d 1246, 1249 (9th Cir. 2000) (quoting *Consumer Product Safety Commission v.GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Napster's discussion of Section 1008 is notably selective about following this rule. Napster correctly points out that the introductory language of Section 1008 - "[n]o action may be brought *under this title* alleging infringement of copyright" - makes Section 1008 potentially applicable to any infringement action under Title 17, not just an action under the AHRA itself. But Napster conspicuously fails to address the remaining language of Section 1008, and makes no effort to explain how that language can be read to protect Napster's users or Napster itself.

Napster's reluctance to come to grips with the statutory language is understandable, because the activities of Napster's users do not even arguably come within the terms of the statute. Not only does the language of Section 1008 foreclose Napster's immunity defense, but it does so in four separate and independent ways. Napster's argument thus depends on a wholesale disregard of what Section 1008 actually says.

1. Napster's Users Are Not Using Any of the "Devices" or "Media" Covered by Section 1008

Section 1008 identifies four specific kinds of products whose manufacture, distribution, and noncommercial use Congress wished to shield from actions for copyright infringement. Those products are "[1] a digital audio recording device, [2] a digital audio recording medium, [3] an analog recording device, or [4] an analog recording medium." 17 U.S.C. § 1008. Section 1008 prohibits actions for copyright infringement based on "the manufacture, importation, or distribution" of these four types of devices and media. Section 1008 also prohibits actions for copyright infringement based on "the noncommercial use by a consumer of such a device or medium" for making digital or analog musical recordings.

Nothing in the language of Section 1008 purports to grant manufacturers, distributors, or consumers any immunity with respect to products *other* than the devices and media specified in Section 1008 itself. To the contrary, if an action for infringement does not involve the specified devices or media, it falls outside the scope of Section 1008 altogether. By its terms, Section 1008 protects consumers only from infringement actions that are based on "noncommercial use * * * of *such a device or medium*" (emphasis added). If an infringement action rests on consumer use of other products, Section 1008 on its face has no applicability to such an action.

In this case, the plaintiffs' copyright claims are not based on the use of any of the devices or media covered by the terms of Section 1008. Napster's users exchange music by using personal computers to locate and transfer files from one computer hard disk to another. Neither a personal computer nor its hard disk constitutes "a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium." Napster itself does not suggest otherwise.

The terms "digital audio recording device" and "digital audio recording medium" are specifically defined in the Act. A "digital audio recording device" is defined, with exceptions not relevant here, as any machine or device "the 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) (emphasis added). A "digital audio recording medium" is defined (again with inapplicable exceptions) as "any material object * * * 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." *Id.* § 1001(4)(A) (emphasis added).

This Court has already held that the statutory definition of "digital audio recording device" does not reach personal computers and their hard drives. *RIAA v.Diamond Multimedia Systems Inc.*, 180 F.3d 1072, 1078 (9th Cir. 1999). Although personal computers are "capable of" making "digital audio copied recordings," neither they nor their hard drives are "designed or marketed

for the primary purpose of" making such recordings. *Ibid*. For similar reasons, hard drives fall outside the statutory definition of "digital audio recording medium," since they are not "primarily marketed or most commonly used * * * for the purpose of" making such recordings.

Unlike "digital audio recording device" and "digital audio recording medium," the terms "analog recording device" and "analog recording medium" are not expressly defined in the Act. Congress presumably had in mind the analog counterparts to digital audio recording devices and media - for example, traditional analog tape decks and analog recording tapes. Whatever the precise scope of these terms, however, they cannot encompass personal computers and their hard drives, because computers process and store information in digital rather than analog form. Thus, Napster users are not even arguably using any of the devices and media referred to in Section 1008.

2. Napster's Users Are Not Making "Digital Musical Recordings" Or "Analog Musical Recordings"

Section 1008 protects the noncommercial consumer use of digital and analog recording devices and media for making "digital musical recordings or analog musical recordings." 17 U.S.C. § 1008. Even if Napster's users were using the specified devices or media, they are not making "digital musical recordings" or "analog musical recordings." Their activities fall outside the scope of Section 1008 for that reason as well.

The Act defines a "digital musical recording" as "a material object * * * in which are fixed, in a digital recording format, *only* sounds, and material, statements, or instructions incidental to those fixed sounds, if any * * * ." 17 U.S.C. § 1001(5)(A)(i) (emphasis added). The definition goes on to exclude, among other things, "a material object * * * in which one or more computer programs are fixed * * * ." *Id.* § 1001(5)(B)(ii).

Napster's users copy music files to their computers' hard drives. Hard drives store data of all kinds, from word processing files to multimedia files, and they ordinarily store computer programs as well. As a result, hard drives fall outside the statutory definition of "digital musical recording" in two respects: first, they are not objects in which "only sounds" are "fixed," and second, they are objects in which "one or more computer programs are fixed." See *Diamond Multimedia*, 180 F.3d at 1076 ("a hard drive is a material object in which one or more programs are fixed; thus, a hard drive is excluded from the definition of digital musical recordings").

Unlike "digital musical recording," "analog musical recording" is not a defined term under the Act. However, just as a computer's hard drive cannot be an "analog recording medium" (see p. 15 *supra*), neither can it be (or be used to store) an "analog musical recording," because hard drives store data in digital rather than analog form. Thus, Napster's users cannot be claimed to be making either "digital musical recordings" or "analog musical recordings" - and if a consumer is not making a digital or analog musical recording, the terms of Section 1008 do not provide him with any immunity.

3. Section 1008 Provides Immunity Only for Noncommercial Copying, Not for Public Distribution

The Copyright Act grants the owner of a copyright a number of distinct legal rights. See 17 U.S.C. § 106(1)-(5). The most widely known right is the right of *reproduction* - the "exclusive right * * * to reproduce the copyrighted work in copies or phonorecords." Id. § 106(1). However, the Copyright Act also grants the copyright holder a separate and distinct right of *public distribution* - the "exclusive right * * * to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." *Id*. § 106(3).

The plaintiffs assert not only infringements on the right of reproduction, but also infringements on the right of public distribution. In the proceedings below, Napster stated that it has at least 20 million users, all of whom are able to use Napster's service to access and download music files containing copyrighted sound recordings. When a Napster user makes the music files on his or her hard drive available for downloading by other Napster users, he or she is distributing the files to the public at large. *Cf.Michaels v.Internet Entertainment Group, Inc*., 5 F. Supp. 2d 823, 830-31 (C.D. Cal.1998); *Playboy Enterprises, Inc. v. Webbworld, Inc*., 991 F. Supp. 543, 551 (N.D. Tex. 1997), *aff'd mem.*, 168 F.3d 486 (5th Cir. 1999); *Marobie-Fl, Inc. v. Nat'l Ass'n of Fire and Equip. Distributors and Northwest Nexus, Inc*., 983 F. Supp. 1167, 1173 (N.D. Ill. 1997).

To the extent that Napster users are engaged in the distribution of copyrighted works to the public at large, such activity falls outside the scope of Section 1008. The language of Section 1008 is directed at uses that infringe on the right of reproduction, not at uses that infringe on the right of public distribution. By its terms, Section 1008 only bars infringement actions "based on the noncommercial use" of the specified products "for making digital musical recordings or analog musical recordings" - in other words, for making copies of the music. Section 1008 makes no reference, and provides no possible defense, to infringement claims based on the public distribution of copied works. Thus, even if it were proper to treat the use of Napster's service for the public dissemination of copyrighted music as a "noncommercial" consumer use, which is far from clear, it is not the use at which the terms of Section 1008 are directed - the "making [of] digital musical recordings or analog musical recordings." (2)

4. Section 1008 Does Not Transform Infringing Consumer Uses Into Non-Infringing Ones

As the foregoing discussion shows, the language of Section 1008 cannot be read to encompass the activities of Napster's users. But even if Section 1008 did apply to Napster's users, it would not provide Napster itself with a defense to liability for contributory or vicarious infringement. That is because the terms of Section 1008 address only whether consumers can be sued for infringement; nothing in Section 1008 addresses or changes whether they are engaged in infringement.

When Congress has chosen to make particular uses of copyrighted works non-infringing, it traditionally has said so expressly. For example, the fair use provision of the Copyright Act provides that "the fair use of a copyrighted work * * * is not an *infringement of copyright*." 17 U.S.C. § 107 (emphasis added). Congress has spoken with equal clarity regarding other uses. See, e.g., *id*. § 108 ("it is not an infringement of copyright" for library or archive to reproduce single copies of works under specified conditions); *id*. § 110 (specified performances and displays of works "are not infringements of copyright"); *id*. § 117 ("it is not an infringement" for

owner of copy of computer program to make an additional copy for, *inter alia*, archival purposes).

In contrast, Section 1008 of the AHRA conspicuously does not say that the activities it describes "are not an infringement of copyright." Instead, Section 1008 provides only that "[n]o action may be brought under this title alleging infringement of copyright" based on such activities. The legislative record indicates that this language reflects a deliberate decision by Congress to relieve consumers from the threat of copyright liability *without* altering the underlying contours of the copyright laws or resolving the legal debate over the legality of home taping. In the words of the Senate Report:

> [S]ection 1002 [now Section 1008] provides only that certain copyright infringement actions are precluded. *The section does not purport to resolve, nor does it resolve, whether the underlying conduct is or is not infringement*. The committee intends the immunity from lawsuits to provide full protection against the specified types of copyright infringement actions, but it has *not* addressed the underlying copyright infringement issue * * * .
>
> Senate Report at 52 (emphasis added).

Thus, assuming for present purposes that Napster's users are engaged in copyright infringement, their actions would remain infringing even if Section 1008 were applicable to them, since Section 1008 does not purport to address the underlying issue of infringement. And if Section 1008 does not transform the actions of Napster's users into non-infringing uses, then it cannot provide shelter to Napster itself. In invoking Section 1008, Napster has argued that it cannot be liable for contributory or vicarious infringement if its users are not themselves engaged in infringement. Once it is recognized that Section 1008 does not alter whether the consumer uses that it addresses are infringing, Napster's argument falls apart.

It is noteworthy in this regard that Section 1008 expressly provides immunity not only for the specified noncommercial consumer use of digital and analog recording devices and media, but also for the manufacture and distribution of such products. Napster's argument assumes that the immunity conferred on consumers is sufficient by itself to preclude liability for contributory or vicarious infringement on the part of the firms whose products are being used. But if that were the case, then there would have been no reason for Congress to include distinct immunity protection for manufacturers in Section 1008 itself, and the manufacturer immunity language in Section 1008 would serve no purpose. Napster's argument thusconflicts with the elementary principle that "legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. CFTC*, 519 U.S. 465, 472 (1997). The fact that Congress found it necessary to extend an express statutory grant of immunity to manufacturers, as well as to consumers, confirms that Congress did not regard consumer immunity from suit as sufficient by itself to insulate other parties from liability for contributory or vicarious infringement.

B. Napster's Reliance on Section 1008 Is Inconsistent With the Policies Underlying the AHRA

In *Diamond Multimedia*, this Court observed that it "need not resort to the legislative history [when] the statutory language is clear." 180 F.3d at 1076. Given the clarity with which the

language of Section 1008 prescribes (and circumscribes) the scope of statutory immunity under the AHRA, and given Napster's manifest inability to bring this case within the language of the statute, resort to the legislative history of the AHRA is therefore unnecessary. Nevertheless, if recourse is had to the legislative history, it reinforces the conclusion that Section 1008 does not protect Napster. Far from advancing the policies of the AHRA, Napster's invocation of Section 1008 is directly contrary to those policies.

1. Napster's Invocation of Section 1008 Upsets the Quid Pro Quo That Underlies the Act

The legislative history of the AHRA makes clear that the Act was intended by Congress to embody the compromise agreement reached in 1991 between the music industry on the one hand and the consumer electronics industry and consumer groups on the other. See, *e.g.*, Senate Report at 34 ("the competing parties have, through negotiation and compromise, reached an agreement which all parties involved feel is equitable," and the legislation "reflects this agreement"); House Report at 13, reprinted in 1992 USCCAN at 3583 (the Act "preserves the essentials of the agreement").

As explained above, the compromise underlying the Act involves a basic quid *pro quo*. In exchange for accepting the marketing of digital audio recording technology and the use of such technology for noncommercial home taping, the music industry receives financial compensation through the Act's royalty system) and protection against serial copying. This *quid pro quo* was central to the agreement and the legislation that embodies it. See, *e.g.*, Senate Report at 30 (summarizing the purpose and basic elements of the legislation). (3)

Construing Section 1008 to protect Napster would mean repudiating, rather than preserving, the *quid pro quo* underlying the Act. On the one br>hand, Napster would be permitted to facilitate the copying and distribution of copyrighted sound recordings on a scale far surpassing the "home taping" that Congress foresaw when it enacted the AHRA. On the other hand, the products employed by Napster and its users - computers and their hard drives -- are not subject to royalty payments (by Napster or anyone else) and are not required to be equipped with anti-serial copying circuitry, because the royalty and serial copying provisions of the Act apply only to "digital audio recording devices" and "digital audio recording media," and as shown above, those terms exclude computers and hard drives. 17 U.S.C. §§ 1002(a), 1003(a), 1004; see p. 15 *supra*. As a result, the music industry would bear the burdens of the statute without receiving the corresponding benefits.

The legislative history makes clear that the Act's exclusion of computers and hard drives was the product of a deliberate choice by Congress.
See, *e.g.*, Senate Report at 48 ("a personal computer whose recording function is designed and marketed primarily for the recording of data and computer programs * * * would [not] qualify as a 'digital audio recording device'"). In invoking Section 1008, Napster is inviting this Court to countermand that legislative choice, and to do so in a way that undoes the reciprocal nature of the Act's digital recording provisions. That invitation should be declined.

2. Section 1008 Was Not Intended To Immunize All Consumer Copying of Musical Recordings

Section 1008 identifies with precision the consumer activity that Congress meant to shelter from copyright infringement suits: "the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings." 17 U.S.C. § 1008. Despite the precision of this language, Napster asserts that Congress actually intended to immunize "all noncommercial consumer copying of music in digital or analog form" (Napster Brief at 20), whether or not the copying comes within the terms of Section 1008. But Napster has identified nothing in the limited legislative history of Section 1008 that supports this argument or overcomes the explicit language of the statute.

The following passage from the House Report on the Act is representative of the legislative history regarding Section 1008:

Section 1008 covers one of the critical components of the legislation: exemptions from liability for suit under title 17 for *home taping* of copyrighted musical works and sound recordings, and for contributory infringement actions under title 17 against manufacturers, importers, and distributors of digital and analog recording devices and recording media. *In the case of home taping*, the exemption protects all noncommercial copying by consumers of digital and analog musical recordings. Manufacturers, importers, and distributors of digital and analog recording devices and media have a complete exemption from copyright infringement claims based on the manufacture, importation, or distribution of such devices.

House Report at 24, reprinted in 1992 USCCAN at 3594 (emphasis added).

The highlighted references to "home taping" suggest, not surprisingly, that Congress meant to address the problem that gave rise to the AHRA - the introduction and use of DAT tape decks and similar digital taping technology (see pp. 3-5 *supra*). There is no indication that Congress also meant to cover other kinds of devices and media that fall outside the terms of Section 1008. To the contrary, the legislative history reiterates the message conveyed by the language of the statute itself: Congress meant to "extend[] protection to users *of such audio recording devices andmedia* by prohibiting copyright infringement actions based on the use of *such devices and media*" to make musical recordings. Senate Report at 51 (emphasis added). In short, the legislative history confirms that Congress meant what it said in Section 1008 - and what Congress said cannot be reconciled with what Napster is seeking.

3. The Legislative History of Statutes Other Than the AHRA is Irrelevant

In construing the scope of Section 1008, Napster attempts to rely on the legislative history of two statutes *other* than the AHRA - the Record Rental Amendment Act of 1984 and the Computer Software Rental Amendment Act of 1990. See Napster Brief at 23-24. Napster argues that Congress's treatment of "commercial" lending of phonorecords and computer software under those two statutes is consistent with Napster's reading of Section 1008. The short answer is that this case involves the meaning of the AHRA, not the meaning of other statutes. Napster's invocation of Section 1008 cannot be sustained on the basis of Section 1008's own language and legislative history; *a fortiori*, it cannot be sustained by resort to the language and legislative history of unrelated statutes. The Record Rental Amendment Act and the Computer Software Rental Amendment Act were both enacted prior to the AHRA, and they address entirely different

subjects. Neither their language nor their legislative history purports to address the meaning of Section 1008 in any way.

C. *Diamond Multimedia* Does Not Resolve the AHRA Immunity Question At Issue in This Case

Napster suggests that this Court's decision in *Diamond Multimedia* confirms Napster's reading of Section 1008. It does not. The meaning and applicability of Section 1008 were not at issue in *Diamond Multimedia*, and nothing that the Court decided in *Diamond Multimedia* in any way requires the Court to accept Napster's Section 1008 defense in this case.

Diamond Multimedia involved a suit under the AHRA by the recording industry against the manufacturer of the Rio portable music player, a "Walkman-like" device that plays MP3 music files. The recording industry claimed that the Rio player is a "digital audio recording device" and therefore is subject to the Act's royalty and serial copying provisions. Based on that claim, the recording industry sought to enjoin the manufacture and distribution of the Rio player and to compel Rio's manufacturer (Diamond) to make royalty payments under the Act. This Court rejected the industry claim, holding that the Rio player does not come within the Act's definition of a "digital audio recording device" and therefore is not subject to the Act's royalty and serial copying requirements. 180 F.3d at 1075-1081.

Diamond Multimedia was not an action for copyright infringement. Because Section 1008 of the AHRA applies only to "action[s] * * * under this title alleging infringement of copyright," it was facially irrelevant to Diamond's liability, and Diamond never invoked Section 1008 as a defense. Accordingly, the Court was not called on to decide whether Section 1008 protected Diamond itself, much less whether or how Section 1008 may protect defendants in other cases that (unlike *Diamond Multimedia*) involve claims of copyright infringement.

Napster relies on a single passage from the Court's opinion in *Diamond Multimedia*:

As the Senate Report explains, "[t]he purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their *private, noncommercial use*." S. Rep. 102-294, at *86 (emphasis added). The Act does so through its home taping exemption, *see* 17 U.S.C. § 1008, which "protects all noncommercial copying by consumers of digital and analog musical recordings," H.R. Rep.102-873(I), at *59.

180 F.3d at 1079 (emphasis in original).

To the extent that this passage speaks to the meaning of Section 1008, it is no more than dictum, since Section 1008 was not at issue in the case. In any event, nothing in the passage is in any way inconsistent with the proposition that Section 1008 means what it says. The passage merely quotes excerpts from the House and Senate Reports regarding the purpose of the Act in general and Section 1008 in particular. As shown above, when the legislative history is considered in its entirety,it directly supports, rather than refutes, the conclusion that Section 1008 does not protect Napster or its users. Accordingly, nothing in *Diamond Multimedia* provides refuge for Napster in this case.

CONCLUSION

For the foregoing reasons, the district court's holding that Section 1008 of the Audio Home Recording Act does not excuse Napster from liability is correct and should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d)and Ninth Circuit Rule 32-1, I certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 7000 words or less.

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Scott R. McIntosh

CERTIFICATE OF SERVICE

I certify that on September 8, 2000, I filed and served the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* by causing an original and 15 copies to be filed with the Clerk of the Court by overnight mail and by causing copies to be served on the following counsel by overnight mail and (where indicated) by fax:

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1. This brief does not address or express a view regarding any issue in this case other than the AHRA issue. For purposes of addressing the AHRA issue, the United States assumes that the plaintiffs have made out an otherwise valid claim for contributory and/or vicarious copyright infringement against Napster based on the use of Napster's service and software by consumers to exchange computer files containing copyrighted musical works.

We note that one of the *amici* participating in this appeal is a former Register of Copyrights, Ralph Oman. As a former Register, Mr. Oman speaks for himself and his client rather than the Copyright Office.

2. We should not be understood to suggest that every distribution of a copyrighted work, regardless of its scope or attendant circumstances, is necessarily an infringement of the statutory right of distribution. The right of distribution conferred by 17 U.S.C. § 106(3) is a right of *public* distribution - the right "to distribute copies or phonorecords of the copyrighted work to the *public*" (emphasis added). See 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.11[A] (1999).

3. As noted above, unlike digital audio recording technology, analog recording technology has inherent limitations that make it substantially less useful for copying in general and serial copying in particular. For that reason, the Act does not require manufacturers of analog recording devices and media to make royalty payments or incorporate anti-serial copying circuitry. The exclusion of analog recording devices and media from the royalty and serial copying requirements of the Act does not mean that the statute is not predicated in a *quid pro quo*. Instead, it simply means that the rationale for the *quid pro quo* is not implicated by analog.

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