The Future Meets The Past In The Napster Case

August 23, 2000

Brief for Amici Curiae Association of American Physicians & Surgeons, Inc. and Eagle Forum Education and Legal Defense Fund

PDF document (81 kb)

Google Ads are provided by Google and are not selected or endorsed by Eagle Forum

"This is a culture war, between the powers that were and that will be." Is he talking about abortion? Gay rights? Hollywood violence? Illegitimacy? No, the culture war is about ownership and regulation of the internet, according to John Perry Barlow, Grateful Dead lyricist and cyber rights activist.

Barlow may be right. The influence of the internet may be overflowing into our culture as well as our politics.

The current flashpoint of controversy about the internet is a case now in the Ninth Circuit Court of Appeals (RIAA v. Napster) where the five giant music companies are fighting a website called Napster for facilitating online music. The music cartel wants to stop listening to music on the internet.

Most music CDs are stamped with a warning that unauthorized duplication is prohibited by law, but this is not true. It's the same claim Hollywood made when trying to stop individuals from taping TV shows with VCRs, but the Supreme Court in 1984 ruled that unauthorized copying for the purpose of time-shifting is legitimate "fair use."

Furthermore, Congress specifically legalized the noncommercial consumer copying of digital music in the 1992 Audio Home Recording Act. The music cartel lobbied for this bill because its main purpose was to allow the cartel to control and impose a mandatory royalty on Digital Audio Tape (DAT).

The political power of the music cartel in Washington was also demonstrated last year when it sneaked a law through Congress making music a "work for hire," i.e., the property of the recording companies rather than the musicians. Without any hearings or debate, this provision was buried in an unrelated bill as a

"technical correction" and signed by President Clinton.

Musicians were outraged that the law no longer considered them authors of their own music, and Sheryl Crow and other artists testified at a post-passage hearing of the House Intellectual Property Subcommittee. Subcommittee chairman Howard Coble (R-NC) was unsympathetic, grumbling that he hoped rock star Don Henley (of Eagles fame) "gets carpal tunnel syndrome" from counting his money.

The recording cartel backed down and agreed to the repeal of this law. The music cartel usually gets what it wants: in recent years it has gotten Congress to pass a copyright term extension, draconian criminal penalties on small incidents of copyright infringement, and a law to criminalize "circumvention" of the wishes of a copyright owner.

For years the music cartel was coercing retailers to sell CDs at the Manufacturers Suggested Retail Price (MSRP), a violation of antitrust law. The FTC stopped this price-fixing scheme and 28 states are now suing for hundreds of millions of dollars in damages.

The music cartel desperately wants to shut down Napster and similar web sites that facilitate the noncommercial sharing of music. The big five labels are frightened that online music may upset their out-of-date business practices.

The U.S. Constitution allows Congress to enact copyright protections for authors "to promote the progress of science and useful arts," not to protect the special interests of Hollywood or music executives. Copyright holders have certain temporary rights but so, under fair-use applications, do consumers, and that's what the music cartel and other powerful interests are trying to eliminate through internet regulation.

The internet is a medium for peer-to-peer communication. The phone company doesn't regulate who we call or what we say on the phone, and the music industry should not be regulating internet connections.

Nor should anyone be regulating information on how to use products in a manner that has been traditionally and legally considered fair use. Unfortunately, the 1998 Digital Millennium Copyright Act (DMCA) was intended, by Hollywood and others who lobbied for it, to give copyright owners a measure of control they never had before.

A 16-year-old Norwegian kid figured out a code that allows people to view legitimately purchased DVD movies on Linux computers, even though Hollywood rigged these movies to be playable only on Windows computers and other machines. Now Hollywood is suing everyone who spreads the word about the DVD code, including a magazine called "2600" and one guy who put the code on a T-shirt.

Despite scare stories, new technologies have nearly always expanded markets and created new opportunities for profits. Hollywood fought VCRs in Congress and all the way to the Supreme Court, and lost every battle in spite of doom and gloom predictions about how VCRs would ruin the industry.

It turned out that videotaped movies became a financial bonanza for Hollywood. We can also tape music over radio, but radio did not ruin the music market.

I have shelves of CDs I never listen to, but I'd buy a lot more if I could conveniently and easily find the music I really like. But the music cartel has blocked the online sale of the music it controls, and sites such as emusic.com have only fringe music.

Even though new technologies tend to disrupt current business models, legislative or judicial attempts to protect economically inefficient distribution channels are misguided.