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Beyond Napster—The Future of the Digital Commons: Introduction

*Elizabeth Rindskopf Parker**

Recognizing the need to explore the relationship of law to emerging cyber technologies, University of the Pacific, McGeorge School of Law, hosted a symposium entitled *Beyond Napster: The Future of the Digital Commons* in February 2002. The articles which result from this symposium begin an exciting McGeorge dialogue with bench, bar, and academia on the evolving relationship of law to technology in the information age.

“Cyberlaw”—the body of evolving law of the Internet—is a subject in its infancy. Yet, lawyers in both national and international circles are now beginning to address the problems raised when traditional legal concepts are applied to the novel facts created by Internet technologies. Legal principles must be adapted to govern a full range of personal, commercial, and political relationships affected by the Internet. When complete, this legal framework will provide the confidence needed for individuals and organizations to make maximum use of Internet technologies in commercial, private, and governmental activities. The increasing importance of Internet technologies to all aspects of modern life makes this work particularly important; the speed with which these technologies are developing makes this task of creating an effective legal framework equally urgent.

Of course, in many respects, the effort to forge a body of national and international cyberlaw, of which these essays are an important part, is the traditional work of lawyers: identifying and understanding relevant facts and applying traditional legal principles. Yet, the power of Internet technologies, whether for creating new business models or in changing the ways in which the individual citizens of all nations relate and communicate across time and space, makes this effort unusually challenging—as well as important.

The current set of essays extend from analysis of technology-driven business models to discussions of traditional legal issues applied in an Internet setting. A brief review of them shows that cyberlaw will touch—and sometimes challenge fundamentally—every traditional sphere of legal principles. Clearly, there is much work to here for bench, bar, and academia.

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In this first colloquium on Law and Technology, McGeorge School of Law welcomes the opportunity to contribute to this vital new area of legal scholarship. The five essays which follow explore a number of current problems in the application of law to the Internet and offer thoughts on several current dilemmas which Internet technologies create for traditional legal principles.

Grace Bergen begins the collection with a discussion of the varying perspectives on the challenging facts underlying the recent *Napster* decision. Ms. Bergen concludes that Napster “has forever changed the landscape” and goes on to comment that the application of “outdated” legal principles to modern technology has created unpredictable results. Still, she argues that legislation may be the solution that major music industry players advance to re-balance the rights of publishers and creators. Continuing this conversation, Scott Hervey carefully examines current business models in the recording industry, an essential first step to understanding the impact of Napster and its P2P communication capability.

Next, Matthew G. Jacobs and Michael S. Mireles discuss the changing relationship of antitrust principles to the intellectual property protection established in the United States Constitution. Their analysis of the changing balances between antitrust and IP protections make a persuasive case for the view that this balance may have shifted too dramatically in favor of the inventor.

Scott Pink continues the symposium with an exploration of the Internet business model conceived to support “e-books.” He concludes that the economy of scale advantage of e-books, with their ability to market directly to individual consumers, has yet to be realized. When that happens, he notes the legal dilemma that will confront both publishers and authors who seek to allocate electronic rights to works originally licensed and marketed before the advent of the Internet. Observing that ownership of digital rights has been strengthened in recent years through efforts of the World Intellectual Property Organization and related treaties, Pink raises important questions on issues that go to the balance of rights between authors and publishers in a digital world.

Finally, Professor Jed Scully concludes the symposium, arguing that in light of the *Napster* decision, enforcing the copyright protections of the recording industry against a new person-to-person (“P2P”) technology, is destined for failure. Like the Genie of old, the enabling Napster technology, allowing direct recording of music, is “out of the box” and unlikely to be eliminated as an alternate means of enjoying music.

We at McGeorge School of Law recognize that exploring the dimensions of cyberlaw will be a continuing challenge for the legal community as new applications for cutting edge Internet technologies emerge. The current economic downturn in technology activities is but a momentary pause in this process. The potential of the Internet and its associated technologies will continue to grow, as will the need for lawyers to explore and master the cyberlaw frontier. We look forward to future opportunities to continue this conversation with bench, bar, and academia as our contribution to a national discussion, and we celebrate the excellent beginning that the essays included here represent.