

# Intellectual Property and Designers of Music Information Retrieval Systems



Michael W. Carroll  
Assistant Professor  
Villanova University School of Law

# Third Party Liability Under Copyright Law



Contributory Infringement  
Vicarious Liability

# Third Party Liability

- The Designer or Operator of a Music Information Retrieval System (MIRS) can be held liable for the infringing actions of users of the MIRS.
- Two theories of liability might apply:
  - Contributory Infringement, or
  - Vicarious Liability

# Contributory Infringement

- Knowledge of the Direct Infringer's Infringement(s);
    - Actual knowledge
    - Constructive knowledge
- and
- "Substantial Participation" in, or "Material Contribution" to, the Infringement(s).

# Contributory Infringement

## ■ Actual Knowledge

- Does notice from plaintiff give defendant actual knowledge?
- What other evidence might support showing of actual knowledge?
  - Copyright notice?
- In the *Napster* case, company memos referring to users' downloading "pirated" music was evidence of actual knowledge.

# Contributory Infringement

- Constructive Knowledge
  - Evidence that the defendant “should have known” that users are using the MIRS to infringe music copyrights.
  - If users provide the music information that others retrieve, should the designer be held to know that some infringing files will be exchanged?

# Contributory Infringement

- Constructive Knowledge
  - Courts look at the circumstances to determine whether a third party should have known of infringing activities.
  - Once the copyright owner alerts the third party of user infringement, the third party must at least make a reasonable inquiry to investigate the allegations.

# Constructive Knowledge – Sony

- Should the designer of a technology that enables copying be held to have constructive knowledge of any infringing uses made of the technology?
- In *Sony*, the Court held that VCR manufacturers did not have constructive knowledge of infringing copies made by television viewers.
- The Court said that a manufacturer of a copying technology does not have constructive knowledge so long as the technology is capable of “substantial non-infringing uses.”
- In *Sony*, the “substantial non-infringing use” was copies made for “time-shifting”.



# Constructive Knowledge – Napster

- The *Napster* court extended *Sony* to computer *systems*.
- The *Napster* court also held that the designer or operator of a system does not have constructive knowledge of infringement so long as there are *potential* substantial non-infringing uses.

# Substantial Participation

- Netcom and Napster stand for the proposition that providing computer network services that enable infringing reproductions and distributions is substantial participation.

# Vicarious Liability

- Right and Ability to Control Infringements
- Direct Financial Benefit from infringing activities.
- The classic case is holding an employer liable for the employee's infringing activities.
- Liability is strict. Knowledge of infringement not necessary.

# Vicarious Liability

- Right and Ability to Control Infringements
- The Napster decision has good news and bad news for MIRS designers.
- The good news is that copyright law does not require a designer to design the system to minimize infringing activities - the law applies to the system as designed.
- The bad news is that any ongoing operation of the system may be interpreted as having the power to control infringing uses of the system.

# Vicarious Liability

## ■ “Direct Financial Benefit”

- How “direct” must the financial benefit be?
- One court has held that an Internet Service Provider’s flat fee price structure gives it no marginal benefit from carrying infringing posts.
- The *Napster* court took a broad view.
  - The court held that Napster received a direct financial benefit from trading of infringing files because Napster’s future revenues will depend on size of userbase, and
  - copyrighted music “acts as a draw” to increase the size of the userbase.

# FAIR USE

- Judicially-created doctrine.
- Not all unauthorized uses of copyrighted works harm the owner's *economic* interests in the work.
- In essence, fair use permits a court to balance the value of the allegedly infringing work against the harm to the copyright owner before finding liability.

# FAIR USE

- MIRS designers should know about fair use for at least two reasons:
  - MIRS designers likely make temporary copies of music information during the design and testing phase.
  - MIRS designers and operators also can raise their *users'* fair use defense if sued under a theory of third party liability.

# FAIR USE

- Purpose and character of the use.
  - Is the infringing work transformative?
    - If yes, then the defendant is adding value and less likely to be displacing sales.
    - What proportion of the defendant's work uses the copyrighted work?
  - Is it a commercial use?
    - If the defendant is gaining revenue, more likely to be harming copyright owner on the market failure view of fair use.



# FAIR USE

- Nature of the work
  - The more “original authorship” that’s expressed in the work, the more material is possible to infringe.
  - Musical works gets more weight under this factor than a factual compilation.

# FAIR USE

## ■ Amount taken

- Clients always want “rules of thumb”.
- What proportion of the copyrighted work was used?
- Even if a very small percentage, what’s the *economic value* of the portion used? (The *Nation* held liable for using a small portion of Pres. Ford’s memoirs because it was the most valuable part).

# FAIR USE

## ■ Harm to the Market

- The most important factor.
- Measured as to current and potential markets?
- How to measure a “potential market”?
  - Was it possible for defendant to get a license?
  - If not, is it because transaction costs were prohibitive or plaintiff has not yet offered such licenses?

# FAIR USE

## ■ Harm to the Market

- In *Napster* and other cases, defendant usually argues that its activities actually benefit the copyright owner.
- This form of the argument usually is not persuasive. Courts routinely respond that it is up to the copyright owner to decide how to exploit the work.

■ Questions?