

2002

## Symposium Introduction: Napster: Innocent Innovation or Egregious Infringement

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### Repository Citation

Magarian, Gregory P., "Symposium Introduction: Napster: Innocent Innovation or Egregious Infringement" (2002). *Scholarship@WashULaw*. 228.

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# VILLANOVA SPORTS & ENTERTAINMENT LAW JOURNAL

VOLUME 9

2002

NUMBER 1

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## Symposium

### INTRODUCTION

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Napster is gone for now, but the fissures it opened in our understanding of intellectual property will challenge lawyers for a long time. The basic idea behind Napster was a simple outgrowth of the Internet's premise of linking computers to facilitate the widespread exchange of information. The Napster Web site, with its peer-to-peer file sharing technology, created a sort of "clearing house" for information, specifically the sound files known as MP3s. Thousands upon thousands of users could sign on to the Napster site at any given time, offer MP3 files for downloading, and in turn download any files that any of the other users had to offer. For music lovers, the system provided opportunities to sample music they might not have known well enough to risk purchasing and to download familiar music in a format that allowed them to store hundreds of songs on portable players. The music industry, however, saw Napster as a sinister force that would let users own music without buying it. As such, the industry believed, Napster implicated a core purpose of copyright law: to protect artists' ability to profit from their creation.

The inevitable legal confrontation led the Ninth Circuit, in *A&M Records, Inc. v. Napster*,<sup>2</sup> effectively to pull the plug on Napster. The Court held that the site operators, although not themselves infringing copyrights, had facilitated infringement by the site's users. The conclusive nature of the Court's decision, how-

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2. 239 F.3d 1004 (9th Cir. 2001), *affg in part, rev'g in part*, 114 F. Supp. 2d (N.D. Cal. 2000).

ever, belied a story that was just beginning and remains in the expository stage. Numerous variations on Napster have sprouted on the Web since the decision – some of them clearly aimed at respecting copyrights, others simply designed to circumvent the precise architectural features that downed Napster. The technology is complex and nascent enough that the decision's implications may quickly become ambiguous or unclear. The stakes are only getting higher: the quality of the MP3 files transferred over Napster was appreciably lower than that of commercially available digital music, but new systems are closing the gap. Napster allowed the sharing only of sound files, but some of its descendents allow the sharing of software and video files. The music industry looks more and more like the Dutch boy before a very leaky dike, attempting to license above-ground file-sharing systems here, surreptitiously copy-protecting compact discs there, and constantly looking over its shoulder to see whether the artists whose interests it claims to protect still prefer industry middlemen to the allure of online distribution.

Napster and its progeny have required intellectual property lawyers to confront challenging doctrinal issues, such as the problem of third-party liability for copyright infringement and the nature of fair use, in a sophisticated and unpredictable context. At a theoretical level, the controversy has breathed fresh life into venerable debates about the purposes behind intellectual property protection. Why and to what extent should the law protect artists' control over their creations? What sort of intellectual property regime best ensures the flourishing of creativity? How should the law mediate the tension between the First Amendment's mandate of a free flow of information for the public good and copyright's protection of creators' autonomy? Congress' contemporaneous extension of copyright protection in the Digital Millennium Copyright Act<sup>3</sup> underscores the pressing importance of these legal issues.

This symposium, convened amid the echoes of Napster's death rattle, memorializes early responses to the legal problems of online file sharing by a group of accomplished copyright scholars and advocates. Both Michael Carroll and Llewellyn Gibbons focus on the Ninth Circuit's *Napster* decision and its portents for the development of copyright law. Professor Carroll's contribution analyzes the case with special emphasis on its treatment of the third-party liability problem. The court's decision turned on its conclusion that Napster's users infringed music copyrights, making the site liable by extension. Carroll fleshes out the court's reasoning by work-

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3. 17 U.S.C. § 512 (2001).

ing through its rejection of defenses to the site users' liability – its conclusion that the massive scope of file sharing on Napster constituted not a fair use but a commercial use and its refusal to apply statutory immunities in the Napster setting. Professor Gibbons' article explains the Napster technology, analyzes the Ninth Circuit's decision, and further explores the lessons of the court's third-party liability holding for future online entrepreneurs whose systems facilitate the sharing of information.

Two considerations of online file sharing's practical consequences round out the symposium. Intellectual property attorney Vickie Feeman, after examining the Ninth Circuit's decision, prefigures the future of file sharing technology by focusing on the post-Napster present. She introduces some of Napster's successors in the online file-sharing game, such as Gnutella, Morpheus, and online radio pioneer Bitbop. Feeman suggests that these varied services' enhanced quality, speed, and ease of use may ultimately render *A&M Records* a pyrrhic victory for the music industry. The joint contribution of Bernard Resnick, an agent for musicians, and Kevon Glickman, a record company executive, offers a thoughtful record industry perspective on the Napster phenomenon. After describing the pros and cons of Napster from an industry standpoint, Resnick and Glickman conclude that artists and record companies may have more to gain than to fear from file sharing if they can develop and carry out a strategy to harness it.

Napster and the litigation it prompted represent the first chapter in what promises to be a long and rich story about technology and law in Twenty-first Century society. The eminent contributors to this symposium have provided a foundational intellectual gloss on that story. Their perspectives and observations reflect a critical moment that present and future lawmakers, judges, and analysts must understand in order to decide and critique what happens next.

