

Artists, Consumers & The Great Napster Debacle

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The Napster court case has set off a holy war. Technology advocates have lined up on one side and distributors on the other, and consumers and artists are being caught in the cross fire. The media distributors paint a comic book caricature of greedy consumers stealing from starving artists and the greedy internet companies that facilitate such theft. The technology advocates, on the other hand, paint an equally silly picture of filthy rich rock stars and fat bloated media companies trying to squelch technology and run over consumers.

The problem is that these stories are counterproductive. They serve one purpose and one purpose only, to stoke consumer resentment of artists and artist resentment of consumers. Consumers are exasperated at the high price of art consumption (be it music CDs, books, movies, etc...), while artists resent how little they make from their distributors for their work and buy in to the notion that piracy is what cheats them of their reward.

The high price of art consumption is not the fault of the artists, the price is set by the distributor, not the artist. The time has come for we as artists to have a closer look at the way our art is distributed, and understand that we need not have an adversarial relationship with our consumers. Consumers might do well to understand how they can help artists to break the current model of distribution, and help artists to a more equitable distribution of the money generated by their creations. The media companies are reliant on the work of their artists, and when all is said and done, pay them very little for their time and effort.

I will examine the Napster court case, both from a consumer standpoint, and from the point of view of the artist. More precisely, how we as artists should look at Napster carefully, and see how peer to peer technology, and digital distribution in general can be used to change the way our work is sold, and how we are compensated for that work. We will start by looking at the Napster case and the media companies' push to end consumers non commercial usage of the art they purchase.

Napster R.I.P.

"I think that Napster is allowing the theft of copyrights of Artists. They should be fined so that there is no money left to run anything. That money should be evenly distributed throught (sic) the RIAA. Because of Napster's piracy my "legal" business model failed."

Anonymous posting on a Macintosh News Network (<http://www.macnn.com>) forum

First, let us establish that the RIAA is not fighting to protect the intellectual property rights of recording artists, any recording artist dealing with the big media companies has already had those rights stolen. If you have any doubts, please look at Courtney Love's (surprisingly) cogent analysis of the recording industry and how distributors use the artists (it can be found at <http://www.stormymondays.com/home/courtney.htm>). This is not about the intellectual property rights of artists; it is about the change of economic models and the commercial property rights of the consumer. You still doubt me? How many of you have bought used CDs or records? Are you under the impression that the artist collects royalties from these sales? You think that this is illegal? Why hasn't the RIAA gone to war against the second hand music stores for stealing the intellectual property rights of artists? It's because they can't. There is more to this debate than the intellectual property rights of artists. The part of this issue that has been overlooked by the technology advocates and by the media companies is that there is a third party involved.

The media has portrayed the issue as one of digital pirates stealing from musicians and Napster facilitating said theft through their software and network. It is a self serving and erroneous analysis, and Napster has not helped itself by arguing only for their rights and ignoring the rights of music consumers. Traditionally, the law recognised the rights of the consumer to the non-commercial usage of the intellectual property that they purchased. That is, someone who buys a book is entitled to loan that book to whom ever they please. They are even free to start a lending service so long as they do not charge for it. Once they bought that book, it was theirs, and they were free to use it. They were even free to sell their copy without paying a royalty to the artist.

These established principals of law do not appeal to the RIAA, they would like a pay/usage profit model, where consumers must continuously replace poorly made CDs (commercial CDs that one buys in a record store are of poorer quality than the blank ones bought for burning) and not copy and redistribute music to friends, even though the law explicitly permits them to do so. The price of CDs has even remained static while the cost of producing them has decreased. The price of a new CD has remained at near \$18 while the cost of producing them has gone below 50 cents. The artists have not seen an increase in royalty payments with the declining costs, the increased profits have been retained by the companies. I am not saying this as a socialist; I am a capitalist, and have my own company. Companies have the right to pursue profitability (not too mention a duty to their stockholders), these remarks are only

meant to establish that the Napster suit is NOT about protecting the artists, they have already been cheated by their distributors (please read the full text of Ms. Love's remarks). This is really about the profit model used by the record companies.

Deep in to the information age, one surviving relic of the industrial era is the economic model of scarcity. Diamonds, a plentiful natural resource, are driven up in price by an economic cartel that limits the consumer supply (they are used more cheaply for industrial purchases). Oil, another plentiful natural resource, is driven up in price by a cartel which limits production, large oil companies whose economic models are predicated on scarcity, their high paid lobbyists, who along with environmentalists (that agitate to prevent exploration), reinforce the scarcity. Scarcity is easy to maintain when the resources are physical; it is easier to prevent the harvesting of natural resources and to limit the production of physical goods. Far harder to restrict the flow of information in our current age of communication, as the Soviet Union found and China is now discovering.

Companies that deal exclusively in information are finding it increasingly difficult to restrict the flow of the information they produce. Their executives, steeped in industrial age economics of scarcity try to enforce old business models on a new industry. It will not work. Federal judges, steeped in command/control economics, may try to enforce those rules in a market that is inherently mobile and Napster may be economically ruined, but the victory will be short lived. The Media firms may ruin people who distribute DeCSS, but that will not long hold, either. Frankly, the *ancient regime* should be careful, because eventually some victim will find a sympathetic and crusading lawyer who will take the case on the offense rather than the defense. Someone that will use RICO laws as a cudgel against the RIAA and their ilk (a serious argument can be made that they are in violation of the racketeering statutes by the loose standards that the federal courts created to destroy anti abortion dissent).

If the RIAA thinks it will find a sympathetic jury, they are kidding themselves. Eventually, one of their victims will find a sympathetic judge, one that will allow the case to go to trial. It only takes one. One sympathetic judge and one jury trial on RICO violations will be one loss for the RIAA. Are they under the impression that the CD buying public, after years of price fixing by the big media companies will return anything less than a ten digit penalty? Neither can there be any argument about the price fixing, the big record companies settled a price fixing suit some years ago with the FTC, admitting that they had overcharged the public by half a billion dollars (this was what they ADMITTED to in settling the suit) by use of anticompetitive pricing policy. Has that changed the policy? The price of CDs has not changed, despite falling production costs. You tell me.

They may smugly believe that they can get any unfavourable judgement overturned on appeal, by judges ignorant of economics and information technology, however, what happens when a jury turns in a ten billion dollar punitive damages award (trebled for RICO)? Their stock prices will lose half their value overnight, and their stockholders will not be quite so smug anymore. I won't have any sympathy for them, though, they knew what they were doing when they bought their stock. They gambled that the media distributors could make the old economics of scarcity work in an information economy, knowing that the model would, by necessity, include legal harassment, bullying, and the cheating of the artists who produced the content that made the media companies wealthy.

Subscription Time

Napster's announcement of a subscription service is being seen by some supporters as a capitulation to the RIAA and the record companies, this is unfair. Did everyone think that Napster would indefinitely spend millions of dollars keeping up a network, developing the program and supporting all those employees? Were you under the impression that this was a philanthropic enterprise? Napster was NEVER a charitable organisation. They have pursued market share, though there are other peer to peer clients (for the record, I rarely use Napster, my program of choice is Audiognome), and many far better, Napster is the most popular. That was their goal, capturing users, and when they were hooked, charge a subscription for the service. In this, they were no different from Microsoft (in the future, Microsoft software and operating systems will be sold as a subscription service). By that very model, they would need begin compensating the media distributors the MOMENT they became a pay service. At most, the RIAA suit has accelerated those plans, forcing Napster to show their hand. Napster users may wail and gnash their teeth about how the RIAA ruined their program, but THAT is not the RIAA's doing. The RIAA is guilty of many things, but they did not force Napster to become a pay service.

The fact is that Napster was NEVER a charity, neither could internet advertising (ESPECIALLY in this market) support it. From the beginning people ought have realised that the day would come that Napster would charge for the service. From the start, Napster officials knew that they would, eventually, have to pay the record companies once it became a pay service. Presumably, the record companies realised this as well. This is, after all, established law, one can loan a book to friends (or anyone else for that matter), or sell it outright, but one can not rent it out or sell copies. Napster viewed itself, in this stage, as a music swapping service, when the time came to implement the pay model; the content distributors would have become part of the deal, financially. Napster attorneys might have tried the second hand music argument; it does have some validity. I have found **Duke & Drivers** MP3s online (taken from old vinyl records) whereas I can NOT purchase **Duke & Drivers** CDs (that myth about how every LP would be released on CD was just that, a myth). Is the RIAA position that I can not be allowed to download music from long forgotten bands who released only a few LPs, or maybe even just a few 45s? If they wish me to pay for it, let them burn a CD and make it available to me. However, I

digress. Presumably, Napster understood that the record companies would need be compensated eventually, and the record companies knew that they would be compensated once Napster became a pay service.

So, if Napster knew that they would need pay the record companies, and the record companies knew that they would eventually be compensated, what is the suit about? Well, what it is about is the economic model of the record companies. Fifty cent CDs are sold at prices ranging from twelve to twenty dollars. When the CD becomes damaged (as it will) you are supposed buy another (rather than ripping a back up copy of the original). The MP3 file format (as well as the DeCSS program in the case of DVD movies) represents a danger to that business model. Does it make it impossible for record companies to be profitable? No. Will it make it impossible for record companies to maintain current profitability? Perhaps, perhaps not. As none have yet tried to incorporate the new technological realities in to their economic models we cannot predict how it will affect profits. Will it make it harder for record companies to achieve current profit levels? Yes. Record companies will need to be more creative and work harder to continue making the money that they have to date.

The question is not whether companies will make money from Napster and other like services, that will specialise in custom burned CDs, software subscriptions, and the sale of individual songs, because they will profit still. The question is about controlling the flow of information, and pursuing a policy of restricting that flow as a business model, rather than the alternative of profiting by facilitating information availability. For those Napster utopians, mourning for the good old days, don't. The good old days have not yet arrived. The information age is here, and the inherent mobility of information will do to the *ancient regime* of media what the mobility of electronic capital did to governments. It will force a change. Moreover, please stop savaging the artists, they are NOT the villains here. They are trying to make the best of a bad situation. As their immediate future is controlled by their record labels, they are acting in what they perceive to be their best interests. Until they see how the new model will work, their support will be for their labels, though many are undoubtedly ambivalent about the situation.

It is interesting to note that the anonymous poster cited above claimed that his "legal" business model failed because of Napster, more likely it was done in by ineptitude, and insistence on profiting by restricting the flow of information. I will note with interest that after complaining that Napster was facilitating the theft of the intellectual property rights of artists, their chosen remedy was to seize the assets and distribute them to the record companies. This will help the artists? The artists are being screwed, so let's screw Napster and give the money to the record companies that are already screwing the artists? Napster's enemies clearly do not sympathise with the artist, nor for the consumer, but only for the large media companies. Consumers have rights too.

Artists & Consumers

The Napster conflict has highlighted the way that the creative information business is managed and how the media industry is willing to fight to the end to preserve the current distributional model. We, as artists, ought look at the matter carefully, and understand how poorly the present model of information distribution has served us. The media companies have striven to obfuscate the whole picture and focus merely on the claim of intellectual property right theft.

Napster has abandoned the field, legally, playing a defensive strategy of denying complicity in their users "theft of intellectual property rights". This is a mistake that will spell their own end, by stipulating that their users are engaged in a criminal activity, they ensure that no judge will even listen to the rest of the case. The media companies cry intellectual theft, Napster cries first amendment, and no one points out that consumers are involved and have explicit rights as well. If the RIAA succeeds in shutting down Napster, the people harmed will be consumers, who will now need to fight an increasingly arrogant media industry that feels it has leave to cheat consumers of their non commercial usage rights. But the damage won't be limited to the consumer. We artists will be hurt by Napster's failure, as well. This is another part of the debate that the media has ignored.

The battle is portrayed as the record companies protecting intellectual property rights from digital pirates, or alternatively, of the masses of consumers exercising their rights and heroically fighting greedy artists and record companies. The common thread is that the battle always places the artists in the record company's camp, and starts with the presumption that we belong there. The media, whether pro or anti Napster has tried to keep artists and consumers separated, and ensured that we, as artists, never examine the matter closely. Most artists I know, though not involved in the music business, voice support for the musicians, and by extension, the recording industry, what offends them is the thought that copyrights can be so quickly and easily circumvented. Placing value on their own art, they respect the art of others, and working with a distribution model similar to the musicians, never question as to whether the current model benefits them. More importantly, they never ask whether there is a better one available. This is how many creative content distributors prefer it.

I shall now turn my attention to the economic model of the media companies and how poorly it serves us, as artists, and why we need to start taking the economics of art more seriously. To learn how to start profiting by facilitating consumption of what we produce. We artists produce the content that the media companies have become wealthy distributing. It is our work that fuels the engine, our

books and music and films that they are marketing. Some artists have been very well compensated and even become wealthy. Some are able to make a living. Most are not. It is referred to sometimes as the lottery economy, where one person in a million makes it, some are able to get by, and most labour in obscurity with little to show for it. It is also a reality of a business model predicated on scarcity. In the market where music is distributed in record stores on CD, there are the costs associated with producing and distributing that piece of hardware. When we turn to books there are the costs of printing and distribution to consider. Movies? The costs are even higher for raw production. Promotion and distribution to theatres make the matter even worse. The Blair Witch Project, of course, made more than \$100 million, but that money was made by the distributor that bought the film, not the people that made it.

Courtney Love points out in her speech that musicians are glorified share croppers, that even people who succeed get little or nothing for the songs they produce while the record companies continuously lobby Congress to further tilt the playing field in their direction. In the Napster case, the artists are not losing royalties, the record companies make their artists pay all the expenses related to production, which generally consumes the royalties produced by sales. Neither are the record companies losing much in sales. Most Napster users spend more on music than the average consumer. The real issue involved with Napster is that Napster represents a sketch of a new distribution model, one that threatens the hegemony of the big media firms.

As artists, we distribute data, whether written, visual or aural, the network age has allowed for the instantaneous transmission of our data to consumers. The current distributional model involves high costs of entry that are usually beyond the means of the individual artist, even when one has the up front costs, the distributional model works on scarcity, scarce shelf space for CDs and books, and a limited number of screens for the viewing of films. Once these scarcities have been overcome we stand at the third section, the money of our consumers and how they choose to spend it. Because of the distributional model, prices for our art are kept artificially high, consumer budgets are limited to smaller levels of consumption. If a consumer has \$100/month to spend on consumption of art, using the current model of scarcity, where new CDs cost \$18 (or thereabouts) and books \$25 (hardcover) or \$13 (paperback), and movie tickets \$7-\$10 (depending on location), the consumer is limited to a few purchases a month. If the consumer is spending \$100/month on artistic consumption, it does not matter to the media firms how much they are consuming, so long as they are getting that money from consumers.

The model of scarcity serves the media companies by ensuring that the largest firms have an advantage in the marketplace that is tough to overcome. In the case of The Blair Witch Project, the large media firms threatened to withhold product from the theatre chains that held over the film at the expense of their product. Though free marketeers will point out that The Blair Witch Project shows that anyone can succeed in the market, it is the exception that proves the rule. The model of scarcity serves the media companies well, they are focused on the quantity of money that consumers spend, not the quantity of art that they consume, the less product required to acquire that money, the better off they are. The question is not whether small distributional companies can compete with the large media firms using a model of scarcity. The question is why would they want to? Moreover, why do we, as artists, want to participate in this model?

Maybe we all hope to be the next Jerry Seinfeld, Steven King, David Bowie or James Cameron. However, when we do that, when that becomes our goal, we buy in to the lottery economy, the notion that one in a million will make it and that he/she should be compensated as such. It is time to do away with the lotto mentality. As artists, our goal should be to make as much money as we can from our art, so that art can become a full time vocation. Using the current models of distribution, it is not practical. To take an example from the world of literature, let us examine, in brief, the career of one of the greatest writers of 20th century America, Dawn Powell. She laboured in obscurity for most of her life, and died broke in a New York hotel in 1967. She did succeed in the lottery economy, however, thirty years after her death. A small Vermont publisher began reissuing her books and they finally achieved best seller status. How well did the distributional model of scarcity serve her? Of course, she had no choice in the matter. In her day (the mid 20th century) data was transmitted via physical medium, paper (literature), vinyl (music), and film.

Ms. Powell had no other options, the high cost of entry to the physical transmission of data kept her locked in to a system that did not meet her needs. She scraped out a living as a writer, but never achieved the success due to the finest American writer of the mid 20th century (as a critic I shall say the whole century, though Fitzgerald is her equal). The same will be seen no matter what artistic endeavour we look at, whether music, film, painting or photography, the model of scarcity has served the distributors well, they have become wealthy. It has served some artists well, the few that have prospered under the old system have done well for themselves. Most of us, however, aren't in this for the money. This is not about artistic integrity (though we might pretend otherwise), the reason we aren't in this for the money is because we don't make enough money to support ourselves doing what we love, be it writing, acting, composing or painting. We work jobs that we hate, well, some do, some of us realize eventually that the despised bourgeoisie have a point about finding a job that you like, but I digress. We, as artists have bought in to the old system of distribution, and labour on in the hopes that one day we will hit the lottery and be able to pursue our art full time. The question is, why?

Napster was the first glimpse of what the new economy could do for us as artists. A glimpse of a future where we, as artists, could make our living doing something we enjoyed. The danger that the media companies see from Napster is NOT the lost sales. Music

product sales are at an all time high, the record companies are reduced to arguing that CD singles have declined in sales volume, and smugly point to Napster as the reason. Might it have anything to do with the fact that the CD single is a bad idea? Two songs on a medium that can hold ten times that? A piece of plastic that leaves you paying ten dollars for two songs? The sales decline is obviously not the result of a music consuming public tired of being screwed by wealthy media companies, it is obviously Napster. It is a false argument and a make believe threat. The real threat that the media companies see is the threat that we artists might wake up and realize that we don't need them. Their determination to destroy Napster is thus insatiable. Napster might offer to cut them in on the profits, but what do the media companies want with a share of the money? What they want is to prevent an alternate means of distribution from springing up. A model of distribution that will give artists direct access to the consumers who buy our output.

After hearing a wonderful song from a singer called Moby, I went out and bought the CD. Of the 18 songs, there were six or seven that appealed to me. The others were of no matter. I paid \$19 for those songs. Moby may have seen a few cents from the sale, most of which his record label no doubt consumed in promotional expenses. Why does this model of distribution make sense for him? As all I am buying is digital data, why oughtn't I merely buy the songs I like directly from him? Pay him a dollar a track, he makes money, his web team, handling the distribution, makes money, and I get the songs I want. We're all happy. Musicians would no longer need to produce CDs. The album, as a format, is quite moribund. Using the new direct distribution model, musicians can do what makes them happy, make music, and distribute that music directly to fans. Most importantly, using this model, musicians retain the rights to their music, something that they don't do under the current model of distribution.

What about CDs you say? Who says that we artists need distribute physical items at all? We create data. We don't HAVE to distribute physical items at all. Books? Why not pdf files? If our reader wants a bound copy, they can go to Kinkos and have one printed and bound. Why do we need sell books? I am a writer. I don't write books, I write stories, there is a difference. Before the book, stories were transmitted orally, the book was a means of transmission, it was not the first, and it won't be the last. Movies? Well, obviously the theatre is still the chosen medium for movies, but videotapes and DVDs flattened out that model, allowing small distributors to do an end run around the theatre chains and mainstream distribution, but, why do we need to distribute on physical medium at all? After all, a DVD is only a plastic disk containing an MPEG file. Certainly the end user is capable of burning his own DVD.

The network era has opened a new vista for we artists. If we stop buying in to the notion that our work MUST be distributed as a physical object, and instead learn to leave that as an option for the consumer, suddenly the cost of entry is lower, and we can distribute our own work. Now, as artists, we can begin to make a living at what we do best. Without begging at the doors of the large media companies for the scraps that they consent to give us. We must stop worrying about hitting the lotto, and start looking at ways that we can make a living at our art. For the record, Napster has not served musicians well, economically. What it has done is show us a glimpse of the future, and what might be, and that is what the media companies are really afraid of, and why they will go to the mat to destroy it. Someone should tell them it is too late. Some of us have seen the future, and are already building it. ☐☐☐