

Case #04 - Napster and the Story of Online Copyright

It is doubtful that Shawn Fanning ever dreamt of derailing an entire cultural industry when he was a little boy. Nevertheless, the knock-on effects of the software he developed at the age of 18, designed to help him and his friends share digital music files more easily, can be argued to have done just that. Within two years of its release Napster had over 26 million users and at its peak they were sharing over 80 million songs (Jupiter Media, 2001). By 2011 the Recording Industry Association of America (RIAA) estimated that they had lost a staggering USD55bn in revenue over the previous decade, and their explanation for this was simple: the advent of peer-to-peer (P2P) file sharing (Arista et al, 2011)¹.

Fanning didn't invent P2P; others got there before him. However, by applying it to one of teenagers' and young adults' most cherished cultural products — music — his invention managed to take the concept into the mainstream and alert tens of millions of Internet users to the possibility of getting free media over the Internet. By doing so Napster, and the copycat clones it spawned such as Gnutella, Kazaa, Limewire, and Grokster, almost immediately broke the stranglehold that major record companies had on the distribution of recorded music and alerted users, musicians, entrepreneurs and lawyers that the established ways of doing business on the Internet were in for a change.

These services also placed a gigantic nail in the coffin of analog-era copyright. Significant lawsuits in the past decade have made it clear that by offering access to copyrighted files the services provided by Napster et al were illegal (Giblin, 2011). They were closed down and huge fines were levied; but putting the genie back in the bottle has since proved impossible. Thanks to the ease of digital copying, illegal digital versions of music and movies continue to be distributed all over the Internet. And yet, even before the representatives of the major music labels or the movie studios, such as the RIAA or Movie Picture Association of America (MPAA), expanded their legal campaigns to essentially bludgeon the practice to death in U.S. courts by suing individual Internet users — their own customers! — members of the global file-sharing community produced by Napster had begun developing alternative means to share files and avoid detection. A new means of sharing called BitTorrent had been developed by Bram Cohen in 2001 and it would soon spread even further around the world than the original P2P services. Additionally, new forms of cloud-based file storage websites called cyberlockers sprang up, offering access to digital files for free and premium rates. By January 2012, when Megaupload boss Kim Dotcom was arrested in New Zealand, large amounts of money were being made from what courts all over the world clearly saw as copyright infringement (Kravets, 2012).

In hindsight, the recording industry's choice to pushback against the inevitability of file sharing seems shortsighted. Their campaigns against users in the courts, including verdicts that initially levied charges of USD222,000k per infringing file against Jamie Thomas, or USD22,500k per file against Joel Tenenbaum, served only to demonise them as money-grabbing corporates with no connection to culture, and no hesitancy in suing members of public who no doubt were also their customers (Haller, 2006; Johnston, 2011). In setting out to make an example of individuals they drew attention to their own behaviour regarding artists, and in the process made it easier for people to justify their online sharing (Masnick, 2011; WinstonTPB, 2012).

¹ Copyright 'math', however, being a source of some debate:
<http://blog.ted.com/2012/03/20/the-numbers-behind-the-copyright-math/>

Furthermore, they failed to understand the potential of new Internet technologies for their businesses, with the end result being that a technology company, Apple, which stepped into the breach and founded an online platform where digital music, books and movies could be purchased legally, taking a substantial cut from the major entertainment corporations while doing so.

While it might seem harsh, it is instructive to note how badly the incumbent players in the entertainment industry called this wrong. As with other new technologies, such as the VCR, instead of trying to adapt their initial response was to try to shut things down and attempt to maintain the status quo (Barro, 2012). The legality of MP3 players was questioned (Johnson, 2012). When that didn't work music files were only made available with digital rights management (DRM) embedded that restricted what users could do with their files and which devices they could play them on. If you were an unlucky Sony customer, you might have bought a CD that installed a hidden rootkit on your computer to monitor your activities (Schneier, 2005). These mistakes are glaring in 2012, but the underlying truth is that industry executives have continually tried to turn the clock back rather than adapt to the Internet.

In the past decade more and more legal services have appeared and begun to prosper. Apple's iTunes remains the market leader but all types of music are now available to buy online, legally. Streaming services, such as Spotify, have also emerged, and countless startups, from Soundcloud to Mixcloud to Turntable.fm have given music fans a chance to create and share their sounds with others. As time has passed, and economists have realised that the sky is not falling for these industries, and that people continue to spend roughly the same amount of money on entertainment, just spread over a wider range of formats, sales of digital media have begun to slowly increase as people explore more innovative ways to connect with fans (Karaganis, 2012; Masnick, 2012a; Sanchez, 2012).

The innovative ability of those who understand Internet technology is therefore not in doubt; but neither is the continuing desire of the established entertainment industry to shape the legislative environment in which these activities take place in. Copyright is key to this situation — music, movies and publishing are industries that use business models based around the collection and exploitation of rights. Simple digital reproduction of media files disrupts these models or even makes them obsolete and the post-Napster years have seen new attempts to tackle this through far-reaching legislation. Putting aside for a moment the activities of copyright trolls such as Righthaven or ACS:Law, suing individual users is no longer the weapon of choice (Cammaerts and Meng, 2011). Instead, the RIAA and MPPA have influenced policymakers to go after intermediaries, such as search engines or social media sites, drafting and promoting legislation that seeks to criminalise online copyright infringement and even, ultimately, cut off repeat infringers' access to the Internet². Under such legislation other intermediaries caught in the middle, such as hotels, cafes, pubs universities or libraries, could be held liable for the activities of their users (Dutton, 2010).

13 years after Napster appeared on the scene the central issue at stake — the extent to which culture can be shared, changed and then shared again online — has gone from being the preserve of those with the technical know-how to download and install P2P software to those who know how to use Google. Copyright legislation, which

² Such as the Stop Online Piracy Act (SOPA)/Protect IP Act (PIPA) in the U.S., the Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet (HADOPI) in France, the Digital Economy Act (DEA) in the UK, or clandestine free trade agreements such as the Anti-Counterfeiting Trade Agreement (ACTA), or the Trans Pacific Partnership (TPP).

was once a fairly stuffy legal interest, has motivated thousands of people to take to the streets in protest against ACTA in Eastern Europe, or one of the world's best known websites, Wikipedia, to black itself out for a day in protest against SOPA/PIPA (FightfortheFuture.org, 2012; Lee, 2012).

Importance

The story of Napster is one of a struggle to scale on behalf of the established media industries. The shift to digital left the major record labels behind but then, strangely, the movie industries and now the publishing industries have failed to learn from their mistakes. Instead these industries have consistently failed to provide services that give consumers what they want, at an appropriate price and free of restrictions. The major record labels' initial insistence on DRM, eventually abandoned by 2009, was at the root of an Internet arms race with hackers and crackers that continues to this day in relation to the online offerings of movie studios and publishers. Users cannot stand this.

It is no coincidence that the world's biggest social network, Facebook, is built on the human urge to share information with each other (Sengupta, 2011). The successful media startups of the post-Napster period have embraced this and turned to users themselves to become the stars of the show. Building upon the social innovation connected with file sharing, crowdsourcing, remixing, and the creative responses to DRM and online surveillance has resounded with Internet users. The old model of one distributor hoarding content, then turning on a tap to allow an unreleased box set or rare b-side to dribble of it out now and again entirely on their terms, is completely redundant in the face of Tivo, Spotify, or Hulu. Unbundling is now *de rigeur*.

However, the companies that have taken advantage of technical expertise and creative thinking have continually banged their heads on a legislative ceiling that is outdated and clunky. What has become clearer post-Napster is that copyright frameworks at national and international levels are woefully unable to deal with the explosion of creativity and sharing that the Internet has created. The extension of copyright term in the U.S. and Europe in the 1990s has come to be seen as beneficial only to corporate interests, and nothing to do with the promotion of culture and creativity at all (Lessig, 2002). Legitimate uses of copyrighted material, such as making personal backup copies, are restricted by DRM, or exceptions to copyright are trumped by licenses (British Library, 2010). The development of Napster et al is significant because the behaviour of corporate players who feel their control slipping away has consistently shown them to be only concerned with the bottom line.

This may be one of the most important things to monitor in this debate. The sense of fear that pervades the cultural industries, despite the continued profits to be made in this sector, may lead to overreach. In the case of the proposed SOPA/PIPA legislation, for example, this overreach took the form of a proposal that would mandate the blocking of websites and interference in the Internet DNS system (McCullagh, 2011). Under such a proposal the underlying architecture of the Internet would be altered to protect the established entertainment industry's business models. Connected to overreach is the issue of unrealistic demands placed on intermediaries. For example, Viacom asking Google to monitor all content posted on YouTube for copyright infringement, or photographers requesting diligent search for the rightsholder for every item included in a mass digitisation programme (Gibault, 2012). The extent to which policymakers are being influenced by the existing creative industries is a cause for concern, and is increasingly countered by those who understand the Internet's development since Napster.

Another view, however, is that the lessons of the past fifteen years tell us that without a change to this system...not much will change. Circumventing DRM on media files or hiding one's file sharing activities via an anonymising service is relatively easy to do if someone shows you how (or if you look it up on Google). Criminalising copyright infringement, penalising intermediaries to the extent that they restrict services, or cutting people off from the Internet – these will all affect Internet users but they will not make the issue of online piracy go away. Instead they will drive it underground to the darknet and into contact with the even more worrying types of content that live down there (Beckett, 2009).

In some ways, therefore, it is users who have the key to this situation in their hands. The exchange of media files on the Internet adheres to the market forces of supply and demand, and if music and movies and books are not being made available in a timely manner and reasonable price users will go elsewhere. Fifteen years of seeing user-driven technology consistently outpace platforms that established industries are comfortable with will also have an effect on the way users will view the situation. There is a general awareness that the change proposed by incumbents will be gradual if not glacial — something that is not attractive to users who have grown up with an attitude that favours instant and low cost to free access. There is a generational gap to consider in this aspect of the Internet's growth, and the fact that so many of the protestors against ACTA and SOPA/PIPA were under 30 should give some indication of how future generations will see the situation.

For younger Internet users are not stupid. It is clear that reports of the death of the music industry have once again been exaggerated. Home taping did not kill music, and neither will the Internet (Goldacre, 2009). For the cultural industries though, gloom has been the order of the day, and there has been a sense since the advent of Napster that the giant media companies have dragged their feet all the way to the Internet age and failed to engage with the technology in a realistic and positive way. Their thunder has been stolen by smaller, more nimble businesses and their attempts to seize the narrative back have been hamstrung by their decisions to turn on their own customers and game the legislative system in their favour.

It might be thought that national governments would have stood back from this situation and let the market sort it out. However, this has not been the case, and since the birth of the web copyright legislation has been repeatedly proposed which favours incumbent copyright holders and actively disrupts a system that is supposed to balance the interests of creators and users (Council of the European Communities, 1993; Gifford, 1999). Big media itself is often behind this legislation, and pushes it forward through well-funded supporters in government (Lessig, 2002). In a country like the United States, the entertainment industries are a major contributor to the political machine, and normally they expect to receive something in exchange for their donations (Masnick, 2012b). In the 1990s the U.S. government gave it to them; post SOPA/PIPA it may become more difficult to satisfy their wants.

Presently, more governments have begun to consider copyright reform³ and, while these efforts may yet flounder on the rocks of industry lobbying, if there is some progress in this area it may help to counterbalance the work being done on increasing copyright enforcement through trade agreements like ACTA and TPP. The question of whether to nurture and support new digital industries or protect and shepherd the old ones into the 21st century is going to be difficult for Internet-age

³ Reviews of copyright legislation have recently been undertaken in Australia, Canada, France, Ireland and the United Kingdom

governments to answer. The way that they do will have a great effect on whether users continue to engage with the mainstream Internet or whether they will turn their backs and go underground.

Right now is a crucial point. The Internet's architecture has scaled perfectly in terms of the framework needed to support mass sharing of information, but the legal frameworks to guide this sharing have failed almost completely. Put simply, the question now is whether real-world consumption of digital media by Internet users will drive the future frameworks for content distribution, or whether the established entertainment industries will be able to maintain their role as gatekeepers of content in the digital age. Governments will have to decide which horse to back, or continue to find the tricky third way — which will almost certainly be outpaced by technological advances. Whatever the result, something will become a collateral casualty: the old ways of content creation, distribution and payment, or the flexibility of the Internet's structure itself.