

The Hong Kong Polytechnic University School of Professional Education and Executive Development

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Information Society Issue and Policy Group Project Report

Topic



A&M Records, Inc.

v.



Napster, Inc.

Group Member

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1. Summary of the case

1.1. Background of Napster, Inc.

Napster, Inc., which provide an Internet service, operates a system of peer-to-peer technology to share digital audio files, typically music, encoded in MPEG-3(abbreviated “MP3”). The system allowed the transmission and retention of digital audio files between and among its users that is different from previous system. To access Napster system, the users must first download the MusicShare software that provides users to create MP3 files stored on personal computer hard drives available for copying by other Napster users. To transfer a copy of a requested MP3 file, the Napster server-side software instantly links the requesting and host computers and then transmits the MP3 file to the requesting computer (Lisa, 2002). The transferred files between the users do not pass through the Napster system at any point during the process, hence, the Napster do not acquire any copies of transferred files. However, with each request from user, the system make an additional reproduction and the transmission can establish a distribution of the work.

1.2. Background of A&M Records, Inc.

Indeed, the lists of the plaintiffs included 18 record companies but the case referred as A&M Records, Inc. v Napster, Inc. The major plaintiffs of the case including Sony Music Group, Universal Music Group, EMI and Warner Music Group. A&M Records, Inc. was founded by Herb Alpert and Jerry Moss in 1962. It was an American record label owned by Universal Music Group where the record label refers to the brand or trademark associated with the marketing of music recordings and music videos.

1.3. Cause of the case

The reproduction and distribution of Napster system may probably be the cause of the case since it gave rise to the potential copyright violations. The Napster system constituted the peer-to-peer file sharing technology in 1999, users may load and store the audio MP3 files into their personal computer by connecting to the Napster system. By allowing the file transmission, users make works available in their own choosing location to retrieve music files upon requesting any other users. Napster system, however, did not act as a centralized database to provide users download requesting files or upload their music files. In contrast, the system conducted a utilization of the internet connecting the users throughout the world. The music files are just duplicated, stored and transferred in MP3 files by Napster system where the system connected the host and requesting computer to provide music file transmission. Although the system utilized the file transmission of internet, it generates the legal dilemma when the files are protected by copyright and the owner of the copyright has not given the permission for the circulation of the works. Many members of music industry claimed that the transmission of files on Napster would substitute potential marketing sales of disks and other media including those same works.

1.4. Defense of the case

Basing on the view of the Napster, Napster defence the accusation rely on the two major arguments which are “the exemptions under the section 1008 of the Audio Home Recording Act (AHRA)” and “Napster’s users have fair use exemption to direct infringement.”

Firstly, for the AHRA, section 1008 is used to prohibit the copyright infringement and one of the aims is the noncommercial use by the consumer of a device or medium for making digital musical recordings or analog musical recordings. The Napster’s users share the music in the medium with no compensation. Therefore, the Napster indicated that their users do not directly infringe because of the protection of the section 1008 of AHRA.

For the fair use exemption, the judgement of the fair use based on four factors under the Copyright Act: 1) the purpose of the use, 2) the nature of the copyrighted work, 3) the amount of the work used and 4) the effect on the market for the original work.

Napster insisted on the Napster's users share the files without any money transaction, so they are in non-commercial infringement. In addition, as the music recordings are creative in nature, this weighs against fair use. Also, more creative works receive larger protection than the fact-based works. Moreover, Napster indicated that space-shifting, home taping both are the example for the fair use. Both of them copy the entire copyrighted work are not count for the infringement. Thus, the Napster's user copy and share the entire music also should be categorized into fair use.

1.5. Impact of the case

The case of the Napster are raised the attention of the internet users and those Napster's user about the online music sharing. Moreover, the case of the Napster will have the critical effect to the future technologies development such as the Internet and the peer-to-peer architecture. Also, it may affect the implementation of the law about the copyright issues.

For the technology aspect, after the case of the Napster, more and more file sharing networks such as Grokster and KaZaA, are surfaced in the Internet. The most famous similar file sharing network must be the BitTorrent which are the technology that share the files via the peer-to-peer technology. BitTorrent is more widely used than the Napster as it share the files that are not only limit to the music, it also can share the movie files. Therefore, the concern of the copyright issue are also extend to the film industry.

Moreover, the case of the Napster also affect to the creation of new business model. The industry tend to adopt the new technology innovation such as the file sharing network, instead of prohibit the new technology via taking the legal action. For instance, Napster and BMG cooperated to develop a platform with the peer-to-peer network in 2000. The platform were using the “pay-for-play” service, the user can access the music files by paying the monthly fee for the platform.

Actually, the case of the Napster become the important point of the online sharing technology and it makes the sharing technology become universalize.

2. **Ethics or moral issues**

There was a great controversial problem in Napster's case that whether the service of Napster is a fair use, and the interest of the Napster users and the recording industry were mainly affected in this case. Napster provided the service that allowed the users to share and download the entire songs through internet. In the initial stage, most of the users from Napster were students and Napster claimed that the use of Napster was for educational purposes, but it was exploited by the public later. (*A&M Records, Inc. v. Napster, Inc*, 2001) Therefore, it arose a controversy in this case.

Although the service of Napster seems to be a kind of fair use due to its non-profit, educational purposes, the court found a commercial use in the “repeated and exploitative copying” of the works. The court inferred a great economic advantage to the users due to the copying is “repeated”, “exploitative” and “unauthorized”. The repeated copying allowed other users to save the expenditure of purchasing authorized copies in an unauthorized way, so the service of Napster can be viewed as a commercial purpose and obviously as a violation of copyright. (*A&M Records, Inc. v. Napster, Inc*, 2001)

Besides, the judgment of the case of Napster was also viewed from the utilitarian approach. The service provided by Napster could be possibly consider as song copying, this action resulted in affected the market for CD sales and it would possibly damage the recording industry's future in digital markets and result in a decline in the recording industry. Therefore, the service provided by Napster indirectly led to fewer products and benefits produced to the society and it could not consider as a fair use. (*A&M Records, Inc. v. Napster, Inc*, 2001)

On the other hand, there are also another controversial problem In Napster's case whether the service of Napster could damage the future development of music industry. The infringement of Napster are mainly focus on two aspects which are the harm to the sales of compact disks and the barrier to entry of the music industry. In Napster's court case, Napster provided its own study in order to show the sampling of music on Napster would lead to the increased sales of compact disks, but it was discounted by the court due to the objectiveness of the data. However, a musician who called Dj Xcalot, involved in Napster lawsuit, publicly defend Napster by indicating that Napster is a effective tools that help promotion of the musician's works. (*A&M Records, Inc. v. Napster, Inc*, 2001) In this case, it was questionable to draw conclusion that Napster could damage the future development of music industry without any positive impacts, It could possibly improve a singer reputation as a long-term benefit. Therefore, it rose a moral issue between the harm and benefit with the use of Napster.

The case of Napster contributed a great subsequent influence on the use of the peer-to-peer service such as BitTorrent that arose further moral issues between benefits and harm to the society. In this case, both music industry and Napster tried to minimize the occurrence of the moral issues by using computer encryption technology. The music industry tried to strengthen the protection and encryption of those digital products such as the creation of Apple's FairPlay, so that the industry could prevent the further moral issues about digital product. Besides, Napster also wanted to incorporate with digital-rights management, the MP3 files were encrypted when uploaded to the server, and those persons who got the 'key' could decrypt the files and play them. (Burkart & McCourt, 2006,P.60) From this situation, the computer technology play a critical role to minimize or deal with moral issues.

3. Copyright of music

Napster provided a platform for the users to search and download the music file through the Internet, and this may threat the copyright protection due to the services and business strategies. In the following sections, we will base on the copyright act and law to discover Napster file share and download service.

The safe harbor provision of the Digital Millennium Copyright Act (DMCA) was passed in 1998, it addresses the liability of online service and Internet access providers for copyright issue occurring online. According to the subsection 512(a) of DMCA, Napster had argued that the service they provided should be emitted from the copyright legality, and the users of their services are mainly non-commercial use without involving monetary trading. (Green, M, 2002) However, subsection 512(a) of DCMA limits the service provider to emit the copyright liable only involve transmitting, routing or providing connection services through a system or networking control processes. (Green, M, 2002) Although Napster provided a service involve routing and connection, but the core use was a file-gathering system, and the function is mainly for searching and indexing. For more details, file-gathering services provide a search function of MP3 music file with P2P download host access to the users, and it provide a link between the hosts and the requesters. It is true that Napster serve the connection between users, but the connection service is through the Internet instead of itself, and this cannot be identify as providing connecting service.

From the above discussion, Napster tried to evade the copyright legality by fulfilling the subsection of 512(a), but Napster was failed due to the type of services provided is not included in the DMCA safe harbor.

On the other hand, the subsection of 512(i) requires additional copyright compliance for the safe harbor of DCMA, and the service provider should provide a termination in appropriate circumstances of subscriber. (Green, M, 2002) In this case, Napster did not collect any personal information and allowed the users to re-sign or re-subscribe. Napster lost its responsibilities to manage the users of its services, as Napster ignored to block the IP addresses for those users who already kicked off the service. Napster had failed to fulfill the subsection 512(i) of DMCA, and this was another reason for Napster of getting out the safe harbor of DCMA.

Looking back to the service of Napster, they have repeatedly to state that they did not copy files or provided any technology for copying files, and they even did not involve any creation or transfer the copyright music file. According to Hank Barry, who was the interim Chief Executive Officer of Napster, he stated that "Napster simply facilitates communication among people interested in music." and the users are legally to copy their file as a backup and share the file to others with noncommercial use. (S. Greene, 2001) Thus, Napster had asserted section 1008 of the Audio Home Recording Act (AHRA) to prove the users have the immunity from liability for the copyright infringement, and then evaded the liability of Napster itself for the corporate infringement.(J. Langenderfer, 2001) And the detail statement of the section 1008 of the ARHA is state as following:

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, ... or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog recordings. (17 U.S.C. §1008)

Napster was failed to fulfill the section 1008 of the ARHA with three reasons. (1)Section 1008 only allows the user to copy the file for backup, but not distributing files to others. (2)The users are not using any of the “media” covered with section 1008 of AHRA. (3)The users are not using Napster for making “digital music recording” or “analog music recording”. Thus, Napster unable to have the immunity for the copyright infringement with AHRA.

From the above sections, we have go through lots of copyright laws with the case of Napster, and it shows the limitation of copyright law, as copyright law only aims at the music author and control the user behavior. Furthermore, contract law and legal provisions should also be considered as a solution of addressing the copyright issue, as the contract law and legal provision are both focus on the back-up technological protection. (U. Gasser, 2005) Contract law in forms of “term of service” or consider as “license agreement”, and it prohibits users from reselling, lending or transferring songs.(U. Gasser, 2005) In these few years, the number of digital content providers have sharply increase to add the “technological protection measures” into their business strategies to constrain the usage of e-content. For instance, iTune Music Store limited the number of burnt music and restrict on the music transform via FairPlay Digital Right Management technology. The increasing of limitations on the user access and the use of digital content are troublesome from a policy perspective, since it is difficult to have the balance of interest between holders and the public.

4. Fair Use

4.1. Fair use problem in the case

US court had defined 4 factors for analysis fair use, which are purpose of the use, nature of the copied work, amount of copied work and effects of work's value.

1. Purpose of the use

From Napster's point of view, they did not charge for the materials online and did not recommend users to use it as commercial tools, basically, it was operating as nonprofit platform for sharing music and videos. Based on the current law in US, due to Napster is not a digital audio recording device, a digital audio recording medium, an analog recording device, and an analog recording medium. Hence, Napster did not involve into any copyright issue in Section 1008 of US law as users exchange files by using personal computers to locate and transfer files from one to other. However, a particular point from “purpose of the use” section is the material cannot be used for public distribution, which mean is it cannot be displayed in public place, Napster's users are only using the shared material in a private space, but the action of sharing is involving public distribution.

2. **The Nature of the Work Being Used**

This factor focuses on the work itself rather than users or creators. It measures the level of reproducing the product(s), in this case, it is music. Moreover, if the product has a nature that they are meant of be consumed such as workbooks, this product will never be counted into fair use. Hence, exchanging music is debatable because of the nature that not each piece of music is made for money. In this case, Napster is used as a mean to share materials that are not meant to be consumed due to the purpose of making music.

3. **Amount of the Work Being Used**

The less you take, the more likely that you are copying will be excused as a fair use (Stanford University, 2013.). This factor considers how much of the copyrighted work was used in comparison to the original work, which mean is the more you copy, the higher chance that this will not be a fair use. In this case, Napster as a platform, it allows users to share full length of music instead of short version. However, from the court case Sony Corporation of America v. Universal City Studios, copying entire television programs for private viewing was upheld as fair use as it was treated as space shifting, which means is the copyrighted material stored on one device to be accessed from another place through another device, hence, that case was announced as fair use. In this case, although all the users exchange full length version of music, but it can be treated as space shifting rather than violating the principle of fair use.

4. **The effect of the use on the market for or value of the original work**

According to the law case, the court agreed that the use of the Napster results in at least two forms of harm to the music industry. The market harm could not only damaged the present market, but also to the future of the market. Although Napster has a research on that the sampling of music on Napster actually leads to increase sales of CDs. However, the study is lack of objective data and the music in Napster is not all are only the sampling of the music. The customer download the MP3 files from Napster won't buy the CD. As it is free to download, music industry won't get any money from the customer, this harm the profit of copyright owner and it is not in a fair use.

As Napster cannot pass to these factors so that their service is not fair use to the music industry. Fair Use has been influenced to many countries to protect the creator and the public to use the copyrighted work, for example, Israel, Poland, South Korea and China. According Goldman (2009), there is a case from Israel that the judge use these 4 factors analysis to rule that streaming of live soccer games on the Internet is fair use.

4.1. The role of computer professionals in fair use

As it is important that we should protect the creator to earn benefit from their work in a period as it would be encourage for them to work on the innovation of work. When we use the work that it is not for us, we should get the permission from the creator. However, we sometimes need to use the work but they have the copyright. Fair Use is the way that we can get the use of the work. It can grant a limited permission for the user to use the copyrighted work and have a balance between public and creator. When we search in the Internet, it is very easily to find many resources, such as music, video, or some coding. We should be careful on the copyright to the resources. For example, we can watch a video on a video sharing websites but if we want to download it and for other use, we should ask the creator to agree.

Also, we should not use fair use as an excuse on using the copyrighted work. According to a research from Computer & Communication Industry Association, there are 4.5 trillion in the annual revenue in USA for fair use. Many people use the work from other and it hurts the benefits from the creators. It is a new situation for us that the Internet helps on the people who use other copyrighted work with fair use. We should aware on the issues and it is serious that if the creator cannot get benefits, therefore, no one would want to work on the innovation anymore.

5. Conclusion

Napster has failed in the court case. Although Napster provided a great platform for all of us to share music file, their service is not ethical. Innovation is a big step of the society progress. Creator of an artwork has the right to use their work to earn benefit in a period, so that they have motivation to make another artwork to the world. If we like Napster in the case, we share the copyrighted work to another. As it is free, no one would pay. Creator may lose the benefit from the work. Therefore, there is less income to the creator and the creator may not want to work on the innovation. The society may stop developing here. This is the question we want to ask here.

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