Do You Think You're a Thief When You Download Music?

*The Case of Napster, the Internet & Copyright Law*

Frank Field
ESD Lunch Talks; IAP 2002

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“Ice-T's Take On Napster, the Law and Morality;”
Laura Holson; *New York Times* August 7, 2000

- The recording companies, "are tripping off the fact this stuff comes through the computer clean," he said. "That's the thing. When it comes on the radio, you can tape it, I can send it to my homeboy. But mail moves slow and the Internet moves faster."

- ...Why do so many people traffic in music they haven't paid for? "To me," Ice-T said, "you got the cops and the robbers. And, to me, I think human beings are naturally robbers. I think human beings want it free. And that's just your nature. And, if there is a way around paying, that is what you are going to do. None of you guys are moral enough to say I would rather pay $16 than get it free."

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(Online) Music Sharing - Napster *et al.*

- Yes, It is theft!
  - Hilary Rosen, President, RIAA
  - Jack Valenti, President, MPAA
  - Peter Chernin, CEO, News Corp

- No, It isn't
  - Consumer Electronics Cos.

- Most Lawyers
  - "It Depends"

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Plan of Attack

- Given The Current Rhetoric, Start With the Legal Domain
  - Copyright Law
  - Origins, History and Policy Basis

- Music and Online File Sharing
  - The Market
  - The Business
  - The Technology and Its Role

- Framing The Problem
  - Lessig's Architecture Paradigm
  - Policy Questions

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**Intellectual Property - Copyright - Title 17, US Code**

- Title 17; Chap. 1; Sec. 102. Subject matter of copyright: In general
- (a) Copyright protection subsists, in accordance with this title, in
  - original works of authorship
  - fixed in any tangible medium of expression, now known or later developed,
  - from which they can be perceived, reproduced, or otherwise communicated,
  - either directly or with the aid of a machine or device.
- Works of authorship include the following categories:....
- (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery....

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**What An Odd Idea - Why Does It Exist?**

- Not A “Natural” Right (e.g., life, liberty, etc.)
- The Right To Intellectual Property Is A So-Called “Legislated Right”
  - Exists Only As A Matter Of Law
  - Among the Most “Strictly Constructed” of Rights
- Has Led To An Interesting History
- Inextricably Tied Up In Technology, Starting With The Printing Press
- Also Inextricably Tied Up In Concepts Of Distribution
- Finally, A Construct Of Government Policy
  - In Fact, Derives Specifically From A Specific Constitutional Mandate
- All The Elements!!!

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**Historical Context - Where Does Copyright Come From?**

- Printing Invented: 1445; Gutenberg press
  - Wide dissemination of ideas;
  - not always those that supported the government or the church
- Middle of 16th century - Legislation to prevent the publication and distribution of seditious, heretical or treasonable works
  - 1547 - Edward VI grants monopoly to King’s printer for certain works
  - 1556 - the Stationer’s Company established
  - 1637 - codification of printing by Star Chamber
  - 1694 - expiration of monopoly grant
- 1707+ - External Competition from the Scots to break the monopoly
- New law - English Copyright - Statute of Anne - 1709/10

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**Innovations in the Statute of Anne**

- Objective: To Promote Distribution/Dissemination Of Ideas
- Legal protection for consumers of copyrighted works
  - Cartailment of the term of copyright
    - (Stationer’s Company Essentially Held Copyright In Perpetuity)
    - Effective Monopoly On What Would (and Could) Be Published
  - Creation of a “public domain” for literature
    - Copyright Only For New Works
    - Limited Term
    - Limited Copyright To Power To Print, Publish and Sell (i.e., control of the copy is relinquished once sold)
  - Copyright Belonged To The Author/Creator
- Final Legal Challenges Resolved - Donaldson v. Beckett, 1744
Intellectual Property - Basis In US Constitution

- Section 8. The Congress shall have Power
  - To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; ...;
  - To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

- Note: The Utilitarian Language
  - Contrasts With Continental Concept of “droit d’auteur”

IP Controversial Even At The Outset - Thomas Jefferson

- If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it.
- Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.
- ... The exclusive right to invention [is] given not of natural right, but for the benefit of society

So, What Did That Constitutional Provision Give Us?

- Title 17 of the United States Code - Copyrights
  - 13 Chapters, Starting With Definitions
- Title 37 of the Code of Federal Regulations
  - 2 Chapters, Multiple Subchapters, Even More Sections
  - An Example: Title 37, Part 255: Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords

Sec. 255.3 Adjustment of royalty rate.

- (a) For every phonorecord made and distributed on or after January 1, 1983, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 4.25 cents, or 0.8 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (b) through (m) of this section.
- (b) For every phonorecord made and distributed on or after July 1, 1984, ...

From A Small Dictum, A Mass Of Laws and Legislation

- Copyright Is Older Than The US
- Would Expect It To Be Complicated
- The Complexities, However, Come From A Surprising Number Of Sources
- As A Legislated Right, Formal Declarations Are Required
So, What Are Copyright Rights?

- 1790 - Right To Copy
- 1790 - Right To Distribute
- 1870 and 1909 - Right to Make Derivative Works
- 1856 and 1897 - Right to Public Performance (what is public)
- 1976 - Right to Public Display
- 1990 - Rights of Attribution and Integrity
- 1994 - Fixation and Trafficking in Sound Recordings and Music Videos
- 1998 - Right to Incorporate Technological Protection Measures
- 1998 - Right to Include Copyright Management Information

Limitations, Exclusions and Compromises

- Nonprofit Musical Performances
- Radio Musical Performance in Restaurants and Small Businesses (1976)
- Compulsory Licenses (a taking of works for a predetermined fees) - music
- "Works of utility" (a chair)
- Expressions of fact (phone books)
- Ideas vs. Expression of Ideas
- Fair Use
  - Originally a judicial exception
  - Written into the statute - 1992 Audio Home Recording Act
- Parody and Commentary
- Compromises
  - Betamax Case (Home VCR)

Why Is Copyright Law So Tortuous?

- History Is Vital To Understanding
- First US Copyright Law - 1790 - "maps, charts and books"
- 1831 - Sheet music added
  - Player Pianos (White-Smith vs Apollo - 1908)
- 1897 - exclusive right to perform
- 1909 - Compulsory licensing
  (First sale vs. subsequent)
  - Radio - for profit?
A race between legislated rights and technological advance!

Another Reason - Process Of Copyright Legislation

- Not Quite As Outlined In Simple Civics Books
- Small, But Vocal Constituency With Each Rewrite
  - Whose Ox Is Gored?
- Congress Largely Referees The Making Of The Legislation
- Actually Written By Committees Composed Of Affected Members
  - Publishers
  - Distributors
  - Others As Specified By Congress
- A Negotiated Document
Consider, For Example, Copyright Terms

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<th>Term</th>
<th>MMouse</th>
<th>Diff.</th>
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<tr>
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<td>1978</td>
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Corporate Influences: Lobbying and Negotiation

- "Steamboat Willie," Debut of Mickey Mouse, 1928
- Note Importance of ~25 Years In These Trends
- May Have Been Latent At Outset
- Pattern Became Too Obvious To Miss
- 1998 Statute: "Sonny Bono Copyright Term Extension Act" a/k/a "Mickey Mouse Protection Act"

Evolution Of The Governing Principle

- Early Copyright
  - Protection of Distribution
  - Assurance of Dissemination of Ideas
  - Enrichment of the "Intellectual Commons"
- Distribution Has Increasingly Been The Focus
  - Lots Of Money To Be Made
- Increasingly, Copyright Arguments Have Suggested The Need To Provide Economic Incentives For Innovation and Innovative Works
  - Subtle Change
  - Changes The Nature Of The Debate
  - At The Margin, A More Protective Scheme Will Always Add A New Innovator
  - Loss Of "Intellectual Commons"
The Maze Of Copyrights in the Business of Music

- First Distinction
  - A "Song"
  - A "Sound Recording"

- Second Distinction
  - Reproduction Right
    - Making Copies
  - Public Performance Right
    - Owned By the "Song" Owner
    - Not Owned By the "Recording" Owner
    - Changed in 1995 to add "digital audio transmission"
  - Compulsory License (Section 115)
    - If a recording has been distributed in the US,
    - The owner of a song must license the use of the song at a legislated rate
    - (No rate has been yet set for digital phonorecordings)

Music & Copyright
US Code: Title 17, Section 106 (as of 1/23/2000)

Sec. 106. Exclusive rights in copyrighted works
Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

The Actors
- Record Companies
  - Contracts With Recording Artists
  - Financing, Promotion and Distribution of Recordings
  - Royalty Payment To Artists
- Music Publisher
  - Contracts With Songwriters
  - Commercial Exploitation of Songs
  - Licensing for Recordings
    - Sheet Music Printing
    - Public Performances, Live and Recorded
- ASCAP/BMI/SESAC
  - "Performance Rights Societies"
  - Representation of Publishers and Songwriters wrt Performance Licensing
  - "Songs" not "Song Recordings"
- Harry Fox Agency
  - Licensing Agency
  - Specifically To Record Companies for Music Publishers
  - For Reproduction of "Songs" as Phonorecordings
  - Compulsory Licensing Arrangements

The Actors (continued)
- Recording Industry Association of America
  - Trade Association
  - Promotion of Record Company Interests
  - Current Head: Hilary Rosen
  - Aggressive Anti-Piracy and Intellectual Property Protection Efforts
- The Recording Artists Themselves
  - Prince
  - Courtney Love
  - Janis Ian
  - Don Henley & The Recording Artists Coalition
  - Metallica
**A Complex Structure of Relationships**

- Creators of Intellectual Property
  - Composers
  - Performers
  - Arrangers
- Distributors of Intellectual Property
  - Music Publishers
  - Phonorecording Manufacturers
  - Performers
  - Broadcasters, etc.
- Consumers of Intellectual Property

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**Music Licensing Structures - Current Non-Digital**

- (*simplified*: focus on music delivery & mechanical reproduction)

  - Song (writer)
  - Record Company
  - ASCAP/BMI
  - Harry Fox Agency
  - mechanical reproduction (CD, etc.)
  - public performance (analog)

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**Music Licensing Structures - Digital Phonorecord Issues**

- Record Companies — Digital Copies, Persistent Or Otherwise, Are As Good As The Original - Could Displace CD Sales - Added To The 1995 Law
- Harry Fox — Digital Copies, Persistent Or Otherwise, Are "Mechanical Reproductions" - Thus, Copying Licenses Must Be Paid
- ASCAP/BMI/SESAC — Digital Distribution Is A "Public Performance" - Thus Performance Licenses Must Be Paid

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**Why All These Extra Lines?**

- Record Companies — Digital Copies, Persistent Or Otherwise, Are As Good As The Original - Could Displace CD Sales - Added To The 1995 Law
- Harry Fox — Digital Copies, Persistent Or Otherwise, Are "Mechanical Reproductions" - Thus, Copying Licenses Must Be Paid
- ASCAP/BMI/SESAC — Digital Distribution Is A "Public Performance" - Thus Performance Licenses Must Be Paid
Enter - Napster and its Peers

- Shawn Fanning -
  - Northeastern U. Undergraduate
  - 1st prerelease - mid-1999
- Concept
  - MP3 Search Engine
  - File Sharing Protocol
  - IRC/Communication Tool Within A
    Community
- Peer-to-Peer Technology Rather Than
  Central File Store
  - Central Indexing/Locating
    Mechanisms
- Explosive Growth
  - Feb 2000; 1.1 million
  - Aug 2000; 6.7 million
  - Feb 2001; 15.6 million US

Pew Study - Upward Trend
Percent of Internet Users Who Download Music (+/- 3%)
Immediate Controversy

- Typical Positions - “Napster...”
  - “Is Theft of Intellectual Property; Abuse of Artists”
  - “Lets Me Sample Before Buying”
  - “Lets Me Find Music Unavailable Otherwise”
  - “Lets Me Acquire Only That Which I Like On A CD”
  - “Lets Me Stick It To The Record Companies”

- Other Points
  - “MP3s Allow Me To ‘Space Shift’ Just Like Analog Cassettes”
  - “MP3s Are Infringing Copies”
  - “MP3s Are/Can Be Degraded Copies, Not Pure Digital Copies”

RIAA Sues Napster For Copyright Infringement

- RIAA Complaint
  - Making Copies
    - No Right To Distribute
  - Playing Phonorecords
    - No Licensing
  - Economic Harm To Artists, Industry

- Napster Counterpositions
  - Fair Use
  - Noncommercial Use - Home Recording Act
  - DMCA - Safe Harbor Provision
    - Transitory digital network connections
    - Information location tools
  - Lawful Sharing (uncopyrighted works or copyrights not enforced by owners)

Rejected at Trial
  - Appeals Process Seemed To Go Napster’s Way
  - Ultimately Failed - “100% requirement”

Effect Of The Decisions On Napster

- February, 2001 - Peaked
- Trailed Off Rapidly
- Thereafter
- Ultimately, Complete Shutdown
- Still Weak, Tried To Convert To Subscription Service
- Purchased By Bertelsmann
- Declared Bankruptcy
- Sold to Roxio - 11/27/2002 - Now What?

Alternatives Immediately Emerge

- According to WebNoize, 3.05 billion audio files were shared in August, 2001
  - FastTrack - 970 million
  - AudioGalaxy - 910 million
  - IMesh - 640 million
  - Gnutella tools - 530 million
- Compared with 2.79 billion in Feb 2001, Napster’s peak
- Growth Has Continued Subsequently

- Alternative Technologies
  - KaZaA - downloaded 141,147,219 times in total; 3,097,221 times last week (CNet)
  - Morpheus - comparable rates (for obvious reasons!)
  - Everyone else is an order of magnitude less; but only one
Music As A Copyrighted Expression

- Technology Has Been A Key Element Of Its Distribution For More Than A Century
  - Sheet Music
  - Player Piano Rolls
  - Music Boxes
  - Phonographic Recordings
  - Analog Tape
  - Radio
  - Digital Tape
- And Then We Get The Internet

Napster Confronts Us With Some Key Questions

- What Is It That Record Companies Sell?
- What Is It That Consumers Buy?
- What Is The Value Proposition For Both?
- What Is The Business Model That Underlies This Industry?
- What Is The Proper Role Of Technology In This Area?
- How Should The Modalities Of Control Be Employed?

Let's Look At Our First Block Of Questions

- What Is It That Record Companies Sell?
- What Is It That Consumers Buy?
  - Who Are The Consumers?
- What Is The Value Proposition For Both?

Consider The Language Of The US Copyright Statute:

Copyright protection subsists, in accordance with this title, in
- original works of authorship
- fixed in any tangible medium of expression, now known or later developed,
- from which they can be perceived, reproduced, or otherwise communicated,
- either directly or with the aid of a machine or device.

Proposition: The CD Is Just One Type Of Music Package

Copyright protection subsists, in accordance with this title, in
- original works of authorship
- fixed in any tangible medium of expression, now known or later developed,
- from which they can be perceived, reproduced, or otherwise communicated,
- either directly or with the aid of a machine or device.
Alienation

- Merriam-Webster Collegiate Dictionary Online:
  - a withdrawing or separation of a person or a person’s affections from an object or position of former attachment

- The Author/Creator, in “fixing” her/his creation into something tangible, can now distribute and sell it to others
- The law of copyright dictates who can copy and distribute this fixed creation for profit;
  - creates a legal basis for buying, selling and transferring this right to others
  - creates an economic basis for a business in producing and distributing this “fixed” creation

Incentives To Be Alienated On Both Sides

- Artist/Creator
  - Alienation enables reproduction and distribution
  - Reproduction and distribution enable extraction of economic rents

- Consumer
  - Alienation enables access to experience otherwise unavailable, under circumstances otherwise unavailable

- But, alienation also opens the door to control
  - Stationer’s Guild
  - Copyright laws
  - Other Forms?
- How To Maintain The Balance Of Control?

Note That The Consumer Is Also Alienated

“from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” (the “player piano” text <G>)

- Compare a CD with a book or traditional sheet music
  - Converting the fixed expression (a book or sheet music) into an experience is completely under the individual, personal control of the reader/music player
  - Converting a CD into an experience requires a set of devices, generally owned by the purchaser of the CD
- The consumer invests her/his time/effort/resources into this acquisition and conversion process to achieve the experience implicit in the fixed expression that has been acquired

The Last Set of Questions

- What Is The Proper Role Of Technology In This Area?
- How Should The Modalities Of Control Be Employed?
Architecture

- A Complex Mechanism of Control
  - Can Be Married To One Or More Of The Other Three
- Can Be Overt
  - Access Control (e.g., Turnstiles)
  - Segregation of Classes (Zesinger Center, Airports)
  - Bentham's Panopticon
- Can Also Be Semi- or Fully Covert, With or Without Intent
  - Haussman, Napoleon III and Paris Redesign
  - Robert Moses and Jones Beach

Lawrence Lessig and the Internet

- The End-to-End Design of the TCP/IP Protocol Underlies Many of the Common Assertions about the "Regulability" of the Internet
  - "Intelligence at the Edges"
  - Packets are Just Bits
  - "Censorship == Network Failure"; Re-Route To Avoid
  - Consequence of the Original ARPA Design Goals
- This Architecture Is Being Changed To Service New Goals
- The Implications Of These Architecture Changes Are Subtle
  - Need To Know A Lot To See These Implications
- Lessig Is More Cassandra Than Paul Revere
  - Probably The Most Famous Pessimist In Internet Policy Today

"Architecture" - A Dimension Frequently Missed

- "Digital Copies Are Different"
- "Internet Is Unregulable"
- "We Must Take Extraordinary Measures To Defend A Policy"

Architecture as Control & Technological Alienation

- Potent Combination
  - Especially When The Technology Gets "Clarkian"
    - "Any sufficiently advanced technology is indistinguishable from magic" - Arthur C. Clarke, "Technology and the Future"
- The Lessig Dilemma
  - Significant Effort Necessary To Appreciate The Threat
  - Without This Appreciation, The Threat Is Shadowy, At Best
    - Wake up, Neo............
  - Moreover, The "Rhetoric of Theft" Requires No Effort To Accept
**"Architecture" Changes In The Internet**

- Proprietary Client/Server & Formats
  - RealNetworks
  - Windows Media
- Encrypted Content
  - eBook
  - Content Scrambling System (CSS)
  - SDMI/Macrosvision/SafeAudio/Midbar
- Trusted Server/Identification Systems
  - Hailstorm/Passport
- Hardware Initiatives
  - CPRM
  - Encryption Licensing & "Readers"
  - Palladium & laGrande
- The "Other" Constraint Formats
  - Legal Tie-Ins
  - Copyright/Digital Rights Management
  - Anti-Circumvention
  - SCCCC/EBHTPA - "Fritz Chip"
  - Bernan-Coble
  - Economic Tie Ins
  - Market Power/Dominance
  - Format Constraints - SuperCD
  - Culture
  - "Information" Campaigns

**Disputes - Extant and Emerging**

- Music Sharing Systems
  - Napster
  - For-Pay Services
  - Pure Peer-to-Peer; Gnutella, AIMster, KaZaA & Morpheus
  - OLGA/Tablatures
- Anti-Circumvention Tests
  - Sklyarov & e-Books
  - Felton & SDMI
  - DeCSS/Jon Johansen
- Open Source/"Shared Source"
  - Operating System Standards
  - Licensing Controversies
- Databases
  - "Facts" Exception For Copyright?
  - Webcasting
  - Compulsory Licensing?
  - Other Models?
- Raids On File Sharers
  - National Chengkung Univ (Taiwan)
  - Oklahoma State
  - Soribada/Korea
  - Verizon Subpoena
- Anti-Trust Questions
  - Big 5 and their Online Music Plans
  - Record Promotion/Payola

**A Few Issues**

**Music Questions**

- Defend the Current Distribution Model?
  - Or Develop A New Business Plan?
- Has Napster "Poisoned" The Digital Music Distribution Well?
- Digital Delivery A Perfect CD Substiture?
  - Whose Fault Is That?
- Is Digital Delivery Sufficiently Different To Sacrifice Other Goals?
  - Fair Use?
  - The Public Domain?
  - Functionality In Digital Machines?
  - Functionality In Software & O/Ses?

**Deeper Questions**

- "Copy-Duty" - Lessig/Litman
  - A "Right to Read?"
  - "First Sale" Doctrine
  - Barlow's "Digital Bottles"
  - Is "Digital" == "Better"?
  - Is Ice-T Right? Are We "Robbers"?
  - How To Answer These Questions?
  - Market Power
  - Political Choices
  - Legislative Initiatives
  - Judicial Interpretation
  - Technical Advances/Developments

**Lessig's Future of Ideas "Song"**

<refrain>

1. Creativity and innovation always build on the past.
2. The past always tries to control the creativity that builds on it.
3. Free societies enable the future by limiting the past.
4. Ours is less and less a free society.
</refrain>