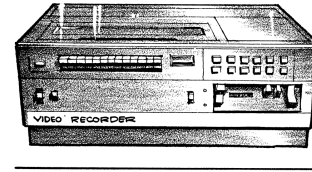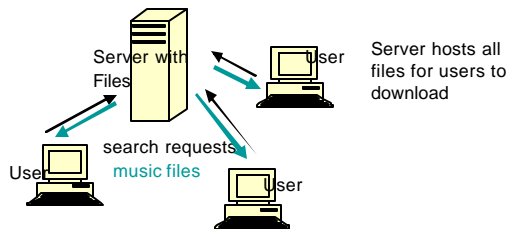## Copyright

- Recap: Direct liability
  - Ownership of Copyright
  - Infringement ("Copying")
    - Access
    - Substantial Similarity

  - Without Authorization
    - authorization by license/permission
    - or by law (fair use, first sale, compulsory license)



ON WHICH ITEM HAVE THE COURTS RULED THAT MANUFACTURERS AND
RETAILERS BE HELD RESPONSIBLE FOR HAVING SUPPLIED THE EQUIPMENT?
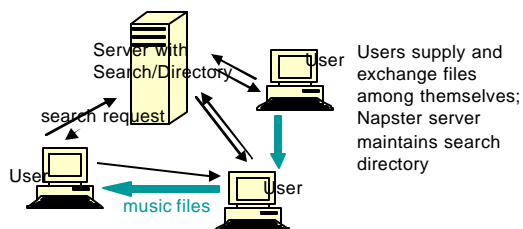
## Pre-Napster Music Sites



Server with Files

User

User

User

search requests
music files

Server hosts all
files for users to
download

## 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?
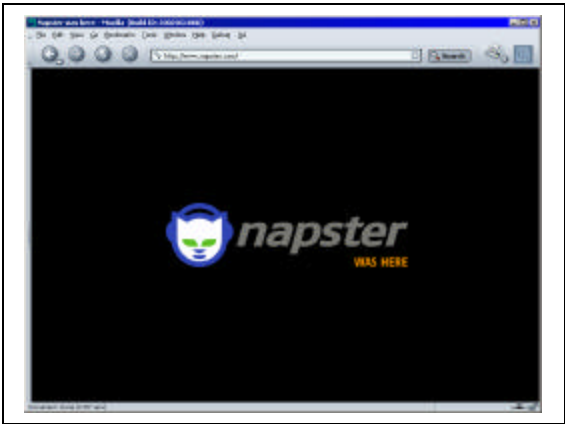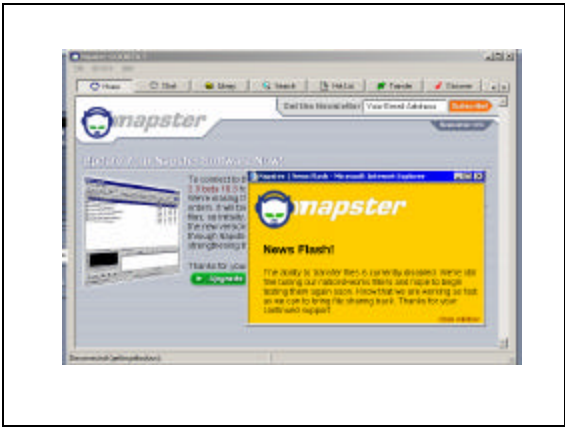  - more difficult to attach liability?

## Napster 1.0



Server with
Search/Directory

User

User

User

search request

music files

Users supply and
exchange files
among themselves;
Napster server
maintains search
directory

- Conrad runs a music shop and sells blank CDs.
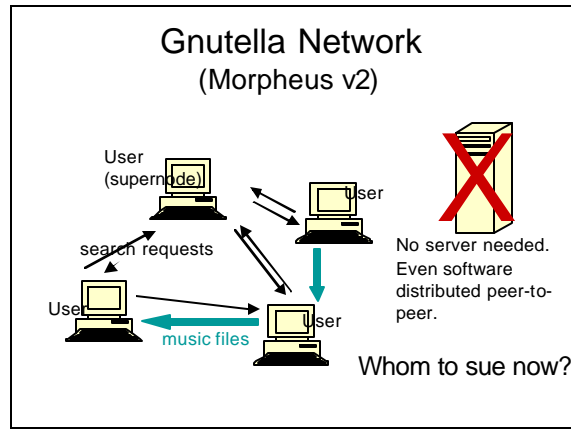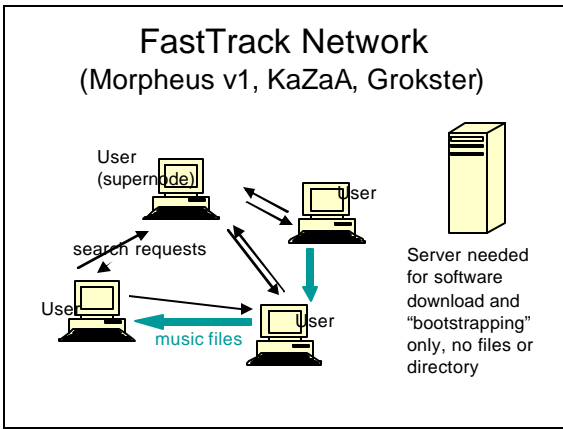  He also rents his equipment to customers who
  want to duplicate albums onto the CDs.
- Is Conrad liable for users' infringements?

- 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?

- 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?

## Napster 1.0

- After litigation started, Napster began to filter filenames from its search index when notified by copyright holders.

- From the infoAnarchy website: "You've certainly heard about the Aimster 'Pig Latin' encoder to prevent filenames from being blocked by Napster. Well, forget about it. Here's a much better solution. CatNap Proxy is a local proxy server that rot13's (simple letter shifting) all data sent to the Napster server, including searches."
- Metallica's Master of Puppets => Zrgnyyvpn'f Znfgre bs Chccrgf

## FastTrack Network
### (Morpheus v1, KaZaA, Grokster)



User (supernode)

User

search requests

User

User

music files

Server needed for software download and "bootstrapping" only, no files or directory

## Gnutella Network
### (Morpheus v2)



User (supernode)

User

search requests

User

User

music files

No server needed. Even software distributed peer-to-peer.

Whom to sue now?

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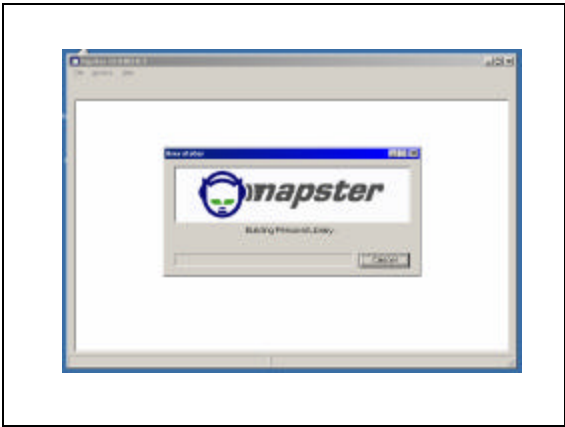
- Inès runs an ISP. She advertises her broadband Internet service with the slogan: "Fat pipes for phat tunes," and tells potential customers that broadband will give them much faster access to online music. Is Inès liable for users' infringements?

---

## Inducester?

- The founder of the Internet Archive is named Brew**ster** Kahle. Is he an inducer?

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

---

- Reading the tea leaves of *MGM v. Grokster*

| Majority | Inducement |
|---|---|
| Souter (Scalia, Thomas) | |
| Ginsburg, Rehnquist, Kennedy | Inducement Plus |
| Breyer, Stevens, O'Connor | Inducement Minus |

---

- 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*, *Napster*, and *Grokster*, what kinds of advice do you offer VidFinder?

---

# Copyright and Secondary Liability

- Indirect liability
  – Direct infringement
  – Responsibility of a second party for that infringement
    - Contributory
    - Vicarious
    - Inducement

---

## *Captiol Records, Inc. v. Does 1-250*

**Exhibit A**

Doe #14 (67.87.48.91 2003-12-04 08:26:24 (EST))

| COPYRIGHT OWNER | ARTIST | RECORDING TITLE | ALBUM TITLE | SR# |
|---|---|---|---|---|
| Elektra Entertainment Group Inc | Eagles | Hotel California | Hotel California | N38950 |
| Sony Music Entertainment Inc. | Nas | Hate Me Now | I Am | 175-149 |
| UMG Recordings, Inc. | Ja Rule | Love Me Hate Me | Rule 3:56 | 270-080 |
| UMG Recordings, Inc. | DMX | Slippin' | Flesh of My Flesh, Blood Of My Blood | 188-98 / |
| Atlantic Recording Corporation | Trick Daddy | Take It to da House | Thugs Are Us | 303-748 |
| UMG Recordings, Inc. | Shaggy | It Wasn't Me | Hot Shot | 286-657 |

---

II    For an injunction providing:

2.    For statutory damages for each infringement of each Copyr Recording pursuant to 17 U.S.C. § 504

3.    For Plaintiffs' costs in this action.

4.    For Plaintiffs' reasonable attorneys' fees incurred herein.

"Defendant shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the Copyrighted Recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (*i.e.,* download) any of Plaintiffs' Recordings, to distribute (*i.e.,* upload) any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control."

## Darknet

- The idea of the darknet is based upon three assumptions:
    1. Any widely distributed object will be available to a fraction of users in a form that permits copying.
    2. Users will copy objects if it is possible and interesting to do so.
    3. Users are connected by high-bandwidth channels.

The *darknet* is the distribution network that emerges from the injection of objects according to assumption 1 and the distribution of those objects according to assumptions 2 and 3.

## A Better Way Forward?

- If you can't stop Peer-to-Peer
- And you can't sue all its infringing users
- Shouldn't you try to license it instead?