

## FACE THE MUSIC: An Update on the Law and Policy of File Sharing

Steven J. McDonald  
General Counsel  
Rhode Island School of Design

---

---

---

---

---

---

---

---

## Who Are You, Who Who, Who Who? I Really Want to Know

- 1) How many have students who have been sued for file sharing?
- 2) How many have received pre-litigation settlement letters?
- 3) How many have received subpoenas?
- 4) How many have received DMCA notices?
- 5) How many have students who are engaged in P2P file sharing?

---

---

---

---

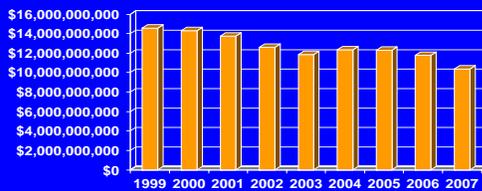
---

---

---

---

## Sympathy for the Devil



Annual sales of recorded music – RIAA

---

---

---

---

---

---

---

---

I Want You to Want Me,  
I Need You to Need Me

---

---

---

---

---

---

---

---

Stuck in the Middle with You

---

---

---

---

---

---

---

---

Liability: Users  
(50,000,000 Elvis Fans  
Can't Be Wrong?)

---

---

---

---

---

---

---

---

## I Fight Authority, Authority Always Wins

- Direct infringement: "Anyone who, **without the authorization** of the copyright owner, **exercises any of the exclusive rights** of a copyright owner, . . . is an infringer of copyright."

---

---

---

---

---

---

---

---

## Fear of Music

- Exclusive rights include copying and distribution, the very functions that are at the heart of file-sharing
- (Very) strict liability
  - Knowledge and intent are irrelevant to liability
  - "Innocent' infringement is infringement nonetheless."
  - Potential liabilities include as much as \$150,000 per infringement, plus attorney fees and possible criminal penalties

---

---

---

---

---

---

---

---

## Don't Think Twice, It's All Right

- "Space shifting" your own music for your own personal use generally is regarded as fair use
  - see, e.g., *RIAA v. Diamond Multimedia Systems* (9th Cir. 1999)
  - "Record companies have never objected to someone making a copy of a CD for their own personal use. We want fans to enjoy the music they bought legally." – *RIAA web site*
- Transferring physical possession of a CD to someone else is protected under the "first sale" doctrine

---

---

---

---

---

---

---

---

## But You Said It's Nice to Share

- "Sharing" with 10,000,000 of your closest personal friends is neither
- "Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights." – *A&M Records v. Napster (9th Cir. 2001)*

---

---

---

---

---

---

---

---

## I Fought the Law, and the Law Won

- *BMG Music v. Gonzalez* (N.D. Ill. 2005)
  - Summary judgment – no need for trial
  - Pre-purchase "sampling" is not fair use
  - "Innocent" infringement: "Ignorance is no defense to the law."
  - 30 downloads = \$22,500
    - Statutory *minimum* of \$750 per song infringed

---

---

---

---

---

---

---

---

## Gypsies, Tramps, and Thieves

"Gonzalez's theme that she obtained 'only 30' . . . copyrighted songs is no more relevant than a thief's contention that he shoplifted 'only 30' compact discs, planning to listen to them at home and pay later for any he liked."

– *BMG Music v. Gonzalez* (7th Cir. 2005)

---

---

---

---

---

---

---

---

### Face the Music

- *Capitol Records v. Thomas* (D. Minn. 2007)
  - First (and still only) case to go to trial
  - Five-minute deliberation: willful infringement
  - Juror: "She's a liar."

---

---

---

---

---

---

---

---

### Rhythm is Gonna Get You

---

---

---

---

---

---

---

---

### Now Give Me Money, That's What I Want

- 24 songs = \$222,000
  - \$9,250 per song
  - Two jurors wanted to impose the statutory maximum of \$150,000 per song (\$3,600,000)
  - iTunes value = \$23.76
  - Publicity value = priceless

---

---

---

---

---

---

---

---

## You're So Vain, You Probably Think This Song is About You

"Plaintiffs and their supporters assert that making a work available for distribution is sufficient. . . . [T]here is no liability for an attempt to infringe under the Copyright Act . . . . Liability for violation of the exclusive distribution right . . . requires actual dissemination."

– *Capitol Records v. Thomas* (D. Minn. 2008)

---

---

---

---

---

---

---

---

## Sorry Seems to be the Hardest Word

- Failure to state a claim
- Rule 11 violations
- Failure to join an indispensable party
- Invasion of privacy
- Abuse of process
- Copyright misuse
- . . .

---

---

---

---

---

---

---

---

## Liability: Software Providers (Send Lawyers, Guns, and Money)

---

---

---

---

---

---

---

---

### With a Little Help From My Friends

- Contributory infringement: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer.'"

---

---

---

---

---

---

---

---

### Let's Go to the Videotape

"[T]he 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."

– *Sony Corp. v. Universal City Studios (U.S. 1984)*

---

---

---

---

---

---

---

---

### Neither a Borrower Nor a Lender Be

"Here, it is undisputed that there are substantial noninfringing uses for Defendants' software – e.g., distributing movie trailers, free songs or other non-copyrighted works; using the software in countries where it is legal; or sharing the works of Shakespeare. . . . [T]he Morpheus program is regularly used to facilitate and search for public domain materials, government documents, [and] media content for which distribution is authorized . . . [or] as to which the rights owners do not object . . . ."

– *MGM Studios v. Grokster, Ltd. (C.D. Cal. 2003)*

---

---

---

---

---

---

---

---

## The Day the Music Died

"The question is under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product. We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."

— *MGM Studios v. Grokster, Ltd.* (U.S. 2005)

---

---

---

---

---

---

---

---

---

---

## It's the Same Old Song, But with a Different Meaning Since You Been Gone

- When the lawsuits started, Kazaa re-incorporated in Vanuatu for "tax reasons"

---

---

---

---

---

---

---

---

---

---

## Liability: ISPs (The Halls are Alive with the Sound of Music)

---

---

---

---

---

---

---

---

---

---

## Together Again

- Contributory infringement: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer.'"

---

---

---

---

---

---

---

---

## You Like to Think That You're Immune to the Stuff, Oh Yeah

- However, the Digital Millennium Copyright Act (DMCA) provides ISPs with two important safe harbors from liability in this context:
  - Information Residing on Systems or Networks At Direction of Users (Hosted Content)
  - Transitory Digital Network Communications (Conduit)

---

---

---

---

---

---

---

---

## General Conditions for Eligibility

- Must accommodate, and not interfere with, "standard technical measures"
- Must adopt, inform users of, and "reasonably implement" a policy that provides for the termination of the accounts of "repeat infringers" in "appropriate circumstances"

---

---

---

---

---

---

---

---

**Nobody's Perfect**

"We hold that a service provider 'implements' a policy if it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications."

– *Perfect 10, Inc. v. CCBill LLC* (9th Cir. 2007)

---

---

---

---

---

---

---

---

**A Perfect Day**

"To identify and terminate repeat infringers, a service provider need not affirmatively police its users for evidence of repeat infringement."

– *Perfect 10, Inc. v. CCBill LLC* (9th Cir. 2007)

---

---

---

---

---

---

---

---

**Perfect Rejection**

"The DMCA notification procedures place the burden of policing copyright infringement – identifying the potentially infringing material and adequately documenting infringement – squarely on the owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider . . . ."

– *Perfect 10, Inc. v. CCBill LLC* (9th Cir. 2007)

---

---

---

---

---

---

---

---

## Be My Host

"A service provider shall not be liable for . . . infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider . . . ."

---

---

---

---

---

---

---

---

## Eligibility Conditions for Hosted Content Safe Harbor

- Have no *actual* knowledge that *specific* material is infringing or awareness of facts and circumstances from which it is apparent
  - Need not monitor or affirmatively seek out infringement
- "Expediently" remove or disable access to infringing material upon gaining such knowledge or awareness
- Derive no financial benefit directly attributable to the infringing activity
- Register a designated agent to receive notices of claimed infringement
- Comply with notice and takedown procedure upon receipt of a notice that "substantially complies"

---

---

---

---

---

---

---

---

## Just Passing Through

"A service provider shall not be liable for . . . infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections . . . ."

---

---

---

---

---

---

---

---

## Eligibility Conditions for Conduit Safe Harbor

- Transmission is directed by someone else
- Transmission is carried out by an automatic technical process with no selection of material by provider
- Provider does not select recipients
- Any transient copy is not "ordinarily" accessible to others or retained for longer than "reasonably" necessary for the transmission
- Material is transmitted without modification of content

---

---

---

---

---

---

---

---

## It's Fun to Stay at the D-M-C-A

- Knowledge doesn't matter
- Takedown requirement doesn't apply
- *But virtually all of the file sharing activity on our campuses involves precisely this situation*
- "That is not surprising; P2P software was 'not even a glimmer in anyone's eye when the DMCA was enacted.'" – *RIAA v. Verizon Internet Services* (D.C. Cir. 2003)

---

---

---

---

---

---

---

---

## Getting to Know You, Getting to Know All About You

"A copyright owner . . . may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer . . . . The subpoena shall . . . order the service provider . . . to expeditiously disclose to the copyright owner . . . information sufficient to identify the alleged infringer of the material . . . to the extent such information is available to the service provider."

– 17 U.S.C. § 512(h)

---

---

---

---

---

---

---

---

## Our Lips Are Sealed

"The issue is whether § 512(h) applies to an ISP acting only as a conduit for data transferred between two internet users, such as persons . . . sharing P2P files. . . . We conclude from both the terms of § 512(h) and the overall structure of § 512 that . . . a subpoena may be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity."

– *RIAA v. Verizon Internet Services* (D.C. Cir. 2003)

---

---

---

---

---

---

---

---

## Meet John Doe

- "The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of . . . a court in which the attorney is authorized to practice . . ." – Fed. R. Civ. P. 45(a)(3)
  - No sworn declaration required
  - Not limited to identity
  - No requirement of judicial approval
  - Few grounds to contest

---

---

---

---

---

---

---

---

## Speak No Evil

"In contrast to many cases involving First Amendment rights on the Internet, a person who engages in P2P file sharing is not engaging in true expression. Such an individual is not seeking to communicate a thought or convey an idea. Instead, the individual's real purpose is to obtain music for free. . . . In sum, defendants' First Amendment right to remain anonymous must give way to plaintiffs' right to use the judicial process to pursue what appear to be meritorious copyright infringement claims."

– *Sony Music Entertainment, Inc. v. Does 1-40* (S.D.N.Y. 2004)

---

---

---

---

---

---

---

---

## In a Big Country

"The first reason that Defendant's Motion to Quash is without merit is because it is premature to consider the question of personal jurisdiction in the context of a subpoena directed at determining the *identity* of the Defendant. . . . [A] court cannot render any kind of ruling on personal jurisdiction or catalog a defendant's contacts with the relevant jurisdiction before the defendant has actually been named."

– *Virgin Records America, Inc. v. Does 1-35* (D.D.C. 2006)

---

---

---

---

---

---

---

---

---

---

## Ex Parte Depression

"In accordance with Federal Rule of Civil Procedure 26(d), discovery does not commence until parties to an action meet and confer as prescribed by Federal Rule of Civil Procedure 26(f), unless by court order or agreement of the parties. A court order permitting early discovery may be appropriate 'where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.' . . . [W]ithout such discovery, Plaintiffs cannot identify the Doe Defendant, and thus cannot pursue their lawsuit to protect their copyrighted works from infringement."

– *Capitol Records, Inc. v. Doe* (N.D. Cal. 2007)

---

---

---

---

---

---

---

---

---

---

## Rescue Me

"Even if the subpoena is colorably lawful, Ohio University has a greater responsibility to its students . . . . Ohio University is in the best position to question both the propriety of the subpoena and the underlying complaint, and should do so before compromising student private information."

---

---

---

---

---

---

---

---

---

---



## Listen to What the Man Said

- As a condition of receiving federal financial aid, each institution must now certify that it:
  - "(A) has developed plans to effectively combat the unauthorized distribution of copyrighted material, including through the use of a variety of technology-based deterrents; and
  - (B) will, to the extent practicable, offer alternatives to illegal downloading or peer-to-peer distribution of intellectual property, as determined by the institution in consultation with the chief technology officer or other designated officer of the institution."

---

---

---

---

---

---

---

---