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## *The Social Construction of Napster*

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**Abstract :** This paper attempts to unpack a few of the vast array of assumptions implicit in how “the technology” known as Napster was understood by several of its key constituencies. Our approach examines discourse about Napster in several areas – legal, economic, social, and cultural. This approach enables us to understand “the technology” as an ongoing encounter, rather than the accomplishment of any one inventor, team of inventors, dominant institution, or rule of law. We do not offer proscriptive advice. While there is value in other research that has tried to determine the “impact of Napster on” a particular market or industry, we argue that a multidimensional understanding is necessary both as a foundation for such research as well as in its own right. In only the past four years, dominant interpretations of Napster have not only emerged, but also have been inscribed into laws, business plans, and purchasing decisions, in effect, determining what “tools” – precedents, myths, data sets, prior objects, capabilities – will be available in the future. Our paper tries to show *how* and *why* certain (subjective) significations increasingly have taken on the status of truth, while other (equally subjective) discourses have been pushed farther and farther out to the fringes.

## INTRODUCTION

In the months leading up to the time “Napster” became a verb in the popular lexicon, two Harvard University professors published compelling works on the social, cultural, and economic implications of technology innovation, namely, Clayton Christensen’s *The Innovators Dilemma* (1997) and Lawrence Lessig’s *Code: And Other Laws of Cyberspace* (1999). Both widely read and highly regarded, these two books gave audiences useful, if slightly antithetical, filters for understanding the phenomenal rise and fall of the file-sharing program known as Napster.

From one perspective, Napster could be understood as the archetypal example of a “disruptive” innovation: a new entrant stealing share in one market (recorded music) by applying a few incredibly simple concepts from another market (Internet file-sharing plus chat) to address an underserved or overlooked demand area in another industry. Almost clairvoyantly, Christensen’s model seemed to have predicted the dilemma that would be faced by the entrenched record labels either to disrupt themselves – and give away lucrative margins – or be disrupted.

From another perspective, however, Napster’s ultimate domestication and containment at the hands of the recording industry, lawmakers, artists, and the courts – and absorption by Bertelsmann – suggests that Napster may not have been truly “disruptive” in a permanent sense. Here, Lessig’s thesis that cyberspace, far from being immune from centralized control, was becoming a tightly regulated environment might seem the more fitting model. *Code* reminded us that even though law may not wield with the same force on the Internet as in the physical world, other forces such as markets, norms, and architectures can and often do regulate in their place. These forces, Lessig warned, were increasingly serving entrenched commercial interests, and constraining the realm of the possible in terms of breakthrough innovations.

The contrast between Christensen’s and Lessig’s theories, as applied through our Napster case study, is not so much evidence to their contraposition as to the tension between “dynamic” and “constrained” that is inherent whenever you peer inside technology’s black box. Technologies, as Claude Levi-Strauss observed of even the most basic tools, are the glue “betwixt and between” the concrete and the conceptual. (Levi-Strauss, 1966) They are flexible in the sense that they do not have any single definitive use; a tool may have been created initially with a particular set of goals, values, or objective in mind, but not all users will be equally

bounded by these concepts, or even agree as to what the definitive uses were intended to be. Thus, there is always a dialogue that occurs between the craftsman and the technical artifacts in his repertoire to “discover what each of them could ‘signify’.” A cube of oak could serve as a wedge one day, and as raw material for constructing a pedestal another day. But despite this innate flexibility, “the possibilities always remain limited by the particular history of each piece and by those features which are already determined by the use for which it was originally intended or the modification it has undergone for other purposes.” Ultimately, the user’s actions are constrained by the physical reality of what tools are available, as well as the conceptual category through which she perceives the particular “job” at hand.

This paper will unpack a few of the vast array of assumptions implicit in how “the technology” known as Napster was understood by several of its key constituencies. We suggest that, at the peak of the cultural fascination with Napster in 2000-2001, “the technology” was a tool with many different possible uses and meanings, which captured and perpetuated an even greater number of pre-reflective beliefs, tensions, and anxieties concerning technical capabilities and cultural meanings, users and uses, laws of society and laws of human nature. Far from the singular “game-changing” event others have portrayed it to be, Napster’s significations were contested on public as well as private grounds – in boardrooms, courtrooms, living rooms, and even the halls of Congress – and ultimately resolved, or at least stabilized, within, across, and through these broader systems of power and structured inequalities.

Our approach examines Napster’s path from “interpretive flexibility” (Orlikowski, 1992) to rhetorical stabilization (consensus meaning) by looking thematically across several overlapping dimensions – legal, economic, social, and cultural. This approach is designed to avoid defining “the technology” according to any one of these traits, or implying that “it” followed a preordained trajectory from invention, to adoption, to social impact. Our focus is on Napster’s “context of practice” as a tool deployed according to the need, customs, values, goals, and prior associations of its various user (interpretive) communities (Fish, 1989). This approach enables us to understand “the technology” as an ongoing encounter, rather than the accomplishment of any one inventor, team of inventors, dominant institution, or rule of law.

We do not offer proscriptive advice. While there is value in other research that has tried to determine the “impact of Napster on” a particular market or industry, we argue that a multidimensional understanding is necessary both as a foundation for such research as well as

in its own right. For one thing, our approach allows us to document how popular, or vernacular, theories mobilize around a tool to reveal its “true” qualities. This is not simply about deconstructing a seemingly “disruptive” occurrence to reveal its partial, subjective, and fleeting nature – an observation which, to be sure, does not invalidate the usefulness of Christensen’s theory – but also about demonstrating *how* and *why* certain (subjective) significations increasingly take on the status of truth, while other (equally subjective) discourses are pushed farther and farther out to the fringes. But more than “merely” theoretical, the process of collectively making sense out of “the technology” has demonstrable impact on consumer behavior as well as regulatory and management decision-making. In only the past four years, dominant interpretations of Napster have not only emerged, but also have been inscribed into laws, business plans, and purchasing decisions, in effect, determining what “tools” – precedents, myths, data sets, prior objects, capabilities – will be available in the future.

### ***THE INVENTION MYTH***

Frequently, the Napster phenomenon has been framed as an object lesson on how web based, information and communication technology (ICT) can challenge long- and widely-held notions about economic competition and industrial organization. Under the assumptions of industrial economics, as industries grow and mature, and as their products become more homogeneous (less differentiated), there are increasing returns to scale, as well as a concomitant concentration of capacity and market power in the hands of relatively fewer and ever larger players (Oster, 1999 ; Porter, 1998 )

Napster was supposed to change all of that. Given that Napster leveraged both the MP3 file compression format and permitted the rapid distribution of said files over the highly decentralized peer-to-peer computing architectures, it appeared that Napster enabled almost anyone to reproduce and distribute digital content (i.e. music, videos, software, etc.) at close to zero marginal cost. This led many to speculate that Napster would force a radical rethinking of the economic logic underlying the production and distribution of musical recordings, would help to reconfigure the extant recording industry value chain along more highly decentralized and self-organized lines similar to the P2P architecture itself, would facilitate the entry of new players in the industry sporting business models and performing functions and roles which had no antecedents in the offline world, and lead eventually to what one observer described in 2000

as a “cacophony of free market expression” fueled in large part by “more than over 20 million directly-wired music lovers” (Barlow, 2000).

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 (Greenfeld, 2000):

*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>1</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, meanwhile, 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 infrequently.”<sup>2</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>3</sup> Fanning and Parker modified the beta version with help from several early adopters.<sup>4</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 whether or not Napster actually “worked” depended on whom you asked. On Slashdot.com, a message board known for its population of Linux enthusiasts, community members complained about the application’s technical glitches, aesthetic design, and “untrustworthy” code.<sup>5</sup> Meanwhile, many general audiences expressed concern that sharing files over the system would compromise the security of their PC’s, rendering their hard drives open to unwelcome visitors.

Although the “author” paradigm would present Napster as the product of a unified, teleological event, clearly the “working” of the machine was not wholly determined by Fanning’s design. For example, some argued that Napster’s “success” owed more to loopholes left open by 1998’s Digital Millennium Copyright Act (DMCA)<sup>6</sup> than to the genius of its creators. Lawyers for the RIAA used as evidence an e-mail message written by Sean Parker during Napster’s early development stages to demonstrate the degree to which design and legal issues were related:

*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>7</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 full context under which the founders worked, the technical and cultural goals they sought to achieve are perhaps best understood in light of Bijker’s (1990) notion of “technological frames”. The notion of frames attempts to account for the contingent and constrained aspects of technical development by incorporating “exemplary artifacts as well as cultural values, goals as well as scientific theories, test protocols as well as tacit knowledge.” 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 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) (p. 75)*

For Bijker, progress occurs not only when theoretical contradictions in a dominant paradigm are suddenly realized (Kuhn, 1980). Rather “the technology” emerges gradually from interactions between and within social groups with different degrees of inclusion in multiple overlapping frames.

Though laws clearly mattered, they were not the only problem Fanning and his collaborators were trying to solve. The more local and tangible objective was to solve the two-fold problems of (1) finding MP3's on the Internet and (2) creating an IRC-like community centered around musical tastes. Applying Bijker's (1975) terminology, Shawn Fanning was an innovator with a much lower degree of inclusion in the music industry's technological frame than, say, the record labels' R&D departments.<sup>8</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. To be sure, Fanning, Parker, and the community of early adopters did all work under the same generalized legal, economic, and technical conditions as the recording industry. The crucial difference was that, based on their involvement in other spaces, such as online communities, Fanning and company's immediate goals were much more personal and utilitarian – to provide a tool to help themselves and other enthusiasts find and discuss music on the Internet. To the general market of users, however, 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.

#### *SOCIAL CONSTRUCTION: THE LAW*

Bijker's notion of “technological frames” is helpful because it enables us to recognize how and why objects can take on multiple and contradictory meanings within a culture. Legal briefs debating the record labels' early proposed injunction against Napster provide an especially lucid example of how various discursive communities deploy objects according to



their own interpretive principles. These documents, many of which predate and contradict the narratives later espoused by the mainstream press, depict an object whose functions, as well as meanings, was uncertain. By no means “merely” rhetorical or theoretical, the fate of these indeterminacies would directly shape legal precedent, public norms, and the future viability of “the technology.”

The RIAA filed its initial complaint against Napster for “contributory” and “vicarious” copyright infringement on December 8, 1999. On this day, the U.S. District court reified two discursive communities: plaintiff and defendant. Plaintiffs were comprised of 18 affiliates from the five major record companies, although they also claimed to speak for the interests of artists, retailers, consumers, lawmakers, and the nation. Defendant, Napster Inc., represented a handful of investors, a team of developers, a business staff (including a new CEO, Linda Richardson), and maybe a few tens of thousands of users. This is a crucial point, indeed, for what triggered the record labels’ lawsuit was the enrollment of wider audiences into Napster’s technological frame.<sup>9</sup> But, because the courts’ focus was on the specific legal entities named in the case, we will focus too (for now) on their particular arguments to demonstrate Napster’s interpretive flexibility (Orlikowski, 1992).

\* \* \*

Let us start by considering what might seem a 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 hard-drives – without modification or direction from the service provider. By contrast, the plaintiffs, rejecting the notion that users were part of the system, argued 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 affects 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 (*Sony Corp. v. Universal Studios, Inc.* 464 U.S. 17 1984).<sup>10</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. In case there was any question, Judge Marilyn Patel denied the Napster motion on two separate grounds. First, that Napster was not entirely an ISP because MP3s traveled “through” the Internet – from user to user – and not “through” Napster’s proprietary system. Second, 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, in granting the RIAA’s injunction against Napster, Judge Patel called the program a “monster,” which was in a sense suggestive of her ongoing frustration with having to classify this abomination of a technology (*A&M Records, Inc. v. Napster, Inc.* No. 99-5183. Transcript of Proceedings. (N.D. Cal. July 26, 2000)).<sup>11</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 were they intimately joined in acts of defiance by the common text? Attorneys for the defense submitted that “[t]here is nothing that resembles an agency relationship.” (*A&M Records, Inc. v. Napster, Inc.* No. 99-5183)<sup>12</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, the RIAA argued:

- Napster *provides its users with* proprietary MusicShare ...
- Napster *creates and provides its users with* an index and directory to all MP3 music files available for copying ...
- Napster *makes MP3 files downloaded by its users immediately available to its other users...*
- 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 ...<sup>13</sup> (emphasis added) (A&M Records, Inc. v. Napster, Inc. No. 99-5183.)

Of course, Napster Inc. would have preferred these statements take “users” as the subject (e.g., “Users provide *each other...*”). But, for the RIAA’s vantage point, the software was so “fully integrated” into the experience that the user became *its object*.

In *Life on the Screen*, Turkle (1995) described how personal computers are often positioned as “test objects” in a struggle between modern and postmodern understandings. In her accounts, this struggle was frequently waged “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” (1995:43). The Napster trial hinged on much the same epistemological debates.

On one side, Napster’s attorneys insisted that the company had no way of determining 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—a characteristically “postmodern” view. Thus Napster’s lawyers claimed that MP3 file-names were imprecise as signs; 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. Furthermore, 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>14</sup> (*A&M Records, Inc. v. Napster, Inc.* No. 99-5183).

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.

By contrast, the record labels argued that knowledge was intrinsic to the nature of the technological system – the more “modernist” view. To them, what happened inside the “box” could most certainly be known, as computers were knowable objects, even if people were not.<sup>15</sup> Furthermore, the RIAA added in a rhetorical twist, the defendant’s generalized awareness that virtually everyone used the system to get free access to copyrighted materials was tantamount to knowing of infringing uses in a concrete sense.

\* \* \*

While acknowledging that these opposing views served self-interested goals in the courtroom – indeed, that is the point – we maintain that the courtroom struggle also exemplified contrasting ways of knowing that were deeply ingrained in the plaintiff and defendant’s respective “technological frames.” People like Fanning, who saw tools like Internet Relay Chat as the Internet’s “killer app,” were comfortable with the idea of community-driven systems. Similarly, Napster’s Silicon Valley investors – rightly or wrongly – equated “eyeball accumulation” with profits were quick to buy into the idea of a “viral” marketing community. The record labels, who were culturally and financially invested in selling contained goods, were much less comfortable with decentralized distribution. These were the same companies who had sued the manufacturers of cassette and digital audio tape recorders – and even radio – when they first appeared on the marketplace. Cassettes and DAT’s introduced new, more portable formats through which music could be sold, but also enabled consumers to reproduce copies at little cost. Radio helped stimulate consumers’ interest in recorded music, but also provided a medium where songs could be freely accessed by all comers at the cost of a few inconveniences (e.g., advertisements, 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, on-demand access, maintain permanent copies, and freely distribute them to friends at no cost (by e-mail or otherwise). But because of the Internet’s

scale, and 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>16</sup>

For the record labels involved in the Napster suit, the paradigm technology for the Internet at the time 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 when Napster debuted, SDMI was a consortium of content producers and device manufactures aimed at creating a secure standard to establish 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 permitted by law), the promise of SDMI was that, through watermarks embedded in the CD and device reader, it would be nearly impossible to distribute digital copies to others. Future digital rights management technologies would, in theory, also enable the record companies to reap greater efficiencies by price discriminating 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).

As a self-consciously interpretive space, the courtroom merely provides an especially lucid, and well-documented, example of how Napster could assume multiple, contradictory meanings within the culture. The courtroom is also important in another respect: it demonstrates the significance of interpretive flexibility as a heuristic device. Here, 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. The example of the Napster trial illustrates how interpretive disputes mobilize and wield power within a system of structured inequalities, and how this has real consequences.

### ***SOCIAL CONSTRUCTION: NAPSTER USES***

Discursive battles were not only a focal point to the Napster trial, but also a motivation behind the trial in the first place. Given that the record labels were eager to put Napster out of business as quickly as possible, retaliatory technical measures and marketing strategies might have accomplished this objective more effectively, and at less cost, than a lawsuit. For example, the labels might have anonymously swarmed the Napster market with thousands of mislabelled "dummy" tracks, or with corrupted files. But to them, the trial was crucial as part of

a broader discursive performance aimed at educating consumers that downloading music on the Internet was unethical, and, the RIAA hoped, illegal.

The RIAA used 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. 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." (*A&M Records, Inc. v. Napster, Inc. No. 99-5183.*)<sup>17</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 lawyers and spokespersons to speak on behalf of the founders.<sup>18</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 helped structure Napster's social meaning. Instead, this chapter will describe the multilayered strategies that guided Napster toward rhetorical stabilization. Only from there we will be able to assess the ways in which "the technology" may have been used to resist and subvert those strategies.

\* \* \*

Whereas the RIAA emphasized Napster's authorship by the defendants, 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., piracy),<sup>19</sup> the defense advanced a reading that considered "the user" to be more fragmented. Even if every individual user was engaged in piracy, Napster's lawyers 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 (Napster, Inc. v. A&M Records, Inc. No. 00-16401).<sup>20</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>21</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 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>22</sup>

Paradoxically, as much as the “facts” were contested, the dispute was underpinned by a set of shared assumptions which closely defined what purposes those facts ought to serve. Despite its apparent boldness, the “sampling” doctrine Napster proposed was tactfully 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>23</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, Napster's proponents and detractors both 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. Dyson (2000) was among those who 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"). Meanwhile, industry executives like Warner Music's Paul Vidich saw the Internet as a costly added service area and an impediment to differentiating artists:

*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. ( A&M Records, Inc. v. Napster, Inc. No. 99-5183).<sup>24</sup>*

But clearly the business logic of the Internet was not the only issue, or arguably even the central issue, in these debates. Tellingly, Vidich's boss, Time Warner President Richard Parsons, chose instead to cast the problem in much broader terms: "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" (Philips, 2000).

### **SOCIAL CONSTRUCTION: NAPSTER USERS**

It is important to that the debate over "the technology" was not just a contest between competing legal and economic theories. In the broader social sense, the dispute was also 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 (Pew Charitable Trust, 2000).



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 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" (Kover, 2000).*

While this observation came in the article’s fifth paragraph, Newsweek published a cover story three months later 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” (Levy, 2000). 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” (Greenfeld, 2000).

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 (Harmon, 2000b).

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 (Stewart, 2000). 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 (Douglas, 1987). The amateur operators, many of whom built their own wireless transmitters and receivers, pleased their elders 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>25</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 (Bagdikian, 1997). 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 precisely *because* they were a “monster” hybrid of both exoticized otherness and idealized sameness(Hebdige, 1979).

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 (Sinnreich, 2000).

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” (Beaupre, 2000). 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 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. (emphasis added) (Geide, 2000).*

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>26</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” (Vatis, 2000).

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 kids the right ways to use the Internet” (Reno, 2000).<sup>27</sup> Though the Napster injunction was still pending – and the trial had not even begun – the government-sponsored Cybercitizen 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” (Rodger, 2000). 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>28</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 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?’” (Kover, 2000). 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” (Philips, 2000). 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” (Napster, Inc. v. A&M Records, Inc. No. 00-16401).<sup>29</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.

### ***SOCIAL CONSTRUCTION: NAPSTER ARTISTS***

Famously outspoken on the topic, Motion Picture Association head Jack Valenti championed the argument that, by opposing Napster, entertainment companies were fulfilling a moral duty to artists and society. 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” (A&M Records, Inc. v. Napster, Inc. No. 99-5183).<sup>30</sup> As Napster’s proponents were quick to point out, VCR rentals and sales had 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 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>31</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 followed Valenti in regarding Napster as an affront to the creative process, depriving 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 (Levy, 2000). Metallica’s Lars Ulrich saw “the technology” as a sign of the cultural degeneracy of the masses. But in his public statements, Ulrich struggled 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.*<sup>32</sup>

Sean “Puffy” Combs (aka Puff Daddy, P-Diddy) 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 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” (Varanini, 2000).

Despite the shock expressed by many artists over Napster, the circulation and appropriation of mass culture products at a grassroots level was not exactly a new phenomenon. For many years, consumer technologies – across media platforms – had been supporting a movement toward a more “participatory” culture (Jenkins, 2002). 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. Portable devices, such as the Gameboys, Walkmans, and cell phones, enabled consumers to carry media into their everyday lives, allowing them to create their own personal soundtracks

and communication networks. The Internet captured, but also gave shape to, the culture's increasingly interactive patterns of media consumption. Napster's service, as well as sites such as MP3.com, followed the trend by allowing unsigned artists to circulate beyond the "garage" with relatively minimal transmission costs. In the context of the Napster trial, this amateur movement might have even represented a legally significant "noninfringing use." Indeed, Napster's court briefs noted that, contrary to the assumption that popular culture had become centrally composed and produced by a handful of media companies, 98% of all recording artists were not signed to the "major" labels who were party to the lawsuit. The defense further 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 (Napster, Inc. v. A&M Records, Inc. No. 00-16401).<sup>33</sup> The defense 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>34</sup> For recording artist 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" (A&M Records, Inc. v. Napster, Inc. No. 99-5183).<sup>35</sup>

The Internet not only blurred the cultural distinction between "amateur" and "professional," but also greatly complicated the categories "producer" and "consumer." New technologies had given "amateurs" the tools to produce "professional" work, which could travel through cyberspace reaching audiences around the world. Now, "the technology" was used to facilitate consumers' movement toward an even greater level of engagement with popular culture, as DJ's, archivists, distributors, and critics. To Fanning and company, chat and one-to-one recommendation features were what "made" the system—file sharing, they claimed, 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's defense argued that this too was nothing new: Hundreds of artists, including the Grateful Dead and Metallica, had long permitted the digital taping of their live performances and the trading of these "bootlegs" among fans (A&M Records, Inc. v. Napster, Inc. No. 99-5183).<sup>36</sup> The difference was that cassette copies cost money, and take effort to make, whereas, as Ice-T put it, "this stuff comes through the computer clean" (Holson, 2000).

The discursive context also branded Napster consumers “participatory” in another sense: as subversives. It was said that consumption practices actually had the corollary effect of “resisting” record companies, artists, the law, and, at times, Napster Inc. Within six months of a District Court judge’s declaring that Napster users were engaged in “wholesale infringement,” their ranks doubled. Echoing attacks on media industry concentration by many academic elites (Chomsky, McChesney, Bagdikian), Napster users could be heard complaining about the high price of CD’s; the bland product selection offered by the major labels; the frequent 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”) (Harmon, 2000); and that record labels were withholding backlisted titles from circulating (“Make it available or give it back”).<sup>37</sup> And while artists complained about unreleased or unfinished tracks being leaked public, their fans persisted in trading them as collectibles.

Many observers have found the notion that Napster was meaningful to consumers in any sense other than “getting something for nothing” objectionable. The “freeloaders” argument was widely advanced by the RIAA-sponsored coalition “Artists Against Piracy,” which adopted as its tagline, “If A Song Means a Lot to You, Imagine What It Means to Us.” Such slogans—which ran for a period of time as full-page advertisements in all the major national newspapers—took for granted that producers have more valid claims to a song than consumers; of course, many fans would continue to disagree.

### ***CONCLUSION: FROM ICONOCLAST TO POP ICON***

In late October 2000, on the eve of the presidential election – and, not to mention, the Napster-Bertelsmann alliance – Red Herring published an interview with Al Gore in which the Democratic nominee was quoted as comparing the American democratic system to, of all things, an “political version of Napster.” As Gore explained, “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...Our democracy, our constitutional framework, is really a kind of software for harnessing the creativity and political imagination for all of our people...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.” In 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.”

As Gore noted, Napster did not spring from a void, but rather, was constructed within a culture already attached to certain values and practices. Values and practices construct objects, systems, organizational structures, constitutions, and machines, which in turn produce new values and practices, and new net effects. For the then-Vice President, Napster’s values resonated with certain political virtues; for others, of course, Napster could just as easily carry very different meanings – an anarchic symbol, a Marxist symbol, a symbol of cultural empowerment, a symbol of electronic theft, among other things. Its innate flexibility notwithstanding, Napster’s object-ness and cultural “context of practice” made certain responses more likely than others. “The technology” was not a word processor, or an automobile, or a lamp.

Gore’s example captures three of the central themes to this thesis. First, that people from all ranks of society used Napster, in particular, and peer-to-peer file sharing more generally, as an organizing principle for a wide range of possible objectives – the creation of virtual communities (Collins, 2001; Katz, 2000 ), as a tool for facilitating social interaction and building social networks (e.g. Friendster), as both a model (Giesler & Pohlmann, 2001) and as a catalyst for social change (Borland, 2001,), and as means for aggregating those ideas and disseminating them to others (Organizer’s Collaborative, 2001).

Second, that, by October 2000, 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 under review by the courts) speaks volumes about how quickly and pervasively Napster had attained legitimacy as the dominant alternative to the recording industry’s paradigm. This legitimacy was further extended by the fact that Napster’s meteoric rise, struggle with the RIAA, and ultimate capitulation, prompted vigorous debates in legal, economic, and technological, and academic circles about the future of the music industry (Liebowitz, 2003), the role and limits of intellectual property enforcement in the digital age (Liebowitz, 2002; Einhorn, 2002; Tehranian, 2003), the economics of digital technology (Yen, 2001; Carroll, 2003; Bartow, 2001; Rayku, 2003), and the formation of social norms on the internet (Strahilevitz , 2003).

Third, that Napster's circulation around the culture mattered, even if no words in the Copyright Act were ever changed. The mythologizing about the creation of Napster solely by Shawn Fanning became the running joke in a major motion picture, *The Italian Job*, released in summer 2003. In the movie, a computer hacker played ably by Seth Green, contends adamantly, and on several occasions that he, not Fanning (who has a cameo in the movie playing himself) was the true (solo) inventor of Napster. The suffix "-ster" came to be used not only by many Napster clones, (e.g. Grokster, Aimster, Madster, Rapster, and Blubster) but also all manner of technology-related product like childhood education software (e.g. Leapster ©), dating and friend-making services (e.g. Friendster and Palster), wide-format ink jet printers (the Jetster ©), and a talking web browser (Talkster), as well as an interactive help system and a HVAC system (both named "Helpster"). Management gurus used Napster as a model for organizational designs and an object lesson in the need for continuous, rather than episodic, organizational change and transformation (Harris, 2002). Artists, fans, and record executives used "the technology" to engage in a dialogue over categories such as artist/producer, production/consumption, and amateur/professional (Heilman, 2000). Software companies, continuing the move toward a more "participatory" culture, set out to find new ways to give audiences greater control over the entertainment experience (Brown, 2001a, 2001b). Technology companies launched efforts to "re-architect" the Internet with Napster-like peer-to-peer products (e.g. Groove Networks, see Udell, 2000) while management theorists and economists began talking about the potential for "Napsterizing" for non-media-related industries such as pharmaceuticals (Hughes, Moore, & Snyder, 2002) and financial services (De Meyer, Dutta, & Srivastava, 2002).

On October 9, 2003 Napster returned once again, briefly, to become the object of widespread public attention. The circumstances under which it did so, however, could not be more different than the fall of 1999. The occasion for renewed focus on Napster was the webcasted re-launch as a "street legal" on-line music vendor. Promising more than 500,000 songs for sale at about \$0.99 each, the new Napster boasts the original logo (the head of a cat wearing headphones), a much improved interface, and more reliable downloading, as well as many of the features that made it so appealing to music listeners—access to other file-sharers' music libraries and playlists. For a

fee, listeners will have access to pre-programmed streaming radio, music videos, and message boards.

And while the website exclaims that “The Cat is Almost Back!” there is no mistaking the fact that Napster 2.0 is nothing like the one that raised the hackles of the RIAA in the late 1990’s. For one thing, the on-line music landscape has changed tremendously since Napster faded from view in 2001. There are already at least five other legal on-line music vendors, the most popular and perhaps successful of which is Apple Computer’s iTunes, having sold over 10 million tracks in its first 6 months- and all of that only to Macintosh users! There are also over a dozen free file-sharing networks whose applications have been downloaded in excess of 500 million times.<sup>38</sup>

Thus, Napster 2.0 will have to compete with several legal downloading services and an even greater number of legally-questionable file-sharing networks. This raises numerous questions, many possessing more than a pinch of irony. For example, Will Napster 2.0 take a public stance for or against the RIAA’s lawsuits against the remaining file sharing services and their individual users ( Borland, 2003)? Will Napster 2.0 condone, turn a blind eye, or try to prevent files downloaded on its service from being shared over free services? Will Napster 2.0 be able to survive, let alone prevail, in a competition for primacy among incumbents in the legal music downloading space (Cohen, 2003)? Will Napster’s high name recognition, estimated at 3-5 times that of its nearest rivals (Hesseldahl, 2003)- prove a liability or an asset. Does the very existence of Napster 2.0 signal that the revolution in on-line music that it began is effectively over? Is the “cat’s that’s almost back” the fearsome crouching tiger of old or the RIAA’s spayed and de-clawed house cat ?

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<sup>1</sup> 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.

<sup>2</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>3</sup> In the Newsweek account, Fanning and Parker were joined by a third collaborator, Jordan Ritter, 23. Levy, "The Noisy War over Napster."

<sup>4</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>5</sup> "Easy Mp3 Distribution," Slashdot.com Discussion Thread Started 16 November 1999.

<sup>6</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).

<sup>7</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>8</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."

<sup>9</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).

<sup>10</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>11</sup> 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.

<sup>12</sup> Opposition of Defendant Napster, Inc. to Plaintiff's Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

<sup>13</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>14</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).

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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>15</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). Napster, Inc. v. A&M Records, Inc. No. 00-16401. Opinion. (U.S. Court of Appeals for the Ninth Circuit) 2001.

<sup>16</sup> For an overview of the trade-offs between efficiency and control in the filmed entertainment industry, see Ronald 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>17</sup> Motion of Plaintiffs for Preliminary Injunction. (N.D. Cal. July 26, 2000).

<sup>18</sup> Ibid.

<sup>19</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>20</sup> Appellant Napster, Inc.'s Opening Brief. (U.S. Court of Appeals for the Ninth Circuit) 2001.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</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.

<sup>24</sup> Opposition of Defendant Napster, Inc. to Plaintiff's Motion for Preliminary Injunction. (N.D. Cal. July 26, 2000).

<sup>25</sup> Ibid., 191-2.

<sup>26</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>27</sup> In a public letter to parents, released to coincide with the launch of [cybercitizenship.org](http://www.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!"

<sup>28</sup> "What Is Cyber Ethics?," Cybercitizen.org, available from:

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<sup>29</sup> Appellant Napster, Inc.'s Opening Brief. (U.S. Court of Appeals for the Ninth Circuit) 2001.

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<sup>31</sup> Declaration of Jack Valenti In Support of Plaintiff A&M Record's Motion for Preliminary Injunction.

<sup>32</sup> This statement was posted, among other places, on the RIAA's Web site. "Artist/Manager Quotes Regarding Napster," RIAA, available from: [http://www.riaa.com/Napster\\_artist\\_quotes.cfm](http://www.riaa.com/Napster_artist_quotes.cfm); Internet; accessed 1 May 2001.

<sup>33</sup> Appellant Napster, Inc.'s Opening Brief. (U.S. Court of Appeals for the Ninth Circuit) 2001.

<sup>34</sup> Ibid.

<sup>35</sup> 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>36</sup> 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>37</sup> "Boycott-Riaa.com Home Page," available from: <http://www.boycott-riaa.com/>; Internet; accessed 1 May 2001.

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<sup>38</sup> At its peak Napster claimed to have upwards of 50 million members. On October 13<sup>th</sup>, 2003 at 12:51 PM EDT Download.com reported that the Kaaza application has been downloaded 284,727,760 times. Another program named "Morpheus" has been downloaded over 116 million times. No fewer than ten other programs, with names like "BearShare", Imesh, Lime Wire, Audio galaxy, Grokster, and Xolox have been downloaded from 3 to 60 million times each. Most of these applications are still facilitating file-sharing despite numerous court decisions declaring this kind of activity to be illegal. At 1:45 PM on October 8<sup>th</sup>, 2003 the same author observed that Kazaa reported 4,052,899 simultaneous users sharing 710,457,640 files. This is about 8-10 times the level that the author observed trading music files over Napster in March of 2001 when that service facilitated approximately file-sharing by approximately 450,000 users at one time.