

# A&M RECORDS v. NAPSTER, INC.

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United States Court of Appeals for the Ninth Circuit, 2001  
239 F.3d 1004

## AMENDED OPINION

BEEZER, Circuit Judge:

Plaintiffs are engaged in the commercial recording, distribution and sale of copyrighted musical compositions and sound recordings. The complaint alleges that Napster, Inc. ("Napster") is a contributory and vicarious copyright infringer. On July 26, 2000, the district court granted plaintiffs' motion for a preliminary injunction. The injunction was slightly modified by written opinion on August 10, 2000. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000). The district court preliminarily enjoined Napster "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner." *Id.* at 927. Federal Rule of Civil Procedure 65(c) requires successful plaintiffs to post a bond for damages incurred by the enjoined party in the event that the injunction was wrongfully issued. The district court set bond in this case at \$ 5 million.

We entered a temporary stay of the preliminary injunction pending resolution of this appeal. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). We affirm in part, reverse in part and remand.

### I

We have examined the papers submitted in support of and in response to the injunction application and it appears that Napster has designed and operates a system which permits the transmission and retention of sound recordings employing digital technology.

In 1987, the Moving Picture Experts Group set a standard file format for the storage of audio recordings in a digital format called MPEG-3, abbreviated as "MP3." Digital MP3 files are created through a process colloquially called "ripping." Ripping software allows a computer owner to copy an audio compact disk ("audio CD") directly onto a computer's hard drive by compressing the audio information on the CD into the MP3 format. The MP3's compressed format allows for rapid transmission of digital audio files from one computer to another by electronic mail or any other file transfer protocol.

Napster facilitates the transmission of MP3 files between and among its users. Through a process commonly called "peer-to-peer" file sharing, Napster allows its users to: (1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users; (2) search for MP3 music files stored on other users' computers; and (3) transfer exact copies of the contents of other users' MP3 files from one computer to another via the Internet. These functions are made possible by Napster's MusicShare software, available free of charge from Napster's Internet site, and Napster's network servers and server-side software. Napster provides technical support for the indexing and searching of MP3 files, as well as for its other functions, including a "chat room," where users can meet to discuss music, and a directory where participating artists can provide information about their music.

#### A. Accessing the System

In order to copy MP3 files through the Napster system, a user must first access Napster's Internet site and download<sup>1</sup> the MusicShare software to his individual computer. See <http://www.Napster.com>. Once the software is installed, the user can access the Napster system. A first-time user is required to register with the Napster system by creating a "user name" and password.

#### B. Listing Available Files

If a registered user wants to list available files stored in his computer's hard drive on Napster for others to access, he must first create a "user library" directory on his computer's hard drive. The user then saves his MP3 files in the library directory, using self-designated file names. He next must log into the Napster system using his user name and password. His MusicShare software then searches his user library and verifies that the available files are properly formatted. If in the correct MP3 format, the names of the MP3 files will be uploaded from the user's computer to the Napster servers. The content of the MP3 files remains stored in the user's computer.

Once uploaded to the Napster servers, the user's MP3 file names are stored in a server-side "library" under the user's name and become part of a "collective directory" of files available for transfer during the time the user is logged onto the Napster system. The collective directory is fluid; it tracks users who are connected in real time, displaying only file names that are immediately accessible.

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<sup>1</sup> "To download means to receive information, typically a file, from another computer to yours via your modem. . . . The opposite term is upload, which means to send a file to another computer." *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) (quoting Robin Williams, *Jargon, An Informal Dictionary of Computer Terms* 170-71 (1993)).

### C. Searching For Available Files

Napster allows a user to locate other users' MP3 files in two ways: through Napster's search function and through its "hotlist" function.

Software located on the Napster servers maintains a "search index" of Napster's collective directory. To search the files available from Napster users currently connected to the net-work servers, the individual user accesses a form in the MusicShare software stored in his computer and enters either the name of a song or an artist as the object of the search. The form is then transmitted to a Napster server and automatically compared to the MP3 file names listed in the server's search index. Napster's server compiles a list of all MP3 file names pulled from the search index which include the same search terms entered on the search form and transmits the list to the searching user. The Napster server does not search the contents of any MP3 file; rather, the search is limited to "a text search of the file names indexed in a particular cluster. Those file names may contain typographical errors or otherwise inaccurate descriptions of the content of the files since they are designated by other users." *Napster*, 114 F. Supp. 2d at 906.

To use the "hotlist" function, the Napster user creates a list of other users' names from whom he has obtained MP3 files in the past. When logged onto Napster's servers, the system alerts the user if any user on his list (a "hotlisted user") is also logged onto the system. If so, the user can access an index of all MP3 file names in a particular hotlisted user's library and request a file in the library by selecting the file name. The contents of the hotlisted user's MP3 file are not stored on the Napster system.

### D. Transferring Copies of an MP3 file

To transfer a copy of the contents of a requested MP3 file, the Napster server software obtains the Internet address of the requesting user and the Internet address of the "host user" (the user with the available files). *See generally Brookfield Communications, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1044 (9th Cir. 1999) (describing, in detail, the structure of the Internet). The Napster servers then communicate the host user's Internet address to the requesting user. The requesting user's computer uses this information to establish a connection with the host user and downloads a copy of the contents of the MP3 file from one computer to the other over the Internet, "peer-to-peer." A downloaded MP3 file can be played directly from the user's hard drive using Napster's Music-Share program or other software. The file may also be transferred back onto an audio CD if the user has access to equipment designed for that purpose. In both cases, the quality of the original sound recording is slightly diminished by transfer to the MP3 format.

This architecture is described in some detail to promote an understanding of transmission mechanics as opposed to the content of the transmissions. The content is the subject of our copyright infringement analysis.

## II

We review a grant or denial of a preliminary injunction for abuse of discretion. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc). Application of erroneous legal principles represents an abuse of discretion by the district court. *Rucker v. Davis*, 237 F.3d 1113, 2001 WL 55724, at \*4 (9th Cir. 2001) (en banc). If the district court is claimed to have relied on an erroneous legal premise in reaching its decision to grant or deny a preliminary injunction, we will review the underlying issue of law de novo. *Id.* at \*4 (citing *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996)).

On review, we are required to determine, "whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case." *Id.* "As long as the district court got the law right, 'it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995) (quoting *Sports Form, Inc. v. United Press, Int'l*, 686 F.2d 750, 752 (9th Cir. 1982)).

Preliminary injunctive relief is available to a party who demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor. *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000)." These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id.*

## III

Plaintiffs claim Napster users are engaged in the wholesale reproduction and distribution of copyrighted works, all constituting direct infringement.<sup>2</sup> The district court agreed. We note that the district court's conclusion that plaintiffs have presented a prima facie case of direct infringement by Napster users is not

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<sup>2</sup> Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995) ("There can be no contributory infringement by a defendant without direct infringement by another."). It follows that Napster does not facilitate infringement of the copyright laws in the absence of direct infringement by its users.

presently appealed by Napster. We only need briefly address the threshold requirements.

#### A. Infringement

Plaintiffs must satisfy two requirements to present a prima facie case of direct infringement: (1) they must show ownership of the allegedly infringed material and (2) they must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106. *See* 17 U.S.C. § 501(a) (infringement occurs when alleged infringer engages in activity listed in § 106); *see also Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987); *see, e.g., S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 n.3 (9th Cir. 1989) ("The word 'copying' is shorthand for the infringing of any of the copyright owner's five exclusive rights. . . ."). Plaintiffs have sufficiently demonstrated ownership. The record supports the district court's determination that "as much as eighty-seven percent of the files available on Napster may be copyrighted and more than seventy percent may be owned or administered by plaintiffs." *Napster*, 114 F. Supp. 2d at 911.

The district court further determined that plaintiffs' exclusive rights under § 106 were violated:" here the evidence establishes that a majority of Napster users use the service to download and upload copyrighted music. . . . And by doing that, it constitutes--the uses constitute direct infringement of plaintiffs' musical compositions, recordings." *A&M Records, Inc. v. Napster, Inc.*, Nos. 99-5183, 00-0074, 2000 WL 1009483, at \*1 (N. D. Cal. July 26, 2000) (transcript of proceedings). The district court also noted that "it is pretty much acknowledged . . . by Napster that this is infringement." *Id.* We agree that plaintiffs have shown that Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction, § 106(1); and distribution, 4229 § 106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.

Napster asserts an affirmative defense to the charge that its users directly infringe plaintiffs' copyrighted musical compositions and sound recordings.

#### B. Fair Use

Napster contends that its users do not directly infringe plaintiffs' copyrights because the users are engaged in fair use of the material. *See* 17 U.S.C. § 107 ("The fair use of a copyrighted work . . . is not an infringement of copyright."). Napster identifies three specific alleged fair uses: sampling, where users make temporary copies of a work before purchasing; space-shifting, where users access a sound recording through the Napster system that they already own in audio CD format; and permissive distribution of recordings by both new and established artists.

The district court considered factors listed in 17 U.S.C. § 107, which guide a court's fair use determination. These factors are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the "amount and substantiality of the portion used" in relation to the work as a whole; and (4) the effect of the use upon the potential market for the work or the value of the work. *See* 17 U.S.C. § 107. The district court first conducted a general analysis of Napster system uses under § 107, and then applied its reasoning to the alleged fair uses identified by Napster. The district court concluded that Napster users are not fair users.<sup>3</sup> We agree. We first address the court's overall fair use analysis.

### 1. Purpose and Character of the Use

This factor focuses on whether the new work merely replaces the object of the original creation or instead adds a further purpose or different character. In other words, this factor asks "whether and to what extent the new work is 'transformative.'" *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 127 L. Ed. 2d 500, 114 S. Ct. 1164 (1994).

The district court first concluded that downloading MP3 files does not transform the copyrighted work. *Napster*, 114 F. Supp. 2d at 912. This conclusion

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<sup>3</sup> Napster asserts that because plaintiffs seek injunctive relief, they have the burden of showing a likelihood that they would prevail against any affirmative defenses raised by Napster, including its fair use defense under 17 U.S.C. § 107. *See Atari Games Corp. v. Nintendo*, 975 F.2d 832, 837 (Fed. Cir. 1992) (following Ninth Circuit law, and stating that plaintiff must show likelihood of success on prima facie copyright infringement case and likelihood that it would overcome copyright misuse defense); *see also Dr. Seuss Enters. v. Penguin Book USA*, 924 F. Supp. 1559, 1562 (S.D. Cal. 1996) ("The plaintiff's burden of showing a likelihood of success on the merits includes the burden of showing a likelihood that it would prevail against any affirmative defenses raised by the defendant."), *aff'd*, 109 F.3d 1394 (9th Cir. 1997); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 923 F. Supp. 1231, 1242 n.12 (1995) (same); 2 William W. Schwarzer et al., *California Practice Guide, Federal Civil Procedure Before Trial* P13: 47 (2000) (advising that when a preliminary injunction is sought "plaintiff must demonstrate a likelihood of prevailing on any affirmative defense as well as on plaintiff's case in chief"). *But see Fair Use of Copyrighted Works*, H.R. Rep. 102-836 n.3 (criticizing a Northern District of New York case in which "the district court erroneously held that where the copyright owner seeks a preliminary injunction, the copyright owner bears the burden of disproving the [fair use] defense"); *see also* 1 William F. Patry, *Copyright Law & Practice*, 725, 725 n.27 (1994) (citing cases placing burden on defendant at preliminary injunction stage).

The district court stated that "defendant bears the burden of proving ... affirmative defenses." *Napster*, 114 F. Supp. 2d at 912. Plaintiffs assert that the district court did not err in placing the burden on Napster. We conclude that even if plaintiffs bear the burden of establishing that they would likely prevail against Napster's affirmative defenses at the preliminary injunction stage, the record supports the district court's conclusion that Napster users do not engage in fair use of the copyrighted materials.

is supportable. Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium. *See, e.g., Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1994) (concluding that retransmission of radio broadcast over telephone lines is not transformative); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y.) (finding that reproduction of audio CD into MP3 format does not "transform" the work), *certification denied*, 2000 U.S. Dist. LEXIS 7439, 2000 WL 710056 (S.D.N.Y. June 1, 2000) ("Defendant's copyright infringement was clear, and the mere fact that it was clothed in the exotic webbing of the Internet does not disguise its illegality.").

This "purpose and character" element also requires the district court to determine whether the allegedly infringing use is commercial or noncommercial. *See Campbell*, 510 U.S. at 584-85. A commercial use weighs against a finding of fair use but is not conclusive on the issue. *Id.* The district court determined that Napster users engage in commercial use of the copyrighted materials largely because (1) "a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester" and (2) "Napster users get for free something they would ordinarily have to buy." *Napster*, 114 F. Supp. 2d at 912. The district court's findings are not clearly erroneous.

Direct economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use. *See Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000) (stating that church that copied religious text for its members "unquestionably profited" from the unauthorized "distribution and use of [the text] without having to account to the copyright holder"); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (finding that researchers at for-profit laboratory gained indirect economic advantage by photocopying copyrighted scholarly articles). In the record before us, commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies. *See Worldwide Church*, 227 F.3d at 1117-18; *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (finding commercial use when individuals downloaded copies of video games "to avoid having to buy video game cartridges"); *see also American Geophysical*, 60 F.3d at 922. Plaintiffs made such a showing before the district court.<sup>4</sup>

We also note that the definition of a financially motivated transaction for the purposes of criminal copyright actions includes trading infringing copies of a work for other items, "including the receipt of other copyrighted works." *See No*

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<sup>4</sup> Napster counters that even if certain users engage in commercial use by downloading instead of purchasing the music, space-shifting and sampling are nevertheless noncommercial in nature. We address this contention in our discussion of these specific uses, *infra*.

Electronic Theft Act ("NET Act"), Pub. L. No. 105-147, 18 U.S.C. § 101 (defining "Financial Gain").

## 2. The Nature of the Use

Works that are creative in nature are "closer to the core of intended copyright protection" than are more fact-based works. *See Campbell*, 510 U.S. at 586. The district court determined that plaintiffs' "copyrighted musical compositions and sound recordings are creative in nature . . . which cuts against a finding of fair use under the second factor." *Napster*, 114 F. Supp. 2d at 913. We find no error in the district court's conclusion.

## 3. The Portion Used

"While 'wholesale copying does not preclude fair use per se, 'copying an entire work 'militates against a finding of fair use.'" *Worldwide Church*, 227 F.3d at 1118 (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986)). The district court determined that Napster users engage in "wholesale copying" of copyrighted work because file transfer necessarily "involves copying the entirety of the copyrighted work." *Napster*, 114 F. Supp. 2d at 913. We agree. We note, however, that under certain circumstances, a court will conclude that a use is fair even when the protected work is copied in its entirety. *See, e.g., Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984) (acknowledging that fair use of time-shifting necessarily involved making a full copy of a protected work).

## 4. Effect of Use on Market

"Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566-67, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985). "The importance of this [fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors." *Campbell*, 510 U.S. at 591 n.21. The proof required to demonstrate present or future market harm varies with the purpose and character of the use:

A challenge to a noncommercial use of a copy-righted work requires proof either that the particular use is harmful, or that if it should become wide-spread, it would adversely affect the potential market for the copyrighted work. . . . *If the intended use is for commercial gain, that likelihood [of market harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.* *Sony*, 464 U.S. at 451 (emphases added).

Addressing this factor, the district court concluded that Napster harms the market in "at least" two ways: it reduces audio CD sales among college students



and it "raises barriers to plaintiffs' entry into the market for the digital downloading of music." *Napster*, 114 F. Supp. 2d at 913. The district court relied on evidence plaintiffs submitted to show that Napster use harms the market for their copyrighted musical compositions and sound recordings. In a separate memorandum and order regarding the parties' objections to the expert reports, the district court examined each report, finding some more appropriate and probative than others. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 2000 WL 1170106 (N.D. Cal. 2000). Notably, plaintiffs' expert, Dr. E.

Deborah Jay, conducted a survey (the "Jay Report") using a random sample of college and university students to track their reasons for using Napster and the impact Napster had on their music purchases. *Id.* at \*2. The court recognized that the Jay Report focused on just one segment of the Napster user population and found "evidence of lost sales attributable to college use to be probative of irreparable harm for purposes of the preliminary injunction motion." 114 F. Supp. 2d at 923, *Id.* at \*3.

Plaintiffs also offered a study conducted by Michael Fine, Chief Executive Officer of Soundscan, (the "Fine Report") to determine the effect of online sharing of MP3 files in order to show irreparable harm. Fine found that online file sharing had resulted in a loss of "album" sales within college markets. After reviewing defendant's objections to the Fine Report and expressing some concerns regarding the methodology and findings, the district court refused to exclude the Fine Report insofar as plaintiffs offered it to show irreparable harm. *Id.* at \*6.

Plaintiffs' expert Dr. David J. Teece studied several issues ("Teece Report"), including whether plaintiffs had suffered or were likely to suffer harm in their existing and planned businesses due to Napster use. *Id.* Napster objected that the report had not undergone peer review. The district court noted that such reports generally are not subject to such scrutiny and overruled defendant's objections. *Id.*

As for defendant's experts, plaintiffs objected to the report of Dr. Peter S. Fader, in which the expert concluded that Napster is *beneficial* to the music industry because MP3 music file-sharing stimulates more audio CD sales than it displaces. *Id.* at \*7. The district court found problems in Dr. Fader's minimal role in overseeing the administration of the survey and the lack of objective data in his report. The court decided the generality of the report rendered it "of dubious reliability and value." The court did not exclude the report, however, but chose "not to rely on Fader's findings in determining the issues of fair use and irreparable harm." 114 F. Supp. 2d at 912, *Id.* at \*8.

The district court cited both the Jay and Fine Reports in support of its finding that Napster use harms the market for plaintiffs' copyrighted musical compositions and sound recordings by reducing CD sales among college students. The district court cited the Teece Report to show the harm Napster use caused in raising barriers to plaintiffs' entry into the market for digital downloading of

music. *Napster*, 114 F. Supp. 2d at 910. The district court's careful consideration of defendant's objections to these reports and decision to rely on the reports for specific issues demonstrates a proper exercise of discretion in addition to a correct application of the fair use doctrine. Defendant has failed to show any basis for disturbing the district court's findings.

We, therefore, conclude that the district court made sound findings related to Napster's deleterious effect on the present and future digital download market. Moreover, lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works. See *L.A. Times v. Free Republic*, 2000 U.S. Dist. LEXIS 5669, 54 U.S.P.Q.2D (BNA) 1453, 1469-71 (C.D. Cal. 2000) (stating that online market for plaintiff newspapers' articles was harmed because plaintiffs demonstrated that "[defendants] are attempting to exploit the market for viewing their articles online"); see also *UMG Recordings*, 92 F. Supp. 2d at 352 ("Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works."). Here, similar to *L.A. Times* and *UMG Recordings*, the record supports the district court's finding that the "record company plaintiffs have already expended considerable funds and effort to commence Internet sales and licensing for digital downloads." 114 F. Supp. 2d at 915. Having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads.

Judge Patel did not abuse her discretion in reaching the above fair use conclusions, nor were the findings of fact with respect to fair use considerations clearly erroneous. We next address Napster's identified uses of sampling and space-shifting.

## 5. Identified Uses

Napster maintains that its identified uses of sampling and space-shifting were wrongly excluded as fair uses by the district court.

### a. Sampling

Napster contends that its users download MP3 files to "sample" the music in order to decide whether to purchase the recording. Napster argues that the district court: (1) erred in concluding that sampling is a commercial use because it conflated a noncommercial use with a personal use; (2) erred in determining that sampling adversely affects the market for plaintiffs' copyrighted music, a requirement if the use is non-commercial; and (3) erroneously concluded that sampling is not a fair use because it determined that samplers may also engage in other infringing activity.

The district court determined that sampling remains a commercial use even if some users eventually purchase the music. We find no error in the district court's determination. Plaintiffs have established that they are likely to succeed in proving that even authorized temporary downloading of individual songs for sampling purposes is commercial in nature. *See Napster*, 114 F. Supp. 2d at 913. The record supports a finding that free promotional downloads are highly regulated by the record company plaintiffs and that the companies collect royalties for song samples available on retail Internet sites. *Id.* Evidence relied on by the district court demonstrates that the free downloads provided by the record companies consist of thirty-to-sixty second samples or are full songs programmed to "time out," that is, exist only for a short time on the downloader's computer. *Id.* at 913-14. In comparison, Napster users download a full, free and permanent copy of the recording. *Id.* at 914-15. The determination by the district court as to the commercial purpose and character of sampling is not clearly erroneous.

The district court further found that both the market for audio CDs and market for online distribution are adversely affected by Napster's service. As stated in our discussion of the district court's general fair use analysis: the court did not abuse its discretion when it found that, overall, Napster has an adverse impact on the audio CD and digital download markets. Contrary to Napster's assertion that the district court failed to specifically address the market impact of sampling, the district court determined that "even if the type of sampling supposedly done on Napster were a non-commercial use, plaintiffs have demonstrated a substantial likelihood that it would adversely affect the potential market for their copy-righted works if it became widespread." *Napster*, 114 F. Supp. 2d at 914. The record supports the district court's preliminary determinations that: (1) the more music that sampling users download, the less likely they are to eventually purchase the recordings on audio CD; and (2) even if the audio CD market is not harmed, Napster has adverse effects on the developing digital download market.

Napster further argues that the district court erred in rejecting its evidence that the users' downloading of "samples" increases or tends to increase audio CD sales. The district court, however, correctly noted that "any potential enhancement of plaintiffs' sales . . . would not tip the fair use analysis conclusively in favor of defendant." *Id.* at 914. We agree that increased sales of copyrighted material attributable to unauthorized use should not deprive the copyright holder of the right to license the material. *See Campbell*, 510 U.S. at 591 n.21 ("Even favorable evidence, without more, is no guarantee of fairness. Judge Leval gives the example of the film producer's appropriation of a composer's previously unknown song that turns the song into a commercial success; the boon to the song does not make the film's simple copying fair."); *see also L.A. Times*, 54 U.S.P.Q.2D (BNA) at 1471-72. Nor does positive impact in one market, here the audio CD market, deprive the copyright holder of the right to develop identified alternative markets, here the digital download market. *See* 54 U.S.P.Q.2D (BNA) at 1469-71.

We find no error in the district court's factual findings or abuse of discretion in the court's conclusion that plaintiffs will likely prevail in establishing that sampling does not constitute a fair use.

#### b. Space-Shifting

Napster also maintains that space-shifting is a fair use. Space-shifting occurs when a Napster user downloads MP3 music files in order to listen to music he already owns on audio CD. *See* 114 F. Supp. 2d at 915-16. Napster asserts that we have already held that space-shifting of musical compositions and sound recordings is a fair use. *See Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) ("Rio [a portable MP3 player] merely makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive. . . . Such copying is a paradigmatic noncommercial personal use."). *See also generally Sony*, 464 U.S. at 423 (holding that "time-shifting," where a video tape recorder owner records a television show for later viewing, is a fair use).

We conclude that the district court did not err when it refused to apply the "shifting" analyses of *Sony* and *Diamond*. Both *Diamond* and *Sony* are inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user. In *Diamond*, for example, the copyrighted music was transferred from the user's computer hard drive to the user's portable MP3 player. So too *Sony*, where "the majority of VCR purchasers . . . did not distribute taped television broadcasts, but merely enjoyed them at home." *Napster*, 114 F. Supp. 2d at 913. Conversely, it is obvious that once a user lists a copy of music he already owns on the Napster system in order to access the music from another location, the song becomes "available to millions of other individuals," not just the original CD owner. *See UMG Recordings*, 92 F. Supp. 2d at 351-52 (finding spaceshifting of MP3 files not a fair use even when previous ownership is demonstrated before a download is allowed); *cf. Religious Tech. Ctr. v. Lerma*, 1996 U.S. Dist. LEXIS 15454, No. 95-1107 A, 1996 WL 633131, at \*6 (E. D. Va. Oct. 4, 1996) (suggesting that storing copyrighted material on computer disk for later review is not a fair use).

#### c. Other Uses

Permissive reproduction by either independent or established artists is the final fair use claim made by Napster. The district court noted that plaintiffs did not seek to enjoin this and any other noninfringing use of the Napster system, including: chat rooms, message boards and Napster's New Artist Program. *Napster*, 114 F. Supp. 2d at 917. Plaintiffs do not challenge these uses on appeal.

We find no error in the district court's determination that plaintiffs will likely succeed in establishing that Napster users do not have a fair use defense.....