Napster seeks to block access to copyrighted music

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5 March 2001

Confusion reigned over the weekend following a hearing Friday March 2 to determine how to formulate a new injunction against the online music swap company Napster.

US District Judge Marilyn Hall Patel told lawyers for Napster and the recording industry that she was seeking to enforce copyright protections in a fair and workable manner. "The reason for this hearing today is to discuss not what if, but what an injunction should look like," she said.

Her remarks do not bode well for Napster executives, who had hoped they could win more time while seeking to transform the company into a subscription-based operation.

Technical and legal experts alike regard the Napster case as a landmark that will have a profound effect upon the way books, movies and all forms of entertainment are distributed in the future.

Following a February 12 hearing, in which the appeals court ruled against the company, Napster has effectively conceded the legal argument with its offer of a $1 billion deal for the recording industry giants. This was underlined at Friday's hearing when Napster said it was working towards policing itself and would use filtering software to block the transfer of one million files. The measures were due to be implemented over the weekend, but it was still possible to download songs by Metallica (the band most closely aligned with the recording industry's case against Napster) at 3am Eastern time on Sunday.

Napster attorney David Boies said last week, "We have come considerably closer together on the issue of an injunction. Sometime this week we will have completed the software implementation so that these file names will be blocked."

Lawyers for the recording industry have urged judge Patel not to delay implementing the injunction, fearing she may do so in the hope that the technical issues surrounding file blocking may soon be resolved.

"It is an ongoing, long and tedious process" according to Russ Frackman, attorney for the Recording Industry Association of America (RIAA). "It is not our view that we should wait for relief for this process to run its course," he said.

Speaking for Napster, chief executive Hank Barry told *Reuters* last week, "What we've asked for is to have some input in the injunction process and we are looking for ways to comply with the language in the 9th circuit opinion."

Technical difficulties

Judge Patel had issued her original injunction in July 2000 but a federal appeals court issued a stay of her ruling two days later, pending review. On reviewing the case February 12, a three-judge panel of the appeals court ruled that Napster could be held liable for copyright infringement and that an injunction, which would essentially shut down Napster was both warranted and required. The panel ordered Patel to modify her injunction requiring the record labels to identify which copyrights were being infringed by Napster; and last Friday's hearing was called to work over the details about how such an order should be implemented.

The following newsflash appeared on the Napster web site Sunday: "At a hearing in Federal District Court on Friday, March 2, Napster proposed to carry out the February 12th Court of Appeals ruling by blocking the sharing of file names submitted to Napster by copyright holders. In contrast, the injunction proposed by the recording industry would force Napster to shut down entirely. The judge has not yet ruled, but we are hopeful that the court's injunction, when it is issued, will allow the Napster community to operate while we continue to seek an agreement with the recording industry and transition to a membership-based service."

A statement by Barry says, "We proposed a workable injunction that follows the 9th Circuit ruling and keeps the Napster community together while we are working to settle this case and transition to our new membership-based service. While we await the judges modified injunction and while we continue to pursue our legal case, we will begin later this weekend to block the transfer of file names we have previously received from copyright holders, consistent with the 9th Circuits ruling."

Much of the legal argument is now focused around the question of who is responsible for identifying the music that must be blocked and how this is to take place. The record industry has proposed that it submit a list of artists' names and titles of songs that it requires blocking, with Napster then being responsible for finding and blocking these files. Napster argues this would be unworkable and could lead to the blocking of non-copyrighted material. The company argues that the recording industry should identify the specific files that contain copyright protected material.

Artists divided

Alongside the legal issues, the growth of Napster and music swapping has fueled a raging debate among artists on questions of intellectual property rights in the age of the Internet.

The most well known protagonists are rapper Chuck D and the Dave Mathews Band, on the side of Napster, and rap star Dr Dre and rock band Metallica, on the side of the recording industry.

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Trying to straddle the two sides is the musician Prince. Although a long-time critic of the music industry, Prince condemns Napster and calls for artists to take control of the distribution of their music, citing his own NPG Music Club. In an online interview with *Sonicnet.com* he said, "The creator of said work should and will define it." He argues that file sharing was inevitable because people are tired of getting ripped off at the record store, "One or two good songs for $18 is crazy." By signing artists to contracts giving the record labels ownership of the master recordings, Prince said, the industry has tried to redefine art as product and property, "That way, they redefine us."

Others oppose Napster on clearly commercial grounds. The estate of the late rock artist Jeff Buckley has asked the company to remove users who swapped his music. Representatives of rock pioneer Roy Orbison's estate have also notified the company of more than a million violations by Napster users of copyrights they hold.

In contrast, the Dave Matthews Band issued its latest single "I Did It" via Napster in January. Matthews, with several platinum discs under his belt, says that artists should rally round Napster. "I don't see the sense in fighting something that is the future. I don't feel that I'm in the position to say I'm being ripped off by Napster in any way," Matthews told *Siliconet*.

"We will always be able to play music, and no one will be able to take that away from us," he said. "There will be a lot more positive things that come out of Napster than negative. It's going to give people access to music they otherwise wouldn't have, because of the nature of the industry."

Rapper Chuck D wrote a column for the *New York Times* last April in which he encouraged fellow artists to embrace Napster.

The band Rage Against the Machine has asked Napster to reinstate thousands of members who had been kicked off the service at the request of Sony Music for downloading copies of songs from the group's â€œRenegadesâ€• album.

Opinion is equally divided among lesser-known artists who stand to benefit from the ability to get their music heard by a wider audience, but at the same time fear that file swapping by Napster users would undermine their potential income from royalty payments.

An issue of civil liberties

Beyond the concerns of the individual artist, the case also has huge implications for civil liberties. The ruling against Napster is the third such verdict based upon provisions in the Digital Millennium Copyright Act (DMCA) introduced during the Clinton presidency.

Though each case has focused on different sections of the Act, together they serve to restrict the flow of information on the Internet.

Napster's proposed subscription service will be based on technology similar to that employed to encrypt DVDs, which make it impossible for people to copy a movie or music on such discs, even if this is for personal use, which was previously recognised in law as "fair use". When a software system was developed to remove the DVD encryption, online hacker magazine *2600* was sued for providing links to the code.

According to the magazine's lawyer Robin Gross, "We've got legal rights to make copies of our own property that are being taken away from us. The DMCA isn't supposed to change fair use; however, the DMCA does outlaw the dissemination of the tools that are required to use those rights." The fair use argument was rejected in the Napster case in the hearing last June.

Speaking to *Wired.com*, Gross argues that since it is illegal to break the encryption, the works would basically remain under the control of the original copyright owner, but US law only grants limited protection to holders of copyright for 35 years, at which point the works become part of the public domain.

"The effect is really chilling on freedom of expression. We are going to find the kinds of liberties we've traditionally enjoyed in the real world are not going to exist on the Internet. The coupling of these decisions will restrict freedom of speech in cyberspace," Gross said.

A conflict between the profit system and the development of information technology

Napster and similar cases have revealed a fundamental conflict between the emergence of information technology and the existence of a social system based upon the profit interests of a privileged wealthy minority.

The emergence of a technology that can facilitate a far greater exchange of ideas, both political and cultural, than has ever been possible in the past immediately conflicts with the vested interests of big business. The most obvious examples of these are the media giants, but in a situation in which art itself is transformed into a commodity, this inevitably embroils the individual artist as well.

Napster has become a point of controversy precisely because, under the present economic system, the recording artist largely depends upon the system of royalties for his or her income. To the extent that this set up actually undermines the widest distribution of artistic work, however, it runs counter to the essentially democratic ethos of the Internet and World Wide Web, which is for all participants to be both receivers and broadcasters of material.

The debate must be taken beyond the existing confines of the profit system, towards the need for a society in which there can be the maximum social interaction between an audience and the artist, without detriment to his or her livelihood. This would require first and foremost putting an end to the virtual monopoly of a handful of media giants over the vast majority of artistic work.

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