Intellectual Property and Designers of Music Information Retrieval Systems

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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.”
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 get 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?