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CONSUMER NEWS

Michelle C. Liffick

Napster: The Boundary Between Sharing and Theft¹

I. Introduction

Who *wouldn't* like to get something for nothing? Most consumers would agree that, when making any purchase, the smaller the price, the bigger the deal. But, if the consumer isn't paying for music, who is? According to music industry executives, the companies in the music industry are.

Napster was born as a means for the college student to exchange music with his roommate, and has now blossomed into a tool allowing over 75 million other users to do the same B for free.² How? Basically, Napster allows its members to download a free program that lets them swap digitally-encoded songs (known as MP-3 files) with other users.³ The only glitch is that, according to the music industry, this exchanging and downloading is really stealing.⁴

II. The Recording Industry v. Napster

Over the past year, Napster has been the defendant in at least 5 cases alleging copyright infringement.⁵ A & M Records and 17 other record companies filed the first lawsuit and won an injunction against Napster, shutting down their service, in the Northern District of California on July 26, 2000.⁶ The court enjoined Napster from engaging in, or facilitating others in copying, down-

loading, uploading, transmitting, or distributing plaintiffs copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner.⁷ However, the Ninth Circuit Court of Appeals stayed the injunction just two days later putting Napster back in business.⁸

Then, on March 5, 2001, after the United States Court of Appeals for the Ninth Circuit remanded the case⁹, the District Court again enjoined Napster from engaging in, or facilitating others in, copying, downloading, uploading, transmitting, or distributing copyrighted sound recordings.¹⁰ In other words, Napster is out of business for the moment. This ruling, requiring Napster to stop copyrighted songs from being distributed on its site, has been called the beginning of the end for the company.¹¹

The music industry is afraid of losing its livelihood.¹² If consumers can use Napster to download music without paying, why would they go somewhere else to pay? The director of BMI Internet Operations, Bob Grohovsky, opined that somewhere along the way we consumers began to believe we have a right to this music.¹³ Instead, according to Mr. Grohovsky, it really is a privilege.¹⁴

Representatives of Napster view the issue from a decidedly different angle. According to Napster CEO, Hank Barry, copyright laws must be balanced with the public's interest in sharing and building upon the creativity of others.¹⁵ Napster, according to its CEO, believes that recording artists *should* be compensated and that keeping Napster up and running will benefit artists and consumers of music in the long run.¹⁶

III. The Competition v. Napster

Napster is neither the first nor the only company to connect consumers to their favorite music via the Internet. In July of 1998, EMusic.com began *selling* digital

downloads of music on the Internet.¹⁷ Music enjoyed great success B at first.¹⁸ The numbers indicated that consumers would eventually be purchasing music by the millions on the web.¹⁹ EMusic operates by selling subscriptions to its catalog of music B Napster let its users download music for free.²⁰ Music CEO, Gene Hoffman, hoped that the courts would shut down or limit Napster's services.²¹ If not, it seemed inevitable that Music, which charges its customers for music, would not survive.²²

IV. The Future of Napster, the Music Industry, and the Internet

Moore's Law stands for the proposition that computer power doubles every 18 months.²³ The inevitable growth and expansion of computer capability makes the resolution of the Napster cases a potential bellwether of how intellectual property law will be defined on the Internet.²⁴ As technology improves, video games, movies and pay-per-view TV programs could be swapped as easily as songs.²⁵ Several on-line multimedia file-sharing services are already being used.²⁶ According to one source, Hollywood quakes in its boots.²⁷

So, what could Napster do? Before sustaining its most recent blow, Napster proposed the idea of charging a monthly subscription fee B just like all the other sites.²⁸ This type of business idea signals what could become a major shift in the way music is distributed.²⁹ The shift is toward a subscription-based future for the entertainment industry.³⁰

In addition, Napster agreed to its first out-of-court settlement with TVT Records during the first month of 2001.³¹ TVT Records filed its copyright infringement action against Napster in June 2000.³² Though all terms of the settlement agreement were not made public, the settlement does allow users of Napster to swap songs copyrighted by TVT.³³ In addition, the president of TVT

Records, Steve Gottlieb, will act as an advisor to Napster.³⁴

Napster, in early 2001, began trying to recruit other major labels.³⁵ But, Napster has a tough road ahead as a result of the legal and philosophical war over the online service which has been raging over the last year or so.³⁶ Napster must, in order to make peace with those who have called it theft prove to the rest of the music industry (and, apparently, to the federal courts of California) that it has good intentions AND can make money for the artists and companies in the industry.³⁷

V. Conclusion

For now, the road ahead of Napster is uncertain at best. Unless a settlement is reached in the interim, the case will go to trial in the United States District Court for Northern California sometime during the summer of 2001.³⁸ The focus of this summer's trial will likely be on the amount of damages — certain to be huge — if the issue of liability for copyright infringement has been resolved against Napster.³⁹

Endnotes

1. *A & M Records v. Napster, Inc.*, 114 F.Supp.2d 896, 902 (N.D.Cal. 2000).
2. *Id.*
3. *Napster CEO Evangelizes For Digital Music*, 63 TEX. B. J. 1028, 1028 (Dec. 2000) [hereinafter *Napster*].
4. Matthew Mirapaul, *Is It Theft, or Is It Freedom? 7 Views Of the Web=s Impact on Culture Clashes*, N.Y. TIMES, Sept. 20, 2000, at H-42 [hereinafter *Mirapaul*].
5. *Napster, BMG Parent Enter Into Agreement Settling Copyright Claims*, MEALEY LITIG. REP.: INTELL. PROP., Vol.9, No.3 (Nov. 6, 2000).
6. *Id.*; *A & M Records*, 114 F.Supp.2d at 896.

7. *A & M Records*, 114 F.Supp.2d at 927.
8. See Mirapaul, *supra* note 4, at H-42.
9. *A&M Records, Inc. v. Napster, Inc.*, 2001 U.S. App. LEXIS 5446 (9th Cir. 2001).
10. *A&M Records, Inc. v. Napster, Inc.*, 2001 U.S. Dist. LEXIS 2186 (N.D.Cal. 2001).
11. Janet Shprintz, *Litigious Spin*, VARIETY, Mar. 12, 2001, at 5 [hereinafter Shprintz].
12. *Napster*, *supra* note 3, at 1028.
13. *Id.* (quoting Bob Grohovsky, Director of Internet Operations at BMI, who spoke at a CLE seminar, Entertainment Law and Technology, in Austin, Texas).
14. *Id.*
15. *Id.*
16. *Id.*
17. Pete Barlas, *Napster Grows; Paid Sites Suffer; EMusic, Others Struggle to Find Subscriptions while Napster Offers Free Songs*, INVESTORS BUS. DAILY, Jan. 29, 2001, at A6.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Napster*, *supra* note 3, at 1028 (comment by Hank Barry, CEO of Napster).
24. Matt Richtel, *Napster Case: Hard Queries on Copyrights*, N.Y. TIMES, Oct. 3, 2000, at C-1.
25. Mirapaul, *supra* note 4, at H-42.

26. *Id.*

27. Joel Brown, *Hollywood Heads for the Net*, THE BOSTON HERALD, Jan. 28, 2001, at A11.

28. Jefferson Graham, *Napster Moving Toward Monthly Fee; Song-swapping Service Could Set the Tone for Internet Music Sales*, USA TODAY, Jan. 30, 2001, at 1A [hereinafter Graham].

29. *Id.*

30. *Id.*

31. P.J. Huffstutter, *Company Town; Napster Strikes Deal with First of Its Many Litigants; Music: The Agreement Will Allow the Online Service to Use TVT Records= Material for File-Sharing*, L.A. TIMES, Jan. 25, 2001, at C6.

32. *Id.*

33. Matt Richtel, *Technology Briefing: Internet; Record Label Settles With Napster*, N.Y. TIMES, Jan. 25, 2001, at C4.

34. *Id.*

35. Mirapaul, *supra* note 4, at H-42.

36. Graham, *supra* note 28, at 1A.

37. *Id.*

38. Shprintz, *supra* note 11 at 5.

39. *Id.*

