

Who's liable, for what?

Professor Wendy Seltzer
<http://wendy.seltzer.org/brooklaw/07copyright/>

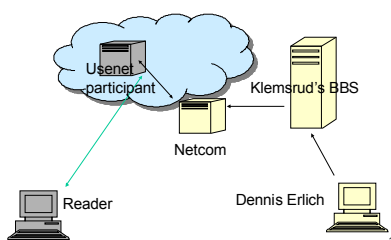
1

Who is liable for infringement?

- Copier [violation of any exclusive right]?
- Proprietor of venue where copying happens?
 - Landlord?
 - Flea market?
 - ISP?
- Maker of copying technology?
 - Xerox?
 - Sony (Betamax)?
 - Napster? Grokster?

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RTC v. Netcom



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How do we analyze Netcom's copyright liability (1995)?

- Direct:
 - Assume Erlich is directly infringing. Is Netcom?
 - Copying, Fixation (MAI)?
 - No "element of volition or causation"
- Contributory:
 - Knowledge?
 - Substantial participation?
- Vicarious:
 - Right and ability to control?
 - Direct financial benefit?
- Fair use? First Amendment?

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Then, two things happen

- Grokster (2005): Inducement
- Digital Millennium Copyright Act (1998): ISP safe harbor

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Who is liable for infringement?

- Direct infringement
- Indirect infringement
 - Contributory
 - Knowledge
 - Material assistance
 - Vicarious
 - Right and ability to control
 - Financial benefit
 - Inducement
- *Safe Harbor?*

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VIACOM

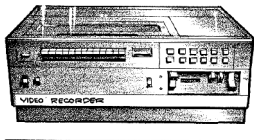
You Tube
Broadcast Yourself™

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Peer-to-Peer File Sharing

- Exchange among "peers" -- other users -- rather than with a distinct "server"
- Decentralized
 - reduces the resources and knowledge required at the "center"
 - allows the individual peers to determine what the system will carry
 - more difficult to filter?
 - more difficult to attach liability?

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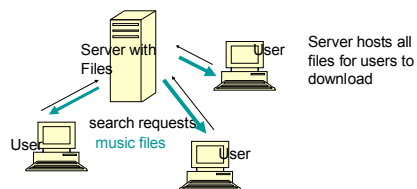
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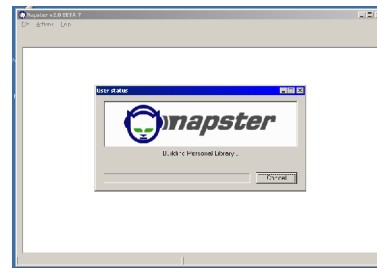
Andrew*, on flickr

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Pre-Napster Music Sites

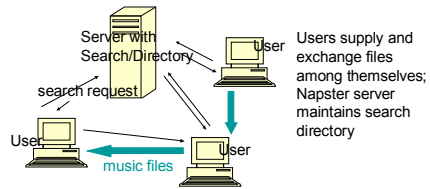


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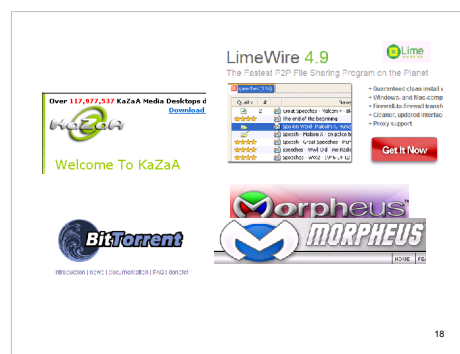
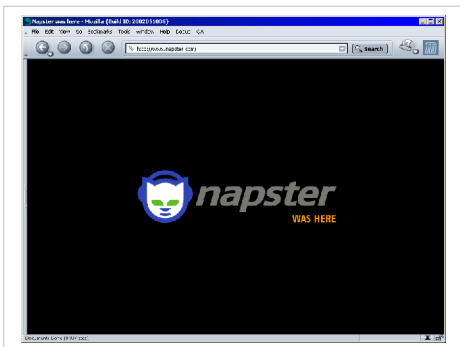
Napster 1.0



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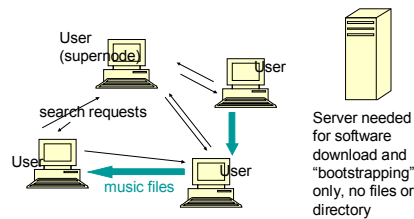


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FastTrack Network (Morpheus v1, KaZaA, Grokster)



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How do we analyze Grokster's copyright liability (2005)?

- Direct?
 - Contributory?
 - Vicarious?
 - Inducement:
 - "Vast majority" of works shared were unauthorized
 - Advertised to appeal to former Napster users
 - No attempt at filtering
 - Ad-supported model benefited from wide use
- These, and "capable of substantial non-infringing use," are not the only options
- Distribution of device "with the object of promoting its use to infringe copyright"; communication of inducing message; Purposeful, culpable expression and conduct
 - Evidence of actual infringement by users

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MGM v. Grokster

- Reading the tea leaves

Majority Souter Scalia, Thomas	Inducement
Ginsburg, Rehnquist, Kennedy	Inducement Plus insubstantial lawful use
Breyer, Stevens, O'Connor	Inducement Minus potential lawful uses can be substantial

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- How is inducement different from contributory and vicarious liability?
 - in doctrine?
 - in practice?

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- Conrad runs a music shop and sells blank CDs. He also rents his equipment to customers who want to duplicate albums onto the CDs.
- Is Conrad liable for users' infringements?
- If some music albums are offered under Creative Commons licenses and others are the users' own creations?
- If Bob asks customers to complete a log with the names of the albums they're copying so he can purchase more of "the right length" CDs?

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- Victoria owns a bar. Since she usually plays music she writes herself, she doesn't have a blanket public performance license. One night each month, she rents the space to a group of mash-up DJs. She doesn't ask where they get their music. (Lots of it is Top 40 songs.)
- Is Victoria liable for the DJs' infringements?
- If she keeps the bar open and her bartenders report greater sales on music nights?
- If she closes the bar and "rents" the space for free?

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- Inès runs an ISP. She advertises her broadband Internet service with the slogan: "Fat pipes for phat tunes," and tells potential customers that broadband will give them much faster access to online music. Is Inès liable for users' infringements?

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- One of your college friends is launching a tech start-up and invites you on as General Counsel. The first product in development, VidFinder, is a collaborative filtering engine to help users find videos they might like amid the terabytes of video content online.
- In light of *Sony* through *Grokster*, what kinds of advice do you offer VidFinder?

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ADMIN

Exam: 8 hour take-home, available any time during the exam period (April 30-May 10).
Open book, closed Google/Lexis/Westlaw.

Meetings: In-person before April 23
By email/phone/wiki before April 30

No Tuesday office hours; around any afternoon *but* Tuesday

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