

NAPSTER THROUGH THE SCOPE OF PROPERTY AND PERSONHOOD: LEAVING ARTISTS INCOMPLETE PEOPLE

INTRODUCTION

Less than a year removed from his high school graduation, eighteen-year-old Shawn Fanning "wrote the code that changed the world," the source code for Napster.¹ The concept behind Napster struck Fanning while he was relaxing in his Northeastern University dorm room in Boston, "hanging out with his bros, drinking a brew, and listening to his roommate whine about dead MP3 links."² Essentially, MP3s are digital quality sound files compressed into a smaller format.³ In Napster, Fanning developed a program that allowed "computer users to swap music files with one another directly, without going through a centralized fileserver or middleman."⁴ "He'd heard . . . how so many of the pointers on websites offering current (which is to say copyrighted) music seem to lead only to dead ends."⁵ Napster allows users to exchange music files while bypassing "the rats' nest of legal and technical problems that kept great music from busting out all over the World Wide Web."⁶

Due in large part to litigation initiated by members of the Recording Industry Association of America ("RIAA") against Napster for contributory copyright infringement, Napster's increasingly high-profile status has led to a significant amount of debate over the legality and morality of the widely popular system.⁷ Since its inception, Napster has incited mixed and often emotional responses, most notably from the musicians whose music is shared via the system. Recording artists such as Limp Bizkit⁸ and Chuck D of the rap group Public Enemy⁹ have been vocal in their support of Napster. Conversely, the band Metallica has arguably been the

¹ Karl Taro Greenfeld, *Meet the Napster*, TIME, Oct. 2, 2000, at 61.

² *Id.* at 63.

³ *See id.*

⁴ *Id.* at 62. *See also* A & M Records v. Napster Inc., 114 F. Supp.2d 896, 902-03 (N.D. Cal. 2000) (granting a preliminary injunction against the operation of Napster).

⁵ *See* Greenfeld, *supra* note 1, at 62.

⁶ *Id.*

⁷ *See* A & M Records, 114 F. Supp. 2d at 903.

⁸ *See* Jon Zahlway, *Limp Bizkit Heads Free Napster Tour*, LIVE DAILY, at <http://www.live.com/news/1347.html> (June 21, 2000) (discussing Limp Bizkit's support for Napster) (on file with author); *see also* Dwight Silverman, *Napster Creating Lot of Legal Noise*, HOUS. CHRON., Apr. 28, 2000, at Tech. 1 (describing artist backlash against Napster).

⁹ David Ferris, *Interview with Chuck D*, MACWORLD MAGAZINE, at <http://macworld.zdnet.com/2000/05/12/chuckd.html> (May 12, 2000) (detailing Rapper/Producer Chuck D's strong support of Napster) (on file with author); *see also* Silverman, *supra* note 8.

largest opponent of Napster among the musicians whose work is "shared" by Napster users.¹⁰ In fact, Lars Ulrich, Metallica's drummer, spoke out against Napster before the United States Senate Committee on the Judiciary.¹¹ Ulrich succinctly stated his case against Napster to the Committee by testifying, "Napster hijacked our music without asking."¹²

The strong reaction to Napster naturally leads to the question of whether the copyright holders protesting the dissemination of works via the Napster system own those works in the first place. Individuals in support of Napster follow "the info-anarchists' rallying cry that 'information wants to be free.'"¹³ Conversely, those against the free transmission of MP3s adhere to the contrary position: "[I]nformation doesn't want to be free; only the transmission of information wants to be free. Information, like culture, is the result of labor and devotion, investment and risk; it has a value."¹⁴ Whether or not Napster is "wrong" can be determined by deciding which philosophy should be followed.

This paper discusses the theory of property and personhood,¹⁵ and addresses its applicability to the Napster controversy.

I. PROPERTY AND PERSONHOOD

A. Background: Property and Personhood

"The premise underlying the personhood perspective is that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights."¹⁶ In her seminal paper outlining the property as personhood theory, Professor Margaret Radin offers the premise that, in order to reach the required state of liberty to be considered a person, individuals must practice self-identification through property ownership.¹⁷

People possess "certain objects they feel are almost part of

¹⁰ See *Copyright Issues and Digital Music on the Internet: Testimony Before the Senate Committee on the Judiciary*, 106th Cong. (2000) (statement of Lars Ulrich, Musician, Metallica, available at 2000 WL 964353 (F.D.C.H.)) (on file with author) [hereinafter Ulrich Statement].

¹¹ See *id.* (detailing Metallica's position that Napster, in effect, usurps the rock band's ability to control the distribution of their music).

¹² *Id.*

¹³ Adam Cohen, *A Crisis of Content*, TIME, Oct. 2, 2000, at 69.

¹⁴ Edward Rothstein, *Swashbuckling Anarchists Try to Take the © Out of Cyberspace*, N.Y. TIMES, June 10, 2000, at B11 (discussing theories by advocates of free information on the Internet, and their relation to Napster).

¹⁵ See Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

¹⁶ *Id.*

¹⁷ See *id.*

2001] themselves."¹⁸ "These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."¹⁹ It follows that objects such as wedding rings, portraits, heirlooms, and houses are closely tied with one's existence as a person, evidenced by the significant pain that would accompany the loss of such property. These objects give rise to a stronger moral claim than others do.

The level of importance that a piece of property has in establishing a sense of personhood, however, depends on who owns the property. "For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so."²⁰

This leads to the division of property into two categories: personal and fungible.²¹ Depending on who owns the property, fungible property can become personal, and personal property can become fungible, or commodified.

The same claim can change from fungible to personal depending on who holds it. The wedding ring is fungible to the artisan who made it and now holds it for exchange even though it is property resting on the artisan's own labor. Conversely, the same item can change from fungible to personal over time without changing hands.²²

While there is no bright-line test for establishing to which category a piece of property belongs, the perspective of the property holder is the crucial factor in making this determination.²³ From the property holder's perspective, the more personal a piece of property, the more that property becomes "intertwined" with that person.²⁴ Personhood attained through property rights results in personal liberty by affording one the ability to be a "person."²⁵ It follows that the more a piece of property creates a sense of personal existence, *i.e.*, the more personal a piece of property, the broader the control an individual should be afforded with respect

¹⁸ *Id.* at 959; see also *id.* at 978 (briefly stating Hegel's notion that "certain kinds of property relationships can be presumed to bear close bonds to personhood.").

¹⁹ *Id.* at 959.

²⁰ *Id.*

²¹ See Radin, *supra* note 15, at 987.

²² *Id.* at 987-88.

²³ See *id.* at 987.

²⁴ See *id.* at 988.

²⁵ See *id.* at 960.

to that piece of property.²⁶ "Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement"²⁷ to control that property.

Ultimately, allowing a heightened level of protection for increasingly personal property affords an individual control of herself, as it is control over this type of property that provides personal liberty. "This case is strongest where without the claimed protection of property as personal, the claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened."²⁸

Necessary protection is lost when the owner of personal property loses control over it and the property becomes commodified. Commodification, then, represents the destruction of an individual's existence as a person, or the force that prohibits her from achieving personhood.

B. *Application of the Property as Personhood Theory to Copyright*

1. Copyrighted Works as Personal Property

"[W]e do not have a good grip on what constitutes the 'personality' or 'personhood' interests that may be present in a particular piece of intellectual property."²⁹ While it is apparent that Professor Radin's theory of property and personhood is applicable to tangible property, the theory must be expounded upon in the intellectual property and, more specifically, the copyright contexts. Perhaps the greatest differences between tangible property and copyrighted works are the role the owner has in the creation of each, and the excludability of tangible property as compared to intellectual property.

The difference between tangible and intangible property is strikingly apparent in examining the role the property "owner" has in the creation of a piece of property.³⁰ With respect to tangible property, the property owner "probably had no role in the material object's design or creation; most of us neither designed nor constructed the houses, furniture, and clothes we live with. Nonetheless, we come to identify with these objects and they come to be

²⁶ See *id.*

²⁷ Radin, *supra* note 15, at 986.

²⁸ *Id.* at 1015.

²⁹ Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 82 (1998) (describing personhood interests in intellectual property).

³⁰ See *id.* at 86.

2001] imbued with our 'personhood.'³¹

Conversely, the copyright holder has often had a direct hand in creating intellectual property. Development of a valid copyright requires originality.³² This "originality" is the judicial equivalent of creativity. "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."³³ Thus, the standard for copyright-ability requires some modicum of creativity.³⁴ Creativity is the predecessor, and in many ways the equivalent, of individuality. "We cultivate [creativity] in our children, linking it intimately with their development as autonomous individuals."³⁵

In developing copyrightable material, artists draw from personal experiences.³⁶ From painters, to writers, to singers, artists "have no choice but to describe where they live."³⁷ The artist, who creates forms, is distinguished from the artisan, who copies forms.³⁸ Copying of forms involves no originality and, hence, neither creativity nor individuality.

Therefore, it follows that in order to hold a valid copyright, the artist, as distinguished from the artisan, must establish herself as a person. This is accomplished in several steps: (1) the artist has personal experiences; (2) she bases her work on these experiences and ultimately creates new forms from them; (3) her work qualifies as creative (which is the functional equivalent of individuality); and (4) this creativity meets the requisite level of originality required to obtain a copyright. Thus, the artist realizes personhood through her development of individuality by creating a copyrighted work. "When we first encounter a res of intellectual property, instead of noting that an individual's personality has moved *into* an existing object, we may note that an individual's personality caused the object to come into existence."³⁹

With this framework in mind, applying property as personhood to copyrighted materials leads to a classification of virtually all copyrighted material as personal property.⁴⁰ If, in order to

³¹ *Id.*

³² "Copyright subsists. . . in original works of authorship. . ." 17 U.S.C. 102 (a) (2000).

³³ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (holding that telephone directory producer was not entitled to copyright on its white pages).

³⁴ See *id.*

³⁵ Hughes, *supra* note 29, at 88.

³⁶ See *id.* at 107.

³⁷ See *id.* (quoting musical group U2's lead singer, Bono).

³⁸ See *id.* at 126.

³⁹ *Id.* at 87.

⁴⁰ See Radin, *supra* note 15, at 986.

achieve the creativity required for a work to attain copyright status, one inevitably bases her work on personal experiences, then the intellectual property embodied in the copyrighted material is, by its very definition, personal. In turn, as personal (and non-fungible) property, copyright holders should be afforded the heightened level of control reserved for personal property.

Similar protection should be allotted to those who created copyrighted works as a part of a collaborative process. In fact, those working in collaborative efforts often realize a greater sense of individualism as a result of their efforts than do those working alone. "Scientists and engineers working in research teams have, as courts have noted, a tendency to remember their own work on the team in a magnified form."⁴¹ Thus, those collaborating on copyrighted works may achieve an even higher sense of personhood through their efforts. Therefore, the personal investment in the development of collaborative copyrighted works dictates that this intellectual property be classified as personal property.

In applying the property as personhood theory to copyrighted works, the second major difference between tangible and intangible property is the level to which each is excludable. This distinction can best be viewed by analyzing a critique of the commodification portion of Professor Radin's theory offered by Professor Stephen Schnably. "In Radin's conception, commodification utterly disempowers people; the only solution is for the state to counter commodification by imposing rules of market-inalienability."⁴² However, as Professor Schnably argues, "[a]ny measure that advances partial or complete decommodification will be vulnerable to the charge that it disrespects the very objects of its protection by prohibiting them from entering into a market transaction to which they would otherwise agree."⁴³ Therefore, the liberty offered by obtaining personhood through property is destroyed when individuals are stripped of control over their personal property.

Within the boundary of copyrighted materials, however, alienability is not an issue as the intangible nature of intellectual property does not lend itself to the same excludability as does tangible personal property. Intellectual property is,

"non-excludable" in that once one has had some access to the

⁴¹ Hughes, *supra* note 29, at 94.

⁴² Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 379 (1993).

⁴³ *Id.* at 380.

intellectual property *res*, one cannot be completely separated from it. If a person were deprived of all his music and books, he would have a great sense of personal loss, but yet would still know Satie's "Gymnopedies" by heart, would still remember much of Faulkner, and could still go to the library to read or listen to these favorites.⁴⁴

If one who has merely been exposed to copyrighted material "cannot be completely separated from it,"⁴⁵ then the same is true for the creator of intellectual property, only to an infinitely greater extent as she has lived the experiences on which her copyrighted work is based. Thus, this non-exclusivity dictates that, although copyrighted materials exhibit the personal property characteristics of alienable tangible property, copyrighted materials never need to be, nor can they practically be, subject to the rule of market-inalienability in order to preserve the intellectual property holder's personhood status generated by property ownership.

2. Inapplicability of Property and Personhood's Commodification to Copyrighted Works

A further discussion of commodification in the context of intellectual property is necessary to understand the significance of how personhood can be realized through development of, and control over, a copyrighted work. Criticism of the view of the home as personal property closely aligned with personhood exemplifies that, while this attack on Radin's theory may be applicable to tangible property, there is a meaningful difference between tangible and intangible property within the property and personhood context.

A critique of the role of the home points out that, while there are many legal doctrines that bolster the personhood interest in the home, "[t]he vast majority of lower-income people who live in apartments are not protected by anti-eviction and rent control laws."⁴⁶ This criticism is inapplicable to copyrighted works. While there may be differing statutes and ordinances pertaining to the home, once it is established that a valid copyright exists, copyright protection is the same for a wealthy home owner and a low-income apartment dweller. Equal protection for all copyrighted works evidences the sanctity of that intellectual property as an important tool through control of which people accomplish personhood.

⁴⁴ Hughes, *supra* note 29, at 86-87.

⁴⁵ *Id.*

⁴⁶ Schnably, *supra* note 42, at 380.

C. *Application of Property as Personhood to the Napster Controversy*

By providing the infrastructure through which copyrighted works are shared, Napster interferes with artists' ability to experience personhood. Each artist whose copyrighted work is available on the Napster system created the work based on personal experiences. Unlike a piece of tangible personal property that has been commodified (converted into fungible property), the impact that her work has on her personhood still exists even if millions of people have purchased her album.⁴⁷ The immoral aspect of Napster is that it strips the artist of control over her copyrighted work, her personal property.

In analyzing a work's impact on the artist's personhood, the fact that one or one billion people own a particular album is non-consequential. What is crucial is that the artist has the ability to control the dissemination of her work, or at least has the power to appoint one to do this for her. Lars Ulrich's statement to the Senate Judiciary Committee⁴⁸ illustrates the pain occasioned by this loss of control:

I don't have a problem with any artist voluntarily distributing his or her songs through any means the artist elects—at no cost to the consumer, if that's what the artist wants. But just like a carpenter who crafts a table gets to decide whether to keep it, sell it or give it away, shouldn't we have the same options?⁴⁹

The key to understanding the impact that Napster has on an artist's personhood is acknowledging that artist's copyrighted works are personal property. These works, therefore, are entitled to the same heightened level of protection as tangible personal property. The *ability* to produce an infinite number of those works will not lessen the impact on the artist's personhood. It is an issue of control, not of compensation.

Only a system that provides the artist with the heightened level of protection to which her personal property is entitled will suffice.

This view of personhood also gives us insight into why protecting people's "expectations" of continuing control over objects seems so important. If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the reali-

⁴⁷ See Hughes, *supra* note 29, at 87.

⁴⁸ See Radin, *supra* note 15, at 959.

⁴⁹ Ulrich Statement, *supra* note 10.

2001] zation of these expectations.⁵⁰

Artists who distribute copyrighted works based on their personal experiences make the decision to make their work accessible to the public. Nevertheless, depriving an artist of the ability to determine how her work is distributed denies her the necessary protection and control over her personal property required to experience personhood. Therefore, by stripping away this control, Napster denies the artist the right to be a person.

CONCLUSION

There is nothing inherently wrong with the Napster system. There is nothing immoral about sharing MP3 files. Nor is there anything improper about providing an infrastructure that allows for a quicker and easier mode of sharing information.

However, Napster's current operation is immoral as it deprives artists of the ability to fully and freely experience the personhood that each has rightly developed through creating copyrighted works. Personhood is attained when individuals exercise control over personal property, property that people feel is "almost a part of themselves."⁵¹ Since achieving a valid copyright requires creativity, and because all copyrighted works are based on personal experiences, it is inevitable that, in developing a copyrighted work, an artist creates personal property.⁵² Thus, artists are entitled to an increased level of control over their copyrighted works. Napster does the opposite: "Napster hijack[s] music without asking."⁵³

Since copyrighted works are personal property, individuals must be afforded an elevated level of control over those works. The alternative is embodied in Napster. Napster deprives an artist of control over the dissemination of her personal property, hindering the artist's ability to develop into a person.⁵⁴ Thus, by providing an infrastructure that encourages the unauthorized distribution of an artist's copyrighted works, her personal property, Napster deprives that individual of the ability to fully experience personhood.

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⁵⁰ Radin, *supra* note 15, at 968.

⁵¹ *Id.* at 1015.

⁵² See *supra* Part I, B.1.

⁵³ Ulrich Statement, *supra* note 10.

⁵⁴ See Radin, *supra* note 15, at 960.

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