



September 2012

Capitol Records, Inc: Holding No Public Performance Violations for Deleting Duplicative Files Off Cloud Servers and the Positive Future Implications Regarding Consumer Efficiency

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CAPITOL RECORDS, INC.: HOLDING NO PUBLIC PERFORMANCE VIOLATIONS FOR DELETING DUPLICATIVE FILES OFF CLOUD SERVERS AND THE POSITIVE FUTURE IMPLICATIONS REGARDING CONSUMER EFFICIENCY

*Christina Chow**

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I. INTRODUCTION

Although not necessarily known by name, cloud computing has become an integral part of everyday life for the average American.¹ Cloud servers are storage systems that are accessed by users via internet connections.² With the continued growth and availability of the internet over the last decade and a half, intellectual property challenges and lawsuits have increased significantly.³ Copyrighted works, both authorized and unauthorized, are now available at the press of a button. The multiple amendments to copyright laws reflect the adaptation of the law to the developments of new technologies. Similarly, the numerous copyright infringement cases brought since the initiation of cloud computing reflect the quickly evolving area of copyright law.⁴

Over the years, Congress has attempted to balance the interest of protecting creative works with the interest in promoting public learning and stimulation of the arts and sciences.⁵ Although not perfectly clear, current copyright laws and case law pertaining to cloud computing have attempted to distinguish cloud servers that do no more than blatantly encourage violations of a copyright holder's privileges from those that legitimately seek to provide societal gain.⁶

¹ See William Jeremy Robison, *Free at What Costs?: Cloud Computing Privacy Under the Stored Communications Act*, 98 GEO. L.J. 1195, 1199 (2010) ("Many [i]nternet users have experienced cloud computing, but fail to recognize . . . the technology . . ."). Cloud computing and cloud servers are generally synonymous with the term "remote servers" for the focus of this Note.

² See Marc Aaron Melzer, *Copyright Enforcement in the Cloud*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 403, 406 (2011) ("Cloud computing relies on the technology of virtualization, which allows an application to create and manage non-permanent, virtual . . . servers on physical server hardware. . . . Virtualization means that e-mail, [w]eb, or file servers . . . can be conjured up as soon as they are needed; when the need is gone, they can be wiped from existence . . .") (quoting Erica Naone, *Conjuring Clouds: How Engineers are Making On-Demand Computing A Reality*, TECH REV., July–Aug. 2009, at 54, available at <http://www.technologyreview.com/computing/22606>)).

³ See *id.* at 403, 412–13 ("Copyright in the digital age faced initial challenges in defining what constituted copying, given the potentially transient nature of digitally stored content The increasing digitization of content has created numerous challenges to copyright enforcement over the last two decades . . .").

⁴ See ORRIN HATCH, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 DATES OF CONSIDERATION AND PASSAGE, S. REP. NO. 105-190 at 2 (1998) [hereinafter *Hearings*] ("With this constant evolution in technology, the law must adapt . . .").

⁵ See U.S. CONST. art. I, § 8, cl. 8 (granting Congress the authority to create copyright protections in order "[t]o promote the Progress of Science and Useful Arts").

⁶ See *Hearings*, *supra* note 4, at 11 ("Title I [of the DMCA] encourages technological solutions . . . by enforcing private parties' use of technological protection measures with legal sanctions for circumvention and for producing and distributing products or providing services that are aimed at circumventing technological protection measures that effectively protect copyrighted works.").

Currently, there are a number of different types of cloud computing.⁷ One of the more recently developed cloud servers is one that acts in the same manner as a personal computer's internal memory. Cloud servers of this type, such as Dropbox, allow users to sign up for an account and receive a certain amount of storage space where they can save, store, and access files as they would on their computer's hard drive or on an external memory stick.⁸

Capitol Records, Inc. v. MP3tunes, LLC is a recent case addressing how courts should treat these storage-based cloud servers.⁹ While the case involved multiple causes of action, one holding in particular implied that the defendant was permitted to delete multiple copies of identically-coded music files.¹⁰ The court struck down the copyright-holding plaintiffs' claim that a public performance violation had occurred.¹¹ In so doing, that court may have unwittingly created enormous positive implications for the future use of such servers.

Part II of this Note will discuss the background of cloud computing, copyright laws regarding the internet, and the debate concerning whether a downloaded music file should be considered a transmission of data or the transmission of a performance. Then, the holding in *Capitol Records, Inc.* regarding public performance will be thoroughly discussed.

Part III will make the argument for upholding summary judgment on appeal because, in actuality, there is no public performance violation. This Note will argue that absent a clear showing of a public performance infringement by cloud servers' users, courts should lean in favor of permitting cloud servers to function as efficiently as possible, which will likely lead to the deletion of multiple copies of exact files. This Note will further argue that courts should permit cloud servers to maintain only a single copy of a file, despite slight differences in the underlying coding of the file. The crucial rationale for every argument made—and the underlying theme of this Note—is the need for the continued support and promotion of consumer efficiency within the boundaries of the law.

⁷ See Robison, *supra* note 1, at 1203–04 (describing various models of cloud computing such as “Software as a Service,” “Platform as a Service,” and “Hardware as a Service”).

⁸ See *id.* at 1204 (“[S]ome cloud providers are selling raw computer resources, including processing power and data storage, as a type of utility service . . .”).

⁹ *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627 (S.D.N.Y. 2011).

¹⁰ See *id.* at 650 (“MP3tunes uses a standard data compression algorithm that eliminates redundant digital data.”).

¹¹ *Id.* at 649–50.

II. BACKGROUND

This section discusses the definition and evolution of cloud computing as well as the modern-day uses of cloud computing in consumers' everyday lives. A very general background of the history and purpose of copyright laws as well as its current application to internet lawsuits is discussed. This section addresses the way in which the advent of downloadable music files has shaped internet litigation. Additionally, a brief history and overview of the various copyright laws and amendments follows.

This section follows with a detailed background of *Capitol Records, Inc. v. MP3tunes, LLC*, including the district judge's decision to grant the defendant's motion for summary judgment on the claim of infringement on the plaintiffs' right to public performance. A brief discussion of *United States v. American Society of Composers, Authors, and Publishers* and its implications for copyright holders' right to public performance under copyright laws follows. This case was the first case to address the modern-day issue of downloading music files during the explosive growth of technology and the internet. The grant of summary judgment regarding the plaintiffs' right to public performances in *Capitol Records, Inc.* is the focus of this Note. However, an understanding of the implications of the court's decision in *American Society of Composers, Authors, and Publishers* is necessary to appreciate the transformation of public performance copyright laws in regarding the changing times and technology.

A. THE EVOLUTION OF CLOUD COMPUTING

Despite the constant presence of the internet in the average American's everyday life, many consumers may be unaware that they have been utilizing basic cloud computing capabilities since the inception of the World Wide Web.¹² The rudimentary concept of cloud computing is a technological phenomenon that dates back to the 1960s.¹³ This primitive model utilized remote computer-like terminals known as "dumb" terminals that required enough power to access the mainframe terminal system, which was a large mass of computing equipment.¹⁴ Once connected to the mainframe terminal system, the "dumb" terminals could then complete necessary tasks.¹⁵ Because this was

¹² See Robison, *supra* note 1, at 1199 ("Many [i]nternet users have experienced cloud computing, but fail to recognize . . . the technology . . .").

¹³ See Melzer, *supra* note 2, at 406 ("Modern cloud computing is a matured version of the mainframe-terminal system that was in vogue in the 1960s and 1970s . . .").

¹⁴ *Id.*

¹⁵ *Id.* at 406–07.

the beginning of modern computing technology, few businesses, and fewer individuals, could afford to employ such luxurious technology.¹⁶

Presently, anyone with access to the internet can utilize cloud computing that was reserved for the wealthiest of businesses only half a century ago.¹⁷ Surprisingly, even as the technology has evolved light-years, the same basic concept of cloud computing has remained the same.¹⁸ Rather than the mainframe terminals being enormous masses of equipment one room over, mainframe terminals are now remote servers accessible via broadband internet connections.¹⁹ The term cloud computing now “involves the sharing or storage by users of their own information on remote servers owned or operated by others and accessed through the [i]nternet or other connections.”²⁰ The metaphorical cloud refers to a depiction of a cloud bubble where one’s information is stored and later accessed by the individual or by others the user permits to access the cloud.²¹ Many websites employ this system; their cloud bubble is public, which permits anyone with an internet connection access to the website’s stored information.²²

As technology and the internet continued to advance in the twentieth and twenty-first centuries, various applications of cloud computing were utilized.²³ Soon, e-mail servers such as Yahoo! and Google created infrastructures that permitted their users to create personal accounts on their servers.²⁴ Consumers could store personal e-mails on the server without taking up space on their personal computers, thereby creating their own personal clouds.²⁵

¹⁶ Robison, *supra* note 1, at 1197.

¹⁷ See Melzer, *supra* note 2, at 405 (“Nearly all computer users today, and an even greater portion of [i]nternet users, utilize some method of cloud computing in their day-to-day activities.”).

¹⁸ See Robison, *supra* note 1, at 1197.

¹⁹ *Id.* at 1197–98.

²⁰ ROBERT GELLMAN, WORLD PRIVACY FORUM, *PRIVACY IN THE CLOUDS: RISKS TO PRIVACY AND CONFIDENTIALITY FROM CLOUD COMPUTING* 4 (2009), available at http://www.worldprivacyforum.org/pdf/WPF_Cloud_Privacy_Report.pdf.

²¹ See Kevin Hartig, *What is Cloud Computing: The Cloud is a Virtualization of Resources That Maintain and Manages Itself*, CLOUD COMPUTING J. (Dec. 13, 2009, 12:30 PM), <http://cloudcomputing.sys-con.com/node/579826> (describing the origins of the term “cloud computing”).

²² *Id.*

²³ See Robison, *supra* note 1, at 1203–04 (including “Software as a Service,” “Platform as a Service,” and “Hardware as a Service”).

²⁴ See Melzer, *supra* note 2, at 406 (“[E]-mail[s] . . . can be conjured up as soon as they are needed; when the need is gone, they can be wiped from existence, freeing the host computer to run a different virtual machine for another user.” (quoting Erica Naone, *Conjuring Clouds: How Engineers are Making On-Demand Computing a Reality*, TECH. REV. (July–Aug. 2009), <http://www.technologyreview.com/computing/22606>)).

²⁵ *Id.*

More recent models of cloud computing consist of remote servers that act purely as storage drives.²⁶ Users may register for the services of these providers and then save, store, and access their personal files on these remote servers.²⁷ Access to these servers is available on any device that has internet capabilities, readily increasing consumer convenience.²⁸ This model of cloud computing benefits consumers in a twofold manner. First, consumers are not restricted to accessing their data solely by computer; they are able to retrieve stored data from any device that has internet capabilities, which increases consumer convenience.²⁹ Second, as consumer convenience increases, so does consumer efficiency, since files stored on cloud servers can be accessed anytime, anywhere with any internet capable device.³⁰ For these reasons, cloud computing has become particularly attractive, and its utilization has skyrocketed.³¹

B. BRIEF EVOLUTION OF COPYRIGHT LAWS AND INTERNET LAWSUITS

Copyright laws date as far back as the 1700s with the Statute of Anne.³² The Statute of Anne, enacted by British Parliament in 1710, protected the unauthorized reproduction of literary works in hopes of incentivizing British citizens to create masterpieces.³³ The Constitution granted Congress similar authority to establish intellectual property incentives “[t]o promote the [p]rogress of [s]cience and useful [a]rts.”³⁴ Currently, the provisions of the Copyright Act of 1976 apply to copyright infringement lawsuits.³⁵ Copyright holders under the Copyright Act of 1976 enjoy the following privileges:

²⁶ See Robison, *supra* note 1, at 1204 (“[S]ome cloud providers are selling raw computer resources, including processing power and data storage, as a type of utility service . . .”).

²⁷ *Id.*

²⁸ See *id.* at 1202 (“A cloud user only needs to have a device connected to a cloud provider—a laptop, smartphone, or shared public computer will suffice.”).

²⁹ See *id.* (providing examples of various devices that facilitate cloud access).

³⁰ *Id.* at 1200, 1202 (“A major limitation is people’s need to interact with their applications or data while outside the home or office.”).

³¹ See *id.* (“Cloud computing helps users circumvent these [inconveniences] by making the personal computer largely irrelevant.”).

³² Shyamkrishna Balganes, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1545, n.4 (2010).

³³ KARL-ERIK TALLMO, *THE HISTORY OF COPYRIGHT: A CRITICAL OVERVIEW WITH SOURCE TEXTS IN FIVE LANGUAGES* (forthcoming), available at <http://www.copyrighthistory.com/anne.html>.

³⁴ U.S. CONST. art. I, § 8, cl. 8.

³⁵ Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2006).

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) 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; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.³⁶

As technology continued to expand, progress, and develop, once seemingly straightforward rights became muddled.³⁷ In the last thirty-five years, the rise of the use of the internet and various other cloud computing functions produced many lawsuits, which contested what constitutes copyright infringement in this new technological realm.³⁸

With the influx of internet-related copyright infringement cases, two distinct categories of infringement emerged: direct and indirect infringement.³⁹ A claim of direct infringement brought by a copyright owner alleges that the defendant has violated one of the previously mentioned privileges.⁴⁰ Claims of direct infringement, though straightforward, proved difficult to litigate with the emerging technological evolution.⁴¹ Various technological innovations made it effortless for consumers to infringe, thereby making litigation against each

³⁶ 17 U.S.C. § 106.

³⁷ Melzer, *supra* note 2, at 412–13; *see also* *Hearings*, *supra* note 4 (“Copyright laws have struggled through the years to keep pace with emerging technology.”).

³⁸ Melzer, *supra* note 2, at 412–13; *see also* Balganesch, *supra* note 32, at 1545, n.1 (“As of 2004, Congress had amended the Copyright Act of 1976 about forty-eight times.”).

³⁹ *See* Lori E. Lesser et al., *Current Copyright Internet Litigation Issues*, 932 PLI/PAT 349, 353 (2008) (“Internet copyright infringement litigation has been brought on the basis of direct infringement or indirect infringement.”).

⁴⁰ *Id.*

⁴¹ *See* *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 914 (2005) (“When a widely shared product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all *direct* infringers” (emphasis added)).

individual infringer unrealistic for copyright holders, particularly as the internet began to weave its way into the average person's everyday life.⁴²

Thus, courts began applying a theory of secondary liability when websites⁴³ promoted infringement by contributing to the infringement, by profiting off those who infringed, or by inducing clients to infringe.⁴⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* was a landmark case that addressed secondary infringement and set up a legal framework for addressing future internet cases, particularly with file sharing, as cloud computing became common among internet users.⁴⁵ The Court held that website owners could be held secondarily liable for the unauthorized infringement by its users.⁴⁶

C. RISE OF MUSIC DOWNLOADS AND LITIGATION WITH THE GROWTH OF THE INTERNET

With the expansion of the internet into the average person's everyday life, copyright infringement became widespread,⁴⁷ perhaps more so in the area of music downloads.⁴⁸ Prior to the internet, consumers were required to purchase cassettes or compact discs for their listening enjoyment.⁴⁹ Those who did not wish to purchase these sources of music could still enjoy music via radio transmissions.⁵⁰

Some litigation accompanied the use of cassette recorders because they permitted consumers to record songs off the radio, rather than purchasing the cassette.⁵¹ However, the volume of litigation regarding copyright infringement

⁴² *Id.*

⁴³ *See id.* (“[T]he only practical alternative is to go against the device’s distributor for secondary liability on a theory of contributory or vicarious infringement.”).

⁴⁴ Lesser et al., *supra* note 39, at 353.

⁴⁵ *Metro-Goldwyn-Mayer Studios, Inc.*, 545 U.S. at 914.

⁴⁶ *Id.* at 941.

⁴⁷ *See* Melzer, *supra* note 2, at 403 (“The increasing digitization of content has created numerous challenges to copyright enforcement over the last two decades, as . . . infringement became easy and inexpensive.”).

⁴⁸ *See* Kaleena Scamman, *ADR in the Music Industry: Tailoring Dispute Resolution to the Different Stages of the Artist-Label Relationship*, 10 CARDOZO J. CONFLICT RESOL. 269, 299 (2008) (“The growth in consumption of music has led to changes in the way music is distributed and consumed.”).

⁴⁹ *See* Jesse Rendell, *Copyright Law in the New Millennium: Digital Downloads and Performance Rights*, 81 TEMP. L. REV. 907, 907 (2008) (“[M]ore and more people are turning to the [i]nternet to obtain music rather than purchasing music from traditional retailers . . .”).

⁵⁰ *See id.* at 920 (describing the intentions of Congress to protect copyright owners’ right to public performances, including television and radio broadcasts).

⁵¹ *See* Joshua M. Siegel, *Reconciling Shareholder Limited Liability with Vicarious Copyright Liability: Holding Parent Corporations Liable for the Copyright Infringement of Subsidiaries*, 41 U. RICH. L. REV. 535,

via the use of the World Wide Web grew as quickly as the internet did.⁵² Many cloud service providers, such as Napster, made downloading music files virtually effortless.⁵³ These websites placed access to music at the fingertips of its users.⁵⁴

D. VARIOUS AMENDMENTS TO THE COPYRIGHT ACT OF 1976 AND THE DIGITAL MILLENNIUM COPYRIGHT ACT

As technology evolved, it became apparent that the standing provisions of the Copyright Act of 1976 alone were insufficient to combat many of the novel techniques utilized by copyright infringers.⁵⁵ Realizing the need to address the advancements in technology, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA) as an amendment to the Copyright Act of 1976.⁵⁶ Generally, the DPRSRA was meant to protect copyright holders' rights in their works, not only at the time the works were created, but also as technology continued to grow and expand exponentially.⁵⁷ As time progressed, technology evolved, and the number of lawsuits grew.⁵⁸ Tensions between protecting copyright holders' works and encouraging the development of new technology grew.⁵⁹ To strike a balance between these two

551 (2007) (describing a case in which a record company brought lawsuits against those using and permitting the duplication of songs via the cassette player).

⁵² See Rendell, *supra* note 49, at 907 (“As the number of music consumers who use the [i]nternet to obtain their music continues to increase, [copyright] issues, which once seemed trivial, have become increasingly problematic . . .”).

⁵³ See David Polin, *Proof of Copyright Infringement by File Sharing*, 63 AM. JUR. PROOF OF FACTS 3D § 2 (2001) (describing the relatively easy process of signing up for a Napster web account, installing the necessary software, and connecting with other users who possess the music files for which the user is searching).

⁵⁴ *Id.*

⁵⁵ See Rendell, *supra* note 49, at 908–09 (“Congress amended the [Copyright] Act [of 1976] by enacting the Digital Performance Right in Sound Recordings Act . . . to ensure that the rights of copyright owners are adequately protected as new technologies continually change the way others use the owners’ creative works.”).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *Hearings*, *supra* note 4 (“Copyright laws have struggled through the years to keep pace with emerging technology.”).

⁵⁹ See *id.* (“The ‘Digital Millennium Copyright Act of 1998’ is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”); see also *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 636 (S.D.N.Y. 2011) (“The DMCA seeks to balance the interests of copyright owners and online service providers by promoting cooperation, minimizing copyright infringement, and providing a higher degree of certainty to service providers on the question of copyright infringement.”).

vital public interests, Congress enacted the Digital Millennium Copyright Act (DMCA).⁶⁰

The DMCA purposefully sought to deter service providers who attempted to circumvent the provisions of the Copyright Act of 1976 and its subsequent amendments.⁶¹ Websites that unlawfully attempted to infringe on copyright owners' privileges, either primarily or secondarily through contributing, profiting, or inducing, would not be afforded the safe harbor protections of part two of the DMCA.⁶²

Additionally, the DMCA sought to protect internet service providers that offered access to copyrighted works by creating safe harbors that shielded these services providers from liability upon certain conditions.⁶³ In order to be afforded safe harbor protection, service providers must "[have] adopted and reasonably implemented, and inform[ed] subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."⁶⁴ Cloud servers must additionally show that they

(A)(i) [do] not have actual knowledge that the material or an activity using the material on the system or network is infringing . . . ; (B) [do] not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (C) upon notification of claimed infringement . . . respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.⁶⁵

Despite the availability of the safe harbors, copyright holders could take solace in the fact that many websites do not take such precautions and thus are

⁶⁰ See *Capitol Records, Inc.*, 821 F. Supp. 2d at 636 ("The [Digital Millennium Copyright Act] seeks to balance the interests of copyright owners and online service providers.").

⁶¹ *Hearings, supra* note 4 ("Title I [of the DMCA] encourages technological solutions . . . by enforcing private parties' use of technological protection measures with legal sanctions for circumvention and for producing and distributing products or providing services that are aimed at circumventing technological protection measures that effectively protect copyrighted works.").

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 17 U.S.C. § 512(i)(1)(A) (2010).

⁶⁵ *Id.* § 512(c)(1).

not shielded from the narrowly interpreted protections under the DMCA.⁶⁶ For example, courts have been hesitant to shield from liability websites that neither take precautions to monitor repeat offenders⁶⁷ nor comply with copyright holders' requests to take down unauthorized material.⁶⁸ However, "[g]eneral awareness of rampant infringement is not enough to disqualify a service provider of [safe harbor] protection."⁶⁹

Despite Congress's intention of promoting digital progress while protecting copyright owners, many—including consumers, service providers, and courts—may have been left with more questions than answers.⁷⁰ Although the DMCA is seemingly direct in application, numerous cases have challenged the validity, applicability, and scope of the DMCA safe harbors. The plaintiff in *321 Studios v. Metro-Goldwyn-Mayer Studios, Inc.* challenged Congress's authority to enact the DMCA altogether, arguing that the statute exceeded the enumerated powers of Congress.⁷¹ Both parties in *Capitol Records, Inc. v. MP3tunes, LLC* argued that the safe harbor provisions of the DMCA applied to the defendant's website.⁷² Finally, in *Brown v. Stoud*, the plaintiff argued that the actions of the defendant caused him to fall out of the scope of the protection provided by the DMCA safe harbors.⁷³ Despite Congress's good-faith efforts to clarify the copyright laws in the wake of the growth of the World Wide Web, cases such as these show how murky copyright laws have become.

⁶⁶ See *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 636 (S.D.N.Y. 2011) (“[S]afe harbors, as with all immunities from liability should be narrowly construed.” (citing *United States v. Texas*, 507 U.S. 529, 534 (1993))).

⁶⁷ See *id.* at 637 (“The purpose of subsection 512(i) is to deny protection to websites that tolerate users who flagrantly disrespect copyrights.”).

⁶⁸ See *id.* at 642 (“After proper notice, a service provider must act expeditiously to remove identified content. Service providers must take down the specific infringing material identified in the notice . . .”).

⁶⁹ *Id.* at 644 (citing *Viacom v. YouTube*, 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010)).

⁷⁰ See Melzer, *supra* note 2, at 412–13 (“Copyright in the digital age face[s] . . . challenges in defining what constitute[s] copying, given the potentially transient nature of digitally stored content . . .”).

⁷¹ *321 Studios v. Metro-Goldwyn-Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1090 (N.D. Cal. 2004).

⁷² *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 636–37 (S.D.N.Y. 2011).

⁷³ *Brown v. Stoud*, 2011 WL 2600661, at *1, *3 (N.D. Cal. 2011).

E. *CAPITOL RECORDS, INC. V. MP3TUNES, LLC*—PAVING THE ROAD FOR CONSUMER EFFICIENCY

1. *Background of Case.* In *Capitol Records, Inc. v. MP3tunes, LLC*, the plaintiffs—a group of fifteen record companies⁷⁴—brought suit, asserting both direct and secondary copyright infringement claims.⁷⁵ The defendant, owned and operated a cloud server where users stored their downloaded music in what was coined a music locker.⁷⁶ The music locker was essentially storage space on the defendant's cloud server that allowed users to store their music files in personal accounts.⁷⁷ These stored music files were accessible by any device with internet capabilities.⁷⁸ Consumers gained access to the defendant's cloud server by agreeing to a variety of terms and conditions that were intended to deter unauthorized use of the music lockers,⁷⁹ thereby placing the defendant's cloud server within the scope of the DMCA's safe harbors.⁸⁰ Additionally, the defendant established a protocol that banished repeat infringers from having a personal music locker upon evidence of habitual unauthorized infringement,⁸¹ as well as a procedure that removed the infringing material.⁸²

2. *Public Performance Right Infringement Claim.* Amid all of the copyright infringement causes of action brought by the plaintiff, one claim is particularly significant. The plaintiffs asserted a copyright infringement claim based on their right to public performance against the defendant.⁸³ The right to public performance, as defined by the Copyright Act of 1976, is the right

- (1) to perform or display [the work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a [public] performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether

⁷⁴ *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 633 (S.D.N.Y. 2011).

⁷⁵ *Id.* at 646.

⁷⁶ *Id.* at 633.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 635.

⁸⁰ *See id.* at 642–43 (stating the basic terms, such as the prohibition against storing copyrighted materials in the lockers as well as the consequence of severance in the event that the defendant's warnings were not heeded).

⁸¹ *Id.* at 648–39.

⁸² *Id.* at 642–43.

⁸³ *Id.* at 649.

the members of the public [are] capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.⁸⁴

The plaintiffs contended that their right to public performance was violated when the defendant permitted users to upload personal music files into the cloud server and kept only a single unique file of each copy, rather than every user's individual copy.⁸⁵ The copyright-holding plaintiffs argued that because only one copy of the music file was maintained, each time a user listened to the song, he was enjoying a public performance that was not authorized by the copyright holders.⁸⁶

Personal computer hard drives and external hard drives run slower as the memory becomes full;⁸⁷ similarly, remote servers are also likely to slow down as memory increases, particularly when numerous users upload large quantities of music files.⁸⁸ To combat this potential issue, the defendant created a compression algorithm to determine which music files were composed of the same coding.⁸⁹ Each unique file was kept on the server while the rest were deleted,⁹⁰ thus freeing up an enormous amount of memory. This method not only provided more room for files, but also it allowed the cloud server to run more efficiently.⁹¹

The plaintiffs challenged the legality of this scheme, arguing that it employed a "master copy," which permitted the defendant to publicly transmit various versions of the same song to different users in the public sphere.⁹² The district judge disagreed.⁹³ Granting summary judgment in favor of the defendant on this issue,⁹⁴ he stated that the defendant did not actually use a "master copy" of

⁸⁴ 17 U.S.C. § 101 (2006).

⁸⁵ *Capitol Records, Inc.*, 821 F. Supp. 2d at 649.

⁸⁶ *Id.*

⁸⁷ See Robison, *supra* note 1, at 1200 ("[C]omputer purchasers must buy more processing power and storage capacity.").

⁸⁸ See Jay, *How Does A Full Hard Drive Slow Down a PC?*, ASK YOUR PC – PC WINDOWS HELP (Jan. 8, 2009, 2:48 PM), <http://www.askyourpc.com/blog1.php/2009/01/08/how-does-a-full-hard-drive-slow-down-a-p> (stating that one reason a full hard drive runs slower is because it has more files to index).

⁸⁹ *Capitol Records, Inc.*, 821 F. Supp. 2d at 634.

⁹⁰ *Id.* at 650.

⁹¹ See *id.* (stating that the defendant's algorithm solely deletes duplicative coded music files to free up more storage space).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *id.* ("[This] is precisely the type of system routinely protected by the DMCA safe harbor.").

files, which were later transmitted to its users.⁹⁵ In determining which files to delete, the defendant's cloud server preserved *unique* copies only; the algorithm distinguished between the underlying make-up of the file, not between the different songs.⁹⁶ Thus, variously-coded copies of the same song remained on the defendant's cloud server.⁹⁷

F. COPYRIGHT HOLDERS' RIGHTS TO PUBLIC PERFORMANCE

1. *The First Case on Copyright Holders' Rights to Public Performance Concerning Music Downloads.* Just as other causes of action under the Copyright Act of 1976 became muddled with the advent of modern technology,⁹⁸ so did public performance rights, particularly with the surge of downloadable music files with the rise of the internet.⁹⁹ *United States v. American Society of Composers, Authors, and Publishers (ASCAP)* was the first case to establish the law on the issue of downloaded music files and peer-to-peer file sharing.¹⁰⁰ The primary legal question was whether a downloaded digital music file infringed on the copyright holders' right to public performance under 17 U.S.C.A. § 101 as previously defined.¹⁰¹

The court distinguished the act of streaming live music from the act of downloading music files.¹⁰² Simply stated, streaming live music constituted an infringement on public performance rights because the mechanism behind internet streaming was synonymous to listening to the radio or watching television,¹⁰³ a situation in which a copyright holder's public performance right

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See id.* (“[T]he system preserves the exact digital copy of each song uploaded to MP3tunes.com.”).

⁹⁸ *See Hearings, supra* note 4 (“Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player piano roll in the 1900’s to the introduction of the VCR in the 1980’s.”).

⁹⁹ *See Rendell, supra* note 49, at 909 (“[Since] a digital transmission may . . . be a public performance . . . some commentators [also] infer that downloads may be indeed be public performances.”).

¹⁰⁰ *See United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 439 (S.D.N.Y. 2007) (declaring that “transmission of a digital file over the internet” was an “issue of first impression”).

¹⁰¹ *See id.* at 442 (“[E]ach [party] moved for partial summary judgment on the issue of whether the downloading of a digital music file constitutes a public performance of the downloaded song within the meaning of the United States Copyright Act.”).

¹⁰² *Id.* at 441–42.

¹⁰³ *See id.* at 446 (“The broadcasting of television signals is closely analogous to the streaming of music over the internet.”).

is undisputedly protected.¹⁰⁴ The court further held that there was no public performance rights violation by users who obtained songs by downloading files from the internet.¹⁰⁵ The court reasoned that unlike streaming music, when a consumer downloads a music file, the music itself is not being performed in any capacity.¹⁰⁶ The district court's grant of summary judgment on this issue was upheld on appeal to the Second Circuit Court,¹⁰⁷ and certiorari was subsequently denied by the Supreme Court in 2011.¹⁰⁸

2. *Lack of Litigation of the Public Performance Infringement Law.* Since the issue of public performance in connection with downloading of music files from the internet was litigated for the first time in 2007,¹⁰⁹ there has been a lack of case law regarding the protection of copyright holders' right to public performance with the rise of music downloads.¹¹⁰ The lack of litigation in this area of intellectual property likely is due to a fine line distinction between distribution and performance that no longer exists.¹¹¹ Prior to the expansion of the internet and all of its technologically savvy applications, most people could probably distinguish between when a copyrighted work was reproduced and when it was performed.¹¹² However, as technology evolved in a manner that was unforeseeable by those who drafted the Copyright Act, the 1976 provisions were rendered inadequate.¹¹³ At no point did the members of Congress realize that a debate over whether a transmission of music could be both a redistribution of music and a public performance of the work would ensue.¹¹⁴

¹⁰⁴ See Rendell, *supra* note 49, at 920 ("Congress sought to ensure that the definition of 'perform publicly' would cover both live performances . . . and performances that are conveyed to audiences through technological processes, like in the case of television or radio broadcasts.").

¹⁰⁵ *United States v. Am. Soc'y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 441 (S.D.N.Y. 2007).

¹⁰⁶ See *id.* at 443–44 ("[W]e can conceive of no construction [of the term 'performance'] that extends it to the copying of a digital file from one computer to another in the absence of any perceptible rendition."); see also Rendell, *supra* note 49, at 913 ("[T]he transmission of a performance, and not simply the transmission of data, is required to implicate the performance rights granted under the Copyright Act.").

¹⁰⁷ *United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64 (2d Cir. 2010).

¹⁰⁸ *Am. Soc'y of Composers, Authors, and Publishers v. United States*, 132 S. Ct. 366 (2011).

¹⁰⁹ *Am. Soc'y of Composers, Authors, and Publishers*, 485 F. Supp. 2d at 438.

¹¹⁰ See Rendell, *supra* note 49, at 913 ("*American Society* is the only case to date that has dealt squarely with the issue of downloads and performance rights.").

¹¹¹ Jonah M. Knobler, *Public Performance Rights in Music Downloads: United States v. ASCAP and Beyond*, 11 NO 12 J. INTERNET L. 1, 11 (2008).

¹¹² See *id.* at 11–12 ("Every act that resulted in the public's experiencing recorded music was . . . either a reproduction-and-distribution or a public performance.").

¹¹³ See *Hearings, supra* note 4 ("With this constant evolution in technology, the law must adapt . . .").

¹¹⁴ Knobler, *supra* note 111, at 11–12.

Prior to this, much of the downloading-copyrighted-files litigation focused on direct and indirect liability for copyright infringement through various forms of reproduction and distribution.¹¹⁵

ASCAP was the first case to grapple with this form of copyright infringement.¹¹⁶ The plaintiffs argued that downloaded files constituted an unauthorized performance that infringed upon their exclusive rights to public performance.¹¹⁷ Though ultimately unsuccessful in their cause of action,¹¹⁸ the *ASCAP* plaintiffs illustrated just how murky these once distinct rights had become.

3. *Proponents and Critics of ASCAP's Public Performance Decision.* As is the case with much of the law, proponents and critics argue over the law's proper interpretation of infringement on copyright owners' public performance rights.¹¹⁹ Proponents of the *ASCAP* decision argue that a strict interpretation and understanding of the written statute needs to be heeded because copyright holders are not without redress¹²⁰ and are able to pursue other causes of action for infringement, such as unauthorized reproduction.¹²¹ ¹²² Critics of the law argue that the statute was not intended to be so narrowly construed.¹²³

Up to this point, case law has established that the transmission of data files from one computer to another, as well as the storage of single, *unique* copies of files on a cloud service provider, are not violations of copyright owners' public performance rights.¹²⁴ However, if the history of technological advancements is

¹¹⁵ Lesser et al., *supra* note 39, at 353.

¹¹⁶ *United States v. Am. Soc'y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 438 (S.D.N.Y. 2007).

¹¹⁷ *Id.* at 442.

¹¹⁸ *Id.* at 441.

¹¹⁹ See Rendell, *supra* note 49, at 915 ("Various commentators have also weighed in on this issue [about whether downloading music would implicate the Copyright Act]. [One] specialist . . . notes that various arguments exist on both sides of the debate.").

¹²⁰ See *Am. Soc'y of Composers, Authors & Publishers*, 485 F. Supp. 2d at 444 (listing prior cases where the court held that unlicensed downloads implicate the Copyright Act of 1976 for unauthorized reproduction and distribution of such works).

¹²¹ See *id.* at 445 ("A distinction must be made between transmissions of *copies* of works and transmissions of *performances* . . . of works." (citing BRUCE A. LEHAM, INFORMATION INFRASTRUCTURE TASK FORCE, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 71 (1995))).

¹²² See Rendell, *supra* note 49, at 918 ("Based on the plain meaning of the words 'recite' and 'play' as used in the statute, it is hard to argue that the transmission of a data file in the form of a download can be considered either a recitation or a playing of a work.").

¹²³ See *id.* at 917–18 ("Given that Congress intended the language of the [Copyright] Act to be interpreted broadly, the statutory arguments in support of the notion that downloads implicate performance rights are more convincing.").

¹²⁴ *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627 (S.D.N.Y. 2011); *Am. Soc'y of*

any indication, seemingly straightforward public performance case law regarding downloaded music files likely will create a confusing mess of litigation.

III. ANALYSIS

In this section, the framework and implications of current case law on public performance rights is analyzed. In the analysis, the need to uphold the district judge's grant of summary judgment on this issue in *Capitol Records, Inc.* is discussed, along with the various rationales. Additionally, the potential future implications of affirming the grant of summary judgment is discussed.

A basic assumption critical to this analysis is that the music obtained by the consumer has been lawfully attained or authorized. Although seemingly related, as previously discussed, copyright holders' right to reproduce and distribute their works is distinguishable from their right to publicly perform the work.¹²⁵ Thus, the discussion of public performance presumes that the performance has been obtained legally, and the sole question is the right to transmit it.

A. THE SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS IN *CAPITOL RECORDS, INC.* SHOULD BE UPHELD

A very small portion of the sixteen-page *Capitol Records, Inc.* opinion was dedicated to the discussion of the plaintiffs' claim for infringement of their public performance rights.¹²⁶ Despite the lack of discussion given to the topic, the potential positive implications of a definitive finding could prove to be enormous in this era of ever-changing technology. This particular decision made by the district judge should be affirmed because public performance rights are not implicated and because public policy necessitates promotion of societal interests, particularly consumer efficiency.

1. *Public Performance Rights are Truly Not Implicated.* As previously discussed in this Note, there has been an increase in debate about how copyright holders, consumers, and courts should interpret the downloading and transmission of music files and whether the downloaded files infringe upon public performance rights.¹²⁷ Some argue that during the process of downloading the music file, the

Composers, Authors & Publishers, 485 F. Supp. 2d 438, 438.

¹²⁵ See *Am. Soc'y of Composers, Authors & Publishers*, 485 F. Supp. 2d at 447 (stating that although reproduction and distribution of copyrighted works could overlap with the category of public performance, Congress showed no intention of such overlap "in light of the distinct classification and treatment" of each).

¹²⁶ *Capitol Records, Inc.*, 821 F. Supp. 2d at 633.

¹²⁷ Rendell, *supra* note 49, at 917.

music cannot be simultaneously performed; thus, the very nature of the right to public performance is not implicated.¹²⁸ Others argue that the term “perform” should be understood in a broad sense and that a music download is available to be performed the moment it finished downloading.¹²⁹ The plaintiffs in *Capitol Records, Inc.* argued that the defendant’s cloud server, which permitted users to store their music, infringed on their right to public performance.¹³⁰ The claim in *Capitol Records, Inc.* was predicated on the plaintiffs’ belief that their right to public performance was violated because the defendant kept a single, unique copy of each file. Thus, when users play music stored in their music lockers, they receive a performance that has not been authorized by the copyright owners.¹³¹

However, as the district judge notes, the plaintiffs’ claim is a weak one,¹³² irrespective of which side of the public performance argument one espouses. The defendant’s algorithm to free space taken up by multiple copies of files recognizes coding, not songs.¹³³ Therefore, a user who listens to a song from his music locker is not listening to an unauthorized performance; the song that is saved to the server is the same song that is played at a later time.¹³⁴

Understanding how music lockers work is the key to understanding why the use does not constitute a public performance, and therefore, why public performance rights are not implicated. Undoubtedly, the playing of the music would be considered a performance.¹³⁵ However, according to the Copyright Act, in order for there to be a *public* performance, the work must be played for a large group of people outside of the family, either as a live performance or in a re-transmitted version.¹³⁶ Because songs are stored in a personal music account that likely is used only by the music locker owner, one should not presume that the music file will be played for anyone else’s listening pleasure. Thus, storing files in a music locker and replaying them at the listener’s leisure arguably falls out of the scope of the public performance rights granted to copyright

¹²⁸ See *Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d at 443–44 (stating that despite the need to interpret the term “perform” broadly, there was no adequate understanding of the term without some of the music being playable as it was being downloaded).

¹²⁹ Rendell, *supra* note 49, at 918–19.

¹³⁰ *Capitol Records, Inc.*, 821 F. Supp. 2d at 627.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See *id.* at 650 (“[T]he system preserves the exact digital copy of each song uploaded to MP3tunes.com.”).

¹³⁵ See Rendell, *supra* note 49, at 912 (stating that performances of copyrighted works includes when they are “recite[d],” “render[ed],” and “play[ed]”).

¹³⁶ 17 U.S.C. § 101 (2006).

holders.¹³⁷ Assuming that the music files were obtained with some form of authorization, the user is permitted to listen to the music file whenever he wants. Thus, though there is a performance per the statute, both advocates and critics of the majority opinion in *ASCAP* should agree that no *public* performance has occurred.

2. *Rationales for Affirming the District Judge's Decision are Rooted in Public Policy.* In addition to the argument that the copyright holders' rights truly are not infringed upon, the district judge's decision is supported by other public policy rationales. First, the principle purpose of the copyright clause in the Constitution is to encourage the expansion of the arts and sciences.¹³⁸ Though incentives are given to those who create copyrightable works, this is not the chief purpose of the Constitution. Nowhere in the Constitution were such rights explicitly given to creators.¹³⁹ It is beneficial to incentivize people to continue to create; however, users, copyright holders, and courts should remember that the primary focus of the Copyright Act is not for personal gain, but instead for societal gain.¹⁴⁰ Many of the amendments to the Copyright Act evidence this. Amendments such as the DMCA would be unnecessary if Congress wished solely to protect the owners of copyrighted works. Many of the amendments reflect congressional intent keep up with the ever-changing progression of technology.¹⁴¹ The need for new amendments arises as various technological innovations are released, forcing Congress to amend prior provisions and create new ones.¹⁴² Many of the amendments are not additional protections to copyright holders; rather, they are protections for the *development* of technological advancements.¹⁴³ With the progression of modern technology, lawsuits based on outdated understandings and notions of copyright law should not prevail. One could argue any hindrance in the development of new technology is contrary to the very purpose of the Copyright Clause in the

¹³⁷ *Id.*

¹³⁸ See U.S. CONST. art. I, § 8, cl. 8 (the Constitution permits Congress to establish copyright incentives in order “[t]o promote the Progress of Science and useful Arts”).

¹³⁹ *Id.*

¹⁴⁰ See Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 326 (2003) (“[T]he legislative grant of rights to authors has been conceived as a means of achieving the societal goal of promoting learning and public access to knowledge, rather than being the primary goal of the copyright system.”).

¹⁴¹ See *Hearings*, *supra* note 4 (“With this constant evolution in technology, the law must adapt.”).

¹⁴² See *id.* (“Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player piano roll in the 1900’s to the introduction of the VCR in the 1980’s.”).

¹⁴³ See Samuelson, *supra* note 140, at 328 (“[T]he goal of copyright law [is] to provide enough rights to provide adequate incentives to induce creators to innovate — but not more than this.”).

Constitution. If copyright holders prevail on claims of public performance infringement in weak cases such as *Capitol Records, Inc.*, computer and technology innovators will likely be deterred by potential lawsuits from creating new works. Even if the creators could not be sued for designing the device, creators will have little incentive to create if the primary function of the device is deemed a violation of a copyright owner's rights. Thus, a seeming battle over which incentives should receive promotion would ensue. Who is more likely to be dis-incentivized: copyright holders of works that are still afforded protections of the Copyright Act, such as the exclusive rights to reproduce, distribute, and create derivative works,¹⁴⁴ or creators of technology whose innovations are likely to continue to be the source of copyright litigation, despite its positive use by the general public? Because our society does not accept one side's interests as the lesser evil and the other as the greater, the Copyright Act and its subsequent amendments were predicated on an attempt to balance each side's interests.¹⁴⁵ This Note does not advocate the belief that the legislature banishes the public performance right, but it does suggest that in weak showings of public performance intrusions, courts should rule in favor of allowing the development to be used to its fullest potential, absent any other unlawful purposes.

Additionally, a storage method such as the defendant's greatly enhances consumer efficiency. When memory becomes full, computer processes slow to a crawl.¹⁴⁶ This happens to cloud servers too, such as the one owned and promoted by the defendant in *Capitol Records, Inc.* When hundreds and even thousands of consumers utilize the same server, memory is quickly filled. The defendant's resourcefulness combated this problem by using an algorithm that eliminated duplicative files from his server, thereby freeing memory space.¹⁴⁷ Aside from the blatant mischaracterization of the defendant's cloud server processes to bring a claim of unauthorized transmission of a performance,¹⁴⁸ the plaintiffs' argument that all music files should be kept on the server

¹⁴⁴ Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2006).

¹⁴⁵ See Rendell, *supra* note 49, at 908–09 (“Congress amended the [Copyright] Act [of 1976] . . . to ensure that the rights of copyright owners are adequately protected as new technologies continually change the way others use the owners’ creative works.”); *Hearings, supra* note 4 (“The ‘Digital Millennium Copyright Act of 1998’ is designed to facilitate the robust development and world-wide web expansion of electronic commerce, communications, research, development, and education in the digital age.”).

¹⁴⁶ See David Levine, *Slow Computer Syndrome*, COLBY-SAWYER COLLEGE, <http://www.colby-sawyer.edu/information/technology/updates/slowcomputer.html> (listing reasons including hard drive capacity, why computers run slower).

¹⁴⁷ *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 650 (S.D.N.Y. 2011).

¹⁴⁸ *Id.* at 649–50.

advocates a waste of storage and resources. As more users begin to store their files on cloud servers, memory space becomes a valuable commodity.¹⁴⁹ Many personal files, such as pictures and documents, would not be deleted, as they are individualized and unique to each user. Therefore, allowing duplicate files to be deleted when possible in order to preserve memory space makes practical sense. Although the defendant's remote server was utilized for the sole purpose of storing music,¹⁵⁰ similar servers permit their users to upload any type of file to their servers.¹⁵¹

The court's decision on this issue implicates not only the defendant's music locker but also other servers whose users upload more than music. This decision could potentially affect these non-exclusive servers, since many of the uploaded files are likely to be unique in content. Because non-exclusive servers will fill with all types of files more quickly than music-only cloud servers, consumer efficiency is more likely to suffer, and application of this ruling to servers providing computer hardware services will become desirable. In conclusion, societal interests in the continual development and promotion of consumer convenience necessitate that the district judge's ruling on this issue be upheld.

As technology inevitably progresses, this conclusion permits cloud servers to continue to provide adequate services to their users. Although the current holding is specifically applicable to music files, the next logical step will be that larger files, such as television shows and movies, will be saved to these cloud servers. As innovations, including televisions with wireless internet capabilities, gain popularity,¹⁵² the ability to store television shows and movie files on such servers to later be accessed via television sets will become commonplace. Forcing cloud servers to retain copies of every user's movie files is impractical and would render such a practical tool useless.

¹⁴⁹ See Robison, *supra* note 1, at 1203 ("Widespread consumer embrace of early cloud computing offerings suggests that a meaningful shift is underway.").

¹⁵⁰ *Capitol Records, Inc.*, 821 F. Supp. 2d at 633.

¹⁵¹ See Robison, *supra* note 1, at 1204 (describing how some cloud servers sell storage space to their users who can then access their account via any internet capable device).

¹⁵² See Alessandra Springmann, *New WiFi-enabled TV from Toshiba Sports LED Backlight, 1080p*, PCWORLD (Mar. 22, 2010, 12:37 PM), http://www.pcworld.com/article/192042/new_wifienabled_tv_from_toshiba_sports_led_backlight_1080p.html (describing wireless internet capabilities as one of the newest features (at the time) of televisions).

B. THE POSITIVE FUTURE IMPLICATIONS OF UPHOLDING THIS DECISION ON APPEAL

Upholding this decision on appeal would not only have positive implications for the present but also would provide enormous future benefits for our technology-driven society. As our society continues to grow more reliant on computers to accomplish daily routine tasks, the use of cloud servers will likely become more of a necessity.

Because the World Wide Web technology continues in rapid progression, American society has been graced with the ability to perform tasks quickly and more conveniently than ever. However, if this district court finding is not upheld, our ability to complete many of our tasks will soon plateau and potentially decline. Many factors contribute to this possibility. First, as any form of hard drive memory fills, it starts to run more slowly,¹⁵³ causing consumer efficiency to plummet as completing tasks takes longer since the computer runs slower. By not permitting the deletion redundant files from the server's memory, a reversal of the court's decision would escalate the speed at which servers would become almost useless because of the vast amount of stored files.

Many of the newest technological innovations of the decade, including smartphones, netbooks, and iPads, have wireless internet capabilities. This allows for access to information that users have stored on their personal accounts on these servers.¹⁵⁴ This consumer convenience is exemplified in a twofold manner. First, large computers, or even small external hard drives, are no longer needed to store files.¹⁵⁵ Second, users are no longer limited to accessing these files stored on the internet solely with a personal computer.¹⁵⁶ So long as a user can access the internet, he can access his data on the cloud server. Numerous devices have internet capabilities, which furthers the convenience of cloud computing in everyday life.¹⁵⁷

Currently, music files are among the largest files that users wish to access at will. However, this will soon change, as users will soon wish to store larger files, such as television shows and movies, on their servers. As wireless

¹⁵³ See Jay J., *supra* note 88 (“[One] reason[] include[s] the fact that the hard drive has to index more files . . .”).

¹⁵⁴ See Robison, *supra* note 1, at 1202 (“A cloud user only needs to have a device connected to a cloud provider—a laptop, smartphone, or shared public computer will suffice.”).

¹⁵⁵ See *id.* at 1204 (“[S]ome cloud providers are selling raw computer resources, including processing power and data storage, as a type of utility service . . .”).

¹⁵⁶ See *id.* 1202 (listing various devices that allow consumers to connect to the internet).

¹⁵⁷ *Id.* (listing various devices with internet capabilities that therefore have access to cloud servers).

internet-capable televisions begin to gain popularity, users will want to store their movie files online and access them whenever and from wherever they choose. The possibility of movies only being purchased in digital form a similar to music is in the foreseeable future. As it becomes more feasible and more reasonable to store movies and television shows digitally, there will be no reason for society not to opt for that path. In fact, iTunes already sells digitalized copies of movies.¹⁵⁸ Some of the current issues impeding the change in movie delivery format are likely related to the size of the movie files. Unlike music files, movie files are scores larger. If more than a handful of movies was stored on a hard drive in addition to the usual music, document, and picture files to (name a few), the speed of the computer would be hindered. Similarly, if movie files are stored on cloud servers already burdened with hundreds of thousands of users' files, the server's efficiency would be impacted.

Just as most people no longer purchase cassette tapes or compact discs for music, in the future, many people will likely stop buying DVDs and will instead purchase movies in their digital form. The court in *Capitol Records, Inc.* recognized the need for the defendant to clear out redundant music files stored on his cloud server. The holding reflects the importance of permitting similarly-situated cloud server owners to delete repeated movie files as they are more frequently stored.

As technology progresses, future societal needs and demands will continue to stem from the promotion of consumer efficiency. Thus, this holding, which finds no violation of public performance rights, should be upheld.

C. THE NEXT POSSIBLE STEP AFTER AFFIRMING THIS DECISION

As stated throughout this Note, the district court's decision found that public performance rights were not implicated when the defendant deleted repetitive files from his servers in order to create more space.¹⁵⁹ Taking the rationale that the user must upload his own file before he can access it from the music locker, the user was not privy to an unauthorized public performance when he listened to music that he owned. Additionally, one could argue that the use of the music locker is personal; therefore, the public is not privy to the personal music locker. Thus, the music locker falls outside of the scope of the Copyright Act's definition of a public performance.¹⁶⁰

¹⁵⁸ APPLE, <http://www.apple.com/itunes> (last visited Feb. 16, 2013).

¹⁵⁹ *Capitol Records, Inc. v. MP3tunes, LLC*, 832 F. Supp. 2d 627, 650 (S.D.N.Y. 2011).

¹⁶⁰ *See* 17 U.S.C.A. § 101 (2006) (defining public performance as to the public, by means of any device or process).

In order to promote consumer efficiency within the bounds of the law, this Note argues that this finding could be expanded by allowing any of the files, regardless of coding, to be deleted. As it currently stands, the defendant's algorithm deciphers the underlying code makeup of the file and only deletes files with the same coding. However, there does not appear to be a public performance rights violation if cloud server owners are permitted to delete any file that is duplicative in outcome, even if it is not in coding. First, only users who have uploaded the file would have access to it, which ensures that not every user of the server itself has access.¹⁶¹ This limits the public concern aspect. Second, the plaintiffs, in mischaracterizing the function of the defendant's algorithm, stated that a "master copy" system would give users access to performances to which they were not entitled.¹⁶² As the court correctly noted, the defendant did no such thing.¹⁶³ However, the plaintiffs' "master copy" system should be employed. The copyright-holding plaintiffs would argue that users would in this case receive unauthorized performances because only one "master copy" would be retained, despite slight differences in the file's coding. However, such a technical difference should not be read into the public performance rights definition because the public would not be granted access to a private user's cloud account where the data would be stored. Further, despite the coding, the user properly owned and uploaded the file. The user does not care whether the song he hears has the same coding of the song he uploaded. Therefore, a mere technicality that does not appear to impose any liability should be overlooked, so long as the user was the one to upload the file to a personal account, which shows prior ownership of the file.

The implementation of this Note's proposal would create more consumer efficiency and would free up additional cloud server space, which is becoming a hot commodity. As digital movies and wireless television become commonplace, society can expect the need for these cloud server providers to grow drastically.¹⁶⁴ However, by permitting servers to keep only a minimal number of redundant files, the need for users to establish numerous personal cloud accounts with various cloud servers can be kept to a minimum.

¹⁶¹ See *Capitol Records, Inc.*, 821 F. Supp. 2d at 633–34 (describing how users of MP3tunes must create an account to have a *personal* music locker through MP3tunes).

¹⁶² *Id.* at 634.

¹⁶³ *Id.*

¹⁶⁴ Robison, *supra* note 1, at 1204.

IV. CONCLUSION

Cloud computing is becoming an integral aspect of the internet and the everyday life of the average American. With this new way of storing our files on a remote server, members of society have become less dependent on computers and external hard drives to access their data.¹⁶⁵ With the growing presence of cloud computing, people have the ability to save, store, access, and edit their files on a third-party server that can be connected to with any device, not just computers, that has wireless capabilities.¹⁶⁶ Consumers now have convenient access to their files whenever they wish, wherever they may be. In a society where time is money, these developments cannot be overlooked.

Consumer efficiency is the name of the game, and for that reason, the holding in *Capitol Records, Inc. v. MP3tunes, LLC* should be upheld. Recognizing Congress's inclination for encouraging technology developments, courts should back Congress's intent by refusing to allow weak claims to succeed. Because the defendant did not engage in or induce any unlawful conduct by deleting repetitive files on his server to free up more space for his users, on appeal, the court should affirm this particular decision.

Arguably, no public performance violations occurred in *Capitol Records, Inc.* since the defendant did not make the contents of each user's personal music lockers available to the rest of its users. Because of the apparent weakness in the plaintiffs' claim for a public performance rights violation, the decision in favor of the defendant should be upheld because that decision creates the incentive to continue developing new and improved technologies, as well as to promote of consumer efficiency.

Additionally, just as the music industry has evolved over the past two decades from cassettes to compact discs to digital files, an analogous evolution is emerging in the television and movie realm. Therefore, the proposal that the district court decision should be taken a step further to permit cloud server owners to delete any redundant files, regardless of the underlying coding, should be seriously considered. Although this is a "master copy" system within the meaning that the plaintiffs' cause of action, the copyright-holding plaintiffs have established no legal foundation for why a "master copy" system is unlawful or even why such a system should not be tolerated. The same rationales of personal ownership of the file—personal use of the account and consumer efficiency, both of which appear to favor the defendant—are applicable only when a single copy, unique or not, is kept at all. So long as the

¹⁶⁵ *Id.* at 1202–03.

¹⁶⁶ *Id.* at 1202.

cloud server provider neither shares the file with those who have not uploaded it to their personal accounts nor allows the accounts to be publicly used, the minute, technical differences between the two systems should not be deemed a violation.

As consumer efficiency remains a constant demand in the hustle-bustle lifestyle of the everyday American, courts should favor consumer efficiency when it cannot be adequately shown that any violations have occurred. To entertain weak public performance causes of action, such as the one in *Capitol Records, Inc.*, would result a waste of resources as well as in the detraction from the all-important societal goal of consumer efficiency.

