

# Contested Codes: Toward a Social History of Napster

by

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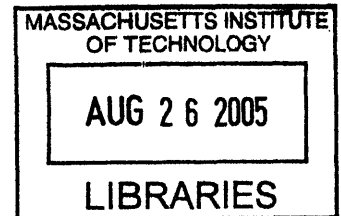
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# Contested Codes: Toward a Social History of Napster

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## ABSTRACT

In the years since its inception, some interpretations of the software program known as "Napster" have been inscribed into laws, business plans, and purchasing decisions while others have been pushed to the fringes. This paper examines how and why certain assumptions about Napster gained consensus value whereas others did not. The analytical approach involves an examination of discourses about Napster in several arenas – legal, economic, social, and cultural – and is informed by a conceptualization of Napster as an ongoing encounter between, rather than the accomplishment of, inventor(s), institution(s), and interest(s). While acknowledging the importance of empirical examinations of Napster's impact on firms and markets, as well as the proscriptive advice which it supports, the focus here is on providing a contextualized understanding of the technology as an object whose meanings were contested and ultimately resolved, or at least stabilized, within, across, and through a broader systems of power and structured interests.

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## *Introduction*

To date, much of the literature on Napster speaks of “the technology” in positivistic terms, seeking, for example, the “economic logic of the Internet” or the “future of music on the Internet.” By contrast, this thesis steps back and asks what has been taken for granted, and assumed as fact, in these debates. What *is* Napster? When we talk about “the technology” what do we mean? Whom does this discourse benefit? How did Napster come to be seen as a revolution, and what does it signify? In the broadest sense, how did codes become technologies, assertions become facts, ideologies become common sense?

To the extent possible, this project attempts to demystify reified notions of “the technology” by portraying Napster as a site of multiple, contested meanings, which were fought out within a broader cultural context, and system of social inequalities.<sup>1</sup> The thesis seeks to demonstrate how “the technology” captured and perpetuated certain pre-reflective assumptions concerning technical capabilities and cultural meanings, users and uses, laws of society and laws of human nature.

As Lawrence Lessig has observed, “If there is any place where nature has no rule, it is in cyberspace.”<sup>2</sup> Lessig reminds us that, while traditional governing institutions may not act in the same capacity on the Internet as they do in the physical world, cyberspace, like any place else, is governed by a heterogeneous set of power relations. While the laws

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<sup>1</sup> See Robert F. Berkhofer, *Beyond the Great Story: History as Text and Discourse* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1995).

<sup>2</sup> Lawrence Lessig, *Code: And Other Laws of Cyberspace* (New York, N.Y.: Basic Books, 1999) 30. See also, Lawrence Lessig, “The Law of the Horse: What Cyberlaw Might Teach Us,” *Harvard Law Review* 113.50 (1999); available from <http://cyberlaw.stanford.edu/lessig/content/works/finalhls.pdf>; Internet.

of the state may be relatively unenforceable on the Internet (for now, at least), Lessig argues, markets, norms, and architecture, or “code,” regulate in their place.

Napster was until recently known as *the* technology that empowered consumers to swap digital music files over the Internet free of charge. However, as of this writing, the company that owns the software has begun discouraging such activities, by installing content filters, and is planning to institute a subscription fee by year’s end. Napster’s corporate culture used to typify that of the subversive start-up, but now the company is run by lawyers, backed by one of Silicon Valley’s most prestigious venture firms, and allied with Bertelsmann, a global media player. In under a year, even the norms dictating when it is ethical to download music have changed.

On the other hand, while Lessig has shown us how numerous constraints co-exist online, he does not account for resistance to them. A system may be constructed with a particular set of values in mind, but (as Napster in some way demonstrates) not all users will be constrained by these supposedly “embedded” values in the same way, or even agree what those values are.<sup>3</sup> In this sense, the metaphor of tools, rather than laws, may be more fitting to online applications such as Napster. Tools are flexible objects, in the sense that they do not have any single definitive use, but still actions are constrained by what tools are available, how those tools have been employed in the past, and the category through which one perceives the particular task at hand. As Lévi-Strauss writes,

[The bricoleur] has to turn back to an already existent set made up of tools and materials, to consider or reconsider what it contains and, finally and above all, to engage in a sort of dialogue with it and, before choosing between them, to index the possible answers which the whole set can offer to his problem. He interrogates all the heterogeneous objects of

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<sup>3</sup> Admittedly, this may be doing Lessig’s argument some injustice, as he does note that “norms” determine how laws are applied. My point, however, is that “norms” may be too broad and too narrow a term—too

which his treasury is composed to discover what each of them could ‘signify’ and so contribute to the definition of a set which has yet to materialize but which will ultimately differ from the instrumental set only in the internal disposition of its parts. A particular cube of oak could be a wedge to make up for the inadequate length of a plank of pine or it could be a pedestal—which would allow the grain and polish of the old wood to show to advantage. In one case it will serve as extension, in the other as material. But the possibilities always remain limited by the particular history of each piece and by those of its features which are already determined by the use for which it was originally intended or the modifications it has undergone for other purposes.<sup>4</sup>

To Lévi-Strauss, objects are the glue “betwixt and between” the concrete and the conceptual, through which “the signified changes into the signifying and vice versa.”<sup>5</sup> Meanings are not inscribed into tools in any permanent sense, yet nor are tools entirely free-floating conceptually. As the concrete and the conceptual develop in tandem, there is always some space left for “the technology” to accrue new uses and new meanings, even if, as Lessig notes, that space may be severely constrained.

Chapter One (“Shared Authorship”) discusses this middle space between “technology” and “society” by examining Napster’s societal genesis, cross-referencing the people commonly regarded as Napster’s “inventors” with the broader social setting. Based on a review of accounts published in major newspapers, magazines, and online publications prior to May 2000, Chapter One lays out how Napster was mutually inscribed by both “concrete” and “conceptual” associations. On the one hand, I note how particular social groups produced and employed Napster in a manner delimited by their political, economic, and cultural customs and values. On the other hand, I suggest that

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broad, because norms are construed differently across society, and, too narrow because “culture” frames all markets, laws, and architectures, as well as customs, habits, etc.

<sup>4</sup> Claude Lévi-Strauss, *The Savage Mind* ([Chicago]: University of Chicago Press, 1966) 19-21.

<sup>5</sup> *Ibid.*, 21.

this production process reflected and constituted new associations, enabling new customs and values to take form.<sup>6</sup>

Chapter Two (“Interpretive Flexibility”) looks at how controversies over “the technology” were inevitably controversies over social customs and values, as “text” (Napster) and “context” (culture, law, society) could not be easily separated from one another. Here I show how Napster was contested on both “literal” and conceptual grounds. My focus is not on the individual level, where all objects will inevitably have a certain innate flexibility according to one’s personal associations, but rather on the more shared sense Stanley Fish describes, in which the “contexts of practice (interpretive communities) confer...a shape and a direction.”<sup>7</sup> Legal briefs from *A&M Records v. Napster Inc.*’s preliminary hearings are by way of example of how interpretive groups constructed Napster’s literal and literary significations in accordance with their prior experiences, ways of understanding, values, customs, and goals.

Based on court documents, press articles, Congressional testimony, and evidence of institutional discourse from the corporate world, Chapter Three (“Social Construction: Napster Uses”) and Chapter Four (“Social Construction: Napster Users”) examine the strategies by which the options narrowed, and Napster’s meanings began to stabilize. Focussing on the period May 2000 to November 2000,<sup>8</sup> Chapter Three proposes to deconstruct and demystify “the technology” not only by unveiling its subjectivity, as in Chapter Two, but also by showing how certain interpretations achieved consensus across

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<sup>6</sup> See generally, Wiebe E. Bijker, *The Social Construction of Technology* (Eijsden, The Netherlands: 1990).

<sup>7</sup> Stanley Eugene Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, Post-Contemporary Interventions (Durham, NC: Duke University Press, 1989) 26.

<sup>8</sup> In May 2000, Napster Inc. received a \$15 million investment led by the Hummer Winblad Venture Partners. On October 31, 2000, Napster’s strategic alliance with Bertelsmann was announced.



social groups and how they forcefully dislodged others. Chapter Five focuses more closely on the discursive construction of “Napster users” as adolescents, which, I argue, cut across several dominant social groups, and set the foundation for Napster’s rhetorical closure. In the end, I argue that the social ordering described in both these chapters was important because it would constrain what “tools”—precedents, myths, data sets, prior objects, capabilities—would be available in the future.

Chapter Four (“Distinctions”) is a high-level attempt at considering the culture wars surrounding “the technology” and positioning Napster and Napster-like systems within the context of an ongoing movement toward more “participatory” patterns of media consumption. I suggest that the fascination with “the technology” in the popular imagination was, for artists, producers, and fans, largely due to the fact that Napster offered an object for thinking through the dehierarchization of cultural production, rather than merely an opportunity to get “something for nothing.”

While the narrative in these four sections follows a chronological path, I do not wish to mislead the read into thinking these events unfolded in some preordained, linear trajectory. Trajectories, such as invention-adoption-social impact, are herein regarded as historicizing constructions, that is to say, myths, which rarefy an otherwise gradual, unfolding, and dispersed process of constructing “the technology.”<sup>9</sup> My point of entry will be not through the window of History, temporally determined, but rather through the *histories* constructed by various user groups: Napster Inc., the Record Industry Association of America (RIAA), the courts, lawmakers, artists, the popular press, Silicon Valley venture capitalists, and Napster users. The narrative skips between these

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<sup>9</sup> Bruno Latour, Science in Action: How to Follow Scientists and Engineers through Society (Cambridge, Mass.: Harvard University Press, 1987).

interpretive groups, in an attempt to portray “the technology” as an ongoing encounter between and among them, rather than the accomplishment of any one inventor, team of inventors, dominant institution, or rule of law.

While some readers will accept, or take for granted, that technologies are socially constructed in this way, others will no doubt say that, by viewing “the technology” in “relativistic” terms, I am skirting my obligation as a researcher to search for causality, mechanism, and depth. I respond to these criticisms in two ways. First, this thesis examines how popular, or vernacular, theories mobilize themselves. Yes, it may be fashionable to “decenter” texts in this way, especially when your subject has to do with the Web.<sup>10</sup> But then again, in the case of computers, we are not merely super-imposing metaphors for theorizing in an academic sense. Computers are, as Sherry Turkle calls them, “objects to think with” in a very real sense, which enable people to bring complex theories into their everyday lives, test them out against their own circumstances, and open up a dialogue with the customs and values of their culture. What I hope to establish in this thesis as a point of fact is that tensions between modern and postmodern theories of knowing, authorship, and control were central to the competing claims about “the technology.” Hence, to seek out any one set of “rules” or governing principles, and to examine Napster through that lens, would be to privilege one side of the debate.

My second response is that, on this politically charged subject, the indeterminacy of contested constructions has never been adequately acknowledged—and this has real consequences, as ideologies, assumed by pre-baked notions of “the technology,” are inscribing themselves into legal, economic, cultural, and technical decisions. This thesis

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<sup>10</sup> See for example, George P. Landow, [Hypertext: The Convergence of Contemporary Critical Theory and Technology](#) (Baltimore: Johns Hopkins University Press, 1992).

exposes how certain (subjective) expressions have, over the past two years, increasingly taken on the status of truth, while other (equally subjective) discourses have been increasingly marginalized, making them harder and harder to recover.

The current approach does not offer a “definitive” narrative from the perspective of the legal community, the business community, the artistic community, or your “average” music consumer. With “the technology” still very much in flux, the public record may not in fact be sufficiently developed to support such an analysis, and while my work has been informed by dozens of conversations I have had over the past few months with Napster users, the data I present here is not ethnographic. The argument that follows will focus instead on revealing the subjective and partial nature of several overlapping discourses, but particularly those that have tended to dominate the public debate. Presenting “the technology” as a symbol co-constructed by struggles and resistance will be a first step toward mapping the range of possible meanings available to socially situated readers, and in turn realizing the meanings produced at both the social and personal level. My hope is that this provisional mapping will also offer some degree of breadth and subtlety to the disciplinary research, both qualitative and quantitative, that will be looked to as we sort through Napster’s implications for the future.

— CHAPTER ONE —

## *Decentered Authorship*

The Napster story is often framed as a lesson in decentralization. Under the old paradigm, so this lesson goes, concentration in media industries was structurally inevitable due to the hard-economic fact that information markets were defined by economies of scale. However, with “disruptive” technologies enabling anyone to reproduce and transmit content at close to zero marginal cost, consumers can and will break free from the oligopolies’ constraints. As John Perry Barlow recently noted in *Wired* magazine, “For settlers of cyberspace, the fuse was lit last July [2000], when Judge Marilyn Hall Patel tried to shut down Napster and silence the cacophonous free market of expression.” As he saw it, the revolution was already won by virtue of the “the more than 20 million directly wired music love”—for, as history has shown, “no law can be successfully imposed on a huge population that does not morally support it and possesses easy means for its invisible evasion.”<sup>11</sup> Software developer David Winer captured this democratizing sentiment with the mantra: “The P in P2P is People.”<sup>12</sup>

Oddly, the same self-organizing notions are rarely used to account for Napster’s own existence. Napster’s creation story is often told with just one actor, Shawn Fanning, whose “transformative” genius wholly envisioned and produced the technical artifact that made decentralization possible. Consider the following example from *Time* magazine:

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<sup>11</sup> John Perry Barlow, “The Next Economy of Ideas,” *Wired* October 2000; available from [http://www.wired.com/wired/archive/8.10/download\\_pr.html](http://www.wired.com/wired/archive/8.10/download_pr.html); Internet.

At dawn, Fanning lay on the brown carpet in the shadow of a converted bar counter, consumed by the idea. He had been awake 60 straight hours writing code on his notebook computer. In his daze, the idea appeared to him as something tangible—a hard, shiny piece of black metal—that he had to forge and form so that it became usable, so that the hard black metal was transformed into a friendly tool, so that the 0s and the 1s, the Windows API protocols and Unix server commands were all somehow buffed and polished and worked to a fine, wonderful, simple application. That was his idea. And it was big and frightening and full of implications, and it filled him up, this 18-year-old college dropout sprawled on the floor of his uncle’s office, in what used to be a restaurant, across the street from the breaking waves in Hull, Mass.<sup>13</sup>

The narrative depicts the creation as an event, unified temporally by sleepless nights, and situated spatially in one dingy room. The holistic setting resonates with the inventor’s teleological intent, to transform culture and society.

The trouble is, if we imagine Fanning just a few months early, as a freshman surrounded by peers in a Northeastern University dormitory during the 1998-1999 academic year, and, at the same time, as an active member of several online communities, the picture changes dramatically. By Fanning’s own admission, “his” idea was derivative of the Internet Relay Chat rooms (IRC) he frequented at the time. The design problem he set out to solve was not his own, either. The problem, as he later recalled, was framed by one of his peers. “My roommate often complained about the unreliability of [Internet sites such as MP3.lycos.com and Scour.com], finding that links to sites would not work, and the index would become out of date because the indexes were updated

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<sup>12</sup> Quoted in Tim O’Reilly, “Remaking the Peer-to-Peer Meme,” Peer-to-Peer: Harnessing the Power of Disruptive Technologies, ed. Andy Oram (Sebastopol, CA: O’Reilly & Associates, Inc., 2001) 49; available from [http://www.openp2p.com/pub/a/p2p/2000/12/05/book\\_ch01\\_meme.html](http://www.openp2p.com/pub/a/p2p/2000/12/05/book_ch01_meme.html); Internet.

<sup>13</sup> Karl Taro Greenfeld, “Meet the Napster,” Time 2 October 2000; available from <http://www.time.com/time/magazine/article/0,9171,55730,00.html>; Internet. It is striking that this narrative is put in the writer’s voice, whereas, when Newsweek published the same story five months earlier, “he spent all days and nights on the program” was attributed to Fanning, suggesting perhaps that, in the interim, the creation myth somehow became more “real.” Compare to, Steven Levy, “The Noisy War over Napster,” Newsweek 5 June 2000.

infrequently.”<sup>14</sup> Even the name “Napster” was only partly his own—he used it as his IRC handle and personal e-mail address, but, as it was his grade-school classmates who called him “Napster” in the first place, we might say he *appropriated* rather than *invented* the term.

Fanning did not suddenly assume sole authorship when he left college to devote himself to the project. In fact, the closer “his” concept came to “thing-ness,” the more social it became. In mid-1999, he partnered with twenty-year-old Sean Parker, a like-minded programmer he had met through IRC, to develop the beta release of the software—only then was it formally named “Napster.”<sup>15</sup> Fanning and Parker modified the beta version with help from several early adopters.<sup>16</sup> A Web site called Betanews announced the release of Napster 2.0 Beta 2 on July 22, 1999, then an improved Beta 3 two weeks later. In August, the program was featured on Download.com, which Fanning and Parker considered Napster’s mass-market debut, but still, “the technology” was by no means fully formed.

## **Early Adopters**

The early adopters agreed that Napster was evolutionary, not revolutionary—their main concern being “What could it do?”, not “What did it mean?”. The Betanews notices, most likely based on descriptions provided by the developers themselves, described the

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<sup>14</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Declaration of Shawn Fanning In Support of Defendant Napster’s Opposition to Plaintiff’s Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

<sup>15</sup> In the Newsweek account, Fanning and Parker were joined by a third collaborator, Jordan Ritter, 23. Levy, “The Noisy War over Napster.”

software as an application that created a “virtual community” and eliminated “the problems of conventional FTP transferring.”<sup>17</sup> An Internet newswire described the program as “combining almost all of the functions you need in a single application.”<sup>18</sup> Wired News described the software as a product that “[combines] chat features, a music player, and allows users to share their MP3 libraries.”<sup>19</sup> As late as December 1999, a sidebar comparing MP3 sites in Fortune magazine matter-of-factly described Napster as “a unique online MP3 trading community: Downloading the free application provides a user with an MP3 player, playlist manager, search engine, and Napster’s best asset, an integrated chat-and-swap feature, that enables users to trade songs directly, without going through FTP sites.”<sup>20</sup> Here, “the technology” was a bundle of features, not the reified set of meanings that it would become.<sup>21</sup>

Whether Napster actually “worked” was in fact unclear. While some users saw the program as a “success” from early on, others did not. The legal problem, as I will argue, was just one possible bug in the system. General audiences, for example, were concerned that sharing files over Napster would compromise the security of their computers, rendering their harddrives open to unwelcome visitors. On Slashdot.com, a message board known for its population of free software enthusiasts, community members complained about a number of other problems with the application. “This

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<sup>16</sup> “A few early adopters provided feedback and helped us track down bugs in the software.” A&M Records, Inc. v. Napster, Inc. No. 99-5183. Declaration of Shawn Fanning In Support of Defendant Napster’s Opposition to Plaintiff’s Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

<sup>17</sup> Chris Hilbert, “Napster 2.0 Beta 2,” [BetaNews.com](http://betanews.com) 22 July 1999; <http://betanews.efront.com/article.php3?sid=932662754>; Internet.

<sup>18</sup> Martyn Williams, “Internet Update,” [Newsbytes News Network](http://newsbytes.com) 23 July 1999.

<sup>19</sup> Jennifer Sullivan, “Napster: Music Is for Sharing,” [Wired.com](http://www.wired.com) 1 November 1999; <http://www.wired.com/news/print/0,1294,32151,00.html>; Internet.

<sup>20</sup> “Tune In: Mp3 Goes Mainstream, but Internet Music Has yet to Find Its Perfect Form,” [Fortune Magazine Special](http://fortune.com) 1 December 1999.

<sup>21</sup> See Latour, [Science in Action: How to Follow Scientists and Engineers through Society](#) 88.

program is just to [sic] buggy, not to mention ugly.” “How can I possibly run this software when the source is not available? Do you trust it?” “All the RIAA people need to do is start a download from someone, then go netstat -s to see connections (in Windows 95 for example).” “Their client is buggy as hell and their servers are crashing all the time. I mean really, these people could work for Microsoft.”<sup>22</sup>

Due to our culture’s “author” paradigm, Napster would soon become the product of a unified, teleological event. Yet, historically speaking, the “working” of the machine was not wholly determined by Fanning’s design. “Working” would be an achievement earned only after numerous cultural as well as technical adjustments had been made. Far from the unified *event* depicted by the June 2000 Time article, Napster’s “invention” was an ongoing *process*. This is part of what Bruno Latour calls the social construction of technology: “It is only after endless little bugs have been taken out, each bug being revealed by a new trial imposed by a new interested group, that the machine will *eventually* and *progressively* be made to work.”<sup>23</sup> Technical artifacts, Latour argues, are co-constructed by the multitude of constituencies represented by the audience at any given time. This was doubly true in Napster’s case, where the user’s “nodes” functionally comprised both client and server, system resource and content—the P in P2P.

## **Technology and Society**

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<sup>22</sup> “Easy Mp3 Distribution,” [Slashdot.com](#) Discussion Thread Started 16 November 1999.



The literary critic Roland Barthes tells us that a text is a “multidimensional space in which are married and contested several writings, none of which is original...a fabric of quotations resulting from a thousand sources of culture.”<sup>24</sup> For Barthes, texts have no closed meanings, no intrinsic hierarchies, and no stable signifiers. In other words, texts do not stand on their own—they are collections of fragments of “codes” that make sense only in relation to the reader’s preconditioned ways of knowing them. Barthes suggests that the author’s biography, for instance, is just one reference point among many, as all writing is inevitably an intertextual weave spun from a multitude of sources.

We can speak of technology as a similar sort of text. Because Napster was so much a site of conflict, one could not refer unambiguously to “the technology” without some implicit acknowledgment of the broader community within which one wished it to be understood. Napster—the trope I use in these pages to refer to the multidimensional, contested space—had no *intrinsic* nature. This is not to say that when someone imagined Napster they were free to think of just anything, be it a file-sharing system, a word processing program, or a typewriter, but rather that the range of possible associations was determined or at least delimited by a seamless web of values, customs, and practices.

Laws and markets conditions, for example, had direct bearing on the production process. Some authors have even gone so far as to suggest that Napster’s technical architecture was engineered *solely* to the specifications set forth by one law in particular – 1998’s Digital Millennium Copyright Act (DMCA).<sup>25</sup> Court evidence showed this be

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<sup>23</sup> Latour, *Science in Action: How to Follow Scientists and Engineers through Society* 11.

<sup>24</sup> Roland Barthes, *The Rustle of Language*, 1st ed. (New York: Hill and Wang, 1986) 52-53.

<sup>25</sup>To give an example of this legal determinism, “The problem Shawn Fanning, Napster’s creator, set out to solve was a gap between what was possible with digital songs...and what was legal.” Clay Shirky, “Listening to Napster,” *Peer-to-Peer: Harnessing the Power of Disruptive Technologies*, ed. Andy Oram (Sebastopol, CA: O’Reilly & Associates, Inc., 2001).

partially true, as the RIAA uncovered considerable evidenced suggesting the degree to which design and legal issues were closely related, including an e-mail message written by Sean Parker during Napster’s early development stages, which noted:

Users will understand that they are improving their experience by providing information about their tastes without linking that information to a name or address or other sensitive data that might endanger them, especially since they are exchanging pirated information.<sup>26</sup>

Clearly the inventors were, at least to some degree, working in relation to the laws, even if their intention was to break them.

The market context also played a significant role. Although Napster Inc. received some financial support from Shawn’s uncle John Fanning, “the technology” might never have been able to accommodate more than a few hundred users—much less stand up to the challenge of a lawsuit—were it not for the funding the start-up received from the venture capital market which, like the DMCA, would not have existed a decade prior. Likewise, Napster’s “success” was also in many ways predicated on filling market spaces that the major labels had chosen to overlook or abandon, such as the market for digital downloads, the market for genres such as hip hop and electronica, the market for backlisted music, the market for “low-end” product offerings. Despite the revolutionary rhetoric that was to come a year later, Napster’s objective was at the time not to supplant the record labels, but rather to work with them. As Fanning once put it, “The key is...to grow our user base, and then use [this] user base coupled with advanced technology to leverage the record company into a deal.”<sup>27</sup>

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<sup>26</sup> In the District Court, this correspondence helped establish that the founders were directly aware from early on that their invention would be used for the illegal exchange of copyrighted works. Furthermore, Judge Marilyn Patel was not amused by the irony that Sean Parker was designated Napster’s DMCA copyright compliance officers, despite the fact that he himself used Napster to download copyrighted music files. *A&M Records, Inc. v. Napster, Inc.* No. 99-5183. Opinion. (N.D. Cal. August 10, 2000).

<sup>27</sup> *Ibid.*

But laws and markets speak only partially to the context under which Napster's founders worked, and the technical and cultural goals they sought to achieve. The immediate problems Fanning and friends aimed to solve were more local, namely, the problem of finding MP3s on the Internet, and perhaps also the problem of creating an IRC-like online community centered on musical tastes. To be sure, local and nonlocal were related; for example, the DMCA had effectively shut down the music listing services that might have resolved Fanning's roommate's searching for MP3 links. But this does not make the legislation *causal* in any direct sense. Myths, laws, rules, or codes cannot suffice by way of explanation because, by themselves, these are no less open and contingent than "the technology." When dealing with unfamiliar objects, where the "rules of the games" can be especially unstable, the production of meanings must be conceived in some other way.

Technology historian Wiebe Bijker has proposed a model to account for both the contingent and constrained aspects of technical development. Mirroring Thomas Kuhn's notion of the scientific "paradigm," Bijker reconciles "technology" and "society" by conceptualizing a "technological frame" that, as a world view, is both social and cognitive. This frame, he writes, includes "exemplary artifacts as well as cultural values, goals as well as scientific theories, test protocols as well as tacit knowledge."<sup>28</sup> Functionally, the frame constrains meanings, but also establishes the "language" that enables new meanings to arise.

A technological frame offers both the central problems and the related strategies to solve them. But at the same time the building up of a technological frame will constrain the freedom of members of the relevant social group. A structure is being created by actions and interactions, which will in turn constrain further actions and interactions. Within a

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<sup>28</sup> Bijker, *The Social Construction of Technology* 175.

technological frame not everything is possible anymore (the structure aspect), but the remaining possibilities are more clearly and readily available to all members of the relevant social group (the actor aspect).<sup>29</sup>

Progress is not what occurs only when theoretical contradictions in a dominant paradigm are suddenly realized, in some abstract sense. For Bijker, “the technology” emerges from interactions between and within social groups with differing degrees of inclusion in multiple overlapping frames.

Applying Bijker’s terminology, Shawn Fanning would be an innovator with a much lower degree of inclusion in the music industry’s production-and-distribution frame than, say, the record labels’ R&D departments.<sup>30</sup> While working from his college dorm room, and later his uncle’s basement, Fanning was distanced from the record industry’s social, cultural, cognitive constraints—yet he was by no means completely isolated from it. Fanning, Parker, and the community of early adopters all worked under the same generalized legal, economic, and technical conditions as the recording industry. On the other hand, based on their involvement in other spaces, such as online communities, their immediate goals were more personal, perhaps utilitarian—again, to provide a tool to help themselves and others find and discuss music on the Internet. Still, Napster’s “invention” was not completed the day Shawn Fanning mythically imagined a synergy between IRC and MP3 search engines, or the day Napster debuted on Download.com. The technological frame was continually being updated, reconfigured, and refined by the incorporation of new user groups, with new values, goals, skills, customs, and prior points of reference.

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<sup>29</sup> Ibid.

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<sup>30</sup> As one of Fanning's friends told Time: "Shawn could focus on problem solving—and there was no one to tell him he couldn't do these things. There was no one who ever really understood what he was doing." Greenfeld, "Meet the Napster."

— CHAPTER TWO —

*Interpretive Flexibility*

Even when understood dialectically, totalizing concepts such as “technology” and “society” fail to explain how objects can take on multiple and contradictory meanings within a culture. These terms assume the veneer of objectivity only after the controversy has stabilized—that is, only after certain (subjective) interpretations have dislodged other (subjective) interpretations. This, in turn, presents an asymmetry. When an artifact succeeds, then its supposedly “inherent” characteristics are invoked as the cause (e.g., Napster’s “decentralized” architecture). When an artifact fails, then it’s because the machine did not meet the needs of “society” (e.g., too costly, too unethical). In the interim, as long as technological controversies remain open, both “technology” and “society” are themselves indeterminate and contested.

Rather than focus on “the technology” or “the laws,” this chapter will demonstrate how discursive communities deployed these tropes according to their own interpretive principles. In this sense, legal briefs debating the record labels’ proposed injunction against Napster may be read, I will argue, as a contest over interpretive practices as much as anything else. These documents, many of which predate and contradict the narratives later propounded by the mainstream press, depict an object whose functions, as well as meanings, were uncertain. But these indeterminacies were not “merely” rhetorical, as they would help shape legal precedent, public norms, and the future viability of “the technology.” Furthermore, as I will also argue, although the courtroom setting offers an

especially lucid example of this flexibility, interpretive disputes over “the technology” were not unique to this self-consciously interpretive space.

### **Case Study: A&M Records v. Napster Inc.**

On December 8, 1999, when the RIAA filed its complaint against Napster for “contributory” and “vicarious” copyright infringement, the U.S. District court reified two contesting viewpoints into “plaintiff” and “defendant.” Plaintiffs were comprised of 18 affiliates from the five major Hollywood- and New York- based record companies, who claimed to speak for the interests of artists, retailers, consumers, lawmakers, among others. At this point, Napster Inc. was a handful of investors, a team of developers, a business staff (including a new CEO, Linda Richardson), and a few tens of thousands of users. This is a crucial point, for what triggered the record the record labels’ lawsuit was the enrollment of wider audiences into Napster’s technological frame.<sup>31</sup> Yet, while the trial did address viewpoints from several overlapping constituencies, because the courts privileged the parties named in the case, and because their concerns had particular resonance beyond the courtroom, we will focus (for now) on the arguments presented by these two communities to demonstrate Napster’s interpretive flexibility.

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<sup>31</sup> As the RIAA alleged in its complaint, Fanning and his friends were no longer just producing a “cool” object for their own personal use; compared to Napster, plaintiffs argued, most “pirate” sites were “amateur operations.” “To date, Internet piracy of sound recordings has been confined largely to those who establish Internet sites and offer music for others to download, not for profit, but as a hobby. These sites may contain anywhere from a few songs to several hundred songs, with some having a few thousand songs. These are strictly amateur operations: The sites usually are difficult for the typical Internet user to find and access; some are online only a couple of hours at a time; they are notoriously unreliable and slow; and the selection and quality of their sound recordings vary greatly.” A&M Records, Inc. v. Napster, Inc. No. 99-5183. Complaint for Contributory and Vicarious Copyright Infringement, Violations of California Civil Code Section 980(a)(2), and Unfair Competition. (N.D. Cal. December 8, 1999).

Consider what might seem a very straightforward question: In purely “literal” terms, what *was* Napster? Napster’s lawyers maintained that Napster was an Internet Service Provider (ISP) like AOL or AT&T, offering “the transmission, routing, or providing of connections for digital online access.” To them, “the technology” was a physical link in the chain between one Napster client and another. Data traveled through the system—which included the entire network of individual users’ browsers, but not the whole of their harddrives—without modification or direction from the service provider. The plaintiffs, however, rejected the notion that users were part of the system, arguing that the relevant data did not travel “through” the Napster system at all. To them, Napster was a “listing service” that offered a search engine, directory, index, and links. While granting that, technically, the software did perform search engine-like functions, Napster’s attorneys insisted that the system was, nevertheless, *primarily* an ISP.

Taxonomy matters here because it informs how “the technology” will be regulated. Under the DMCA, ISP’s were protected from contributory copyright infringement liability if they acted expeditiously to remove offenders from their service. Listing services received no such dispensation. Similarly, Napster advanced the claim that computers were “home recording devices” like the VCR or the DAT recorder—and thus protected by the 1992 Audio Home Recording Act—to which the RIAA responded that a “general purpose computer” was nothing like the VCR due to its other potential uses. For our purposes, the point is that, while there may be tangible differences between ISP’s and listing services, or digital audio recording devices and computers, these differences are the product of interpretive operation rather than inherent in the technical coding. Furthermore, even when we define a new artifact in relation to an earlier one, the



antecedent is still discursively defined, despite whatever consensus meaning it may have accrued over the years, and the “translation” must still be decoded.

Courts recognize they are ill-equipped to pass judgment on new technologies since their decisions are largely, and sometimes quite awkwardly, constrained by precedent and laws that may no longer apply.<sup>32</sup> Yet, when Napster filed a motion for summary adjudication under the DMCA’s safeharbor provisions for ISP’s, the District Court was charged with making just such a ruling. Judge Marilyn Patel, therefore, denied the Napster motion on two separate grounds. The first being that Napster was not entirely an ISP because MP3s traveled “through” the Internet—from user to user—and not “through” Napster’s proprietary system. The second was that, even if Napster was an ISP, the company did not meet the requirement for the DMCA safeharbor provision because it had failed to post its copyright compliance policy online. Later on, in granting the RIAA’s injunction against Napster, Judge Patel called the program a “monster,” which was perhaps suggestive of her ongoing frustration with having to classify this abomination of a technology.<sup>33</sup>

The debate over Napster’s literal qualities was supported by conflicting theories of “literary” interpretation. What was the relation between Napster-the-company and Napster users? Were producers and users independent agents or intimately joined by the common text? Was Napster’s “authorship” directly enforced, positively or negatively, by

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<sup>32</sup>“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.” *Sony Corp. v. Universal Studios, Inc.* 464 U.S. 17 (1984).

<sup>33</sup>*A&M Records, Inc. v. Napster, Inc.* No. 99-5183. Transcript of Proceedings. (N.D. Cal. July 26, 2000). This question of how to classify Napster, if it were in part an ISP, but part not, lingered even after the Ninth Circuit’s review of Patel’s preliminary injunction. *Napster, Inc. v. A&M Records, Inc.* No. 00-16401. Opinion. (U.S. Court of Appeals for the Ninth Circuit) 2001.

the software code? Attorneys for the defense submitted that “[t]here is nothing that resembles an agency relationship.”<sup>34</sup> Users created and named the MP3’s, chose which files from their collection, if any, they wanted to share, executed downloads from other users, and, decided to what end those downloads would be used in the future. Napster Inc. merely provided the software. Conversely, the plaintiffs charged that Napster was not just an object, but an ongoing one-to-one relationship. Whereas Napster Inc. claimed that users performed all the necessary steps, the RIAA charged that Napster in some sense also acted upon its users. Under this view,

- Napster *provides its users with* proprietary MusicShare software (and free upgrades) easily downloaded to their personal computers at no cost from Napster’s Web site...
- Napster *creates and provides its users with* an index and directory to all MP3 music files available for copying at any given time on the particular Napster server to which Napster has connected those particular users...
- Napster *makes MP3 files downloaded by its users immediately available to its other users*, thereby increasing the availability and accessibility, at any given time, of specific sound recordings...
- Napster *provides its users with specific information* about the quality and download speed of each of the millions of sound recordings that Napster makes available on its system: file size; bit rate; frequency; length; the login “name” of the user on whose hard drive the recording resides; the line speed of the user’s connection; and the ping (or “echo”) time for that particular sound recording...<sup>35</sup> (emphasis added)

Of course, Napster Inc. would probably have reformulated these same statements beginning with words, “Users provide *each other*...” But, for the RIAA, the software was so “fully integrated” into the experience that the user bordered on becoming *its object*.

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<sup>34</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Opposition of Defendant Napster, Inc. to Plaintiff’s Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

<sup>35</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendant Napster, Inc.’s, Motion for Summary Adjudication on the Applicability of the 17 U.S.C. 512(a) Safe Harbor Affirmative Defense. (N.D. Cal. March 27, 2000).

In *Life on the Screen*, Sherry Turkle observed that the computer was often “an actor in a struggle between modern and postmodern understandings.” This struggle, Turkle noted, was frequently waged on epistemological grounds, “between those who put their faith in reductive understanding (open the box, trust what you can see inside, and analyze completely) and those who proclaim such ideas bankrupt or at least impractical.”<sup>36</sup> In the context of this trial, “the technology” was similarly positioned in tension between modern and postmodern understandings. On the postmodern side, Napster’s attorneys insisted that the company had no way of knowing whether files offered through the network were copyrighted, and attempts at centralization were posited as contrary to the nature of an open-ended, dispersed, and fragmented system such as theirs. The problem was twofold. First, MP3 file-names were unknowable as signs, for they did not necessarily reference any one musical track. As these names were coded locally, by users, there was no way to identify the precise “signifier” (i.e., the exact song and artist), and certainly no way to “control” the sign-signifier relationship. Second, the company argued, as there was no way to determine the relationship between “user” and “usage,” there was no way to distinguish between “fair” and “unfair” uses.<sup>37</sup> Constructing knowledge as only feasible on a local level—specific persons doing specific things—Napster Inc. asserted that there was no way to “control” file-transfers without such knowledge as was untenable on such a large scale.

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<sup>36</sup> Turkle locates these tensions both at the production level, where there is an ideological divide among programmers, and at the consumer level, where users express different aesthetic preferences in line with their own personal “styles” and cultural contexts. We will address the consumer level in Chapter Five. Sherry Turkle, *Life on the Screen: Identity in the Age of the Internet* (New York: Simon & Schuster, 1995) 43.

<sup>37</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Opposition of Defendant Napster, Inc. to Plaintiff’s Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000). Napster, Inc. v. A&M Records, Inc. No. 00-16401. Appellant Napster, Inc.’s Opening Brief. (U.S. Court of Appeals for the Ninth Circuit) 2001.

The record labels, on the other hand, saw knowledge as intrinsic to the nature of any man-made system. For example, they argued, “Napster had the right and ability to supervise and/or control the infringing conduct of its users by...preventing or terminating a user’s access to Napster’s computer servers and/or by refusing to index and create links to infringing music files.”<sup>38</sup> From the RIAA’s vantage point, what happened inside the “box” could most certainly be known, as computers were knowable things, even if people were not.<sup>39</sup> Furthermore, the RIAA added in a postmodern twist, the defendant’s generalized awareness that just about everyone used the system to get free access to copyrighted materials was tantamount to knowing of infringing uses in a concrete sense.

While no doubt strategically motivated in this context, these contrasting ways of understanding were also deeply ingrained in the plaintiff and defendant’s respective “technological frames.” People like Fanning, who saw tools like Internet Relay Chat as perhaps the leading virtue of the Internet, were comfortable with a vision of the community-driven systems. Likewise, Napster’s Silicon Valley investors—rightly or wrongly—equated “eyeball accumulation” with profits. The record labels, who were culturally and financially invested in selling contained goods, were much less comfortable with decentralized distribution. They had previously sued the manufacturers of cassette and digital audio tape recorders—and, some years earlier, radio—all of which improved market efficiency, but at the expense of control. Cassettes and DAT’s introduced new, more portable formats in which music could be sold, but also enabled

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<sup>38</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Complaint for Contributory and Vicarious Copyright Infringement, Violations of California Civil Code Section 980(a)(2), and Unfair Competition. (N.D. Cal. December 8, 1999).

<sup>39</sup> This was in essence the position supported by Judge Patel in her preliminary injunction, but later amended by the Ninth Circuit Court of Appeals. A&M Records, Inc. v. Napster, Inc. No. 99-5183. Opinion. (N.D. Cal. August 10, 2000).

consumers to pass copies onto friends and family at little cost. Radio helped stimulate consumers' interest in the recorded music, but also provided a medium where songs could be freely accessed by all comers, though with some inconveniences (e.g., advertisements, and waiting for your song to play). Even with a subscription fee, Napster combined the worst of all possible worlds—a “monster” as Judge Patel put it—because consumers could get unlimited access on demand, maintain permanent copies, and distribute them to friends at no cost (by e-mail or otherwise). But, at the same time, because of the Internet's scale, and also by virtue of the fact that copying could occur at essentially zero marginal cost, and without any quality loss, Napster was also an entirely different beast.<sup>40</sup>

For the record labels, the paradigm technology for this new medium was not IRC, but SDMI, the Secure Digital Music Initiative, which was formed in December 1998, just as Fanning and Parker were getting underway, Frankenstein-like, with their creation. Though still in its planning stages, SDMI was a consortium of content producers and device manufactures aimed at creating a secure standard that would essentially create a pay-per-song model for digital music, as opposed to an advertisement model, like radio, or a subscription model, like HBO or Cinemax. While still allowing consumers to make personal copies of their CD's (as mandated by law), SDMI would, through watermarks embedded in the CD and the device reader, make it virtually impossible to distribute those copies to others. Similar digital rights management techniques would, in theory, also enable the record companies to reap greater efficiencies by price discriminating

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Napster, Inc. v. A&M Records, Inc. No. 00-16401. Opinion. (U.S. Court of Appeals for the Ninth Circuit) 2001.

through bundling products (e.g., by genre, artist, label) and selling different levels-of-use rights (e.g., by time elapsed since initial release, number of uses, player type).

## **Napster as Discursive Object(s)**

However, “the technology” was more than the legal-illegal dialectic presented to the court, and, as a social practice, was certainly more widespread. Napster’s ethical and judicial “problems” were, of themselves, not objectively clear. Just a few days before the RIAA filed suit, Fortune magazine had, in a sense, declared the end of such wrangling (“While the piracy protection and other legal issues have yet to be resolved, Internet music is no longer regarded as just a geek fad, but rather as a legitimate business”).<sup>41</sup> Up to several months into the Napster trial, when press reports did mention the lawsuit, their accounts dismissively cast the RIAA, having recently lost its suit against the Diamond Rio MP3 player, as absurdly litigious. There were other stories to tell about Napster at the time. Music aficionados pointed to the application’s community-building tools and search functions as paradigmatic features, while other early adopters focussed on problems such as security, anonymity, and compatibility. Meanwhile, at colleges and universities when a spokesperson for the administration claimed that Napster users were “stealing,” that speaker could just as well have been referring to the theft of network resources, as opposed to music files.<sup>42</sup>

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<sup>40</sup> For an overview of the trade-offs between efficiency and control in the filmed entertainment industry, see Ronald v. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property*, Critical Studies in Communication and in the Cultural Industries (Boulder, Colo.: Westview Press, 1996) 79-115.

<sup>41</sup> “Tune In: Mp3 Goes Mainstream, but Internet Music Has yet to Find Its Perfect Form,” *Fortune Magazine Special* 1 December 1999.

<sup>42</sup> “We found at least 75 Napster.com servers on campus, and there were probably many more than that,” says Lanny Udey, associate dean for learning and IT at Hofstra. ‘Because of the way the application works,

The bandwidth controversy was the first Napster story widely covered by the mainstream press. The dispute began in late 1999, when several universities started experiencing computer network slowdowns due to students running Napster's MP3-swapping service on their campuses. After finding several dozen Napster servers on campus at Hofstra University, IT officials there blocked the service in late December—the subject of the first New York Times article on Napster, published January 20, 2000.<sup>43</sup> Northwestern University also banned Napster around this same time, claiming that the service was consuming as much as 30 percent of the university's high-speed network. By February, 2000, more than 50 universities had followed suit.

Though some were concerned that students were running commercial servers on an educational network, and possibly distributing pirated materials, administrators insisted Napster was primarily a bandwidth problem. As Northwestern's spokesperson put it, "We see it not as a content issue, but a resource issue."<sup>44</sup> At Indiana University, where Napster had been eating up more than 60 percent of the network bandwidth at one point, an IT officer likewise noted that there was just one reason for the ban: "It's an application used primarily for recreation that was consuming an expensive resource."<sup>45</sup>

The student reaction helped reframe the bandwidth problem as a free speech issue, to which school administrators could be more sympathetic. At Indiana University, a sophomore computer science major founded a much publicized "save-Napster"

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they were stealing our bandwidth." Carolyn Duffy Marsan, "Is Rock and Roll Bad for Your Net?," Network World 2 February 2000.

<sup>43</sup> Lisa Guernsey, "Mp3-Trading Service Can Clog Networks on College Campuses," The New York Times 20 January 2000.

<sup>44</sup> Marsan, "Is Rock and Roll Bad for Your Net?"

<sup>45</sup> Kathi Black, "Napster Faces the Big Sleep on Campus," TheStandard.com. A March 2000 feature in Fortune magazine seemed to be of a similar mind, leading with the Indiana story, and not mentioning the RIAA's concerns until the sixth paragraph. Amy Kover, "Who's Afraid of This Kid?," Fortune 20 March 2000; available from <http://www.ecompany.com/articles/mag/1,1640,1058,00.html>; Internet.

movement which, by late March, had collected more than 11,000 signatures.<sup>46</sup> Based on reactions of this sort, several universities agreed to reconsider their Napster blockades. One solution, the product of a town meeting at USC, was to allocate bandwidth on a per-user-per-diem basis, calculated so as to avoid the need for filtering.<sup>47</sup> Another solution, collaboratively engineered by Indiana University and Napster Inc., was to improve Napster's bandwidth efficiency on local high-speed networks. These technical-cum-political fixes led several schools, including Indiana, to reinstate the service on their campuses.

While university IT officers constructed bandwidth-light solutions, other users migrated to bandwidth-intensive alternatives perceived as more resilient to corporate and government intervention. To these users, the Napster "problem" was its centralization. For one thing, while Napster was free to download, the software code was not publicly available, which many open source proponents considered a fatal flaw. In addition, the system architecture relied on indexes that were centrally compiled, making Napster Inc. an "infomediary" like Microsoft or AOL, companies that were very much despised among certain circles. The most best-known "solution" to Napster's centralization problem may have originated as a subversive act hurled directly at one of these companies; the programmer allegedly responsible was Justin Frankel, whose software company, Nullsoft, had been recently acquired by American Online. In March 2000, Nullsoft posted the distributed, open-source file-sharing program Gnutella on its Web site. Unlike Napster, Gnutella's index is distributed among users' machines, making it far

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<sup>46</sup> Lisa Guernsey, "Save the Children, the Whales and Napster," *The New York Times* 9 April 2000.

<sup>47</sup> Brendan Loy, "Student Objection, Legal Opinion Stop Napster Blackout," *The [USC] Daily Trojan* 25 February 2000; available from <http://www.usc.edu/student-affairs/dt/V139/N30/04-student.30c.html>; Internet.



more difficult to control or shut down. Although AOL executives later claimed to have no prior knowledge of the Gnutella project, the Nullsoft Web site boasted, “See? AOL \*CAN\* bring you good things!” Within a few hours, the parent company—which was in the process of acquiring one of the major record labels in the Napster suit—had forced the program to be removed from its subsidiary’s site. By that time, however, the Gnutella program and source code had already been copied and downloaded across the Internet.<sup>48</sup>

Significantly, Gnutella’s production frame constructed decentralization as a technical solution, and explicitly not a social one. The Nullsoft team claimed that the application was designed for the exchange of recipes, not for swapping pirated materials, which, disingenuous as it may be, reflects their noticeable apolitical bias. Even after Nullsoft’s involvement ended, the community of programmers around the world who continued to collaborate on the open source Gnutella “movement” seemed to share the same primarily technical concerns with network efficiency. By contrast, Ian Clarke, the “project coordinator” behind Freenet, was brashly political. In his manifesto, the London-based 23-year-old claimed his system would “[protect] freedom of speech by enabling anonymous and uncensorable publication.” With echoes of people like Stewart Brand and John Perry Barlow,<sup>49</sup> the Freenet mission statement promised to eliminate speech restrictions of all kinds, including copyrights:

The specific purpose of this corporation is...to guarantee consenting individuals the free, unmediated and unimpeded reception and impartation of all intellectual, scientific, literary,

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<sup>48</sup> Amy Harmon, “Free Music Software May Have Rattled A.O.L.,” The New York Times 20 March 2000. Lee Gomes, “Software ‘Free Spirits’ Release Version of Program Mimicking Napster Product,” The Wall Street Journal 15 March 2000.

<sup>49</sup> See Edward Rothstein, “Swashbuckling Anarchists Try to Eliminate Copyrights from Cyberspace,” The New York Times 10 June 2000; available from <http://www.nytimes.com/2000/06/10/technology/10copyright.html>; Internet.

social, artistic, creative, human rights, and cultural expressions, opinions and ideas without interference or limitation by or service to state, private, or special interests.<sup>50</sup>

Like Gnutella, Freenet allows free “peer-to-peer” transfer of any file type, be it software, music, digital films, or recipes. Unlike Gnutella, Freenet anonymously spreads and caches these files across the system, making it “virtually impossible” to remove information that has been posted to Freenet, to locate where on the network information has been stored, or to trace a file to its original source. Clarke has termed this approach “near perfect anarchy.”

All of this is to suggest that Napster’s public meanings were not limited to arguments for and against “contributory” and “vicarious” copyright infringement. Months after the software’s beta release, “the technology” was still being invented, as suggested by the “bandwidth-light” and “anarchist” iterations described above, and many others. If the story was simply that Napster was produced by Fanning, marketed by venture capitalists, and (later) bought by Bertelsmann, then Fanning would indeed be the seminal genius. The record labels, meanwhile, would have to be dismissed as passive bystanders, who simply resisted the inevitable, naively, and perhaps tragically.<sup>51</sup> But agency was more dispersed than that. Fanning’s machine did not convince, say, university administrators that it “worked” until after a compromise had been made. Meanwhile, the record labels on the one hand, and Ian Clarke on the other, were never fully persuaded. Even to its own producers, Napster was not a stable object from one month to the next, as

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<sup>50</sup> “Donations,” Freenet Inc., available from: <http://freenet.sourceforge.net/index.php?page=donations>; Internet; accessed May 1 2001.

<sup>51</sup> As Latour writes, the trouble with this approach is that society is “simply a medium of different resistances *through which* ideas and machines travel.” Latour, Science in Action: How to Follow Scientists and Engineers through Society 136.

the production frame was continually being revised by shifting legal, economic, and technical concerns.

## *Social Construction: Napster Uses*

When we say that one could not speak unambiguously about “the technology” because there were in fact several different Napsters, we are not being “relativistic” for its own sake. Discursive battles were a focal point to the Napster trial—and indeed the motivation behind the trial in the first place. While the record labels were no doubt eager to put Napster out of business, technical measures and market strategies could probably have accomplished this objective more effectively, and at less cost, than any lawsuit. But, for the record labels, the trial was part of a discursive performance aimed at “educating” consumers that downloading music on the Internet was unethical, and, the RIAA hoped, illegal. One of the most quoted sentiments in the RIAA’s argument was Berkley professor David Teece’s comment that “the greatest danger posed by Napster ... is that consumers are beginning to consider free music to be an entitlement.”<sup>52</sup> As Motion Picture Association of America head Jack Valenti put it, “If the court allows Napster and services like it to continue to facilitate massive copyright infringement, there is a grave risk that the public will begin to perceive and believe that they have a right to obtain copyrighted materials for free.”<sup>53</sup> The courtroom was viewed as part of a multi-pronged attack that also involved establishing lobbying groups (e.g., Valenti’s “Copyright

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<sup>52</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Motion of Plaintiffs for Preliminary Injunction. (N.D. Cal. July 26, 2000).

<sup>53</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Declaration of Jack Valenti In Support of Plaintiff A&M Record’s Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

Assembly”), running full-page anti-Napster newspaper ads, and sponsoring “educational” Web sites, which helped teach kids and adults to apply “old values to a new medium.”<sup>54</sup>

The RIAA utilized the courts as a mechanism to shape the discourses produced by a range of interpretive groups, but especially Napster Inc. The RIAA charged that co-founders Shawn Fanning and Sean Parker had intended Napster as a tool for pirating music, that Napster executives themselves used the system for that purpose, and that the company’s marketing actively encouraged infringement on a wide scale. This critique, as noted earlier, assumed that the inventors’ intentions were unproblematically tied to the invention’s inherent character, as opposed to the opposition’s claimed that intention was irrelevant to what users did, even if those practices were illegal. At the same time, however, the RIAA was also asserting that the company’s statements and practices mattered especially by virtue of the fact that they emanated from the interpretive community that actually “owned” the technical system.<sup>55</sup> The trial helped the RIAA win an early victory on this front. Napster quickly changed its promotional message, deleting from its Web site slogans like “you’ll never come up empty handed when searching for your favorite music again!” and “you can forget about wading through page after page of unknown artists.”<sup>56</sup> The company also posted a formal copyright policy so as to qualify (or so it hoped) for safeharbor under the Digital Millennium Copyright Act, and anointed

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<sup>54</sup> “What Is Cyber Ethics?,” [Cybercitizen.org](http://www.cybercitizen.org), available from:

<http://www.cybercitizenship.org/ethics/ethics.html>; Internet; accessed 1 May 2001.

<sup>55</sup> See Foucault on the “author function” in Michel Foucault, “What Is an Author?,” trans. Donald F. Bouchard and Sherry Simon, *Language, Counter-Memory, Practice*, ed. Donald F. Bouchard (Ithaca, New York: Cornell University Press, 1977).

<sup>56</sup> *A&M Records, Inc. v. Napster, Inc.* No. 99-5183. Motion of Plaintiffs for Preliminary Injunction. (N.D. Cal. July 26, 2000).

lawyers and spokespersons to speak on behalf of the founders.<sup>57</sup> These were first steps toward stabilizing Napster's meaning in the public sphere.

This chapter and the one that follows will examine several other strategies through which public meanings were created, leading the artifact's interpretive flexibility to decrease. In doing so, we will break from the positivist approach that says Napster was shaped by the "natural" market logic of the Internet. We will also break from the more populist rhetoric that has over-emphasized the social power of "the masses" at the expense of overlooking the court decisions, business alliances, and other institutionalizing forces that also structured Napster's social meaning. Instead, this chapter will describe the multilayered strategies that guided Napster toward rhetorical stabilization. From there, we will be able to assess with greater precision the ways in which "the technology" may have been used to resist and subvert those strategies.

## **"Sampling"**

Whereas the RIAA emphasized Napster's authorship, Shawn Fanning's own declaration posited a more social constructivist approach, which cast Napster as derivative of predecessor technologies, such as IRC and MP3.lycos.com, and as jointly produced by an extended community of programmers and music fans. Similarly, whereas the record labels saw all Napster users as engaged in a single, unified practice (i.e.,

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<sup>57</sup> Ibid.

piracy),<sup>58</sup> Napster Inc. advanced a reading that considered “the user” to be more fragmented. Even if every individual user was engaged in piracy, Napster argued, the important thing was that a “substantial” portion of Napster’s *uses* were legitimate. One example of such a use was trading music that was in the public domain already, or had been licensed to Napster by the copyright holder. No one doubted this was legal, only that this use was “substantial.”

A more common—and controversial—user practice was that of temporarily “sampling” MP3’s as a way to inform purchasing decisions.<sup>59</sup> Napster argued that “sampling” was a legitimate fair use, particularly because the practice did not have any demonstrated harmful affect on the market for the plaintiff’s copyrighted works. The defense pointed to seven independent studies showing that Napster users were buying at least as much music, if not more music, than before they began using the service, and noted that record sales had actually been increasing since the RIAA filed suit.<sup>60</sup>

According to Napster’s expert witness, 84% of Napster users downloaded music to see if they wanted to buy the CD, and, of that group, 42% had increased their music purchasing, 53.3% had stayed the same, and only 4.7% had decreased purchases.

However, the numbers submitted by the RIAA’s expert, Nancy Jay, told a different story. By her tally, 41% of respondents said that Napster decreased, or “displaced” music purchases, compared to just 8.4% who said Napster led them to increase their music purchases. This disparity, like the other contradictions over Napster’s technical

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<sup>58</sup> As evidence, the RIAA noted that every Napster user’s playlist in their sample included at least some copyrighted materials for others to download, and determined that at least 87% of all the files being downloaded on Napster were copyrighted by plaintiff companies. *Ibid.*

<sup>59</sup> *Napster, Inc. v. A&M Records, Inc.* No. 00-16401. Appellant Napster, Inc.’s Opening Brief. (U.S. Court of Appeals for the Ninth Circuit) 2001.

<sup>60</sup> *Ibid.*

characteristics, emerged from interpretive differences, as opposed to “real” ones, in any positivistic sense. The Jay report, for example, classified as “displaced sales” statements such as “I can get free music” and “[Napster is] easier, better than a CD.” Napster Inc. interpreted these same claims as “sampling” and “space-shifting,” respectively.<sup>61</sup>

Paradoxically, as much as the “facts” were contested, the dispute was underpinned by shared assumptions which closely, and rather narrowly, defined what purposes those facts ought to serve. Despite its apparent boldness, the “sampling” doctrine Napster proposed was fairly, and perhaps inevitably, conservative—the main point of contention was not over whether companies who distribute music *should* remunerate copyright holders, but that Napster *did*. Napster’s defense claimed that its system was indeed financially benefiting record labels, and, if the amount of compensation was not sufficient, then a mandatory licensing arrangement should be imposed.<sup>62</sup> Napster and the RIAA both agreed that copyright was still a necessary incentive on the Internet to motivate artists to create, especially given that information goods could now be easily copied and distributed at close to zero marginal cost. Without these incentives, “quality” music would never get produced, and the market would fail. Although they differed on implementation schemes, both parties operated under this basic dilemma, which economists refer to as a “public good” problem, and further agreed that “sampling” would improve market efficiency overall, making it possible to sell more music, to more consumers, in more formats, than before.

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<sup>61</sup> Ibid.

<sup>62</sup> In February 2001, Napster Inc. made public its proposed settlement offer of \$1 billion over five years. “Napster Makes Public Business Model for New Service,” [Press Release], Napster Inc., 20 February 2001, available from: <http://www.napster.com/pressroom/pr/010221.html>; Internet; accessed 1 May 2001.



## Alternative Constructions

The “public good” rationale for copyright is not the only logically evident position even from an economic perspective. Copyrights give producers a monopoly over their creative works, and, as with all monopolies, this can dampen the incentives for them to produce quality goods and also lead to artificial scarcity (which is especially salient in information markets). The marginal cost of reproducing and distributing information on the Internet is close to zero, yet consumers who cannot or will not purchase them at the market’s price (maybe they are willing to pay \$0.20 for an MP3, but unable to pay \$2) are shut out, creating a welfare loss to both consumers and suppliers. Furthermore, by restricting inputs to innovation, copyright laws may actually worsen the problem they aim to solve even further still. To the extent that creativity depends on being able to sample, appropriate, recontextualize, adapt, and transform, the material goods of one’s culture, copyright laws actually regulate against the very act of turning these “raw materials” into value-added outputs. Unfortunately, there isn’t any empirical way to determine whether a copyright creates a solution to a “public good” problem, or a “monopoly” problem in its own right. Analyses of either, as James Boyle has written, depend on a “pre-reflective categorization from which the analysis flows.”<sup>63</sup>

Another common economic critique of copyright law is that, while copyrights may reward output, they do little to stimulate inputs, and indeed may obstruct them.<sup>64</sup> Many Napster supporters who call for the abolition of such restraints, including John

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<sup>63</sup> James Boyle, “Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Economic Property,” Vanderbilt Law Review 53.2007 (2000); see also, James Boyle, Shamans, Software, and

Perry Barlow, the onetime lyricist for the Grateful Dead, argue that copyright is not a primary mechanism for rewarding artists and incenting them to create. For example, few artists ever see the proceeds from album sales, as royalties generally go toward paying contractual obligations to the record labels. Barlow suggests that, by trying to restrict the free-flow of information on the Internet, copyright presents both a real cost (digital rights management, legal fees) and an opportunity cost (free distribution). Meanwhile, artists make art for personal reasons—satisfaction, status, glory—and therefore may prefer that their work circulate to the broadest possible public. Barlow claims that future revenues will come from live appearances and other “excludable” (as opposed to public) goods, which free distribution in fact promotes.

To treat the Napster problem as an economic one, rather than a debate over modes of cultural and ideological conveyance, was itself a consensus of sorts. This consensus was evidenced not only by Napster’s emphasis on the system’s ready-made viability as a marketing mechanism, but also by the company’s construction of “personal” use. While Napster invoked the defense that the system was a “personal” one-to-one borrowing, the argument did not construct “sampling” to be “personal” in the sense that it was personally meaningful to the user. However, the distinction drawn between “personal” and “commercial” may not have been so absolute. In the postmodern context, after all, mass media and other “commercial” goods are, as Rosemary Coombe notes, “the most important cultural resources for the articulation of identity and community in Western societies, as traditional ethnic, class, and cultural indicia fade, and minority groups must organize along alternative lines.” Applying this argument to the law, Coombe suggests,

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Spleens: Law and the Construction of the Information Society (Cambridge, Mass.: Harvard University Press, 1996).

If what is quintessentially human is the capacity to make meaning, challenge meaning, and transform meaning, then we strip ourselves of our humanity through over-zealous application and continuous expansion of intellectual property protections.<sup>65</sup>

Invoking Bakhtin's notion that all personal and cultural life is essentially dialogical, Coombe argues that to be denied access to shared cultural symbols is to be denied a portion of one's self. Thus, the practice of "sampling" (say) your wedding song, or the theme to your high-school prom, could be construed as the act of recapturing a sign that is partially your "personal" property to begin with, whether or not you have the intention to buy.

Finally, Napster Inc. did not try to appeal to other possible "fair use" defenses by for example claiming that "sampling" was a free speech entitlement or a "transformative use." By contrast, the rap artist Chuck D's interest in Napster, stemmed from his conviction that access to rap music, which he once dubbed the "black CNN," should be as much an entitlement as access to news media. By the same token, in the late 1980's, Chuck D also argued that musicians like himself should be entitled to "sample" freely from other creative works, as a form of expression. Instead, calling for a very different sort of freedom—one of convenience, rather than equity or personal meaning or expression—Napster Inc. argued that free "sampling" merited protection under the "fair use" provision because transaction costs were otherwise too burdensome for a practice that was so localized and harmless.

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<sup>64</sup> Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* 104-5.

<sup>65</sup> Rosemary J. Coombe, "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue," *Texas Law Review* 69.1853 (1991)

## **Hank Barry's "Bridge"**

Just as the RIAA hoped, through its lawsuit, to shape the social construction of “the technology” by enrolling third-party discursive alliances, Napster’s “sampling” construct was also implicit in a broader process of enrolling outside support. Even assuming that Shawn Fanning actually had a teleological vision of Napster’s full potential, he needed funding from investors, who in turn transformed Napster Inc. into a “working” business, something more than what Fanning may have seen as a “working” machine. To appeal to desired user groups, the company had to bolster security features, ensure anonymity on the system, and improve the client interface. To appeal to universities, the company modified the means by which the software handled requests on local high-speed networks. To enroll new investors, as well as more mainstream audiences, Napster Inc. discursively recast “the technology” as a legitimate home recording device, and a promotional tool for musicians and record labels. In yet another translation, to the court, Napster Inc. changed its marketing message and instituted a copyright policy.

The association Fanning drew between IRC and MP3 search engines was, by itself, barely workable, much less revolutionary. Even after numerous adjustments had been made, Fanning could not have “disrupted” the paradigm of one institution, commercial or otherwise, without assistance from another. This was why it was so vitally significant that, in May 2000, Napster received a \$15 million investment led by Hummer Winblad, one of Silicon Valley’s leading venture capital firms. The VC’s invested not only money, but also the social capital and corporate know-how to make Napster’s

system a definitive rival to the recording industry's paradigm. "The technology" became something that the press, the courts, and even the U.S. Senate were, at the very least, obliged to argue against.

The venture firm installed partner Hank Barry as Napster's new CEO with the explicit mandate to enroll the widest possible audience, or as he put it, "build a bridge to all of the constituencies that can benefit from Napster."<sup>66</sup> Not coincidentally, Barry had been a musician, record executive, and copyright lawyer before joining Hummer Winblad. This appointment was, on the one hand, implicit in a business strategy aimed at shaping "the technology" to appease record labels and artists, while, on the other hand, part of Napster's ongoing attempt to enroll outside support by undercutting the record labels' legitimacy. Testifying before the Senate Judiciary Committee in July 2000, Barry used broad strokes to paint the Napster debate as a contest over business methods, not copyright. Making an appeal to the promise of the Internet as a whole, he opened his testimony with a quote from Intel's Andy Grove: "The whole Internet could be re-architected by Napster-like technology." Barry went on to claim that Napster's model symbolized "new, more efficient and vibrant" paradigms, but was being challenged by others who "attempt to protect themselves by keeping down innovative Internet technologies."<sup>67</sup> With statements such as these, Barry reframed the debate by appealing to social categories that cut across traditional political, economic, social, and cultural lines,

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<sup>66</sup> Matt Richtel, "Napster Has a New Interim Chief and Gets a \$15 Million Investment," The New York Times 23 May 2000; available from <http://www.nytimes.com/library/tech/00/05/biztech/articles/23music.html>; Internet.

<sup>67</sup> "Music on the Internet: Is There an Upside to Downloading?," United States Senate Committee on the Judiciary (Washington, DC: 2000), vol.; available from <http://www.senate.gov/~judiciary/wl7112000.htm>; Internet. For Hank Barry's testimony, see, [http://www.senate.gov/~judiciary/7112000\\_hb.htm](http://www.senate.gov/~judiciary/7112000_hb.htm)

and typified the move to “subjectify” the music industry’s position as the dominant paradigm in the public sphere.

Of course, the record labels saw Napster as a business issue as well. They were eager to open new distribution channels, and had in fact already partnered with Internet ventures including Launch.com and MP3.com. The difference was that the labels, who were financially and socially invested in other aspects of the market, sought to achieve a balance between economic efficiency and strategic control. “We don’t have a protectionist attitude,” one Sony executive told *The New York Times*. “Come back in two years, and let’s see what the world looks like. The models are evolving. If we take Napster to be the paradigm, it will hurt our business.”<sup>68</sup> The labels insisted that the market would be more profitable if they could obtain, through digital rights management, the ability to price discriminate on the Internet, and also to calibrate “sampling” practices to maximize profits across media. Just as Napster was trying to leverage its user-base and innovative technology to broker a more favorable deal with the RIAA, the record labels were also hoping to leverage their strategic assets—content—to gain a stronger foothold in the online music space. They insisted that, even if their own business proposition was ill-conceived (and it was frankly too soon to tell) their legal and ethical rights to make those decisions should not be discounted. In sum, while these competing frames encapsulated two different sets of beliefs concerning management, political, and social theory, they were not entirely incompatible, as they were underwritten by a common logic of capital.<sup>69</sup>

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<sup>68</sup> Laura M. Holson, “Which Direction for Digital Music?,” *The New York Times* 20 November 2000; available from <http://www.nytimes.com/2000/11/20/technology/20TUNE.html>; Internet.

<sup>69</sup> Bettig makes a similar argument about the relationship between the cable and filmed entertainment industries. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property*.

— CHAPTER FOUR —

*Social Construction: Napster Users*

The debate over “the technology” was not just a contest between competing legal and economic values. In the broader social sense, the dispute was underpinned by a need to discursively define “Napster users” as a cultural category. During the summer of 2000, the Napster demographic could be represented as wholly integrated members of society (“music fans”), external threats (“pirates”), or both. While Napster was popular with college students, especially young men, surveys by commercial and noncommercial research organizations suggested that most Napster users were actually between the ages of 25 and 49, and that the most characteristic variable was not age, but rather online tenure, the majority of Napster users having been online more than two years.<sup>70</sup> Nevertheless, as is often the case with new technologies, adolescent was a metonymy for Napster users as a whole.

In the trial context, for instance, Nancy Jay’s report for the RIAA, on which the District Court based its finding of fact, focussed exclusively on college students. This emphasis on the “underaged” subset of users was echoed and extended beyond the courtroom by the press. A March 2000 article in Fortune magazine observed,

No wonder teens are smitten. Since launching last September, Napster has been the buzz of college dorms and high school locker rooms around the country. Napster claims its user base grows between 5% and 25% daily (daily!). As of early March some five million people had downloaded the software. And why wouldn't teens flip for Napster? Mixing

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<sup>70</sup> 13 Million Americans “Freeload” Music on the Internet (Pew Charitable Trust, 2000); available from <http://www.pewinternet.org/reports/toc.asp?Report=16>; Internet. See also, Aram Sinnreich et al, Digital

music and hanging out in a chat room sounds like a teen's dream. As one 15-year-old user, Sarah Gunther, puts it: "I love Napster. I'm never buying a CD again."<sup>71</sup>

While this observation came in the article's fifth paragraph, Newsweek published a cover story three months that was even more direct about the assumption teens were the demographic force behind the Napster phenomenon. In the lead paragraph, which opens with the sentence, "Meet the Napster Generation," technology writer Steven Levy introduces the reader to Rachel, 14, who says that teenagers use Napster because they "don't have much money" and therefore "don't think it's anything bad." By way of contrast, Levy goes on to cite a 50-year-old Napster user who is morally conflicted over the program and feels he has "gotta stop."<sup>72</sup> As one industry consultant commented: "Every time a 42-year-old figures out how to lock something up, a 14-year-old is going to figure out a new program."<sup>73</sup>

The mythologizing of the child inventor by the press helped situate "the technology" within this rhetoric of adolescence. Shawn Fanning was often stereotyped as a liminal teen—auteur, outcast, hacker, drop-out, loner. Coupled with the story of Jon Johansen, the Norwegian teenager whose DVD encryption code was also being prosecuted under the DMCA, the Napster narrative expressed, on the one hand, a dystopian case for adult supervision, but, on the other hand, a utopian promise that young "computer wizards" would pave the way for the future.<sup>74</sup>

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Music Subscriptions: Post Napster Product Formats (Jupiter Communications, 2000); available from <http://www.jup.com/company/pressrelease.jsp?doc=pr00721> (Press Release); Internet.

<sup>71</sup> Kover, "Who's Afraid of This Kid?"

<sup>72</sup> Levy, "The Noisy War over Napster."

<sup>73</sup> Karl Taro Greenfeld, "The Free Juke Box," Time 27 March 2000; available from [http://www.time.com/time/everyone/magazine/sidebar\\_napster.html](http://www.time.com/time/everyone/magazine/sidebar_napster.html); Internet.

<sup>74</sup> Amy Harmon, "Online Davids Vs. Corporate Goliaths," The New York Times 6 August 2000; available from <http://www.nytimes.com/library/review/080600napster-review.html>; Internet.



On the utopian side, Newsweek's "Napster Generation" cover story celebrated the magnitude of Fanning's personal achievement. The article noted Fanning's family had been on welfare at one point, Shawn and his siblings were briefly shipped to a foster home, and that he later "applied to only two [colleges] because he didn't have the \$40 application fee—he was too proud to ask his uncle for the money." Shawn Fanning was a real-life Horatio Alger character, a white middle-class boy who made good in the business world by the courage of his convictions. Time magazine's creation story was no less sensational in noting that, while writing code in his uncle's basement, "[Fanning] didn't need friends, family, financing—he almost went without food."

The youth as inventor-hero was deeply rooted in the cultural imaginary. Recent examples of innovators mythologized as twenty-something whizzes include Steve Jobs, Tim Berners-Lee, and Jerry Yang—not to mention Bill Gates, who was 19 when he left college to start Microsoft.<sup>75</sup> At the turn of the century, the youthful pioneers of radio were similarly valorized by the popular culture. In 1907, as Susan Douglas notes, The New York Times Magazine ran a cover story on 26-year-old Walter J. Willenborg, under the headline, "New Wonders with 'Wireless'—And by a Boy." Douglas argues that the fascination with Willenborg, and others like him, captured a cultural redefinition of white middle-class American boyhood—from a time of physical prowess into one where young men channeled their virulence into mechanical and electrical tinkering, preparing themselves for useful positions in an industrialized society.<sup>76</sup> The amateur operators, many of whom built their own wireless transmitters and receivers, pleased their elders

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<sup>75</sup> Colin Stewart, "The Art of Innovation," [Salon.com](http://www.salon.com) 28 November 2000; <http://www.salon.com/tech/feature/2000/11/28/art/index.html>; Internet.

<sup>76</sup> Susan J. Douglas, [\*Inventing American Broadcasting, 1899-1922\*](#), Johns Hopkins Studies in the History of Technology (Baltimore: Johns Hopkins University Press, 1987) 187-94.

with their technological know-how—even while using “the technology” to misbehave, disrupting businessmen’s conversations, or perhaps challenging the authority of the U.S. Navy officers with whom they also shared the airwaves.<sup>77</sup> These playful teens, Douglas suggests, were substantial innovators, producing unforeseen technical solutions, and inventing new uses for the medium. However, their behavior went from being celebrated by the mainstream press in 1907, as a useful and appropriate past-time for middle-class boys, to being condemned as reckless by adult society just a few years later. Following the public outcry over the Titanic’s unsuccessful distress calls, the federal government in 1912 regulated against amateur use of the airwaves, imposing harsh penalties on “malicious interference” and other favorite pastimes.

There was a similar ambivalence toward Napster’s inventor-hero, but this ambivalence was not divided the way Douglas suggests the amateur operator debate began, in 1907, in tension between the pro-amateur mainstream press and the anti-amateur corporate interests, perhaps because these had become so intertwined during the intervening years.<sup>78</sup> The ambivalence toward Shawn Fanning was *internal to* much of the press’s rhetoric. This was captured by Time’s October 3, 2000, depicting him as an average middle-class teen, wearing a T-shirt, Red Sox cap, an headphones, along with an ambiguous grin, and the part-question-part-statement headline, “What’s Next For Napster.” At the same time, there was also another young white male on this cover, grinning in the upper-right corner, above the tagline: “Inside a Teen’s Stock Scam.” These two young whizzes were promising and frightening at the same time, perhaps

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<sup>77</sup> Ibid., 191-2.

<sup>78</sup> Ben H. Bagdikian, The Media Monopoly, 5th ed. (Boston: Beacon Press, 1997).

precisely *because* they were a “monster” hybrid of both exoticized otherness and idealized sameness.<sup>79</sup>

Whereas the Titanic disaster made the case for radio regulation in 1912, the argument for regulating the teenage body, in Napster’s case, had already been made. Adolescents’ media consumption habits, for instance, had been at the center of the 1996 Communications Decency Act, which made it illegal to allow anyone under 18 to gain access to “patently offensive” materials over the Internet. Although the Supreme Court later struck down this provision, the anxiety over teenagers’ consumption of “inappropriate” entertainment was reinvigorated in 1999 after several much publicized high-school shootings, and became a central campaign issue in the 2000 presidential elections—around the same time that Napster was becoming especially popular among fans of niche music genres such as hip-hop, indie rock, punk, and electronica.<sup>80</sup>

Napster users also resonated as a symbol for pathologizing and criminalizing kids’s use of technology. The pathologizing of technologies, especially television and video games, as addictive substance resonated with the genre of front-page news stories with headlines such as “Napster Frenzy: Racing Against a Midnight Shutdown, Area Music Fans Scramble to Download Recordings” and “A Binge on Music at State U.”<sup>81</sup> The criminalization of technologies was made even more explicit, not only by the RIAA and the District Court Judge who declared Napster use “wholesale infringement,” but also by the Justice Department. For example, as the keynote speaker to an October 2000

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<sup>79</sup> Dick Hebdige shows how “exotica” and “sameness” can both serve as paths toward the “ideological incorporation” of subcultures in Dick Hebdige, Subculture, the Meaning of Style (London: Methuen, 1979) see esp. 97.

<sup>80</sup> Sinnreich, Digital Music Subscriptions: Post Napster Product Formats.

<sup>81</sup> Becky Beaupre, “Napster Frenzy; Racing against a Midnight Shutdown, Area Music Fans Scramble to Download Recordings,” Chicago Sun-Times 28 July 2000.

conference on teaching “cyber ethics” to children, Michael Vatis, the director of the FBI’s National Infrastructure Protection Center, noted that:

Incidents such as hacking into Department of Defense computer systems during deployment of troops to the Persian Gulf in February 1998; theft of proprietary software worth 1.7 million dollars from a NASA computer system responsible for space station operations in 1999; and denial of service attacks on CNN, Yahoo, Amazon.com, and Ebay in February 2000 *are only three of the numerous examples of computer crimes initiated by individuals under the age of eighteen.*<sup>82</sup> (emphasis added)

People like MPAA head Jack Valenti similarly cast “Napster users” as a risk to the nation’s well-being, by connecting “Internet intruders” to the multi-billion dollar global theft that, in 1998, resulted in the loss of “109,000 American jobs” in the software sector alone.<sup>83</sup> The problem for law enforcement, Vatis suggested, was not only the direct harm done by the youthful intruders themselves, but also the fact that they were indistinguishable from “a hostile foreign nation trying to steal secrets or shut down our military operations.”<sup>84</sup>

Vatis’s comments were part of an effort to educate the public about adolescents’ misuse of information technologies. As part of this outreach, Attorney General Janet Reno had recently announced the launch of Cybercitizenship.org, a Web site designed, according to the Justice Department press release, “for parents and educators...to teach

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Matt Richtel, “A Binge on Music at State U.,” The New York Times 9 July 2000; available from <http://www.nytimes.com/library/financial/personal/070900personal-napster.html>; Internet.

<sup>82</sup> Cherie A. Geide, ed., National Conference on Cyberethics: Teaching Responsible Use of Technology, Executive Summary (Marymount University, Arlington, VA: Marymount University, Arlington, VA, 2000); available from <http://www.marymount.edu/ethics/cyberethics/cyberethics4.html>; Internet.

<sup>83</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Declaration of Jack Valenti In Support of Plaintiff A&M Record’s Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

<sup>84</sup> Michael Vatis, National Conference on Cyberethics: Teaching Responsible Use of Technology, Keynote [Transcript] (Marymount University, Arlington, VA: Marymount University, Arlington, VA, 2000); available from <http://www.marymount.edu/ethics/cyberethics/cyberethics5.html>; Internet.

kids the right ways to use the Internet.”<sup>85</sup> Though the Napster injunction was still pending—and the trial had not even begun—the government-sponsored Cybercitizenship Web site, which also received funding from the RIAA, had a decidedly anti-Napster spin. Under a section titled “What is cyber crime?” the site coyly noted, “Recently, tools have surfaced that allow Web users to download and save music from the Internet for free—music that is copyrighted by artists and sold in stores. Taking tracks from the Internet is no different from stealing a CD or tape from a music store.”<sup>86</sup> These thinly veiled references were later toned down, and then removed. Nevertheless, as of May 2001, the site still noted that, “children armed with computers can be dangerous and cause serious damage and harm, regardless of whether they are being mischievous or trying to intentionally commit cybercrimes.”<sup>87</sup>

To be sure, the construction of “Napster users” as adolescents was not singly motivated toward the criminalization of youth culture, as these signs were multilayered and flexible enough to serve several interests at once. While the RIAA branded as pirates Napster’s youthful founders and followers, the labels refused to prosecute individual consumers, whom they portrayed as being victimized by “the technology.” Similarly, Napster Inc. shared with the RIAA, and with the broader culture, a complex and

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<sup>85</sup> “U.S. Justice Department, Leading Technology Association Launch Web Site to Teach Children Responsible Computer Use,” [Press Release], Department of Justice, 5 September 2000, available from: <http://www.usdoj.gov/criminal/cybercrime/cybercit2.htm>; Internet; accessed 1 May 2001.

In a public letter to parents, released to coincide with the launch of [cybercitizenship.org](http://cybercitizenship.org), Janet Reno wrote: “While most children know that it is wrong to break into their neighbor’s house or read their best friend’s diary, fewer realize that it’s wrong to break into their neighbor’s computer and snoop through their computer files. As children learn basic rules about right and wrong in the off-line world, they must also learn about acceptable behavior on the Internet. We need kids to understand that hacking is the same as breaking and entering—that being a hacker doesn’t make them ‘cool’ or show their smarts—it makes them a criminal!” Janet Reno, “Letter to Parents on Cybercitizenship and Cyberethics,” Department of Justice 5 September 2000; <http://www.usdoj.gov/criminal/cybercrime/cybercit.htm>; Internet.

<sup>86</sup> Will Rodger, “Justice Site to Drop Anti-Napster Spin,” USATODAY.com 21 September 2000; <http://www.usatoday.com/life/cyber/tech/cti560.htm>; Internet.

contradictory relationship toward youth culture. On the one hand, the company exploited its youth culture cachet by marketing its service as the “next MTV” and celebrating Shawn Fanning as the company spokesperson. This cachet was in many ways Napster’s core asset. In March 2000, then-CEO Eileen Richardson noted that an “underground feel” was part of what distinguished her company’s product (“People love the fact that they can say, ‘Pssst. Have you heard about Napster?’”).<sup>88</sup> A few months later, in his attempts to build a bridge to wider audiences, Hank Barry used the company’s youth appeal to naturalize “the technology” by noting, “The reality is that the next big thing is already being developed somewhere by some 17-year-old high school student. Technology will continue to evolve.”<sup>89</sup> On the other hand, these same statements, made by middle-aged executives, can also be viewed as an objectification of Napster’s youth culture origins. The distinction between Napster’s management and Napster’s founders was made explicit in the disavowal of various incriminating e-mail correspondences uncovered during the litigation as the “legal characterizations of two 18-year-olds before the company had any professional management in place.”<sup>90</sup> The narrative of Napster’s corporate culture was rewritten, as company statements and press releases started to embrace the Time and Newsweek creation stories that celebrated Shawn Fanning’s genius but were much more reticent toward teenagers in general. Gradually, and without much explanation, Sean Parker, the more anarchical of Napster’s co-founders, was expunged from corporate histories, and sent back to college.

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<sup>87</sup> “What Is Cyber Ethics?,” [Cybercitizen.org](http://www.cybercitizenship.org/ethics/ethics.html), available from: <http://www.cybercitizenship.org/ethics/ethics.html>; Internet; accessed 1 May 2001.

<sup>88</sup> Kover, “Who’s Afraid of This Kid?”

<sup>89</sup> Chuck Philips, “Music Giants Miss a Beat on the Web,” *Los Angeles Times* 17 July 2000.

<sup>90</sup> *Napster, Inc. v. A&M Records, Inc.* No. 00-16401. Appellant Napster, Inc.’s Opening Brief. (U.S. Court of Appeals for the Ninth Circuit) 2001.

## **Ideological Dimensions**

Information economists claim that the problems associated with media concentration can be tempered in the long-run by technological innovation. In practice, as critics like Ronald Bettig have argued, this is rarely the case: new technologies have historically been incorporated by old media powers.<sup>91</sup> Bettig cites the examples of cable television and the VCR as case studies in how supposedly disruptive technologies are eventually, through acquisition and public policy, brought into line with the interests of entrenched media institutions, and in turn the interests of cultural elites.

Though its timing was somewhat unanticipated, the Napster-Bertelsmann alliance was not entirely surprising for perhaps this reason. According to a Napster-Bertelsmann press conference held October 31, 2000, Bertelsmann had agreed to loan Napster an undisclosed sum in order to help the technology company develop a secure file-sharing subscription service, and, conditioned upon the service being implemented, the German media giant would drop its portion of the lawsuit. The press inferred from the statement that Bertelsmann and Napster had broken ranks with their closest allies, Bertelsmann with the other record companies, Napster with their users. “The real surprise is coming for those users who convinced themselves that Napster’s growth had anything to do with anti-authoritarian zeal,” Clay Shirky wrote in *Feed* magazine; *Salon* magazine called the deal “one more victory for big company profiteering.”<sup>92</sup> Conversely, *The New York*

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<sup>91</sup> Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* 100.

<sup>92</sup> Clay Shirky, “[Daily News],” *Feed.com* 1 November 2000; [http://www.feedmag.com/templates/daily\\_master.php3?a\\_id=1381](http://www.feedmag.com/templates/daily_master.php3?a_id=1381); Internet. Katharine Mieszkowski,

Times praised the alliance in an editorial stating that, even though the arrangement “may irritate the 40 million Napster users” who will “lose their free ride,” the deal was to be commended as a service to the public interest.<sup>93</sup> The Times’s reaction reflected the sentiments expressed by the mainstream press, as well as the Senate Judiciary Committee chairman, that music companies should open their catalogues to the Internet, that copyright interests should be enforced, and that consumers should be made to pay.

However, Bettig’s invention-to-incorporation model breaks down in our own analysis when we consider that “the technology” was always a composite of heterogeneous social determinants, including prior objects, practices, and habits. Just as there was no single moment of invention, and no stable object of diffusion, there was no particular point of ideological capitulation, either. Napster’s corporate discourse had been moving toward this announcement since Hank Barry took over as CEO in May, and arguably well before then; similarly, Bertelsmann, the fifth-largest of the Big Five record labels, had long viewed online distribution channels as central to its corporate strategy, and had already made major investments in Barnesandnobles.com and CDNOW.com. Moreover, while this particular business deal may have been driven by a convergence of corporate values, “the technology” was, as noted above, always being shaped and reframed by the social constructions of “Napster use” and “Napster users.” Which is to say, since there was no single locus of domination, there was really no reason to privilege any one moment of incorporation over another.

Despite all this, the fact that technologies are composed by collective action should not negate the concerns that critics like Bettig, Chomsky, and Schiller have raised

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“Maverick or Monopolist?,” [Salon.com](http://www.salon.com/business/feature/2000/11/02/bertelsmann/print.html) 2 November 2000; <http://www.salon.com/business/feature/2000/11/02/bertelsmann/print.html>; Internet.



about the concentration of power and ideology in the media industry. Though control was perhaps not as absolute as some Frankfurt school critics might have suggested, there were certainly authoritative discourses that had more power than others in terms of being able to structure how “the technology” was perceived by other social groups, and to inflect alternative interpretations. Not all interpretive groups had the same institutional resources—the same access to the press, the same means of production, the same cultural prestige, the same economic base.

Nor did all groups carry the same discursive authority. In so far as they were able to produce “authoritative” meanings, the courts—not the corporations—were perhaps the “dominant” institution. Despite the Napster-Bertelsmann alliance, the Ninth Circuit Court of Appeals upheld and remanded (with a few slight modifications) the District Court’s injunction in February 2001. On March 5, 2001, the District Court’s injunction issued, declaring that Napster begin blocking from users access to songs which copyright owners requested be removed from the system. A few weeks later, Judge Patel scolded Napster’s filtering process, calling their efforts “disgraceful,” and instructed the company to delist not only specific song titles, but also variations on those titles, which users had been using to elude the company’s filters. Where Napster.com had once boasted that “you’ll never come up empty handed when searching for your favorite music again!”, the Web site now contained the following carefully worded admonition:

Napster is continuing to comply with the District Court’s injunction and to prevent the record companies from shutting down file sharing. In the process of doing so, we have implemented a range of filters designed to remove from the Napster service all copyrighted works for which we have received notice... While many of the variations in artist and title names are the natural result of individuals naming their own files, some of the variations are deliberate attempts to evade the filters and share material over the Napster service that

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<sup>93</sup> “The Napster Deal,” Editorial, The New York Times 2 November 2000.

would otherwise be blocked. Napster's terms of service prohibit the use of evasive measures such as pig latin, napcameback, napsterdecoder and otherwise deliberately altering file names in order to evade Napster's filters. Users found to be employing such evasive techniques will receive a warning and those who continue to share such files will be blocked from using the Napster service. This determination is based on an examination of the file names the user is making available to the Napster index.<sup>94</sup>

Although this was not by any means an admission of guilt, as the court case was still pending, this front-page notice reflected the degree to which the discursive alliance between Napster Inc. and "Napster users" had digressed over time.

In addition to shaping Napster's marketing messages, the state's power to inflect the social rhetorical also operated on a more subtle level. By amassing a range of amicus briefs, declarations, and depositions into the canonical record, yet overlooking other sources, such as testimonies from users, the trial helped to delimit what positions would become reasonable starting points for debate in the future, while pushing those opinions on the margins even further out. Perhaps most notably, though they were labeled as key forces in the discussion, no adolescent users, other than Shawn Fanning, were asked for their input. Even so, the courts could not produce socially accepted meanings entirely on their own. Other groups had to "buy into" this discourse. The amortization of vested (dominant) interests was supported by The New York Times, for instance, and arguably Napster's alignment with Hummer Winblad, and later Bertelsmann.<sup>95</sup> While helping to subjectify the record industry's position, these public institutions also affirmed the logic of intellectual property and of capital as a whole. As these meanings were layered upon

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<sup>94</sup> "Napster," ['Home' Page], Napster Inc., available from: <http://www.napster.com>; Internet; accessed 1 May 2001.

<sup>95</sup> I borrow the phrase "amortization of vested interest" from Bijker, The Social Construction of Technology.

meanings, the options narrowed, and Napster was “branded” as a music subscription service, where users would pay for convenience, access, and ease of use.<sup>96</sup>

Meanwhile, one could argue that Napster was more destabilizing as an everyday practice than as a bundled set of legal doctrines, consensual ideas, and marketing messages. If people make sense of the world through their concrete actions, not through abstract concepts and values,<sup>97</sup> then using Napster was indeed “ideological” in the sense that “the technology” was presented as an alternative way of relating to cultural goods, where information markets were in a sense more free-floating, and “carnavalesque.” By this same token, the Bertelsmann-Napster alliance would indeed have had a “chilling” effect on the cultural meanings produced through such everyday practices. Prior to striking the deal with Bertelsmann, Napster Inc. had joined the SDMI coalition that sought to force online consumers to remunerate suppliers in more ways than ever before—by time, by medium, by number of uses. But with Bertelsmann’s support, Napster actively engineered technologies to regulate consumption practices further still. Napster Inc. developed a business model that entailed not only charging a subscription fee, but also these restraints on access and use:

The new Napster, slated to launch this summer, will be designed as a promotional service with fidelity limitations of 128 kbps and lower. Users will be asked to pay an additional fee in order to burn CDs and to transfer their music to portable devices.<sup>98</sup>

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<sup>96</sup> Market research firms created a new genre of reports in which they tried to determine what users found so likeable about Napster, and at various price they would be willing to accept what restrictions on similar services. In one of the more colorful of these reports, Jupiter Communications likened Napster to eBay, the online auction site, and described the community aspects of both services as a new concept called “Users as Programming.”

<sup>97</sup> See for example Ann Swidler, “Culture in Action: Symbols and Strategies,” American Sociological Review 52.2 (1986)

<sup>98</sup> “Napster Makes Public Business Model for New Service,” [Press Release], Napster Inc., 20 February 2001, available from: <http://www.napster.com/pressroom/pr/010221.html>; Internet; accessed 1 May 2001.

Although “the technology” had at one point exposed the alternative, Napster was now being devised to regulate at what speed, how often, where, and at what cost one engaged with the system. As much as the company’s discursive stance symbolized their “reformed” sensibility, these technical adjustments would literally determine what repertoire of actions were possible through the software.

Acknowledging that competing technological frames are in fact ideological disputes at the level of the sign—over language, objects, and actions, for example—helps us to better recognize the social forces behind the reified “technology,” and the significance of resistance to them. Even if Napster’s technical architecture did not “revolutionize” dominant systems of thought and practice, the recognition of conflict and contradiction tied to the Napster debate at least made possible a critique of those systems. As Bourdieu observed, ideological contestations produce a state in which people are at least aware that “orthodoxy” exists, as opposed to the alternative state (“doxa”) in which hegemony is largely assumed, or taken for granted. It was not that these tensions were alien to the culture prior to Napster’s invention, but rather that the debate surrounding “the technology” highlighted fissures already within the social fabric, which had been sublimated, or repressed. As we have argued in this chapter, “the technology” was not produced by the domination of any one governing body, or economic class, yet certain discursive communities had more power and control than others. The manner by which artists and fans engaged with these “authorative” discourses is the subject to which we now turn.

— CHAPTER FIVE —

*Distinctions*

By October 2000, Napster's service was said to have attracted more than 38 million users, and was declared the fastest adopted piece of software in the history of computing.<sup>99</sup> Although the copyright system was still in place, and the record labels were still in business, Napster was helping to carry and open up new ways of thinking about industries, institutions, and cultural production. From board rooms to courtrooms to living rooms, "the technology" was provoking a dialogue through which cultural categories could be shown and debated.

In *Life on the Screen* (1995), Sherry Turkle argued that computers were becoming the "test objects" for postmodernity. Turkle observed, for instance, that the Macintosh computer interface served as an emissary and "object to think with" for the postmodern notion that "knowing" was something usually attained on a surface level, through layering and simulation, rather than through a search for mechanism and depth.<sup>100</sup> Similarly, Turkle found that, for many users, online virtual communities, such as MUDs and MOOs, both embodied and provoked an understanding of the self as decentered and multiple. The cultural fascination with these machines, Turkle concluded, was that they

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<sup>99</sup> Michael Learmonth, "Let the Music Play: Bertelsmann and Napster Come Together," [TheStandard.com](http://www.thestandard.com/article/0,1902,19820,00.html) 31 October 2000; <http://www.thestandard.com/article/0,1902,19820,00.html>; Internet.

<sup>100</sup> Turkle, *Life on the Screen: Identity in the Age of the Internet* 47,43.

offered themselves not only as objects to think with, but specifically as objects to think about thinking, as “models of mind.”<sup>101</sup>

Life in the decentered virtual worlds Turkle describes may have “come naturally” to Napster’s founders, who had in fact met through IRC, but Napster’s popularity helped extended these alternative ways of knowing to wider audiences. The Napster software, for instance, allowed users not only to chat with one another, but also to view as well as share each other’s playlists, creating a virtual space where personae were largely defined by one’s heterogeneous collection of objects. As a file-sharing system, these playlists offered a rich model for reflecting on how we construct our objects, and how our objects construct us, as Turkle suggests.<sup>102</sup> However, that these files contained music was also significant in a more particular sense, as “the technology” became an object for rethinking the boundaries between cultural “production” and “consumption.”

From a business perspective, Napster’s “distributed aggregation” system could either enrich or dilute the value of music tracks being shared, depending on one’s point of view. Esther Dyson, for instance, argued that Napster and Napster-like systems were natural tools for “viral” marketing (“Napster is already doing what the music industry itself should be doing—making music enjoyable and easy to find”).<sup>103</sup> Conversely, many others held that the Internet was a costly added service area for the record companies. As Warner Music Group executive Paul Vidich explained,

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<sup>101</sup> See generally, Sherry Turkle, “What Are We Thinking When We Are Thinking About Computers?,” Science Studies Reader, ed. Mario Biagioli (New York: Routledge, 1999); available from [http://web.mit.edu/sturkle/www/routledge\\_reader.html](http://web.mit.edu/sturkle/www/routledge_reader.html); Internet.

<sup>102</sup> “We construct our technologies, and our technologies construct us and our times. Our times make us, we make our machines, our machines make our times. We become the objects we look upon but they become what we make them.” Turkle, Life on the Screen: Identity in the Age of the Internet 46.

<sup>103</sup> Esther Dyson, “Napster Forcing Music Industry to Change Its Money-Making Tune,” Los Angeles Times 21 August 2000; available from [http://www.latimes.com/business/reports/musicweb/lat\\_release000821.htm](http://www.latimes.com/business/reports/musicweb/lat_release000821.htm); Internet.

I see no benefit to the record companies from the Internet in lowering costs in that category [marketing and A&R]. Payments to artists, which have been rising steadily for 30, 40 years aren't being affected in any way by the Internet other than increased competition because of lower barriers of entry. . . . I see it being not easier but harder to differentiate artists in an environment where you said 50,000 artists have the ability to post their music and get them to consumers. Not only are you now differentiating all the artists signed but all the artists unsigned.<sup>104</sup>

While Vidich justified the need for “differentiating” artists in self-interested economic terms, his boss, Time Warner President Richard Parsons portrayed Napster as a threat to society at large: “If we fail to protect and preserve our intellectual property system, the culture will atrophy... Worst-case scenario: The country will end up in a sort of cultural Dark Ages.”<sup>105</sup>

Motion Picture Association head Jack Valenti championed this argument that entertainment companies were fulfilling a moral duty to artists and society at large. Valenti had spent the last two decades pushing lawmakers to protect and expand the authorship rights of Hollywood artists and producers. Napster's court brief invoked this history by citing Valenti's famous statement on the 1982 Sony Betamax case, in which he declared that the video recorder was to the movie industry “as the Boston Strangler is to a woman alone.”<sup>106</sup> As Napster's proponents were quick to point out, VCR rentals and sales have since become one of the film industry's most lucrative markets. But, according to Valenti, VCR's, digital audio tapes, and now Napster, can choke cultural expression in other-than-economic ways. “Creative works do not spring from a void,” he noted in the declaration he submitted to the Napster court. “The seed bed of this creativity lies within

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<sup>104</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Opposition of Defendant Napster, Inc. to Plaintiff's Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

<sup>105</sup> Philips, “Music Giants Miss a Beat on the Web.”

<sup>106</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Opposition of Defendant Napster, Inc. to Plaintiff's Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

the imagination, artistry and ingenuity of a community of artists and craftspeople who provide Americans with most of what they read, hear and watch...[I]f we cannot protect what we invest in, create and own, then we really don't own anything."<sup>107</sup> Consistent with Valenti's monologic view of "creativity" as arising from a centralized community, he insisted that this "seed bed" had to be preserved at all costs.

Many artists also believed Napster degraded the creative process, and deprived them of the very distinctiveness that made them "artists" to begin with. "Basically they're saying our art is worthless, it's free for the taking...Music used to be a collectible, now it's a disposable," one industry agent was quoted as saying.<sup>108</sup> Metallica's Lars Ulrich regarded "the technology" as a sign of the cultural degeneracy of the masses. Ulrich's public statements attempted to reconcile romantic notions about art's transcendent value with contemporary music's commercial status:

We are in the business of art. This is a walking contradiction if ever there was one. However, there is no denying it. On the artistic side, Metallica create music for ourselves first and our audience second. With each project, we go through a grueling creative process to achieve music that we feel is representative of Metallica at that very moment in our lives. We take our craft—whether it be the music, the lyrics, or the photos and artwork- very seriously, as do most artists. It is therefore sickening to know that our art is being traded, sometimes with an audio quality that has been severely compromised, like a commodity rather than the art that it is. From a business standpoint, this is about piracy- a/k/a taking something doesn't belong to you; and that is morally and legally wrong.<sup>109</sup>

Sean "Puffy" Combs took Ulrich's outrage even further when he depicted Napster as an act of violence against the artist's person. "I couldn't believe it when I found out that this Napster was linking thousands of people to the new Notorious BIG album, Born Again, a

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<sup>107</sup> Declaration of Jack Valenti In Support of Plaintiff A&M Record's Motion for Preliminary Injunction.

<sup>108</sup> Ron Stone, quoted in Levy, "The Noisy War over Napster."



week before it even hit the streets,” Combs told the press. “This album is a labor of love from Notorious BIG’s friends to the man, his kids, the rest of his family, and everyone else whose lives will never be the same since BIG passed. BIG and every other artist Napster abuses deserve respect for what they give us.”<sup>110</sup>

Despite the shock these artists expressed upon learning that their work was being used in ways they could not control, the circulation and appropriation of mass culture products at a grassroots level was not exactly a new phenomenon. For many years now, as Henry Jenkins has noted, consumer technologies—across media—have supported a movement toward a more “participatory” culture. Camcorders spurred the production of home movies and low-budget reality documentaries. VCR’s enabled consumers to become video archivists and editors. Photocopiers, and later laser printers and desktop publishing applications, enabled hobbyists to become professional-style publishers. Video games encouraged consumers to immerse themselves in fictional universes. Portable devices, such as the Gameboys, Walkmans, and cell phones, helped carry media into everyday life, allowing people to create their own personal soundtracks and communication networks.<sup>111</sup> The Internet in many ways captured, and gave shape to, the American culture’s changing patterns of media consumption as an object for thinking through the distinction between “professional” and “amateur” art. For example, Jenkins notes that, while homemade films have existed for many years, the Internet has reinvigorated the “Do It Yourself” movement by offering a low-cost medium through

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<sup>109</sup> This statement was posted, among other places, on the RIAA’s Web site. “Artist/Manager Quotes Regarding Napster,” [RIAA](http://www.riaa.com/Napster_artist_quotes.cfm), available from: [http://www.riaa.com/Napster\\_artist\\_quotes.cfm](http://www.riaa.com/Napster_artist_quotes.cfm); Internet; accessed 1 May 2001.

<sup>110</sup> Giancarlo Varanini, “Q&A: Napster Creator Shawn Fanning,” [ZDNet News](http://www.zdnet.com/zdnn/stories/news/0,4586,2455495,00.html) 3 March 2000; <http://www.zdnet.com/zdnn/stories/news/0,4586,2455495,00.html>; Internet.

which such works can circulate. Jenkins argues that the Web has made public a whole genre of Star Wars fan films created using High-8 cameras, camcorders, iMacs, and other consumer media technologies, and that these stories have become every bit as complex as—and perhaps more personally meaningful than—the commercial texts from which they derive.<sup>112</sup>

Likewise, Napster's service, as well as sites such as MP3.com, allowed unsigned artists to circulate beyond the "garage" (with particular ease given MP3's relatively small file-size, and hence its low transmission costs). In the context of the Napster trial, this amateur movement constituted a legally significant "noninfringing use." Napster's court briefs pointed out that, contrary to the assumption that popular culture has become centrally composed and produced, 98% of all recording artists were not signed to the "major" labels who were party to the lawsuit. This defense also noted that, as of July, 2000, 17,000 artists had expressly authorized Napster users to share their music, compared to the only 2,600 albums released in total by the Big Five in 1999.<sup>113</sup> In addition, Napster predicted, "as more and more artists use the Internet to break free of the major labels' oligopoly, an ever increasing proportion of the materials shared using the Napster technology will have nothing to do with Plaintiffs."<sup>114</sup>

If Napster's discursive stance did not have much impact on its own, "the technology" helped given form to these ideas by providing a model for imagining the cultural field writ large. A Napster search for "Mr. Tambourine Man" could bring up the

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<sup>111</sup> Henry Jenkins, "Quentin Tarantino's Star Wars?: Digital Cinema, Media Convergence and Participatory Culture," *D.Film*, ed. Bart Cheever (Cambridge, Mass.: MIT Press, forthcoming); available from <http://www.mit.edu/afs/athena.mit.edu/org/t/21fms/www/faculty/henry3/publications.html>; Internet.

<sup>112</sup> Ibid.

<sup>113</sup> Napster, Inc. v. A&M Records, Inc. No. 00-16401. Appellant Napster, Inc.'s Opening Brief. (U.S. Court of Appeals for the Ninth Circuit) 2001.

<sup>114</sup> Ibid.

Bob Dylan acoustic version, the Byrds version, the version produced by an unsigned cover band, and countless others, all side-by-side, seamlessly juxtaposing “high” and “low,” “professional” and “amateur,” “pop” and “folk.” While all computer screens and television monitors may share this effacement aesthetic, these juxtapositions occurred, in Napster’s case specifically, *on the same screen, in the same instant, and with only text (no trademarks) to distinguish between them.* For Chuck D, the fact that “popular music is traded alongside music by emerging artists and artists who have struggled outside of the mainstream,” made Napster a “truly democratic medium.”<sup>115</sup>

As the frontman for Public Enemy, Chuck D had helped bring a distinctly political voice, as well as an agitprop sound, to rap music in the late 1980’s. Many of Public Enemy’s best known songs railed against the discursive violence white-owned media corporations were inflicting on minority self-representation (e.g., “Elvis was a hero to most/But he never meant shit to me you see/Straight up racist that sucker was/Simple and plain/Mother fuck him and John Wayne”).<sup>116</sup> His music gained commercial and critical success, and The New York Times named Public Enemy’s music one of the 25 most influential albums of the twentieth century. But after helping move rap away from its folk roots, Chuck D became even more critical of what he called the “pimp and ho” system of corporate control, and, in early 1999, left the Def Jam record label, which had been acquired by one of the majors, to take his empowerment message to the Internet. While others were theorizing about the Internet as an “electronic frontier,” Chuck D thought of himself as more an Indian or slave than a cowboy. Describing his decisions to go online, Chuck commented:

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<sup>115</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Declaration of Chuck D. In Support of Defendant Napster’s Opposition to Plaintiff’s Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

People say, 'What do you feel like Chuck?' I feel like a black man in 1866. Some people were told 'If [you] slaves were free, you wouldn't know what to do. Your master didn't give you a house, he didn't give you food. You shouldn't be out there on your own. You might just die out there in the world.' Well, let me try, and let this be on my dime—you know?<sup>117</sup>

In linking business practices to social justice, Chuck D led the way for more mainstream artists, most notably Courtney Love and Don Henley, to break the taboo against talking about the business side of music, and to use the Napster debate as a platform for asserting their rights as workers.<sup>118</sup> Speaking to an industry conference in May 2000, Love branded, the record labels, not Napster users, the “pirates” because, in the end, “the band owns none of its work...they can pay the mortgage forever but they’ll never own the house.”<sup>119</sup> But Chuck D’s rhetoric also had another resonance. “The technology” for him did not only present the promise of fairer wages, but—given that rap music was especially underpromoted and underrepresented on the radio waves—was also an imperative for cultural survival. He drew this analogy in the MP3 track he posted on his Web site upon abandoning his record company, with the lyric, “If you don’t own the Master, then Master owns you.”<sup>120</sup>

Indeed many of the those who were drawn to Napster were already comfortable with cultural hybridity and fluidity, as was perhaps evidenced by the disproportionate

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<sup>116</sup> “Fear of a Black Planet,” *Fight the Power*, Def Jam, 1990.

<sup>117</sup> “Chuck D: Rap Artist and Web Innovator,” [1999 Interview Transcript], *TechTV*, available from: <http://www.techtv.com/print/story/0,23102,2334895,00.html>; Internet; accessed 1 May 2001.

<sup>118</sup> “...Scott Sapp, lead singer for the popular rock band Creed, says the time has come to speak out: ‘It has been taboo for artists to speak out concerning the business side of their music. The fear has been that the buying public, as well as other artists, would perceive this concern as greed, and that the artists’ sole purpose for creating was the money. This perception has silenced many artists concerning MP3 and Napster. The silence must end.’” Eric Boehlert, “Artists to Napster: Drop Dead!,” *Salon.com* 24 March 2000; [http://www.salon.com/ent/feature/2000/03/24/napster\\_artists/](http://www.salon.com/ent/feature/2000/03/24/napster_artists/); Internet.

<sup>119</sup> Courtney Love, “Courtney Love Does the Math,” *Salon.com* 16 May 2000; <http://www.salon.com/tech/feature/2000/06/14/love/index.html>; Internet.

<sup>120</sup> “Swindler’s Lust,” *There’s a Poison Goin On*, AtomicPop.com, 1999.

interest among Napster users in fusion sounds like hip hop and electronica.<sup>121</sup> In his 1994 essay “The Economy of Ideas” John Perry Barlow prophesied that, in cyberspace, where ideas were unbound from physical objects, information would become dynamic, and relational, and would be collaboratively composed by the “cyber-tribal hunter-gatherers of cyberspace.”<sup>122</sup> Hip hop artists, and in turn techno artists, were not surprisingly early adopters, given both their technical fluency and the fact that the aesthetic of their music is to morph and change over time. These genres also accept “hunter-gather” notions of creativity—so much so, ironically, that someone like Puff Daddy, who is best known for his skills at sampling and manipulating existing texts, considers himself an auteur. Additionally, hip hop artists have long expressed their especially deep ties to communal authorship through their regional rivalries, shout-outs to places like Hillis and Compton, posse-driven performance styles, and even in their marketing (recall how Vanilla Ice famously lied about being from the Miami inner-city, though in fact he was from Dallas).<sup>123</sup> Chuck D invoked this tradition of collaborative authorship when he invited Napster users to lay their own lyrics over a Public Enemy song, called “Power to the People and the Beat,” and distribute the co-constructed track through Napster and through the Web site Rapstation.com, the genre hub he co-founded.<sup>124</sup>

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<sup>121</sup> “Musical tastes of Napster users vary, and with the exception of a handful of categories (eight out of 21), Napster users are more enthusiastic listeners of all genres of music than non-Napster users are. Although 63 percent listen to classic rock and 51 percent listen to mainstream rock, the disparity in taste between Napster users and non-Napster users is the greatest of all in niche genres such as hip-hop, R&B, indie rock, punk, and elec-tronica. All of these genres have a higher percentage of listeners among Napster users than among non-Napster users.” Sinnreich, Digital Music Subscriptions: Post Napster Product Formats.

<sup>122</sup> John Perry Barlow, “The Economy of Ideas,” Wired March 1994; available from <http://www.wired.com/wired/archive/2.03/economy.ideas.html>; Internet.

<sup>123</sup> Tricia Rose, Black Noise: Rap Music and Black Culture in Contemporary America, Music/Culture (Hanover, NH: Wesleyan University Press: Published by University Press of New England, 1994) 11-12.

<sup>124</sup> According to Chuck D, “Over 350 artists participated in this project. Tens of thousands of downloads of these new artists’ songs were enabled by links between the Napster site and Rapstation.com.” A&M

While blurring the cultural distinction between “amateur” and “professional” artists, the Internet, and Napster in particular, was also complicating the categories “producer” and “consumer.” On the one hand, new technologies have given “amateurs” the tools to produce “professional” work, which reaches audiences around the world, and takes part in an aesthetic tradition with wider cultural resonances. On the other hand, *all* consumption on Napster may very well have been thought of as participatory. Fanning and company evidently saw the chat and one-to-one recommendation features as central to the system—file sharing, they claim, was an afterthought. Meanwhile, in the rhetoric of the Napster community, the process of compiling a playlist was known as “sharing” as opposed to “collecting,” which is to say, it was seen in the context of a commons. Napster Inc. argued that this too was nothing new: Hundreds of artists, including the Grateful Dead and Metallica, have long permitted the digital taping of their live performances and the trading of these “bootlegs” among their fans.<sup>125</sup> The difference was that cassette copies cost money, and take effort to make, whereas, as Ice-T noted, “this stuff comes through the computer clean.”<sup>126</sup>

“The technology” in this sense facilitated consumers’ movement toward a greater level of engagement with popular culture, as DJ’s, archivists, distributors, and critics. At the same time, the discursive context also branded consumers “participatory” in the sense that their consumption practices were “resisting” record companies, artists, the law, and, at times, Napster Inc. A District Court judge said Napster users were engaged in

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Records, Inc. v. Napster, Inc. No. 99-5183. Declaration of Chuck D. In Support of Defendant Napster’s Opposition to Plaintiff’s Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

<sup>125</sup> A&M Records, Inc. v. Napster, Inc. No. 99-5183. Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendant Napster, Inc.’s, Motion for Summary Adjudication on the Applicability of the 17 U.S.C. 512(a) Safe Harbor Affirmative Defense. (N.D. Cal. March 27, 2000).

<sup>126</sup> Laura M. Holson, “Ice-T’s Take on Napster, the Law and Morality,” The New York Times 7 August 2000; available from <http://www.nytimes.com/library/tech/00/08/biztech/articles/07ice.html>; Internet.

“wholesale infringement,” but their ranks doubled in the six months after that initial pronouncement. Echoing criticisms of media industry concentration advanced by critics such as Robert McChesney and Ben Bagdikian, many Napster users complained about the high price of CD’s and bland, low-risk product selection offered by the major labels. Others complained about product format changes (“I bought the rights to listen to King Crimson 15 years ago...I’m just making a digital copy of what I have in my closet”),<sup>127</sup> or that record labels were withholding backlisted titles from circulating (“Make it available or give it back”).<sup>128</sup> Meanwhile, though artists complained about unreleased or unfinished tracks being leaked public, fans persisted in trading them as collectibles.

Many find the notion that Napster was meaningful to consumers in any sense other than “getting something for nothing” objectionable. These critics view all the various pro-Napster groups as a pastiche of a protest movement, and all Napster users as “freeloaders.” These objections have some troubling resonances—among them, the dismissal of any discourse where “kids” are subjects, the devaluing of popular culture as a meaningful site of conflict, and the privileging of “theorizing” over “bricolage” as a form of cultural reflexivity. Calling consumers “freeloaders” is equivalent to privileging one side of the debate—the side that ran full-page newspaper advertisements with the tagline, “If A Song Means a Lot to You, Imagine What It Means to Us.” The slogan assumes that producers have more valid claims to a song than consumers, something which many fans would contest, if given the opportunity. Yet, Napster users’ motives could be more easily dismissed because the vast majority of them had less access to

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<sup>127</sup> Quoted in Amy Harmon, “Powerful Music Software Has Industry Worried,” *Ibid.* 7 March; available from <http://www.nytimes.com/library/tech/00/03/biztech/articles/07net.html>; Internet.

<sup>128</sup> “Boycott-Riaa.com Home Page,” available from: <http://www.boycott-riaa.com/>; Internet; accessed 1 May 2001.

canonical discursive spaces than the “Artists Against Piracy” coalition that placed these ads, underwritten by the RIAA, in the New York Times, Los Angeles Times, USA Today, Wall Street Journal, and Washington Post.



## *Postscript*

In late October 2000, just days before presidential election and the Napster-Bertelsmann alliance, Red Herring published an interview with Al Gore in which the Democratic nominee proposed an interesting metaphor for thinking about the electoral system. “The secret of America’s success is to be found in our revolutionary decision to place our bets on the abilities inherent in all of the individuals who make up our country,” Gore said. “Our democracy, our constitutional framework, is really a kind of software for harnessing the creativity and political imagination for all of our people. The American democratic system was an early political version of Napster.” He explained, “Dictatorships, Communist countries, monarchies in the past all eventually collapsed because of their inefficiency in moving information and creativity to the places where it was needed.” By contrast, “our democratic system made it possible for the average citizen to participate in the decision-making of this nation by processing the decision-making directly relevant to him or her in an individual congressional district or state.”<sup>129</sup>

As Gore noted, Napster did not spring from a void, but rather, was constructed within a culture already attached to certain values and practices. For the then-Vice President, these values resonated with political virtues and, he noted later in the interview, with “participatory management theory.” For others, of course, Napster carried very different meanings—an anarchic symbol, a Marxist symbol, a symbol of cultural empowerment, a symbol of electronic theft, among other things. Yet, despite this

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<sup>129</sup> All Gore quotes taken from Peter and Jason Pontin Henig, “E-Gore,” *The Red Herring* 30 October 2000; available from <http://hakuseki.redherring.com/mag/issue84/mag-gore-84.html>; Internet.

flexibility, Napster's object-ness and cultural "context of practice" dialectically made certain responses more likely than others. "The technology" was not a word processor, or an automobile, or a lamp.

Values and practices construct objects, systems, organizational structures, constitutions, and machines, which in turn produce new values and practices, and new net effects. Citing Marshall McLuhan's notion of "the Gutenberg Galaxy," Gore associated democratic empowerment with access to information and information networks. Comparing the Web to the printing press, he observed that, "now, computer networks multiply by manyfold the amount of information available to the average citizen, thereby empowering the average citizen to play a larger role still." What the presidential candidate did not consider, though, was that these objects are themselves powerful tools for engaging with ideas, values, customs, and habits through theoretical tinkering (Lévi-Strauss' "science of the concrete"). Napster was so powerful a metaphor *because* people could try things out, explore, get results, and form a personal attachment to "the technology."

On a meta level, Gore's example captures three of the central themes to this thesis. First, that people from all ranks of society used Napster as an object for working through change, and to help them "translate" those ideas and feelings to others. Second, that, by October 2000, Napster had attained enough legitimacy as the dominant rival to the recording industry's paradigm that a major party candidate could use "the technology" to flesh out his political values, even if he could not admit to actually using the system, as its legality was still undetermined. Third, that Napster's circulation around the culture mattered, even if no words in the Copyright Act were ever changed. CEO's

and political candidates used Napster as a model for organizational design. Artists, fans, and record executives used “the technology” to engage in a dialogue over categories such as artist/producer, production/consumption, and amateur/professional. Online content companies, continuing the move toward a more “participatory” culture, set out to find new ways to give audiences greater control over the entertainment experience.

Technology companies launched efforts to “rearchitect” the Internet with Napster-like peer-to-peer products. By April 2001, all five of the major record labels had announced partnerships to put their catalogues online.

Ironically, Napster’s “success” for Gore would also be his own failure. What the Vice President saw as the Constitution’s Napster-like balance between centralization and decentralization ultimately fell to his opponent’s favor—though Gore won the popular vote, he lost the electoral college vote to George W. Bush. Although it has been only six months, there has been no overhauling of the electoral college system, nor has there been the mass migration from Napster to Gnutella many expected. As captured in many ways by “the technology,” the tension between centralized and decentralized systems still runs deep.

*There was a self-reinforcing spiral. People saw the world in centralized ways, so they constructed centralized tools and models, which further encouraged a centralized view of the world. Until recently, there was little pressure against this centralization spiral. For many things that people created and organized, centralized approaches tended to be adequate, even superior to decentralized ones. Even if someone wanted to experiment with decentralized approaches, there were few tools or opportunities to do so.*

*But the centralization spiral is now starting to unwind. As organizations and scientific models grow more complex, there is a greater need for decentralized ideas. And new decentralized tools...are emerging that enable people to actually implement and explore such ideas. Thus the stage is set to move beyond the centralized mindset.<sup>130</sup>*

— Mitchel Resnick (1994)

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<sup>130</sup> Mitchel Resnick, Turtles, Termites, and Traffic Jams: Explorations in Massively Parallel Microworlds, Complex Adaptive Systems (Cambridge, Mass.: MIT Press, 1994) 130.

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