

Napster: The Story Behind the Controversy

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Napster and the peer-to-peer technology it introduced to mainstream America have changed the way people communicate on the Internet and have forced careful consideration of the future of copyright law and its interpretation in the United States. This paper presents a historical background of Napster, an explanation of the technology that made it controversial, the differing views of artists affected by the site, and why Napster has quite possibly changed forever the fate of copyright law. While Napster itself has been shut down, it serves as an important example of how changing technology is forcing a reevaluation and reformulation of related law.

INTRODUCTION

While serving an internship in Washington, D.C. during the fall of 2000, I had the opportunity to gain firsthand knowledge of Napster and the controversy surrounding its fate. This paper will examine what Napster is, the technology that made it possible, the copyright laws that made it controversial, how musicians viewed Napster, and why the technology that Napster propagated cannot be stopped, even if this specific site has been.

THE SIGNIFICANCE OF NAPSTER

The story of Napster can be divided into two segments: its explosive growth as music sharing technology; and its steady decline as music companies successfully brought an injunction against the firm for copyright infringement. Thus the company was forced to change its business model. This paper will focus on Napster's first segment, as the central thesis of the paper is that even if Napster remains shut down, the technology it developed is forcing a reevaluation and reformulation of copyright law.

Napster was a website people could go to and download music for free. At one time, Napster was the world's largest file sharing community as well as the largest conglomeration of music lovers on the planet (Napster, 2001a). It not only provided music, it provided a complete network of vehicles for people to share their interests and tastes as well. If a person had access to the Internet, he or she not only had access to an enormous amount of music, but to an entire community of music lovers. This included an Instant Messenger to keep in touch with your friends in the Napster community, fifty-five Napster chat rooms, a free Napster newsletter, and a

Hot List function that notified you when certain people are online and ready to share. This complex technology could be up and running for the first time in five to ten minutes.

After typing napster.com in the URL window, the next step was to download Napster ShareWare software onto one's computer from Napster's homepage. The Napster software took about five minutes to download to your computer, and after entering some basic information, one now had an account with Napster.

By simply typing the name of an artist or song title into the search field, any music files currently being shared by other Napster users that matched one's search criteria appeared on a list. The individual's window was then transformed and one was connected to the Napster users who were sharing those files. It was not necessary to share files in order to enjoy the benefits of downloading. There were no requirements for people to put music on to share. It was completely voluntary. It was also possible to download more than one song at a time. Frequently people downloaded six to eight songs at the same time. Napster also worked at improving its technology and providing quicker connections and downloading time. Free download updates were available for current users from the website and people were encouraged to take advantage of these and download the new technology as it became available.

As can be imagined, Napster was a very popular service. By October 2000, Napster claimed over thirty-two million users and to be growing steadily at a rate of one million new users each week (Fanning 2000, 2). As of February 2001, Napster stated it had over fifty million members (Napster, 2001a). Whether these numbers were inflated remains to be seen. An independent tracking firm, Jupiter Media Metrix, provided a February 2001 estimate of 14 million online music users, with Napster accounting for all but a very small portion of those users (Foegen, 2002). Over 800,000 people used the system simultaneously on a regular basis, a number limited

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only by network resources (Fanning 2000, 3). While college students originally adopted Napster, members ranged in age from ten-year-olds to my ninety-six-year-old grandpa.

HOW IT ALL GOT STARTED

Shawn Fanning, a nineteen-year-old college dropout from Northeastern University, originally founded Napster in May of 1999. The following account of Napster's invention comes both from Fanning's testimony given at the October 9, 2000 Judiciary Committee hearing and from an informal conversation I had with Shawn while he was in D.C.

Shawn and his uncle were very close and in 1996, between his sophomore and junior years of high school, his uncle gave him a computer. Shawn soon became intrigued and spent more and more time on the Internet. When he started his freshman year at Northeastern in the fall of 1998, Shawn became bored with his entry-level computer classes and decided to write a Windows-based program on his own. He spent a lot of time gaining advice and knowledge from experienced developers in Internet Relay Chat (IRC) rooms. "Napster" was his nickname for his e-mail address and his user name in IRC rooms.

One of his college roommates loved listening to MP3s and would frequently complain about the unreliability of the sites he would use. Shawn decided to design a real-time system for locating MP3 files. As opposed to traditional search engines, Shawn envisioned a system that would be powered by the users, who would select what they wanted to list on the index. When a user left the site, so did his or her list. Shawn also wanted to expand the program to include chat functions so that people could talk about their music.

He quickly became absorbed in this project. He started writing the software and ordered books from the Internet to learn more. At this point Shawn dropped out of school in order to concentrate more fully on completing his program. At first he was not even planning on implementing the program. It was more a "proof of concept" for him, and he figured that if he could devise it, others could as well. Shawn could not believe that someone had not already done what he was doing. Towards the end, he started living in his uncle's old office, where he would scarcely eat or sleep. His entire existence was focused on creating this program.

After he developed the software prototype, Shawn started sending it to his friends, who sent it on to more friends. They would give him feedback and he would work out the kinks. He received such overwhelming support that he decided to expand the system. Along with his uncle, Shawn incorporated the company in May 1999. After raising money from "angel investors," an early beta version of the software was released in the summer and quickly spread by word of mouth. In September of 1999, Napster, Inc. obtained office space in California and continued to grow steadily.

In short order Napster became a household name and had fifty employees. One of these was the former Chief of Staff of the Senate Judiciary Committee. Manus Cooney,

who I worked with while serving my internship, left the committee in December 2000 and became the Vice President for Corporate and Policy Development, where he represented Napster before Congress and in other situations as needed.

THE TECHNOLOGY

In order to have a clear understanding of Napster, one must understand the technology behind it and how it compared to conventional Internet use. Basically, Napster was a throw-back to the traditional structure of the Internet (Fanning 2000, 3). The Internet typically functions by large servers that house the information that is distributed. Instead of building servers, Napster relied on communication between personal computers. This technology, known as "peer-to-peer" technology, allows for a depth and scale that is virtually limitless (Barry 2000, 2).

The music shared by users of Napster and other firms is in the form of MP3 files. An MP3 file is the standard form for the digital distribution of music. It stands for Musical Physical Three file, and provides a compressed format of musical data. In order for music to be at a downloadable speed, it has to be converted from a CD. People cannot simply download music from Napster or other companies onto CDs. They download the music onto their computer's hard drive, where the files can be opened and listened to from a net connection. If someone wants to make a CD out of it, they have to convert the MP3 file into a wave file and then send the wave file to a CD burner.

What made Napster unique is that it did not host, post, or serve any music or MP3 files. Instead Napster provided software that allowed individual users to connect with each other so that they could share MP3 files stored on the hard drives of their individual computers (Fanning 2000, 2). This technology is what made Napster so controversial. Napster provided location information allowing a computer to connect to the other users and transfer the file from its current location. It was not in control of what people did with the music once they downloaded it. Since none of the information was stored in a central location, what was available on Napster was completely dependent on who was currently active on their computer and what they chose to share. At its peak, there were so many users on the site, both day and night throughout the world, that finding anything popular was practically guaranteed, and the range of lesser-known music available was practically limitless. Again, users were under no obligation to share any or all of their files. They chose what they wished to make available. While working on the Judiciary Committee, for example, we were allowed to download music from Napster, but we were not allowed to host any files due to security precautions.

THE POTENTIAL OF PEER-TO-PEER TECHNOLOGY

The peer-to-peer technology Napster developed is quite possibly what the future of the Internet holds. Napster's technology is not only important for music consumers, but for the

future development of other sources as well. Napster has been contacted by such companies as the Human Genome Project and other companies who are interested in sharing information among specific communities of interest (Fanning 2000, 4). Companies who are in the forefront of computer technology such as Intel—one of the world's largest computer technology companies—are also examining the possibilities this kind of computer sharing holds. Napster's technology is effective for the possibilities it holds with respect to increases in information, the development of communities of shared interest, and for environmental and production standpoints, as fewer servers will need to be built.

This technology is important to consider in another respect. Fanning was surprised that no one had developed a program similar to Napster prior to him, and nothing was in place to stop others from developing similar programs after him. Even though Napster's free music sharing was shut down by a court injunction, "peer-to-peer" technology is used in software such as Gnutella and by services such as Kazaa, Morpheus, and Audio Galaxy. Due to the fact that the basic premise of Napster is the software that allows for file sharing, it will be difficult, if not impossible, to completely obliterate this from happening in the future.

HOW DOES NAPSTER COMPARE TO OTHER TECHNOLOGIES?

As noted, Napster is not the only web address people can use to access to music on the net, but due to being the first to employ peer-to-peer technology, it proved to be most controversial. By examining what other services are offering, the study of why Napster has been at the forefront of controversy becomes clearer.

Aside from Napster, My.MP3.com is one of the most popular sites for music consumption. Like Napster, My.MP3.com allows people to listen to music from the net as it is transferred to their computers in the MP3 format. The MP3.com service allows people to download their personal music library and listen to it from any net-connected device including computers, cell phones, and palm pilots (Robertson 2000, 2). It calls itself an MSP, or Music Service Provider, and just as an Internet Service Provider gives a person access to the Internet, an MSP provides a person with access to their music.

The service works by verification of physical CD ownership. Unlike Napster, visitors to My.MP3.com must first provide proof that they own the CD by uploading it to the MP3.com server. Once this is completed, a person then has access to all of those songs loaded on the server. MP3.com does this in order to ensure copyright protection, as they believe that since a person has already purchased the music in one form and an artist has received proper royalties, they should be able to listen to it in a different form for free. All accounts are password-protected, so the music in one account is not available to another account (Robertson 2000, 2). One may not simply type a desired artist or song and download the

material. Visitors do, however, have access to over 469,000 songs that they can add to their personal catalog without uploading the CD because MP3.com has authorized the use of these songs by the content owners. This is what separates services such as MP3.com from Napster.

Napster was seen as a free for all, while companies such as MP3.com and others are trying to legitimately use the work of others. This, in part, accounts for why Napster was both so popular and so controversial. If a person is seeking to listen to music—even in the most legitimate circumstances—it was easier to use Napster than My.MP3.com. It was also a lot cheaper; considering it was free. The problem is that on Napster it was also much easier to pirate music or infringe copyright laws without getting caught.

The Debate Over Intellectual Property Rights

The underlying principle of the technology and the service Napster provided is that people determine for themselves how they are going to use the system and participate in the community. Napster provided the tools, but had no ability to impose limitations or exercise control over its users' actions (Fanning 2000, 3). This is what made Napster so great in the eyes of many, and it is also what brought Napster into the realm of moral and legal debate.

Napster argued that people used the site to sample new music before deciding which CDs to purchase and that the music industry benefited from increased sales relating to increased exposure on Napster. People also used the site to find new artists and talk to other people who shared their same musical tastes. Many people used Napster to house music they already owned on CD, cassette, record, or 8-track. Parents wrote Napster and told them how much they appreciated the ability to screen the music their children were listening to, and some said that Napster became a shared activity that helped them communicate with their teenagers in a new way (Barry 2000, 4). The problem that Napster faced was that many in the music industry protested loudly that Napster violated their rights and forced them to lose money by giving away their music.

Copyright in the United States is extremely important. It is a form of protection "provided by the United States to the authors of 'original works of authorship,' including literary, dramatic, music, artistic, and certain other intellectual works" (U.S. Copyright Office 2001, 177). It is available to both published and unpublished works, and gives the owner of the copyright exclusive right to do and authorize others to do the following:

- To reproduce the work in copies or phonorecords;
- To prepare derivative works based upon the work;
- To distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- To perform the work publicly;

- To display the copyrighted work publicly; And in the case of sound recordings, to perform the work publicly by means of a digital audio transmission (U.S. Copyright Office 2001, 177).

“It is illegal for anyone to violate any of the rights provided by the copyright law to the owner of the copyright. Mere ownership of a book, manuscript, painting, or any other copy or phonorecord does not give the possessor the copyright. The law provides that transfer of ownership of any material object that embodies a protected work does not of itself convey any rights in the copyright” (U.S. Copyright Office 2001, 177). These criteria, taken directly from the U.S. Copyright Office, posed interesting questions about the legality of Napster.

Napster was able to survive initially by a major limitation on these rights—the doctrine of “fair use.” Fair use is given a statutory basis in section 107 of the 1976 Copyright Act. What this entails is that if I purchase a copyrighted item that has been properly licensed and specified royalties have been paid, I can loan the item to another individual for his or her personal use. I buy a book and finish reading it and give it to my friend to read. I am not in violation of the law. What has happened as technology develops is that it is no longer a matter of loaning a friend a book. It is loaning a hundred or a thousand or more people my book or my music or my videos via the Internet. While there is not anything that is physically being stolen, people will often share software, burn CDs, or violate copyright law in other ways.

Napster was founded on the principle that people will share their passion for music with one another in a way that does not violate copyright law or evoke piracy actions, just as sharing a copy of a book with someone is not breaking the law. What the music industry feared was happening on a large-scale basis, however. People were not being honest with Napster and indeed copyright infringement was occurring. Because Napster did not host, post, or serve any music directly, they argued they were not responsible for copyright infringement. They did not provide or distribute anything except a way for two computers to connect. What the recording industry claimed is that “hundreds of thousands of citizens in every state are copyright infringers” (Barry 2000, 3). Since there was no feasible way to prosecute all of these people, the industry sought to shut down the source—Napster.

Napster claimed that they were not in violation of copyright law, and that they supported the copyright and the benefits it ensures both artists and the public as a whole. They strongly believed, however, that the public has the right to share copyrighted works as long as they are not doing it for commercial gain. As Hank Barry, President and CEO of Napster asserted, “Copyright is a tool of public policy; it does not vindicate a private right. The copyright laws are for the benefit of the public as a whole, not the individual copyright owners” (Barry 2000, 5). He argued that while he believes

works should be protected, copyright laws need to be limited so that information can be shared and society can grow as we build upon each other’s creativity. People on the site shared their own works and the works of others in an environment where innovation and the expression of ideas could be fostered. This, in Napster’s opinion, should not be viewed as a violation of the law, but rather as a way that our society is bettering itself.

Aside from the feel good accounts of improving society, Napster also had legal precedent working on its side. This is not the first time that technological advances have landed companies in controversy and/or court. At their onset, the radio, the cassette recorder, cable television, and the VCR all spurred controversy from copyright holders, and all proved to be enormous moneymakers for the copyright holders who originally contested them. Many believe that Napster’s technology had this same potential and indeed promoted the sale of albums worldwide.

In 1984 with the growing popularity of the VCR, Jack Valenti, the president of the Motion Picture Association of America, testified before Congress that the VCR was to the movie industry what “the Boston Strangler is to a woman alone” (Barry 2000, 3). As most of us know, the movie industry in America is alive and doing quite well. Box office receipts in the United States in 1999 alone reached \$7.5 billion (Barry 2000, 4). Tom Cruise is not starving on the street and Steven Spielberg was able to keep his house. All of this is despite a greater than 85 percent VCR ownership rate in U.S. households. The VCR has tremendously helped the movie industry and currently accounts for more than half of the industry’s revenues.

WHAT MUSICIANS HAVE TO SAY ABOUT NAPSTER

As can be imagined, there were mixed emotions throughout the music industry in regard to Napster. Some people think the technology is a great idea and should be supported while others worked to slow it down, if not shut it down. The most vocal dissent about Napster came from Lars Ulrich of Metallica.

Metallica became the first band to sue Napster after discovering that a work-in-progress version of a song had been leaked through the site. The group then learned that their entire catalog was available for free download for anyone who had a computer. “Napster hijacked our music without asking.... My band authored the music which is Napster’s lifeblood. We should decide what happens to it, not Napster—a company with no rights in our recordings, which never invested a penny in Metallica’s music or had anything to do with its creation. The choice has been taken away from us. They never sought our permission—our catalog of music simply became available as free downloads on the Napster system” (Ulrich 2000, 1).

Mr. Ulrich makes a powerful argument. The music he and his band spent hours of their time and talent creating—

not to mention the thousands of dollars that are spent in the recording and producing stages of an album—was simply put on an Internet site for anyone to download onto their computer for free. “It’s like each [Napster user] won one of those contests where you get turned loose in a store for five minutes and get to keep everything you can load into your shopping cart...except there’s no time limit and everyone who owns a computer is a winner. If you’re not fortunate enough to own a computer, there’s only one way to assemble a music collection the equivalent of a Napster user’s: theft” (Ulrich 2000, 1).

Artists such as Ulrich spoke out with such poignant arguments that Senator Orrin Hatch and the Judiciary Committee, among others, questioned whether Napster was ripping artists off and if something needed to be done to stop it. The music recording industry is a multi-billion dollar a year enterprise and it has a lot to lose if people stop buying CDs because they can download them for free. It is a legitimate concern. Music is not only a form of expression and art, but it is the product of artists’ work and their source of supporting themselves. The question that arises is whether technologies such as Napster are really inhibiting popular artists such as Metallica. Similar to the VCR case discussed earlier, Congress was leery of taking any actions to inhibit Napster or similar technologies, because previously the market worked out the problems without government intervention, and the concerned parties benefited significantly from the technology they were trying to stop.

While many in the industry expressed concerns similar to Ulrich’s, other artists gave a surprisingly overwhelming positive response to Napster. Napster gave beneficial exposure for independent artists who chose not to sign on with a label or who were not given that opportunity. Even big name stars stood up for Napster. Their underlying philosophy is similar to that of the Grateful Dead’s, who welcomed bootleggers into their concerts in the 1980’s. The fear in the industry at the time was that if you let people record your shows, then they wouldn’t buy your albums or buy tickets to your concerts because they had free access to the music. The opposite proved true. Both recorded sales and ticket sales for the Grateful Dead increased dramatically. The tapes of the shows floating around gave the band exposure all over the world, and all of this happened with very little radio time or corporate promotions. The band argued that their music was there to be heard, so let the people hear it. “If you give something to your audience, it always seems to come back somehow” (Napster, 2001a).

Peter Breinholt, a favorite local artist in Utah, agrees. He is an independent artist who pays for his CDs to be made, finds people to sell them, designs his CD covers, books the concert halls, and takes out his own ads in the newspaper to promote what he is doing. He is very popular throughout the state, but he cannot get radio play time. Since this is where people have traditionally been introduced to new music, he has had to find alternative ways of exposing his work. He has

found that if he does an occasional free concert, CD sales increase dramatically. “Peer-to-peer technology is sort of like a high-tech version of students playing my CDs in their cars for friends,” he says (Breinholt 2000, 2). Napster has been great for artists such as Breinholt who have seen increased exposure of their work on sites such as Napster.

Napster sought to help lesser-known artists by providing several methods to help people discover new kinds of music. One was Napster Discover, which spotlighted new up and coming artists. The New Artist Program allowed people to type in the kind of music they like and have lists of artists who fall into that category come up. A Featured Music section on the home page allowed for those lesser-knowns to get a big break. Chuck D stated, “We should think of Napster as a new kind of radio—a promotional tool that can help artists who don’t have the opportunity to get their music played on mainstream radio or on MTV” (Napster, 2001a).

It is surprising how many big name superstars spoke out in support of Napster, including Madonna, Prince, and Bono from U2. There is no doubt that these performers are not hurting for exposure, and yet they supported the idea of people coming together and sharing their music over the net for free. They saw it as a way to expand their popularity even further, especially in international markets. Bono stated, “I think it’s cool for people to share our music— as long as no one is making money from the process” (Napster, 2001a).

Courtney Love from Hole said, “There were one billion downloads last year but music sales are way up, so how is Napster hurting the music industry? It’s not. The only people who are afraid of Napster are the ones who have filler on their albums and are scared that if people hear more than one single they’re not going to buy the album” (Napster, 2001a). Napster forced accountability in the music industry in a way that has not been paralleled. New artists’ music was being heard and consumers had more say in what they were, and were not, willing to buy.

Most artists felt that as long as their albums continue to sell and people continue paying money to go to their concerts, Napster should be allowed to thrive. Even Ian MacKaye, co-owner of Dischord Records said, “Most people I know who use Napster listen to stuff they’ve never heard before. And then they get psyched and go out and buy the damn records. What’s wrong with that?” (Napster.com, 2001a)

CONGRESS, THE COURTS, AND NAPSTER

As the developer of peer-to-peer technology, Napster was a primary target for legislative action, or relief through the judiciary. In Congress Napster was very vocal, as members considered such legislation as the Digital Millennium Copyright Act and the Digital Performance Right in Sound Recordings Act. The goal of Senator Hatch and others on the Judiciary Committee was to balance innovation and new business opportunities on the Internet, while ensuring that laws and rights are not violated in the process. No legislation was enacted which effectively shut Napster down. However the

107th Congress indicated it would examine copyright and fair use in greater detail to determine whether more laws are needed to ensure proper intellectual property rights.

The situation in the courts was another matter. Napster was sued by some of the biggest names in the industry, including A & M Records among others. On February 12, 2001, an injunction was filed against Napster by the Ninth Circuit Court of Appeals in *A & M Inc. v. Napster*. The purpose of the lawsuit was to force Napster to cease providing the file sharing until the company found a way to compensate artists more effectively. The firm did not oppose this broad goal. As Hank Berry of Napster stated, "We have been saying all along that we seek an industry-supported solution that makes payments to artists, songwriters and other rights holders, while preserving the Napster file sharing community experience" (Barry, 2000, 3).

While Napster was able to reach agreement with two important distributors, Edel in Germany and TVT in the U.S., it could not reach agreement with the major record companies that had brought suit against it. Since July 2001 the Web based operations of Napster have been shut down, in response to a preliminary court ruling. Unable to generate much in the way of income, the company languished, until in May 2002 the media giant Bertelsmann agreed to acquire Napster's assets for \$8 million. Bertelsmann will acquire the assets through an expedited Chapter 11 bankruptcy proceeding (Foege, 2002).

While Napster has been shut down, the technology it developed continues to thrive. Jupiter Media Metrix estimates that in March of 2002 two million Napster users employed the technology they had downloaded before the shutdown to continue to swap music. However twenty-one million used the free services like Kazaa, Morpheus and Audio Galaxy, all of which imitate the Napster model.

CONCLUSIONS

The peer-to-peer technology developed by Napster cannot be stopped. A court may place an injunction on it and shut it down or Congress can pass stricter copyright laws, but Napster represents an incredible technology—one that cannot be ignored. Rather than shutting it down, we have to learn how to deal with it. People from all over the world, from all different backgrounds, with all kinds of different tastes, can come together and share their music and talk about it. We do not live in a Utopian society; there are people out there who are dishonest and who use the system and the music in ways that are contrary to international copyright laws. The benefits of the technology far outweigh the disadvantages, however. More than the damage these few cause the industry, the millions who use the peer-to-peer sites as they are intended, are going to provide such an incredible benefit to the music industry and individual artists that the long-term advantages that will come about can scarcely be comprehended.

Big record companies are in a state of fear because they recognize the potential companies like Napster have of diversifying the music industry. People might discover that they like someone's music other than Britney Spears or the Backstreet Boys. None of these superstars are going to be defeated, just like Tom Cruise and Steven Spielberg made it through the VCR craze. As radio stations become more and more centralized and corporatized, it is extremely refreshing to know that there is somewhere people can go to get away from the hype and just hear some music.

Similar to the development of other technologies, Napster has run into significant resistance in its early stages. Other industries have overcome such resistance and made their respective fields stronger. In this new millennium, there is no way to stop technological advancement. What needs to be done is to figure out how to use this technology so the respective parties gain the greatest benefit. I believe that this can be achieved by self-regulation in the market and not by more congressional action.

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