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PANEL ONE: The Road to Napster: Internet Technology and Digital Content

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BEYOND NAPSTER: DEBATING THE FUTURE OF
COPYRIGHT ON THE INTERNET

PANEL ONE: THE ROAD TO NAPSTER: INTERNET
TECHNOLOGY & DIGITAL CONTENT

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PROCEEDINGS

PROFESSOR FARLEY: Welcome. I am very excited to see so many interested people, so many knowledgeable people and, as others have already noted, so many people with diverse opinions about these topics. The only tragedy is that we have so many experts and so little time. And so, my role here is to be the ultimate taskmaster and keep us on target.

With that effort in mind, what I would like to do is, regrettably, skip the introductions of our panelists. Everyone has materials that include the biographies of our panelists. I really would like to encourage everyone to have a look at those materials, because we have a tremendously distinguished panel. Also in effort to keep us on target, I would like to pose some broad questions to each of the panels and move down the panel asking each panelist to restrict themselves to about three to five minutes to answer the broad question, subparts of the question, or even other questions they may think are related to my question.

The other thing I would like to mention to the audience is that we will try to reserve some time at the end of each panel for your questions. We think it may be more efficient if you write your questions as they occur to you during the panels and then send them forward. *The Law Review* has left some papers at the end of your rows and you may either bring them up yourselves or motion and *Law Review* staff members will bring them to me.

The first panel today is called "The Road to Napster," and, in a sense, the road to Napster begins, possibly, with the invention of the printing press, but most certainly with the invention of player piano roles, as Bruce Lehman has mentioned. That is, this story is about the development of technology and content owners' response to the development of technology. This response has always been to regard new technology because many of these developments, be it radio or VCRs, have allowed a certain amount of copying. Traditionally, content owners have gone either to the courts or the legislatures, but basically to the law, and asked for some protection. So, the question that I would like to get at today is: What is the proper role of law? What should the relationship between law and technological development be?

I also would appreciate if the panelists could give us a little bit of the background story of the Napster dispute.¹ The story behind the music

1. See *A & M Records, Inc. v. Napster, Inc.*, 2000 WL 573136 at 1 (N.D. Cal. May

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or, I guess, in this case, the story behind the music distribution. How did this development of technology and the development of the music industry's distribution model result in this kind of confrontation, where, in a sense, each side was saying to the court the same thing: "if you listen to them, and if you do what they tell you to do, we will be destroyed?" Either this technology will be stifled, Napster's version, or the music industry as we know it will not survive, the RIAA's version.

So, please address these larger points: the role of law, the development of the technology and the story behind this dispute. Why not start with you, Michael Madison?

PROFESSOR MADISON: All right. Let me start by introducing one concept that Professor Farley did not mention which is also a very important part of the equation here: the idea of norms or customs of using and producing works protected by copyright. Copyright is about the public domain and creating and preserving the public domain. Obviously, this goal exists in tension with the idea of private property rights. This tension gets balanced or resolved in the interplay between technology, its limits, and law, which to some extent can manage technology, and the idea of social norms.

Most technologies have legitimate uses as well as illegitimate uses. The law can travel a certain distance down the road to protect against illegitimate uses, but in the gaps, we rely on social norms. Community customs of fairness and appropriate behavior help us resolve and limit perceptions that there are overly expansive uses of public material that should be protected by private property rights.² Expression of social norms in copyright law is manifested in the fair use doctrine,³ which dictates that we should be deciding on a case-by-case basis what is fair and what is unfair. We should be deciding on a case-by-case basis what those norms should be and how those norms should be protected or channeled in a different direction.

Every new technology that comes along challenges our understanding of existing social norms, and I think a big part of what's going on in this litigation with Napster and other

12, 2000).

2. Lawrence Lessig has described this phenomenon in some detail. See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999). On the power of litigation to shape social norms in copyright, see Michael J. Madison, *Legal-Ware, Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025 (1998).

3. See 17 U.S.C. § 107 (1994 Supp. 2000) (codifying the "fair use" affirmative defense); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (discussing, *inter alia*, parody and fair use); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (interpreting the fair use provisions of the Copyright Act *vis-à-vis* the First Amendment).

Internet-related technologies is a fight over social norms; a fight over appropriate behavior. What content providers and the recording industry, in the Napster litigation in particular, are trying to do is to shape a popular perception through litigation. This authorized use is illegal in public. For example, if you look at Judge Patel's order in the Napster litigation, she enjoins unauthorized uploading or downloading of recorded music. She does not enjoin uploading or downloading of infringing music. Resolution of conflicts over norms requires that there should be parties with different perspectives about what those norms should be.

The last thing that I would like to say in this context is that I am very grateful to the counsel for Metallica, who filed a lawsuit that named Yale, University of Southern California and Indiana University as defendants and, in fact, accused them not only of being copyright infringers, but also racketeers in an effort to have those colleges and universities shut down student access to Napster. Unfortunately, Yale right away agreed to the demand and shut down access to Napster. However, the other two universities did not. Additional demand letters have been sent out to other colleges and universities requesting that they terminate access to Napster. A number of those universities also reject the demand and stand up in their particular cases for principles of academic freedom, free exchange of information, and principles that are closely related to the idea of the public domain.

I think the bottom line is that lawyering matters. It matters how a particular court rules, who the particular lawyers are, what arguments are presented, and who the defendants are. In this context it is useful not only to have the interest of private property claims presented on the plaintiff's side, but also to have defendants and potential defendants taking a stand from their own self-interest perspective that the public domain matters.

PROFESSOR FARLEY: Thank you. Next, George Borkowski.

MR. BORKOWSKI: I am glad that you said that lawyering matters. I certainly agree as one of the lawyers representing the Recording Industry against Napster. I think there has been terrific lawyering on both sides of this case. I cannot let my remarks begin without saying something about Florida, because I was speaking to counsel for Napster beforehand and we kind of feel like the Bush and Gore campaigns, waiting for the ultimate result.

The Ninth Circuit has not ruled as of this time on Judge Patel's injunction and it has now exceeded everybody's predictions as to when it would do so. This symposium would have been more interesting had the Court ruled a couple days ago, but I still think it is going to be very

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interesting.

I am glad that Professor Farley mentioned the printing press, because the printing press is an early technological innovation that sparked the creation of copyright law. There was no concrete concept of copyright before that time as there was no need for it. As technology developed to enable efficient and relatively fast copying, a need for laws protecting the content owner and the creator developed. This has not changed in the hundreds of years since Gutenberg. I think that the Napster litigation that I'm a part of, the MP3.com litigation that was brought, and apparently has now been fully settled by the recording industry, and the most recent suit brought by the Business Software Alliance against software piracy and those who are pirating software and selling pirated software over the Internet, have the potential to result in good outcomes for both sides of the equation—or I should say all sides, because there are more than just two sides to this equation.

I think these lawsuits and debates, like the one we are having now, serve a very useful educational purpose. They send a message to those who think only of the technology side that they also need to take into account copyright law and that the rights of the copyright owners, the content owners, as well as of the creative community, have to be respected as technology develops. Indeed, the primary purpose of copyright law in this country—which, as lawyers, law students, and professors we all know is a concept that comes from the Constitution—is essentially to foster creativity. This is why content owners are given a limited monopoly for a period of time. Intellectual property also has become, at least from the United States' perspective, one of the underpinnings of its economy, a significant part of the gross national product of this country—or gross domestic product, as we now call it. This value is at risk if intellectual property rights get trampled by a myopic and extreme view of technology. All other legitimate industries that use creative content have to, and do, respect copyright law and there is no reason why the technology community should be exempt from playing by the same rules.

I think that this debate and those litigations, though, will allow us to move towards the creation of a model for licensing content for digital distribution. A model for licensing content over the Internet that can, if everybody works hard at it, result in—not to use horrible business jargon—a “win-win” situation for everybody involved, if we do it right.

I think we have the opportunity to strengthen copyright law within the context of developing technology as evidenced throughout history from, as I mentioned, the time of the printing press. I was just talking

with one of the later panelists, for example, about photocopiers and about the dislocations that they caused initially.

What we are debating is also a question of social norms. I think that technology is neutral and that our values are reflected in the way we use our technology. You can point to examples anywhere from the debate about dropping the bomb at Hiroshima and Nagasaki to the current discussion of how we use technology and intellectual property vis-a-vis the Internet.

I think that the goal should be—and what the recording industry's goal has been in the Napster case—is not to prevent a technology, not to shut down a company, but to encourage the use of technology that could be beneficial in a way that is not illegitimate and in a way that protects content owners and the creative community.

If technology companies work with the content owners, I believe both will benefit. I think the technology companies will benefit, because as they grow—and we are seeing this now—they will need the protection of copyright law. Napster itself has filed for patents for its technology, or more accurately for those aspects of its technology that it claims are new. Napster has trademarks that it protects, it has copyrights in its software programs and otherwise that it protects.

Napster understands that copyright law is important, and I think that if both the technology and the creative communities can come together on this, much more positive will be achieved than through the blunt object of litigation. Through cooperation, content can be enhanced, creativity can be enhanced, and the development of technology can be enhanced to the benefit of all.

PROFESSOR FARLEY: Thank you. And now, Declan McCullagh.

MR. MCCULLAGH: Hi, thanks for having me. I come at this from the perspective of an author and writer—someone who produces content. *Wired* is now owned by Lycos now owned by Terra, so we're part of Terra Lycos, one of the largest companies, and get a large percentage of our revenues from content.

This is something that I like in theory, but am afraid that the news I have for my fellow panelists, or at least some of them, is not good. There is Moore's law, that, at least the geeks among you are familiar with. Something like the raw computing power measured in terms of microprocessor speed will double roughly every eighteen months. This has held true since the early '70s and it is a very, very cool benchmark or rule-of-thumb for predicting what is going to happen. It might cause some problems in the future, but for right now we have this.

Now, let me offer McCullagh's law: As bandwidth falls in price, and as the number of users sharing a network increases, the price of

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intellectual-property approaches zero. We see this in a very interesting new technology that is one of the sort of post-Napster applications. What the system is, is called Mojo Nation, instead of just allowing people to transfer files, it encourages transactions.

Now this is a company that has been created in the last few months by a bunch of renegade libertarian cyberpunks who are more than happy to end the idea of intellectual property as we know it, and they might. While it is distributed, unlike Napster, it is not as easy to use as Napster yet, but most importantly, it allows transactions.

We are moving from a transfer model, where you have the tragedy of the commons. Economics do not play a role in a transaction model which encourages by letting people who have content, in other words, pirated content, charge for downloads.

So, what this means is if I have a copy of, say, a copyrighted work, I can put this on the Mojo Nation network and get revenue as people download it, even if I am not the original owner of that content, and based on the design of it, this is an area where technology has outpaced law.

It is going to be very difficult for content owners to technologically shut this down. The Mojo Nation owners and founders believe it is going to be very difficult for them to legally shut it down, as well. They understand the dynamic and they have structured the company in such a way that it is going to be very difficult, they think, and their backers think, to shut it down. So, it is not just Napster we have to talk about, it is what is beyond a Napster.

Finally, a technology may be neutral, but when it comes to social change, it is not. It has revolutionized the world, and I think this is going to mean new ways to think about intellectual property. Instead of getting paid after you write it by advertising or by subscription, we might have to move to a different model. I'm a capitalist, I'm a free marketer and I believe that if people want something, the free market is going to provide it, even in the absence of law. So what this might mean is, instead of me getting paid as an artist, say, Prince, \$10 million after I release an album through the relatively inefficient \$10 and \$15 CD sales, what I might do is say to my loyal fans, look, I, you want me to do this album, this is my cost, contribute toward it. This is what we have seen. So, unless I get \$10 million in contributions, and there are free rider problems, this is not, some people are not going to contribute and enjoy it anyway, but what this will do is move us toward a prepayment model, so once Prince gets the \$10 million he'll release it and everyone can download the music for free. I'll shut up now and turn it over to the next panelist.

PROFESSOR FARLEY: Thank You. Peter Schalestock.

MR. SCHALESTOCK: Dean Pike mentioned in his introduction that with each generation, we seem to have some new technology that comes out that poses a threat to copyright law. There has been a continuing succession of these: the photocopy machine, the videocassette recorder, and the digital audio tape.

What we have moved into with Napster is a technology. While part of that is progression, it is in some ways fundamentally different, because it does not just merely threaten copyright, it threatens to destroy it in certain works. Declan was hinting at some of that. These other technologies certainly allowed copying on a large scale relatively cheaply, but are different in that you do not get a bound volume out of a copy machine and you do not get a perfect copy on a videocassette recorder. It takes time to produce the copies, I mean, there's definitely some overhead there. Napster has taken away most of that: you get perfect copies almost instantly, and as many of them as you want. It has created a higher degree of tension than a lot of these technologies have in the past.

At the same time, in terms of the law adapting to these technologies or trying to build a relationship between them, the technology now is moving much, much faster than the law can possibly keep up with. For instance, I happened to have the privilege of working on Capitol Hill during the consideration of the Digital Millennium Copyright Act.⁴ We were not talking about anything like Napster at that time; it was not something that was on the radar screen as recently as two years ago. Now it is the major issue. If Congress were to sit down today and try to rewrite the copyright law in a way that accommodated Napster, by the time they finished, there would be something else out there that no one had thought of yet.

The same problem exists with the courts. As you know, the Ninth Circuit has taken a fairly long time to come to a decision. Presumably, when they do, it will go to the Supreme Court and take even longer. By the time this issue may be resolved, the technology will have changed again. Therefore, it does create some real problems, and we see illustrations of this in the Napster litigation where there are two statutes that are being vigorously litigated in this case, the Audio Home Recording Act⁵ and the Digital Millennium Copyright Act, either one of which Napster argues creates an exemption for it.

4. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

5. 102 Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as amended at 17 U.S.C. 1001 et seq.).

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The other side disputes that both Act's were written with something in mind that was not Napster. This really is a different technology that is trying to be covered by old law. We have entered an era where there are new problems relating copyright law to the technologies that allow its distribution. The two sides clearly need each other and the MP3.com case has been settled; Napster is moving in that direction.

It may turn out that the business models will adapt and will resolve these issues faster than the law can keep up with it, and we could find that major issues in copyright law are, in fact, being resolved by private contracts rather than by formal legal developments.

PROFESSOR FARLEY: Thank you. Jonathan Band.

MR. BAND: Thank you very much. Continuing with the election theme of some of the other speakers, I feel that Joe Lieberman's candidacy and, perhaps ultimate victory, since he gives me license to wear my religion on my sleeve like he so often wears his religion on his sleeve, and we happen to have the same religion. In Jewish law, there is a concept of siag la Torah, which means building a fence around the Torah. An example of that, and that is sort of how Jewish law has always evolved, is in the Bible it says, "ye shall not cook a kid in its mother's milk and so from that sentence in the Bible, you really have the whole structure of casch root," which was built over the centuries by rabbis sort of constantly building one fence after another around the core principle.

Now, sometimes people say, well, that constant accretion of fences around the Torah is ridiculous and leads to ridiculous results and sometimes takes you so far away from the core principle that you really lose the core principle. I think there is a danger in copyright and a lot of what we are seeing in the last few years is the same kind of pattern of accretion; where in the center you have the basic principles of copyright law, which are very simple about the owners' rights, and then some limited exceptions of fair use stock and so forth. It is really quite simple and straight forward.

But then, over the years, all kinds of fences have been built around that core principle. So, first of all, again, judges have created and have often used this concept of contributory infringement, but certainly, I think in some of the recent cases, contributory infringement is being taken to extents or degrees further than we have seen before. Moreover, copyright owners, because of the economics involved, see it is much cheaper to go after who they say is the contributory infringer, the person they believe is facilitating the infringement, rather than the person who is actually doing the infringement themselves. But then we've seen even sort of an accretion on that accretion of contributory

infringement. So, for example, Bruce Lehman, earlier was talking about the Digital Millennium Copyright Act, and so not only are we saying that there should be technological protections, we are making it unlawful to circumvent technological protections.

Of course, the danger, when you start building fences around the Torah or building fences around the copyright law, is that some of the very limitations and exceptions that are built into the copyright law get lost. That, of course, is the fundamental problem with the Digital Millennium Copyright Act, whether the case we are going to be hearing about later on at lunchtime is a good example or a bad example, is debatable, but, still, there is no question that the copyright law is far more nuanced and contains far more exceptions than the Digital Millennium Copyright Act. The technological protections are much more rigid than the law they are intended to protect.

Similarly, there is something else we have now, at the state level, you see it, the Uniform Computer Information Transactions Act.⁶ Basically it enforces shrink wrap licenses and, again, is enabling. One of the justifications for it is when we need to protect copyrighted content in the digital age. This is being done by contract. But, again, copyright has its limitations, its' balances. However, UCITA allows the copyright owner to impose contract terms that perhaps do not allow for fair use and do not allow for, again, the limitations and exceptions that the copyright law contains.

In terms of how we got here, on the road to Napster, what we see is that there are core principles. There has been this accretion of additional protections justified on the basis of saying, oh, it's the New Age, digital technology, ease of reproduction, ease of dissemination worldwide. However, I think we really need to step back and say, do those technological developments warrant this constant building of new fences around the Torah, the new fences around the copyright law, which will, perhaps over time, break it down and lose its essence of a very finely tuned balance between the rights of owners and the rights of users.

PROFESSOR FARLEY: Thank you. James Laughlin.

MR. LAUGHLIN: In this wonderful place of academic learning, it is appropriate to dispassionately consider for a moment, really what we are about. Our history books are filled with discussions about people, but they frequently ignore what the people were doing. My premise here this morning is to point out to you that it was the technology of

6. See Uniform Computer Information Transactions Act, *available at* <http://www.law.upenn.edu/bll/ulc/ucita/ucita92900.doc> (last visited Dec. 22, 2000).

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the people that drove the human conduct and hence the law.

You have all been exposed a little bit to James Burke, the chronicler of the history of technology in his series of connections and his books, where he notes that the industries of man drove man. As we sit and we look at those societies through the eyes of the historian, we see that at every change, there was a modification in the conduct of men and a modification, which quickly followed, in the laws.

Of course, following the principles of Moore's law, we've had to move faster and faster. Yet, I think it's important to reflect for just a moment on a non-technological issue in our time to see the implication.

Some of you will remember the wonderful story of Daniel Boorstin, the Librarian of Congress, who wrote in his book *Discoverers*,⁷ about the loadstone, the compass, and how the Church, sensing that this was an implement of the Devil, had forbidden its use. Thus, captains of sea ships, who had special authority and special recognition through the Church at the time, were not able to use this technological implement.

But the fact was that sailors understood, down at the dockside, that the ships that went out with the Devil's instrument came back and the ships that did not have such an instrument, frequently did not. The solution, of course, was very pragmatic, the captain didn't carry the devilstone, but the first mate, the man who went to the hiring place to hire the sailors, was known to carry it and, therefore, he was able to attract a crew. It took a long time for the Church to rethink its theories and its relationships to technology. But the conduct of men quickly changed. Technology touches our lives everywhere. We see it in a lot of ways, but I was reminded that Commissioner Bruce Lehman, sat over a patent office that exists across the river, that, since 1790, has issued about six and a-half million patents and these patents have chronicled the advance of technology but, more interestingly, this patent office itself, during his time of leadership, moved into disseminating it throughout society, using the very technologies that we're talking about here today.

We are moving very quickly. The discussion, however, is not about patents, it's about the focus of copyright law. In 1959, Xerox Corporation brought forth the first photocopier, commercially. The so-called 914. It weighed 2,800 pounds. It cost \$7,400, which in '59 terms was a lot of money. But it did something that could not have been done before. It made it possible to take and reasonably, cheaply copy that which previously had only been producible by the presses, the hard iron.

7. DANIEL J. BOORSTIN, *DISCOVERERS* (1983).

No matter where the theory of copyright law comes from, the fact of the matter is it's broad implementation was to build fences and protect the industry of publishing. It was the beginning of the technology age of the computer that started to attack that. Because now, you and I could print, you and I could publish.

This innovation in the technology tracked very nicely the theory that had been being worked on for years, the theory that came about as a part of the Copyright Act of 1976. The idea that copyrights could belong to authors without the work being published. Well, as the challenge of the Xerox machine worked through society, I think it's fair to say that what happened was that, while the law might have changed, what did absolutely change was the publishing industry and the way it dealt with the products that it had.

Now, digital technology brings content to our door, but content requires creators. And we've heard across this panel this morning the discussion about the position that authors have and the position that an industry has and all you're really seeing is this traditional battle between the owners of industrial property who make our economy go and those individuals who create those things that we find of interest and of value.

As we sit here today, the one word that I have not heard across this panel this morning is the one that I believe is going to give us the most trouble. And that word is privacy. Because what we are about today is the delivering of content not en masse to a society, but to individuals as users.

If our ability to receive content and to manipulate and work with this content is going to be a threshold character of technology as we move forward, the ability of the copyright law or concepts of protection of industrial property are all going to be seen through the lens of privacy of those of us who, within our own homes and our offices, are working with this content. This is a tension not often talked about and, certainly, technology is only beginning to deal with it, but we all understand it.

So, as I look forward to this, I appreciate McCullagh's law. It is absolutely right that as the ability to receive more information goes, the price of that information will necessarily come down, but that's an old economic concept anyway. What we need to measure is the price versus the value. In doing so, the law that we're talking about will follow.

PROFESSOR FARLEY: Thank you. Shubha Ghosh.

PROFESSOR GHOSH: I want to take this full circle and also add some of my own comments. Professor Madison started out by

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presenting this as a question of norms, which it is. But what makes the Napster case particularly interesting is that it's a question of conflicting norms. Professor Madison accurately described the consumer norms, particularly those of unbundling and rebundling and the sharing of music, which I am going to talk about. But there are also business norms that should be taken into consideration, specifically, the norms associated with how the music industry has traditionally distributed music.

Napster allows an alternative mechanism to distribute music on a very wide scale outside the traditional retail and distribution chains. And that's exactly why Napster is threatening. I start out with this sort of broad description of the case, because I really think a lot of these issues are not going to be settled for a long time. I'm not going to make any prediction about what the Ninth Circuit is going to say, but even if we had a complete settlement, so all the plaintiffs enter into agreements with the lucky Mr. Fanning, there are still going to be some crucial issues about what rights consumers, the end-user, have over the use of music and the alternate distribution channels that the Internet permits.

The rights of consumers of music, I will state again very broadly, need to be protected by recognizing the non-commercial use by end users as fair use under copyright. There are several limits within existing law to recognizing this type of fair use, and therefore it is an ideal. But the quest for this ideal is what frames the following discussion of the case.

There are at least two types of uses that are raised by the Napster case. The first is the idea of unbundling and rebundling. These terms are from the field of economics, but they should be recognized as part of legal analysis. What are unbundling and rebundling? The way we traditionally get music through CDs, through movies, through television programs, through radio, is by bundling with other content. There may be only one track on the CD that you really like, but in order to get the CD, you're going to have to buy thirteen other lesser qualities songs with it.

The bundling of music with other content is not a tie-in under antitrust, and we can talk about that in our discussion. The consumer should have the right to unbundle within limits. If a consumer wants to have only one song, there should be some mechanism for the consumer to purchase it. Rebundling is something we've all done but may not have talked about. If you've ever made your favorite hits tape, where you have taken tracks from different CDs and created your own mix, then you've rebundled. By rebundling, you have created a derivative work and infringed the rights of the copyright owner to create that same new bundle. It strikes me as odd that we can have a

law that doesn't allow for unbundling and rebundling when the practices are quite common. And, of course, that's where fair use can come in.

But before discussing fair use, I should address the implications of Napster for unbundling and rebundling. Whatever business arrangement is struck between Bertelsmann and Napster and whatever other types of deals that Napster might strike, unbundling and rebundling are going to be more difficult. Because whatever business model is adopted, metering of uses will be possible. The unbundled song or the rebundled songs are items that the new business entity, will be able to distribute commercially. the treatment of unbundling and rebundling as fair use is going to be preempted by how the market and the business model develops. But there's one aspect of fair use that I think is going to be very hard to preempt, and that is music sharing, or broadly, file sharing. Again, file sharing is something we all do. If I make a cassette of a CD and distribute it to a friend as a gift or what not, I'm no doubt giving him a lesser quality, but I'm also sharing a particular experience that I like with somebody I think would enjoy it, as well. The same is true if I rebundle the songs and create my own greatest hits tape or create my own version of how the songs are arranged. I think file sharing is going to be very difficult to prevent and I think there is room within existing law to recognize file sharing as fair use, and I will discuss how this use can be recognized at the end of my talk. But let me make two additional points before the finale.

We have several business models for content distribution that can be adopted for Napster. The Napster-Bertelsmann project may look like LEXIS or Westlaw. Both these services bundle different types of information content, are supported by subscription fees, and depending what kind of institution the end-user is affiliated with, grants specific rights to the user over the content. Napster may very well look like this in the future.

But even in a LEXIS-Westlaw-type world, file sharing is easy. I can run searches for someone else. I can download content and distribute it to someone else. I will admit it; I have done it. I'm a law professor and I have some latitude in the use of LEXIS and Westlaw. I have friends who have hung up their own shingle, and work on largely pro-bono projects and can't afford LEXIS or WestLaw. And I, as a favor to them because they're my friends, have downloaded content and have done searches for them. Sue me.

These are the types of uses out there that are not going to be resolved regardless of the business model adopted. Does the law allow for this? I think there are two obstacles within existing law that

prevent these fair uses from being permitted. Section 1008 of the Copyright Act, the provision of the DMCA that allows consumers to make essentially back-up copies of digital music, may allow for some types of file sharing and for unbundling and rebundling content. But that would be reading the statute too broadly and with the strict constructionist mentality of many courts, it's going to be hard to protect file sharing and unbundling/rebundling under Section 1008.

Section 107, the fair use provisions of the Copyright Act, may provide an avenue for recognizing file sharing and unbundling/rebundling. But the current state of fair use poses difficulties. The problem arises from the fourth element of fair use, the effect of the use on the potential market for the copyrighted work. To illustrate the problem, let me read from a portion of the MyMP3.com decision,⁸ where the court is addressing the fourth element of fair use. In this passage, the court is addressing the argument that MyMP3 actually helps the music industry by providing free advertising for songs and creating incentives for people to go out and buy CD's. The court addresses this argument by pointing out that, first, there is no evidence of such a positive impact and, second, that this would be so even if the copyright owner had not entered the new market in issue.

"For a copyright holder's exclusive rights derived from the Constitution and the Copyright Act include: The right, within broad limits, to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms that copyright owner finds acceptable."⁹

What constitutes the market under Section 107 has expanded. The copyright owner's rights do not simply apply to rights in markets that he or she has already entered and established a foothold in, but to any possible market, according to the MyMP3 case. My suggestion is that that reading has to be wrong, with all respect to the judge. If you go back and read the *Sony* case,¹⁰ the one having to do with the VCR, the difference between the majority and the dissent is that the majority looked at actual market effects. They looked at the actual market in which the movie producers operated and analyzed the effects of the then new VCR technology on existing markets. The dissent, on the other hand, looked at all possible markets, not just currently existing markets. Where would we be now with regards to VCR use if the

8. UMG Recordings, Inc. v. MP3.com, Inc., 2000 WL 524808 at 1 (S.D.N.Y. May 4, 2000).

9. *Id.* at 3.

10. *See Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417 (1984) (finding that the use of video tape recorders for "time-shifting" constitutes fair use).

dissenting opinion had managed to prevail? With respect to Napster and file sharing and unbundling/rebundling, the broad (and incorrect) reading of the fourth element of Section 107 makes it difficult for fair use to go anywhere in terms of preserving non-commercial uses by end users. I will end my comments on that note.

PROFESSOR FARLEY: Thank you. I guess I'd like to open it up for you all to respond to each other's comments. I'll also throw another question out. Many of you have mentioned the recent settlements in the MP3.com case and the Napster case, and I wonder if you think there are any lessons to be learned from those settlements. How do they bear on your opinion of how the law should be responding here? Anyone . . .

MR. BAND: The real question is, could those settlements have been achieved without the litigation and one way of viewing it, of course, it all depends on your point of view. One way of viewing it is whether it was MP3.com or Napster, they wanted to get the information for free, and so they did that and then the RIAA knocked them around the head, brought them in line and then they were able to work out a decent licensing arrangement that works for both sides.

Another way of viewing it is that, and, again, I'm not privy to the discussions and the calculations, another way of viewing it is that the recording industry was not willing or there was a sense that the recording industry was not willing to offer licenses on anywhere near reasonable terms and so, in essence, sort of forced the companies, like MP3.com, to do what they did and then you had the litigation and then they ended up where they did. So, it sort of depends on, it's kind of a chicken-and-egg question. I guess the most important thing that it demonstrates is that, at least in this country, litigation is part of doing business. It is part of the negotiation and whether that's good or bad, I think that is the case, it is part of the negotiation. Sometimes the only way to bring people to the table is to either litigate or to force the issue, and I think the interesting thing, though, is that that's an incredibly socially inefficient way of doing things, but, on the other hand, look at all these law students that need to be employed when they graduate, and so, maybe it's a good thing.

MR. BORKOWSKI: It's interesting, because it may be a question of perspective. Michael Robertson—this is related to your second point, but it's a little broader. Michael Robertson justified MP3.com's settlement with Universal by saying that, well, if we hadn't gone out and infringed all of these sound recordings, we never would have gotten permission from the record companies to do this at all. So, that's a third take on the issue.

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But I think that regardless of which of those three, if any, is accurate—and I'm not going to hazard a guess, because I wasn't privy to any of that, nor was I involved in the MP3.com litigation—what this is doing, in my view, is moving towards a model through which you can have digital distribution and you can have it through some of these alternative formats but, nevertheless, it's imposing a business model wherein the content owners and the creative community get paid for what's being done.

Now, you can debate whether the current model, to the extent there is one, needs to be further modified to take into account new technologies; whether the current model is still too set in the older ways of doing business and just provides a gloss for what's going on right now. But I think that what the MP3.com case shows is that it is possible, if the parties want, to come up with a business model whereby content owners and the creative community do get paid, but where the digital distribution formats already out there continue to be used at least to a core extent of the way that they had been designed to be used. Such an approach does not hinder a new technology.

PROFESSOR MADISON: In addition, if you look at the pattern of who has settled and who has not settled, thinking again of some of the universities against whom demands have been made, some of this responds to the question that Professor Ghosh raised at the end, which is to what extent will we have any right, at the end-user level, of personal noncommercial use of some of this material? In other words, part of the question that's being held out in common in all these cases is, what are the rights of end-users with respect to material that they find on the Internet? That's a big unknown at this point.

As you see the settlements fall into place, I think you're starting to see a trend counter to a right of general personal noncommercial use of this material. Rather, the fact that some of the universities in this context have taken a position that they will not terminate academic or student access to this service means that academic or scholarly use is an area where we may see more emphasis placed in the context of the fair-use doctrine as a particular gloss on, or application of, fair-use rights.

MR. McCULLAGH: So, we've heard about two lawsuits that are at least being negotiated or settled. There's a third lawsuit which is the case brought by, I think, eight motion picture studios against 2,600 magazine, in the Southern District of New York;¹¹ I was up there

11. See *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) (finding that the promulgation of "DeCSS" decryption software violated the Digital Millennium Copyright Act).

covering it, of course, Judge Kaplan was presiding, and no settlement there.

The case, for those of you who haven't followed it, is a bunch of European hackers, largely in their teens who, created a program or were working on a program to allow people in the Linux community to view DVDs, and that meant doing some reverse engineering, that meant, arguably, violating the DMCA by publishing something that would let them do so. The system that's used to scramble DVDs is called CSS. Their program was called DCSS for D or undoing, and the 2600 magazine, a hacker quarterly, published this program on their website. They got sued. They lost at the district court level and that's ongoing. They're not going to settle. Eric Corley, someone I know, has no intention of settling with what he views as his archenemy, the motion picture industry.

More importantly, these eight movie studio lawsuits against Corley have had little, if any, effect except to popularize this technology. DCSS has become so widespread that you have hackers, marching with large DCSS signs outside the courthouse. You have them giving it to people on flyers, when they're walking into the building.

They put it on t-shirts, this is all over the place. So there's no central distribution point for the lawyers to go after, it's mirrored in thousands of places around the that are on the Internet. So, we also heard about digital distribution technologies, like the DVD scrambling system and SDMI. There's a problem for intellectual-property protectionists. You can't protect content on insecure hardware.

Even on supposedly secure hardware, there might be flaws, there might be bugs, it may not be successful. The enemy of intellectual-property protectionists is the general-purpose PC. I mean, this is what Apple Computer popularized in the 1970s and what we use today on Windows' laptops and what not.

You can take it apart, you can install a debugger, you can go through every memory location, you can view what programs are running, you can extract whatever data you want and dump it to a file. This means, there's no good way-you can make it difficult but against a determined hacker there's no way that you can adequately protect information on a general-purpose PC. So that means going to secure hardware. That means, maybe, an ebook or ibook or something like a palm that's secure and protected and you can't take apart.

Of course, if you thought Windows, PCs, were the enemy of intellectual-property protectionists, there's Linux, which was designed from the get-go to be open-source and, therefore, impossible. You can't even create something that's difficult, in terms of an intellectual

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property you can't copy the scheme, it's just plain impossible, since everything is open-source. I'll leave it at that.

MR. SCHALESTOCK: This being Washington, D.C., I feel like I'd be remiss if I didn't make this point, that it's not only that litigation has become a standard part of doing business in the United States, which we've certainly seen in this case but, also, lobbying has become just part of the negotiations that go on between businesses and another way of gaining some advantage in those negotiations. I've seen this specifically in this situation, where Internet companies and particularly ones that are dealing with distribution of music over the Internet, have gone to Congress and have asked in so many words that their business model be exempted from copyright obligations under the law. The recording industry and other copyright holders have gone to Congress and asked that the copyright law be revised to specifically state that these business models are subject to copyright protection. So, there are some very explicit negotiations going on in the public policy realm, as well as the courts.

The other point I wanted to make, getting back to this issue of the fair-use aspects of the copyright law and the impacts of the new technology on them, there has always been a degree of leakage in copyright protection; some of it formally recognized in the form of fair-use, some of it not recognized under the law, but simply accepted as a matter of course and the compilation tapes of music recordings that you make for yourself or give to a friend are a great example that record companies know it goes on. They know it's technically against the law, but it's not really worth the time or effort to try and enforce it.

What's happening now, with this newer technology, is that that leakage has gone from a slow trickle to Niagara Falls. This impacts the notion of social norms, because what may have been acceptable as a social norm before now, suddenly, becomes of such a large volume that it simply can't be tolerated as a business matter and, therefore, the social norms either have to change or the business has to change significantly to recognize them.

PROFESSOR GHOSH: That's an empirical question. I don't know whether it's on a larger scale than it was before. The assumption is that since technology makes copying easier, more people will start to infringe or more copies will be made by current infringers. I don't know whether that's factually true or not. The answer will depend upon how one defines the market with its own set of norms and institutional structure. Of course, that raises burden of proof issues. Section 107 is an affirmative defense, which means that the alleged infringer bears the ultimate burden of proof. But there is still the

question of who bears the burden of production on market effects, especially on the crucial question of what is the market. Furthermore, even under Section 107, there would have to be some sort of estoppel or reliance to protect certain uses.

I think there is a problem under Section 107 to say that the right to distribute doesn't mean markets you have already entered, but any possible market, even those you have not entered. The MyMP3.com opinion basically gives the copyright owner the right to pre-empt markets from emerging, and that seems over broad. Perhaps that is the antitrust lawyer in me speaking, but such a broad reading is inconsistent with copyright law, and intellectual property law more broadly.

MR. BORKOWSKI: The empirical issue is interesting for another reason, I think. I have not heard in the debate on fair-use any attempt to go back to first principles, and I would be curious to hear particularly Professor Ghosh's view on this, because I think that, if you look at the purpose of the fair-use doctrine, if you look at the statute itself, 17 U.S.C. § 107, it focuses on things like criticism and social commentary, news reporting, teaching, those kinds of uses.

If you look at the legislative history to the fair-use section, it expressly states that its purpose is to foster creativity and to allow for small exceptions to the underlying copyright principles so that creativity is not stifled. It really contemplates that the fair-use use of copyrighted materials is, itself, a creative function that helps the overall discourse.

That's what I don't think has been discussed in this case, because I don't see that present at all in consumers downloading prepackaged music. There's no exchange of ideas, there's no debate, there's no discourse, they're just taking stuff in my view. I'd be interested in Professor Ghosh's view on that.

PROFESSOR GHOSH: I think that's what makes it hard.

MR. BORKOWSKI: I mean, do you want to respond to it?

PROFESSOR MADISON: That argument, actually, was made in the *Sony* litigation, itself.

MR. BORKOWSKI: Right.

PROFESSOR GHOSH: The movie studios in that case made the argument that when people are sitting at home time-shifting with their VCRs, they are not making a creative or, in the language of the day, a productive use of the copyrighted material. Although it was a very, very close question, the majority of the court ruled that in those circumstances it could be a fair use, even though it was not necessarily a productive one. So, I agree with you that this is still a live issue in the new context and the new technology that we have today. But it is not settled as a matter of first principles that creative or productive reuse is

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required in order to find fair use.

MR. BORKOWSKI: Yes. I'm just saying that the issue has come up and it's not a settled issue.

PROFESSOR GOSH: You get into a circularity problem in terms of figuring out what is creative because, of course, Napster, itself, is the product of a creative effort. I couldn't have done what that genius Fannin did. Admittedly, there are negative sides to it, but how you determine what is creative or productive is so value-laden, while looking at market effects is potentially objective. The market effect analysis is precluded by the broad readings of market in Section 107.

PROFESSOR MADISON: As a matter of protection of creative works in terms of whether they are copyrightable to begin with, we impose such a low threshold of creativity at the front-end, it seems inconsistent, at least to me, to impose a higher threshold of creativity to determine whether something is a fair use subsequently.

MR. BAND: I think it's almost just a follow-on, I mean, there seem to be, in the cases two strains to the fair-use doctrine; one is some of the transformative use, but that seems to be, when you're dealing with a situation where a person is making a copy and then disseminates it to the world. So, for example, a parody that you market it, whether even a scholarly work, that is, you quote from something, but then you sell it to the world. So, then, whether it's commercial or not commercial is another issue but, certainly, if you're going to be redisseminating it to the world, then you need to have that transformative aspect, that seems to be my view of the case.

On the other hand, there is this other strain of fair-use, which really is private copying, which goes to what you were talking about. Now, the tension with Napster, what makes Napster hard is that it seems to be private copying, but in a public context. And that's why it doesn't fit; it's not like the simple *Sony* case or the simpler *Sony* case, where people were just sitting in their own home and they were copying it off of the authorized broadcast over the airwaves, because here the sharing is going on in a very public manner, and so that's why Napster doesn't fit neatly into these two historic strains of the affeerors doctrine.

MR. BORKOWSKI: Yes, and for that reason, I'd be interested in elaboration of Professor Ghosh's earlier comment about a safe harbor notion for noncommercial use. I think you posited a safe harbor notion for noncommercial use by end-users, something like that?

PROFESSOR GHOSH: Right, right.

MR. BORKOWSKI: What are you conceiving of as being use? Does use include, essentially, distribution of the type that is involved in a Napster-type system?

PROFESSOR GHOSH: I think it really depends upon what kind of markets are being affected. The question becomes an empirical one, not necessarily in the statistical sense, but in the sense of creating a factual record of the substantial effects of Napster. Those are the facts on which the contributory infringement claim should hinge. So, as Mr. Band has suggested, there probably is piracy going on through Napster. There's probably also a lot of fair use, and it's a factual question as to what dominates at this point.

MR. LAUGHLIN: But the problem is that we are not clearly distinguishing between the commercial value of a product and how society chooses to protect it. First as simply the naked taking of the product in the transfer. I mean, it's easy enough to say, well, it allows file-sharing and, therefore, if I can give you a disc with a file on it, that ought to be permissible because it is personal, private conduct between agreeable individuals.

PROFESSOR GHOSH: Right.

MR. LAUGHLIN: It's another thing, it seems to me, to set up a whole regimen of interconnections through people who have no contact with one another except for the fact that they are tied to the same network and allow them to take this industrial property just because it's a file.

PROFESSOR GHOSH: My response to that is, why? All the Internet does is expand the community. Instead of file sharing with people in your dorm, block, or high school class, you can share with people across the country. I do not see how that affects the fairness of the use—except for a Section 107, hurting the market analysis. No one has demonstrated those market effects except for the argument that it is a possible market, so it must be hurt. The last argument does not seem consistent with what the Supreme Court said in *Sony*, where they clearly said, it's actual markets, not potential markets. Granted, that was a 5 to 4 decision. It could have gone the other way. If the Supreme Court hears the Napster case, it may go the other way and we may see some further legal analysis of the Section 107 market effects issue. But I think the law clearly is saying you look at actual market effects, and I have not seen much evidence of any yet.

MR. MCCULLAGH: I might be the only non-lawyer on the panel, which puts me in an interesting position. I'm sitting here listening to lawyers debate the nuances of copyright law and the numbers and emanations or whatever else. It must be like hearing legislators and politicians a hundred years ago debating the nuances of prohibition: how it's going to apply, what the exemptions are going to be, and how this is going to play out in the courts.

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It is very difficult and I think the country figured it out to prohibit people from engaging in consensual transactions, especially in the privacy of their own homes or communities. This is essentially what intellectual property law tries to do. I don't think it's going to work very well, if we extrapolate current trends, whether it would be a McCullagh's law or what not. Part of the problem is that copyright law in the lay person's view, relied in large part on the difficulty of making copies. Books, videotapes, CDs, it's a pain to copy these things and not so, on line.

There's another problem for intellectual property law is that it just takes one country to be a safe haven for IP anarchists or IP reductionists instead of protectionists. There's a very interesting project called HavenCo, which is based on an abandoned gun platform off the coast of the UK. Supposedly, they claim, and there's some opinion saying this, that it's outside the reach of UK law. There are some Indian reservations who also want to be havens for Internet anarchy. There are going to be intellectual property havens, intellectual property anarchists who will hang out there, and they'll make plenty of money selling IP to people if there's a market demand. I expect there will be. So, I'm not sure if law's going to be all that relevant if, again, if we extrapolate current trends.

PROFESSOR GOSH: Just to follow from that, before, you were mentioning how and you were saying, well, the PC is the content-provider's worst enemy. Well, I would suggest, in many cases, the content-provider's worst enemy is the content-provider.

In many instances they just have not been flexible enough or quick enough. Instead, they have tried to rely on litigation and legislation to protect market share, as opposed to saying, how do we just keep on moving, running faster and jumping higher to keep our market share? You really say, well, why does Napster have 40 million subscribers? Why doesn't Sony have a service that works like that? Why doesn't BMG, why didn't they come up with that idea themselves? Essentially you see that the Sony model, the Sony website, I mean, is charging \$2 per download. Well, duh, I mean, who's going to go there and pay \$2 to hear, to get a song when you can get a lot more on Napster. So, again, it's just a question of, I think, the content-providers, again. It's too easy, in many contexts, and this goes to your antitrust fund it's too easy, when you're in a dominant position to rely on litigation and legislation instead of on competition and innovation.

PROFESSOR FARLEY: I would like to intervene here because there is a question from the audience that is relevant to our current discussion. The question is: "Large popular bands, like Metallica, have

the power to demand their own contractual clauses, whereas 95 percent of musical artists do not. Isn't the recording industry just a middle-man trying to extend its monopoly and retard innovation in the informational commons?" Anyone . . .

MR. BORKOWSKI: I'm not going to answer that because I'm involved in a litigation.

MR. BAND: The court, I mean, the judge, had a pretty easy answer to that question, saying Napster has an area for new artists. She said they could have just had its new artists area and shut the rest of it down. So, Napster could have a market model—just a Napster service, which is really oriented only towards new bands.

PROFESSOR FARLEY: How many people would visit that site?

MR. BAND: But then the point is that what's really driving it is not the new bands and people without recording contracts, but what really is driving the traffic is Metallica. So, the premise of the question, then, is undermined.

MR. BORKOWSKI: I have question about what you said a little earlier though, just a moment before this question. But it is related in that, I think, one of the reasons that the industry has taken a while—and it actually isn't a while in real time, it is a while in Internet time—to get to where it is right now is because it doesn't have the luxury of what Napster has, which is not to worry about security, content ownership, or the payment of royalties. For example, the industry has been trying to solve the problem of developing secure formats for distribution, so that its crown jewels, essentially, don't get dissipated and lose their value.

Napster didn't have to worry about that and the developers of these other technologies don't want to have to worry about that. The undercurrents you hear, even on this panel, from people more on that side of the fence, is that, well, law-schmaw, who cares? The industry just cares about profits. It's all about the technology and the law's a dinosaur and we don't want to pay attention to it. Certainly, the content owners don't have that luxury and that's one of the reasons it's taking them a little while to get to an acceptable place.

MR. LAUGHLIN: I thought I heard an implied criticism in that question. The criticism being that all of this is simply being focused on the distribution industry and really has nothing to do with the creators of the content who we wish to reward through the copyright system. But that kind of begs the question in a way, because you have to, at least pre-Napster, pre-new technology, have methods of distribution.

A band, even Metallica, could not get the appreciation in society that it has without the distribution scheme in place. The problem is, today,

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of course, that the new technologies are attacking the old methods of distribution. The question is, why aren't the old methods of distribution nimble and quick on their feet? The answer is because the old methods are never nimble and quick on their feet, it is only the young that prance and run quickly.

PROFESSOR MADISON: I would like to respond to another thing that I think is underneath the surface of the question there, and I think it echoes something that Declan mentioned in the context of the relationship among all of these issues for lay people or non-lawyers. Not only does the lawyering matter, which is the comment I made at the outset, but the rhetoric matters as well. One of the problems that we are seeing now in the application of copyright law to the Internet is we are no longer comfortable with what some of the words mean. If you go back across some of the comments that you have heard on the panel, you have heard words such as use or user, public and private, commercial and noncommercial, file-sharing, the language that you see in some of the filings and even in some of the language of the reported decisions about piracy and theft. In the Metallica complaint against Napster, counsel characterize college students as common looters.

The rhetorical battle and the definitional battle make a big difference here. I think it is a big source of the confusion and ambiguity in how the different sides to these cases understand how the law should apply and how they are trying to shape public perception of what is appropriate.

Part of the rhetorical battle is, is this really litigation about artists and creative people and their rights to be fairly compensated for what they do, or is this just the "big bad corporations" trying selfishly to keep more of a new pile of money for themselves? People have different answers to that question in good faith, but I think that it is part of the dynamic that is getting played out in the different lawsuits.

PROFESSOR FARLEY: Thank you. Regrettably, I must cut it off here. I do want to thank the panel. It has been very interesting and informative, and has nicely led into the discussion for the next panel. We will now take a 15-minute break and panel two will begin at 11:00 o'clock. Thank you very much.

(WHEREUPON, A RECESS WAS TAKEN).

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