

FILE SHARING & THE ONLINE MUSIC WAR

I. Introduction

- A. Record industry has experienced about 30% decrease in sales since 1999
 - 1. Started after Napster file sharing software became popular
 - 2. Other factors may have some affect, but existed prior to 1999 & not likely to result in such sudden & dramatic decline.
- B. In response, recording industry initiated legal campaign against illegal file sharing.
- C. In addition to asserting legal rights, copyright owners should make their works legally available in ways consumers want them.
 - 1. Recording industry was initially hesitant, but currently licensing recordings for various types of online distribution.
 - 2. Finding profitable business models remains a challenge

II. What Is File Sharing?

- A. Software programs make it possible for computers connected over Internet to search for and transfer files from one computer to others.
- B. Peer-to-peer (P2P) file sharing networks allow many different computers to be connected to each other without any centralized computer server storing files.
 - 1. Allow people to connect directly to each others' computers & download files stored on those computers.
- C. Vast majority of files "shared" contain copyrighted works (music, movies) not authorized to be made available by copyright owners.

III. Legality of File Sharing

- A. People that use file sharing programs to upload & download copyrighted works (without copyright owner's permission) are direct infringers.
 - 1. Unauthorized exercise of reproduction right (making a copy) under §106 of Copyright Act.
- B. More difficult question involves 3rd party liability - whether companies that

provide file sharing software can also be held liable for infringements committed by users of their software.

IV. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (2000).

- A. [Recording Industry Association of America](#) (RIAA), on behalf of record companies, sued file sharing company Napster in 1999 claiming Napster was guilty of copyright infringement by allowing its users to trade copyrighted sound recordings without permission.
- B. People who downloaded Napster software could log onto Napster and share MP3 files with other Napster users. MP3 music files were stored on Napster users' hard drives and the Napster software sent a list of songs on each user's hard drive to Napster's computer servers, resulting in a searchable database of all MP3 files on each user's computer.
- C. District Court - "The matter before the court concerns the boundary between sharing and theft, personal use and the unauthorized worldwide distribution of copyrighted music and sound recordings."
 - 1. Issued preliminary injunction ordering Napster to stop "engaging in or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings ... without express permission of the rights owner."
 - 2. Required Napster to take steps to monitor its service to prevent infringement.
- D. Appeals court agreed Napster could be held liable & upheld injunction
- E. **Contributory Infringement**
 - 1. Defendant has actual knowledge of the infringing activity
 - a. Napster e-mails made incriminating statements such as "Napster was created to facilitate unlawful copying," "we are not just making pirated music available but also pushing demand," and that it was important for Napster to remain ignorant of its users' real names and Internet addresses "since they are exchanging pirated music."
 - (1) Facilitating copyright infringement was important part of Napster's business strategy.
 - b. Napster promoted its service with web pages listing infringing

files.

2. Causes or materially contributes to infringing conduct of another.
 - a. Napster materially contributed to infringing conduct - provided software, search engine & servers used to infringe & enabled users to access each other's computer hard drives.

F. **Vicarious Infringement**

1. Defendant has right & ability to supervise infringing activity & has direct financial interest in infringing activity.
 - a. Napster argued it was not technologically possible to distinguish between infringing & non-infringing files, but admitted blocking access of some infringing users.
 - b. Although Napster had not yet made money, it intended to develop a business model (probably based on advertising) by taking advantage of its large user base.
 - c. Napster's value was primarily based on number of users & ability to download popular music without payment was main attraction

G. **Fair Use?**

1. District Court applied the fair use test & concluded all 4 factors weighed against fair use.
 - a. Non-transformative & commercial purpose - "Napster users get for free something they would ordinarily have to buy."
 - b. Napster users copied entire works
 - c. Napster harmed market for copyrighted music in at least two ways.
 - (1) Evidence indicated Napster use reduced CD sales among college students.
 - (2) Napster adversely affected ability to offer legal online music

V. **Grokster**

- A. Grokster and Streamcast sued by RIAA & MPAA

- B. Unlike Napster file sharing network which operated through central computer servers that listed files available on the computers of Napster users, Grokster & Streamcast file sharing systems were decentralized.
 - 1. Allowed files to be transmitted directly between users
 - 2. Grokster & Streamcast argued they were unable to exercise control over files shared by users of their software.
- C. District court held Grokster & StreamCast not contributorily liable. *MGM Studios v. Grokster, Ltd.*, 259 F.Supp. 2d 1029 (C.D. Ca. 2003) and 380 F. 3d 1154 (2004).
- D. Appeals court upheld decision in 2004. *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).
 - 1. Relied on the Supreme Court precedent from *Sony Corp. of America v. Universal City Studios, Inc.*¹
 - a. Manufacturer of Betamax video recorders used by consumers to make copies of copyrighted television shows was not liable for any resulting infringements.
 - b. Since file sharing software is capable of noninfringing use (although much more commonly used for infringement), Grokster & Streamcast were not contributory infringers since they were not directly involved in and had no actual knowledge of direct infringements by users.

VI. Record Industry Sues Its Customers

- A. *Grokster* decision put music industry in difficult position - could no longer go after companies distributing file sharing software.
- B. Only alternative left to enforce their rights was to sue individual file sharers.
- C. In 2003, RIAA filed first round of lawsuits against file sharers.
- D. Many lawsuits have been settled for \$3000 to \$5000
- E. In one case decided so far, a woman admitted downloading 30 songs & court found her fair use arguments without merit; Awarded \$22,500 judgment (minimum statutory damages of \$750 per copyright)

- F. RIAA and other copyright organizations hope legal campaign against illegal file sharing will provide a deterrent - lawsuits intended to make it clear that it is illegal to use file sharing software to upload or download copyrighted works without copyright owner's permission

VII. **Grokster & Streamcast Revisited**

- A. In mid-2005, the U.S. Supreme Court issued decision. *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005).
- B. Supreme Court held that lower courts misapplied the law.
 - 1. Instead of deciding based on *Sony* substantial non-infringing use precedent, Supreme Court held Grokster and Streamcast are likely guilty of contributory copyright infringement by inducing & encouraging users of their software to infringe.
 - 2. "One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."
- C. Balances copyright owners rights against infringers while also allowing for existence of new technologies which can be used to infringe.
 - 1. Merely distributing a device that can be used to infringe is not enough to be liable as contributory infringer. Must take affirmative action to encourage users of the device to infringe.
 - 2. Grokster & Streamcast encouraged users of their software to infringe
 - a. Intended to take the place of Napster
 - b. Made no attempt to use filtering tools to reduce infringements.
 - c. Business model based on selling advertising & illegal file sharers are the audience for the ads.

VIII. **Grokster Aftermath**

- A. Grokster settled shortly after S/C's decision rather than face liability & huge damage award.
 - 1. Agreed to stop distributing file sharing software & to pay \$50 million music & film industry associations.

- B. Streamcast ultimately held liable
- C. After *Grokster* ruling, RIAA sent letters to other popular file sharing companies (eDonkey, LimeWire, etc.) warning them to stop encouraging infringement.
 - 1. Several ceased operation & some are attempting to develop legal file sharing systems.
 - 2. May, 2006 - Free Peer Inc. (owner of BearShare) settled for \$30 million
- D. Foreign File Sharing Decisions
 - 1. September, 2005 - Australian court ruled against file sharing company Sharman Networks (owner of Kazaa software).
 - 2. Other decisions in Korea, Taiwan, etc.

IX. **Impact of File Sharing Lawsuits**

- A. Decrease in Illegal File Sharing?
 - 1. File sharing decreased substantially after *Grokster*, but then gradually increased
 - 2. Increase may be limited as a result
 - 3. Increase largely in foreign countries
- B. Public Awareness
 - 1. Maybe most important result - people made aware of illegality
 - 2. Parents know to supervise children
 - 3. Some people switch to legal online music services.
- C. Legitimate Alternatives
 - 1. *Grokster* decision has enabled legal online music business to develop (Apple's iTunes, Rhapsody, etc.)
 - 2. Main obstacle is still illegal file sharing.

X. **Recent Online Music Controversies**

A. YouTube

1. Video sites that allow users to post videos (often copyrighted works used without permission)
2. Movie & TV companies want some type of royalty system

B. Illegal Link Sites

1. Search Engine/Portal Sites
 - a. Example: Baidu in China - sued by IFPI
2. Guerrilla video sites - provide lists of links to infringing music & video content
3. Can these sites be liable as contributory or vicarious infringers under U.S. copyright law?