

## Copyright and Peer-to-Peer

## Free Software Definition

- “Free software” is a matter of liberty, not price.  
[free speech, not free beer]
- “Free software is a matter of the users’ freedom to run, copy, distribute, study, change and improve the software. More precisely, it refers to four kinds of freedom, for the users of the software:
  - The freedom to run the program, for any purpose (freedom 0).
  - The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
  - The freedom to redistribute copies so you can help your neighbor (freedom 2).
  - The freedom to improve the program, and release your improvements to the public, so that the whole community benefits. (freedom 3). Access to the source code is a precondition for this.

## GNU General Public License (GPL)

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2. You may **modify** your copy, and distribute modified copies under the same terms with notice of changes under this GPL
3. You may distribute **modified object code (binaries)** iff you make source code available

## GPL’s “viral” licensing

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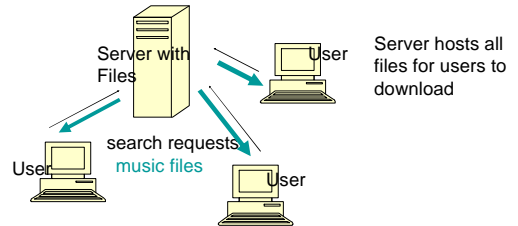
## Viral or Antibiotic?

- Sysco Cistems writes embedded networking software. A programmer finds that someone else has written the function she needs, so she incorporates that code into her program. Sysco sells the product without including source code or any reference to third-party code.
- What liability if the code is copyrighted?
- What liability if the code is copyrighted and licensed under the GPL?
- What options does Sysco have in each case?

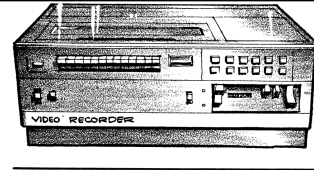
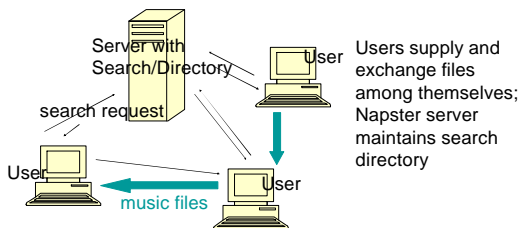
## Copyright

- 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)

## Pre-Napster Music Sites



## Napster 1.0



ON WHICH ITEM HAVE THE COURTS RULED THAT MANUFACTURERS AND RETAILERS BE HELD RESPONSIBLE FOR HAVING SUPPLIED THE EQUIPMENT?

## *Sony v. Universal (Betamax)*

- Staple article of commerce: “it need merely be capable of substantial noninfringing uses”

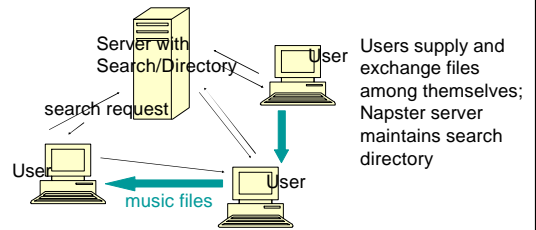
## Is time-shifting Fair Use?

- Four factors:
  - 1) Purpose and character of the use
  - 2) Nature of the copyrighted work
  - 3) Amount used
  - 4) Effect on the market

## 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



## *A&M Records v. Napster*

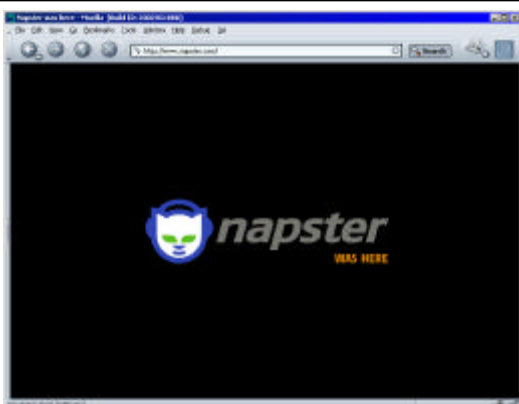
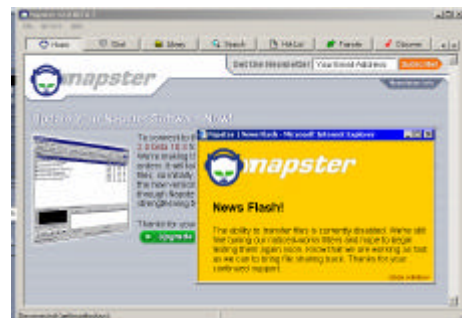
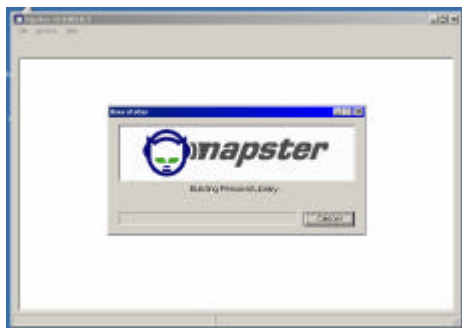
- Contributory infringement
  - Knowledge
  - Material assistance
- Vicarious infringement
  - Financial benefit
  - Right or ability to control

- 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?

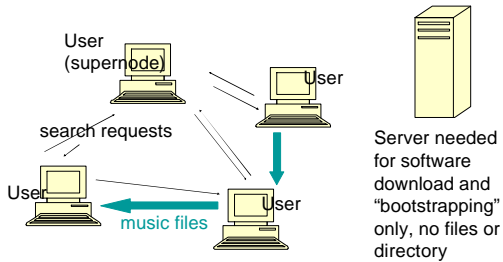
- Victoria owns a bar. Since she usually plays music she writes herself, she doesn't have a blanket public performance license. One night each month, she rents the space to a group of mash-up DJs. She doesn't ask where they get their music. (Lots of it is Top 40 songs.)
- Is Victoria liable for the DJs' 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

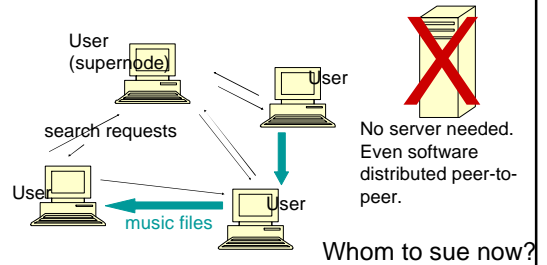
- After litigation started, Napster began to filter filenames from its search index when notified by copyright holders.
- From the infoAnarchy website: "You've certainly heard about the Aimster 'Pig Latin' encoder to prevent filenames from being blocked by Napster. Well, forget about it. Here's a much 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 => Zrgnyyvpnf Znfgr bs Chcgrf



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



### Gnutella Network (Morpheus v2)



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

## Copyright and Secondary Liability

- 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?

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

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

Exhibit A

Due #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 3:36	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's Wastin' Me	Hot Shot	286-657

1 For an injunction providing:

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

"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."

3 For Plaintiffs' costs in this action.

4 For Plaintiffs' reasonable attorneys' fees incurred herein.

## 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?