What is the significance of the delay in the Napster ruling?

James Brewer
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An October 2 hearing to decide whether to lift a stay on the injunction against Napster, the Internet music sharing service provider, concluded without making a decision, stating the need for further information and deliberation. Whatever the final outcome of the case, the delay in the ruling will provide time for deals to be struck by financial interests that have a stake in the dispute.

In the few months since the dispute surfaced, with the rock band *Metallica* 's initiating a lawsuit against Napster last May, it has emerged as a major commercial issue for key new technology concerns, including the recording, publishing, telecommunications, Internet and movie industries. There are large financial interests on both sides of the debate. Internet technology companies stand to gain huge revenues and the hesitation in the court reflects the fact that this case is a seminal one in establishing future business models for the Internet.

The Napster decision is significant in that it portends the attitude of the government toward a myriad of other developments in the digital communications industry. Recent events in this area will highlight what is at stake.

Last month a federal court made a major ruling against MP3.com, an Internet digital music company, which would make them liable for as much as $250 million in fines to be paid to Universal Music Group. The company was charged with "willful violation of copyright law" for their "MyMP3" venture that made mp3 files available for CDs of which users could prove they owned a copy. MP3.com had already reached agreements with the other four major recording labels to the tune of about $20 million each. Universal Music is the only one of the recording companies that refused to settle with MP3.com. During the court proceeding Universal requested that the fines against MP3.com be as high as $450 million.

The band, The Offspring, one of Napster's active proponents, was planning to offer Internet users a free mp3 pre-release of it's upcoming album, "Conspiracy of One" from their web site. Sony Music, the band's label, staunchly opposed the plan. They feared that if successful it would have disproved the claim of the RIAA that free music downloads hurt the sales of CDs. Sony forced the band to scuttle the offering by threatening a lawsuit, eventually settling at allowing the band to make only one song available as a download.

Sony, EMI, Universal Music and now, BMG have all introduced their own proprietary versions of digital music delivery systems to combat the Napster model of free distribution. Typically, downloading a single song will cost two-to-four dollars, charged to your credit card. A one-time hearing may go for 25 cents. Downloading an entire CD will cost anywhere from ten to fifteen dollars. Besides being expensive, all of these systems are necessarily more cumbersome than downloading free MP3 files. When you consider that the user would then have to purchase a blank disk, at the bloated price tag because of RIAA royalties already in place, and then spend a fair amount of time copying the files, the user is probably better off buying the prepackaged CD. This gives an insight into the position of the record companies, who are not prepared to allow the slightest encroachment on their continually escalating revenues. Obviously, this approach will not be viable unless free music distribution is all but wiped out.

America Online, RealNetworks, and the Digital Media Corporation among other webcasters, are pursuing arbitration with the US Copyright Office against the Recording Industry Association of America (RIAA) over royalties. The RIAA has up to now conducted its negotiations on a company-by-company basis with deals preventing webcasters, who deliver digital content such as concerts over the Internet from making the royalty amounts public information. This secrecy effectively hamstrings the negotiations of other webcasters and makes it difficult for artists to collect what they are owed. Webcasters want the Copyright Office to set the royalty rate rather than being held virtually hostage by the record companies.

In late August, a US Federal District Court ruled against the right of Eric Corley of 2600 Enterprises to make a program called DeCSS available on the Internet. DeCSS decrypts the encryption system used by the Motion Picture Association of America (MPAA) on DVDs (Digital Video Disks). Corley claims that the purpose of the program is to allow users of the Linux operating system to view DVDs on their computers and argues that it is his right to make this available under the First Amendment of the Constitution which guarantees freedom of speech. After an initial lawsuit threat, Corley removed the programs from his own website but maintained links to other sites from where the program could be downloaded. The judge ruled that even these links were illegal. The MPAA based its case on the access provisions in the Digital Millennium Copyright Act of 1998 (DMCA) which proscribes any attempt to decrypt protective technologies as illegal.

These provisions in the DMCA are due to expire on October 28. The access provisions were only implemented on a two-year trial

basis in 1998, because Congress had concerns that giving content owners such complete power would have detrimental repercussions. The Librarian of Congress must announce a new incarnation of the access provisions, which may include certain exemptions if the office feels that the public's right to non-infringing uses are being violated. Critics of the DMCA are lobbying in Washington to prevent these provisions from being renewed.

In addition, several enterprises including Microsoft have either announced future releases this year, or have already released, electronic book systems. E-books, as they are called, are handheld devices approximately the size of a book, that can store written works digitally and display them in a form which is convenient for reading. They have the capacity to store several books in memory and the displays are becoming so sophisticated that they are set to rival the readability of print on paper. The potential of this technology for the propagation of knowledge is unprecedented. It means that any book can be quickly located on the Internet and downloaded for reading in a manner closely approximating the conventional books. However, copyright protection is one of the major concerns of the manufacturers, meaning that they are all developing their own encryption technologies. At the same time they are competing among themselves to be early into the market in order be the ones to establish the ad hoc standard file format.

Taken together, the above developments illustrate the depth of the unresolved intellectual property issues relating to digital technologies. The questions go far beyond the rights of the users versus the rights of the artists. In fact, both of those parties are being compromised by the corporate entities that are in the fray. It is generally recognized that there is such a massive potential profit taking in the digital content providing arena, that the future of entire industries, old and new hinges in the balance. The delay in the ruling on Napster reflects that the court is being cautious and to some degree trying to take a more long-term view.

During the proceedings against Napster, there has been much attention to the original 1984 US Supreme Court ruling on the Sony Betamax case (see http://www.hrrc.org/html/betamax.html). This case established the legal precedent on copying technologies available to the public. The ruling in this case stated that "any individual may reproduce a copyrighted work for â€˜fair use'; the copyright owner does not posses the exclusive right to such a use." Fair use included among other things, "time-shifting," that is, the process of copying programming so that it can be watched at another time, more convenient to the user. Further, "VTR's are therefore capable of substantial noninfringing uses." Napster claims that copyright law protects it's users right to non-commercial copying of content and that it's services aside from the copying of content that copyright holders object to, provide "substantial noninfringing uses."

Since the court's adjournment there has been a flurry of activity among the participants. It is conceivable that the court would prefer not to make a ruling on the issues if the parties can come to their own settlements. The panel of judges in the most recent hearing was somewhat less than friendly to the recording industry representatives. Clearly, the RIAA is carrying on in a ruthless and purely selfish manner; consistent with the CD price-fixing activities that have recently been exposed. Their accusations of "piracy" against Napster users are at best unproven charges in a legal sense. Copyright law does not concede and never has, that *all* copying of content is under the strict control of the copyright owners.

Many industry observers make the point that the recording industry had better face the fact that this is a new playing field and that they had better learn how to adapt themselves to it.

In the days following the October 2nd hearing, rumors emerged that Napster has pursued talks with some major Internet service providers about a possible buyout. Since Napster reportedly has a subscriber list of 32 million users, it could prove to be a very profitable acquisition. Hank Barry, Napster CEO has denied that any talks have taken place, but in his denial he said that since Napster's highest regard is for its shareholders, they would talk with anyone who is seriously willing to do business with them.

There has been discussion of Napster charging a monthly subscription rate for its users a substantial portion of which would go to the recording industry in the form of royalty payments. But Barry said he was surprised Napster had been unable to resolve the case outside of court and that Napster had made serious proposals over several months to each record company and publishing affiliates, which had been rejected. Furthermore, he said, â€œthe record companies have made no counterproposals.â€•

A representative of Bertelsmann Music Group said, â€œBMG has in fact discussed various business proposals with Napster. But Napster has never addressed the important issue of licensing nor proposed anything approaching a sound, legitimate business model.â€•

The explicit elaboration of rights of users as well as artists may prove elusive as the deal-making proceeds and "what the market will bear" becomes the operative once again. Whatever emerges from the courts and the business discussions now taking place will be dictated not by the interests of artists or the population at large but the profits, both actual and potential, of big business. The emergence of Napster's free music downloads business model poses a direct threat to the recording industry's control of the channels of distribution.

Far from the era of â€œfree musicâ€• that many have predicted since the emergence of Napster, what is emerging is a new business model in which Napster technology is, in one way or another, made available for the continuance of the proprietary nature of the music industry. It is the production relations under capitalism, based upon the enrichment of the few at the expense of the many that stands as the chief obstacle to a reasonable Internet distribution model that would benefit both the artists and listeners.