Essay

The Evolution and Revolution of Napster*

By PETER JAN HONIGSBERG**

AS I TURNED the corner onto Seventh Street from Mission Street in San Francisco on that Monday morning, October 1, 2000, I knew I was watching history unfold. The satellite dishes, the neon-bright lights set atop the media vans, and members of the press fidgeting anxiously had replaced the homeless who usually encamp near the main entrance to the Federal Court of Appeals building. As many as two hundred members of the national and international media had arrived that day, some as early as 4:15 A.M., although the music industry's lawsuit against Napster was scheduled to begin at 11:00 A.M.[1] A television reporter was interviewing a balding man in a blue striped suit, the artificial lamps barely making a dent in the gray, dull natural light.

I. Piracy—the Word of the Day

While I watched the reporters lining up at the door to the courthouse, I could not help but see the "P" word flashing overhead. The five major record companies ("the majors") and the Recording Industry Association of America ("RIAA")—the association that represents the companies—had paid their publicity agents and lawyers well. *Piracy* was the word of the day. Actually, at least where Napster was concerned, it was the word of the entire millennium year of 2000, and continued to be the word after the Ninth Circuit issued its unanimous

* Just like the technology upon which this essay is based, the essay itself will be out of date the moment the typing stops.

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1. The proceedings were also shown live on television and in streaming video over the Internet. It was the first time that the Ninth Circuit allowed a live telecast.

but dispiriting decision against Napster four months later on February 12, 2001.[2]

Napster was revolutionary. It was one of the most innovative applications to ever emerge on the Internet ("the Net"). It opened up musical horizons. Through a simple file sharing program that employed ingenious Peer to Peer ("P2P") architecture, people searched each other's computer hard drives and transferred songs.[3] Napster's P2P architecture had been hailed by techies as the third most important advancement on the Internet, after email and the Web browser.

The songs were not routed by or stored on Napster servers. Rather, Napster used central servers to provide a real time directory that specified the names and locations of the songs saved on the users' computers. The names of the songs, that is, the file names, were designated by the users, not by Napster. Songs on Napster were downloaded in an MP3 format.[4]

People contributed to Napster by uploading, or *ripping* songs from their compact discs ("CDs") onto their hard drives, compressing them into the MP3 format (using compression software available on the Web) and then adding the songs to their files. People also uploaded songs from tapes and vinyl recordings by plugging the tape or record player into the computer's audio input.

According to some reports, Napster was the fastest growing Internet site in history. In its first year, Napster reached twenty million users. In contrast, AOL had, after more than a decade in business, twenty-three million subscribers.[5] Before Napster shut down, sixty mil-

2. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). On June 22, 2001, the court denied Napster's request for a rehearing before the full court. *See* A&M Records, Inc. v. Napster, Inc., No. 00-16401 (N.D. Cal. June 22, 2001) (panel reh'g & reh'g en banc denied).

3. Under a P2P system, the user avoids the bottlenecks that occur when there are too many users seeking information from the same server. Thus, P2P networking is very different from the usual search for information on the Internet. The typical search begins with an Internet Service Provider ("ISP"), like a cable or Digital Subscriber Line ("DSL") company, that seeks out a search engine such as Yahoo or Google to search the Web for information or files.

4. MP3 technology was developed by a German engineering firm in 1987 as a way of compressing digital audio files by removing inaudible space and squeezing the rest. Before MP3s were created, a person would usually need several hours to download a song from the Internet. MP3 software compresses the song into a file that takes only one-twelfth of the usual disk space. Transmission time is in minutes or less, depending on whether the download is through a phone line, or a faster DSL or cable line. MP3 songs do not deteriorate with each use (as a vinyl record will, but a CD will not).

5. *See* Derek W. Wan, *The voice behind 'You've got mail'*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, July 5, 2000.

lion users shared over one billion songs (many of which were, of course, the same) on Napster. At Napster's peak use, during a one hour period, over three million people exchanged more than three hundred fifty million songs. Napster was one of the most visited sites on the Internet in the summer of 2000.[6] Napster as we knew it is only a memory now. But the Napster we knew and loved became a cultural audio archive of the twentieth century. People downloaded not only recorded music, but also speeches of Martin Luther King and Malcolm X; Charlie "Bird" Parker's jazz recordings performed in clubs but never on record; Maria Callas's old recordings on 78 r.p.m. records; rare Janis Joplin and Jimi Hendrix concert performances; *Saturday Night Live* sketches; *Amos and Andy* radio shows; and Cheech and Chong skits.[7]

Although Napster's users may have lost the battle in the Ninth Circuit, they have not lost the war. The record companies have scored a Pyrrhic victory. Pandora's box has been unlocked. And while the major record companies would like nothing more than to maintain their successful old-fashioned business model of selling vinyl albums and CDs, new and more sophisticated programs have burst forth to replace Napster.

The Napster clones are considerably more Internet savvy. Web sites that have evolved since Napster do not rely on central servers (as Napster did) that courts can easily pinpoint and shut down. At the turn of the twenty-first century, technological wizards created the first alternatives to Napster—Gnutella[8] and Freenet.[9] Although they did not rely on central servers, these sites were less elegant than Napster, and were clunky in their architecture.[10] Several additional sites came

6. *See* Becky Beaupre, *Suit can't stop Napster from gaining*, CHI. SUN-TIMES, Aug. 28, 2000, at 26.

7. Most live concerts, radio recordings and television recordings are, of course, not owned by the record companies.

8. http://www.gnutella.com.

9. http://freenetproject.org.

10. Freenet and Gnutella are both open source code (the source code is a programmer's basic instructions; an open source code means that the program is in the public domain) and they have no central servers. When a request is made, the search is tracked among the users on the system until the song is found. Gnutella and Freenet do not direct the path that the search takes and consequently the file's delivery is virtually untraceable.

Actually, the story of the creation of Gnutella is instructive. Justin Frankel who had earlier created Winamp, an online music player, heard from his brother at college that the college had shut down access to Napster. (In addition to litigating against Napster, the record companies had sent letters to colleges around the country informing them that their students were illegally downloading copyrighted material while on Napster, and implied that the colleges were contributing to the illegal downloads by not taking any action.

online after Gnutella and Freenet, including Aimster[11] and Audiogalaxy.[12] But the most important online music sites that appeared in 2001 were three technologically advanced and user-intuitive programs that relied on the same software. All three—KaZaA,[13] MusicCity[14] (which operates Morpheus) and Grokster[15]— employ the same FastTrack[16] software and the same P2P network. In a repeat of the Napster scenario, the record industry filed lawsuits in October and November 2001 against these three. But even if the record companies succeed against the FastTrack software Web sites,[17] other programs will replace them—the genie is out of the bottle!

A number of colleges responded by blocking student access to Napster, professing bandwidth problems.) Justin wrote a source code in response to his brother's concern, informing his brother that the college would not be able to shut the new code down, and so Gnutella was born. Because America Online ("AOL") owned Frankel's software company, Nullsoft, at the time he created Gnutella, and because AOL was set to merge with Time Warner (one of the five major record companies), it shut the program down. But it was too late: the same day Gnutella was posted on the Web, programmers downloaded hundreds of copies of it and made it available to other sites.

11. http://www.madster.com (formerly http://www.aimster.com).

12. http://www.audiogalaxy.com.

13. http://www.kazaa.com. KaZaA was based in the Netherlands, but is now owned by an Australian company. *See infra* note 17.

14. http://www.musiccity.com. MusicCity is based in Nashville, TN.

15. http://www.grokster.com. Grokster is based in the West Indies.

16. FastTrack is a P2P technology developed by a Dutch-based company that allows individuals to share files and communicate with other individuals on several different networks at the same time. FastTrack licenses the technology to companies like Grokster, KaZaA and MusicCity (Morpheus), allowing users of the three file sharing programs to access each other's files. Unlike Napster technology, which processed individual requests through a centralized server, the FastTrack search requests and actual downloads do not pass through a centralized server. Rather, the individual FastTrack users search "Super Nodes," which are other FastTrack users who meet certain bandwidth, latency, and processing power criteria. The Super Nodes point the search requests to the location where the file can be downloaded directly from another FastTrack user.

FastTrack also improved on the Napster technology by developing "Intelligent Downloads" which automatically locate the fastest source to download a file on the network. The files can be downloaded simultaneously from several sources, if the network calculates that this will improve the download speed. Network bandwidth is reduced by breaking the downloadable files into several chunks, with each chunk being downloaded from a separate source.

17. On January 16, 2002, KaZaA voluntarily suspended its downloads to wait for the decision of a Dutch court on January 31, 2002. *See* John Borland, *Popular file-trader halts software downloads*, CNET NEWS.COM, Jan. 17, 2002, *at* http://news.com.com/2110-1023-817147.html?legacy=cnet&tag=st.net.1005.sndstry.ni. However, a few days later, on January 20, an Australian company, Sharman Networks, Ltd., purchased KaZaA and resumed the downloads. *See* Benny Evangelista, *Australian company buys Kazaa, puts Napster-like service back on Internet*, S.F. CHRON., Jan. 22, 2002, at B1.

Today, more people cumulatively log onto the FastTrack sites than the sixty million people who logged onto Napster at its peak.[18] All three sites are not only faster than Napster, and just as user friendly, they also provide fast download access to other media. Within a week after *The Lord of the Rings: The Fellowship of the Ring* and *Harry Potter* appeared in theaters, college students were downloading the movies onto their hard drives.[19]

II. Control and the Music Business Distribution Model

It is amazing how the media can twist a story with just one word. Since the fall of 1999, when Napster launched its pioneering P2P music sharing system, nearly every person had been talking piracy when it came to Napster. Lawyers, musicians, Napster users, and people who had heard of Napster but had never visited the site had all rushed to judgment. To them, Napster was a pirate that violated copyright law. But the record companies wanted to protect more than their copyrights.[20] Piracy was a smokescreen. If the major record companies had wanted to settle, Napster offered many opportunities. Behind the smokescreen lurked another fear that paralyzed the music industry far more than its fear of piracy. What the record companies really dreaded was losing *control* of the distribution of their music.

The five companies and their major labels[21] compose eighty-five percent of the recording industry. The other fifteen percent is made up of independent labels, most of which use the majors to distribute their music. These same five companies settled with the United States government in May 2000 after the Federal Trade Commission found that the companies had overcharged consumers by five hundred mil-

18. *See* John Borland, *Suit hits popular post-Napster network*, CNET NEWS.COM, Oct. 3, 2001, *at* http://news.com.com/2100-1023-273855.html?legacy=cnet ("Analysis company Webnoize estimated that 3.05 billion files were downloaded using the FastTrack-based network, Audiogalaxy, iMesh and the Gnutella network during August. That compared with a similar estimate of 2.79 billion files downloaded through Napster in February 2001, the peak of that service's popularity.").

19. Federal law enforcement agents seized computers containing copies of the latest movies and other copyrighted software at various colleges around the country in December 2001. *See* Philip Shenon, *Internet Piracy Is Suspected as U.S. Agents Raid Campuses*, N.Y. TIMES, Dec. 12, 2001, at C1.

20. Record companies claim copyright in their sound recordings, and in "works made for hire" (where artists sign away their rights under their recording contracts). *See Recording Artists Fighting for Rights*, DAILY J., Jan. 8, 2002, at 3.

21. Sony (Columbia, Epic); EMI (Capital, EMI, Virgin, Chrysalis); BMG/Bertelsmann (RCA, Arista); Warner Music Group, a division of AOL Time Warner (Warner Bros., Electra, Atlantic); and Vivendi Universal (Universal, MCA, Mercury/Island, A&M, Geffen, Interscope, Motown).

lion dollars over the past four years.[22] There had been talk in spring 2001 that EMI might merge with BMG, leaving only four majors. However, antitrust authorities in the European Union threw a wedge into the proposed merger by concluding that the merger would unreasonably reduce competition.

Furthermore, most of the public bought into the majors' assertions that because of Napster, the record companies, the recording artists, and the songwriters had lost royalties, an allegation they dropped in October 2001.[23] Federal District Judge Patel's unreflective lightning-swift decision granting the music companies' request for a preliminary injunction halting Napster's file sharing program in July 2000[24] did little more than parrot the briefs filed by the music industry. The Ninth Circuit decision[25] similarly reflected the prevailing attitude that Napster was little more than a modern bandit. The only question some commentators had after the Court of Appeals decision was why it took the Ninth Circuit four months to do little more than agree with Judge Patel.

In industry lingo, music companies are called "distributors" and recording contracts are often called "distribution agreements." Eric Godtland, the manager of the rock group Third Eye Blind, astutely explained the system to me: the record industry's principal consumers are not the people who buy the CDs. The key customers are Wal-Mart, Kmart, Tower, Sam Goody, and other brick and mortar sellers of records. Record stores take anywhere from ten to fifty percent of the retail price. The brick and mortar stores are therefore the businesses that have the most to lose if the distribution model changes. In the short haul, the record industry still needs Wal-Mart to sustain its business model.

Godtland saw the record companies as having deeply entrenched interests. Even if they are beginning to see that change is inevitable, they have such a good thing going that they are hesitant to transform their business model. In October 2000, Godtland told me:

> Record executives do not want a fast track to the consumer. They very carefully arranged the system for selling songs. They don't want a digital design. They want to keep things just the way they

22. *See* Press Release, Federal Trade Commission, Record Companies Settle FTC Charges of Restraining Competition in CD Music Market (May 10, 2000), *available at* http://www.ftc.gov/opa/2000/05/cdpres.htm.

23. *See* discussion *infra.*

24. *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000).

25. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

> are. Their faith is to ride the horse into the ground . . . until it has heart failure,

he laughed. Continuing, he said,

> people in the business only care about this year. They want it to be the same as last year and the previous ten years. They wake up every morning hoping Napster [or any instrument of change for that matter] has gone away.

But, he concluded,

> the good news for them is that it isn't over. They still got the numbers.[26]

In fact, record sales had actually increased before Napster shut down. In 2000, when Napster was at its peak, record sales increased by 500 million dollars.[27] From January to March 4, 2001, sales of CDs were up 5.7% from the same period in 2000,[28] but after Napster was shut down, record sales dropped.[29] The music industry attributed the decline to the slowing economy. Nevertheless, one can argue that after Napster's file sharing program was shut down, the music industry lost one of its primary sources of advertising (a system that is not all that different from Columbia Record House—where the consumer purchases a number of CDs for a penny and is then exposed to new songs and new artists).

The industry further argued that the increase in sales while Napster was in operation was due to the strong economy, and that sales would have increased even further if Napster had not existed. They pointed to decreasing sales in some record stores near college campuses—since college students originally constituted a large segment of Napster users. However, that demographic changed as Napster's popularity grew and increasing numbers of thirty, forty, and fifty somethings logged onto to the site.

Napster argued that after being exposed to the music and artists on its Web site, people went out and bought CDs. Several research groups affirmed that Napster acted as an impetus for sales and Napster users were significantly more likely to purchase music than non-

26. Telephone interview with Eric Godtland, EGM, Inc. (Oct. 20, 2000).

27. *See* Roy Bragg, *Court allows Napster to run—for now; File sharer still in dire straits*, SAN ANTONIO EXPRESS, Feb. 13, 2001, at 1A.

28. *See* Jeff Leeds, *Album Sales Test the Napster Effect*, L.A. TIMES, June 20, 2001, at C1.

29. *See id.* In 2000, 785 million albums were sold in the United States; in 2001, 763 million albums were sold. *See Major Slump for US Album Sales*, BBC NEWS, Jan. 4, 2002 (quoting statistics gathered by Soundscan), *at* http://news.bbc.co.uk/hi/english/entertainment/music/newsid_1741000/1741941.stm.

users.[30] For many Napster users, it was a lot faster and easier to buy a CD than to copy the songs using a CD burner;[31] besides, CD burners cost around $300. Interestingly, when the record companies requested summary judgment on October 10, 2001, they did not rely on any claim of harm to the CD sales market.

At the end of the twentieth century, the music industry's business model of manufacturing the records, packaging the albums, placing them on pallets, and delivering them to the stores was on its way out. It was the alarm of seeing its business model slip away without any immediate successor that caused the industry to sue Napster. The industry argued piracy to the public, but it was really concerned about control over the promotion and distribution of its music. Although the industry successfully quashed Napster, its control over Internet access to digital music is still as tenuous as it was that October 1, thanks to future generations of Napster imitators.

When Frank Biondi, former chair of Universal Studios (and former CEO of HBO and Viacom), was asked to comment on the entertainment industry, he said, "Hollywood still believes there's never a penalty for being a slow adopter."[32] Substitute "the record industry" for "Hollywood," and the quote would be equally true. Larry Lessig, a Stanford University law professor and a premier expert on cyberspace law recently noted that "it's the intent of the music industry to stifle and slow innovation to better protect existing market positions. Whenever there is a model created they don't like, they sue and get it pretty much stopped."[33]

The record companies argued in their briefs to the Ninth Circuit that they were working on an Internet distribution model at the time Napster appeared. To the extent that it was true, it was little more than a faint-hearted attempt. The industry was not really interested in redesigning a distribution business model that had been successful for nearly one hundred years. In fact, at the time the record companies argued to the Ninth Circuit that they wanted—and intended—to offer

30. *See, e.g.*, Defendant Napster's Opposition to Motions for Summary Judgment; Memorandum of Point & Authorities, *In re* Napster, Inc. Copyright Litigation at 9 n.8 (N.D. Cal. 2001) (No. C-MOL-00-1369 MHP) (stating, "[the] L.A. TIMES reports that CD sales continued to rise until Napster was constrained by injunction—at which point CD sales declined.").

31. Electronic equipment that makes copies.

32. Michael Menduno, *MP3 Meets MPAA*, WIRED, Nov. 2000 at 3, *available at* http://www.wired.com/wired/archive/8.11/mustread.html?pg=3.

33. Mary Anne Ostrom, *Law and the Internet: more worries than hopes, Q&A: Lawrence Lessig*, S.J. MERCURY NEWS, Nov. 25, 2001, at 1F.

online music on their own, they had made no credible attempt at offering music on the Net. When they finally began offering music on the Net in early 2000, they offered a very limited selection and priced individual songs at "between $2.49 and $3.29 per download."[34] As one commentator wrote, "consumers didn't care to pay $3 for a song wrapped in clunky security software . . . ."[35]

Realizing that the demand for digital music on the Net would not go away and fearing the effects of other more updated online Napster clones, the record companies acted brazenly and injudiciously. Within months of the Ninth Circuit decision in February, and only hours before a Senate Judiciary Committee hearing was to begin on access to digital music, the record companies revealed that they had entered into joint ventures creating online subscription music services. Not surprisingly, the two distribution companies, MusicNet and press*play* (formerly called Duet) were owned by the record companies. MusicNet was owned by BMG, EMI, Warner Music Group, RealNetworks (which developed the technology) and Zomba Records, a large independent label. Press*play* was owned by Sony and Universal. Other businesses wanting to sell digital musical recordings produced by the five major record companies on the Net were required to enter into restrictive arrangements with these two distributors, or were effectively locked out of their music. The industry's arrogant behavior may have backfired.

On October 10, 2001, Judge Patel heard the industry's request for summary judgment on 213 copyright infringed works. A decision in favor of the music companies would have opened the door to the computation of damages Napster would be obligated to pay for copyright infringement. Instead, when Napster argued to Judge Patel that the arrangement the music industry forged with MusicNet and press*play* created horizontal price-fixing combinations[36] by setting whole-

34. Laura Rhode, *Universal to Offer Digital Music Downloads*, THE INDUSTRY STANDARD, Aug. 1, 2000, *at* http://www.thestandard.com/article/0,1902,17284,00.html.

35. Michael Learmonth & Ronna Abramson, *In Digital Music, First You Must Eat Your Rivals*, THE INDUSTRY STANDARD, Aug. 6, 2001, *at* http://www.thestandard.com/article/0,1902,28275,00.html.

36. It is illegal for competitors to conspire together to fix prices. This kind of attempt at market control is prevented by section 1 of the Sherman Act, 15 U.S.C. § 1 (2001). The Sherman Act prevents conspiracies in restraint of trade, and price fixing is considered a per se violation of the antitrust laws. Horizontal price restraints are fixed prices, or some other kind of strict price-setting guidelines, imposed by would-be competitors on the marketplace. The effects of horizontal price restraints include a price to consumers which is higher than the marketplace would otherwise demand if competition were allowed to work effectively.

sale, and possibly also retail, prices for their digitally distributed recordings, Patel became concerned. Patel's reaction was surprising, because Napster had raised the same misuse of copyright issue to her and to the Ninth Circuit panel in 2000, and both courts dismissed the issue with little comment or consideration.

In fact, up to this point in the history of litigation between Napster and the record companies, Judge Patel had been blatantly unsympathetic, if not thoroughly disagreeable, to Napster. Yet she was apparently disturbed enough by the allegation at the October 10 hearing to remark, "I'm really confused as to why the plaintiffs came upon this way of getting together in a joint venture. Even if it passes antitrust analysis, it looks bad, sounds bad and smells bad."[37] At the end of the hearing, she concluded that a decision for summary judgment would be premature.

Napster further argued that along with other small independent services, it too was a victim of the joint ventures. Napster had signed a distribution deal with MusicNet that prohibited Napster from contracting to secure licenses with press*play* and its labels, Sony and Universal. Under the terms of the deal, Napster could not contract individually with Warner and EMI without MusicNet's consent.[38] Undoubtedly, the record companies would have liked as little as possible to do with the pirate Napster. They certainly would rather not see Napster, for all the trouble it has caused them, rewarded and—even more importantly—a company that could become independent of the record companies sometime in the future.

Napster also argued that the companies engaged in vertical foreclosure of the digital music market[39] by refusing to enter into agreements on reasonable terms with independent sources for digital

37. Dawn C. Chmielewski, *Napster Accuses Labels of Abusing Licenses, Industry Calls Charges a Sideshow*, S.J. MERCURY NEWS, Oct. 11, 2001, at 1C.

38. BMG had purchased a twenty percent interest in Napster on October 31, 2000, and thus did not forbid Napster's negotiating separately with it. *See* discussion *infra* Part III.

39. Vertical foreclosures of a market are prohibited under the antitrust laws because they restrain trade. *See* the Sherman Act, 15 U.S.C. § 1 (2001). If done to monopolize a particular market, there might also be a violation of the Sherman Act, 15 U.S.C. § 2 (2001). Vertical restraints occur when companies at different levels in the production and distribution chain (such as a supplier of raw materials, a manufacturer, and a distributor) collude in an attempt to have an anti-competitive advantage over others in the marketplace. "Foreclosure occurs when vertical integration by one firm denies another firm access to a market." HERBERT HOVENKAMP, ANTITRUST 140–41 (3d ed. 1999). Here, by creating their own distribution channels for digital music, and by refusing to deal with the existing online companies, the record companies are effectively foreclosing the digital music marketplace for the existing companies like Napster. In addition, group boycotts and refusals to deal are also violations of the Sherman Act.

distribution and by imposing burdensome licensing requirements on both retail competitors and their customers. There was also concern that MusicNet and press*play* would offer licenses to each other on terms more favorable than those offered to other digital distributors, thus expanding their dominance into digital music distribution. According to Napster's expert, Stanford Professor Roger Noll, the majors' anticompetitive behaviors would have the effect of squeezing out a number of independent wholesale and retail competitors. The result would harm consumers by raising prices, and harm artists by reducing competition for the right to distribute their recordings.[40]

In addition, Noll pointed out that because independent labels are often excluded from prime retail shelf space by the major record companies, online distribution could offer the independents less costly access to the consumer—that is, if the major record companies do not dominate and otherwise restrain the distribution system.[41]

At a future hearing, Judge Patel could find that the record companies and their online distributors colluded by merging the distribution of their digital recordings into two companies in violation of federal antitrust laws. If she does, whatever damages the majors expected to acquire from Napster for Napster's violation of their copyrights would be offset, if not entirely enveloped, by the damages they would be compelled to pay to compensate Napster and other excluded online distributors for antitrust violations.

Following the October 10 hearing, the United States Justice Department's Antitrust Division sent out civil investigative demands ("CIDs") to the record companies, MusicNet, press*play*, and the Recording Industry Association of America seeking further information on the joint ventures.[42] The CIDs included questions on whether the companies intended, by leveraging the copyrights, to control content and the distribution channel.

At the Future of Music Policy Summit held in Washington, D.C., in January 2002, Mark Cuban, who founded Broadcast.com and owns the Dallas Mavericks, stressed the theme that the record companies are willing to make decisions against their economic self-interest by not licensing their full catalogs to independent online distributors.

40. *See* Declaration of Roger Noll, Morris M. Doyle Professor of Public Policy, Stanford University, in Opposition to Motions for Summary Judgment and in Support of Napster's Rule 56(f) Motion at 4, *In re* Napster, Inc. Copyright Litigation (No. C-MDL-00-1369 MHP) (redacted—not filed under seal).

41. *See id.* at 4–6.

42. *See* Jon Healy, *Antitrust Probe of Music Firms Intensifies*, L.A. TIMES, Oct. 15, 2001, *available at* http://www.latimes.com/business/la-000082195oct15.story.

"The people who had the keys to the mall decided to burn it down rather than try to make money from it. The premium wasn't on making money, the premium was on control."[43]

Apparently, Napster's claims that the music industry's practices are anticompetitive are terrifying the record companies. Four of the five companies made a paradigm shift from their intransigent stance of refusing to negotiate with Napster and, in January 2002, requested that the lawsuit against Napster be suspended. (EMI did not participate in the request.) Judge Patel granted a thirty-day suspension on January 22.[44]

Evidently, Patel was about to issue discovery orders against the record companies in order to further probe the industry's joint ventures. Patel had also agreed to inquire into Napster's allegation that the record companies may not own many of the copyrights that they claim.[45] Cary Sherman, general counsel for the RIAA, explained that the discovery orders would "get the parties more enmeshed in litigation and less focused on resolution."[46] In other words, the record companies were alarmed at what the court and the government might learn, and saw a settlement as an escape route from the investigations.

In essence, if the record companies are permitted to control, consolidate, and seriously restrict online distribution (including online costs and the catalog of available songs), they can continue to aggressively sell their CDs and vinyl records—a market with which they are familiar and in which they have been wildly successful during the twentieth century. Once again, the record companies appear to be doing whatever it takes to continue their monopolization of recorded music.[47]

III. The History of Napster

Napster began in the fall of 1998, when Shawn Fanning, Napster's creator, was an eighteen year old freshman at Northeastern University in Boston. Shawn originated his P2P architecture by combining the features of existing programs—Internet Relay Chat (a real time

43. Jon Pareles, *The Many Futures of Music, Maybe One of Them Real*, N.Y. TIMES, Jan. 10, 2002, at B1 (quoting Mark Cuban).

44. *See* Matt Richtel, *Judge Grants A Suspension of Lawsuit On Napster*, N.Y. TIMES, Jan. 24, 2002, at C4.

45. *See* Matt Richtel, *Plaintiffs Sought Timeout After Turn in Napster Case*, N.Y. TIMES, Jan. 31, 2002, at C5.

46. *Id.* (quoting Cary Sherman).

47. *See* discussion *infra* Part VIII on the music industry's latest scheme to "rent" rather than sell the music on the Internet.

network similar to instant messaging), a search engine, and the file sharing function of Microsoft windows. In three months, Napster—Shawn's nickname because of his nappy hair—was born. Shawn's uncle John incorporated the company in the spring of 1999, and became its largest shareholder.[48]

In the summer of 1999, John Fanning, Shawn Fanning, and Sean Parker—who was also in his teens when he met Shawn through the Internet and who had assisted Shawn in testing the program—moved to California. John found investors to help with the initial financing of the project. Napster established offices south of San Francisco in Silicon Valley, but its relatively inexperienced management team members were unfamiliar with the music industry culture.[49]

For the better part of a year, Napster had problems raising substantial funding. Several venture capitalists declined to invest because they were concerned about the music industry's copyright infringement lawsuit (which had been filed in December 1999) and because they could not envision how Napster could make a profit. But in May 2000, the venture capitalist firm of Hummer Winblad saw an opportunity where others did not, and invested thirteen million dollars for a twenty percent stake in the company. John Hummer was a former Seattle Supersonics center, and his partner, Ann Winblad, was a successful software entrepreneur (and Bill Gates's former girlfriend). One of their partners was Hank Barry, who had considerable experience as a copyright lawyer for the music industry. Barry was chosen to become Napster's new CEO. Hummer Winblad likely figured that Barry could reach out to the music industry and find common ground.

Hank Barry hit the dirt running. He immediately sought out and hired former record industry lawyers and executives, offering them major positions in the company. Apparently from the beginning, Barry intended to move the company in the direction of a more traditional business and revenue-producing model, something the music industry could live with. In fact, given Barry's music industry connections, one could suggest that the beginning of the end of Napster occurred when Barry took the helm in May 2000. He knew that Napster had to reach an accommodation with the music industry to survive (and, of course, return Hummer Winblad's investment). A professional drummer before he went to law school, Barry understood the business from both ends. As a lawyer, he had worked with Carey Ra-

48. *See, e.g.*, Karl Taro Greenfeld, *Meet the Napster*, TIME, OCT. 2, 2000, at 60; Benny Evangelista, *Napster Names CEO, Secures New Financing*, S.F. CHRONICLE, May 23, 2000, at C1.

49. *See generally* Karl Taro Greenfeld, *Meet the Napster*, TIME, OCT. 2, 2000.

mos, the attorney for the music publishers and songwriters suing Napster. Later, Barry represented A&M Records, the lead plaintiff suing Napster. Barry had the contacts and the connections, and he could speak their language.

Soon after Barry came on board, Napster originators John Fanning and Sean Parker left the company (I would venture to say that they were squeezed out). John Fanning moved back to Massachusetts and Sean Parker returned to college. Napster gave Shawn Fanning stock worth approximately nine percent of the company and paid him a five figure salary. The company informed the media that Shawn was continuing to work on the next generation of Napster's architecture, although it seemed that Shawn was far more important for the company's public relations image than he was for his computer/Internet application skills.

Napster was reshaping its image. The Napster the media had portrayed as a rebel outfit and a menace to the music industry was on the wane. Within six months after Barry took charge and thirty days after the Court of Appeals hearing, the first major transformation occurred. On October 31, 2000, Bertelsmann AG's music division, BMG[50]—one of the five major record companies in court that October 1—announced that it was switching sides and would partner with Napster in a fee based membership service. They would create a new company, one that would rely on some form of a subscription service to earn its keep. In late November 2000, Napster no longer seemed worried about being shut down. This formerly outlaw "dot com" was looking to become a major corporate entity. BMG, also the owner of book publisher Random House, hoped that by aligning with Napster, the company would be able to utilize Napster's P2P technology to expand its online services not only for digital versions of its music, but also for its books and magazines.

Thomas Middelhoff, the CEO of BMG, once said that he would make BMG a powerhouse in the industry. But it had not happened, and the company also experienced some nasty clashes with a couple of record labels and the recording group *N Sync. Middelhoff may have seen his partnering with Napster as a dramatic statement that BMG's difficulties were a thing of the past, and the company was now moving boldly forward into the new millennium. Also, by being the

50. BMG's catalog of music includes contemporary artists like the Dave Matthews Band, Christina Aguilera, Britney Spears, Backstreet Boys, *N Sync, and Carlos Santana, as well as Elvis Presley and Duke Ellington.

first on board, BMG hoped to stake a foothold in the new technology, and obtain a competitive edge.

BMG's outlay was reportedly between fifty and sixty million dollars in the form of a loan. At worst, BMG would get the write off. At best, BMG had the option to convert the loan into a prominent interest in the company—a company with sixty million users who could have at some later date rendered billions of dollars in revenue. BMG also had agreed that once the fee-for-service went online, BMG would drop out of the lawsuit against Napster. Apparently, Middelhoff had been a fan of Napster, downloading songs on Napster along with his fifteen year old son, at the same time that his company was litigating against Napster. BMG could have sued them too.

Following the hearing, Hank Barry announced to the press that Napster had offered to enter into settlement negotiations with the music industry. Barry's offer was to charge the Napster users $4.95 per month, and share seventy to eighty percent of the proceeds with the record industry. Barry calculated that for the first year, this would amount to somewhere around $500 million. But Hilary Rosen, the president of the RIAA, said that the offer was not of interest to any of the companies. More likely, no record company wanted to negotiate with Napster regardless of how lucrative Napster's offer might be. The companies wanted the enemy crushed and humbled. The industry was more interested in preserving control and maintaining its profit-maximizing business model, and not in sharing proceeds with an upstart dot com.

Soon after the February 12, 2001, appellate court decision, Napster installed filters to block access to unauthorized material. Users employed misspellings for song titles and artists' names and confounded the filters. In response, Napster refined its filters and ultimately blocked over ninety-nine percent of copyrighted material. At a status conference on July 11, 2001, Judge Patel, relying on an expert consultant's advice, ruled that Napster had to achieve "zero tolerance" of copyrighted works in its file sharing network.[51] Patel required Napster to adopt particular architecture that would block the remaining less than one percent of copyrighted material. Napster appealed Patel's ruling to the Ninth Circuit. It argued that Patel's order was excessive, essentially surpassing, if not ignoring, the requirements set by the appeals court's February 12 decision requiring that Napster po-

51. *See In re* Napster Copyright Litigation, Nos. MDL-00-1369 MHP & C99-5183 MHP, at 22:2–3, 32:3, 34:19–21 (N.D. Cal. July 11, 2001) (proceeding tr.), *available at* http://news.findlaw.com/cnn/docs/napster/transcript071101.pdf.

lice its system within the limits of its architecture. The Court of Appeals nullified Patel's order, refusing to require Napster to change its architecture, and heard the matter on December 10, 2001.[52]

Although Napster was permitted to remain online until the court considered its appeal of Patel's ruling, Napster closed down its network on July 2, 2001. Napster preferred to wait until it established a viable subscription service before returning online. Napster intended to install the new system in the fall of 2001 but, presumably for technical and financial reasons, it postponed the introduction of the new program until 2002.

The record companies became increasingly uncompromising and unforgiving to Napster after the Ninth Circuit decision. The only agreement that Napster could assemble after the appellate court decision was with a number of independent European record labels in June 2001. However, these were small labels that did not provide much in the way of desirable music for Napster to offer in a subscription service. Apparently, the majors believed that after the Ninth Circuit's decision they held all of the marbles. Something had to give if Napster was to survive in the music industry. That something occurred on July 24, 2001, when Konrad Hilbers replaced Hank Barry as CEO. Hilbers is a native of Germany and a former chief administrative officer at BMG and chief operating officer for the European company, AOL/Bertelsmann. A former colleague described Hilbers by saying, "[h]e comes more from a financial, professional background. [He is] not an outgoing, salesperson type . . . . But you feel he is someone you can trust."[53] In others words, he was positively corporate. Hilbers studied at the business school at the University of St. Gallen in Switzerland, described by BusinessWeek as "a bastion of the European capitalist establishment."[54] If anyone still needed convincing as to who was in charge of Napster, and whether Napster was still an outlaw, the placement of Hilbers at the helm should have quieted their unease. As an online music analyst described Napster after Hilbers took the reigns: "This closes the page on Napster's adolescence and begins its

52. A&M Records, Inc. v. Napster, Inc., No. 01-16308 (9th Cir. filed July 18, 2001) (stay of order modifying preliminary injunction).

53. Jack Ewing, *The Grown-Up in Charge of Napster, Bertelsmann veteran Konrad Hilbers is no Net hipster, which may be a major plus as he charts a new course for the humbled online music service*, BUSINESSWEEK ONLINE *1, Aug. 1, 2001, *at* http://www.businessweek.com/technology/content/aug2001/tc2001081_936.htm (quoting Felix Somm).

54. *Id.* at *2.

adult career."[55] Perhaps, a more fitting assessment would have been that henceforth begins Napster's capitalistic career.

Hank Barry returned as a partner to Hummer Winblad, intending to remain on Napster's board. There are people who believe that he would have been more successful at Napster if he had worked out a license agreement with the larger American independent labels before Patel's issuance of her preliminary injunction in the summer of 2000, and possibly even the time between her decision and the Ninth Circuit's, a time when the independent labels would have been much more likely to arrive at mutually agreeable terms. A contract with the large independents could have kept Napster on its mission. By selling their songs through a subscription service, Napster would have earned money throughout the litigation. Presumably, Barry did not negotiate with the independents because he did not want to antagonize the five major companies. However, if the record companies had seen Napster as a truly viable operation, they might not have pursued their scorched earth policy against it.

Unconfirmed rumors surfaced that around the same time that Hilbers was appointed CEO, Shawn Fanning disappeared from the company's offices. Supposedly, he was profoundly upset with the direction the company he had started was heading. Fanning did return a month later. Some people believe that the company had to drop a bundle of money on him to convince him to return. Napster obviously could not afford to lose its poster boy at this juncture—that is, while it was still trying to retain customer loyalty.

In January 2002, Napster previewed its new subscription model by inviting 20,000 users to test out the program. A very limited music selection was available. The cost of the service was predicted to be between five and ten dollars a month.[56]

IV. Artists and Songwriters Who Sued Napster

Along with the record companies, certain songwriters and artists also sued Napster. Two such artists, Metallica and Dr. Dre, captured much of the media's attention. In the spring of 2000, Metallica, one of the first heavy metal bands in the 1970s, and Dr. Dre, a rap artist who also owns a record label that produces many of the most popular rap and hip-hop artists, asked Napster to eliminate their songs from Napster's central servers. (During the litigation, Metallica permitted Nap-

55. *Id.* at *3 (quoting Mark Mulligan).

56. *See* Benny Evangelista, *Napster Releases New Program*, S.F. CHRON., Jan. 10, 2002, at B1.

ster to make their live performances and concerts available.) Napster responded to their requests by indicating that it could not identify particular songs and delete them since it did not keep a master list of files. Napster offered to remove people who shared these artists' copyrighted songs with others.

Metallica, tracking users through an independent firm over one weekend, collected the names of 335,435 people who copied or allowed others to copy Metallica's songs.[57] Dr. Dre also tracked users several weeks later, identifying over 239,000 alleged infringers.[58] People who were affected by the actions of Metallica or Dr. Dre found a message on their screen the next time they tried to log onto Napster, informing them that Metallica or Dr. Dre had denied them entry.

Napster offered to reinstate people who wrote a letter to Napster explaining that they were wrongly terminated providing Metallica or Dr. Dre did not file a copyright suit against them within ten to fourteen days. Neither Metallica nor Dr. Dre—nor anyone in the recording industry for that matter—had any intention of litigating against all the people who downloaded songs. There were two obvious reasons: first, the cost of bringing thousands of individual lawsuits against students and others was prohibitive; and second, the negative publicity. Metallica and Dr. Dre had already succeeded in angering a significant segment of the student population which declared that it would never purchase Metallica or Dr. Dre CDs again and which had set up Web sites such as "Fuck Metallica" to spread the message.

At the same time, most students did not concern themselves all that much with Napster's being shut down. Most knew of several other Web sites that had similar music sharing programs, such as Gnutella and Freenet, although these other sites were not as convenient and effortless to access and had limited files to share because fewer people were logged onto them. Other students changed their user names and tried to log back on. Napster first blocked the users' Internet Protocol ("IP") addresses. Computer wizards, however, created Web sites for the express purpose of explaining to people how to bypass the blockage by finding another server. A small number of people were successful. Napster then changed its blocking procedure by disabling the user name and password and inserting a code on the user's computer that blocked access from that computer under any account name.

57. *See* John Borland, *Metallica fingers 335,435 Napster users*, CNET NEWS.COM, May 1, 2000, *at* http://news.com.com/2100-1023-239956.html.

58. *See Rapper tells Napster of alleged copyright woes*, ORANGE COUNTY REG., May 18, 2000, *available at* 2000 WL 4833282.

Not every popular musician agreed with Metallica and Dr. Dre. In 1998, rap star Chuck D posted songs on his Web site for free downloading. His record company, Def Jam, threatened him with violating the copyrights of others, forcing him to take the music off the site. In the fall of 2000, the rock group Offspring offered one million dollars as a giveaway to one of its fans chosen from among all the people who downloaded one particular song from Napster. Initially, Offspring wanted to encourage users to download all the songs off its new album, but its record company, Sony, threatened to sue the band for copyright infringement if it did. In the summer of 2001, Metallica and Dr. Dre settled with Napster.

Songwriters also joined the record companies' lawsuit against Napster. Mike Leiber and Jerry Stoller were two of them. Beginning in the early 1950s, Leiber and Stoller cowrote such well known hits as *Hound Dog*, sung by Elvis Presley (to hear a truly rousing rendition, find the version by Big Mama Thornton); *Jail House Rock*, also by Elvis; *Stand by Me*, performed by Ben E. King; *Love Potion No. 9*, sung by the Clovers; and *Poison Ivy*, recorded by the Coasters. They also penned songs for the Beatles, the Rolling Stones, and Barbra Streisand. Their attorney's argument in the Ninth Circuit necessarily focused on the legal issues. But five days later, Stoller wrote an op-ed piece in the New York Times that revealed his feelings about Napster. Stoller wrote that the songs that he had written "have been my bread and butter," and that writing songs has taken him from ten minutes (for *Hound Dog*) to five years.[59] He went on to say that, "[e]ach time a Napster user downloads a copy of a song I have composed, I am deprived of the royalty that my work should have earned me."[60] Then, worried about Napster's effect on his financial position, he said that Napster was "threatening not only my retirement, but the future of music itself . . . [and that] by taking the incentive out of songwriting, Napster may be pushing closer to a time when there won't be any songs for its users to swap."[61]

V. An Answer to Copyright Holders

The answer to Stoller and all copyright holders should be this: Pay the copyright holders their money. They are entitled to their income for copyright use. But do not shut down innovation. The law

59. Mike Stoller, Editorial, *Songs That Won't Be Written*, N.Y. TIMES, Oct. 7, 2000, at A15.

60. *Id.*

61. *Id.*

must roll with the technological changes. A protest similar to Stoller's on the future of music was heard many times in the past—whenever new and creative technology advanced the contemporary culture. Piano rolls, radio, television, cable television, and the VCR were all denounced by people who feared the impact of the changes on their economic well being. But technology is designed to innovate, not perpetuate.

One obvious way to resolve the payment issue would be to model a proposal on the industry's concept of "compulsory license." Compulsory licenses are currently in effect when an artist records someone else's song. Once a song is recorded, any artist may re-record or "cover" the song without the approval of the copyright owner, but the artist and her publisher must pay a compulsory license fee to the copyright holder.

For example, if Britney Spears wanted to record the Knack's *My Sharona*, she could do it without anyone's permission. But Spears's record company would be required to pay the songwriter and/or the publisher of *My Sharona* a "mechanical" license to record or manufacture the song, whether on CD, cassette, or vinyl. (After Spears records it, the songwriter would also receive royalties each time the song is played on the radio.)

Napster lobbied Congress to adopt a compulsory fee arrangement for each song downloaded on its system. That is, Napster wanted to apply the concept of "mechanical" royalties to online distribution. Thus, Napster would have paid a royalty to the publisher every time a song was distributed online. (Presumably, Napster would have paid the fee from users' subscriptions and from banner advertisements.) But since the record companies' fundamental goal is to maintain control of the distribution of the music, even if against their economic self interest, they have successfully lobbied Congress to reject all proposed compulsory license plans with Napster. Congress needs to act responsibly and pass a compulsory license act that will strike a balance between the record companies' desire for control and the larger national interests in promoting innovation and encouraging the development of new technology.

VI. The Litigation

Judge Marilyn Hall Patel, who has been overseeing the case in district court in San Francisco was appointed to the bench by President Carter in 1980. She is described by the local legal community as an intelligent, thoughtful, and well respected jurist. Nevertheless, she

seemed to have framed her opinion with a solid bias against Napster. On July 26, 2000, in little more than two hours time, she issued a preliminary injunction that would have essentially shut Napster down.[62] Rather than carefully considering each of Napster's arguments, she adopted the music industry's designation of Napster as a rebel outfit that had to be enjoined immediately. She could barely contain her attitude toward Napster and its attorneys. Her opinion reads like the music industry's brief. Napster lawyers appealed to the Ninth Circuit Court of Appeals, and two days later the court stayed the injunction in order to review the key legal issues that were raised by the case.[63]

Since the image of a company pirating copyrighted works on a massive scale had its desired effect on Judge Patel, the recording industry ran with the same image in its brief to the Court of Appeals. The record companies' lawyers wrote that Napster "is a business to facilitate the anonymous theft of music."[64] The brief continued that "Napster's business strategy from the inception was to use Plaintiff's [the record companies'] music to usurp and undermine the record industry, to take over, or at least threaten, plaintiff's role in the promotion and distribution of music."[65] The lawyers added that "[o]ver 87% of the music copied and distributed on Napster is pirated."[66]

The three judge Court of Appeals panel selected to review Patel's decision consisted of Mary M. Schroeder, Robert R. Beezer, and Richard A. Paez.[67] Within minutes after the hearing began, Judge Paez asked David Boies,[68] counsel for Napster, whether there had ever

62. *See* A&M Records, Inc. v. Napster, Inc., No. C99-5183 (N.D. Cal. July 26, 2000) (proceeding tr.), *available at* http://www.riaa.org/pdf/napsterpatel.pdf.

63. *See* A&M Records, Inc. v. Napster, Inc., Nos. 00-16401 & 00-16403, 2000 U.S. App. LEXIS 18688 (9th Cir. July 28, 2000).

64. Brief of Appellees at 3, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401 & 00-16403).

65. *Id.*

66. *Id.* at 5.

67. Judge Schroeder, from Phoenix, Arizona, was the senior member of the panel. She was born in 1940 and appointed in 1979 by President Carter. Schroeder became Chief Judge of the circuit in December 2000. Judge Beezer was appointed in 1984 by President Reagan. Born in 1928, he has always made Washington his home. Judge Beezer took senior status in 1996. Judge Paez was born in Utah in 1947, and moved to California to attend law school in Berkeley. He later worked at California Rural Legal Assistance. President Clinton nominated him to the Court of Appeals in 1996, but because of Republican opposition to many of Clinton's nominees, his confirmation was held up for nearly four years, until March 2000.

68. David Boies, Napster's "superstar litigator" as the New York Times once called him, had come from Armonk, New York, with his eight member legal staff. A lawyer on his staff told me that Boies had appeared earlier that morning in Courtroom Two arguing a

been a case like the *Napster* case. Boies pointed to the 1986 *Sony Corp. of America v. Universal City Studios, Inc.*[69] decision. In that case, Universal, the motion picture company, appeared before the United States Supreme Court with an argument similar to the one the music industry was raising in *Napster.* Universal asked the judges to outlaw the Sony Betamax home video recorder—similar to the more familiar VCR—because it could be used, and was in fact used, to make unauthorized copies of movies and television shows.

Although acknowledging that the video recorder was capable of infringing uses, the Supreme Court recognized that it was also capable of substantial non-infringing uses—since some of the movies and television shows were either not copyrighted or copyright owners gave permission for duplication.[70] Moreover, the Supreme Court believed that the video recorder had the potential to contribute significant value to our society in the future, in ways that our society could not necessarily conceive of at the moment.[71] The Court ruled that Sony could continue to supply the technology to consumers and not be held responsible for unauthorized copying by individuals.[72] Both in Napster's briefs and at the hearing, Boies argued that Napster, having technology capable of multiple commercially significant, non-infringing uses, was analogous to the video recorder and should be similarly protected.

Boies pointed out that approximately ten to thirteen percent of the music traded on Napster was not in violation of copyright and that this segment was large enough to warrant its continuation. The ten to

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horse racing racketeering case via a live video link to the federal courthouse in Pasadena, California, where the appellate judges were actually sitting. I was surprised that Boies could switch gears so easily. After taking a forty minute break, he argued the *Napster* case.

Boies had worked for thirty years at Cravath, Swaine & Moore in New York, before leaving in 1997. The National Law Journal described Boies as the "Michael Jordan of the courtroom" and named him "Lawyer of the Year" in 1999. *Lawyer of the Year: Boies wonder,* NAT'L L.J., Dec. 27, 1999, at A8. Before *Napster,* he had represented the government in its antitrust case against Microsoft. The Democrats, quick to recognize his apparent star quality, seized the opportunity and hired him in November to represent them in the Florida election recount tragicomedy. But as with *Napster,* Boies was unable to succeed in the election recount case. Even his success with Microsoft was thwarted when the Justice Department under President Bush offered a favorable settlement to Microsoft in November 2001. In January 2002, the New York Times reported that Boies is representing former Enron chief financial officer, Andrew S. Fastow, in the Enron scandal. *See Who's Who: Lawyers in the Enron Case,* N.Y. TIMES, Jan. 17, 2002, at C11.

69. 464 U.S. 417 (1984).

70. *See id.* at 456.

71. *See id.*

72. *See id.*

thirteen percent was music written by new, unrecorded artists who wanted the exposure (the five music companies represent only two percent of all artists); by songwriters and independent labels who gave permission to download their work; by bands that have released free music like the Beastie Boys; and by artists such as the Grateful Dead, the Dave Matthews Band, and Metallica.

The Ninth Circuit did not adopt Boies's argument, and ruled that the Supreme Court's decision in *Sony* was of limited assistance to Napster.[73] The court distinguished *Sony* by noting that, unlike Sony, Napster had actual and specific knowledge of the users' direct infringement.[74] In addition, Napster had control over the system in that it could terminate users who violated Napster's polices, unlike video recorder manufacturers who had no control over their consumers' use of the recorders.[75]

The Ninth Circuit also drew a distinction between Napster's P2P architecture and Napster's conduct in relation to the operation of the system. The court conceded that although Napster's P2P technology may have been used to infringe the copyrights, that was not enough to impose liability on Napster.[76] Nevertheless, the court wrote that "whether we might arrive at a different result is not the issue here[,]"[77] since the evidentiary record supported the lower court's finding that Napster knew or had reason to know of its users' infringement of the copyrights.

(During the time that the *Sony* case was wending its way through the courts, the film industry, in a pattern similar to what the record industry did with Napster, tried to shut down the new technology. In fact, the president of the industry, Jack Valenti, analogized that the VCR is to film "as the Boston Strangler is to the woman alone."[78] Fortunately for Valenti, the court did not take him seriously. By legalizing the video recorder, the court made it possible for the entertainment industry to add billions of dollars to its profit column.)

On the issue of direct copyright infringement, the court acknowledged that Napster, by only providing the directory and the routing

73. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001).

74. *See id.* at 1020.

75. *See id.* at 1024.

76. The appellate court thus disagreed with the district court's opinion which placed undue weight on the proportion of current use. Instead, the appellate court said that the trial court should look at the current and future noninfringing use. *See id.* at 1020–21.

77. *Id.* at 1021.

78. Frank Pellegrini, *Will Music Giants Bite at Napster's Bait?*, TIME.COM *2 (Feb. 21, 2001) *at* http://www.time.com/time/nation/article/0,8599,100133,00.html.

system, did not in itself engage in direct copyright infringement.[79] Only its users directly infringed the copyrights. However, Napster could be held liable for facilitating the infringement, whether vicariously or contributorily.[80] The legal theories of vicarious infringement and its sister contributory infringement work like this: A contributory infringer knows or should know of the infringing act, and contributes or participates in the act. A vicarious infringer does not need to know of the infringing act or does not participate in it; however, the vicarious infringer must have control and a financial stake. An example that copyright experts use to describe vicarious infringement is where a musician performs at a club without having first obtained permission for performing the songs in public. Since the owner of the club has control over the musician's performance and has a financial interest in the success of the performance, the owner can be held vicariously liable for copyright infringement. Since the appeals court found that the Napster users were direct infringers, Napster could be held accountable for vicarious or contributory infringement.

The court ruled that Napster's ability to police its system and terminate the accounts or block the access of people who violated Napster's policies constituted sufficient control to warrant a finding of vicarious infringement.[81] The court also found that Napster gained a clear financial benefit because the infringing material acted as a draw for Napster's users, and resulted in an incredible expansion of Napster's consumer base.[82] In analyzing contributory infringement, the court noted that Napster had actual and specific knowledge of infringements.[83] Thus, once Napster received notice that a copyrighted work was available on its system without authorization, Napster had a duty to take whatever action was needed to halt the infringement.

Napster also argued that the fair use defense to copyright infringement allowed a user to download songs. The United States Constitution empowers Congress to enact copyright laws to "promote the Progress of Science and useful Arts . . . ."[84] In promoting the science and the arts (i.e. in making the work accessible to the public in furtherance of the societal goals of education, broad dissemination of information, and innovation), the government strikes a bargain with

79. *See Napster*, 239 F.3d at 1013–14.
80. *See id.* at 1022–24.
81. *See id.* at 1023.
82. *See id.*
83. *See id.* at 1022.
84. U.S. CONST. art. I, § 8, cl. 8.

the artist. The government grants the artist the copyright for a certain period of time for her artistic creation. As a general rule of thumb, songs created after January 1, 1978, are protected for the period of the life of the author plus seventy years.[85] For works created before that date, the period could be as long as ninety-five years.[86] The period had been seventy-five years,[87] but in 1998, the Disney company convinced Congress to extend the period another twenty years[88] so that Disney could retain its copyright to Mickey Mouse, which was set to expire in 2003. Mickey Mouse first appeared in the 1928 motion picture *Steamboat Willie.*

During the time the artist holds the copyright, federal law[89] allows others a fair use defense to the work, so that people may creatively expand on the work with a new expression or meaning. There have been hundreds of cases interpreting fair use in all kinds of contexts. Fair use has been recognized for purposes of criticism, comment, news reporting, teaching, scholarship, research, and parody.

The law generally does not look favorably on copying for entertainment purposes. Similarly, copying an entire song would not appear to be fair use. It certainly is not transformative. Nevertheless, Napster made several fair use arguments in the trial court and on appeal.

Both the trial judge, Marilyn Hall Patel, and the Ninth Circuit rejected Napster's fair use argument that users frequently download songs they already own in order to "space-shift" them to another venue for convenience—such as an MP3 player, or a computer to listen to while working. Napster's argument was that space-shifting was similar to "time-shifting" (taping for a later viewing) that the Supreme Court in the *Sony* case recognized as an acceptable non-infringing,

85. *See* 17 U.S.C. § 302(a) (Supp. 1999).

86. *See* 17 U.S.C. § 304(a) (Supp. 1999).

87. Before 1978, the duration of copyright measured from the date of first publication; after 1978, duration of copyright measures from the death of the author.

88. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

89. *See* 17 U.S.C. § 107 (2001). Under the statute, the following factors are considered in determining fair use:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

non-commercial fair use for the video recorder.[90] The music companies argued that most video recorder taping or time-shifting of television shows is a one time event, while songs on Napster were played over and over again. Moreover, unlike most video recordings, the songs were transferred to other individuals.[91] Napster countered that since the users often owned the songs whether on CD, tape or vinyl, the record companies could not prove that space-shifting in any way harmed the market for its music.[92]

The Ninth Circuit concluded that since Napster users shifted copyrighted material to the general public, making it "available to millions of [users]," and not only to the original user's hard drive or MP3 player,[93] the *Sony* decision, which presumably only conceived of shifting the taped broadcast to the home, was inapposite.

Napster also insisted to Judge Patel and to the Court of Appeals that the fair use doctrine protected "sampling,"—a process where users download songs to "sample" or preview them before deciding whether to purchase the CD. The music companies argued that Napster's position was specious, charging that sampling does not imply downloading the entire song. But Napster pointed out that the sampling was non-commercial and personal, and that the music industry incurred no harm since studies had shown that a significant number of people who sample frequently increase their music purchases. The Ninth Circuit once again agreed with Judge Patel "that both the market for . . . CDs and . . . for online distribution [were] adversely affected by Napster . . . ."[94] The appellate judges further believed that even if Napster had contributed to an increase of sales of CDs, that in itself should not deprive the record companies of the right to license their material—which, of course, Napster had been wanting to do the entire time. But because of the companies' fanatic determination to

90. *See Napster*, 239 F.3d at 1019.

91. *See id.*

92. The Napster situation was not the same as the online service MP3.com, where music is also space-shifted. The Audio Home Recording Act (*see infra* note 96) allows an individual to space-shift by ripping or uploading a CD into her computer and then storing the music in a virtual locker online so that she can listen to it wherever she is. MP3.com provided the user with a simpler procedure that did not require ripping a CD onto a hard drive. Instead, when a user verified that she owned a particular CD that MP3.com had in its database, MP3.com would copy the music from that CD to the user's virtual locker on her computer. Because MP3.com had some eighty thousand CDs in its database, the record companies sued MP3.com for copyright infringement. During the summer and fall of 2000, MP3.com settled with the record companies, agreeing to pay out approximately one hundred fifty million dollars.

93. *See Napster*, 239 F.3d at 1019.

94. *Id.* at 1018.

retain control at any expense, the majors would not agree. They preferred to lose sixty million potential buyers of online music rather than negotiate with Napster.[95]

In addition to the fair use arguments, Napster argued that recent federal laws also protected it from copyright infringement. In the 1990s, to accommodate the rapid growth of the Internet and technology, Congress passed laws that permitted a person to copy a song for her personal, non-commercial use.

Under the 1992 Audio Home Recording Act[96] ("AHRA"), a person can make unlimited copies of a song for one's own, non-commercial use, whether the recording is analog or digital. If you want to copy a song (audio file) from the radio or a CD or even download it from your computer onto a tape or disk and play it in your car or while you are working out, the law protects you. You can even lend it to a friend. However, you cannot make a copy from a copy.

The problem that vexed the music industry lawyers was that the copying by Napster's users was massive in scope. Thus, even if a person is allowed to download a song for his own use under the AHRA, it is very different when sixty million people are doing it, the lawyers argued. But the AHRA does not draw a distinction between small scale and large scale copying. Thus, Napster argued that since the law did not address this point, it was up to Congress to make the changes and not the courts. The music industry responded that the AHRA does not apply to Napster users, since each user's computer hard drive acted as a public server where anyone connected to the Napster network had access to that user's server. These individual servers or computer hard drives were not protected by the AHRA. The Ninth Circuit agreed with the record industry that the hard drives were not digital audio recording devices because their primary purpose was not make digital audio copied recordings. As they saw it, "computers [did] not make 'digital music recordings' as defined by the [AHRA]."[97]

Adding to the argument under the AHRA, Napster pointed to the Digital Millennium Copyright Act[98] ("DMCA"), passed in 1998. Title

95. Exposure on Napster could easily have lead to continued appeal and the possibility of making more records. The effect of Napster was demonstrated when musicians from Primus, Phish, and the Police joined together using the name Oysterhead to perform an eighty minute concert at the New Orleans Jazz and Heritage Festival in Spring 2000. Someone taped the show, and within weeks, people were eagerly downloading the music on Napster.

96. 17 U.S.C. § 1008 (2001).

97. *Id.* at 1024.

98. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

II of the act, called the Online Copyright Infringement Liability Limitation Act, provided what the law calls a safe harbor to shield a company that would otherwise be in violation of the law.[99] Congress acknowledged that with the growth of the Internet, an Internet Service Provider ("ISP") could not realistically monitor the huge quantities of information that are stored and delivered through its systems.[100]

There are four safe harbors under the DMCA,[101] but Napster had focused on the exception for "information location tools,"[102] such as an index or directory. The safe harbor rules require that the ISP have no control over the content of the information that passes through its system and that when an ISP is informed that someone on its network is engaging in illegal infringement of copyright, the ISP must shut it down, unless the receiver gives counter notice justifying its actions. Where such notice is given, the issue goes to a court for determination.[103]

Napster argued in court that even if it knew that someone was infringing, it was not liable until it received notice of the specific infringement. The record companies responded that specific notice of infringement was not a requirement, and that because Napster had constructive notice of the infringement it could not take advantage of the safe harbor provision. Taking the path of least resistance, the court said that it need not accept a blanket conclusion that section 512[104] of the law would never protect secondary infringers. However, although the record companies raised "serious questions" regarding the statute and although "the balance of hardships tips in their favor," they chose to defer to the trial court on the issues, expecting the issues to be more fully developed at trial.[105]

Because Napster's application incorporated innovative P2P technology, the issues raised by the Napster case went beyond copyright infringement, and touched on the larger and tougher questions of what limitations should be imposed on the "Information Highway." That is, it was not only the music industry that was running scared by

99. 17 U.S.C. § 512 (2001).

100. A company that provides online services or network access would be considered an ISP if it temporarily stores information on its servers, allows users to store information on its servers, or provides links to information. Napster apparently qualifies as an ISP.

101. *See* 17 U.S.C. § 502 (Supp. 1999).

102. 17 U.S.C. § 512(d) (Supp. 1999).

103. *See* 17 U.S.C. § 512(g)(C) (Supp. 1999).

104. 17 U.S.C. § 512.

105. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1025 (9th Cir. 2001).

the creation of P2P technology. Any company that supplied information was equally fearful. More than just music, videos, and movies could be affected—books, comics, drawings, maps, films, cross-stitch needlework patterns, recipes, photographs, and architectural blueprints have all been directly exchanged among users on the Net. The parties to the lawsuit in the Ninth Circuit addressed this issue.

Several amicus briefs submitted on behalf of Napster in the Court of Appeals hearing advised the judges to exercise caution in crafting their decision. One brief signed by eighteen Intellectual Property Law professors[106] and another brief by the Association of American Physicians and Surgeons[107] warned that a ruling that was too broadly framed against Napster and in favor of the corporate record industry and the protection of copyrights could inadvertently result in obstructing the development and expansion of P2P networking, thereby thwarting the evolution of the Internet.[108]

The Ninth Circuit judges recognized that concern. The court noted that it would not shut down Napster's P2P technology merely because P2P technology could be used to infringe the industry's copyrights. Instead the court said that it was only concerned with Napster's unlawful use of the technology for transferring songs.[109]

The record companies had fought vigorously against the private, non-commercial exceptions in the AHRA and DMCA copyright laws of the 1990s. But Congress, understanding that it had other interests to serve besides the record industry's, granted the exceptions. Congress had two objectives in mind: first, to guarantee that the concept of fair use would extend to the expanding Internet; and second, to

106. Amended Brief of Amicus Curiae Copyright Law Professors in Support of Reversal, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401 & 00-16403), *available at* http://dl.napster.com/amicus_law.pdf.

107. Brief for Amici Curiae Ass'n of Am. Physicians & Surgeons, Inc. et al. in support of Appellant Napster, Inc. Supporting Reversal, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (No. 00-16401), *available at* http://dl.napster.com/amicus_physicians.pdf.

108. For example, Intel and other companies have been developing platforms and other gateways for promoting P2P networking in business and on the Internet. The SETI@home screen saver that analyzes radio signals from space and searches for intelligent life in the universe by harnessing the power of two and one-half million idle PCs connected to the Internet is a P2P venture. The National Institute of Health has been considering using P2P technology for a human genome project. KaZaA, MusicCity, and Grokster, like Napster, all use sophisticated P2P software that is capable of downloading and transferring many kinds of files that do not infringe copyrights.

109. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020–21 (9th Cir. 2001).

support evolving technology and the creation of new electronic goods manufactured in response to the growth of the Internet.[110]

As to Congress's first objective, it seems that just the reverse has happened. Section 1201(c) of the DMCA provides that the act will not affect defenses within the Copyright Act, including fair use.[111] However, section 1201(a)—described as the anti-circumvention provision—forbids anyone from breaking into someone's copyrighted work without permission.[112] Courts have held that section 1201(c) does not apply to the anti-circumvention provision.[113] Thus, if a person circumvents copyrighted work for fair use purposes, that person is still deemed to have violated the act. That is, regardless of whether the person has a proper fair use defense under the Copyright Act, there is no fair use defense to the anti-circumvention provision. The DMCA has effectively put copyright owners in control of access to material, even material that is otherwise accessible under the copyright law through fair use or through the public domain.

Congress' second objective was surprisingly furthered when the electronics industry drafted an amicus brief on behalf of Napster in the appellate hearing.[114] The electronics industry apparently wanted the court to understand that when major technological changes impact copyright issues, the court should hesitate to expand copyright protection without clear and specific guidance from Congress. Ironically, or perhaps one can look at it cynically, Sony's music division sued Napster, while its electronics division signed onto the amicus brief as a member of the Consumer Electronics Association on behalf of Napster.[115]

The Department of Justice and the United States Copyright Office under the Clinton administration supported the record companies' position in the Court of Appeals. The fact that the record industry was a "friend of Bill's" while Napster was just a small dot com may or may not have been a factor in the government's choosing to write its amicus brief in support of the entrenched music industry, rather than advocating for innovative technology. Interestingly, Re-

110. *See* H.R. REP. No. 105-551(II), at 26 (1998).

111. *See* 17 U.S.C. § 1201(c) (Supp. 1999).

112. *See* 17 U.S.C. § 1201(a) (Supp. 1999).

113. *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

114. Brief of Amicus Curiae Consumer Elec. Ass'n et al., A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Nos. C99-5183 & C00-0074).

115. *See id.* Sony Electronics Inc. is listed as a member of the Consumer Electronics Association ("CEA") on CEA's Web site. *See* http://www.ce.org/About_CEA/about_cea_member_list.asp.

publican Senator Orrin Hatch, Chair of the Senate Judiciary Committee, sent a letter to the court advising the judges that the government's brief did not necessarily represent the views of Congress. Senator Hatch writes Christian gospel music and has had the good fortune to see some of his work recorded and performed. His music was also shared on Napster.

In September 2001, Senator Hatch and Senator Patrick Leahy persuaded various songwriters and the 800-member National Music Publishers Association to settle with Napster for twenty-six million dollars. Napster paid an additional ten million dollars as an advance against future licensing royalties. The parties also resolved that Napster would pay the publishers one-third of whatever royalties it will pay to the record companies.[116] Judge Patel still needs to approve the settlement. The contract does not cover ASCAP and BMI, two major music publishers. Of course, this agreement does not cover the copyrights that the record companies hold separately.

As noted earlier,[117] the record companies may be running scared because of Judge Patel's inquiry into their anticompetitive operations. Apparently, the companies are eager to settle and block further inquiries into their practices.

VII. Who Earns the Money in the Record Business?

Like most large businesses, a record company's priorities are itself and its shareholders. Although very few musicians make a living on their music, the record industry does well. The few artists who make it big reap huge profits for the record companies. The majors argue that they need blockbuster sales from those few artists to support the eighty-five to ninety percent of all albums they issue but that are not commercially successful.[118] However, their argument is somewhat disingenuous. The companies put their major resources behind the albums that they expect will become the blockbusters. The albums released by other artists are left to fend for themselves, with little to no advertisement or promotion from the companies.

Most artists, if they are to earn any income at all, do so through performances and direct sales of CDs and merchandise. Ideally, artists hoped that the Internet would open up opportunities. Artists could have found it more economically advantageous to sell merchandise

116. *See* Dawn C. Chmielewski, *Napster settles music lawsuit: net music service to pay $36 million to settle copyright suit*, S.J. MERCURY NEWS, Sept. 25, 2001, at 1C.

117. *See* discussion *supra* Part II.

118. *See Recording Artists Fighting for Rights*, DAILY J., Jan. 8, 2002, at 3.

and tickets to their own tours and performances directly to their fans. Using the Internet, any number of artists could possibly have made an end run around the music companies with relatively little investment. However, after the record companies quashed Napster and moved to take control of all digital music distribution, those early ideals have nearly evaporated.

Songwriters, publishing companies, and recording companies earn their money in the music business differently. For example, often the artist who performs a song will see relatively little money compared to the unknown writer of the song who could be receiving royalties for years. Songwriters whose names are unfamiliar to us live in some of the most posh homes in Beverly Hills, while once famous recording artists often find themselves in bankruptcy court—having spent the advances they received in recording the albums and receiving no income thereafter.

Songwriters receive royalties every time the song is played on the radio, on television, on a jukebox, in a movie, elevator, airplane (a huge source of income), bowling alley, or anywhere else, although the process and rates differ when audio-visual media such as movies, video, karaoke, and television are involved. Royalties are also collected from foreign "subpublishers" and from sheet music sales. Since the AHRA permits people to make copies of songs for their own private use, Congress added a tax to the sales of digital audio recorders and digital audiotapes. The money raised by the tax is paid to the songwriters, artists, and record companies for lost royalties and profits. Recording companies make most of their money by manufacturing and selling the CDs or albums.

An artist with power can maintain her wealth even if she does not write the songs by negotiating for a piece of the songwriter's share. Madonna is rich not only because she has written and recorded many popular songs, but reportedly because she has also been able to convince several of her songwriters to share the copyrights with her. Thus, every time a song of which she shares the copyright is played on the radio, Madonna gets paid. Another less powerful artist who did not write the song he sings and was not able to command a share in the rights to the song, receives nothing when his song plays on the radio.

As noted earlier, once a song is recorded, the law allows anyone to re-record or "cover" it without permission from the songwriter. The record label that records the song pays royalties to the songwriter and/or his publisher for a "mechanical" license that allows the label

to record or manufacture the song.[119] After it is recorded, the songwriter receives royalties each time the song is played on the radio.

Artists receive royalties from the record company usually ranging from 10% to 20% of the suggested retail list price, less the dubious deductions for packaging (20% to 25% of the retail price), promotional and other giveaways, returns, and breakage (10%).[120] Obviously, in an ideal world, the artist could receive a considerably larger portion of the royalty percentage from the sale of music online, since the costs of digital distribution should be appreciably lower. In a digital sale, companies could not in good faith deduct costs for packaging and breakage. Nevertheless, given the record industry's ability to control its contracts, it is likely that new contracts formed with the sale of digital music will still shovel the bulk of income from digital sales to the companies rather than to the artists.

Out of their advances, artists must pay their producers—who manage the recording project, hire the studio musicians and select the music and arrangement—between 2 1/2% and 5% of the suggested retail list price of the album. Artists also have to pay their personal managers—who are involved in selecting the recording company, the producer, and the publishing company—between 15% and 20% of gross earnings. Gross earnings include income from the recording as well as from licensing, publishing, and live performances.

The publishing company, which often links the songwriter with an artist to perform the work, finds a record label to record the work. It also looks for other venues such as airlines and ad agencies for ongoing play of the recording. Publishing companies usually share the copyright of the work equally with the songwriters. Not surprisingly, major record labels have their own publishing arms.

VIII. Attempts by the Majors to Protect the Music

In December 1998—more than half a year before Napster's debut—the record companies created the Secure Digital Music Initiative ("SDMI") with the hope of protecting the copyrights of music downloaded from the Internet and played on digital audio devices. Since then the industry has experimented with all kinds of devices to encrypt music. They explored an electronic watermark system that identifies the downloaded song and the computer that downloaded

119. *See* discussion *supra* Part V.

120. For example, if the cost of a CD was $20, the record company would first deduct up to $7.50 (25% plus 10% equals 35%) for the various deductions, and then pay the artist a 10% to 20% royalty on the remaining $12.50.

the song, and then determines whether the song's copyright is protected. At another stage, the recording industry announced that it was developing an identification tag, similar to a universal bar code, that could be embedded in songs. Emusic, which sold MP3s online, reported in November 2000[121] that it had created a program that could track the digital fingerprints of songs on Napster, searching for illegal copies.

The industry sold its first CD that "locked" songs in the spring of 2001. It was a Charlie Pride country album that could not be ripped or copied onto a PC. However, a Marin County, California, resident filed a lawsuit soon after the CD's release against the record company claiming that the locked CD interferes with the fair use of the consumer who wants to listen to the CD while working on her PC.[122]

In December 2001, RealOne Music, a service of MusicNet—one of the two industry-backed digital services—went online. Using Real Audio and Microsoft's Windows Media Audio formats, the service blocks subscribers from transferring the songs to MP3 players and Apple's iPods, or from burning songs onto CDs. RealOne Music merely allows users to download a limited number of songs (around one hundred) onto their hard drives per month. At the end of the month, the songs expire unless the users renew the songs by continuing the subscription. Press*play* also went online in December permitting subscribers who paid a premium fee to burn a limited number of songs from a selected play list. However, subscribers were prohibited from burning more than two songs per artist (presumably so users would not download an entire album). Essentially, the music industry's objective is to no longer sell the music. Rather, the industry is seeking to orchestrate even more control over the music by only allowing the users to rent the songs—one day, one week, or one month at a time.

Also in December 2001, several cable companies (presumably at the record industry's urging or at least with the industry's blessings) were considering imposing speed limits on their networks to prevent users from downloading too many songs. Record companies and movie studios are also pressuring ISPs to deny access to anyone who is sharing copyrighted material on the Net.

While the push for encrypted technology and other mechanisms for blocking digital music sharing continues, the companies persist with their comforting and job-secure brick and mortar model.

121. *See* Benny Evangelista, *Program Hunts Users of Napster*, S.F. CHRON., Nov. 22, 2000, at B1.

122. *See* Peter Lewis, *Pay to Play*, FORTUNE, Jan. 7, 2002, at 116.

Of course, as long as computer geniuses continue to roam the Web eager for the challenge of breaking into encrypted files, the game of cat and mouse between the record companies and the hackers will endure. As the record companies create new technology, they will also have to regard the interests of the electronics industry which apparently wants to sell its products such as MP3 players, iPods, and CD burners, and does not want rigid security systems that would result in fewer sales of its products.

In fall 2001, people who were willing to pay around $300 could purchase the Archos Jukebox HD-MP3 Recorder that seems to circumvent many of the security systems the industry has designed to prevent burning CDs or sharing MP3s over the Internet.[123]

The programs run by the record companies and by the file sharing networks raise issues of privacy. Although this Essay cannot explore these issues in any detail, users of file sharing networks need to be aware of both "spyware" and "adware" programs. For example, to earn income, KaZaA and other file sharing networks have used adware to superimpose advertising links over Web page text by attaching targeted advertising programs to users' web browsers.[124] Spyware has been used to not only track user downloads and listening habits, but to send user ID names and Internet addresses to other Websites.[125] Also, be on the lookout for "Trojan horse" spyware programs that are designed to take over a user's computer and attach new instructions.[126]

IX. Looking to the Future

In the summer of 2000, the author of a Business Week article wrote, "Napster may wind up among the martyrs in the Internet Revolution."[127] Apparently, he was right. Napster as we knew it is no more. Stanford law professor Larry Lessig, in commenting on the even more disturbing prospect that the Internet itself is under siege, notes that the government and the music industry have subverted

123. *See* Jon Fortt, *Putting Halt to Music Copying is Daunting Task*, S.J. MERCURY NEWS, Nov. 8, 2001, *available at* http://www.azstarnet.com/public/startech/archive/110701/wire4.html.

124. *See* Stefanie Olsen & Gwendolyn Mariano, *Peer-to-peer exchanges court advertisers*, CNET NEWS.COM, Aug. 2, 2001, *at* http://news.com.com/2100-1023-271020.html.

125. *See* John Borland, *File-sharing programs carry Trojan horse*, CNET NEWS.COM, Jan. 2, 2002, *at* http://news.com.com/2100-1023-801599.html.

126. *See id.*

127. Spencer E. Ante, *Inside Napster*, BUS. WEEK, Aug. 14, 2000, at 113.

copyright law's objective of promoting the progress of science and the arts.

> Historically our Constitution created a very limited protection of what we've come to call intellectual property. We've slowly expanded it quite dramatically. This didn't really matter before the Internet . . . . But now copyright law begins to regulate absolutely everybody, as they connect their computer to the network. Before the Internet you could set up a fan fiction club, or you could talk about "Star Trek" with friends in your dorm room . . . . Now you do the same thing on the Internet, and you're subject to the regulations of copyright law. What's surprising to me is that there's been very little reflection on the importance of maintaining balance, and the dangers of this very strong protection, where dinosaurs get to protect themselves against innovation.[128]

The dinosaur record industry is throwing everything it can at innovation, and it has made some headway. But its victories will be short-lived. Even with its power and its fierce strikes to sustain control in this fast changing world, there will always be another Shawn Fanning with a new design that will disrupt its plans and bring forth yet another original way in which we listen to music. While we wait for that next spirited idea, we can envision a future where: (1) Judge Patel aggressively pursues the misuse of copyright and antitrust claims against the record companies; (2) Congress adopts a compulsory license plan for Napster and other music sharing programs; and (3) the United States Supreme Court overturns the Ninth Circuit's *Napster* decision. In the meantime, we will always remember Napster.

Napster was inspired. It struck a cord with sixty million people, and not simply because the music was free. In our fast paced, workaholic culture, we rarely found the time to lunch with a friend or chat on the phone. We emailed when convenient, and waited for a convenient response. In a world that seemed to care less and less for direct contact, Napster served as a reassuring community. Napster spanned across artificial borders. It evoked memories, passions, yearnings, and thrills through the sharing of songs and voices.

The community we knew as Napster is history now. But it is one of those blips in the narration of the world that we will fondly remember.

128. Steven Levi, *The End of the Net*, NEWSWEEK, Nov. 19, 2001, at 63 (interview with Lawrence Lessig), *available at* http://www.msnbc.com/news/655756.asp. *See generally* LAWRENCE LESSIG, THE FUTURE OF IDEAS (2001).