

HIS NAPSTER'S VOICE

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Everybody, by now, knows the Napster story; news travels quickly these days. Napster is a clever little Internet application, invented by a 19 year old college dropout right out of Central Casting. It's very simple. You download a piece of software from Napster's web site. The software scans your hard disk and compiles a directory of the music files it finds there. It then sends that directory—not the files themselves, just the list of files —back to Napster's computer, where it is placed into a database, along with the directories of all of the other Napster users who have gone through the same process (68 million or so by last count).

Then, when you find yourself desperate to hear, say, Bob Dylan's version of the Stanley Brothers' classic "Rank Stranger," you log into the Napster database to see if anyone, from among those 68 million people, both (a) has a copy of this song on his or her hard disk and (b) is currently logged on to the Internet. If there is someone who fulfills both criteria, the software conveniently connects you directly to them, and the file in question is then transmitted directly to your machine.

Napster's the fastest-growing software application in the (relatively short) history of personal computers, and using it is an intoxicating experience. It gives you a glimpse of the extraordinary power of the global network, and of the power of the notion that if information exists anywhere on the planet, you can find it and you can use it. When people began talking, back in 1995 or thereabouts, about the coming of the "celestial jukebox," the instantly downloadable library of songs that would be available at the touch of a button, most people (myself included) assumed that it would come from Time/Warner, or Sony Music, or EMI, or BMG, that there really would be some box, housed in the basement of an office building in L.A., with a zillion songs stored on it, and that we would all be able to dial in and access it over the net.

But it didn't happen like that. *The network is the jukebox*. A string of code --

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relatively simple and straightforward code, I'm told – does the trick, turning the whole world into your personal, searchable hard drive. You agree to share a portion of your hard drive with others, in return for their reciprocal agreement to share a portion of theirs with you.

As everybody also knows by now, Napster raises some hard questions about copyright law. Are Napster users infringing if they are only downloading files for “personal use”? Is their use covered by the Audio Home Recording Act? Does, or should, the fair use doctrine cover these activities? If its subscribers are indeed infringing when using Napster's software and services, should Napster be liable for that infringing conduct? Does the “staple article of commerce doctrine” apply to Napster? Who has the responsibility for identifying those files available on the Napster service that are, and those that are not, infringing? What happens if a Napster-like service opens up offshore – whose copyright law applies then?

I could go on and on – anyone who thinks about these issues (not to mention anyone who has tried to *teach* this body of law) could go on and on. It's no trick, at least in the cyberlaw business, coming up with the hard questions; the trick is coming up with the easy questions. That's not quite as silly as it sounds; teasing apart this thicket of questions into those on which we might agree and those on which we don't is the only way we'll be able to focus on the latter and figure out what to do about them.

Talking about Napster sometimes seems a bit like old news, like last year's headlines. Napster exploded on the scene, had its fifteen minutes of fame (including a *Time* magazine cover story), the lawsuits followed, the courts have spoken (at least, in the United States), Napster's been enjoined, and that's that. Time to move on.

But one of a law professor's jobs, on occasion, is to slow things down – a job that seems particularly important these days. Napster's not old news – at least, we shouldn't treat it as such. The Napster litigation represents one small step through a very deep and very dark forest. It's very important that we think hard about how we got here and where we should be going, that we not conclude too early that we're through with this and onto the next problem. Napster poses some critical issues for the development of law of the global network, issues that are going to be with us for a long, long time.

The IS.

To start thinking about these issues, we need to distinguish the ‘is’ from the ‘ought,’ the question whether the Ninth Circuit was correct in its recent decision (holding that Napster is liable for violating the Copyright Act) from the question whether copyright law should, or should not, impose liability on Napster. [Not that “is” and “ought” questions are unrelated to each other; I’m not sure if the meek inherit the earth, but the next generation always does, and in a democratic society, the “ought” can become the “is” because processes exist whereby people can always bring what the law “is” into closer conformity to what they believe it should be.]

Is Napster infringing? Even assuming that millions of people use Napster to make unlawful copies of copyrighted works – there is a contrary argument, based on either the “fair use doctrine” or other provisions of the Copyright Act, that users’ ‘personal use’ of downloaded files does not constitute infringement, but we can ignore that for now – is Napster, which after all does not actually “copy” any files, liable for that copying?

The answer, we all know, is “yes.” The headlines told us: *NAPSTER LOSES*. Just last month, the Ninth Circuit Court of Appeals affirmed the entry of an injunction against the continued operation of the Napster service on the ground that Napster is responsible for these infringing uses.

But the headlines conceal some interesting nuance – that’s one problem with moving too quickly through these issues. The Ninth Circuit actually did some interesting things here. For instance: Napster based part of its defense on the important 1984 Supreme Court case of *Sony v. Universal Studios*.² In *Sony*, the entertainment industry challenged a new copying technology – the VCR – which, they claimed, was about to destroy their business; tumbleweed would be blowing through the streets of Hollywood, they cried, if the VCR were not brought under control. The Court ruled, however, that the VCR manufacturers were not liable for the copyright infringements of VCR users; because the VCR had “substantial non-infringing uses” – because it could be used for perfectly lawful copying as well as unlawful copying -- Sony (and the other VCR manufacturers) could continue to distribute VCRs without permission from (or payment

² *Sony v. Universal Studios*, 464 U.S. 417 (1984), available at <http://supct.law.cornell.edu/supct/cases/464us417.htm>.

to) the copyright holders.

[It is, perhaps, interesting that the entertainment industry plaintiffs in the *Sony* case were, in fact, wrong; the VCR did have, in fact, substantial non-infringing uses, and the industry learned how to live with that technology quite comfortably. And notice, too, the nice twist: Sony, Inc. is pitching a 2-0 shutout thus far – having won as one of the copyright defendants in *Sony v. Universal* and as one of the copyright plaintiffs in *A&M Records et al. v. Napster*.]

“We’re just like the VCR manufacturers,” Napster claimed; the Napster service has “substantial non-infringing uses” and should be allowed to continue because of that.³ There is a great deal of original music being written out there in which the authors do not assert their rights to prohibit copying and distribution, but in fact encourage it; go to MP3.com if you don’t believe that. Sharing those files is not infringement of copyright. A substantial amount of traffic through the Napster system involves transmission of those files. QED.

The district court had disagreed: the non-infringing uses of Napster, that court ruled, are insubstantial, trivial, in comparison to the infringing uses. Some of us thought that was plain wrong, and the Ninth Circuit agreed with us. It held that Napster *does* have “substantial non-infringing uses”; indeed, it reversed the district court on just this point. But, the Ninth Circuit went on, although Napster (like the VCR) has substantial non-infringing uses, Napster is not in the same position as Sony or the other VCR manufacturers, because it (unlike Sony) has “actual knowledge that specific infringing material is available using its system” as well as the ability to “block access to [its] system by the suppliers of the infringing material.” (The emphasis is in the original.) The record companies had given Napster “actual notice” of the names of “more than 12,000 infringing files” that appeared in Napster’s database. For this reason, the court said, the *Sony* doctrine does not shield Napster from liability.

That’s a critical component of the court’s decision that many reports have overlooked. Napster is liable only when it has actual knowledge of the specific infringing files appearing in its database. How can it obtain that knowledge? The burden is on the

³ The briefs and court opinions in the *A&M v. Napster* litigation are helpfully collected together by Prof. Stuart Biegel at <http://www.gseis.ucla.edu/iclp/napster.htm>.

record companies; they must deliver the list of infringing files that are being shared over the Napster system, the names of the recording artists involved, and a “certification that [they] own or control the rights allegedly infringed” before Napster has the obligation to remove the files.

That’s not quite the victory for the record companies that many news reports suggested it was. At least as I write this (in May, 2001), Napster’s still out there, still going strong by the look of it. It ain’t over, like the man says, till it’s over.

THE OUGHT

What should copyright law say about Napster?

Let’s try to unpack that question into its difficult, and its not-so-difficult, components. Here’s the easy – at least, easier than it appears – part. Suppose we were trying to come up with a copyright law applicable *only* to information created and distributed on the global network; what would that law look like? Imagine, in other words, an impenetrable boundary between the world of atoms – “Here” – and the world of bits – “There.” Information *cannot move* across the border. Information can appear There only if created There. What copyright law would we think best for There, for that side of the border?

I understand, believe me, that this is fantasy. There is no such boundary, information moves easily back and forth from analog to digital to analog, from cyberspace to realspace and back. That is, indisputably, reality. But true knowledge, Kierkegaard said, consists of “translating the real into the probable.”⁴ Let’s indulge in this thought experiment and put the real aside for the moment – there will be plenty of time to re-introduce reality later. If we were to pretend that there is such a boundary, what kind of copyright law would we think best over There, over on the other side?

An easy question? I think it is – at least if we look at copyright not as a “natural” right but as something we impose on the world for a very specific purpose, namely to increase the overall stock of creative works. This “instrumentalist” view of copyright law

⁴ See W.H. Auden (ed.), *The Living Thoughts of Kierkegaard* (1952) at 113 (“The only reality that exists for an existing individual is his own ethical reality. To every other reality he stands in a cognitive relation; but true knowledge consists in translating the real into the probable.”).

is familiar⁵ (though it is by no means universal) as the view that, by and large, underlies U.S. copyright law. This is Copyright 101: we give legal protection to creative expression in order to induce creative activity, to give creators an incentive to produce new works of authorship by promising them the opportunity to profit from their labors via a market in their works; we tolerate the “monopoly” that we grant to these creative artists because, and to the extent that, it is a means to that end.. We seek in our copyright law the right balance, the optimum point, between protection that is “too strong” (*i.e.*, protection that reduces creative output by making it difficult for authors to borrow from pre-existing works) and protection that is not strong enough (*i.e.*, protection that does not

⁵ The most eloquent statement of this view remains Thomas Jefferson’s, in his justly-famous 1813 letter to Isaac MacPherson:

“It has been pretended by some, (and in England especially,) that inventors have a natural and exclusive right to their inventions, and not merely for their own lives, but inheritable to their heirs. But while it is a moot question whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural . . . right to inventors. It is agreed by those who have seriously considered the subject, that no individual has, of natural right, a separate property in an acre of land, for instance. By an universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it; but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society.

It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. *If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.*

Inventions then cannot, in nature, be a subject of property. *Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any body. . . .*

give authors enough of an incentive to invest the time and energy required into producing works of value).

So: how much copyright protection do we need to induce creative activity There, on our hermetically sealed global network?

Fortunately, we have been conducting (inadvertently, to be sure) a little natural experiment over the past decade or so to help us answer this question. We know how much creative activity we'd get if there were little or no copyright protection in cyberspace, because there has in fact been, in effect, little or no copyright protection in cyberspace. Copyright has been, at best, a 'weak force' in cyberspace, routinely flouted (as the Napster plaintiffs and other copyright holders keep reminding us). Copyright "piracy" is rampant There; nobody has been voluntarily making information available on the global network in the expectation that copyright law will protect that information (and any lawyer who has been advising clients otherwise is probably guilty of malpractice).

So we can answer the question "is copyright protection needed to stimulate creative activity in cyberspace?" because we have some idea what cyberspace would look like as a "copyright-free zone" – it would look like cyberspace does today.

And what does that look like? It looks to me like the greatest outpouring of creative activity in a short span of time – the Internet itself, let us not forget, is only a quarter-century or so old, and it has been all of 7 years since the World Wide Web was loosed upon an unsuspecting world – that the world has ever seen. I recognize that I can't prove the truth of that statement (any more than I could prove its opposite, that we would have seen *more* creative activity had there been more legal protection for that activity). All I know is that cyberspace keeps growing and growing; more and more stuff keeps appearing, in new guises and new shapes; there are more and more people trying to give me information to place in my computer than I have room for. Look at my desktop, for goodness sake – real time stock quotes, the weather in five pre-selected cities, news headlines from Reuters and the Associated Press, the complete works of Thomas Jefferson, the latest scores from the English Premier League, maps of the city of my choice, maps of the distribution of information in cyberspace, powerful search tools, etc. I'm one click away from a lot of pretty interesting stuff. All at a marginal cost to me of zero. And all this without any substantial legal protection for that information at all.

It was fortunate that we actually conducted this natural experiment because without it, the conventional wisdom would have assured us that it could never happen. Without any incentive to create provided by strong property rights, we surely would have said, there will be no creative activity, and cyberspace will be a vast wasteland.

But somehow it's not. Perhaps we don't understand everything there is to understand about the need for intellectual property protection. Perhaps the world is trying to tell us something, that this is a new kind of place where things that worked well in the world of atoms don't work so well. Perhaps in these special circumstances – in a medium built upon the ability of machines to copy and to disseminate information at previously-unimaginable speeds with previously-unimaginable efficiency, and at a previously-unattainable low cost – there are other ways that creative activity can be stimulated.

Eben Moglen of Columbia Law School puts it more elegantly (and colorfully) that I:

In the world of digital products that can be copied and moved at no cost, traditional distribution structures [that] depend on the ownership of the content or of the right to distribute, are fatally inefficient. As John Guare's famous play has drummed into all our minds, everyone in society is divided from everyone else by at most six degrees of separation. Let's not concentrate on the precise number, but on the fact it reveals: the most efficient distribution system in the world is to let everyone give music to whomever they know who would like it. When music has passed through six hands under the current distribution system, it hasn't even reached the store. When it has passed through six hands in a system that doesn't require the distributor to buy the right to pass it along, after six exchanges it has reached several million listeners.

This increase in efficiency means that composers, song-writers and performers have everything to gain from making use of the system of unowned or anarchistic distribution . . . Hundreds of potential "business models" remain to be explored once the proprietary distributor has disappeared, no one of which will be perfect for all artistic producers, but all of which will be the subject of experiment in decades to come, once the dinosaurs are gone.

Musicians, though terrified of the possible losses (which the industry is doing everything to overestimate for them) are beginning to discover the enormous potential benefits. No doubt there will be some immediate pain that will be felt by artists rather than the shareholders of music conglomerates. The greatest of celebrity musicians will naturally do fine under any system, while those who are presently waiting tables or driving a cab to support themselves have nothing to lose. For the signed recording artists just barely making it at present, on the other hand, the changes now occurring are of legitimate concern. But musicians as a whole, from the top to the bottom of the current

hierarchy of success, stand to gain far more than they can lose. Their wholesale defection from the existing distribution system is about to begin, leaving the music industry--like manuscript illuminators, piano-roll manufacturers, and letterpress printers--a quaint and diminutive relic of a passé economy.⁶

We can discuss *why* all this is happening (and have an interesting discussion in the course of so doing), but it seems to me very difficult to deny that it *is* happening.

Thinking about cyberspace as a copyright-free zone might not come naturally to most of us in this room, but it sure comes naturally to my kids (and I bet to yours, too). And remember: they get to write the rules, soon. As the plaintiff record companies put it in their brief to the Ninth Circuit: “If the perception of music as a free good becomes pervasive, it may be difficult to reverse.” Indeed.

So if there were a real border between cyberspace and realspace, between There and Here, we might conclude that we don’t need strong property protection for the information There to induce creative activity, and we might be a tad more sympathetic to the millions of people who indulge in the free sharing of information over There. Why, they’re not lawless banditti out there in cyberspace – they’re implementing sound and sensible public policy!

What difference, though, does all of this make? Suppose that a “bordered cyberspace” would flourish without copyright law; so what? There is no such border; what good is it to talk as if there were? Where has this little thought experiment gotten us?

It might, perhaps, cause us to think more about what copyright can continue to work (where its needed) and can disappear (where its not). The “Napster problem” is not that people are using the tools at their disposal in cyberspace for the rapid sharing and re-distribution of information; on the contrary, that’s the *solution* to the age-old problem of finding ways to distribute information to the maximum number of people.

The “problem” consists in the ease with which information can be moved from realspace to cyberspace – “smuggled,” as it were, across a border that is insufficiently impermeable. People can, with ease, transfer information created Here – the songs, say, of Jerry Lieber and Ben Stoller, two of the plaintiffs in the Napster suit (who just happen to be two of America’s greatest songwriters) – and move it There, onto the global

⁶ Eben Moglen, “Liberation Musicology,” <http://www.thenation.com/doc.mhtml?i=20010312&s=moglen>.

network. And once the information is There, it is subject to the customs and practices of the people There – which in this case, involves rapid and efficient sharing and re-distribution.

Lieber and Stoller deserve compensation when that happens; I agree with the Recording Industry Association of America (RIAA) (and many others who look at this problem) that there is something *unfair* here, that we made a bargain with Lieber and Stoller that is now being broken against their wishes. Solving the Napster problem, then, does not mean figuring out ways to impose an unnecessary copyright regime on the information circulating on the global network; it means figuring out ways to reduce the incidence of smuggling, and/or to compensate those whose works are the object of this smuggling activity.

That's not a trivial task, to be sure – but it's not an impossible one, either. Maybe I'm wrong, but I don't think that shutting down Napster gets us much closer to accomplishing it. The RIAA is right: the perception of music as a free good has become pervasive; they will not succeed with a strategy that makes all 70 million Napster users into copyright infringers. Shutting down Napster will only speed up the development of other peer-to-peer sharing technologies -- gnutella, and FreeNet technologies, for example – that will be **much** harder to shut down.

If I were working for the RIAA and trying to solve this problem, I'd focus my attention on better “border construction,” on the development and deployment of tools that would increase the impermeability of the relevant boundaries. One set of such tools are things like the Secure Digital Music Initiative – cryptographically-based protection schemes to prevent the unauthorized movement of information – do just that, creating a boundary between a world of protected information and a world of unprotected information. Unlike many of my colleagues on the academic side of this debate, I think that these tools hold out terrific promise. If Lieber and Stoller or other artists want to “lock up” the information they have created in unbreakable cryptographic envelopes, I say more power to them. We can have, in effect, two alternative worlds, two parallel universes – one consisting of protected information, and one of unprotected information. Then we get to see which one really does stimulate creativity. Perhaps if the RIAA spent

less of its money on lawyers to shut down offending networks, and more on engineers designing a Napster-resistant security system, we'd be a little closer to that goal.

I'd also look to Charles Dickens.⁷ Dickens, it turns out, was as angry about border permeability and copyright smuggling as Lieber and Stoller are. Dickens' works, too, were being transferred across a border – in his case, the border between the United Kingdom and the United States – and freely reproduced and distributed on the Other Side. It wasn't truly “smuggling,” because U.S. copyright law, in the nineteenth century, gave absolutely no protection whatsoever to works created on the other side of the U.S. border, so it was perfectly lawful to bring Dickens' works into the U.S. and to reproduce and distribute them to your heart's content. [Sound familiar?]

International copyright relations have always reflected a simple opposition between net copyright exporters (favoring reciprocal recognition of foreign copyrights) and net copyright importers (resisting such recognition). In Professor Paul Goldstein's words, “If Country A imports more literary and artistic works from Country B than it exports to Country B, it will be better off denying protection to works written by Country B's authors even if that means foregoing protection for its own writers in Country B.”⁸ The first copyright exporters (like Great Britain and France) were happy to offer to protect the works of foreign authors to countries offering reciprocal protection for their authors. On the other hand, the U.S., in its early days, was primarily an *importer* of copyrighted works, and U.S. copyright policy was designed (largely by America's first Treasury Secretary, Alexander Hamilton) precisely to promote the development of infant copyright industries within the United States; providing copyright protection only for American authors, Hamilton (and others) believed, worked to the advantage of the growing American publishing industry, because American publishers could publish cheaper versions of foreign (especially British) works (since they were not obligated to pay royalties to the [foreign] authors when they did so).

These protectionist provisions of the U.S. Copyright Act were relatively uncontroversial for the first 40 years or so, as the American publishing industry grew (at

⁷ This argument is presented in some more detail in my paper “Some Thoughts on the Political Economy of Intellectual Property: A Brief Look at the International Copyright Relations of the United States,” available at <http://www.temple.edu/lawschool/dpost/Chinapaper.html>.

least partially due to these protections). Dickens and other prominent British authors (most notably Anthony Trollope) did not take kindly to their treatment at the hands of the Americans, and they complained bitterly, and quite publicly, about the injustice of this arrangement. Dickens devoted much of his public tour of the United States in 1841-42 to this subject, as he did on a later tour in 1867, which helped to increase the awareness of the American public of this question. Trollope, in 1868, wrote “The argument . . . is that American readers are the gainers -- that as they can get for nothing the use of certain property, they would be cutting their own throats were they to pass a law debarring themselves from the power of such appropriation. . . . In this argument all idea of honesty is thrown to the winds ... [T]his argument, as far as I have been able to judge, comes not from the people, but from the book-selling leviathans, and from those politicians whom the leviathans are able to attach to their interests.”

As the nineteenth century proceeded, however, domestic voices began to be heard in support of the recognition of foreign copyrights. The first formal proposal to recognize international copyright and to remove the discrimination against foreign authors was made in 1837 by Senator Henry Clay—one of America’s most influential Congressmen and a future Presidential candidate—in the much-publicized “Clay Report.” Clay argued that American interests were harmed, not benefited, by the absence of recognition for foreign copyrights; whatever benefits American *publishers* might be reaping by virtue of the ability to reprint foreign works at low cost, Clay suggested, was offset by the benefits that American *authors* would reap by an extension of copyright to the works of foreigners. Soon thereafter, a number of the most distinguished American authors and artists—including Louisa May Alcott, William Cullen Bryant, George William Curtis, Ralph Waldo Emerson, Horace Greeley, Oliver Wendell Holmes, William Dean Howells, Henry Longfellow, Harriet Beecher Stowe, and J.G. Whittier, among many others – began to speak out on behalf of copyright protection for their foreign counterparts.⁹

It sounds like a paradox: what did American authors have to gain by an extension

⁸ The quote is from Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (1994), an excellent introduction to the history of U.S. copyright law.

⁹ These developments are marvelously described in Thorvald Solberg, “The International Copyright Union,” 36 *Yale Law Journal*, 68 (1926),.

of copyright protection to the works of their counterparts—their competitors—in other countries? The answer is two-fold. First, American authors were finding that their works, though protected by copyright in the United States, were hard-pressed to compete with inexpensive editions of foreign works; why pay a dollar for the work of an American author such as Herman Melville or Nathaniel Hawthorne when you can get the latest Dickens or Trollope for half that price or less?

And second, U.S. authors found that they were being harmed by discriminatory treatment directed against them in foreign markets; other nations were—understandably!—reluctant to give copyright protection to American authors when the United States was denying copyright protection to their authors, and American authors were accordingly frustrated in their attempts to market their works overseas.

This battle was fought where all battles about policy in a democratic society are fought: in the court of public opinion. The American people (and the U.S. Congress) ultimately were persuaded that Dickens' copyrights should be respected over Here. In 1891 – 101 years after enactment of the first U.S. Copyright statute – the U.S. Congress passed the International Copyright Act, granting, for the first time, protection to foreign works.

The moral of the story? Napster users have to be convinced that it is in their interest to grant recognition to the “foreign” copyrights held by Lieber and Stoller. They will, I predict, do so (that's easy for me to say!). We could speed that process up by a policy of non-recognition of cyberspace copyrights here in realspace; if, for example, we denied copyright protection Here for Napster's software, a constituency for reciprocal copyright recognition would develop There among cyberspace's Hawthornes and Melvilles and Emersons.

Border construction is a long and complicated process, unlikely to satisfy those looking for a quick fix. But the Future is (always) just beginning. The border between cyberspace and realspace can be as real as we want it to be; like the border between France and Belgium, we make it up as we go along, if we choose to.