The Ups and Downs of the Napster Revolution

Mia Garlick provides a thoughtful analysis of the Napster revolution.

Music has long been associated with revolutions but the revolution which we are currently experiencing is about music itself. It is a revolution about how we enjoy music and how people make money out of creating and selling music. At the heart of this latest revolution is the search and swap software called Napster, although the revolution has not been caused by Napster per se but the attitude which the Internet, and Napster, epitomise.

This article explores the Napster phenomenon to date. It briefly discusses the evolution of the Napster phenomenon and then reviews the Record Industry Association of America's recent preliminary injunction and the subsequent appeal which stayed the injunction.

STUDENTS AND ARTISTS REVOLT

As with many revolutions, university students have been heavily involved with the Napster revolution. In fact, university students have been so involved with Napster that many universities and colleges around the US blocked their students' access to Napster in February this year.[1]

Students and Napster fans have also been taking political action in defence of Napster. In response to the university bans, the Students Against University Censorship ("SAUC") group formed to collect signatures for a petition against the bans.[2] Several other protest sites have appeared more recently including anti-fan.com, which calls for boycotts against artists who have spoken out against Napster.

Also, when the US Senate recently began its hearings into music and copyright laws, hundreds of students bombarded the Senators who were participating in the hearings with emails in support of Napster.

Artists have also been lining up in support of and against Napster. Metallica announced in April this year it was bringing an action against Napster for copyright infringement (the band owns all of its masters and songs), unlawful use of a digital audio interface device and racketeering.[3]

Another band, the Tabloids, is critical of Napster because of the practical effect it says that Napster has on signed artists. The band claims that Napster only sends artists deeper into debt with their record labels by cutting into record sales. The Tabloids response has been to encourage people to create Trojan horse files and swap them through Napster, to frustrate the search and swap system.[4]

However, not all artists see Napster as the harbinger of doom. At the same time as Metallica was inflaming its fans, Limp Bizkit spoke out in support of Napster saying that Napster was an amazing way to market and promote music to a massive audience.[5] Rap artist Chuck D has also spoken out in support of Napster.[6]

NAPSTER'S BEGINNINGS

The Napster phenomenon is about a technology that has evolved gradually and continues to evolve to improve the ability of Internet users to locate and download music online.

Arguably, one of the first steps towards improving the ability of Internet users to search for and locate music online was taken by the search engine Lycos. Lycos developed an "MP3 Search" function as part of its website, which assisted music fans to locate MP3 files on the Internet.[7]

However, the MP3 searches which were available via search engines such as Lycos were unreliable and incredibly slow. The ability of "MP3 Search" to locate music files was limited to those files of which it became aware, either by registration or webcrawling.

As a direct result of the frustration experienced with Web-based search engines such as mp3.lycos.com, Shawn Fanning, who had recently dropped out of university and had never written a computer program before, bought a manual about programming and wrote his first Windows program. That program was called Napster.[8]

Napster enables a user to designate a folder in the harddrive of their own computer which is shared with the rest of the world. The user then stores their MP3 files in that folder and when they next log onto the Internet, the list of files stored in that folder is sent to Napster's central servers. Other Napster users can then search the directory at the Napster site to locate the MP3 files they want and go to the user's computer which has the desired file and download it.

Since Napster, several other programs have been written which further improve on the speed and reliability of locating and swapping MP3 files on the Internet.

One of these programs is Gnutella which was posted to the back pages of AOL's website while merger discussions were underway between AOL and Time Warner, one of the "Big 5" record companies. Gnutella was posted on an AOL subsidiary's pages for only 24 hours. It was quickly removed when AOL became aware of it amid mutterings that it was an "unauthorised freelance project". However, during Gnutella's limited online life, hundreds of free-software fans had downloaded the software and it is now circulating widely.[9] Due to its open source nature, programmers are able to continually improve Gnutella.

The AOL subsidiary which developed Gnutella, Nullsoft, was founded in 1997 by Justin Frankel who, shortly after he dropped out of the University of Utah, developed Winamp, a very popular program which allowed users to play music in the MP3 format. Nullsoft, was acquired by AOL 2 years later for approximately $80 million in stock.

As Napster was developed to improve on Lycos-style searches, Nullsoft developed Gnutella to resolve some of the bandwidth issues experienced in relation to Napster.[10] Unlike Napster, Gnutella does not require users to connect to each other through a central computer. Gnutella enables a peer-to-peer network to develop, basically linking users' computers and making the searching and swapping of music files quicker and easier.

Napster has to date been more popular than Gnutella precisely because it does have a central server. Gnutella servers change and migrate several times a day. This means that a person wanting to use Gnutella must know the numeric IP address of a Gnutella server in order to be able to use the application.

Already, new and varied software programs are being developed which aim to improve on both Napster and Gnutella, such as the services MojoNation, Scour.net (which is currently being sued by the Motion Picture Association of Amercia in an action similar to the action against Napster) and Free.net.

The most recent application which improves on Gnutella is Aimster. Aimster combines AOL's instant messaging ("**IM**") software with Gnutella. This new application is like a "skin" for an AOL IM user which reads the Internet addresses of "buddies" as they come online. Buddies can then share their music files amongst each other. AOL has not yet commented on Aimster.[11]

Amidst the variety of file swapping systems, Napster's centralised server is its main point of difference and also the reason for the current action against it.

BACKGROUND TO THE NAPSTER INJUNCTION

The major US record companies, including Universal, Sony, Warners, and BMC commenced an action against Napster in December 1999 alleging contributory and vicarious copyright infringement. US record companies' own the rights to many of the sound recordings which appear on CDs and which are being swapped and downloaded on Napster.

The rights in the underlying songs are owned, generally, by music publisher and songwriter representative organisations. These organisations, such as Frank Music Corporation, have also brought an action against Napster for contributory and vicarious copyright infringement. Their action has been joined with the record companies' action because the same issues arise in both cases.

Essentially, the basis for these actions against Napster is that Napster is authorising copyright infringements. As the owners of the rights in the sound recordings, the record companies' members control whether and how much a person can, for example, copy or broadcast or transmit their recordings over the Internet. Publisher and songwriter organisations can do the same in relation to the songs which make up such recordings. This means that if, for example, someone copies or transmit a sound recording over the Internet without the permission of the rightsholder, that person is infringing copyright.

However, it is also an infringement of copyright to "authorise" someone else to infringe copyright. In other words, if you direct someone to infringe copyright or if you let them do it or provide them with the facilities on which to infringe, and do not take reasonable steps to prevent them from infringing copyright, you will also be guilty of infringement. Essentially, this is record companies' complaint against Napster.

In July this year, Napster sought to dismiss the case against them on the grounds that they were similar to an ISP and therefore came within the special exception provisions, also known as "safe harbours", of the *Digital Millennium Copyright Act 1999* ("**DMCA**")[12]. The DMCA was enacted in the US to provide specifically for copyright laws as they apply to the Internet. Part of the DMCA provides that 'mere conduits' such as ISPs, are not liable if copyright infringing material is on their networks or passes through their networks. To come within this exception, an organisation must satisfy the definition of a 'service provider' under the DMCA as well as other conditions, such as removing any material if and when the service provider becomes aware that such material infringes copyright.

Judge Patel of the US District Court, Northern District, dismissed Napster's motion on the grounds that Napster did not satisfy the elements of the definition of 'service provider' and also, because she considered that the record companies raised genuine issues that Napster did not comply with the other requirements for a service provider to be exempt from infringements, namely that Napster did not have a policy of terminating repeat copyright infringers.

It is against this background that the record companies sought a preliminary injunction to shut Napster down on the grounds that, before a full trial of the issues was concluded, Napster would have 75 million users, "*a user base which would irreparably harm the industry and drive down CD sales*".[13]

"THE DOWN" – THE NAPSTER INJUNCTION

On 26 July 2000, the same Judge Patel who had heard Napster's motion for summary judgement, heard oral arguments in relation to the record companies' application for a preliminary injunction. In practical terms, the record companies were seeking an order against Napster to stop music files being swapped via the Napster service, until its action against Napster had been fully heard.[14]

Somewhat dramatically, the attorney for the record companies, Russell Frackman, opened his arguments with the claim that within the few minutes it took people to find their seats in the courtroom that morning, 30,000 songs, the majority of which were protected by copyright, were downloaded using the Napster service.[15] Frackman emphasised the historical importance of the injunction, saying:

> "*this is just the beginning and your honour has the ability to nip this in the bud.*"[16]

Essentially, the record companies' case was that its members would suffer irreparable harm if Napster was allowed to continue until the conclusion of the trial. The record companies claimed that 87% of all files swapped via Napster were unauthorised copies. In conjunction with this statistic, the record companies estimated that Napster would have 75 million users by the end of the year.

To be successful in the injunction, the record companies needed to show that they would suffer irreparable harm, which could not be remedied by monetary compensation, if Napster was not stopped. The record companies also had to show that it was reasonably likely to win at trial.

Judge Patel found that the record companies were not only reasonably likely to be successful at trial but had a strong chance of success. She granted the injunction and gave Napster until midnight two days later to remove all copyright material from its service.

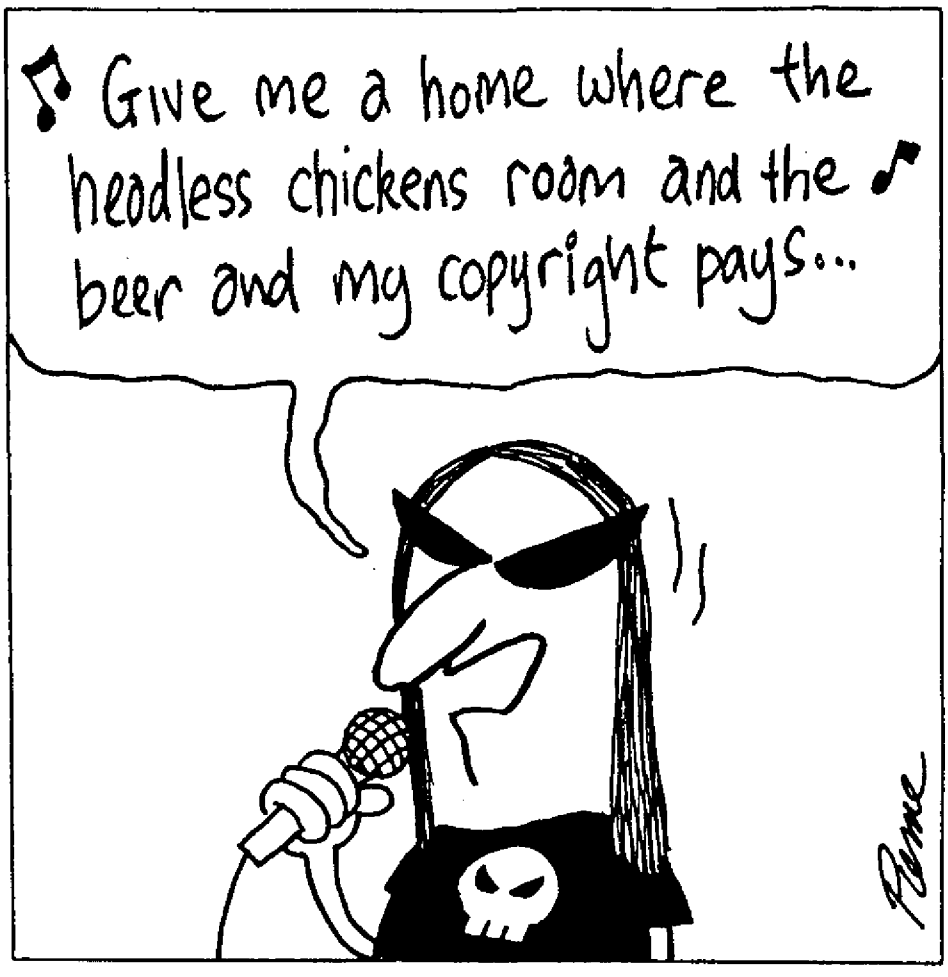
In response to Napster's protests that the effect of such a ruling was to cause Napster to shut down its service, Patel commented that "*You have other substantial, non-infringing uses that you tried to convince me of*" and further, that "*That's the system you created.....Napster wrote the original software. It's up to Napster to write software which will*

remove the copyright material. They've created the monster."[17]

As well as making the ruling against Napster, Patel ordered that the record companies pay $5 million dollars to protect Napster against any damage it may suffer in the event that the record companies were not successful at trial.

Napster's arguments seem to have held little sway for Judge Patel. In particular, early internal documents of the company supported Patel's view that Napster not only knew about the infringements which were occurring via their service but actually encouraged and participated in them.

A key piece of evidence for Patel in reaching her decision was an internal memo written by Fanning which stated that Napster users had to remain anonymous because they were engaged in copying files illegally. Also, the fact that some Napster executives were former music industry executives, who, the judge found, were aware of copyright laws and knew what their users were doing but nevertheless downloaded copyright songs from the Napster service themselves and did not act to prevent Napster users doing the same.



Patel dismissed each of Napster's defences and found that Napster employees and executives knew that direct infringement was occurring on their service. This made Napster liable for authorising the infringements because the company failed to take reasonable steps, or indeed any steps, to stop the infringements its users were committing. Patel also found that Napster was likely to be guilty of vicarious infringement to the extent that it had the ability to supervise the actions of its users.

Napster raised a number of arguments in defence. The first was the decision in what is popularly known as the Betamex case. In *Sony Corporation of America v Universal City Studios, Inc*[18], which was decided on US legal principles, the US Supreme Court held that Sony's Betamex VCRs were not illegal for two reasons despite the fact that users were able to use VCRs to make copies of copyright protected films. The reasons for the decision were that VCRs were capable of substantially non-infringing uses and because part of the purpose of using VCRs to copy films was 'time shifting', that is, making copies to enjoy the programs at a later date. Time shifting was considered by the court to be a "fair use" which did not do substantial harm to Universal's interests.

David Boies, Napster's attorney, argued that Napster was similar to the VCR because it could be used for non-infringing purposes. Boies cited as examples the ability of users to "space shift" their collections from CDs to their computers, to sample a CD before buying it or to find out about and search for new artists on Napster's New Artist Program.

Patel rejected this argument. She found that Napster differed from to a VCR because it connected to a vast number of people over the Internet. It did not facilitate better personal use of copyrighted material but promoted a use which went beyond any concepts of noncommercial or personal use.

In commenting on the New Artist Program, Patel said that the program was not part of Napster's main strategy but something which was developed "late in the game" after the litigation had commenced.

Also, Patel posed the question that if Napster is capable of substantial non-infringing use, Napster should not be arguing that the injunction would put it out of business. She considered that these two arguments were inconsistent.

Napster's other defence, that it was entitled to a fair use defence was similarly given short shrift. Under US copyright law, a person is not liable for infringing copyright where it can show that its use was fair. Fair use of copyright work is use which is for a "fair use" purpose, such as criticism, comment, reporting the news, study and research. As well as being for a fair use purpose, the extent of the use must also be fair. This is determined according to a non-exhaustive list of factors having regard to the circumstances. Section 107 of the *US Copyright Act* sets out these factors. They are:

- the purpose and character of the use, including whether the use is of a commercial nature;
- the nature of the copyrighted work;
- the amount and substantiality of the portion of work used in proportion to the whole of the work; and

- the effect of the use on the potential market for or the value of the copyrighted work.

It is clear from the wording of section 107, even without considering the cases in which these fair use factors have been applied, that it would be difficult for Napster to show that the file swapping which users engaged in via its service satisfied all the conditions.

Patel said that Napster was not entitled to a fair use defence because the free music which was available through Napster would lead to reduced CD sales. Users downloaded songs from Napster rather than going out and purchasing it.[19]

Finally, Napster claimed that it was excused from copyright infringement under the US *Audio Home Recording Act 1992*.[20] The Audio Home Recording Act was enacted to prevent unauthorised serial copying of recordings. However, under the legislation, an infringement action cannot be brought for noncommercial digital or analog copying of sound recordings. However, Patel quickly rejected this claim on the basis of the definitions of "audio recording devices" in section 1001 of the US Copyright Act. Patel said that the Audio Home Recording Act did not apply to computers and harddrives, such as Napster. It applied to audio recording devices, which Napster was not.

"THE UP" – INJUNCTION STAYED

Although the news of the Napster shutdown spread like wildfire across the globe and, particularly, among online music fans everywhere, the shutdown never took place.

The day following the grant of the injunction, on 27 July 2000, Napster's attorneys were in the US Circuit Court of Appeals asking that the order be stayed (in other words, postponed) until a formal challenge to the ruling could take place.

In seeking the stay of the injunction, Napster claimed that it would be forced to close its services within 48 hours and lay off 40 employees within days in order to comply with the injunction. In addition, Napster claimed that it would suffer irreparable harm to its business reputation and customer goodwill.[21]

The Court of Appeals granted the stay giving a short decision without reasons. The decision states that Napster

> *"raised substantial questions of first impression going to both the merits and the form of the injunction."*[22]

Rather than allow a formal challenge to the injunction, the Court of Appeals expedited the hearing. Napster has filed its opening brief with the court on 18 August, the US record companies on 8 September.

It is peculiar if the Court of Appeals granted the stay on the basis of Napster's evidence that it would have to close its business. In a recent decision, *eBay, Inc v Bidder's Edge, Inc.*[23], the court refused to allow Bidder's Edge to crawl and take information from eBay's site on the grounds of trespass saying that

> *"In the copyright infringement context, once a plaintiff has established a strong likelihood of success of the merits, any harm to the defendants that results from being preliminarily enjoined from continuing to infringe is legally irrelevant..... ....a defendant who builds a business model based on a clear violation of the property rights of the plaintiff cannot defeat a preliminary injunction by claiming the business will be harmed if the defendant is forced to respect those property rights".*[24]

More likely is the fact that the Court of Appeals considered that the Napster case raises serious and novel questions of law, in particular in relation to copyright, which need to be given a full hearing. Indeed, several trade groups such as the Consumer Electronics Association and the Digital Media Association have taken the opportunity to file submissions with the Court on points of the law being considered in this case.[25]

WHAT DOES IT ALL MEAN?

The most telling comment about the case against Napster was made by the Record Industry Association of America ("RIAA") Senior Executive Vice President, Cary Sherman when he said that:

> *"This once again establishes that the rules of the road are the same online as they are offline and sends a strong message to other that they cannot build a business based on others' copyright works without permission".* (emphasis added)[26]

The Napster case is about establishing the principles to guide businesses about what they can and can't do with copyright protected material. The record companies are seeking to assert that it is illegal to conduct a business based on an interference with property rights. It is not and can not be about Napster users or the way in which people enjoy MP3 or music in the future.

The Napster case will not be effective to change the nature of the use of music online. This is evidenced by the fact that, within hours of the injunction being granted, the number of unique users of Napster increased by 71%. It is also evidenced by the fact that the main webpage for Gnutella was forced to shut down temporarily within hours of the injunction because of increased file trading, although it was back online later with increased capacity. New and improved file sharing applications are being developed each week.

Indeed, the US record industry admitted that its high profile attempts to stop online music piracy were only exacerbating the problem. Reports have commented on users engaging in a "downloading binge" in the wake of the injunction. Hilary Rosen, the head of the RIAA noted that, since the injunction"

> *"the illegal downloading of copyright music openly encouraged by Napster has probably exceeded all records."*[27]

There is certainly a real danger that if and when Napster is shut down, digital music pirates will be forced to the "undernet".

Upon hearing of the injunction, Napster users posted messages to the service lamenting the expected loss of Napster but also encouraging Napster users to move to other file-sharing applications. For example[28], "Estecaz" wrote "*This is a sad day for our community*" but then "*I encourage all of you who love this program as I, don't buy label music, and go to Gnutella!*". "Teilo" wrote:

> *"Everyone is focusing on Napster. Why bother? Napster can be shut down because it is a company and requires dedicated servers. Gnutella is open source and does not require any servers, it cannot be stopped without placing individual writs on the entire Internet community around the world."*[29]

These statements and the proliferation of file-sharing applications, indicates that

the heart of this revolution is not Napster itself but rather the attitude of music's biggest consumers, the under 18 year olds, who are highly technologically literate and have little respect for proprietary rights.

The growth of the Internet has seen the rise of a hacker mentality and an entitlement philosophy. The majority of Internet users expect information, and particularly music, to be free. They also feel entitled to access such information or music, regardless of any technological protection measures. This is partly reflected in the share and swap practices made possible by Napster and the popularity of MP3. This attitudinal change makes the outcome of the Napster decision fairly irrelevant on a practical level, even though Napster epitomises this change.

Napster also epitomises the Internet business model. It has been very successful in attracting a huge user base, 22 million users, and is widely known. However, the company has not yet earned any revenue from its service.

There is some positive fallout from the Napster case. Through cases such as the Napster case, copyright laws and their effect on the Internet and new forms of technology are clarified. This promotes greater stability for business. There are several lawsuits in the US, in addition to the Napster case, which are currently being brought in relation to the DMCA which will give guidance to lawyers and businesses about the permitted uses of copyright protected material in the brave new world of the Internet.

John Potter, director of the Digital Media Association when commenting on the current dispute between the record companies and webcasters, noted that:

> "*With copyright legislation, there are very strong political interests and the only way to get things through Congress is to leave the statutes grey. At the time the DMCA was going through Congress, the National Association of Broadcasters and the Recording Industry Association of America agreed to support the legislation with the understanding that there would be some kind of legal confrontation between the two sides once the law went into effect.*"[30]

With cases like the record industry v Napster, the laws in the US are clarified, which may offer guidance in other jurisdictions such as Australia.

Another benefit of Napster is that it has brought "old economy" companies kicking and screaming into the "new economy". Some record companies have been slow to embrace digital technologies and incorporate them into their products and businesses.

In 1998, before Napster had been developed, the RIAA's members were only talking about the security of their product. With the advent of Napster in mid-1999, the RIAA's members could not postpone making their catalogues available in a digital format any longer. Since Napster's meteoric rise in fame, three of the majors have made albums and singles available for download and numerous other online music initiatives have been developed, such as Garageband.com.

On a more humorous note, perhaps the real cause for concern in the Napster revolution is the fact that the prime movers of the revolution have had sufficient time to create such a commotion. It is university drop outs or, in the case of Aimster, college trained friends, who have given birth to the applications which have realised file search and swap services. It is university students on campus, with the benefit of state of the art connections and high bandwidth, who have been prime consumers of search and swap services. Maybe the real issue here is to make tertiary studies more interesting with the aim of minimising the time which students have to participate in the revolution.

Note: This article is current to 9 September 2000.

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3 *Metallica Takes on Napster*, The Standard Media Grok, 14 April 2000.

4 King, B, *Napster Fight Goes to the People* Wired News 29 July 2000.

5 Reuters, *Bizkit Bonds with Napster*, Wired News, 25 April 2000.

6 *Showbiz reacts to Napster Ruling*, Salon.com Technology 28 July 2000.

7 Similar to the Recording Industry Association of America's action against Napster, the Norwegian company which provides the technology which enables the search, is being sued by the International Federation of Phonographic Industry of Norway for infringement of copyright in the music which is made available on the Lycos site.

8 Brown, J *MP3 Free-for-all*, Salon.com Technology, 3 February 2000.

9 Brown, J *Did AOL eat Gnutella for lunch?*, 15 March 2000.

10 Ibid.

11 Breitling, J *Start-Up Debuts File Swap, AOL Instant Messaging Hybrid*, Webnoize, 10 August 2000.

12 5 May 2000, US District Court, N.D. Cal No. C 99-05183.

13 Cave & Quistgaard, *Court to Napster: You're Going Down*, 27 July 2000.

14 The actual decision of Judge Patel in granting the preliminary injunction against Napster has not yet been published. The following discussion is based on a variety of news reports of Judge Patel's statements during the hearing and when giving her decision, such as *Judge Rules Against Monster, Napster to Appeal*, Webnoize 27 July 2000; King, B *Napster's File-Trading No More*, Wired News 27 July 2000; *Federal Appeals Court Grants Stay of Napster Injunction, Service Will Continue*, Webnoize 28 July 2000; Cave & Quistgaard, *Court to Napster: You're Going Down*, Salon.com Technology 27 July 2000.

15 Cave & Quistgaard, *Court to Napster: You're going down*, Salon.com Technology 27 July 2000.

16 Ibid.

17 Ibid.

18 US Supreme Court, 1983/1984, 2IPPR225.

19 Although there are studies which contradict this finding, see for example Bailey, M *Digital Delivery: An Eight Fold Path to Digital Enlightenment*, Webnoize Research Report, 15 August 2000; King, B *Despite Piracy, CD Sales Up* Wired News, 24 April 2000.

20 It should be noted that the *Audio Home Recording Act* does not have an Australian counterpart.

21 Barnes, C, *Napster Seeks Injunction Appeal* CNet News.com 27 July 2000.

22 28 July 2000, US State Court of Appeals, 9th Circuit, No, 00-16401, No, 00-16403.

23 US District Court, N.D. Cal. No C99 21200RMW).

24 at p15.

25 King, B *Napster's New Friends*, Wired News 25 August 2000.

26 Opsit, at 14.

27 Foremski, T *Napster Dispute Increases Piracy*, FT.com 30 July 2000.

28 Philipkoski, K *Napster Still an Open Issue*, Wired News 27 July 2000.

29 Ibid.

30 King, B *Tuning Up Digital Copyright Laws* Wired News 16 May 2000.

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