



Trends in Copyright & the Web

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Background



- Internet built on concepts of shared access (TCP/IP)
- Little interest in control or protection of content
- Development of HTML/Web
- Now is a major medium for entertainment and distribution of commercial content



Implied License Environment



- Deemed to consent to such copying, distribution, performance, display and use in derivative works as is necessary or intrinsic to the working of the Internet or Web



Ownership Issues/Mindset

- Pre-Berne Convention
Implementation: Copyright notice required
- Post-Berne Paradigm: Deemed copyrighted unless otherwise disclosed
- Internet culture of the view that “information wants to be free” and that is a medium for sharing and collaborating freely

Copyright Cases

■ *Playboy v. Frena:*

- Closed BBS service
- BBS operator did not screen uploads
- When informed of alleged violation, operator removed & began monitoring for recurrence
- M.D. Fla. granted summary judgment for Playboy and found BBS operator strictly liable on direct copyright infringement analysis

Copyright Cases - Cont'd

- ***RTC v. Netcom* (N.D. Cal. 1995):**
 - Claim against Usenet operator and ISP that provides Internet access to the Usenet operator
 - RTC notified Usenet operator & ISP and requested they keep Erlich's postings off
 - Usenet operator requested proof of validity of copyright claim; refused by RTC. ISP expressed impossibility of prescreening or shutting down entire Usenet site

Copyright Cases - Cont'd

■ *RTC v. Netcom - Cont'd*

- Judge Whyte acknowledged strict liability of copyright law and no requirement of state of mind but held that “copying” entails a volitional element requiring affirmative action by the Defendant; applied a “copy machine owner” analogy
- Declared that would “not make sense” to hold operator of a computer liable “merely because ...is linked to computer with an infringing file”

Copyright Cases - Cont'd

■ ***RTC v. Netcom - Cont'd***

- **Contributory Infringement:** Knowledge + Substantial Participation (induces, causes or materially contributes) - *Financial Benefit Irrelevant*
 - Reasonable ISP standard / ability to verify copyright claim; failure to cancel = substantial participation
- **Vicarious Liability:** Control + Direct Financial Benefit From The Infringing Activity - *Knowledge Irrelevant*
 - Judge Whyte relied on the Fonovisa District Court decision in rejecting vicarious liability despite control, but *Fonovisa* later reversed by 9th Circuit.

Copyright Cases - Cont'd

■ *Fonovisa v. Cherry Auction:*

- 9th Circuit reversed “swap meet” case relied on by Netcom court in rejecting vicarious liability
- analogized “swap meet operator” to “dance hall operator” rather than an “absent landlord”
- held that admission fees, concession stand revenues and parking fees collected amount to “direct financial interest” in the draw of patrons

Perfect 10 v. Visa International (N.D. Cal. 8/5/2004)

- Credit card companies are not subject to contributory or vicarious liability for processing credit card charges for Websites that publish materials that infringe others' copyrights.
- Material contribution must bear some direct relationship to the infringing acts and must be substantial;
- Here content neutral; do not promote the sites; no content-specific regulations; do not hold out as to quality of product; concerned only with financial aspects not content – no reason to believe could not operate but for Visa and MasterCard.
- As to vicarious liability, no control over alleged infringing activity; financial interest itself is not enough
- Contrast *UMG v. Bertelsman* (N.D. Cal. 7/14/2004) re alleged Napster control

DMCA and Safe Harbor

- **Safe Harbor Provision for ISPs ([Sec 512](#)) – OCILLA**
 - Congress intended to codify *RTC v. Netcom* result
- **Ellison v. Robertson & AOL (9th Cir. 2/10/2004):**
 - Usenet access provided by AOL
 - Contributory infringement - triable issue in that storing and allowing access may be deemed “material contribution” to the infringement, agreeing with *Napster II* and *RTC*
 - Vicarious – may be sufficient financial benefit where availability “acts as a draw” for customers; need not be “substantial” -- but here lack of evidence of this.
 - Thus, Safe Harbor issue addressed: found that while AOL would otherwise qualify, some evidence that it did not meet the threshold requirements of maintaining an adequate notification procedure in place; remanded to trial court.

Safe Harbor – Cont'd

- **Corbis v. Amazon** (W.D. Wash. 12/21/2004)
 - Amazon a “service provider” under Section 512 re its zShops.com site and entitled to Safe Harbor protection;
 - Amazon provides tools and forms for vendors; collects percentage of each sale but exercises no other control.
 - However, does have a policy against infringement and has terminated access of repeat infringers
 - Evidence of some slipping through not fatal. Held policy does not have to be perfect, only “reasonably implemented.”

Digital Millennium Copyright Act

■ Anti-circumvention provisions

- Protects against circumventing technological measures designed to protect access to copyright protected content
- Permits limited circumventing for interoperability purposes only – open question as to for fair use (see HR 107 – The Digital Media Consumer Rights Act proposed in 2004)
- *Davidson & Associates, Inc. v. Internet Gateway* (E.D. MO. 9/30/2004): Plaintiff's Blizzard Entertainment controls Battle.net, a free 24 hour gaming site for playing Blizzard games online. Members of the BnetD Project reverse engineered Blizzard's software to create a "functional alternative" emulation server software which was hosted by Defendant, Internet Gateway. The Court found violation of DMCA and rejected a Fair Use argument. An appeal to the 8th Cir. is pending. See www.eff.org

"P2P or Not P2P" – The Supreme Question

- Content industry groups aggressively pursuing P2P providers
- Tech industry concerned on innovation impact if Sony precedent discarded or new precedent giving claimed practical monopoly to content industry
- Split in the courts (9th Circuit *Grokster* approach vs. 7th Circuit *Aimster* approach) to be resolved by U.S. Supreme Court or perhaps Congress

The Background- Napster/MP3

- Initial cases involved centrally hosted or coordinated networks, similar to a BBS (Sega v. MAPHIA)
- MP3.com involved “space shifting” of music purportedly owned by individual subscribers and hosted on the defendant’s servers. Direct infringement found.
- Napster P2P network involved music residing on subscribers’ individual computers, but defendants provided an index as to where the songs could be found. Contributory & vicarious liability found.

Napster

- If not capable of “substantial or commercially significant non-infringing uses” then plaintiff need show only constructive knowledge to meet the “Knowledge” prong for contributory infringement.
- If is capable of such non-infringing uses, then must show defendant had “reasonable notice of specific [infringements] and failed to act on that knowledge to prevent infringement.” (Napster I 239 F. 3d at 1027).
- Plaintiff has burden of giving notice. (Napster II, 284 F.3d at 1096).

The Aimster Case – 7th Cir.

- IM based swapping; register a name and password on Aimster system; can designate other “buddies” (or by default all others become “buddies”) and then exchange files BUT the Aimster software encrypts the communications (“Willful blindness”); Aimster server assists in locating files being sought – somewhat like a “stock exchange” matching service but with no exchange in its “facilities” or servers. Provided tutorial on exchanging copyrighted music. Plus provided “Club Aimster” one click service.
- Sony could not de-mix the infringing from non-infringing uses in the Betamax case; found “time shifting” to be fair use and thus non-infringing.
- Also holds that the ability of a service provider to prevent its customers from infringing is a factor to be considered;

The Aimster Case – Cont'd

- Interprets Sony-Betamax case to require assessment of how probable the non-infringing uses of a product are and not merely that the product be “capable” of such substantial or commercially significant non-infringing uses.
- However, 7th Circuit implicitly interprets Sony-Betamax to preclude Contributory Infringement liability if it meets that test (whereas the 9th Circuit’s Napster case still permits liability if have specific knowledge but fail to act). Disagrees with Napster holding on that point. 334 F.3d at 649.
- Did not focus on vicarious liability, referring to issue as academic because “ostrich-like refusal to discover the extent to which system being used to infringe copyright is merely another piece of evidence that it was a contributory infringer.”
- Held that it did qualify under broad definition of the DMCA Safe Harbor language as a service provider, but noted that far from doing anything to discourage repeat infringers...Aimster invited them to do so...” disqualifying it from protection.

The 9th Cir. Grokster Case – No Contributory Infringement.

- Neither Grokster (Kazaa-type supernode) nor Streamcast (Gnutella-type decentralized) maintain control over index files.
- Capable of substantial or commercially significant non-infringing use (authorized files such as Wilco songs; public domain files such as Project Gutenberg and Prelinger Archive);
- Notice of specific infringement not received at time where “materially contributed” to the infringement; when notified, could not do anything about it.
- Also found do not materially contribute to infringement – no site and facilities provided; files don’t reside on defendants’ computers and defendants cannot suspend user accounts. Not “access providers.”
- Streamcast XML file for user software parameter retrieval and Sharman’s maintenance of root nodes with list of currently active supernodes, are “too incidental” to be deemed to “facilitate infringement.”

The 9th Circuit Grokster Case – No Vicarious Infringement

- Sony-Betamax is inapplicable to this analysis; vicarious liability treated interchangeably with contributory liability issue there.
- Found no dispute that direct infringement by third parties and direct financial benefit via advertising revenue exists;
- Held no right and ability to supervise the infringers, so no vicarious liability can exist. Reference to Dance Hall and Landlord cases.
- No registration and login required so no practical way to terminate access. IP address blocking also ineffective where dynamic IP address instead of static. Can not selectively “evict” individual violators as in *Fonovisa*.

Grokster Case Briefs – S. Ct.

- 26 *Amici* briefs filed supporting the two Respondents
- 19 filed supporting the two groups of Petitioners (music and movie groups)
- 9 briefs filed neutral as to result
- Much more far reaching impact than just on P2P and file-sharing: lining up to be a content versus technology showdown – but consider ironies of blurring lines (e.g., Sony and AOL/Time Warner)
- Chief Justice Rehnquist was a dissenter in the Sony/Betamax case
- Oral argument set for March 29th

Judicial Deference?

- “Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials...”
 - Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984)
- Both 9th and 7th Circuits agree that content industry desire to change the Sony precedent should be addressed to Congress rather than the courts
- Congress failed to proceed with major legislation pending outcome of Grokster
- Differing views of Sony’s application may force Supreme Court to act despite its protestations in the quote in Sony itself.

Q&A

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