

Peer-to-Peer File Transmission and Copyright Law

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Direct Copyright Infringement Using a Peer-to-Peer Service

An individual who, without permission, causes a copy of a copyrighted work to be transmitted on a peer-to-peer network from one “peer” to another has infringed:

- the reproduction right; and
- the distribution right; and
- (possibly) the public performance right

Secondary Liability of a Peer-to-Peer Service

- **Contributory Infringement.** 2 elements:
 - knowledge of infringing activity; and
 - material contribution to the infringing conduct of another
- **Vicarious Liability.** 2 elements:
 - the right and ability to supervise or control the infringing activity; and
 - a direct financial benefit from that activity

Reasons for Secondary Liability

- *Efficiency and Practicality*: “Recognizing the impracticability or futility of a copyright owner's suing a multitude of individual infringers ... the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aider and abettor.” *In re Aimster*.
- *Fairness*: When an individual seeks to profit from an enterprise in which identifiable types of losses are expected to occur, it is ordinarily fair and reasonable to place responsibility for those losses on the person who profits, even if that person makes arrangements for others to perform the acts that foreseeably cause the losses. *Polygram v. Nevada/TIG*.

Sony Corp. v. Universal City Studios (1984)

- Betamax machine (videocassette recorder)
- Primary use of Betamax was time-shifting, which court found was fair use.
- No liability for copyright infringement.
 - Constructive knowledge that customers may infringe is not sufficient.
 - *Staple article of commerce doctrine*: “The sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses. The question is thus whether the Betamax is capable of commercially significant noninfringing uses.”

Secondary Liability of a Peer-to-Peer Service

- Is peer-to-peer software a “staple article of commerce”?
- Is an operator of a peer-to-peer network liable if it doesn’t have actual knowledge of specific acts of infringement at the time they take place?
- Does the peer-to-peer service have substantial noninfringing uses?
 - And if so, what are the consequences?

A&M Records v. Napster

9th Circuit 2001

- Centralized peer-to-peer service
- Contributory Infringement:
 - Napster had actual knowledge of infringing activity.
 - When you have actual knowledge of specific infringements, it doesn't help that your product is capable of substantial noninfringing uses"
 - Napster's software and services materially contributed to the infringement
- Vicarious Liability:
 - Napster enjoyed a financial benefit
 - Napster had the right & ability to supervise the infringing conduct by blocking users' access to its service.

In re Aimster

7th Cir. 2003

- Peer-to-peer service that operated in conjunction with AIM.
- Transmissions were encrypted
 - Aimster thereby shielded itself from knowing what files were being transmitted.
- Court found contributory infringement (didn't address vicarious liability)
 - Aimster had knowledge that its users were engaging in infringing activity
 - Encryption: “willful blindness”
 - Which is equivalent to knowledge
 - “a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind”

In re Aimster

7th Cir. 2003

- It is not enough for a defendant to show that a “product or service be physically capable ... of a nonfringing use.”
- The *Sony* “cost-benefit tradeoff”:
 - Even if Aimster could show substantial noninfringing uses, it would have to “show that it would have been disproportionately costly for [it] to eliminate or at least reduce substantially the infringing uses.”

In re Aimster

7th Cir. 2003

- *Aimster* approach:
 - balance the infringing uses of the defendant's products or services against the noninfringing uses,
 - look at the actual, and not just hypothetical, uses being made of the defendant's products or services
 - determine not only what the defendant knows about the ways in which its product or service is being used, but also what it has chosen not to know.

MGM v. Grokster

9th Cir. 2004

- Decentralized services.
- “If substantial noninfringing use was shown, the copyright owner would be required to show that the defendant had reasonable knowledge of specific infringing files.”
- Grokster & Morpheus were capable of substantial noninfringing uses:
 - Wilco
- Irrelevant that the vast majority of uses were infringing

MGM v. Grokster

9th Cir. 2004

- Court acknowledged disagreement with *Aimster's* focus on probability of noninfringing uses.
 - Even at a 10% level of legitimate use, the volume of noninfringing use would indicate a minimum of hundreds of thousands of legitimate file exchanges.
- Liability under *Napster* requires specific knowledge of infringement *at the time* at which they contributed to the infringement.
 - Grokster & Morpheus had no such knowledge.
- No centralized servers; no central index of files being shared.
 - Even if they ceased operation, their users could continue to make infringing transmissions using their software.

MGM v. Grokster

9th Cir. 2004

- No material contribution:
 - Napster provided the “site & facilities for infringement”
 - E.g., centralized indexes of files
 - ; Grokster & Streamcast don’t.
 - The *users* of the software created the networks and provided access to infringing files
- No vicarious liability:
 - No right or ability to supervise and control:
 - Grokster & Streamcast didn’t have ability to block access to individual users.
 - Infringing material and index information didn’t pass through their computers.
 - Court rejected *Aimster’s* “blind eye” theory

MGM v. Grokster

9th Cir. 2004

Supreme Court granted writ of certiorari December 10.

Inducing Infringement of Copyrights Act (S. 2560)

Original Text:

- “Whoever intentionally induces any violation identified in subsection (a) shall be liable as an infringer.”
- “‘intentionally induces’ means intentionally aids, abets, induces, or procures, and intent may be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability.”

Inducing Infringement of Copyrights Act (S. 2560)

- Copyright Office Proposal:
 - Whoever manufactures, offers to the public, provides, or otherwise traffics in any product or service, such as a computer program, technology, device or component, that is a cause of individuals engaging in infringing public dissemination of copyrighted works shall be liable as an infringer where such activity:
 - (A) relies on infringing public dissemination for its commercial viability;
 - (B) derives a predominant portion of its revenues from infringing public dissemination; or
 - (C) principally relies on infringing public dissemination to attract individuals to the product or service.