Playing Fair With Copyright
After Napster, the entertainment giants might use technology to stop even legal copying

By Steven Levy
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Feb. 26 issue - The appellate judges have spoken: the indiscriminate music-sharing bacchanalia must end. But can 62 million Napster users really be wrong? Almost by definition, such a massive consumer force is a market that must be served.
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- JIM GRIFFIN
CEO of Cherry Lane Digital

THAT’S WHY, at the same time they’re trying to shut down Napster, the giant entertainment conglomerates are frantically trying to come up with their own business models to somehow combine Napster’s selection and ease with a big, fat cash register on the other end. "They’re engaged in Tarzan economics," says Jim Griffin, CEO of Cherry Lane Digital. "Desperately holding on to one vine—their old business model—until they can grab firm hold of the next one."

Watch out, folks. "The next vine" might present a slew of copyright problems even more difficult to untangle than the Napster case. It turns out that the entertainment industry’s ultimate line of defense is not lawsuits. Instead, it plans to protect intellectual property from the new technologies of digital copying with ... new technologies of digital anticopying. Some of these are already in effect; the movie DVDs you buy have a complicated coding system that prevents copying. Other such technologies are in the works—including one just announced by Napster itself to "manage digital rights" by preventing users from burning CDs, and monitoring Nap-oids to make sure they’re behaving. The moguls insist such schemes will only maintain the status quo from those palmy days when listeners didn’t have CDs capable of generating perfect copies, or Internet connections that transformed sharing from a localized exchange to a global grabfest. But in many cases, these schemes actually take away certain rights from consumers. If the moguls have their way, not only will song sharing be outlawed, but certain uses that music listeners and movie viewers take for granted—like making copies for personal use or taking a snippet of a copyrighted work for an educational purpose—will go the way of the vinyl LP.

What’s more, the industry has persuaded Congress to make sure nobody tries to tamper with its schemes, even if the intent is only to engage in "noninfringing" uses of music or film, like personal copies or fair use. The Digital Millennium Copyright Act, passed in 1998, makes it illegal for anyone to provide users with tools—or even publish information about such tools—that would get around
anticopying controls. But what if you wanted to circumvent the controls only for a legal use? Or what if the work in question has entered the public domain since publication, losing its copyright protection? Tough. "It was way too broad," says University of California copyright expert Pamela Samuelson. "A lot of icky consequences regarding fair use got swept under the carpet."

THE END OF FAIR USE?

These restrictions are currently being tested in the courts, and it doesn’t look good. When 2600 Magazine published the work of a 16-year-old Norwegian hacker who cracked the scheme that encodes movie DVDs (his purpose was not piracy, but a means for Linux users to view films on computers), it got hit with a lawsuit from the Motion Picture Association of America. A district-court judge wasn’t swayed by the argument that the Millennium Copyright Act obliterates fair use, and the case is now under appeal. The Electronic Frontier Foundation’s Lee Tien believes that the content industries will eventually use the laws to create even more controls over creative works, engineering a pay-per-view model for all forms of intellectual property. Instead of buying a record or a book and enjoying it as often as you like, he says, you might wind up having to fork over bucks every time you reread the book or replay the tune. Tien also says that the content holders hope to use their schemes to limit consumers from other non-infringing pursuits they want to stamp out, like fast-forwarding past commercials on digital video players.

Meanwhile, it’s boom time for companies concocting schemes to lock up creative works from infringers and paying customers alike. Just last week I learned that an Israeli company called TTR has created a technology called Safe Audio that allows music companies to press CDs in such a way that digital copies can’t be made. If the next Jennifer Lopez

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try to burn a CD copy, or even use a software program to place it in your computer jukebox, J. Lo’s dulcet tones will be overwhelmed by horrible white noise. TTR’s Mark Tokayer notes that though U.S. consumers might have the right to make such copies for themselves, the Sonys and AOL Time Warners of the world have no legal obligation to provide you with the means to exercise those rights. And the Millennium Copyright Act is ready to whack you if you try to take those rights back. Tokayer says that his company is negotiating with all the major entertainment powers and expects Safe Audio to be on discs sold by the end of this year.

Does this mean that we’re doomed to whatever crumbs the Bertelsmanns throw us? That eventually the wonderful so-called celestial jukebox that comes from the availability of zillions of copyrighted works on demand will require not only an endless stream of nickels, but a loss of our traditional rights? Not necessarily. Pamela Samuelson believes that if the combination of law, technology and industry greed threatens to wipe out fair use, adjustments to the law can restore what’s been lost—if the people make their will known to their legislators. Sixty-two million constituents can’t be wrong.

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