

Transcript of Napster@20: Reflections on the Internet's Most Controversial Music File Sharing Service – November 18, 2019

I think our mics work. I think we're going to get started. There are some people still making their way in, grabbing lunch. Feel free to help yourself to food in the back. Thank you all so much for being here for this conversation about Napster at 20. And special thanks to the team at the Recording Artist Project and the Journal of Law and Technology, who joined us-- up with us at Berkman Klein to put this event together.

I'll just say two words on the genesis of this. We at the Cyberlaw Clinic here at HLS are celebrating our own 20th anniversary this year. The clinic was founded in '99, and I've been thinking about interesting events that relate to some of the tech law issues that have been on our docket for the last two decades. And it just so happens that 1999 was also the birth of Napster in Shawn Fanning's dorm room, just across the river here at Northeastern.

We thought it would be great to bring together some amazing experts, so we're going to have a conversation here for 40, 45 minutes. We're going to leave plenty of time for you all to ask lots of questions along the way. And we'll go from there.

We have a really interesting mix of people at the table today. I'll say really briefly some intros, then full intros are in the materials. And you can introduce yourselves as well to the extent you want to provide some context for your marks.

Dave Herlihy teaches at Northeastern, is a music lawyer and a musician as well, and a member of the band O Positive-- sort of at the right time frame here to talk about Napster--

Absolutely.

-- in your heyday. So we'll get through the mixed legal and creative perspective from Dave, great friend of ours, great friend of Berkman. He's done a lot of stuff with us over the years. Jennifer Jenkins here from Duke, who teaches music law, teaches trademark-related issues at Duke, co-wrote the coolest book. This book Theft!, a great graphic novel about the history of the music business, as well as a really terrific open IP casebook. If you're looking for a resource for an intellectual property course, it's fantastic, and it's available online, and you should check it out.

And then Nancy Baym from Microsoft Research, who, among many other things, has a really great book that came out last year called Playing To The Crowd that's about artist-fan engagement-- our token non-lawyer, I think. Is that right? Yes. So Nancy is going to give us her perspective as well.

And I thought I would ask each of you to just say a few words about-- either about Napster or about the wake of Napster over the last 20 years. And we can dig into some specific questions. Want to just come down the line? Dave--

[INTERPOSING VOICES]

Sure. so I teach at Northeastern. I've been teaching there for more than 20 years. I was actually teaching copyright before-- pre-Shawn Napster, and then post Shawn Fanning And so I remember some of my students were saying, Professor Herlihy, you got to come and see this thing. You've got to come and see this thing.

So I went to a dorm, and I saw the Napster app. And I said, oh, come on, not really. So I said, the Simpsons theme song. Go ahead, get me the Simpsons theme song. And like, 20 seconds later, [HUMMING SIMPSONS THEME].

I was like, oh my god. So it was the end of the music industry, also the end of copyright as a very well-established field. It became completely topsy-turvy after that.

And it upended the way that I teach copyright law, the way that I understand copyright law. And it makes it a very dynamic marketplace, and it creates all these policy questions. Like, why should copyright do? What kind of progress should it support, whether it's progress for the owners of copyright or for the public good? And how do you sort of balance these issues?

And so it's just been-- it's like that moment when The Wizard of Oz goes into color. And I look at my pre-Napster period as the black-and-white era, and then, all of a sudden, it just completely changed. And also, the effect it has had on business models and the music industry.

When I talk music industry back in the 20th century, it was pretty well established. And now, it's completely different, and there's so many different variables and dynamics and-- and values to be tried to be unearthed. And so it's completely changed the entire landscape, which I think is actually a positive thing, and I don't think anybody's business model deserves to be permanently enshrined just because. So I'm going to also leave it at that.

That's great. Jennifer?

I concur with that. So first, I'm going to turn on my mic.

Excellent.

Hey, everybody. Thanks for coming out. Thanks for putting this together, Chris. So I started out as a copyright lawyer in 1997, so shortly before the birth of Napster. And I've been doing music copyright, teaching music copyright for most of that time.

And I think we're at a real milestone now. I was reflecting over the past 20 years. So it used to be that when I asked my students, why are you in this IP class, and why are you in music copyright, almost all of them would say, well, my little brother was using this thing called Napster, and my roommate was using this thing called Napster, somebody was using something called Napster, and then it went away, and my free music went away. And I said, what's going on Mom? And Mom said, it's copyright law. And so I'm in your class because I want to know who shut down my Napster.

And that went on for a few years. And I've seen this seismic shift in the past few years. This is the first year in my copyright class that every single person is using Spotify, or a paid streaming service, and they're all paying for it. Everyone was file sharing, and then there was a period where people were experimenting with freemium and dealing with the ads, and now, my students, all around-- between the ages of 20 to 27 or so, they all find that the price discrimination works, and they're willing to fork out the \$4.99, or the family plan.

So streaming is here. The first-half results for 2019 show that streaming is now accounting for 80% of industry revenues. And so I think we're at a milestone, both looking back and thinking about what we can learn from the Napster experience, and everything that's happened since then, and lawsuits and that sort of thing. And also looking forward and trying to predict, imperfectly, how streaming is going to change the way music gets made.

Like, we always force everything into the first 30 seconds, so you can get paid for your stream. How's it going to change how people get paid? The pie is bigger, but some people are doing better than others in the streaming economy. And how is streaming going to affect-- and I think this might be your area of expertise-- how music gets discovered?

I used to listen to albums. I remember albums. I own all of these albums in many formats, so I have all those [? different ?] albums. But now, it's a playlist, and it works. If Spotify recommends something to you, you might get turned on to it.

So I think we're in an inflection point where we can learn from the past, and all the disruptions that happened in the wake of Napster to the music industry, and mistakes that were not made. And then we can also look towards the future and try to see, when the dust settles, what the music industry, the made-paid-discovery aspects are going to look like. So it's an exciting time.

We have the same experience. Jen and I have compared notes, so we both have taught a music copyright class for about the last 10 years. And my ice breaker question, first class, is always how did you get your music, or your content? And exactly the same experience-- it's morphed over time to now where it is, not just mostly on-demand streaming, not just mostly paid, but, basically, 100% Spotify paid.

Almost 100% Spotify.

Nancy?

Hi, everybody.

What are you doing here as non-lawyer, Nancy? Tell us about your amazing work.

I'm just trying to get the Harvard cred.

[LAUGHTER]

It's an influencer era. I need all the cred I can get. I come at this from communication studies. I study online practices, how people use communication technologies in everyday life. And for almost 30 years, I've been following online fan community and what happens when audiences get together and start chatting with each other.

So from my perspective, Napster is one moment in an extremely long history of relationships between people who make music and people who listen to music, and, indeed, of the idea that those are separate groups in the first place, and, therefore, ought to be subject to different rules around the economics of their engagement in those practices. So if I think about the Napster moment, I think about it as a moment where the internet had empowered audiences to organize at scales they had not, but they had always been organizing ever since they got torn asunder from the sort of, hey, we're going to a parade, and we're all going to make music together, into you better pay for this music or else you're a thief kind of language.

The internet let them get back together, but, also, let them really be super scaled, so they could organize into structures that persisted. They could share information at a scale they never had. They could scale-- share interpretations at a scale they never had.

They were forming personal relationships. They were building identities of experts in their own, so there were all kinds of ways in which the supremacy of gatekeepers was being-- I hate to use the word disrupted, but it was. It was being really challenged, that power dynamic between the people who control the means of production and its distribution, and the people who were meant to be consumers of it.

So while I agree that we're at an inflection moment, I always understood Napster as market failure. People, this is bullshit. We want to listen to music wherever, whenever. We don't care about territorial licensing. This is stupid, and it is stupid. It remains stupid.

And so Spotify and those things are a great solution to this problem. We've come up with solution. But I would at the same time say, we've in part come up with a solution by reaffirming that audiences are-- it's nice if they're communities of certain types, but their real role is as a customer. And they're-- belong in a capitalist logic, not a cultural logic.

That's great. I think that's the new tagline for my music and digital media classes. This is stupid. It remains stupid. I'm just going to put that in the catalog, which is great.

Great words. So we've talked about how massively disruptive this was at the time Napster comes on the scene in the late 90s. Dave, as you say, you can get instant access to virtually anything. Can you situate us a little bit and tell us what else was going on in terms of music distribution at the time, what the music industry looked like for artists and consumers?

And then legally, if we want to go-- we're here at a law school, so we're not going to go deep down the rabbit hole of secondary liability. Also, if we could talk a little bit more specifically about what legally was so interesting and complex about this service that, again, facilitated our sharing, the individual-- put the peers, put the two individuals together, and allowed them to share content. So can you give us a little sense of that?

Oh, sure. The thing that I was always struck by is you have what the marketplace does, and then the law responds to that. And lawyers and everybody reacts to what the technology allows. And the old business model was very-- it was a thing business. It was thingy.

I go to Harvard Square, I go to Newbury Comics, and I buy a thing. And I bring the thing home and huddle around the campfire, like I'm putting a log on the fire, right? And sitting there and playing music and being stuck in a place.

And I think that with the liberation of music from containers, and content from containers, it just opened people up to so many more possibilities. I can go where I want to go. I can share this in a way that I want to share. To me, it just seems like the music industry is-- at least, well, the recording industry was the last one to-- or maybe still the last one to really listen to what people want, and how do I do this?

People still love music. It's still this incredible thing that just-- I wear a Pink Floyd t-shirt more because I want to let you know what I'm about, then just the fact that I like how this shirt looks. It's like a deeply psychological realm, and I think it's going to continue to be that way. And I just think that the music industry was-- someone stole their cheese.

And so they were like looking, we always make money this way, and we want to keep making money this way. And they were able to make you buy a \$17 CD for the one recording you wanted, right? And so they bundled this thing, and it was-- and it was frustrating to people.

So all of a sudden, when you had Napster and file sharing-- you know what's the peak user base of Napster? Like 85 million or something like that. It's like, I talked to my students in-- at Northeastern. I say, whenever you see 85 million people doing something, don't take out your sledge hammer right away.

Like, try to figure out what are they doing? What's bringing them there? What's the value proposition? How can we fan the flames of what they are finding interesting?

And the music industry just couldn't wrap their heads around it. They responded in a classic, old-school, sword-and-shield IP approach. Those are mine. Stay away. I'm going to slash you down. It was not very open innovation.

A lot of the things the internet has taught us about generativity and the idea of the opening up to a larger community and just learning from that. They had a really well-defined business model that they couldn't get their heads around. And frankly, I don't know that they could have gotten your heads around it.

You and I had a conversation once about Carrie Sherman, who was then-- I think he was a lawyer for the RIAA. He was asked by Jon Zittrain, actually, at an event at Berkman put on several years ago, maybe 10 years ago. And he asked Carrie Sherman, if you could-- if you look back differently at a crystal ball or a time machine, you could go back to 2000, what would you do differently? And Carrie Sherman said, nothing. We needed to enforce our copyrights. And frankly, I don't know that they could have, in a way, responded any differently.

BMG tried, right? BMG tried to invest in Napster. And what did they get? They got sued by the other labels. It was, I think, a possible-- difficult for the labels to collaborate and say, OK, how can we get around this and do this?

The problem was, in the intervening 10, 12 years, people began to look at music as having no value. And so we, as an industry, have had a super hard time recovering from the fact that music wants to be free. It doesn't really want to be free. I want it to be free, but music doesn't want it to be free.

And so how do you find that-- how do you find that point? It's been a constant evolution of business models and analyzing the market and figuring out, how do we structure deals in a way that really allows us to capitalize on this? And instead of gnashing our teeth and looking backwards, rolling up our sleeves and looking forwards.

Jennifer, do you want to talk a little bit, maybe, about-- about that, and also, maybe, about the legal landscape at the time? How did Napster upend this world of contributory and vicarious secondary liability under copyright law?

So I guess I'm here to talk about the sledgehammer. His daily [INAUDIBLE] panel. I have been thinking about, like, if I was Carrie Sherman or I was Hilary Rosen, the people running it. If I was in one of the Universals, or if I was in one of those boardrooms, would I have done anything differently?

If, A, your business model is going really well-- and it was going really well. CDs-- for one song, you had to buy a CD, and they controlled everything. They controlled CD, making it, getting it to Tower Records, selling it. This was Backstreet Boys, Dr. Dre, people were making money. And when your business model looks good, a disruptive technology comes along, it's a lot easier to focus on the threats to your robust business model than to embrace the opportunities.

And if you focus on the threats, how do you react to it? You bring some lawsuits. You start suing.

I do think there were missed opportunities. There were people at the labels-- we talked about BMG-- who said, hey, 60 million, 80 million, whatever, this is-- this is like a user base that you can market to, that you can capture through a single platform. This is gold. Why don't you partner with Napster?

But there are a number things going on. One of the big things that was going on, by the way, was just the MP3 audio compression format. Napster couldn't have existed without that. It made music portable, the download speeds at the time. And there were people like Neil Young-- I love Neil Young-- who just were offended by the very-- the sound quality of MP3s.

And there was a cultural shift, the Sean Fanning and Sean Parker, these like geek dudes. And they just see the tech community, the disruptive community, and the content community were very siloed. There was a lot going on.

But the missed opportunities occurred during a stream of law suits. And the copyright policy question at the heart of the Napster case, and the secondary liability that Chris was talking about, is an important question that still resonates today, because the tension is-- so you might think, copyright law, that's content regulation. What can you do? How can you use content?

Napster is copyright as technology regulation. The lawsuit is against Napster, not for Napster copying and illegally downloading music, but for providing the technological tool that allows its users to infringe copyrights. And so the nerdy secondary liability question there is under what circumstances are we going to hold a technology producer liable for the infringing activities of the technology's users when that technology is capable of both legal uses and illegal uses?

And that's a tough one, because we're always having to recalibrate this balance between giving real, not symbolic, protection the copyright holders, who were freaking out at the time, and not impeding the development of new technologies. So funnily enough, the case at the forefront, when Napster came along, involved the VCR. At the time, they called it the VTR, the video tape recorder.

And those of you who are taking Chris' class know about this, but just very quickly. When a VCR first came along, it allowed people to record shows without permission. It looked really scary to the movie industry, so Jack Valenti, who was, at the time, the head of the Motion Picture Association of America, said, quote, I say to you that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone. That's an actual quote.

And not only, this Boston Strangler was Japanese, because Sony was making it. And so they were terrified that this VCR was going to kill the movie and TV industry. So they sued, but they weren't suing the people who were using the VCR to make libraries. They were suing Sony, the producer of the VCR piece of technology.

And so the Supreme Court sat back. Secondary liability is not in the copyright statute, so Congress has not spoken on this. So this is a judge-made law.

So in a 5-to-4 decision, the Supreme Court, way back in 1984, said, you know what, we're a little troubled by this. We think we should not really move too hastily when Congress hasn't acted, and there's nothing here in the statute. So we're going to go ahead and look at the patent statute and import this doctrine-- it's called the Staple Article of Commerce Doctrine-- which is, if you produce a technology that is capable of both licit and illicit uses, you're good. You're not liable for secondary liability for copyright infringement if, quote, your product is capable of substantial non-infringing use.

The VCR was capable of substantial non-infringing use. Mr. Rogers didn't care. He had testimony in there, Mr. Fred Rogers. He said, I don't care if you videotape my shows, and that's a non-infringing use. And time shifting was [INAUDIBLE].

Sony-- it's on the books. It's the Supreme Court. It's the statement on secondary liability. That's from 1984.

2001 rolls along. Napster is in front of the Ninth Circuit, and, well, Napster is capable of substantial non-infringing use. There were a lot of artists who were happy to have their stuff on Napster, because it was getting discovered. There was public domain music on Napster.

But wait a minute, the sheer magnitude and scale of 80 million-- whatever the number is. I've seen different numbers, 60 million. Whatever the number is of the infringement that was going down on Napster was terrifying. And so you see, during the oral argument, you see the Ninth Circuit trying to figure out, oh my god, how are we going to deal with this? It cannot possibly be true that Napster is legal.

So they cabined Sony and, basically, said Sony only applies-- Sony does not apply if the technology provider has actual knowledge of what's going down. Napster did. They had a centralized index. Or if they have the right and ability to control what's going on.

All right. So that's the long story short. But was this a victory for the music industry? And that's the sledgehammer thing. I would argue no. It's like a game of whack-a-mole. It's like, knock down Napster, up pops [INAUDIBLE]. Knock that down, LimeWire. Knock that down, Kazaa. And it was like a game of whack-a-mole.

And while all these lawsuits were going on, what wasn't happening was adapting to the new business model that took the intervening 20 years to really settle. So I think when I look back-- and again, hindsight is 20/20. I don't know if I would have done any better. But I think one takeaway is look at the opportunities and not just the threats. And sometimes, copyright is a very awkward tool for technology relation, and maybe we-- maybe you need to adapt.

Do you want to jump in on any of that, Nancy? There's a couple of pieces that are interesting, to me, from the work you do, around, in particular, they made the statement about I, as the fan, want the music to be free, but as the artist, you don't want the music to be free. Talk about the tension between me loving the artist that I love and wanting to support them, and also, living in this amazing new world of ubiquitous online access to everything at, in Napster's case, no cost, and even today, as Spotify's case, pretty low cost.

I think when we think about the idea that if you take the phrase, music has no value, or people learning that music had no value, I think that's at the heart of the missed opportunity. Music had so much value that the 80 million people built a whole new system and devoted their processors to sharing music. So clearly, it had value to the fans, or they wouldn't have been doing all this stuff. And fans continue to do all kinds of creative things to share music, because music has so much value. It's just not all, always, monetary value.

So from my point of view, the-- the lost opportunity was in imagining that controlling the distribution of the recording was the heart of where music's value lies in the first place, which is where all the copyright issues congregate, and all the attention, and all the conceptualization of what is value in the first place. But from the point of view of a fan, if you hear a song that you love, and you don't share it with your friends, what kind of person are you? It's like, I know this really great restaurant, but I'm not going to tell you what it is because you might go eat there. It's just being a bad human.

So from the point of view of people who listen to and love music, it's not just that it wants to be free. It's that it's a way that we build meaning with each other and build culture with one another. So a Pink Floyd t-shirt has value, not because you can press a button then hear a Pink Floyd song, but because it has all of this social signaling, and community value, and differentiating value, and so on. So, yeah, I guess that's most of what I have to say about that.

I think a lot about this hindsight 20/20 question that you all teed up. And I was at a record company at the time, not of Napster, but a little bit afterwards. And I do sometimes think back, because of the narrative around it is certainly one of missed opportunity.

If only that the companies had not sued and had saw fit to do the deal then, that they ultimately ended up doing with the legitimate streaming services today, it would have been a really different-- different landscape. And I wonder to what extent we think that's true, and what would a deal have looked like at the time with Napster that artists could have lived with, that the labels could have lived with, and that consumers could have lived with? I don't know if anyone has thoughts on that.

Well, I don't think, necessarily, that the economics would have been that far off from where they are now. It might have been \$10 a month, but the golden opportunity would have been all the fan data. You would have known who they were.

Again, to go back to the prior model, when I went to the Harvard coop to buy a CD on a record label, they had no idea who I was. The band had no idea who I was. And the big deal we're realizing now is that it's important to know who your fans are, so you had that community, so you can continue to build. Music is about-- about community, right?

I don't necessarily think that it would have changed the economics. Maybe it would've been slightly more. I think that the prices were depressed because we had that decade where music was-- you couldn't really charge for it, so I think the price did go down, but I think in the end of the day, we just missed an opportunity to really change from a thing business to a relationship business. And we really could have cultivated that in a huge way.

And even do tie-ins, where the future is going to be, maybe, bundling recordings with ticketing services and with merch, and all the things you want to have from your artist into deals with other companies. So that recordings isn't just the only thing you're doing. It's just a spoke in this wheel that has a lot of other values that can tie in.

Spotify is the leader now. I don't know how many more services a standalone streaming company-- or features a standalone streaming company can have. A lot of recordings, pretty high quality, social feature, plays for a quick, easy interface, not a high price point. What more can you do really, right?

But I think there are still opportunities for us to envision what we would want from an ideal music environment-- fan data. Or like, when I travel, I go to a town, and my phone knows what I like, and there's a band playing in town. And I can just go to the club, and swipe my phone, and get in to see the band for free. And they know who I am, if I want to share that information.

There's a lot, I think, that can be done in a much larger business model context. And I think that you can look at it myopically just as how we charge for recordings. And I think that's not really a wide enough perspective now.

There was, actually, a study that was done around the time the Napster litigation was going on. And that some people were pushing for a deal with Napster, some of the labels that suggested that people would have been willing to pay \$15 a month. So I think I agree. I think people would have been willing to pay for it.

And one of the arguments was that it wouldn't be fair to our artists if we shifted. We would have to redo their contracts. But the fact is the music industry has had to shift.

When Apple-- basically, after Napster lost, there was a vacuum. And Steve Jobs came in, and he's like, I'm comfortable with disruptive technology. Here, it's an iPod. And they made-- they made some significant changes then, so it's not like they aren't able to pivot in incremental ways.

Drawing together what you just said, and what you said about value, yes, music absolutely has value. And the overall pie is bigger. It's just that it's being divided differently.

And one of the revenue streams that's been consistent and growing is live performances, and that's a kind of value. People are willing to pony-- I don't know how much you have to pay for a Taylor Swift ticket, but I'm thinking it's pretty high. Maybe it's \$4.99 a month for Spotify, but my students will fork out \$200 to go to a concert, because they love music, and that's-- that's an experience.

That's the good. That's the form it comes in, the relationship with the artist, the merch that's over there, the Pink Floyd t-shirt, whatever it is, that is worth to them the \$200 to pay for it. So it absolutely has value, and it's just that the pie is still there, but the division of revenue streams has changed significantly.

Nancy, other thoughts on the value-- the value question? And I guess I'm thinking about one of the-- we're talking about this moment that we've arrived at where we had the Napsters of the world. They resulted in litigation. They were sued out of existence. And now we live in this world where we have ubiquitous access to stream music. I think one of the big questions is whether the amount of money that's going back to the artist is enough.

Even acknowledging that there are many other royalty streams [? and ?] many other revenue streams that we should be thinking about-- is that a long-term problem? Is that a legacy of Napster, and is that a long-term problem? Does that have to change, or do the artists have to change to adapt to the fact that recorded music revenues are always going to be much lower than they were in the '90s, which was sort of the absolute high point of this business? If you have thoughts on that [INAUDIBLE].

Well, yeah. Of course I have thoughts. First of all, as though royalties were going to artists in the first place--

Mm-hmm.

Right.

--right? I mean, I think in these conversations, we so often romanticize the music business as before, as though the people who wrote the songs-- all the money just showed up like magic when there's-- and of course, we know that's not what happened. But people were-- not only were they screwed out of their rights, but there were active efforts to inactivity not try to find them if they moved. So people were denied their revenue all the time before the internet came along, before file sharing came along.

My take on this is that audiences are always willing to pay. They're not all willing to pay the same amount, and I don't think that it's thousand true fans formula. But prior to Napster, we were already seeing online crowdfunding happening for music. Kristin Hersh was living on fan subscription for many years on a model where people were paying \$15 a year and they were getting an MP3 every month. That started in 1996.

Marillion had fan-funded a North American tour for which everybody who had contributed to the fan funding then bought tickets. So it wasn't even that they had prepaid. They had just paid twice. So-- which points to the idea that different people will pay different amounts.

And I think one of the missed opportunities that persists in the music business, although we kind of get it with the whole superfan thing, is that some people will pay much more. And the music industry always set an upper cap on how much you're allowed to pay. And if there's a margin above that, it was going to some third party, not to the artists.

So you would get people doing things like buying 10 copies of a CD at a show, even though they already had it, because it was a way that they could at least give some money, and they knew that the artist was going to get it-- or buying T-shirts.

When I say this super fan thing with some dismissiveness, part of that is because a lot of people don't really want the poster, and the hat, and the T-shirt. They just want to give the money, right? And there's not really a way to go, don't send me all that stuff, right? It still gets set up as this-for-that transaction when the fact is, some people were just willing to pay more for the same thing.

I just want to follow up--

[INAUDIBLE]--

--quickly on something Nancy said. I was in China for about a week, and I was speaking at a forum there. And one of the things I realized-- I went to Tencent and saw their corporate headquarters, and saw all the things that they're doing. And one of the things I realized is how much they capitalize on that fan enthusiasm much more so than we do here in the States.

They actually have-- during a live stream, people can just give money, like in a tip jar as a matter of course that goes right to the artist. Some people buy 10 copies of the same record because they know the money is going to the artist.

And I feel like that kind of ties back into the reason why we are drawn to music in the first place-- that connection that we have. And I feel like there may be some ways here in the States of changing people's perception of the business model. Because I was a recording artist back in the '80s on Epic Records. And I never got a royalty. Significantly unrecouped, right?

And there were-- even, like, Roger McGuinn-- he spoke before Congress talking about how the record industry worked. And he said he never got a royalty from Columbia being in the Byrds. Roger McGuinn never got a royalty. That's crazy, right?

But so I think, though, one discussion I've heard about is this idea of, rather than everybody's subscription money for Spotify going into a pool and is divided up by-- you know, numerator is your amount of streams, denominator is the total streams-- what if my subscription money went to the artists that I streamed, right? And not go to the pot at large. That way, if I play one artist a lot, then all my money goes right to that artist, not to Nickelback. I mean, no offense to Nickelback, right?

But wouldn't fans feel better-- kind of tap that emotion that people have about buying 10 CDs at their show, because my money is going right to the bands that I really listen to a lot. And that seems, to me, to be a much more fair allocation of my subscription money going to the artists that I actually listen to than just sort of be the business model which distributes everything according to sort of market share.

Jennifer, you got something?

Well, I just want to second what you guys are saying. You're absolutely right. I mean, if you look at the charts, it's incredible how little money, because of contractual arrangements and other things, actually makes it back to the people who are writing the music or performing the music.

And music has an income inequality situation, too. There is a superstar effect. And if you look-- I don't have the charts here, but there's a great book from 2019 called Rockonomics with a lot of charts in it. You look at the charts, the top echelon of superstars makes this much of their money, and then everybody else-- including Roger McGuinn, which blows my mind.

Yeah.

They don't see royalty checks. They're significantly unrecouped. And so there is definitely a way to, A, make the distribution more fair, and B, look at more artist to fan-- direct artist to fan models-- cutting out the middle man. I mean, we have the technology now to cut out the middleman, in many cases, in which my \$10 goes to the person who I want to listen to. And I think there's a lot opportunity there for fans and for artists.

Yeah. I would say there are different kinds of middlemen. Because we do still value somebody in the middle. Bandcamp would be an example of a different kind of middleman where you can pay what you want. And Bandcamp's model is that they take a percentage of it. So if you're not selling anything, they're not making any money off of you. And if some fan wants to pay \$10,000 for your song, they can. No problem.

I wanted to follow up, also, on the user-centric streaming model, which is what you're talking about. Deezer is supposedly giving that a try. There is a research group out of the University of Oslo that did a lot of research with WiMP before it was consumed by TIDAL. And they had access to all of WiMP's streaming data, because they were in partnership with them.

And what they were able to-- they tested this idea, and they showed, recalculating their listening figures, that a user-centric streaming model would make a very, very small difference for the people who were totally at the top at this income gap, while making a huge difference for people in the middle and the bottom. So it's a really compelling idea.

And then we go back to the idea-- everybody yells at Spotify, right? But the labels are kind of involved in these negotiations, right? It's not like it's all just between Spotify and the artists.

Mm-hmm. Right. Absolutely. I want to give my friends a heads up that we're going to open up to the audience in a few minutes. So they'll come around with microphones. One thing that we've talked about a couple times-- we talked about sort of the legal changes, the business changes. And then as a music fan, we've talked about the need for curation to music discovery.

And I wonder if I could talk about that a little bit, about one of the things that Napster changed significantly is the fact that I had access to all this music for free. It changed, obviously, the legal landscape. But it also meant that you now had to sift through 10 million, 20 million-- whatever it is. Spotify, these days, has 40 million something tracks. The number goes up every day. Look at it.

What does that mean for how individuals discover music, find new artists? Again, as someone who's been a die hard music fan my whole life, I was always talking to friends, and listening to radio stations, and watching TV shows, and reading zines, and then ultimately transformed into looking at blogs to kind of find what the new thing is. How does that work in a world with ubiquitous access to almost everything? [INAUDIBLE]

Well, to me, it's playlists are sort of the new curation mechanism. And they know what you like. They know what you listen to. They know what you add. And behind all of that data about you personally, they also have Echo Nest sort of calling all this data from however many millions of data points they had to come in.

So to me, whatever mood I'm in, I just sort of pop that mood onto Spotify. And I hear something, and it's like, oh, that's pretty good. And I add that to a playlist. So I have a slight way of getting into a zone. And then I kind of use that as a way of sort of adding to my personal collection.

So in the old days, you could be lazy, because it was sort of top down mass media. These are the songs, you know. And this is what you're getting, right? And I loved to listen to college radio, because it's an amazing college radio town. Boston was unbelievable. And you had just this incredible diet of people who cared a lot about music. And so that was reliable.

And then, as you say, then you had sort of the Napster effect. And then you have this infinite sort of choice. And trying to find the right grain of sand in the desert was impossible. And so curation is a huge piece of that, right? And then there are a million places you can go to find that. So I think, in some ways, everybody maybe has their personal method of going to either a certain sources to get what they want.

But everybody sort of has their own little private universe, their own private headphone Idaho, right? Where they're-- it's great, and it's not as hard. It's not as labor intensive as surfing blogs. That was a lot of work. You know, this is really good. I like that. I'm going to download that. I'm going to add it to my player. That was like a multi-level effort. Now it's just much more readily available. So it's curbing.

[INAUDIBLE] one of the middlemen that we still need is the curation aspect. And I find the combination of data analytics-- the vast amount of data and human curation-- to be fascinating. And it's better than Clear Channel telling you what to listen to, and payola and everything. And I love college radio, too.

But do you know the data that's being collected-- they can cross-reference what you're listening to with what the weather was like where you were listening to it, what type of day it is. They can look at what I'm listening to and look at what you're listening to. And if we listen to the same song, they're going to recommend something else that you're listening to to me. And so the data that's out there that services can use for curation, in addition to the music genome is completely fascinating.

And this is entirely anecdotal, but I could ask you guys, does Spotify kind of serve up things that you think actually-- yeah, I do like this song. Whatever's going on in the black box is working out OK? I mean, I think it's a wonderful time for music discovery. And it's certainly much better than the push model back in the days where it was just what actually made it to the top 40 and was playing in radio. But I think that there's a middleman that's very important. It's the human and data curation middleman.

Oh, boy. I have so many thoughts on this one. He knows so much more about this than me, but--

[INAUDIBLE]

I'm old, but yeah. No, I think that the curation piece is huge. And certainly, curation has shifted over to algorithmic recommendation. I don't think there's any question about that. I wonder sometimes, to what extent-- certainly Spotify serves me up gems that I like. Sometimes I find myself wondering if it's training me to like music that I didn't like before.

I find myself listening to disco. And I'm like, no, I'm a punk. I don't know like disco, but this song's different. There are things about algorithmic recommendation that I think are sometimes quite magical or shockingly precise. And yet, at the same time, it's shockingly poor how much of the music I actually don't like, as a person with very strong musical opinions.

So yes. But also, I miss the community of the record store who knew my tastes and would say, this is one you need. And that really has been made so much harder, and not just by music streaming and the scale of ubiquity, but also by the shift to social media platforms that have really undermined the ability of freestanding groups.

And you mentioned blogs, which were a lot of work. But if you had a trusted blog that you knew they were going to be posting MP3s you had a good odds of liking, and now you're trusting Spotify to deliver the right stuff, maybe that trusted blog was a little more trustworthy.

So I kind of have some remaining skepticisms, and I don't think we really fully know yet the cultural ramifications on music taste or production of algorithmic recommendation. The shift to mood is huge. Certainly, we used to say, oh, I'm in the-- I need something. I'm in that angry mood. I'm going to put on this record, right?

But we didn't then automatically get generated the next one, and the one after that, and the one after that. And that, I think, is the real shift to have mood be the dominant entry point into defining what music we're going to listen to in a moment, and how our tastes' rivers will flow. That's a real change.

The other piece that I want to point out is that some of those playlists are curated, but a lot of the recommendation algorithms-- it's true all that magic data exists out there. But in fact, a lot of the algorithms are much cruder. And many of them are relying on things like, users who put this on a personal playlist also put that on a personal playlist.

So some of these things that appear to be, it's amazing! They're pulling data from 87,000 sources and weighting it in real time to deliver you the songs you love. In fact, it's like, well, Steve put that on a playlist along with that other one. And you seem to like some other songs Steve likes, so OK. It's just an automation of the record store thing writ large. And it still is social recommendation underneath. It's just a little more automated, but still, often, I think, much cruder than people recognize.

That's great.

What mood does disco go with?

Yeah, I want to hear that.

Strangely enough, it--

[LAUGHTER]

--it seems to go with kind of a Caribbean lounge [INAUDIBLE].

[LAUGHTER]

I get French lounging girls and disco.

We'll throw it open. Megan, then Reuben, and there you have-- and please put up hands if you have questions, thoughts, concerns. Aaron Dunn, right there. Reuben-- oh. We got one in the back from Kyle, and over there on Aaron, yeah.

Hi. I love the idea that we moved from Napster to these streaming services for algorithm recommendations and discovering new music. I get all this good stuff. But my concern is when I had Napster, and I had CDs, and I had MP3s, I actually owned and controlled them in some capacity.

And I know you've all probably read *The End of Ownership*, the book. But my concern is that with all this streaming we have, no ownership of this music anymore. And that's a concern. And I know we're talking about curation, but what about preservation? Because if these streaming services decide to turn themselves off, we don't have that music anymore. It's not sitting somewhere where we can access.

So I think the sacrifice is what I'd like to hear about, because when we moved from Napster to the streaming services, we sacrificed our own personal collections that we really own, and control, and can share, and lend, and loan, and all that good stuff. So I'd like some reflection on Napster's move in that direction.

Kyle is a copyright lawyer who spends all day long hanging out with librarians, so--

[LAUGHTER]

That's a great question about preservation.

Well, it's totally true, and I agree with that. In fact, if Spotify loses its deal with Universal, then a huge hunk of my listening library kind of goes away. By the same token, I have a bunch of vinyl which I can't bear to part with, but I don't have a turntable anymore. And so-- and even CDs. Are they going to keep making CD players? So whatever form you have these things in, as the technology kind of moves forward, you have to kind of cascade your collection to some new way of playing it.

And so, yeah. I mean, when I went to school, the big thing was walking in with my record collection and plopping it down, and then checking out my roommate's record collection and going, wow, you like that, too. And I was a huge-- it was a physical activity, right? Kind of going back to, like, putting a log on the fire and sitting in front of your speakers. And it's a very tribal, collective experience. And ownership was a huge part of me kind of coming to terms with music.

But it's the end of ownership as we know it, right? And so it definitely is-- it's not that anymore. And as much as I really used to love going to record stores-- you know it was like, whenever we were on tour, first thing we'd go to would be a record store to find what's going on, and people that we were sort of simpatico with, and just to see what the pulse was of a city we were in. The sort of the community is there, but the physical space of that is gone.

And I think we're in a post-physical era now. And it's just one of those things that I think, personally, at least, it's just sort of the nature of technology and progress. I don't know if it's progress in the way that many people would like it to be, but it just-- so the technology is dictating how that goes.

I just want to say, absolutely, again, *The End of Ownership*-- great book.

Yeah.

But there are legal rights that go with ownership. Most notably, copyright has this fun little section, 109, which is the first sale doctrine, which says, if you own something, you can give it away. You know, I can, here. Here, David. Here are all my old LPs. Get that record player right. And that doesn't exist. And so ownership versus rental has significance legally. And it means it could be ephemeral.

Our stupid Sonos speaker system that we paid so much money for will not play the music that we own. It refuses. It's like, we have no way of doing this. We're only going to play stuff from streaming services. And it's like, wait. The library that we spent, like, decades amassing-- so there's a hardware connection, too. Here's my very expensive speaker. Won't play the music I own. How are you to play what's going on in Apple music?

So I think that genie's out of the bottle. I don't think we can clamor it back. I know people who still buy CDs. Interestingly, the CD market still exists mostly for old cars, because if you have an old car, the only way you can listen to music while you're driving [INAUDIBLE]. Some people still own their music. But I just couldn't agree more with what both of you said.

Yeah, I think that the genie is out of the bottle, but I think we can think about it in other ways. Like, why is it that if Spotify goes under, we've lost all the metadata about what was in our playlists and our libraries? If we're all lawyers, we should be fighting for data portability so that at least we've got something we can then plug into what comes next, or what has survived, and we haven't lost all of that curatorial work that we did.

Yeah. I mean, a lot of times, IP lawyers will talk about in any medium now known or hereafter devised, right? And so if I'm going to buy something, why shouldn't I get a license for any medium now known or hereafter devised? So I can take this and go someplace-- I have, like, a personal media certificate. And I miss some industry standard, and I get to go to another provider with my media certificate and then have that collection available on some other format.

That's great.

Some other platform.

Aaron?

Hi. So my question is, you mentioned there are some possible solutions to get more revenue to artists, such as the percentage of streams goes to the specific artist. And I was wondering, do you think any of these solutions to get more revenue to musicians would be from the companies themselves, or could they be legislative?

Because to me, this whole revolution that's happened with streaming was because the music industry basically seemed to have cratered, and was brought to its knees, and had to sort of redo everything. So what would be the incentive now to make those changes?

Great question. And again, these services, depending on the nature of the service, run on a mix of compulsory statutory licenses where the rates are set by statute, and by an administrative board, and market rate negotiations between content owners and the services. So it could be a mix of them both. I don't know if people here--

Yeah, I don't think there's much appetite in Congress to create more statutory licenses for content.

Congress just passed the music modernization, so I think they've done their thing. It was unanimous in the Senate, unanimous in the House, signed into law in October of last year. And so to the extent Congress is going to do anything in the music space is been done. I think it's going to be market forces that--

Right.

--are going to be driving that.

But the notion that record labels are somehow going to pay more money to artists, I think, is completely absurd. They will not do that. In fact, the litigation docket is rife with artists who are complaining that they weren't paid properly. And then you look into the accounting practices of these labels, and they say, wow. That was a complete mischaracterization of these deductions and exclusions, and this is a total mischaracterization of the format and revenue stream.

The labels don't pay. They're not going to like to pay. Nobody likes paying anybody anyway. I think one of the things I've loved about certain aspects of the government's involvement in the music industry is the artist's share that comes from the PROs. So when my musical work is performed on the radio, I get-- my artist's and my writer's share directly from ASCAP. And when my sound recordings are played on a SoundExchange-- or a service that's monitored by SoundExchange, I get my featured artist share directly.

If we could mandate something like that somehow or other-- but that would kind of involve an intrusion into the companies' private contractual dealings. And I can't imagine that there would be-- that would not happen quietly. Although, I think it would be very beneficial for artists.

When you asked, where's the incentive going to come from? I agree completely. I can't be legislative. Among other problems, that doesn't solve the problem globally. But I think it can come from outside of the industry as it's currently understood. We're already seeing people who are making millions and millions of dollars as musicians on YouTube and just completely bypassing.

So I think the answer to what would make the existing labels and publishers change their models is that they will become irrelevant, because people won't sign with them, because why would they become beholden to these byzantine interests that are never going to come back to them, especially if they can be part of a platform that distributes all of their things, that includes a tip jar where people can just be paying them, and people are imagining and writing code for, and trying to develop systems for.

You can also click the License This For Use In Your Film button right there. License This For My Add button. Why is anybody ever going to go to Warner Brothers Music Group to say, can I license that little clip from my ad? When there's a big repository of music where you can just click that button, and boom. You've got your license. So I think the forces will come from outside of the industry and the government.

Another-- yeah, Liz.

Oh, that's actually-- that's actually-- can you hear me?

Yeah. There you are.

A great prelude to what I was going to ask, which was for the panel to kind of talk about what they see coming forward and what they would like to see around, I guess, two things. So if where music is right now is more about the in-person experience and going to shows, and the content is cheap but shows are really expensive in ways that were kind of unimaginable before, and then that's even before this secondary market, which is owned primarily by Ticketmaster-- which used to be illegal, and still is illegal, in a lot of contexts, to scalp-- so that's sort of the first question, is what do you see around kind of how artists make money around touring, which is how they make money, but then there's this crazy financial system around touring?

And then the second part is, if the experience is about being in person, and we see all these people with their phones up, and they're listening to the concert-- they're streaming it to their friends, or they're streaming it to a service where other people are watching, and now we see things like AR and VR happening in ways that seem transformative, how do you see that shifting things?

Do you have thoughts on this? Changing the nature of live experience?

It seems like the-- I guess, I want to say, just as a bracketing, that when we say that the future of music is in touring, we're limiting that to a very particular population of people who have the ability to be mobile, which automatically is going to privilege men, is going to privilege the

young, is going to privilege the physically-abled, is going to privilege single people. There's a lot of cultural issues bundled up in that.

So I guess, partly, I want to-- I don't want to give up on there being other ways for artists to make money besides hitting the road, because that's just a really exclusionary model of music making that doesn't have anything to do with the value of recorded music, anyway.

In terms of the concert going experience, I think there's all kinds of things at play right now. I think that we're in a pretty bad moment for live concerts with phones, because I do think that people are documenting the experience at the expense of enjoying the experience, often. Or they're enjoying the documenting. And I think that for artists on stage, that can be extremely alienating, because they're not experiencing the audience. They're experiencing being filmed.

So I think something's got to give there somehow. And I don't really know what it is. I hope that enhancing AR and putting everybody in headsets isn't going to be the answer. I wouldn't be surprised if there's just some big old backlash, to be honest, where, OK. The first song's when you take your song and then on song two, if you've still got your thing, people are looking at you like you're a jerk. I don't know that it's going to go that way. Or the recording devices will become so-- they'll be built into what we're wearing, anyway.

[LAUGHTER]

I don't think that's that far out. I mean, one chuckles, but it's not that far out to imagine it's a pin on our chest, and we don't have to be going like this, because this is doing it anyhow. It's already a watch half the time, right? So I think there's massive, massive challenges in that domain. But I wouldn't want to put all the hope for the future of music, as a profession, financially in it.

[INAUDIBLE]

Yeah.

So I wouldn't, either. And there are certainly plenty of artists who don't allow you to record. I wonder if VR can be a way of changing the experience of touring so that you can provide a personal experience to people who are not there.

It probably can. It's not very effective right now. It's still pretty clunky. But I can see that, with technology advancing, it could be. I'd like to just say something in response to maybe a larger point about the ecosystem in general. I wish that there-- and you can file this under That's Never Going To Happen department.

[LAUGHTER]

But I would love there to be a data share with artists that are touring so that they know if it's Live Nation, or they know who the fans are, and the fans can opt in so that the artists have the fan data for the people who came. And then they can connect socially with the fans who were willing to pay for them to see them play live.

And then that actually makes artists grow and their communities grow larger, which, in the end, would trickle up to the benefit of Live Nation, because you have a lot of bands who are benefiting from this incredible data and information that the promoters and venues have.

So if there could be more reciprocity of data sharing with artists who are on the road-- again, there's privacy concerns, obviously. But if it's an opt-in situation that's kind of closely monitored, artists could be able to build upon the success they have one gig at a time, and could actually maybe, even on their own scale, be able to branch out. And you could have success.

We don't all need to be like Katy Perry, right? We can have our own success at our own level with our own goals. And if we had the data that allows us to leverage what we've done so far to something that can still serve our goals, that would be, I think, a good way the technology could support artists coming up.

Can I just add that access to data is a million miles from being able to use that data meaningfully? And a lot of people feel very overwhelmed by the quantity of data that's available to them and don't have any sense of how to act on it strategically. At the same time, they're also being asked to manage every other aspect of their career that other people used to manage. Now they're supposed to be expert data scientists as well. So it's a big ask. You're right, but it's a big ask.

[INAUDIBLE]--

Again, back to needing other kinds of intermediaries.

Yeah, turning data into information you can use, actually.

Yeah.

Yes. Some of the services the industry used to provide are still very necessary, yes. You can have Pro Tools and make your music, and you can put it out there on your website. But if you talk to a lot of artists, they're like, I'm in this because I'm a really good musician, and I want to make music. And I spend, like, five hours a day responding to Facebook posts, and managing social media, and looking at my budget. And this is not my value added.

And so there's definitely room for other intermediaries to step up and help with that aspect, even in that sort of more artist-to-fan model. And definitely, there are many things problematic if live performance is the only way you're going to make money, both on the user side who can't get there.

And also, some people are just really good songwriters, and they can't jump around a stage, right? [LAUGHS] We need to support them, too. So yeah, and I agree about external forces. I do think more pressure from the outside, whether it's a tip jar, or micro patronage, or Bandcamp, or whatever-- those have a role to play in moving things in a fairer direction.

We need to wrap up, because it is 1:00. But if people have questions, maybe we could stick around for a few more minutes and answer them. Please join me in thanking Dave, Jennifer, and Nancy. This was such an honor that I put an email out to three great friends and said, hey, come talk about Napster for an hour, and you all said yes, which is great. So thank you all, and thanks, everybody, for coming.

[APPLAUSE]