Internet Law

- Module 7
- Controlling Digital Goods: Copyright

17 USC § 102(a)

- Copyright protection subsists, in accordance with this title, in original works of authorship ***fixed*** in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a ***machine*** or ***device***.
  - Words in blue bold italics have definitions in section 101.
  - The definitions section also describes various types of “works of authorship”

§101 - A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Idea-Expression Dichotomy

102(a)	Copyright protection subsists, in accordance with this title, in original works of authorship . . . ***[expression]***
versus	
102(b)	In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. ***[idea]***

Illustrative Works - § 102

1) literary works
   - including non-literal elements such as structure, organization and sequence, but not extending to names, titles and slogans; the less developed a literary character, the less it can be copyrighted
2) musical works, including any accompanying words
3) dramatic works, including any accompanying music
4) pantomimes and choreographic works
   - Protection extends to written or otherwise fixed instructions for performing a work of art
5) pictorial, graphic, and sculptural works
   - Useful article doctrine poses a significant limitation on the scope of protection; scope of protection runs with degree to which author has delineated the subjects of the work; In some cases, such as photographs, drawings and maps, the limited range of expressive choices necessarily limits the scope of protection
6) motion pictures and other audiovisual works
7) sound recordings
8) architectural works
   - New category after Berne implementation in US law; pictorial representations permitted (if building visible from a public place); alterations and destruction allowed, regardless of 106(2)

Illustrative Works - § 102

1) literary works
2) musical works, including any accompanying words
   - Work must be original in its melody, harmony or rhythm, individually or in combination.
     - But, rhythm is the least likely aspect in which originality may be manifested
   - Non-dramatic musical compositions are subject to a compulsory license once released to the public – "cover license" under § 115
3) dramatic works, including any accompanying music
4) pantomimes and choreographic works
5) pictorial, graphic, and sculptural works
6) motion pictures and other audiovisual works
7) sound recordings
   - Since 1972, sound recordings are protectable independently of the musical, dramatic, or literary works which are recorded; they are a separate work; does not include sounds accompanying a motion picture or audiovisual work; no mechanism such as the "cover license;" embodied in a "phonorecord"
   - No general public performance right
   - Sometimes not clear who the "author" of a sound recording is; singer, band, studio engineer? – typically handled by contract
8) architectural works

Illustrative Works - § 102

1) literary works
2) musical works, including any accompanying words
3) dramatic works, including any accompanying music
   - one that portrays a story by means of dialog or acting and [that] is intended to be performed. It gives direction for performance or actually represents all or a substantial portion of the action as actually occurring rather than merely being narrated or described
4) pantomimes and choreographic works
5) pictorial, graphic, and sculptural works
6) motion pictures and other audiovisual works
   - AV works
     - series of related images which are intrinsically intended to be shown by the use of machines . . . together with accompanying sounds, if any . . .
   - Motion pictures
     - A subset of AV works – "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any"
7) sound recordings
8) architectural works

Derivative Works; Compilations

- is “based upon one or more preexisting works . . . [and is any] form in which a work may be recast, transformed, or adapted”
- Examples include:
  - translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation
  - a work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship
- Why have derivative works protection?
  - Chain of products; new expression from public domain materials; different markets & licensing
- Compilations
  - a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works

Exclusive Rights in © Works - § 106

- Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
  - **(1)** to reproduce the copyrighted work in copies or phonorecords [material object in which sound is fixated . . .];
  - **(2)** to prepare derivative works based upon the copyrighted work;
  - **(3)** to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
  - **(4)** in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
  - **(5)** in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
  - **(6)** in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission

For digital content, there is copying . . .

- When a work is placed into a computer, whether on a disk, diskette, ROM, or other storage device or in RAM for more than a very brief period, a copy is made.
- When a printed work is "scanned" into a digital file, a copy -- the digital file itself -- is made.
- When other works -- including photographs, motion pictures, or sound recordings – are digitized, copies are made.
- Whenever a digitized file is "uploaded" from a user's computer to a bulletin board system (BBS) or other server, a copy is made.
- Whenever a digitized file is "downloaded" from a BBS or other server, a copy is made.
- When a file is transferred from one computer network user to another, multiple copies generally are made.
- Under current technology, when an end-user's computer is employed as a "dumb" terminal to access a file resident on another computer such as a BBS or Internet host, a copy of at least the portion viewed is made in the user's computer. Without such copying into the RAM or buffer of the user's computer, no screen display would be possible

See http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf at 65-66

Distribution Right

- § 106(3):
  - "Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . .
    - to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending"
- "First sale" doctrine - § 109(a):
  - "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of ***that*** copy or phonorecord."
    - But, § 109(a) does not apply to the rental of phonorecords or computer programs for profit. See § 109(b)

Public Performance and Display Rights

- § 101 - to "***display***" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially
- § 101 - to "***perform***" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible

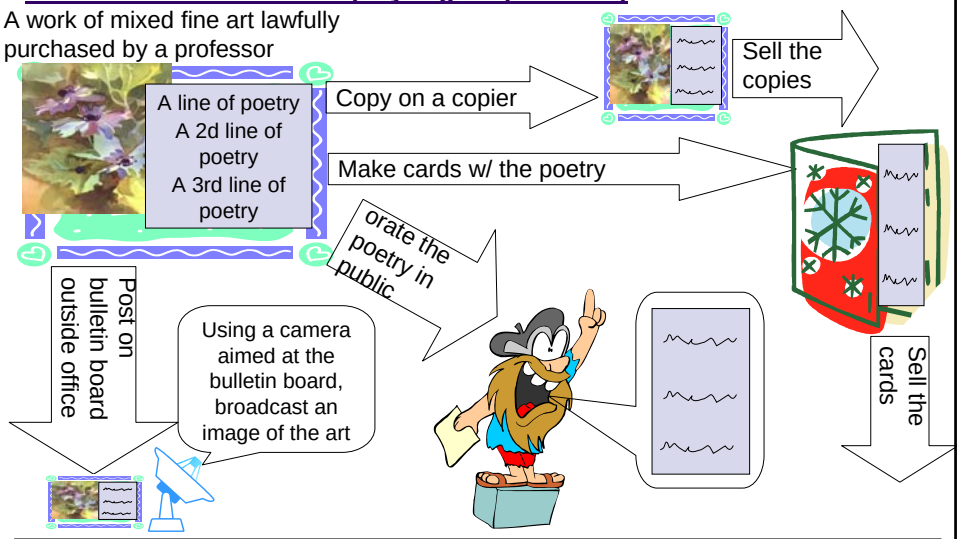
Public Performance and Display Rights

- If it moves, it's a performance; if its stays still, it's a display
- § 101 - to perform or display a work "***publicly***" means –
  - **(1)** to perform or display it at a place
    - open to the public or
    - at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
  - **(2)** to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

§ 109(d)

- The privileges prescribed by subsections
  - 109(a) [first sale doctrine] and
  - 109(c) [limitation on the display right]
  - do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

Public Performance & Display Rights (& others)



- Considering section 109, but ignoring any other possible exemptions arising from sections 107 through 121, which actions infringe which rights?

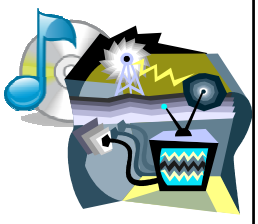
Fair Use

- Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work,
  - including such use by reproduction in copies or phonorecords or by any other means specified by that section,
- for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

- In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
  - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors

Reese – Fundamentals of Digital Music ©

- Reproduction Right
  - Musical Work versus Sound Recording
  - 17 USC §115 – “compulsory mechanical license”
  - 1995 – enter the DPD
- Performance Right
- Sound Recordings
  - No performance right until . . .
  - Digital Transmission Performance Right



Fundamentals of Digital Music ©

- Digital Transmission Performance Right (DTPR) – types and limitations
  - Interactive service "celestial jukebox"
    - Need permission from DTPR owner
  - Non-interactive
    - Non-subscription broadcast (terrestrial)
      - exempt from DTPR
      - need permission for musical work public performance
      - Not applicable to internet simulcasts
    - Non-interactive transmissions other than broadcast qualifying for DTPR compulsory license
      - Compulsory license of the DTPR (long list of detailed conditions)
      - Hypothetical web site: WebJazz
    - Non-interactive transmissions not qualifying for DTPR compulsory license
- "incidental" DPDs
- Streaming, temporary storage, and reproduction

UMG Recordings v. MP3.com (SDNY.2000)

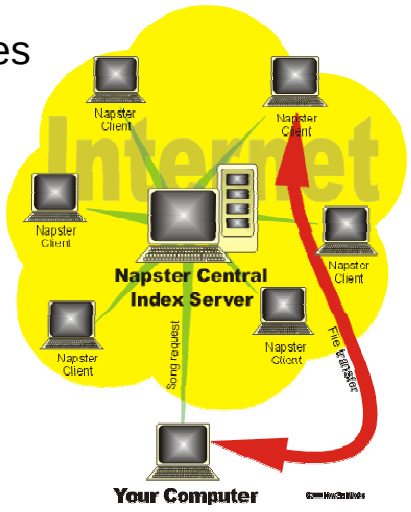
- How did My.MP3.com service work?
  - "Beam-it Service"
  - "instant Listening Service"
- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
  - Court found it commercial
  - "space shift" transformation?
- (2) the nature of the copyrighted work
  - "core" of copyright
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole
  - entirety
- (4) the effect of the use upon the potential market for or value of the copyrighted work
  - Negative or positive effects on P's markets?
- (other) – Consumer Protection
  - Relation to characterization of purpose of copyright?

Reese – Downloads

- Who makes the reproduction?
  - User
  - Web site
- Both a reproduction and a public performance?
  - Transaction cost implications in arrangements between site operator and right(s)-holder(s)
  - Copyright office view

A&M Records v. Napster (9th.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



RIAA v. Diamond Multimedia (9th.1999)

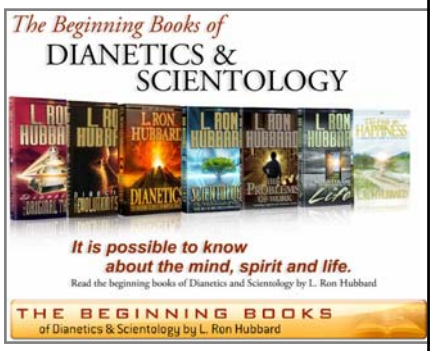
- DARDs need the SCMS

> A "digital audio recording device" is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a **digital audio copied recording** for private use . . .

- To be a DARD, "the Rio must be able to reproduce, either 'directly' or 'from a transmission,' a 'digital music recording.'"
- Directly?
  - Hard drives don't contain "only" sounds, and do contain computer programs, and thus aren't a "material object" containing a 'digital music recording'
- From a Transmission?

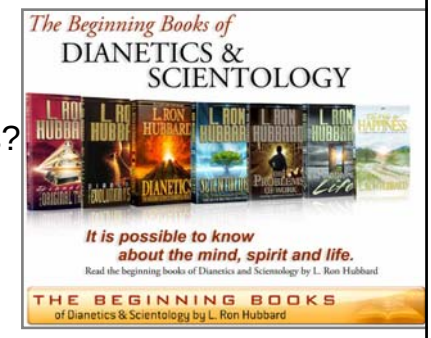
Secondary Liability – ISPs
Religious Tech. Ctr. v. Netcom (ND.Cal.1995)

- BBS/ISP liable for copyright infringement of BBS subscriber?
- Rights holder is RTC, L. Ron Hubbard works related to Scientology
- Direct
  - Volition or causation by Netcom?
    - Or, are contributing actions "automatic and indiscriminate"
    - Mere conduit?



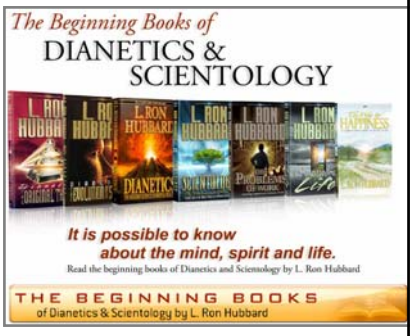
Secondary Liability – ISPs
Religious Tech. Ctr. v. Netcom (ND.Cal.1995)

- Contributory
  - w/ knowledge = Knew or Should Have Known (KorSHK)
- Situations where knowledge might not be found
  - Colorable claim of fair use
  - No copyright notices
  - Insufficient documentation from P
- Substantial participation
  - Compare to leasing premises?
  - "fair" to impose liability assuming simple preventive measures are available



Secondary Liability – ISPs
Religious Tech. Ctr. v. Netcom (ND.Cal.1995)

- Vicarious
- Right and ability to control
  - User terms
  - netiquette
  - Suspend accounts?
- Direct financial benefit
  - Proportional or fixed fees
  - Erlich's infringement doesn't enhance value/profit of Netcom's services
- First Amendment / Fair Use



ISP Safe Harbors - Ellison v. Robertson (9th.2004)

- Robertson scanning Harlan Ellison sci-fi works
- Traveling through Usenet, messages passed through AOL
  - Messages contain non-authorized scanned portions of Ellison's books
  - AOL failure to keep contact email updated
- Can a reasonably implemented policy against repeat infringers contain a faulty notice mechanism?
- If not, impact on the service provider?

17 U.S.C. 512(a)

(a) Transitory digital network communications.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if--

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

17 U.S.C. 512(b)-(d) in part . . .

(b) System caching.--
(1) Limitation on liability.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which--
(A) the material is made available online by a person other than the service provider;
(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and
(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A), if the conditions set forth in paragraph (2) are met. . . .

(c) Information residing on systems or networks at direction of users.--
(1) In general.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider-- . . . .

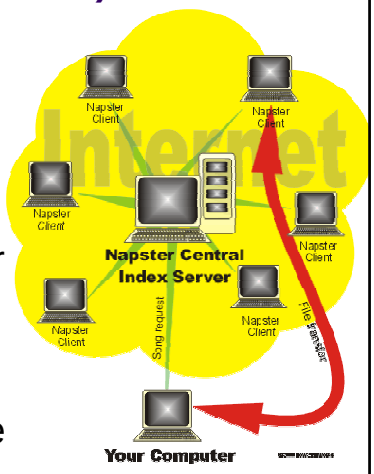
(d) Information location tools.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider-- . . .

Ellison v. Robertson (CD.Cal.2004)

- Robertson scanning Harlan Ellison sci-fi works
- Traveling through Usenet, messages passed through AOL
- §512(a) – no "takedown", but "service provider is narrowed
  - (a) and (k) definitions for limited/narrowed service provider can be analyzed as one
  - Are Usenet message copies "intermediate and transient storage" (§512(a)(4)) if they sit on AOL's servers for 14 days
  - . . . versus
    - Email or Internet connectivity
    - Hosting a web site or chatroom

A&M Records v. Napster (ND.Cal.2000)

- Does the §512(a) safe harbor apply to Napster system?
- What is the Napster system?
  - Napster browsers
  - User computers
- Is the Internet part of the Napster system?
- Is a transmission from a user computer to another user computer a transfer "through" the Napster system?
- A "routing"?
- A "connection"?



§512(a): A service provider shall not be liable for monetary relief . . . for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material ***through*** a system or network controlled or operated by or for the service provider

17 U.S.C. 512(c)

(c) Information residing on systems or networks at direction of users.--
(1) In general.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--
(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.
(2) Designated agent.--The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3) . . .

17 U.S.C. 512(c)

(c) Information residing on systems or networks at direction of users.—

. . .

(3) Elements of notification.--

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B) (i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

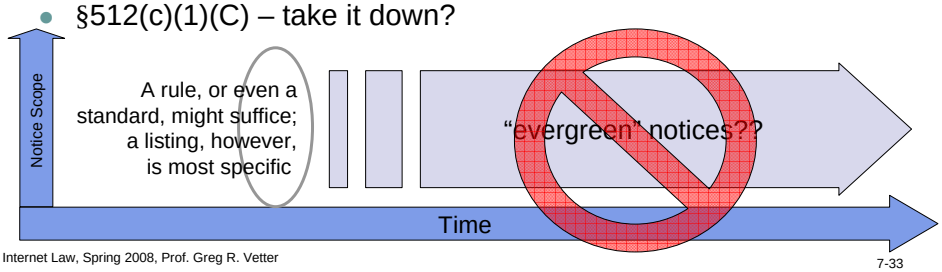
(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

ALS Scan v. RemarQ Communities (4th.2001)

- Newsgroups on RemarQ ISP servers
  - alt.binaries.pictures.erotica.als
  - User postings of ALS's copyright protected pictures
- Letter by ALS, response by RemarQ
- What statutory provision anchors whether or not RemarQ is in the safe harbor?
- What statutory provision feeds into the anchor provision?
  - What clauses are at issue?
- What degree of notice compliance is required? What degree of notice did ALS give?

Hendrickson v. Amazon.com (CD.Cal.2003)

- What is the direct copyright infringement activity?
- Notification: all Manson DVDs are unauthorized
- How long does an adequate notice remain viable?
  - Present tense statutory language
- Does Amazon.com qualify for S/H?
  - No notice due to §512(c)(3)(B) impact on §512(c)(1)(A)
  - §512(c)(1)(B) – financial benefit and control
  - §512(c)(1)(C) – take it down?



Intellectual Reserve v. Utah Lighthouse Ministry (D.Utah.1999)

- D, Utah Lighthouse Ministry, posted Handbook
- After takedown, web site content contained
  - Statements that Handbook is available elsewhere online: "*Church Handbook of Instructions is back online!*"
  - 3 web site addresses as to where
  - Posted emails encouraging traffic to these, and distribution of Handbook found there
- Are browsing users to 3 locations direct infringers?
- Outcome against preliminary injunction standard?

17 U.S.C. 512(d)

(d) Information location tools.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider--

(1) (A) does not have actual knowledge that the material or activity is infringing;
(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) [_identify w/ sufficiently specific information to locate_] shall be **identification of the reference or link**, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

Perfect 10 v. CCBill (CD.Cal.2004)

- Among various Ds is Internet Key's "SexKey" age verification system for adult web sites
- Is the facility provided by the age verification system an Information Location Tool?
- §512(d)(1) - Knowledge?
- §512(d)(2)
  - Direct financial benefit?
  - Right and ability to control infringing activity?

17 U.S.C. 512(k)

(k) Definitions.--

(1) Service provider.--(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

Sony v. Universal (1984)

- Contributory Infringement
  - One who with knowledge of the infringing activity induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a "contributory infringer"
    - What knowledge did Sony have?
- Staple article of commerce doctrine
  - Balancing a copyright holder's legitimate demand for protection, and the rights of others to engage in substantially unrelated areas of commerce
  - Sale of a product does not constitute contributory infringement if the product is widely used for legitimate purposes; it need ~~merely be capable of~~ substantial noninfringing uses
    - Dissent's test – primary purpose and effect of the device; significant portion of use is noninfringing
- With respect to authorized time shifting . . .
  - Some content producers approved, in part because such time shifting had viewer-increasing potential

Sony v. Universal (1984)

- Fair Use defense for unauthorized time shifting
  - purpose and character of the use
    - time shifting for private home use is a noncommercial, nonprofit activity
    - time shifting yields societal benefits in expanding access to free TV programming [public benefit factor?]
  - nature of the copyrighted work
    - provided free of charge
  - amount and substantiality of the portion used
    - entire work is reproduced, but this does not have its "ordinary effect of militating against a finding of fair use"
  - effect of the use upon the potential market for or value of the work [the most important factor]
    - no harm to the market has been shown: no proof of past harm to plaintiffs' market and also no substantial likelihood of future harm

Metro-Goldwyn-Mayer v. Grokster (2005)

http://www.grokster.com/

grokster

The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture 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.

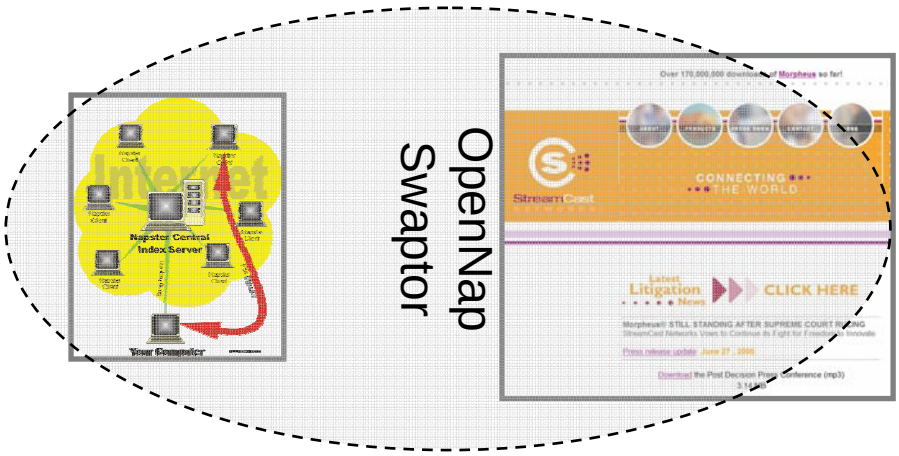
YOUR IP ADDRESS IS 129.7.212.250 AND HAS BEEN LOGGED. Don't think you can't get caught. You are not anonymous.

In the meantime, please visit www.respectcopyrights.com and www.musicunited.org to learn more about copyright.

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"