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Napster: Infinite Digital Jukebox or Pirate Bazaar?

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ABSTRACT

This paper considers the copyright litigation over the file-sharing program, Napster. The first section examines the culture of collecting at work in Napster. The next part examines the litigation by the major record companies and Metallica against Napster. The final section considers the future of file-sharing, looking at alternatives to Napster, such as Filetopia, Freenet, Gnutella, MP3board.com and streaming media.

The controversy over the file-sharing program Napster has been a focal point for debate among copyright users, distributors and creators. The discussion has concerned the relationship between technology, copyright law and culture. Should consumers be able to download music for free? Or is it theft and piracy of intellectual property? Does the advent of such MP3 technology spell the death knell of record companies? Or can they reinvent themselves as online distributors? Are artists liberated from their dependence upon record companies? Or are they being cruelly deprived of royalties?

The debate over Napster and file-sharing programs has been dominated by American copyright owners, users and distributors. The Recording Industry Association of America (RIAA) sued Napster for copyright infringement on the grounds that it helped its users to exchange illegal MP3 files. The heavy metal band Metallica and the rap star Dr Dre also took legal action against the file-sharing program. In response, Napster Inc has argued that its users are copying files for personal, non-commercial use. Their cause has been supported by musicians like Chuck D, Courtney Love and Prince, who have become disaffected with the major record companies.

This paper considers the debate over Napster within the theoretical framework of Lawrence Lessig's book *Code and Other Laws of Cyberspace* (Lessig, 1999). He contends that behaviour in cyberspace, as in real space, is regulated by more than law. Beyond law, Lawrence Lessig notes that social norms regulate behaviour in cyberspace. He points out that the market also regulates behaviour in cyberspace. Lawrence Lessig observes that the architecture or the design of the Internet further regulates behaviour in cyberspace. In other words, 'code is law'.

This paper considers the debate over Napster in the context of technoculture. It examines the interaction between culture, law, technology and the market. It begins by exploring the technology behind Napster, and the cultures of sharing and copying

that have evolved on the Internet. It then evaluates the litigation by the RIAA against Napster in the United States, considering questions of infringement, audio home recording, fair use, the liability of Internet service provider and competition law. The final section considers the future of file-sharing, examining the emergence of programs such as Freenet, Gnutella, MP3Board.com and streaming media.

'THE INFINITE DIGITAL JUKEBOX': THE MP3 COMMUNITY

HUNTERS AND COLLECTORS

As a teenager, Shawn Fanning developed the original Napster application and service in January 1999 when he was a freshman at Northeastern University. He combined the practicality of sharing personal music and finding MP3s online with the community features of the Internet Relay Chat. It is an integrated browser and communications system which enables musicians and music fans to locate bands and music available in MP3 format. The underlying technology is MP3 software, which can be used to compress CD-quality songs by a factor of 10 into a file that can be transmitted over the Internet and downloaded rapidly. Users who obtain Napster's software can share MP3 music files with others logged on to the Napster system. Napster allows users to exchange MP3 files stored on their own computer hard drives directly, without payment. It also provides media fans with a forum to communicate their interests and tastes with one another via instant messaging, chat rooms and Hot List user bookmarks.

Shawn Fanning received the support of Eileen Richardson, a Boston venture capitalist with ten years of experience in the technology industry. She helped form the company Napster Inc, became the chief executive officer and moved the firm to San Mateo, on the edge of Silicon Valley. Napster recently closed a \$15 million series C venture capital funding round. The round was led by Hummer Winblad Venture partners, with additional investments from Angel Investors LP and other existing investors. As part of the investment in Napster, Hummer Winblad partners Hank Barry and John Hummer joined the board of directors, and Hank Barry has assumed the role of interim chief executive officer of Napster.

Although it may espouse a philosophy of sharing and exchange, Napster is nonetheless a business which seeks to profit from its intellectual property. It has sought to prevent competitors from reverse engineering and adapting its software program. Napster has also sent cease-and-desist notices to stop the band Offspring from selling bootlegged merchandise.

Napster has directed its early efforts towards generating an active user base of digital music enthusiasts. It has since been seeking to invent business models, marketing strategies and revenue streams for its product. Napster has considered many business models, including sponsorships, advertising, selling artist and Napster merchandise, and compact disc sales. It has also considered selling or marketing digital music products related to its core service such as compact disc burners. Napster has entered into a written agreement with online Amazon.com, pursuant

to which Napster will receive a portion of the revenues Amazon receives from users Napster refers. It has also prepared for the possibility that the company will be the subject of an acquisition or merger in order to cash in on the size of the user base.

CULTURE OF COPYING

Julian Dibbell thoughtfully discusses the culture of copying on Napster (Dibbell, 2000). He sets the discussion in the context of Walter Benjamin's reflections upon collecting in 'Unpacking My Library' (Benjamin, 1995: 59–67).

Julian Dibbell reflects that his passion for collecting music was reawakened by his introduction to MP3 and Napster. His guide to this new technology was a college boy who showed him his pirate's treasure: a thick looseleaf album, with three dozen CD-ROMs, each one burnt with about a hundred MP3 files. He was a warez trafficker, a member of various groups dedicated to moving pirated digital goods — software, games, movies, music — as fast as high-bandwidth Net lines allowed. The college boy described the competition for collecting in this community:

The zero-day scene. It's a competition. A race to see who can get the latest stuff up first. Way it works is, say some CDs are being released tomorrow. These groups have people that go out, buy these CDs, or get them however they can, rip them, and then put them up on our site. (Dibbell, 2000)

Julian Dibbell observes that the college boy was not interested in the musical works themselves, or the amount that he had copied. He was interested in the speed with which he could transfer the musical works from their corporate origins to his computer. In other words, he was interested in their fluidity, not their history. The whole obsessive idea was to compress a record's history to nothingness, to a sliver of time: zero days. However, Julian Dibble also fears that the perfect organisation of digital collections may result in a loss of intimacy with the musical works. He notes that the disembodiment of the musical works entails a loss of the intimate, possessive touch and a certain intimately personal disorder.

Julian Dibble wonders what Walter Benjamin would have made of collecting in the digital age. He suggests that the Internet has transformed and intensified the nature of collecting cultural works. Julian Dibble observes that users have an almost sexual frisson at their sudden connectedness and vulnerability to the wired population of the world: 'The traditional eros of collecting has been perverted, connecting the collector not just to objects but, of all things, to other people.' (Dibbell, 2000) He magnifies the feeling of solidarity and connectedness at work in the Internet community. Julian Dibble under-estimates the utilitarian motive behind the exchange of information of the Internet. He ignores the fact that consumers find it much cheaper to share and exchange music for free than buy exorbitantly priced CDs. Julian Dibbell concludes: 'For these are the times that try intellectual-property holders' souls, when music flies from hard drive to hard drive on wings of desire and in the face of every known law of copyright.' (Dibbell, 2000)

RHETORIC OF REVOLUTION

Metallica was among the industry doomsayers who declared that Napster would bring about massive piracy on the Internet. The group staged and orchestrated a media event in order to protest against Napster. The drummer of the band, Lars Ulrich, showed up at the Fourth Street headquarters of Napster Inc to deliver the names of 334 435 Napster users who made 1.45 million Metallica songs available for free downloads. He told a news conference: 'If they want to steal Metallica's music, instead of hiding behind their computers in their bedrooms and dorm rooms then just go down to Tower Records and grab them off the shelves.' (Higgins, 2000: 1) Metallica attracted sympathy from the major recording companies, artist management and established musicians such as Dr Dre, Elton John and Deborah Harry.

In response, Napster received support from a number of artists and musicians who have become disaffected with the major record companies. The rap musician from Public Enemy, Chuck D, supports Napster (Chuck D, 2000). He hoped that the revolution of Napster would liberate artists from oppressive contracts with recording companies. Courtney Love agreed that any alternative to record company contracts could only benefit artists. She said that 'stealing our provisions in the dead of night when no one is looking is piracy. It's not piracy when kids swap music over the Internet using Napster.' (Love, 2000) Similarly, Prince, another artist disaffected with recording companies, noted that 'online distribution is turning into a new medium which might enable artists to put an end to this exploitation' (Prince, 2000).

Such evangelists of MP3 speak of a future in which recording artists can use the Internet to deliver their songs directly to the fans, without having to be dependent upon the distribution networks of major record companies. Julian Dibble is circumspect about such rhetoric:

Yet if MP3 advocates think that the money will inevitably flow straight into artists' pockets — or, indeed, that recording artists, as presently understood, will even necessarily exist under the new digital dispensation — then they should think a little harder. Though MP3 proponents are fond of using the rhetoric of revolution to describe their aims, the cultural transformation they promote is potentially more unsettling than most of them imagine. And as is typical with revolutions-in-progress, its final outcome may not be exactly what its instigators had in mind. (Dibble, 1999)

'THE PIRATE BAZAAR' LEGAL SYSTEM

RIAA filed suit against Napster, Inc, operators of the Website Napster.com, accusing them of violating federal and state laws through 'contributory and vicarious copyright infringement'. The complaint describes the case as follows: 'Napster is similar to a giant online pirate bazaar: users log on to Napster servers and make their previously personal MP3 collections available for download by other Napster users who are logged on at the same time.' Metallica amplified the legal questions surrounding Napster. Not only did the band bring legal action against Napster, but

it brought legal action against Yale University, the University of Southern California and Indiana University, alleging that they were complicit in music piracy. They also named a number of anonymous Jane Does — individual consumers who had been using Napster. Furthermore, the rap artist Dr Dre also brought law suits against Napster and individual users at universities. He requested that the company block users from accessing his songs through the means of the software program.

TECHNOLOGICAL MEASURES

Metallica hired an Internet detective agency, NetPD, to hunt down the Web addresses of fans illegally swapping their songs. This points towards a new development in the enforcement of intellectual property rights. Intellectual property rights-holders are increasingly relying upon cyber-surveillance and Internet monitoring companies to police the infringement of intellectual property in the area of cyberspace.

NetPD is a consulting firm based in Cambridge, in the United Kingdom (Doan, 2000). It uses artificial intelligence to track file-sharing activity across the Internet. NetPD plans to use the proceeds from the Metallica case to launch the company into the business of being an Internet detective agency. It intends to offer copyright protection services not just to the music industry, but to the video game industry and movie industry. It has registered the address: www.mp3police.com. NetPD will join the lucrative new market of monitoring infringement of intellectual property rights on the Internet.

In response to the claims of copyright infringement, Napster declared its intention to comply with the *Digital Millennium Copyright Act* 1998 (US). It sought to disable the users who Metallica alleged were infringing the copyrights of the company. However, Napster noted that users who are banned from the service deserve the opportunity for reinstatement in the event that there has been a genuine mistake or misidentification of the materials made available by that user. Users who feel they have been banned as a result of a mistake are able to submit a counter-notification form.

SUMMARY JUDGMENT

Initially, Napster argued that its business activities fell within the protection of the safe harbour provisions of the *Digital Millennium Copyright Act* 1998 (US). Justice Patel declined to grant summary adjudication in its favour on two grounds. First, she doubted whether Napster was a 'service provider' under the safe harbour provisions because it did not provide connections for users through its system. Second, she found that Napster only adopted its copyright compliance policy after the onset of the litigation and did not discipline infringers in any meaningful way.

DISTRICT COURT

In response, Napster hired David Boies, the legal counsel who was successful in the Microsoft anti-trust case. He sought to creatively reinterpret copyright law in order to save the file-sharing program.

First, David Boies maintained that the company was protected under the *Audio Home Recording Act* 1992 (US). He claimed that Napster users were copying files for personal, non-commercial use and that the law was designed to accommodate digital technologies of reproduction.

Second, Boies argued that Napster did not infringe the plaintiff's copyrights because of the defence of fair use. He relied upon the United States Supreme Court decision of *Sony Corporation of America v Universal City Studios Inc* (1984), which found that Sony could manufacture Beta recorder units because they could be used for substantial non-infringing purposes. Boies claimed that Napster users were engaged in a number of fair uses — including listening to authorised works, sampling and space-shifting: copying songs on to portable media. However, such reliance upon the decision is misplaced, because, as John Frow points out, the court failed to challenge the contradictions in copyright law, which have allowed the encroachment of private rights into the public domain (Frow, 1994: 290–304).

Third, Boies reiterated the point that Napster was an Internet service provider, which should enjoy immunity from claims of copyright infringement. And finally, he raised competition issues. He argued that the recording companies were improperly attempting to combine their limited monopoly rights in copyrighted sound recordings to dominate and control the market for online music distribution, affecting the music rights of others.

However, Justice Patel found that Napster was liable for contributory and vicarious infringement. She accepted evidence that the defendant had actual or constructive knowledge that third parties were engaging in direct copyright infringement by downloading MP3 files using the Napster service. Justice Patel was also particularly disapproving of evidence that senior executives at Napster had downloaded illegal MP3 files of popular music. She took into account the submissions of the RIAA: 'Ironically, although Napster's former CEO, Richardson, proclaimed Napster is "not about Madonna", her computer revealed downloads of five Madonna MP3 files.' (RIAA, 2000: 13)

Justice Patel dismissed the arguments about home recording, Internet service providers and competition. She concentrated on the question of fair use. Justice Patel found that the defendants had not established or met their burden of proving that they were entitled to the affirmative defence of fair use. She found that the potential non-infringing uses of Napster were minimal. Justice Patel was persuaded by the Jay report, which found that Napster harmed music sales among college students. She discounted as unreliable the Fader report and the Greenfield survey, which both indicated that Napster actually encouraged music sales.

In a stern decision, Justice Patel granted an interlocutory injunction closing down Napster. She was unconcerned that such an order would destroy the commercial enterprise of the company.

COURT OF APPEALS

The 9th United States Circuit Court of Appeals stayed the court order until it could rule on Napster's appeal of the temporary injunction.

In a hearing before the Court of Appeals, David Boies held that the arguments of the record companies were radical and unprecedented. He claimed that a company had never before been held liable for vicarious copyright infringement when the direct infringer did not engage in commerce. Boies insisted that the users of Napster had not violated copyright laws. He also pointed out that an Internet service provider had not been held liable for the infringing acts of its users. His case found a much more receptive audience in the Court of Appeals than in the District Court.

The Court of Appeals reserved its decision. It is likely that the judges will modify the conditions of the injunction granted by Justice Patel. However, in the end, it seems inevitable that Napster will lose the case against the recording companies, Metallica and Dr Dre for copyright infringement because its defences of fair use and safe harbours are not strong contentions.

The question is whether Napster can change its business model. It is likely that the start-up company will seek to reach a settlement with the musical industry to their mutual advantage and benefit. The chief executive, Harry Banks, is positioning the software company Napster to become the subscription service for the major recording companies. He has been able to forge an alliance with Bertelsmann. Napster will provide a new membership-based subscription service for the music division of Bertelsmann, BMG. In return, the record company will withdraw its lawsuit against Napster and make its music catalogue available. It remains to be seen whether this agreement will lead to a settlement with the other major record companies in the litigation.

'METALLICA AND SYMPHONY': COMPUTER CODE

The litigation by the musical industry against Napster is not an isolated action. It has also filed suits against MP3.com, MP3Board.com, and scour.com. Chris Gilbey (2000) argues that the litigation by the musical industry actually has the counter-productive effect of promoting the downloading of MP3 files: 'As the record industry's attempts to control downloads continues, the likelihood is that the publicity surrounding MP3 will continue to build, resulting in free downloads growing at a geometric pace, while paid-for, legitimate downloads will continue only to have arithmetic growth.' (Gilbey, 2000: 136) Even if Napster is shut down, that will not necessarily result in the extinction of the culture of file-sharing on the Internet. There are a number of alternative peer-to-peer products available that will fill the void.

VIRTUAL UTOPIAS

Just as Napster becomes immanent in the public sphere, it is in danger of becoming obsolete because of the speed of change in digital technologies. A number of file-sharing programs, such as Freenet, Gnutella, Filetopia, I-Mesh, Scour, Wrapster and Uprizer, are threatening the dominance of Napster. It remains to be seen whether these operations will be able to handle the increase in traffic if Napster is shut down and dethroned.

The next generation of peer-to-peer programs have sought to protect themselves against the threat of litigation from copyright owners. Chris Gilbey suggests that sites will start to flourish in countries where copyright laws are weaker than in the United States, the United Kingdom and Western Europe, and Australia and New Zealand. The migration of file-sharing applications has already begun. The program Freenet originates from the United Kingdom. Filetopia is located in Spain. I-Mesh has its research and development wing in Israel. Such developments will raise legal questions about the international conflict of laws.

Furthermore, applications such as Freenet and Gnutella use decentralised systems, so that they are not vulnerable to being prosecuted and regulated like Napster. The founder of Freenet, a 23-year-old copyright anarchist called Ian Clarke, espouses a network which operates outside the confines of copyright law: 'Nobody — myself included — can shut down Freenet. Any legal action against me would be just as ridiculous as taking legal action against the manufacturer of women's tights that were used in a bank robbery' (Martinson, 2000). The programs are also designed to protect the anonymity and the privacy of their users, and resist attempts by third parties to access information. This would make it difficult for copyright owners to sue individual users for copyright infringement.

The new file-sharing programs have expanded upon the capabilities of Napster, so that they allow for the trade in not just MP3 files, but a variety of media files. This means that the debate over the effects of Napster and other file-sharing programs is not limited to just the musical community. The new digital technologies will affect a wide range of cultural industries in the future. The chairman of the Copyright Assembly, Jack Valenti, comments: 'If Napster can encourage and facilitate the distribution of pirated sound recordings, then what's to stop it from doing the same to movies, software, books, magazines, newspapers, television, photographs, or video games?' (Valenti, 2000) However, it may be some time before this potential is fully realised. The publishing industry fears that its works will be next (Roush, 2000). It is still too slow to download products like movies and software products on the Internet at present. The film industry and the software industry will face difficulties if high-speed Internet connections are developed.

HELL'S ANGELS

In the future, Chris Gilbey predicts that the next development will be a fetch-it program. It will be a search engine which will enter into the gateways of Napster, Gnutella and I-Mesh and take whatever files are available. It will be, in other

words, quite parasitic technology. Such a program will be similar to MP3Board.com. However, it would sit on a personal computer as a search engine, rather than as a hypertext interface, in which you have to go on to the Internet. The special quality of such an application is that it does not need to be based anywhere because it is not a hypertext application. It does not need to be specifically server-based. Such a fetch-it program would protect the anonymity and privacy of its users, and resist attempts by third parties to deny access to information. It would also be protected from actions in copyright infringement because it is not based in any particular country.

The fetch-it program will offer the service of downloading material from other people's servers. However, it will not allow others to download material from one's own personal computer. Chris Gilbey observes that what has happened so far is the formation of a community of people who feel impassioned about sharing music. He imagines that the utopia of the community will be threatened by freeloaders who use software to download material without sharing anything in return:

The file-sharing community will be threatened by the real freeloaders. They will not want to share files, but will just want to download files. Just like in the real world, the hell's angels will ride into town, and scream, 'Give us all the beer and all the women'. (Rimmer, 28 June 2000)

So the threat to the file-sharing community may come from within from individuals who do not respect the etiquette of sharing and reciprocity. There is a danger that the society will become divided and fragmented under such pressure. It will hamper the efforts of the file-sharing community to present a united front of resistance against copyright creators and owners.

STREAMING MEDIA

The debate over downloading MP3 files may be made redundant by streaming technologies that use compression in the delivery of media files over the Internet. Tom Kennedy, the managing director of Beyond Online, discusses the advantages of streaming technology:

With streaming, a web user does not have to wait to download a large file before seeing the video or hearing the sound. Instead the media is sent in a continuous stream and is played as it arrives at your local computer after a buffering period. Streaming has the added bonus for the content holders that the content cannot be saved in the viewer's machine, therefore protecting the copyright holder, unlike the case with MP3. Streaming video is usually sent from pre-recorded video files, but can be distributed as part of a live broadcast. (Kennedy, 2000: 1)

The economic model behind streaming media and ubiquitous access will obviate the problems surrounding copyright law and piracy. There is much evidence that consumers are happy to gain access to streaming media without wanting to download

the material. However, it is doubtful that file-sharing programs will become extinct just because of the emergence of streaming media. The downloading of media files will persist, just as the book survived the advent of television and film.

CONCLUSION

Napster has been the site of intense conflict and debate between copyright creators, distributors and users. Australian Labor Party Senator Kate Lundy reflected at length upon the legal challenges against Napster by recording companies and Metallica, and the emergence of new technologies, such as Gnutella:

What we are experiencing here is very much about a cultural change. It is about, in some ways, a clash of generations as young technologists push the boundaries of what is conceivably possible through the Internet and the digital environment. It is the captains of industry who are finding it difficult to adapt to the Internet and all of the ramifications and who use the law in the courts and use parliaments to attempt to block that change and put a lid on it. (Lundy, 2000: 15329)

There are a number of possible scenarios for the resolution of this conflict. Napster could be shut down by the courts altogether. The program could survive as a subscription service for the major recording companies. Napster could be superseded by rivals. Applications like Filetopia could operate offshore from the United States, outside the reach of legal sanction. Peer-to-peer programs such as Freenet and Gnutella are decentralised, and will be difficult to shut down. Furthermore, fetch-it programs could develop and flourish. The debate over downloading could even be made redundant by the emergence of streaming media. The future of file-sharing on the Internet will ultimately depend upon the interaction of culture, law and computer code.

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Freenet: www.freenet.sourceforge.net

Gnutella: www.gnutella.wego.com

I-Mesh: www.imesh.com

Immedia: www.immedia.com.au/

MP3Board: www.MP3Board.com

Napster: www.napster.com

Recording Industry Association of America: www.riaa.org

Scour: www.scour.com

Virtual Recordings Home Page (legal documents and court briefs): www.virtualrecordings.com/mp3.html

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