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The Napster Debate

by
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Napster's music-swapping website hit the entertainment world like a tornado in 2000, raising fundamental questions about the nature and limits of intellectual property. The immediate controversy concerns music, but the broader issues involve computer software, books, and any other creation that can be distributed over cable or wireless as a stream of bits. In February 2001, a US Court of Appeals upheld an injunction against Napster's trading in copyrighted materials, but the controversy is not over. Napster is urging its fans to contact Congress and plump for legislative over-ruling of the judicial decision.¹

The technology. Computer programs can translate music contained on commercial CDs into a format called "MP3" for storage on computers. Music in this format can then be downloaded onto portable MP3 players or translated back into CD format and "burned" onto blank CDs.

The term "Napster" is used to describe two different things: (1) a file-transfer program that enables a user to search for MP3 music on foreign computers and transfer it to his own, and (2) the name of a business/website established to create a centralized system of music file swapping.

The system works as follows: A computer user who has music on his hard drive in MP3 format logs on to a server operated by Napster (the company). This server uses Napster (the program) to list the user's music and make it available to all the other users currently logged on to that server. Each user thus has access to the entire library of music residing on all the computers of all the logged-on users. Further, the list notes the type of connection of the user (e.g., T1, cable, DSL), which informs others of the required download time. Thereafter, to download a song to his own machine, a user sends a command ordering the transfer to the appropriate computer.

Many file-transfer programs similar to Napster exist.² Some, such as Gnutella, do not communicate through a central server.

Instead, each on-line user passes messages to a number of others, in a rapidly proliferating chain.

The legal background. Songs issued on CDs are usually protected by copyright. Napster users pay little attention to this, freely transferring copyrighted music. An estimated 87 percent of transfers over the system violated copyrights.³ The others consisted of music on which the copyright had either expired or not been sought, or for which copyright holders had granted permission.

The \$14.6 billion-per-year recording industry, which already loses \$4.5 billion a year to CD piracy, sees Napster as a mortal threat.⁴ So do artists. The industry, supported by some of its artists, sued the company, winning a victory in the trial court.⁵ In February 2001, the US Court of Appeals for the 9th Circuit upheld the trial court's decision that Napster's listings of copyrighted materials should be enjoined.⁶

The distinction between Napster the business and Napster the file-transfer technology is crucial. The court enjoined only the business, and only to the extent that it fails to police its site and remove access to copyrighted material when asked to do so. The technology remains untouched; anyone is free to use it in ways that do not involve copyright infringement.

The court rejected Napster's "fair use" argument—the suggestion that swapping millions of files among strangers is the legal equivalent of a few friends sharing a track from the latest release.

Napster's other major defense was based on the "*Sony* doctrine," a Supreme Court ruling that technologies cannot be suppressed if they have significant non-infringing uses.⁷ *Sony* is clearly good law, and file-transfer programs are valuable tools that should not and cannot be suppressed. But *Sony* was not at issue because of the distinction between Napster the company and Napster the technology. The technology was not suppressed; the company could still use it as long as copyrighted material was excluded from its operations. No serious claim was made that such exclusion is technically infeasible.

The public relations background. Napster and its supporters have fired off a huge PR barrage in support of their right to swap: "CDs cost too much." "Record companies rip off artists." "We are fans; we made the groups famous, so we have a right to their music." "The marginal cost of producing a CD is almost zero, and economists say that price should equal marginal cost, so CDs should be priced at zero." "The companies

have suppressed Internet distribution to protect their current system. If they made CDs easily available on the Web, people would pay voluntarily.” “Artists can give away CDs and make money on concerts.”

These arguments make appealing sound bites, but they evaporate on analysis:

☪ The creation and distribution of CDs is a cut-throat business. No monopoly profits are made, and the price of CDs is in line with costs of production.

☪ Many successful artists *do* feel ripped off.⁸ Pop music is characterized by a few winners and many losers, and prediction is impossible. Record companies finance both winners and losers, and the successes pay for the failures.⁹ (The major labels release about 7,000 CDs per year, of which 10 percent make a profit. Other sources release another 20,000 CDs.)¹⁰ Once a group becomes successful, its bargaining power improves and it can become rich.

☪ Top-of-the-line artists can make money from personal appearances, but most rely on tours and appearances to promote CD sales. The idea that any but a select few of the many artists jostling for public attention would be able to make a living out of personal appearances is a dream.

☪ The “marginal cost” argument is a theoretical construct that would be accurate only in a static economy. It is not applicable in the context of the dynamic real-world economy of the United States.

☪ Record companies and artists are well aware that the Internet is a potential bonanza. Their slowness in developing systems of Internet distribution is due to technical problems, and to inhibitions on encryption that have been enforced by the US government.

☪ Cooperative systems are usually destroyed by free riders. A recent survey of the file-sharing program Gnutella found that 1 percent of the users provided half the files shared, and 30 percent of the users provided 100 percent of the files shared.¹¹

Predictions. Most music trading is done by students who have access to broadband connections furnished to them by their schools. The schools are limiting the use of these connections. Partly, they are wary of possible liability for facilitating piracy, but the more important consideration is cost. Music swaps gobble up broadband capacity, and schools are unwilling to subsidize it. This trend will continue.

Also, other courts will support the 9th Circuit's view, refusing to allow sites such as Napster to serve as hubs for trading copyrighted music among thousands of users. And the music industry will police them, just as the computer-software industry battles against piracy. However, the *Sony* rule will stand; technologies will not be enjoined if they have substantial non-infringing uses. The lines will often be unclear.

Peer-to-peer networks may arise that have no central hub, and that are thus not susceptible to legal injunction. However, it is probable that these will be of limited importance, because they will be undermined, partly by mischief-makers and partly by vigilantes. Affronted by what they regard as theft,¹² artists and IP owners could seed the Web with Trojan Horse files that do varying degrees of harm, ranging from rendering the music unintelligible to destroying a hard drive. The risks of downloading from strangers would become prohibitive.¹³

File-sharing programs that cut the risks by trading directly among affinity groups will also continue, however. One example comes from a college where authorities cut off access to Napster: "There are only 172 students on our [internal swap] service, but they are sharing some 90,000 songs, so you can still find just about anything you want."¹⁴ The existence of such affinity groups will not be a complete disaster for companies that depend on intellectual property—it is not as deadly as a nationwide system of free downloads for all—but the effect will not be trivial.

Eventually, IP distributors will learn how to process micropayments and will start selling downloads of individual songs for fractions of a dollar. At that point, music will become too cheap to be worth stealing, considering the risks inherent in using pirate sites.

Policy recommendation. Protection of intellectual property rights is important as a matter of justice to artists. It is also important as a matter of economics. If we want people to devote time and effort to creative endeavor, they must be able to collect money for their work.

Property rights for creators are also vital for consumers. It does no good to say intellectual products should be free if the result is that none are produced.¹⁵ Congress should resist simplistic calls to pass legislation "to protect the rights of music users." This prescription is like the classic Vietnam-era joke: "We had to burn the village in order to save it."

On the other hand, Congress should also avoid passing more laws against file transfers or imposing stiffer penalties for copyright infringe-

ment. The ultimate solutions to the problem lie in technology. Better systems for encrypting intellectual products will enable the creators and owners of intellectual property to establish viable systems of Internet distribution, and to establish innovative systems of contract and property rights appropriate to the digital age.¹⁶

~ JAMES V. DELONG

¹ See the Napster website, www.napster.com.

² "p2p Pages: Wired's Guide to Global File-Sharing," *Wired* (October 2000).

³ *A&M Records, Inc. v. Napster, Inc.*, N.D. Cal., 11 August 2000, No. C 99-05183 MHP; available at www.cand.uscourts.gov.

⁴ John Gibeaut, "Facing the Music," *ABA Journal* (October 2000), pp. 37, 38.

⁵ "p2p Pages: Wired's Guide to Global File-Sharing."

⁶ *A&M Records v. Napster*, ___F.3d___ (9th Cir. 12 February 2001); available at www.ce9.uscourts.gov/web/newopinions.nsf.

⁷ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); available at caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=464&invol=417.

⁸ For an artist's view of the system, see "Courtney Love does the math," *Salon*, 14 June 2000; available at www.salon.com/tech/feature/2000/06/14/love/print.html.

⁹ This is a common phenomenon. See Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society* (New York: Free Press, 1995).

¹⁰ Recording industry data; see www.riaa.com/MD-US-7.cfm.

¹¹ Eytan Adar and Bernardo A. Huberman, *Free Riding on Gnutella*, Xerox Palo Alto Research Center, 10 August 2000; available at www.parc.xerox.com/istl/groups/iea/papers/gnutella/FreeRidingA.html.

¹² Eric Boehlert, "Artists to Napster: Drop dead!" *Salon*, 24 March 2000; available at www.salon.com/tech/feature/2000/03/24/napster_artists/index.html.

¹³ Greg Aharonian, *How and Why Napster Will Be Crushed*, 20 December 2000; available at www.bustpatents.com/napster.html.

¹⁴ Personal communication.

¹⁵ James V. DeLong, "Do You Really Want to Be a Product?" *IntellectualCapital.com*, 3 August 2000; available at www.intellectualcapital.com/issues/issue397/item10226.asp.

¹⁶ Napster has entered into a strategic alliance with Bertelsman, a big CD producer, but the terms of the deal are unclear. See www.napster.com. Other companies are entering into license agreements with music copyright holders. See, e.g., Echo Networks, www.echo.com.