Digital Transactions: Part Two: Assignment 10

Rowe v. New Hampshire Motor Transport Ass'n (2008)

- Congress deregulates trucking
  - State law preemption
    - "[A] State ... may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... With respect to the transportation of property."
- State of Maine law
  - "receipt verification" provision
  - "deemed to know" provision
- Preempted because . . .
- Maine's ability to legislate for public health?

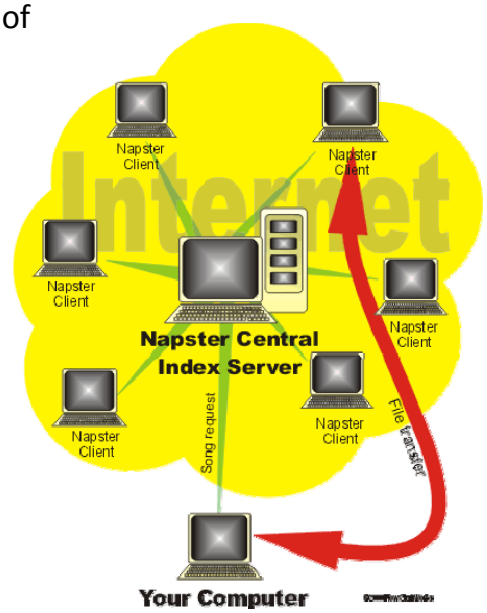
> [T]he state law is not general, it does not affect truckers solely in their capacity as members of the general public, the impact is significant, and the connection with trucking is not tenuous, remote, or peripheral. The state statutes aim directly at the carriage of goods, a commercial field where carriage by commercial motor vehicles plays a major role. The state statutes require motor carrier operators to perform certain services, thereby limiting their ability to provide incompatible alternative services; and they do so simply because the State seeks to enlist the motor carrier operators as allies in its [tobacco] enforcement efforts.

Pluralist Regulation of online conduct

- Transnational cyberspace law
- Intermediaries . . .
  - ISP
  - Payment intermediaries
  - Online auction operators
  - Search engines
  - Domain name system
  - Package delivery companies
- Norms
- Coordinated private action
- Code

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)

- Collective directory to show availability of currently connected client computers
- Uploading file names violates distribution right
- Downloading files violates reproduction right
- Fair Use?
  - Purpose & character
    - Not transformative
    - Commercial
  - Nature of the work
  - Amount used
  - Effect on market

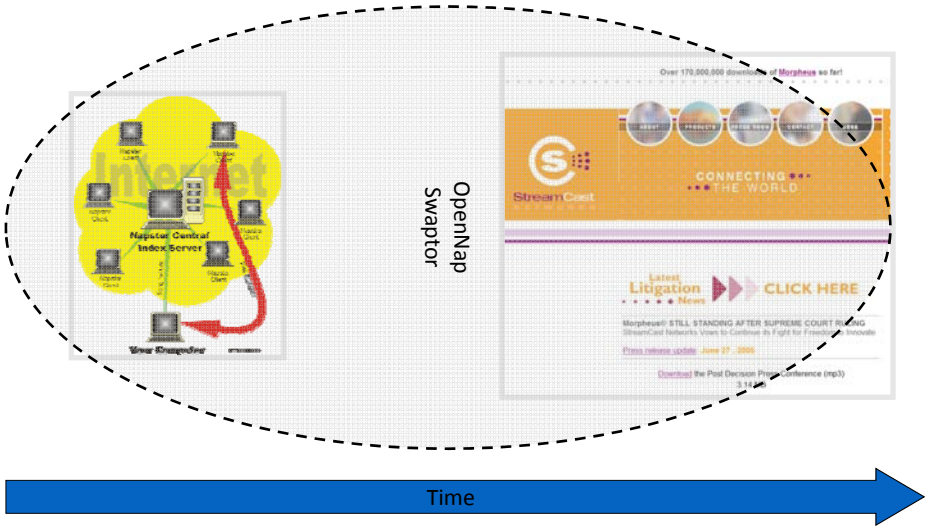


Metro-Goldwyn-Mayer v. Grokster (2005)

Metro-Goldwyn-Mayer v. Grokster (2005)

- Defendants
  - Grokster/FastTrack
  - Streamcast: Morpheus/Gnutella
- Some responses to user emails with guidance about playing downloaded movies
- "active steps to encourage infringement"
  - Streamcast trying to harvest from Napster users
- Business model?
- District Court?
- 9th Circuit?
  - No liability under Sony "safe harbor" to contributory infringement
- MGM argued a vicarious liability theory

Metro-Goldwyn-Mayer v. Grokster (2005)



Metro-Goldwyn-Mayer v. Grokster (2005)

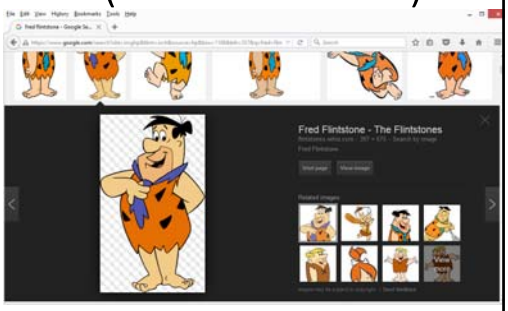
- For copyright, Supreme Court uses a new mode of indirect (secondary) liability
- Inducement
  - "Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* staple-article rule will not preclude liability."
  - "For the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that 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. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, . . . mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on **purposeful, culpable expression and conduct**, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise. "
- Evidence of "**clear expression or other affirmative steps**" and "**purposeful, culpable expression and conduct**"
  - Inducing message[s] to users and internal statements
  - "neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software "
  - "complement to the direct evidence . . .[ad networks]"

Metro-Goldwyn-Mayer v. Grokster (2005)

- Ginsburg concurrence
  - GIMF for both inducement and contributory liability
    - Grokster and StreamCast non-infringing use evidence is anecdotal
  - Sony rule: "substantial" or "commercially significant" noninfringing uses
- Breyer concurrence
  - 9th was correct on Sony rule as it influences the contributory infringement analysis
    - Rich and full record before the Dist. Ct. in Sony
    - Percentages of non-infringing use are comparable
  - Let's not re-litigate the Sony rule or the Grokster/StreamCast contributory liability in concurrences
  - Benefits of Sony rule; reinterpretation of "capable"

Perfect 10, Inc. v. Amazon.Com, Inc. (9th Cir. 2007)

- Action against google and Amazon.com
- Display right violation
  - Google's computers store thumbnail versions of Perfect10 pictures and communicate those thumbnail versions to users
  - These Perfect10 pictures were posted on the internet by third-parties without authorization
  - But, framed full-sized images are not a display right violation

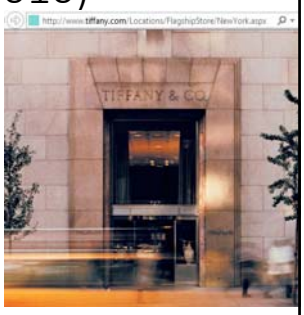


- Distribution right violation
  - No, for full sized images, because only a link is communicated to users; google doesn't store the images
- Fair use of the thumbnails with respect to the display right violation
  - This use is fair, follows Kelly v. Arriba
- Secondary liability
  - There is direct infringement by third parties (but not for cache copies)
  - Contributory . . . substantial non-infringing uses {Dist. Ct. error here}
  - Inducement . . .
  - Vicarious . . .

Perfect 10, Inc. v. Visa Intl Service Ass'n (9th Cir. 2007)

- Perfect10 suing financial intermediaries that enable payments for those websites that post infringing images
- Dist. Ct. – failure to state a claim
  - "The salient distinction is that Google's search engine itself assists in the distribution of infringing content to Internet users, while Defendants' payment systems do not."
  - Compare/contrast with Fonavisa (swap meet) and Napster
- Contributory / inducement / vicarious
  - Inducement – communicating an inducing message to users
  - No claim stated under any of the three theories
- No claim stated under California state law claims
- Kozinski dissent
  - Contributory – "could take simple measures . . ." – payment is an essential step in the stolen content websites selling the pirated images – location services (Google, possibly a contributory infringer) versus payment services
  - "Credit cards already have the tools to police the activities of their merchants, which is why we don't see credit card sales of illegal drugs or child pornography"

Tiffany (NJ) Inc. v. eBay, Inc. 600 F.3d 93 (2d Cir. 2010)



- Tiffany "buying programs" to test degree of counterfeit merchandise sold on eBay
- eBay anti-counterfeiting measures, "fraud engine," VeRO program, "About Me" page on eBay whose content is provided by Tiffany
- eBay advertising of brands like Tiffany
- Dist. Ct. bench trial opinion in favor of eBay on: direct trademark infringement, contributory TM infringement, dilution, false advertising
- Contributory TM infringement
  - Intentionally induce or supply with KorRtoK of infringement (*Inwood* test)
    - But, the knowledge must be of specific acts of infringement
- False advertising
  - Only issue remanded to the Dist. Ct.

Applications

- Trafficking
- Internet Gambling
- Child Pornography

Assignment Ten Problem

- Camford Books