



WHAT REALLY HAPPENED

1ST 297
[Barcode]

The recording industry profited immensely from the CD. But instead of sharing the riches with artists, it built a fortress in Washington D.C., from which it works for laws that benefit itself, literally at the expense of customers—and artists.

THE PERFECT

SITORM



TO THE RECORDING INDUSTRY

by Richard B. Simon

Metallica got a bad rap.

As the Digital Copyright Wars raged in the spring of 2000, the thrash metal champs quickly became better known as the creeps who wanted to take your Napster away. But Metallica never set out to shut down the popular peer-to-peer file-sharing service. The band, which—like the Grateful Dead—had always encouraged fans to tape and share its live shows, merely wanted it to be their choice whether or not to make their studio recordings available for free to Napster's millions of users. When they heard that some software company was making money off their music, Metallica went to war.

The problem was that they went to war against an immensely popular file-sharing system, and, in doing so, allied themselves with the Recording Industry Association of America—the lobbying arm of what were then “The Big Five” record companies—Warner, Universal Music Group, Sony, Bertelsmann Music Group (BMG) and EMI.

Record companies have taken advantage of musicians since recordings were made on wax cylinders, so when asked to choose sides between artists and record companies, music fans typically side with artists. In a choice between artists and a software company, fans probably should have leaned toward the artists.

But asked to choose between Napster and the record companies, a great many wired music fans sided—instinctively—with Napster.

But why?

ROUGH SEAS FOR THE RECORD TRADE

There have long been three entities in the music business: artists, fans and the distribution system that delivers the artists' music to the fans. The recording industry has been the reigning distribution system since the early twentieth century, when it displaced the previous system—sheet music publishers. Before the printing press, music was distributed by bards who traveled from town to town singing the latest numbers, and learning new ones to share with the other towns on the circuit.

The recording industry's model is a tripartite music-industrial complex: The record companies make recordings of musicians performing songs, radio stations promote the recordings by playing the songs, and retail stores sell the recordings to fans who like the songs they hear on the radio.

But during the economic boom of the 1990s, two powerful forces exerted pressure on the existing distribution model.

First, the 1996 Telecommunications Act led to an unprecedented consolidation of radio stations under fewer owners. Clear Channel quickly gobbled up 1,200 stations and programmed them by formula, so the “classic rock that rocks” station played the same mix of Led Zeppelin, Black Sabbath and Journey, whether in Dallas, San Francisco or Fargo, North Dakota. As playlists were increasingly fine-tuned to target specific audiences, the pipeline that the recording industry used to turn customers on to its products became dangerously narrow.

The other problem was in retail, where huge discount chains like Best Buy and Wal-Mart started selling CDs. Because they bought in tremendous bulk, they could sell for cheap—driving average CD prices down from \$15 to \$10. As Wal-Mart became the country's largest music retailer—often selling CDs at a loss to attract shoppers—the big profit margins the recording industry had enjoyed since the introduction of the CD began to shrink.

The record companies did not sit idly by.

On August 8, 2000, 28 states sued the Big Five record labels and major music retailers for bilking consumers in an illegal price-fixing scheme, charging that—in response to the retail chains' devaluing of CDs—the labels, retailers and distributors had conspired to set prices across the distribution chain. From 1995 to 2000, consumers “paid higher prices for CDs than they would have absent the illegal agreements.”

While prices rose, CD burners became common, and fans awakened to just how easy and cheap CDs were to produce. Because of the Internet, music fans were becoming better-informed consumers. Not only did they know what was out there, they knew what was not out there. And the amount of music being made was growing exponentially. According to NAMM (National Association of Music Merchants), sales of music-making software had more than doubled between 1993 and mid-1999. Guitar sales had grown by 50%.

So, as radio consolidation was squeezing off the variety of music reaching customers over the airwaves, the recording industry was using illegal schemes to keep its customers paying high CD prices. New music was mushrooming, but it wasn't making it through the system—and consumers knew it. For the music-industrial complex, it was the perfect storm. That's just when Napster appeared.

THE NAPSTER WARS

Napster launched in July, 1999, as a network that allowed users to peer into each other's hard drives to find music stored as MP3 files. Ravenous music fans flocked to the service. The recording industry sued in December, arguing that the labels could not be expected to compete with their own product as provided by Napster for free.

Napster claimed that it was not providing the copyrighted material that its users were sharing—it was merely providing a service, through which users could share music files or recipes for chocolate chip cookies. The judge disagreed. Napster then argued that file sharing was protected as a “fair use.” Under the Copyright Act's home-taping exception, some infringements are okay—like making a copy of an album to listen to in the car. But that was before digital recording perfected copying, and before the Internet allowed fans to make simultaneous copies for a million best friends who could burn their own CDs.

The big issue was how existing copyright law would apply to the new technologies. By the spring of 2000, the lines had been drawn between the recording industry and the still-booming technology industry. And many in the technology industry believed that the Recording Industry Association of America was at war not against piracy, but against new technologies that were poised to challenge the industry's preeminence. They saw Napster as the answer to consolidated radio—but while

new methods of distributing music online were emerging almost daily from San Francisco's Multimedia Gulch, the recording industry was channeling its efforts into hiring lawyers.

“People should realize that file sharing is a new exposure, a new radio,” Public Enemy rapper Chuck D. said in June, 2000. “What it'll do is end up exposing more music to a bigger audience base than ever before. You attack it, you're gonna get your ass whooped. You go with the flow, you're gonna figure out how much it helps. They need people that understand the inflexibilities within the record companies and they don't have that. They have people that remain rigid, thinking that attack attack attack will get them what they want.”

Attack is what the RIAA did. And every time Napster took a legal hit—like when an injunction threatened to shut the service down in July, 2000—the number of users soared, into the millions. It was the beginning of a giant game of whack-a-mole. Once the RIAA squashed Napster, decentralized peer-to-peer networks like Gnutella and FreeNet sprung up to take its place.

Perhaps sensing music fans' growing distaste for it, the RIAA argued that it was working to protect artists' rights—but that argument rang awfully hollow. Just the previous year, the RIAA had convinced Congress to amend the Copyright Act to allow labels to treat musicians as employees. Now, rather than reverting to artists after 35 years, copyrights would stay with the record companies. “Work for Hire” passed just in time for the labels to retain control of recordings made in 1965 and later—everything recorded after The Beatles had claimed the world for rock and roll. The entire reign of the album.

In May, 2000, as the Napster controversy raged in courtrooms, RIAA chief Hilary Rosen defended the Work for Hire amendment before Congress. It seemed the height of hypocrisy—at the same time Rosen was claiming to protect artists' copyrights against Napster, she was fighting in Congress to keep those very same copyrights for the record labels.

Eventually, the labels must have decided that Napster was a worse threat than allowing 35-year-old copyrights to revert to artists; in August, the RIAA and the Artists' Coalition announced that they had jointly asked Congress to rescind the Work for Hire amendment.

By March, 2001, Napster had been effectively shut down.

THE NEW RELIGION?

Since 1999, the RIAA has argued that file sharing is theft. As evidence, it points to sales figures, which peak in 1999 and 2000—during the Napster period—then drop 33% by 2002. It's exactly when the U.S. economy goes into recession, but the RIAA maintains that file sharing and CD burning are the primary causes of the drop.

Studies support both sides. The most recent, published in April by two academic economists, found that file sharing's effect on CD sales is “indistinguishable from zero.”

The University of North Carolina's Koleman Strumpf and Harvard's Felix Oberholzer looked at two million downloads over a four-month period on KaZaA, a decentralized peer-to-peer network that appeared in the post-Napster vacuum. Even as KaZaA picked up a million new users, Strumpf says, CD sales were unaffected.

THE FALL OF THE MUSIC-INDUSTRIAL COMPLEX

John Perry Barlow has a theory as to why that might be so: “The simplistic argument that downloading is theft and is bad for business is more religious than based on sound figures.” In other words, it’s based on faith, not fact.

A co-founder of the Electronic Frontier Foundation, which works to promote freedom of ideas in cyberspace, Barlow also has a stake in copyright; as guitarist Bob Weir’s songwriting partner, he wrote the lyrics to such Grateful Dead classics as “The Music Never Stopped” and “Estimated Prophet.” The Dead essentially invented file sharing when they let Deadheads record their live shows for free distribution. And Barlow makes money every time the Dead release those same shows on CD.

“Everybody says ‘Well, that’s just the Grateful Dead,’ but everybody who’s tried this has found that it works—including, ironically, Metallica,” Barlow says. “If you do the figures right, you can figure out that Napster was helping out the music industry. There was a corresponding jump in CD sales during the rise of Napster. ...[I]t’s hardly conclusive that this is economically bad for anybody that makes music—or even the people who systematically rip off people who make music and sell it in plastic packages.”

But despite the effects of Wal-Mart and Clear Channel, despite the aftermath of price-fixing, despite artists’ furor over Work for Hire, despite the rising popularity of DVDs and video games, despite speculation that by the late ‘90s, older music lovers finished re-buying all their favorite old albums on CD, despite carefully conducted studies by top economists, and despite the entire U.S. economy having hit the skids at exactly the same time, the RIAA maintains that file sharing and CD burning caused the decline in CD sales after 2000.

They believe it so much that they are pushing bills through Congress that would criminalize sharing over 2,500 pieces of content, or any content that has not yet been widely released, making digital copyright enforcement the responsibility of the Justice Department.

Without legislation, warns Utah Senator and Judiciary Committee Chairman Orrin Hatch, “unscrupulous corporations could distribute to children and students a ‘piracy machine’ designed to tempt them to engage in copyright piracy or pornography distribution... Later, large user-bases and the threat of more piracy would become levers to force American artists to enter licensing agreements in which they pay the architects of piracy to distribute and protect their works on the Internet.”

Aside from its ham-fisted attempt to link file sharing with children and pornography, Hatch’s statement does reflect some Internet music companies’ strategies during the tech boom. But it also sounds like the RIAA is bending the facts to convince Congress to permanently enshrine its special status as the primary music distribution system—and to use taxpayer dollars to enforce that status.

The industry is certainly within its rights to work to guarantee that the copyrights it controls are protected from runaway piracy. Even at the height of Napster-mania, it seemed that a healthy legal push-and-pull between the old and the new would lead to a vital new order. But when entrenched interests become so powerful that their influence prevents the emergence of new ways of doing society’s business, society suffers. And RIAA members control 90% of recorded music.

The old distribution system is broken. MP3, Napster and KaZaA may have helped, but the RIAA does the truth a disservice when it ignores the overwhelming evidence that many factors—its own illegal activities included—contributed to the decline of CD sales after 2000.

David Sutphen, the RIAA’s top liaison to the federal government, seems to understand this.

“There’s no question that a lot of difficult things have happened over the course of the last five years that have given consumers particular perspective,” he says. “But... it’s not just the record labels who have a role in everything that’s happened and everything that needs to happen for the music industry to grow and completely transition into a new world.”

The truth is that the old music-industrial complex was failing to do its job, which is to deliver music from artists to fans. It’s not just the recording industry’s fault—the labels were squeezed by seismic changes within its traditional partner industries, radio and retail. But they responded by jacking CD prices, further alienating already dissatisfied consumers who knew that more (and better) music was being made than delivered. When Napster hit, rather than listening to its customers and joining the revolution, the RIAA went to war against every online music provider that had not first gotten its blessing. After it eliminated the centralized systems, the RIAA was faced with KaZaA—which is decentralized, and incorporated, unreachably, on a Pacific island. Now the industry is suing music fans, and telling Congress that an insidious music and pornography piracy conspiracy is using music fans as “human shields”—just as it seeks to punish file sharers with prison terms.

I’ve been talking to my students about file sharing. They like that it gives them music that they would otherwise never be able to access—or afford. They sample. They buy CDs specifically to support artists they like—but they don’t want to pay \$18 for a CD that has only one good song, especially when the smallest share goes to the artist. Apparently taking their cue from the recording industry itself, they believe musicians should make their money from touring—not from CD sales.

The recording industry profited immensely from the CD. But instead of sharing the riches with artists, it built a fortress in Washington D.C., from which it works for laws that benefit itself, literally at the expense of customers—and artists.

What file-sharing has done, then, is to replace a broken supply-side distribution model, where the people who were supplying the music control the floodgates, with a demand-based model, where the fans control the floodgates. That’s exactly what music fans on the tech side of the Copyright Wars had envisioned. And when a new way to connect with musicians emerged, fans embraced it—because it gave them what they wanted.

That’s something the recording industry, as it fights to survive, still seems to be missing.

“You know what it gave consumers?” Sutphen insists. “It gave them the ability to get what they wanted for free.” ★

Contributing Editor Richard B. Simon teaches writing and critical thinking at Chabot College in Hayward, CA, and Dominican University of California, in San Rafael. He covered the Napster hearings for the now-defunct Sonicnet.com.