Copyright in the Digital Millennium

Fair use and secondary liability

Copyright

- What is protected?
- How do you get protection?
- What rights does it convey?
- What infringes?
- What defenses are available?

- What is the source of law?
- What is the policy behind it?

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   - published/unpublished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

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

Circular arguments?

If fair use, no licensing market

If licensing market, no fair use
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?

Who is liable for infringement?

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

The Digital Millennium

- Was new copyright law necessary?
- Is copyright reform necessary?
Pre-Napster Music Sites

Server hosts all files for users to download

User

search requests

music files

Server with
Files

Pre-Napster Music Sites

napster

Music Playlist

for your listening pleasure. Janet Jackson: Rhythm Nation.

napster

This Here

napster

DED Kitty

UNLIMITED ACCESS TO 1,000,000+ SONGS
FastTrack Network
(Morpheus v1, KaZaA, Grokster)

User
(search requests)

Server

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

User

music files

MGM v. Grokster

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
  - 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

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?

MGM v. Grokster

- Reading the tea leaves

<table>
<thead>
<tr>
<th>Majority</th>
<th>Inducement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Souter, Scalia, Thomas</td>
<td>Inducement</td>
</tr>
<tr>
<td>Ginsburg, Rahnquist, Kennedy</td>
<td>Inducement Plus insubstantial lawful use</td>
</tr>
<tr>
<td>Breyer, Stevens, O’Connor</td>
<td>Inducement Minus potential lawful uses can be substantial</td>
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</tbody>
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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