HIS NAPSTER'S VOICE

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Everybody, by now, knows the Napster story; news travels quickly these days. Napster, a clever little Internet application invented by a 19 year old college dropout right out of Central Casting, is quite simple. It works, more or less, as follows. You download the Napster software. You run the software on your computer. It scans your hard disk and compiles a directory of the names of the music files it finds there. It then sends that directory—not the files themselves, just the list of file names — back to Napster's "home" computer, the Napster server, where it is placed into a database, along with the directories of all of the other Napster users who have gone through the same process (70 million or so at its peak).

The next time you (or any of the 70 million) log onto the Internet, your computer, in addition to doing whatever else it is doing, sends a message to the Napster server: "User John_Doe here – I've just logged on to the Internet, and my 'Internet Protocol address' – the number my Internet Service Provider has assigned to me so that I can send and receive messages over the Internet – is [255.255.4.11]." [2] The Napster server updates the database with this information, so that, in addition to the names of the music files on each Napster user's hard disk, it now contains information about whether each user is, or is not, currently logged on, and the Internet address of all users who are currently online.

So far, so good. If you then find yourself, on some dark and lonely night,

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[2] For non-technical discussions of the Internet Protocol addressing scheme *see, e.g.*, A. Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN to Route around the APA, 50 Duke L.J. 17 (2000) (http://personal.law.miami.edu/~froomkin/articles/icann-main.pdf); David J. Loundy, A Primer on Trademark Law and Internet Addresses, 15 John Marshall J. of Computer and Info. Law 465 (1997) (http://www.loundy.com/JMLS-Trademark.html); Jonathan Weinberg, 50 Duke L.J. 187, ICANN And The Problem Of Legitimacy, 50 Duke L.J. 187 (2000); Milton Mueller, Technology and Institutional Innovation: Internet Domain Names, 5 Int'l J. Comm. L. & Pol'y 1 (2000); Jay P. Kesan and Rajiv C. Shah, Fool Us Once Shame On You - Fool Us Twice Shame On Us: What We Can Learn From The Privatizations Of The Internet Backbone Network And The Domain Name System, 79 Wash. U. L. Q. 89 (2001).

desperate to hear, say, Bob Dylan's version of the Stanley Brothers' classic "Rank Stranger," you send a query to the Napster server: "Does your database list any machines that have a copy of this song? If so, can you please provide me with the list of those that are currently logged onto the Internet – with their IP addresses, if you don't mind?" When the server sends you back that list, the Napster software conveniently lets you send a message directly to any of those machines – because you have their IP addresses you can easily contact them – requesting the file in question; a copy of the file is then transmitted directly from that remote machine to yours.

This simple application was, at least according to some reports, the fastest-growing software application in the (relatively short) history of personal computers.[3] To use it is an intoxicating experience, a glimpse at the extraordinary – the almost unimaginable – power of a truly global network, of the planet's collective mind: If information exists, anywhere on earth, you can find it and you can use it. That is a very, very powerful notion, one that has been lurking around in human consciousness ever since the Library of Alexandria, if not before. We all heard talk, back in 1995 or thereabouts, about the coming of the "celestial jukebox," the instantly downloadable library of songs that would be available at the click of a mouse. Most people, I think it fair to say, pictured this in Library-of-Alexandria terms: there really would be some big *box*, housed in the basement of an office building in L.A., that we would all be dialing into, some machine with a zillion songs stored on it, owned and operated by Time/Warner, or Sony Music, or EMI, or BMG, or all of them together.

But lo and behold, it didn't happen that way. *The network is the jukebox*. Aha! Like many great ideas, this one is so simple that in retrospect it seems obvious. Why go to the immense trouble and expense of gathering and cataloguing all of the material into a single library? The library already exists – at least, bits and pieces of it, scattered in a million different places; it comes into being the moment everyone is given the keys to everyone else's library. A string of code – relatively simple and straightforward code, I'm told – does the trick; the entire network becomes your personal, searchable hard drive.

[3] Simon Crerar, Websites of the Year, Sunday Times (London) December 31, 2000; News in Brief, Chicago Sun-Times, September 12, 2000 Pg. 3.

This is all, of course, old news, last year's headlines. Napster, like some cyberspace algal bloom, or supernova, exploded on the scene, had its fifteen minutes of fame (including a *Time* magazine cover story), and burned out some time last year, when a California federal district court shut it down because of copyright violations[4] and the Ninth Circuit Court of Appeals upheld that action.[5] Time to move on to the next new thing and whatever legal puzzles it presents to us.

But perhaps we should pause for a moment. One of a law professor's jobs is, on occasion, to resist the temptation to move too quickly, to slow the debate down so we can figure out exactly where we are, how we got there, and where we might be going. Napster's not old news – at least, we shouldn't treat it as if it were old news. There are some very hard questions here about how copyright law is going to function on the global network, questions that will be with us, I am certain, for a very long time. The Napster case is one small (though important) step through a deep and dark forest. Napster-like functionality will surely re-appear in thousands of different guises – it's far too powerful for it to be otherwise. We will see many variations on the legal problems it poses, and we will need to understand the ways in which those different variations are the same as Napster (for copyright purposes) and the ways in which they may be different (for copyright purposes).

The IS.

To do that – to start thinking about the relationship between "peer-to-peer" file-sharing technologies (like Napster) and copyright law – we need to distinguish the 'is' from the 'ought,' the 'descriptive' from the 'prescriptive,' the question '*does* copyright law currently make Napster's activities unlawful?' from the question '*should* copyright law make Napster's activities unlawful?'[6]

Is Napster, Inc., infringing copyright? Although the answer, we all know, is "yes" – at least, that's what the headlines ("*NAPSTER LOSES!*") told us when the Ninth Circuit

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[4] *A & M Records, Inc.* v. *Napster, Inc.*, 114 F.Supp.2d 896 (N.D.Cal. 2000), *aff'd*, 239 F.3d 1004 (9th Cir. 2001) (hereinafter "Napster I").

[5] *A & M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), *aff'g*, 114 F.Supp.2d 896 (N.D.Cal. 2000) (hereinafter "Napster II").

[6] "Is" and "ought" questions are related to each other, of course; the meek may not inherit the earth, but the next generation surely will, and one characteristic of a democratic society is that the "ought" sometimes becomes the "is," that processes exist whereby people can bring the law as it "is" into closer conformity with what they believe it should be.

issued its ruling last year – the question is a tricky one, for one simple reason: Napster itself never actually makes, and the Napster server never actually stores or redistributes, "copies" of any copyrighted files at all. All that copies and stores is the (uncopyrightable) list of files already on each user's hard drive. Napster users may, it is true, use Napster's database in order to make infringing copies of copyrighted works[7] — but what makes Napster liable for the infringements of its users? Is the screwdriver salesman liable because his customer chooses to use the screwdriver to burglarize a house?

The record company plaintiffs were, needless to say, aware of this little complication. In their suit, they acknowledged that Napster was not "directly" liable for copyright infringement; instead, they claimed that Napster should be held responsible for the infringing activities of Napster users under the doctrine of "contributory copyright infringement."

The doctrine of contributory copyright infringement, which dates back to the early part of the 20th century, holds that one who "materially contributes" to the infringing conduct of others with knowledge of the infringements can be held liable for them. The Supreme Court put its imprimatur on the doctrine in 1984, in the "VCR case" (*Sony* v. *Universal Studios*[8]*).* *Sony* was similar, at least superficially, to the Napster case; there, too, entertainment industry plaintiffs brought a claim of contributory copyright infringement against the purveyors of a new copying technology – in that case, the videocassette recorder – that was being used to make infringing copies of the plaintiffs' copyrighted works (television broadcasts and movies).[9]

The Court in *Sony*, however, ruled in favor of the defendant VCR manufacturers, holding that they were not contributorily liable for the infringements of VCR users. The

[7] There are a number of contrary arguments that can be made, based on either the "fair use doctrine" or other provisions of the Copyright Act, that Napster users themselves are not infringing copyright when they share music files for their own 'personal use,' but we can pass over those arguments for the time being.
[8] *Sony* v. *Universal Studios*, 464 U.S. 417 (1984), available at http://supct.law.cornell.edu/supct/cases/464us417.htm.
[9] The entertainment industry had launched a public campaign to suggest that the VCR was about to destroy the very foundations of the industry, that tumbleweed would soon be blowing through the streets of Hollywood if the VCR were not brought under control. See Glynn S. Lunney, Jr., Reexamining Copyright's Incentives-Access Paradigm, 49 Vand. L. Rev. 483 (1996). They were, in fact, wrong; the industry learned how to live with that technology (and its "substantial non-infringing uses") quite comfortably. And notice, too, this nice twist: Sony, Inc. is pitching a 2-0 shutout thus far – having won both as one of the copyright defendants in *Sony v. Universal* and as one of the copyright plaintiffs in *A&M Records et al. v. Napster*.]

rule that the Court enunciated was this: manufacturers and distributors of technology that has "substantial non-infringing uses" – technology that can be used for lawful copying activities in addition to its potential infringing uses – cannot be held liable under the doctrine of contributory infringement for users' infringing conduct. Because the VCR was used by many people for "time-shifting" televised broadcasts to more convenient viewing times, for example – an activity the Court found to be a non-infringing "fair use" – Sony (and the other VCR manufacturers) could continue to distribute VCRs to their customers without permission from (or payment to) the holders of copyright in those broadcasts.

"We're just like the VCR manufacturers," Napster claimed; Napster also has "substantial non-infringing uses," and should therefore be free from copyright liability to the holders of copyright in the music Napster users were distributing to one another.[10] There is, after all, a great deal of original music being written out there in which the authors do not assert their rights to prohibit copying and distribution, but in fact encourage it; go to MP3.com if you don't believe that. Sharing those files is not infringement of copyright. Napster can be used for the transfer of those files, in – at least potentially – substantial numbers. QED.

The district court disagreed: Napster is not like the VCR manufacturers, because the non-infringing uses of Napster are not substantial – "minimal," in the court's words – in comparison to its infringing uses.[11] The court held that only "substantial or commercially significant use" of the Napster service was "the unauthorized downloading and uploading of popular music, most of which is copyrighted"[12]; other uses – for instance, the "authorized promotion of independent artists, ninety-eight percent of whom are not represented by the record company plaintiffs" – are "not substantial enough" to bring Napster within the protective confines of the *Sony* defense.

The ruling was not just a defeat for Napster; it was, potentially, a crippling blow for the future development of peer-to-peer file-sharing technology. Developers beware: no matter how powerful the sharing technology you come up with, it is your

[10] The briefs and court opinions in the *A&M* v. *Napster* litigation can be found at http://www.napster.com/pressroom/legal.html and at http://www.riaa.com/Legal.cfm
[11] Napster I, 114 F. Supp. 2d 896 at 912 (2000).
[12] *Id.*

responsibility to make sure that your users are not exchanging copyrighted information – or, at least, to ensure that a more "substantial" part of their activity is devoted to lawful copying activities. No mean feat.

Many of us thought that part of the district court's ruling was plain wrong on this score, and when the Ninth Circuit heard Napster's appeal, it did too. The appeals court reversed the district court on this point; it said that the district court had "improperly confined the use analysis to current uses, ignoring the system's capabilities,"[13] placing "undue weight on the proportion of current infringing use as compared to current and future noninfringing use."[14] Napster cannot, the Ninth Circuit ruled, be held liable "merely because the structure of its system allows for the exchange of copyrighted material"[15]; to hold it liable "simply because the network allows for infringing use would . . . violate *Sony* and potentially restrict activity unrelated to infringing use."[16] Napster can be held contributorily liable for the infringing conduct of its users only if (a) the copyright holder "provide[s] the necessary documentation" containing "specific information which identifies infringing activity" to give the defendant "actual knowledge that specific infringing material"[17] is being transmitted using its system; (b) the defendant has the ability "to block access to [its] system by the suppliers of the infringing material," and (c) it "fails to purge such material from [its] system."[18]

This ruling, to be sure, was of scant comfort to Napster itself, because the court went on to find that the record companies had given Napster "actual notice" of infringing activity by Napster users, having identified "more than 12,000 infringing files" that had appeared in Napster's database; Napster, therefore, did have "actual knowledge that specific infringing material" was being transmitted using its system.[19] Because it also had the ability "to block access to [its] system by the suppliers of the infringing material," and had "fail[ed] to purge such material from [its] system,"[20] the injunction against its continuing operation was allowed to stand.

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[13] Napster II, 239 F.3d at 1021.
[14] *Id*. (emphasis added) (citing *Vault Corp*. v. *Quaid Software Ltd*., 847 F.2d 255 (5th Cir. 1988).
[15] Napster II, 239 F.3d at 1021 (citing *Sony Corp*. v. *Universal City Studios, Inc*., 464 U.S. 417 (1984)).
[16] *Id*. at 1021.
[17] *Id*. at 1021-22 (emphasis in original).
[18] *Id*.
[19] *Id*.

But the ruling was, nonetheless, of critical importance for the future development of these technologies. It placed the initial burden onto the copyright holders themselves; the plaintiffs had to identify the specific infringing files being shared over the Napster system, the names of the copyright holders, and a "certification that [they] own or control the rights allegedly infringed"[21] before Napster can be deemed liable for the exchange of those files by its users. That's not a trivial burden, as evidenced by the continued wrangling between the parties after the Ninth Circuit ruling concerning the precise way that the record companies can sustain that burden.[22] More importantly, though, while it may have shut the door forever on Napster itself, it left other doors open for the development of other kinds of peer-to-peer file-sharing technology. The rule the court formulated – no liability for developers and distributors of these technologies without both "actual knowledge that specific infringing material" is being transmitted using their systems and the ability "to block access to [their] systems by the suppliers of the infringing material" – virtually assures the continued development and deployment of systems that will accomplish the peer-to-peer magic without those characteristics. Napster was liable because it maintained a central database of song listings (and therefore had the ability to remove offending material once it was identified as such by the record companies). Predictably, many second-generation peer-to-peer technologies – gnutella, morpheus, and FreeNet technologies, for example[23] – design around this legal impediment, allowing peer-to-peer sharing without the need for any central databases at

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[20] *Id.* at 1021-22 (citing *Religious Technology Center v. Netcom On-Line Communication Services, Inc*., 907 F. Supp. 1361, 1371 (N.D.Cal. 1995)).

[21] Order filed in March 2001 by the Northern District of California complying with the Ninth Circuit Opinion at 2, *A & M Records, Inc.* (No. C 99-05183 MHP, MDL No. C 00-1369 MHP), *available at* http://news.findlaw.com/cnn/docs/napster/napster030601ord.pdf.

[22] As of this writing (February, 2002), the Napster litigation has been suspended at the request of both sides, to allow the parties to continue settlement discussions and to avoid what RIAA General Counsel Cary Sherman called "more burdensome" litigation. Matt Richtel, Judge Grants a Suspension of Lawsuit on Napster, New York Times, Jan 24, 2002, at C4.

[23] See David P. Anderson and John Kubiatowicz, "The Worldwide Computer," Scientific American, March 2002 at 40 – 47, and references therein, for a general description of a variety of different peer-to-peer file-sharing technologies, including gnutella (http://www.gnutella.com and http://www.gnutellaworld.com), Freenet (http://freenetproject.com), Mojo Nation (http://www.mojonation.com), KaZaA (http://www.kazaa.com/en/index.htm), and Morpheus (http://www.musiccity.com). According to various reports, these services quickly exceeded Napster's popularity at its peak. See Matt Richtel "Free Music Service is Expected to Surpass Napster," New York Times, Nov 29, 2001 at C4. Shortly after the Ninth Circuit ruling in the Napster case, the Recording Industry Association of America launched a series of lawsuits against a number of these services as well. See Scarlet Pruitt, "Recording, movie industries sue Napster progeny," http://www.cnn.com/2001/TECH/industry/10/07/recording.sues.idg/ (October 7, 2001).

all.

It ain't over, like the man says, till it's over.

THE OUGHT

If that, then, is the "is," what about the "ought"? What should copyright law say about Napster? Is this the copyright law we want? How do we figure that out?

The first task, when faced with complicated and difficult questions like this one, is to try to unpack them into their difficult, and their not-so-difficult, components, to tease apart the complicated thicket of legal questions into those that are easy (the answers to which we all might be able to agree on quickly), and those that are hard (the answers to which will be more difficult to come by). This will allow us to focus on the latter and to begin the task of figuring out what to do about them.

Here's an easy question. Suppose we were trying to come up with a copyright law applicable only to information created and distributed on the global network; what would that law look like? Suppose, just for argument's sake, that there was an impenetrable boundary between the world of atoms – "Over Here" – and the world of bits – "Over There," and that information cannot move across that boundary, that information can appear Over There only if created Over There and vice versa.

I am well aware that this is a fantasy, that there is no such boundary, that information moves easily back and forth from analog to digital to analog, from cyberspace to realspace and back. That is, indisputably, reality. Knowledge, though, as Kierkegaard said, sometimes consists of "translating the real into the probable"[24]; let's indulge in this thought experiment and put reality aside for the moment – there will be plenty of time to re-introduce it later. If we pretend that there is such a boundary, what copyright law would we think would be best Over There, on the other side of the border?

This is an easy question? I think it is – at least, it is if you look at copyright rights as "instrumental" rights. From an "instrumentalist" perspective, the rights bestowed by copyright law are not "natural rights" that must, in that sense, appear in any just legal system; rather, they are rights that are granted for one very specific purpose: to increase society's overall stock of creative works. Thomas Jefferson's remains the clearest and most elegant formulation of the position:

[24] See W.H. Auden (ed.), *The Living Thoughts of Kierkegaard* (1952) at 113.

> "It has been pretended by some . . . that inventors have a natural and exclusive right to their inventions, and not merely for their own lives, but inheritable to their heirs. But while it is a moot question whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural . . . right to inventors. . . .
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> Stable [property] ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.
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> That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.[25]

Ideas, in other words, "cannot, in nature, be a subject of property."

> "Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any body . . . "[26]

This "instrumentalist" view is by no means universal; many European copyright regimes, for example, are founded on the opposite presupposition, the notion that copyright exists primarily to protect authors' natural rights – the "droit moral," as the French put it. I make no attempt here to persuade you that the instrumentalist view is the better one – my point is just that it is the instrumentalist view that underlies U.S.

[25] Thomas Jefferson to Isaac MacPherson, August 13, 1813, reprinted in Thomas Jefferson, *Writings* (Library of America, 1984) at 1286; see http://www.geocities.com/tjletter/home.html for an annotated version of this letter.
[26] *Id.*

copyright law. As we all learn in Copyright 101, U.S. law gives legal protection to creative expression in order to induce creative activity – in the words of the U.S. Constitution, "to promote the progress of Science and the useful Arts"[27] – giving creators an incentive to produce new works of authorship by promising them an opportunity to profit from their labors via a property right, and hence a market, in their works. We tolerate the "monopoly" that we grant to these creative artists because, and to the extent that, it is a means to that end. We seek in our copyright law the right balance, the optimum point, between protection that is "too strong" (i.e., protection that reduces creative output by making it difficult for authors to borrow from previously created works) and protection that is too weak (i.e., protection that does not give authors enough of an incentive to invest the time and energy required into producing works of value).

So, back to our (supposedly) easy question: how much copyright protection do we need to induce creative activity Over There, on our hermetically sealed global network?

To answer this question, we would like to know what cyberspace would look like as a "copyright-free zone." Fortunately, we have been conducting – inadvertently, to be sure – a little natural experiment over the past decade or so to help us answer this question. We know how much creative activity we'd get if there were little or no copyright protection in cyberspace, because there has in fact been, in effect, little or no copyright protection in cyberspace. As the recording industry itself keeps reminding us, copyrights are routinely flouted on the global network, copyright "piracy" is rampant Over There; nobody in his right mind would voluntarily make information available on the global network in the expectation that copyright law will protect that information (and any lawyer who has been advising clients otherwise is probably guilty of malpractice).

So a "copyright-free" cyberspace would look much like what cyberspace actually looks like today.

And what does that look like? It looks to me like the greatest outpouring of creative activity in a short span of time – the Internet itself, let us not forget, is only a quarter-century or so old, and it has been all of 8 years since the World Wide Web was loosed upon an unsuspecting world – that the world has ever seen. I can't prove that (any

[27] U.S. Const., Art. I, Sec. 8 ("The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

more than I could prove its opposite, that we would have seen *more* creative activity had there been more legal protection for that activity). All I know is that cyberspace keeps growing and growing; more and more stuff keeps appearing, in new guises and new shapes; there are more and more people trying to give me information to place in my computer than I have room for. Look at my desktop, for goodness sake – real time stock quotes, the weather in five pre-selected cities, news headlines from Reuters and the Associated Press, the complete works of Thomas Jefferson, the latest scores from the English Premier League, maps of the city of my choice, maps of the distribution of information in cyberspace, powerful search tools, etc. I'm one click away from a lot of pretty interesting stuff. All at a marginal cost to me of zero. And all this without any substantial legal protection for that information at all.

It was fortunate that we actually conducted this natural experiment because without it, the conventional wisdom would have assured us that it could never happen. Without any incentive to create provided by strong property rights, we surely would have said, there will be no creative activity out Over There. Cyberspace will become, and remain, just a vast wasteland.

But somehow that's not what happened. Perhaps we don't understand everything there is to understand about the need for intellectual property protection. Perhaps the world is trying to tell us something, that this is a new kind of place where things that worked well in the world of atoms don't work so well. Perhaps in these special circumstances – in a medium built upon the ability of machines to copy and to disseminate information at previously-unimaginable speeds with previously-unimaginable efficiency, and at a previously-unattainable low cost – there are other ways that creative activity can be stimulated.

Eben Moglen of Columbia Law School puts it more elegantly (and colorfully) that I: In a world of digital products that can be copied and moved at no cost, "traditional distribution structures [that] depend on the ownership of the content or of the right to distribute are fatally inefficient."[28]

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[28] Eben Moglen, "Liberation Musicology," http://www.thenation.com/doc.mhtml?i=20010312&s=moglen. Moglen continues:

> "Hundreds of potential 'business models" remain to be explored once the proprietary distributor has disappeared, no one of which will be perfect for all

> "As John Guare's famous play has drummed into all our minds, everyone in society is divided from everyone else by at most six degrees of separation.[29] Let's not concentrate on the precise number, but on the fact it reveals: the most efficient distribution system in the world is to let everyone give music to whomever they know who would like it. When music has passed through six hands under the current distribution system, it hasn't even reached the store. When it has passed through six hands in a system that doesn't require the distributor to buy the right to pass it along, . . . it has reached several million listeners. This increase in efficiency means that composers, song-writers and performers have everything to gain from making use of the system of unowned or anarchistic distribution . . .
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> 'Incentives' is merely a metaphor, and as a metaphor to describe human creative activity it's pretty crummy. [T]he better metaphor arose on the day Michael Faraday first noticed what happened when he wrapped a coil of wire around a magnet and spun the magnet. Current flows in such a wire, but we don't ask what the incentive is for the electrons to leave home. We say that the current results from an emergent property of the system, which we call induction. The question we ask is 'what's the resistance of the wire?' So Moglen's Metaphorical Corollary to Faraday's Law says that if you wrap the Internet around every person on the planet and spin the planet, software flows in the network. It's an emergent property of connected human minds that they create things for one another's pleasure and to conquer their uneasy sense of being too alone. The only question to ask is, what's the resistance of the network? Moglen's Metaphorical Corollary to Ohm's Law states that the resistance of the network is directly proportional to the field strength of the "intellectual property" system."[30]

We can surely discuss *why* all this is happening (and have an interesting discussion in the course of so doing), but it seems to me very difficult to deny that it *is* happening.

> artistic producers, but all of which will be the subject of experiment in decades to come, once the dinosaurs are gone. . . . [The] wholesale defection from the existing distribution system is about to begin, leaving the music industry – like manuscript illuminators, piano-roll manufacturers, and letterpress printers – a quaint and diminutive relic of a passé economy."

[29] See Duncan Watts, *Small Worlds* (Princeton Univ. Press, 2001) for a summary of recent research on "small world" network phenomena.

[30] Eben Moglen, Anarchism Triumphant: Free Software and the Death of Copyright, http://emoglen.law.columbia.edu/publications/anarchism.html.

Thinking about cyberspace as a copyright-free zone[31] might not come naturally to most of us in this room, but it sure comes naturally to my kids (and probably to yours, too). And remember: they get to write the rules, soon. As the plaintiff record companies put it in their brief to the Ninth Circuit: "If the perception of music as a free good becomes pervasive, it may be difficult to reverse."[32] Indeed.

What good, though, is any of this talk? A "bordered cyberspace" would flourish without strong copyright protections: So what? What if it were true, if there were an impenetrable boundary between Over There and Over Here, that we might not need much in the way of intellectual property protection Over There in order to induce creative activity Over There? There is no such border; what good is it to talk as if there were? Where has this little thought experiment gotten us?

Further along than it might appear, I suggest. Thinking about the question in this way doesn't make the problems disappear, but it does turn them into different problems. There is a "Napster problem," but it is not that people are using the remarkable new tools at their disposal in this remarkable new place to accomplish previously unimaginable feats of information-sharing and information-redistribution; that is not a problem at all, that is the solution to a problem, the problem of finding better ways to get more information more quickly to more people.

The "Napster problem" is not that information is being shared but that information is being smuggled – across the border, from realspace to cyberspace (and, somewhat more metaphorically, from the past to the future). The problem is created by the permeability of the boundary, by the ease with which people can transfer information from Over Here – the songs, say, of Jerry Lieber and Ben Stoller,[33] or Metallica[34] – and

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[31] Early suggestions that cyberspace might function best as a copyright-free zone came from John Perry Barlow, "The Economy of Ideas," Wired, Mar. 1994 at 84, and Jessica Litman, Revising Copyright Law for the Information Age, 75 Or. L. Rev 19, 30 (1996).

[32] Brief of Plaintiffs/Appellees at 32, A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401, 00-16403); *available at* http://news.findlaw.com/cnn/docs/napster/riaa/napster09082000.pdf.

[33] Lieber and Stoller were two of the plaintiffs in the A&M v. Napster litigation, as well as two of America's greatest songwriters, the authors of such classics as "Love Potion Number Nine," "Yakety Yak," "Charley Brown," "On Broadway," "Spanish Harlem," "There Goes My Baby," "Stand By Me," and "Jailhouse Rock.". See http://nfo.net/.CAL/tl3.html.

[34] Metallica took a particularly aggressive public stance against Napster. *See, e.g., Metallica Unmasks Music-Swapping Fans*, May 4, 2000, *available at* http://www.usatoday.com/life/cyber/tech/review/crh110.htm.

move it Over There, onto the global network, where it can be placed into the remarkable and remarkably efficient Over There distribution system.

The Recording Industry Association of America is at least partially correct: There is something unfair about this. We made a bargain with Lieber and Stoller: Write and publish your songs, and you will be compensated each time a copy is made of a recording of each of those songs. They kept their end of the bargain, and now we're breaking ours.

Solving the "Napster problem," then, might not necessarily mean figuring out ways to impose an unnecessary copyright regime on the information circulating on the global network; it might mean figuring out ways to reduce the incidence of smuggling, and/or to compensate those whose works are being smuggled, across the border into cyberspace. It means focusing our attention on devising ways that copyright can continue to do its work (if and where it is needed) and can disappear (if and where it is not).

What we need – and what, if I were working for the RIAA, I'd focus my efforts on – are ways to build better borders, tools for making the boundary between realspace and cyberspace more impermeable. It sounds like a task that is either ridiculous or impossible, but it is neither. We actually once had a very nice little 'border-construction tool' – it was called the "copyright notice requirement," a requirement that information had to bear an identifying label if it was to be protected. Unlabelled = unprotected. It would be far, far easier to patrol the border if protected information were labeled in this way.

Oddly enough, though, we got rid of that labeling requirement some time ago – just, some might argue, when we needed it most.[35]

Cryptographically-based protection schemes to prevent unauthorized access to, and movement of, information are another kind of border-construction tool, another means of creating more impermeable boundaries between the worlds of protected and unprotected information. If Metallica wants to "lock up" its performances in completely unbreakable cryptographic envelopes, and charge me outrageous prices to access it, I say:

[35] As a condition of its accession to the Berne Convention on Artistic and Literary Property, the United States prospectively eliminated the copyright notice requirement from its domestic law on March 1, 1989. See Copyright Act, Sec. 401 (17 U.S.C. Sec. 401, as amended) ("Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed copies from which the work can

more power to them. A clearer boundary between protected and unprotected information universes will allow us to see – not just to speculate about, but actually to observe – the extent to which copy protection really is necessary to stimulate creativity. I happen to think that the world of unprotected information will grow much more luxuriantly than its counterpart, that precisely because creativity will flourish where re-use and re-distribution is most widely permitted we'll find it less and less necessary to spend time on the other side of that border.

But I might be wrong about that; perhaps accessing the really good stuff will require a trip across the line. Time will tell – but it will tell.[36]

Another place I'd look if I were trying to solve this problem is to Charles Dickens.[37] Dickens, it turns out, was as angry about border permeability and copyright smuggling as Lieber and Stoller or Metallica are. Dickens' works, too, were being taken without his permission across a border – the border between the United Kingdom and the United States – and, once it was over on the Other Side, they were being freely reproduced and distributed without compensation to him. Interestingly enough, it wasn't even truly "smuggling," because U.S. copyright law, in the nineteenth century, gave absolutely no protection whatsoever to works created Over There, on the other side of the U.S. border. It was, in other words, perfectly lawful to bring Dickens' works across the U.S. border and to reproduce and distribute them to your heart's content. [Sound familiar?]

International copyright relations have always reflected a simple opposition

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be visually perceived . . .") (emphasis added); see, generally, Nimmer on Copyright, Sec. 7.02 ("Statutory Formalities").

[36] The Napster litigation may actually bring us closer to accomplishing that goal, precisely because of the nuances introduced by the Ninth Circuit. The perception of music as a free good has become pervasive; that's the good news. The record companies wanted a ruling that would have declared peer-to-peer file-sharing technology unlawful until the border was properly constructed. That's what they got from the district court, in effect: a ruling that peer-to-peer systems could not operate lawfully unless and until Napster could demonstrate that its users were not sharing copyrighted information. But that's not what they got from the Ninth Circuit. What they got from the Ninth Circuit was a ruling that placed the burden on them – on the copyright holders – to identify the specific instances where the border had been breached.

[37] This argument is presented in more detail in David G. Post, "Some Thoughts on the Political Economy of Intellectual Property: A Brief Look at the International Copyright Relations of the United States," available at http://www.temple.edu/lawschool/dpost/Chinapaper.html. It is taken primarily from Thorvald Solberg, "The International Copyright Union," 36 *Yale Law Journal*, 68 (1926), Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (1994), and Julian Warner, "Information Society or Cash Nexus? A Study of the United States as a Copyright Haven," 50 J. Am. Soc. for Info. Sci. 461 (1999).

between net copyright exporters (favoring reciprocal recognition of foreign copyrights) and net copyright importers (resisting such recognition). In Professor Paul Goldstein's words, "If Country A imports more literary and artistic works from Country B than it exports to Country B, it will be better off denying protection to works written by Country B's authors even if that means foregoing protection for its own writers in Country B."[38] The first copyright exporters (like Great Britain and France) were happy to offer protection to the works of foreign authors, provided their authors were given reciprocal protections. The U.S., on the other hand, was in its early days primarily an *importer* of copyrighted works, and U.S. copyright policy was designed precisely to promote the development of infant copyright industries within the United States. Providing copyright protection only for American authors would, it was widely believed, work to the advantage of the growing American publishing industry, because American publishers could publish cheap versions of foreign (especially British) works (since they were not obligated to pay royalties to the [foreign] authors when they did so).

These protectionist provisions of the U.S. Copyright Act were relatively uncontroversial for the first 40 years or so, and the American publishing industry did in fact grow (at least partially due to these protections). Dickens and other prominent British authors did not take kindly to their treatment at the hands of the Americans, and they complained bitterly, and quite publicly, about the injustice of this arrangement.[39] As the nineteenth century proceeded, however, domestic voices began to be heard in support of the recognition of foreign copyrights. The first formal proposal to recognize international copyright and to remove the discrimination against foreign authors was made in 1837 by Senator Henry Clay—one of America's most influential Congressmen and a future Presidential candidate—in the much-publicized "Clay Report." Clay argued that American interests were harmed, not benefited, by the absence of recognition for foreign copyrights; whatever benefits American *publishers* might be reaping by virtue of the

[38] Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (1994), at 181.
[39] Dickens devoted much of his public tours of the United States in 1841-42 and 1867 to this subject; Anthony Trollope, in 1868, wrote "The argument . . . is that American readers are the gainers – that as they can get for nothing the use of certain property, they would be cutting their own throats were they to pass a law debarring themselves from the power of such appropriation. . . . In this argument all idea of honesty is thrown to the winds ... [T]his argument, as far as I have been able to judge, comes not from the people, but from the book-selling leviathans, and from those politicians whom the leviathans are able to attach to their interests."

ability to reprint foreign works at low cost, Clay suggested, was offset by the benefits that American *authors* would reap by an extension of copyright to the works of foreigners. Soon thereafter, a number of the most distinguished American authors and artists—including Louisa May Alcott, William Cullen Bryant, George William Curtis, Ralph Waldo Emerson, Horace Greeley, Oliver Wendell Holmes, William Dean Howells, Henry Longfellow, Harriet Beecher Stowe, and J.G. Whittier, among many others – began to speak out on behalf of copyright protection for their foreign counterparts.

It sounds like a paradox: what did American authors have to gain by an extension of copyright protection to the works of their counterparts—their competitors—in other countries? The answer is two-fold. First, American authors were finding that <u>their</u> works, though protected by copyright in the United States, were hard-pressed to compete with inexpensive editions of foreign works; why pay a dollar for the work of an American author such as Herman Melville or Nathaniel Hawthorne when you can get the latest Dickens or Trollope for half that price or less?

And second, U.S. authors found that they were being harmed by discriminatory treatment directed against them in foreign markets; other nations were – understandably! – reluctant to give copyright protection to American authors when the United States was denying copyright protection to their authors, and American authors were accordingly frustrated in their attempts to market their works overseas.

This battle was fought where all battles about policy in a democratic society are fought: in the court of public opinion. The American people (and the U.S. Congress) ultimately were persuaded that Dickens' copyrights should be respected Over Here. In 1891 – 101 years after enactment of the first U.S. Copyright statute – the U.S. Congress passed the International Copyright Act, granting, for the first time, protection to foreign works.

The moral of the story? Border construction is a long and complicated process, unlikely to satisfy those looking for a quick fix. Only when Napster users believe that it is in <u>their</u> interest to grant recognition to the "foreign" copyrights held by Lieber and Stoller will they do so. When there is a constituency for reciprocal copyright recognition Over There, among cyberspace's new Hawthornes, and Melvilles, and Emersons, will we see it. There may be things we can do to speed that process up; taking our cue from

Dickens, a policy of non-recognition of cyberspace copyrights here in realspace, for example, under which we might deny copyright protection Over Here for software and systems developed Over There, might be an interesting place to start.

I can't solve this problem; I can only point out that it's there. Borders are always as real as we want them to be, and the Future is (always) just beginning, today.