

# Metallica and Morality: The Rhetorical Battleground of the Napster Wars

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*This article discusses the rhetoric of the highly publicised Napster legal cases, arguing that it is firmly based in the aesthetic and moral implications of copyright infringement. To contextualise current trends historically, the paper summarises insights from recent work analysing the importance of Romanticism to an understanding of contemporary copyright practice. Utilising this theoretical background, the article highlights the importance of the Romantic separation of art and commerce for the recording industry's anti-piracy campaigns. This enables the industry to centre current rhetoric concerning Napster on artists rather than on commercial interests. This turns copyright infringement into not only an aesthetic crime, but also into a moral one. The article argues that the only way the recording industry can prevent substantial online piracy is by creating and winning a moral argument. However, it concludes that the industry is currently unsuccessful in this aim and offers some reasons for this, themselves predicated upon the Romantic separation of art and market.*

On 13 April 2000 in the US District Court, central district of California, the rock group Metallica filed a lawsuit against the then internet startup company Napster. The suit accused Napster of 'contributory and vicarious copyright infringement', as well as violating the Racketeering Influence and Corrupt Organisations Act, for enabling its users to exchange copyrighted MP3 files.<sup>1</sup> On the day of the suit, the band's apparent spokesman, drummer Lars Ulrich, released a press statement which contained the following:

It is therefore sickening to know that our art is being traded like a commodity rather than the art that it is.

This quote is, I think, supremely interesting. Not only does it contain centuries-old ideology regarding the relationship between art and the market, but it also provides the key to understanding the rhetorical battleground upon which the Napster Wars are being fought. It is this battleground that concerns the current paper. In particular, it discusses how,

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despite the fact that the Napster Wars are driven primarily by economic considerations, it is the aesthetic and moral codes, rather than the economic code, that are predominant in this rhetoric. This article is therefore not concerned with the economic and legal arguments surrounding Napster and MP3; indeed, it argues that law and economics alone are insufficient if the record industry wants to eliminate Napster and other similar programs.<sup>2</sup> Rather, it examines the presentation of both sides' arguments in the Napster Wars. The article focuses on the record industry's arguments rather than just Metallica's, but Metallica are important for two reasons: not only were they the first *artists* to take a legal stand against Napster, but the arguments upon which they relied, and the backlash that they faced as a result of their action, are paradigmatic of the ideas under discussion here.

### **Romanticism and the Separation of Art and Market**

Before discussing twenty-first century issues, however, we need briefly to look at the historical origins of the ideologies that are prevalent in the current debate. In particular, we must retreat to the period that we now label Romantic. Recent work on the history of copyright has highlighted the fact that the central features of current copyright law are founded upon the vestiges of early nineteenth century Romanticism.<sup>3</sup> An understanding of the prominent ideas of this period is thus crucial for understanding current debates about Napster and MP3.

Out of social changes such as industrialisation and urbanisation, there developed a number of ideas concerning art and creativity.<sup>4</sup> The most significant of these were: the individualisation of creativity; (tortured) genius; originality; the radical separation of art and market; art as a spiritual not material entity; and a temporal judgment of art. All of these features feed into one another: the idea that art is spiritual rather than material relates to the notion of the incompatibility of art and market; this means that art can only be truly judged over a long period of time rather than through the immediacy of the market; this suggests that the artist has to endure poverty while creating because the market will not reward him adequately, and so on. All of these features are important rhetorically because they provide the dominant image of the artist in modern society.<sup>5</sup> It should be noted that, while they do not feature prominently in this article, the individualisation of creativity and notions of originality are of particular importance for understanding the ideology of contemporary copyright. None of what is suggested here could occur if we did not have the idea that artists create out of nothing, communicating directly from their soul to our own.<sup>6</sup>

The most significant feature of Romanticism for this article, however, is the radical separation of art and market that emerges in this period. For

artists of the time, the most notable change in their material circumstances was the development of the art market. This meant that artists who had traditionally created a work with a specific purchaser/patron in mind were now left facing an anonymous mass audience of uncertain tastes. This developing cultural market resulted in a split between those artists who were commercially successful and those who struggled to make an impact upon popular taste. It is these latter artists, such as Friedrich Schiller in Germany and William Wordsworth in England, that had a major impact upon modern understandings of art.<sup>7</sup> As these artists were materially unsuccessful, they promulgated the view that artists should not be concerned with material reward: art was a spiritual calling which should not be demeaned with money. There is a certain irony in the fact that the conception of the artist *above* the market can only appear once the artist has been positioned *within* the market. This conception of art was in part a carry-over from its earlier position in society when it was related to ritual and tradition. As art became more secularised, artists maintained that their art belonged in the realm of the spiritual rather than the material. Woodmansee describes this conception of art as a 'displaced theology'.<sup>8</sup>

This displacement provided commercially unsuccessful artists with an avenue for explaining their commercial failure. Their art, they argued, was *above* the market, it could not be treated as a commodity. It was anathema, therefore, to use the market as the arbiter of artistic achievement. Wordsworth complained that the public ignored his work because of their 'degrading thirst for outrageous stimulation': the ignorant public was interested merely in cheap and gaudy amusement, not the spiritual enlightenment delivered by artists such as himself and Schiller.<sup>9</sup> The logical culmination of this understanding is that it is impossible to be successful while being true to your artistic self. After he had found himself a wealthy patron, Schiller lamented that 'I now know that it is impossible in the German world of letters to satisfy the strict demands of art and simultaneously procure the minimum of support for one's industry'.<sup>10</sup> The corollary of this argument is that those who write with the market in mind do not deserve the title of artist, and this ideology blossomed in nineteenth century Bohemia, providing a *modus vivendi* for many second-rate artists. There emerged the notion of a fundamental antagonism between art and the market. This conception of the immiscibility of artistic expression and the market remains with us today. Indeed, it is the dominant way of understanding the aesthetic realm, and one of the key elements of 'authenticity' within popular music.<sup>11</sup> So when Lars Ulrich states that it is 'sickening to know that our art is being traded like a commodity rather than the art that it is', it is upon this Romantic separation of art and market that he relies.

## A Brief History of Copyright

The Romantic beliefs listed above have had a major impact upon copyright law but this was not always the case. Although it may now seem surprising, early copyright law had nothing to do with authors. The first copyright law – England’s Statute of Anne in 1709 – was the result of publishers lobbying for protection against pirate editions of their publications. Publishers at this time saw their interests as antithetical to authors: when a copyright bill was introduced that mentioned the ‘undoubted property’ of authors, the publishers moved quickly to extinguish the understanding that copyright was founded in authors’ rights.<sup>12</sup> In the final Act the author is mentioned only once, and then only as a tool for circumventing a long term publishers’ monopoly. The intended beneficiaries of the Act were the publishers, whose commercial monopolies – under threat since the collapse of the Licensing Act in 1695 – were secured;<sup>13</sup> and the public – the Act was subtitled an act for ‘the encouragement of learning’ and, nominally at least, was intended to accelerate the spread of educative works. During the eighteenth century, however, as their copyrights under Anne expired, publishers began to manipulate the idea of an author’s right to their benefit. Exploiting the growing authorial consciousness that would reach fruition in the Romantic movement, copyright-owning publishers argued that the artist had a perpetual right to his or her work. When this is coupled with the inviolability of free contract, the logical conclusion was that, once the author had sold the manuscript to the publisher, the publisher then owned that same perpetual copyright. Publishers thus used the figure of the author as a tool for extending their rights by subverting copyright from being a public right to being an author’s right. This rhetorical use of the author by publishers seeking to extend their copyright is key to understanding the public arguments surrounding Napster today.

The understanding that copyright was an author’s right (and thus perpetual) was definitively dismissed by the House of Lords in 1774. The Lords affirmed copyright as a short-term limited monopoly to encourage publishers to publish new works for the benefit of the public. This interpretation of copyright was fortified in the American Constitution and repeated in the first American Copyright Act in 1790, which modelled itself upon the Statute of Anne.

That should have been the end of the matter. However, in the 1830s, Wordsworth, who was obsessed with copyright for much of his life, lobbied hard for a perpetual copyright for authors. A perpetual copyright, he argued, was the only appropriate monument to artistic genius. He failed in his ultimate aim, but succeeded in gaining new legislation which offered a period of copyright protection for the life of the author plus seven years; the first *post mortem* copyright protection. Legislators evidently thought that

the immediate benefits of a short-term copyright were an injustice to works of art of which only time could prove their ultimate value. This fundamentally changed UK copyright law: copyright was no longer an economic mechanism to encourage the wide dissemination of books; rather, 'Parliament, in evident agreement with Wordsworth's reasoning, placed the law in the service of art'.<sup>14</sup> At the same time, copyright in France, which had also originated as a law to encourage public learning, began to develop strong authorial protection, culminating in the *droit moral*, the inviolable rights of genius.<sup>15</sup> America, however, did not follow this pattern. American copyright has always contained a much stronger sense of public benefit than either its British or French equivalents, and American legislators repeatedly refused to offer a *post mortem* copyright, despite strong pressure from authors and songwriters. It was not until 1976 that American copyright underwent a similar metamorphosis and changed to offer protection for the life of the author plus 50 years.<sup>16</sup>

There are many problems with copyright law being understood as grounded in the natural rights of the Romantic author. The most significant of these are that this type of authorship does not exist, that it leads to too many intellectual property rights for too long, that it undermines the public benefit aspect of copyright, and that it perpetuates economic power relations by adhering to a Western understanding of artistic creation that pays insufficient regard to collective creativity and creativity based on rhythm rather than harmony. They are not important for this article, however.<sup>17</sup> What is significant is that rather than the relationship between publisher and public being at the centre of copyright (which makes sense if copyright is to serve the purpose of encouraging the distribution of books), the heart of copyright, in rhetorical terms at least, is now the Romantic author. Copyright becomes incorrectly interpreted as an author's right. This turns copyright, which is an economic category, into an aesthetic one. This has historically been of great benefit to publishers.<sup>18</sup>

### **The Romantic Artist, the Music Industry and Anti-Piracy Campaigns**

The Romantic author is also one of the key ideological features of the popular music industry.<sup>19</sup> The market for symbolic goods in the music industry is extremely unpredictable.<sup>20</sup> Standardisation is one way in which the industry attempts to alleviate this unpredictability, and the figure of the Romantic artist is one way that the industry attempts to mask such standardisation.<sup>21</sup> Records are thus marketed not according to the individuality of the record but to the individuality of the artist: if all artists in the record industry are unique, creative, original individuals, then the music they produce must necessarily be unique, creative and original. This is institutionalised through what Toynbee calls 'institutional autonomy'.<sup>22</sup>

Despite the capitalist tendency to centralise and concentrate, the centralised corporations of the record industry are unable to predict or shape musical markets with accuracy. It is thus necessary for them to grant a certain autonomy to individuals within more localised areas, most notably musicians. The industry, to a certain extent, allows musicians free rein to produce the music which they then market and distribute.<sup>23</sup> Not only is this economically significant – by allowing the artists autonomy, the labels can pass on the economic burden of creativity to the artists themselves (thus the established practice of artists paying for studio time, promotion and so on out of their royalties) – it is also ideologically significant – it gives the impression that the musicians are creating music *outside* of the industry, without a thought to the industry's will. This to me is its greatest significance, because it emphasises the dichotomy of art and market and situates the performer firmly on the side of art. There is an apparent separation of art and commerce within the music industry: commodification is understood to be something that happens to a pre-existing song. This separation is a myth – no popular music can be created outside of the capitalist structure of the music industry<sup>24</sup> – but the myth's strength is so complete that its contradictory nature is rarely recognised.<sup>25</sup>

The myth that artists are separated from the commercial machinations of the record industry is particularly important when discussing copyright in the music industry. In particular it is the Romantic author that provides the spearhead for industry campaigns against copyright infringement. If the industry is ever to succeed in any copyright battle – be it home taping, bootlegging or MP3 – then they have to justify their actions in terms of art and artists. It is impossible for the industry successfully to increase or defend copyright in terms of economics alone. This is for a number of reasons. The first is that copyright is now economically irrational.<sup>26</sup> You cannot call upon economic logic to prove that there is an extra incentive for people to create if the period of protection is extended from the life of the author plus 50 years to life plus 70 years (as has occurred recently in both the US and EU).<sup>27</sup> Secondly, if the music industry (or any other industry) wants to introduce legislation that is against the public interest – as current copyright extensions almost undoubtedly are – it needs to come up with a good reason to give to legislators and, if the legislation is going to work, a good reason to persuade the public to obey the new law. In this instance, that good reason is the natural rights of artists. The record industry argues that, because artists are very special people (Toynbee describes them as 'exemplary agents'<sup>28</sup>) their rights should be paramount. If copyright is understood as a homage to artists, then if there is a conflict of interests in copyright, it is assumed that the rights of artists (and by extension, the rights of the industry who nurture artists) take precedence over the rights of the public.

Related to this is the third reason: the battle over copyright is in large part a publicity war. It is essential for the record industry to persuade the public that *all* copyright infringement is a Bad Thing, for if it does not, then the public will continue to infringe.<sup>29</sup> The problem for the record industry is that the public is rarely sympathetic to the interests of large corporations. The industry must therefore use the artist in order to protect its copyright interests. It needs to persuade the public that copyright infringement is not in the artists' interests. And it is here that we return to Napster.

### **Metallica and Napster**

Let me illustrate how the ideas expressed here practically manifest themselves in the Napster Wars. The first lawsuits over MP3 were brought by the Recording Industry Association of America (RIAA) – against Diamond Multimedia, manufacturers of the Diamond Rio MP3 player (October 1998),<sup>30</sup> Napster (December 1999)<sup>31</sup> and MP3.com (January 2000).<sup>32</sup> The issue caught the imagination of neither the public nor the media. It seemed that, as far as the public were concerned, this was just another example of big business legal wranglings. When, in April 2000, Metallica brought its own lawsuit against Napster, it initiated a media frenzy and unleashed a debate about art and ethics rarely expressed outside the confines of academia.<sup>33</sup> The main reason for this was that here we had artists, rather than a record company, making the complaint. And while there was undoubtedly a celebrity element to the interest, I believe the most important factor for such intense interest was that it brought to the fore (and threatened to reveal) the fictional division between art and commerce. However, the response to Metallica's suit illustrates the pervasiveness and strength of the ideology.

Because of the separation, artists within the record industry walk a tightrope: despite the fact that they must produce something commercial to satisfy their record labels, they must aspire publicly to the ideology of *art pour l'art* and appear completely uninterested in business matters. For a band to have artistic credibility they have to be against the record industry even while they are a part of it. Traditionally, Metallica have stayed the right side of the line. They are one of the most famous bands to allow fans to tape their live shows and trade recordings of their concerts. This gives them an underground cachet that suggests that they are not interested in money but are more interested in 'getting the music out', as a true band of artists would. Metallica's steady fan base is in no small part due to their anti-establishment attitude toward taping.

Given that Metallica has traditionally been seen to be on the side of the rock and roll outlaw rather than the corporate suit, the band took a brave decision in making a stand against Napster (although it is not certain that they knew exactly what they were getting themselves into – the band later

admitted that they did not really know what Napster was before the lawsuit<sup>34</sup>). However, they were left with a presentational problem – how to issue their lawsuit and continue to be seen as artists who did not care for the commercial side of the industry. They did so in the only way available to them – by claiming that swapping files on Napster was a betrayal of their artistic integrity. The statement released by Metallica on the day of the lawsuit stated that ‘with each project, we go through a gruelling creative process’, implying that those who download Metallica MP3s are paying insufficient homage to Metallica’s gruelling artistry. In an article Ulrich wrote for *Newsweek*, he indicated that the band follows the primary Romantic ethic of being true to their own creative impulses: ‘The truth is, what we do, we do for ourselves. We don’t do it for anybody else. You really have to have that attitude, otherwise it will pollute or distort your creative purity ... There is a selfishness in this band, but that leads to more artistic purity’.<sup>35</sup> He finishes off the same paragraph by highlighting that Metallica are not part of the standardised world of the record industry, stating ‘we are not a product. We aren’t toothpaste’.

Without wishing to demean either the aesthetic motives or the creative output of Metallica they are, to some extent, a product. Everything in the music industry is a product. You have to create a product – if you do not then, sorry, but you do not meet the entry requirements. And it should be recognised that Metallica’s lawsuit against Napster has significant financial ramifications concerning the control of one particular commodity (Metallica’s music). The problem facing Metallica was that they could not stress the financial implications of the suit because, if they gave the message that they had even thought about the financial ramifications of their suit, let alone were bothered in the slightest about commercial matters, they would undermine their artistic credibility. Ironically, this would also seriously affect their sales, as their commercial success to a great extent depends upon their artistic credibility.

Despite emphasising the artistic reasons behind their legal action, Metallica found themselves on the wrong side of the art/commerce dichotomy and quickly found themselves in the firing line. *Inside.com* labelled the band a ‘corporate ho’<sup>36</sup> while *The Nation* wrote that ‘Metallica seems to have forgotten that it got rich through free music shared by loyal fans. Now the band is harassing and exposing its followers who still believe in the value of sharing and community’.<sup>37</sup> Reporting on an online forum involving the band, *TheStandard.com* stated that they sounded ‘remarkably like middle-class parents trying to protect their retirement accounts’.<sup>38</sup> British band Chumbawumba released an MP3 entitled ‘Pass it along’, sampling Ulrich and Madonna (another public critic of Napster) among others. The song’s lyrics encourage listeners to ‘send this song to twenty people’.<sup>39</sup> Chumbawumba released a statement saying that ‘what we are seeing is some of the richest pop stars in the world making the biggest stink about not being

able to screw every last penny from their adoring fans'. One online student newspaper wrote 'Metallica has been producing pure and utter crap for their last three albums and are now scared green that the public will be able to find that out *before* running out to buy their newest collection of sellout, butt-rock trash'.<sup>40</sup> Disillusioned fans also reacted, establishing a number of vitriolic anti-Metallica websites. The most famous of these was [www.paylars.com](http://www.paylars.com), which offered people the chance to submit credit card donations to Lars Ulrich to alleviate the financial hardship he was suffering.

### **The Music Industry and Napster**

The backlash that Metallica received came because they are a group of artists who have transgressed the fictional border between art and commerce. Had a record label filed the lawsuit, the public would not have supported them but there would not have been such an outrage: companies are understood to exist to defend their commercial interests. Metallica's suit was a great boost to the industry campaign, however, and mirrors the industry's approach in their efforts to eliminate the downloading of infringing MP3 files.

The general public is traditionally hostile to, or at least suspicious of, the general interests of large corporations. This is particularly the case with the music industry: there has been increasing public disquiet at the high prices of compact discs, culminating in price fixing enquiries in both the UK and US. With his tongue only slightly in his cheek, *Fortune* journalist David Lidsky said of the record companies 'let's face it, they're evil'.<sup>41</sup> When it comes to anti-piracy campaigns, this gives the labels their own presentational problem: while it is in the industry's interests to uphold and strengthen copyright rights, they must use some other rhetorical tool for getting the public (and legislators) on side. As explained above, it is the Romantic author that performs this function.<sup>42</sup> If copyright rhetoric can be centred on the artist, then copyright infringement ceases to be seen as an economic crime, and becomes an aesthetic one. Copyright infringement is seen as an affront to the dignity and integrity of the artist. And, given that the artist is understood as the idealisation of the modern subjective, individual,<sup>43</sup> then copyright infringement understood in this way is a more serious matter than a petty economic misdemeanour.

Arguments used by the industry regarding piracy are therefore centred on the artist. This is true even for any economic arguments the industry makes. Such arguments are couched not in terms of the record company profits, but of the financial losses artists suffer. In case anyone is not particularly upset about Mick Jagger, Madonna or Metallica losing out, this message is refined further to highlight the losses suffered by small bands and struggling artists – those that better fit the Romantic stereotype of the artist starving in his garret. This is from the RIAA's anti-piracy press kit:

Recording artists, producers, composers, publishers of compositions, musicians and vocalists who helped make the record, as well as musicians unions, are all cheated by pirates out of their share of royalties. These people in the music community generally depend on royalties for their livelihoods.<sup>44</sup>

The other economic argument used against piracy is that harming record industry profits harms the 'creative environment' which the industry provides for its artists. The industry portrays itself as an altruistic conduit, supporting artists like some sort of conglomerate patron. This is again from the RIAA's anti-piracy press kit (note the prioritisation of the 'investments'):

Record companies invest a great deal of artistic and technical skill, money and effort to ... search for, develop and popularize performers ... [and] subsidize less profitable types of music (classical, jazz), new performers and composers.<sup>45</sup>

I have seen and heard many economic arguments put forward by record labels in their efforts against piracy, but I have yet to find one that states that 'counterfeiting will decrease the size of the Polygram president's annual bonus'. All economic arguments are couched in terms of rewarding the artist or providing a creative environment. They are not phrased in terms of profit margins and corporate commerce because economic arguments based on corporate interests would not win over public support. It is therefore not surprising that following their legal victory against Napster in December 2000, Hilary Rosen, President of the RIAA described the outcome as 'a victory for all creators'.

### **The Moral Element of Anti-Piracy**

The artist is at the centre of all anti-piracy rhetoric, from high-level counterfeiting to everyday home taping. This turns copyright infringement into an aesthetic crime. What is more significant, however, is that by focusing on the artist in this way, the industry can turn piracy into not just an aesthetic issue, but also a moral one. There is a constitutive relationship between the aesthetic and the moral in modern society. In analysing popular music, Simon Frith has regularly pointed to the link between the aesthetic and the moral: he states that 'aesthetic and ethical judgements are tied together: not to like a record is not just a matter of taste; it is also a matter of morality'.<sup>46</sup> The basic evaluative phrases of aesthetics are illustrative of the link between aesthetics and morality: there is 'good' music and 'bad' music. The constitutive relationship of the aesthetic and the moral is a feature of modern society and has a history at least as far back as Immanuel Kant who stated that something could not be beautiful if it was not also good. This is probably the

outcome of art's subservience to religion in pre-modern society, strengthening Woodmansee's conception of art as a displaced theology.

The constitutive relationship between the aesthetic and the moral is particularly pertinent regarding piracy. If copyright infringement is an affront to an artist's integrity, it must also be a moral trespass. This moral element is noticeable in the anti-piracy rhetoric of the record industry. As Kretschmer notes the 'rhetoric of plagiarism, theft and piracy has taken on a particular moral certainty' within the record industry.<sup>47</sup> These three words (plagiarism, theft and piracy) again illustrate the link between the aesthetic and the moral. The word plagiarism stems from the Roman crime of *plagium*, meaning the 'crime of stealing a human being'.<sup>48</sup> This indicates the level of crime we are talking about when infringing the Romantic author. At the very least plagiarism is a crime against the person; in all likelihood, it is a crime against the soul.

The rhetoric of theft in anti-piracy campaigns is interesting because it is a sleight of hand on behalf of copyright holders. Copyright infringement is not theft, it is copyright infringement. Statutorily and practically they are two different things.<sup>49</sup> Yet the overwhelming rhetoric of the Napster Wars is that of theft and stealing. The industry deliberately mislabels copyright infringement as theft to emphasise the moral dimension of the activity. Here are a few examples:

[The] single most insidious website I've ever seen – it's like a burglar's tool.

(Ron Stone, artist agency manager.)

If someone is going to work on their craft, they should ... not have someone put it up on the net so people can steal it.

(Johnny Wright, N\*Sync manager.)

It's a theft business ...

(Miles Copeland, Sting's manager.)

If the internet thieves are not stopped ... [it] robs current artists.

(Simon Renshaw, manager of Dixie Chicks.)

The most interesting of the triumvirate of plagiarism, theft and piracy to me, however, is piracy. A detailed history of the uses of the word piracy would prove extremely valuable for anyone studying in this area. The original form of piracy – the high seas variety – was considered a crime against humanity similar to genocide today.<sup>50</sup> The phrase was being applied to the unauthorised copying of books at least as far back as the early eighteenth century. The concrete justification for using such a serious term for this crime would be interesting to ascertain and would probably indicate further the moral nature of intellectual property piracy.<sup>51</sup>

So what moral rhetoric has been used in the Napster Wars? Let us start with Metallica's initial statement on the delivery of their lawsuit. The band stated that 'piracy ... is morally and legally wrong', calling Napster an 'insidious and ongoing thievery scheme' and suggested that those who download Metallica's art 'exhibit the moral fiber of common looters'. On the RIAA website, Lars Ulrich says 'this is not just about money ... this is as close as you get to what's right and what's wrong'. After the recent legal victory, Hilary Rosen stated that a 'business model built upon infringement is ... morally and legally wrong'. There is also an 'immorality by association' rhetoric put forward by the recording industry: the British Phonographic Industry (BPI) reported that downloaders were 'forc[ed] ... to watch horrific scenes of teenage sex' before being able to download MP3s,<sup>52</sup> while Richard Parsons, the man heading up AOL and TimeWarner's marriage, likened file swapping to Satan and Josef Stalin.<sup>53</sup> This is the language of the Napster Wars.

The only way record labels and other copyright holders can successfully protect their copyrights is by emphasising the moral dimension of copyright infringement and winning the moral argument. The industry needs to convince legislators of the need to bring in stronger legislation and, more importantly, garner public support in order to enforce legislation that is not in the public interest. If people do not agree with the law, or if they think it was instigated corruptly, they will continue to break, bend and reinterpret the law. This includes subverting any possible technological protections of intellectual property. The Napster Wars will not be won by law or economics – even if Napster is shut down, new possibilities for online piracy will emerge. Technical solutions are therefore not the answer. The Napster Wars can only be won by morality. The industry has to persuade the public that infringing copyright on the internet is wrong.

This is not a new scenario for the music industry. Previous and ongoing anti-piracy campaigns (such as home-taping/DAT and bootlegging respectively) have also followed the tactic of emphasising the aesthetic and moral dimensions of infringement. Simon Frith wrote in 1993 that the 'failure of the film and music industries in Britain and the United States to persuade governments to introduce a blank tape levy [during the 1980s] ... reflects their failure to win the moral argument'.<sup>54</sup> Unsurprisingly, the countries that did introduce a blank tape levy are those that historically have had a much stronger conception of authorship embodied in their copyright laws (illustrated by their long-standing moral rights provisions) such as Germany and France. In such countries, it was easier to persuade legislators and the public that introducing a levy was the 'right' thing to do for artists.

### **A Report from the Trenches of the Napster Wars**

The American recording industry did, however, persuade the US government to introduce a levy on digital audio copying equipment in 1991 as part of the Audio Home Recording Act (AHRA). Does this mean that American record labels are now winning the moral argument? Can the industry win the moral argument with Napster?

They are not winning at the moment. The gains of the AHRA for the RIAA occurred before MP3, and primarily as a result of two things: a moral panic about all things digital, supported by scare stories about the collapse of the industry were their rights not strengthened in the digital environment; and the fact that the public were not particularly interested in copyright at the time – DAT was not as interesting a topic as Napster so there was little media reportage on the issue, and subsequently little public reaction. This meant that the industry could stress its moral arguments to legislators with few dissenting voices. As Jessica Litman writes, ‘by asserting that what members of the public think of as ordinary use of copyrighted works was, in fact, flagrant piracy ... copyright owners ... won a rhetorical battle the rest of the country never realised was being fought’.<sup>55</sup>

Since the media frenzy about Napster, the recording industry has been on the back foot and the inroads it has made into public consciousness are very limited. There is some anti-Napster feeling among the public, but this is mainly driven by a concern for small artists, not for record companies or superstars.<sup>56</sup> There is, in some quarters, a certain amount of guilt about taking money from deserving artists. Newspapers have carried personal stories of downloaders torn between hearing music they never thought they would hear again and being wracked with guilt about their ‘stealing’.<sup>57</sup> But in general, the public (and the media) have been supportive of Napster. This is for a variety of reasons, all based to a greater or lesser extent on the ideologies of the art–commerce dichotomy.

The first reason is that individuals feel that their downloading of songs is non-commercial and not for profit, and thus acceptable. If they are not commercially exploiting the work, this logic goes, then they are obviously on the ‘art’ side of the dichotomy and are merely engaged in an appreciation of an aesthetic work. Because their activity is concerned with art, it has nothing or little to do with commercial affairs. In fact, this activity is seen as *more* in touch with the artist and their music because the ‘commercial’ element of the music industry has been eliminated. The public, particularly the American public, feel that individual, non-profit usage is protected under fair use. This right was enshrined in the AHRA and has formed the mainstay of Napster’s legal defence. This defence has so far been unsuccessful; the implication of these judgments is that any large scale downloading of MP3s is to be considered a ‘for profit’ activity.<sup>58</sup>

The second reason is that individuals feel that they are hurting only the music industry through their downloading rather than artists. As already stated, individuals do not feel particularly concerned about the interests of giant corporations. They do not feel a moral compulsion to do good for commercial interests. This is particularly so for corporations as avaricious as major record labels. Public resentment towards the record labels could hardly be higher at the moment and Napster has fuelled that resentment.

This results in the third, perhaps most significant, reason: the public does not believe the record industry rhetoric this time around. They feel that the record labels are acting solely out of self-interest. Traditionally, the moral rhetoric used in anti-piracy campaigns has served to emphasise the shared interests of artist and label while underplaying the conflictual nature of the relationship.<sup>59</sup> Record companies implicitly and explicitly argue 'by helping us you are helping the artists'. Thus Ron Stone (an artists' agency manager and, along with the Disney Corporation, the driving force behind the tellingly titled 'Artists Against Piracy' campaign) can claim that 'they're saying *our* art is worthless'.<sup>60</sup> The record industry's campaigns traditionally highlight a unity of interests between artist and industry (as in the earlier example of the 'creative environment'). As far as the current campaign is concerned, however, this attitude has been undermined by artists such as Courtney Love and Chuck D, who have used Napster as a soapbox for explaining how badly the record industry treats its artists. This has severely weakened the industry's position regarding copyright enforcement. One journalist wrote, 'much as companies would love to make their case on moral grounds ... it's not a point they can make with much authority. For years they have been making exorbitant profits on the backs of the artists they now want to say they're protecting'.<sup>61</sup> If the industry's arguments have been undermined in this way, it is far harder for them to persuade the public that downloading MP3s is anything more than a commercial infringement against a large corporation.

A further problem for the industry in the Napster Wars is the *type* of music being downloaded. Napster is used primarily to download mainstream pop songs and has not been utilised in great numbers for more specific genres.<sup>62</sup> Because of constructions of authenticity in popular music (themselves related to conceptions of Romantic authorship<sup>63</sup>), these mainstream songs can more easily be viewed as commercial commodities rather than pure artistic expression. It is easier to understand the music of Britney Spears or Westlife – or even Metallica – as products produced for the marketplace than it is the music of Blind Lemon Jefferson or Charlie Mingus. It is therefore less of a moral dilemma for people to download songs by rich and commercial rock stars. Individuals downloading 'commercial' rather than 'artistic' tracks are less likely to consider the artist when downloading. This poses a problem for record industry campaigns.

The record industry's traditional techniques for combating piracy are thus unsuccessful at the current time in the Napster Wars. To compound this, Napster also has its own rhetoric and this also features a moral element. Napster's keywords are community and sharing – both powerful moral labels. Anyone who has logged onto Napster will see that the program actually opens the portal to the 'Napster Music Community'. The primary verb of this community is of 'sharing' music. This implies that the altruistic individuals on Napster are involved in something more wholesome than the commercial world of popular music. One journalist wrote, 'Napster has always been about the pure love of music'.<sup>64</sup> Note here how the 'pure' interest in music is implicitly compared to the impure, financial motives of the record companies. Napster's image is that of a modern day Robin Hood, taking music from the evil corporations and giving it to the people. Whatever the fallacy of such beliefs (Napster Inc. has \$15m venture capital and has sought to prevent competitors reverse engineering its source code;<sup>65</sup> research on Gnutella suggests that a large majority of people only download rather than share their own files<sup>66</sup>), it is a powerful myth. Combined with all the other factors described here, it is one that the record labels have not been able to counter successfully.

The rhetorical figure of the Romantic artist seems to be on Napster's side at the moment. Napster's creator, Shawn Fanning, was a 19-year-old college student who designed the program for his friends. He thus fits the Romantic stereotype perfectly and there have been a large number of media reports emphasising these credentials. Napster's own publicity focuses on unknown bands who have gained success through the site, such as Canadian group Kittie, who sold 400,000 records after being featured on Napster.<sup>67</sup> Such artists fit the conception of the Romantic artist far better than Madonna or Eminem. The ideological firepower that the music industry seeks to utilise in anti-piracy campaigns has been turned against itself. If the record industry is ever going to wean the public off Napster and the new generation of file sharing programs, it is going to have to find ways of overcoming Napster's moral rhetoric and persuading the public that downloading a copyrighted song is as wrong as stealing a CD from a shelf. It seems that currently the public only views it as 'wrong' as not reminding a store that they forgot to charge your credit card.

The record industry can only ever win the battle against online piracy if it wins a moral argument that downloading is wrong. The internet could become an unenforceable, non-intellectual property, free for all. Even if new legislation is passed (and draconian new legislation is currently being passed at an alarming rate as the copyright industries bankroll governments to try and plug the holes in their failing moral rhetoric), citizens need to be convinced to obey such laws. The industry can only achieve this by persuading everyone that copyright infringement is wrong, and to do this

they rely upon a Romantic construction of the artist who is at the centre of anti-piracy initiatives. However, their current efforts are undermined by a communitarian rhetoric promulgated by those who drive online piracy and by the record industry's own tarnished image.

## NOTES

The title of this article stems from Frith, 1993. Thanks to Martin Kretschmer for reading a draft of this article.

1. *Metallica v. Napster, Inc.* [2000] Case No. 0003914 AHM (Cwx) (CD Cal. Apr. 2000).
2. For discussion of the legal and economic ramifications of Napster, see Jeremy U. Blackowicz, 'RIAA v. Napster: Defining Copyright for the Twenty-First Century?', *Boston University Journal of Science and Technology Law* (Winter 2001), 182–93; Harrison J. Dossick and David Halberstadter, 'Facing the Music: The Fate of Napster in Federal Court will have Far-Reaching Implications for the Distribution of all Forms of Entertainment over the Internet', *Los Angeles Lawyer* (April 2001), 34–40; and Vanita Kohli, 'Mutilating Music: A Critical Look at the Copyright and Business Issues in Online Music Distribution', *Entertainment Law Review* 12/1 (2001), 15–24.
3. For example: James Boyle, *Shamans, Software & Spleens: Law and the Construction of the Information Society* (London: Harvard University Press, 1996); Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"', *Duke Law Journal* (April 1991), 455–502; Peter Jaszi and Martha Woodmansee, 'The Ethical Reaches of Authorship', *The South Atlantic Quarterly* 95/4 (1996), 947–77; Lee Marshall, *Losing One's Mind: Bootlegging and the Sociology of Copyright* (unpublished Ph.D. Thesis, University of Warwick, 2001); Mark Rose, *Authors and Owners* (London: Harvard University Press, 1993); Martha Woodmansee, *The Author, Art and the Market: Rereading the History of Aesthetics* (New York: Columbia, 1994).
4. See Simon Frith and Howard Horne, *Art into Pop* (London: Routledge 1987), 31–35; Marshall (note 3); Raymond Williams, *Culture and Society* (London: Hogarth, 1993), C2; Woodmansee (note 3).
5. For examples of the dominance of these Romantic traits, see Elizabeth Wilson, *Bohemians: The Glamorous Outcasts* (London: IB Tauris, 2000).
6. See Marshall (note 3).
7. Woodmansee (note 3).
8. *Ibid.*, 20.
9. *Preface to the Lyrical Ballads* (1802 and 1850).
10. Quoted in Woodmansee (note 3), 84.
11. Here is one example of this understanding: 'An artist never got involved with his business. It was sacrilegious. Because you weren't a businessman, you were an artist. You were a musician. The idea of talking about demographics and sales points – it was ludicrous. You didn't, morally, ever involve yourself with that.' Peter Wolf, singer with J. Geils Band, in Fred Goodman, *The Mansion on the Hill: Dylan, Young, Geffen, Springsteen and the Head-on Collision of Rock and Commerce* (New York: Vintage, 1998), 130. The subtitle of former *Rolling Stone* editor Goodman's book is another example of this understanding of authenticity.
12. John Feather, *Publishing, Piracy and Politics: a Historical Study of Copyright in Britain* (New York: Mansell 1994), 59–64.
13. *Ibid.*, 50.
14. Woodmansee (note 3), 157.
15. See Calvin D Peeler, 'From the Providence of Kings to Copyrighted Things (and French Moral Rights)', *Indiana International and Comparative Law Review* 9 (1999), 423–56.
16. Jane Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and

- America', *Tulane Law Review* 64/5 (1990), 991–1031. Lyman Ray Patterson, *Copyright in a Historical Perspective* (Nashville: Vanderbilt University Press, 1968).
17. For a discussion of such problems, see Jaszi and Woodmansee (note 3) and Boyle (note 3).
  18. Jaszi (note 3).
  19. Frith and Horne (note 4).
  20. Jason Toynbee, *Making Popular Music: Musicians, Creativity and Institutions* (London: Arnold, 2000), 16.
  21. Jon Stratton, 'Capitalism and the Romantic ideology in the record business', *Popular Music* 3 (1983), 150. David Buxton (1983), 'Rock Music, the Star System, and the Rise of Consumerism', in Simon Frith and Andrew Goodwin (eds.), *On Record: Rock, Pop and the Written Word* (London: Routledge, 1990), 427–40.
  22. Toynbee (note 20), pp.1–33.
  23. Toynbee (note 20), 19–32.
  24. Frith in Mark Neumann and Timothy A. Simpson, 'Smuggled sound: bootleg recording and the pursuit of popular memory', *Symbolic Interaction* 20:4 (1997), 319–41.
  25. Jon Stratton, 'Between Two Worlds: Art and Commercialism in the Record Industry', *Sociological Review* 39 (1982), 281.
  26. Stewart E Sterk, 'Rhetoric and Reality in Copyright Law', *Michigan Law Review* 94 (1996), 1197–1249.
  27. Jenny Dixon, 'The Copyright Term Extension Act: Is Life Plus Seventy Too Much?', *Hastings Communications and Entertainment Law Journal* 18 (1996), 945–80. Joseph A. Lavigne, 'For Limited Times? Making Rich Kids Richer via the Copyright Term Extension Act of 1996', *University of Detroit Mercy Law Review* 73 (Winter 1996), 311–59.
  28. Toynbee (note 20), x.
  29. For this reason, as Jessica Litman notes, the phrase 'piracy' has started to be used to cover private acts committed by individuals rather than its traditional usage of large scale, organised, reproduction of copyrighted materials. Jessica Litman, 'The Demonization of Piracy', *CFP 2000: Challenging the Assumptions, Tenth Conference on Computers, Freedom and Privacy*, Toronto Canada, 6 April 2000. Available from <http://www.law.wayne.edu/litman/papers/demon.pdf> (last visited 22 June 2001).
  30. *RIAA v. Diamond Multimedia Sys., Inc.* [1999] 180 F. 3d, 1079 (9th Cir. 1999).
  31. *A&M Records, Inc. v. Napster, Inc.* [2000] 114 F. Supp. 2d 869 (ND Cal. 2000) (No. 99-5183).
  32. *UMG Recordings, Inc. v. MP3.Com, Inc.* [2000] 92 F. Supp. 2d 349 (SDNY 2000).
  33. Clea Simon, 'Compressed Data: Napster is Stirring Debate on Art and Ethics', *New York Times*, 19 February 2001.
  34. 'Metallica on MP3-Swap Services: Kill 'em all', *The Standard*, 2 May 2000, available at <http://www.thestandard.com/article/0,1902,14708,00.html> (last visited 9 April 2001).
  35. Lars Ulrich, 'Opinion', *Newsweek*, 5 June 2000, 54.
  36. Quoted in Eric Boehlert, 'The Great MP3 Lovefest', *Salon*, 1 August 2000. Available at <http://www.salon.com/business/feature/2000/08/01/napsterpress/print.html> (last visited 4 April 2001).
  37. *Ibid.* Some commentators saw Metallica's action against Napster as surprising given their attitude toward tape trading, *Salon.com* claiming that the lawsuit was 'stunningly ironic in light of the band's history'. There is nothing ironic in Metallica's stance; the whole ethos of tape trading (from the Grateful Dead through to Metallica and Pearl Jam) has developed with an understanding that a band's official releases are sacrosanct and should not be copied. Metallica made a point to not claim copyright infringement in any of their concert recordings distributed through Napster. Their objection was to the reproduction of their officially released music.
  38. 'Metallica on MP3-Swap Services: Kill 'em all' (note 34).
  39. The song ends with 'we don't mind when people pay money to wear our promotional T-shirts/ and it's fine when they pay forty dollars to come to one of our concerts/ but when our fans think they can listen to our music for free/ they just crossed the line'. Both the song and press release are available from Chumbawumba's website: [http://www.chumba.com/\\_passialong.htm](http://www.chumba.com/_passialong.htm).

40. [http://www.chattanoogaarock.com/news\\_stories/news\\_napster.html](http://www.chattanoogaarock.com/news_stories/news_napster.html) (emphasis in original).
41. Quoted in Boehlert (note 36).
42. For a more detailed explanation of why the Romantic author can be used in such a way, see Boyle (note 3) and Marshall (note 3).
43. Wilson (note 5), 79.
44. RIAA anti-piracy press kit, available at [www.riaa.com/antipir/releases/presskit.htm](http://www.riaa.com/antipir/releases/presskit.htm) (last visited 28 December 1999).
45. Ibid.
46. Simon Frith, *Performing Rites* (Oxford: Oxford University Press, 1998), 72; see also Simon Frith, 'Music and Morality', in Simon Frith (ed.), *Music and Copyright* (Edinburgh: Edinburgh University Press, 1993), 1–21.
47. Martin Kretschmer, 'Intellectual Property in Music: A Historical Analysis of Rhetoric and Institutional Practices', *Studies in Cultures, Organizations and Societies* 6/2 (2000), special issue, P. Jeffcut (ed.), *Cultural Industry* (Harwood, 2001), 197–223.
48. Cheryl Swack, 'Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral between France and the United States', *Columbia VLA Journal of Law and the Arts* 22 (Spring 1998), 366.
49. I shall briefly detail here what I see as the most significant two reasons why copyright infringement is not theft. The first is that copyright, as the name suggests, is the right to copy, it is not the ownership of a physical property. Copyright is not founded in the natural rights of authors but is a state granted, short term, limited monopoly. When pirating a piece of music, therefore, the pirate is infringing upon a right to copy, he is not infringing upon a property right. The second reason relates to the immaterial nature of intellectual property: theft involves the removal of a piece of property which prevents the owner from enjoying the exclusive use of his/her property. The nature of cultural works means that it is possible for one person to infringe another's copyright without the owner enjoying any less benefit from their property. Thus producing an imitation of Picasso's *Guernica* is not the same as stealing the original painting.
50. Boyle (note 3), 121.
51. As an aside, maritime piracy was considered a stateless crime, in that it occurred outside the normal jurisdiction of any state. With the type of piracy that goes on through cyberspace today, perhaps the term is becoming more appropriate.
52. NME.com, 'Downloading MP3s Will Make You Go Blind, Warn BPI', 29 October 1999, available at [http://www.nme.com/NME/External/News/News\\_Story/0,1004,2155,00.html](http://www.nme.com/NME/External/News/News_Story/0,1004,2155,00.html) (last visited 22 May 2001).
53. ZDNet.com, 'Napster, Gnutella ... and Josef Stalin?', 24 July 2000, available at <http://www.zdnet.com/filters/printerfriendly/0,6061,2606875-2,00.html> (last visited 16 April 2001).
54. Frith (note 46), 'Music and Morality', 4.
55. Jessica Litman, 'The Exclusive Right to Read', *Cardozo Arts and Entertainment Law Journal* 13 (1994), 36.
56. Catherine Greenman, 'Taking Sides in the Napster War', *New York Times*, 31 August 2000.
57. For example, Steve Johnson, 'Senate's Napster Hearing Takes Some Conflicted Viewers on a Pirate Trip', *Chicago Tribune*, 4 April 2001. Available at <http://www.chicagotribune.com/leisure/tempo/printedition/article/0,2669,SAV-0007140004,FF.html>; Renee Graham, 'My Torrid Love Affair with Napster', *Boston Globe*, 13 March 2001. Available at [http://www.boston.com/dailyglobe2/072/living/My\\_torrid\\_love\\_affair\\_with\\_Napster+.shtm](http://www.boston.com/dailyglobe2/072/living/My_torrid_love_affair_with_Napster+.shtm).
58. The court of appeal's rationale was that 'repeated and exploitative unauthorised copies of copyrighted works were made to save the expense of purchasing authorised copies'. Quoted in Dossick and Halberstadter (note 2), 37.
59. One of the great dangers of the current moral panic over digitisation is that it is enabling publishers to promote the shared interests ideology even further and attempt to have it embedded in new legislation. Thus Gillian Davies of the International Federation of the Phonographic Industry (IFPI) can state 'in these days ... when every form of intellectual property is under attack, it is becoming more widely recognised that the rights of authors are not weakened or whittled away, but on the contrary strengthened, by the granting and

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upholding of parallel rights for producers of phonograms'. Quoted in David Agnew, 'Reform in the International Protection of Sound Recordings: Upsetting the Delicate Balance between Authors, Performers and Producers, or Pragmatism in the Age of Digital Piracy', *Entertainment Law Review* 3/4 (1992), 131. This is supported by Agnew, who states 'it would appear to be in the best interests of authors and performers to allow for the copyright in sound recordings to vest initially in the producer ... In this age of digital piracy, the distinction between authors' rights and neighbouring rights is of dwindling significance' (132).

60. Stephen Levy, 'The Noisy War over Napster', *Newsweek*, 5 June 2000, 46. Emphasis added.
61. Jack Miles and Douglas McLennan, 'The Essential Napster', *Artsjournal.com*, <http://www.artsjournal.com/artswatch/napsterprimer.htm> (last visited 6 April 2001).
62. This is both for technical and commercial reasons. Technically, Napster's browse function is not especially effective. It is difficult to browse for new music and thus people tend to use Napster to download what they already know. Commercially, as Napster is the most successful peer to peer program, with approximately 60m users, the majority of these users will be interested in the most popular, mainstream or commercial releases.
63. Frith and Horne (note 4).
64. Graham (note 57).
65. Matthew Rimmer, 'Napster: Infinite Digital Jukebox or Pirate Bazaar?', *Media International Australia Incorporating Culture and Policy* 98 (February 2001), 28.
66. John Markoff, 'More Taking than Giving on the Web', *New York Times*, 21 August 2000.
67. Kohli (note 2), 15.