

Copyright in the Digital Millennium

Fair use and secondary liability

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Copyright

- What is protected?
 - How do you get protection?
 - What rights does it convey?
 - What infringes?
 - What defenses are available?
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- What is the source of law?
 - What is the policy behind it?

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The Four Factors

1. the purpose and character of the use
 - profit/nonprofit
 - transformative use
2. the nature of the copyrighted work
 - fact/fiction
 - published/unpublished
3. the amount and substantiality of the portion used
 - proportion, "heart"
 - used only so much as necessary
4. the effect of the use upon the potential market for or value of the copyrighted work
 - substitution
 - licensing market

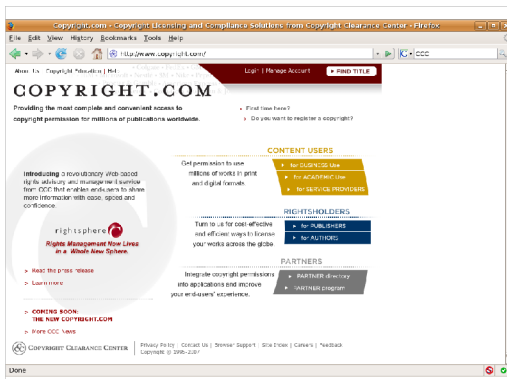
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American Geophysical Union v. Texaco



- Purpose and character of the use
- Nature of the copyrighted work
- Amount and substantiality of portion used
- Effect on the market

4



Circular arguments?

If fair use,
no licensing market



If licensing market,
no fair use

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Google Book Search

- Google's "Book Search" project aims to expand the company's search to the library shelves. Google will scan books from libraries and give the libraries an electronic copy. Google will use the scans to add book listings to search results. In response to search queries, users will be able to browse the full text of public domain materials, but only a few sentences of text around the search term in books still covered by copyright. Google permits publishers to "opt out" of having their books scanned, but will otherwise scan everything on the shelves.

- Copyright concerns?

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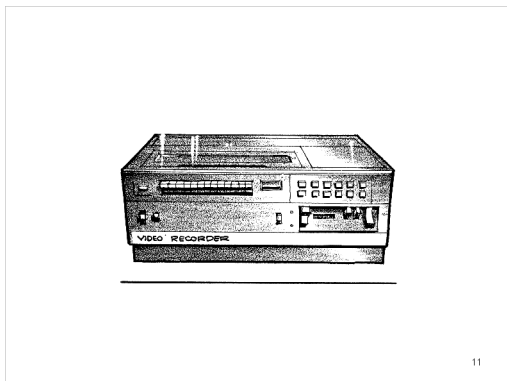
The screenshot shows the Google Books Library Project interface. At the top, it says "Google Books Library Project - An enhanced card catalog of the world's books". Below this, there are navigation links for "Home", "About", "Help", "Feedback", "Privacy Policy", "Terms of Service", "Site Map", "Help Center", "Library Project", "Book Search", and "Site". The main content area features a search bar and several informational boxes. One box titled "What does a Google Books Library Project book look like?" explains that users can see snippets of text around their search term in books still covered by copyright. Another box titled "What's the goal of this project?" states that the project aims to create a digital library of books from around the world, including books that are out of copyright.

The screenshot shows a search result for a book on Google Book Search. The page title is "Google What you'll see when you search on Google Book Search". The search term is "The Rules of the Game". The results show a snippet of text from the book, which is a chapter titled "The Rules of the Game" by John Maynard Keynes. The snippet discusses the relationship between the state and the market. The page also includes navigation options like "Snippet View", "Full Text View", and "Full Text View".

Who is liable for infringement?

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

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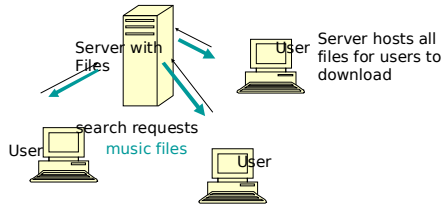
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The Digital Millennium

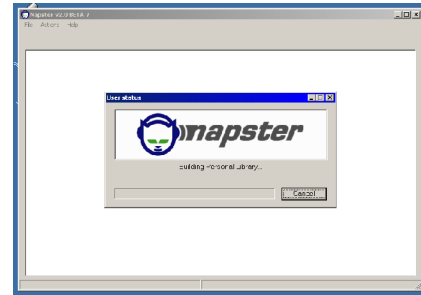
- Was new copyright law necessary?
- Is copyright reform necessary?

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Pre-Napster Music Sites



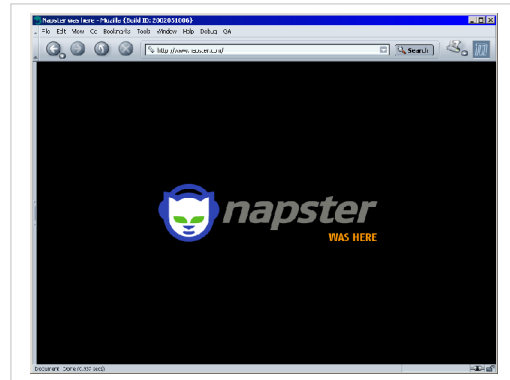
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LimeWire 4.9
The Fastest P2P File Sharing Program on the Planet

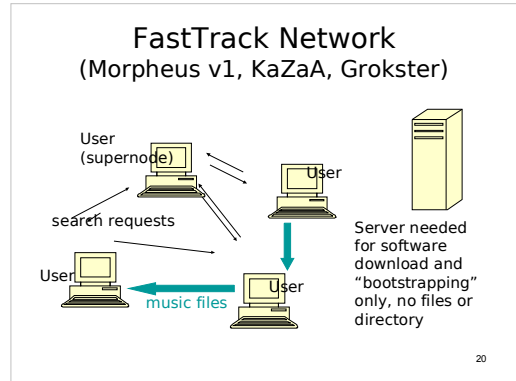
Over 117,977,537 KaZaA Media Desktops d
Download

Welcome To KaZaA

BitTorrent

MORPHEUS

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MGM v. Grokster

The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion pictures and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners.

There are legal services for downloading music and movies. This service is not one of them.

YOUR IP ADDRESS IS 153.33.204.156 AND HAS BEEN LOGGED. Don't think you can't get caught. You are not anonymous.

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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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VidFinder

- 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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DMCA

- Sec. 1201's "paracopyright," makes it unlawful to "circumvent[] protection afforded by a technological measure that effectively protects" access to a copyrighted work or a right of a copyright owner under this title
- Sec. 512 sets up a "safe harbor" for ISPs who respond to notices of claimed copyright infringement