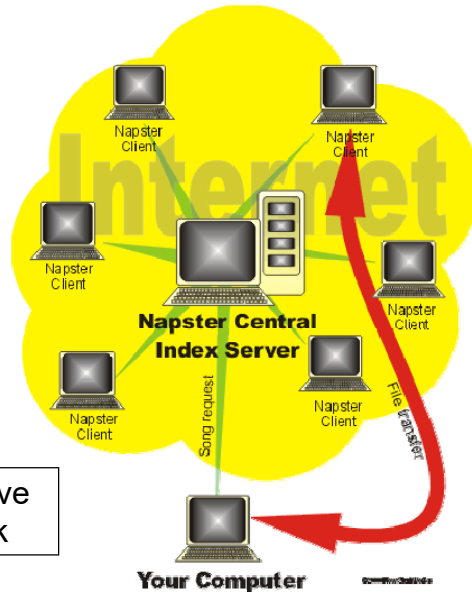


A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)

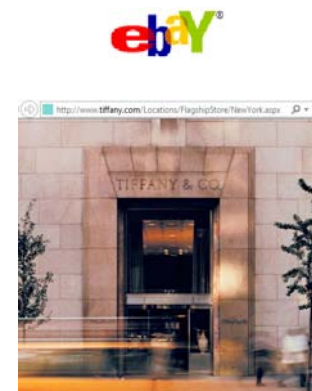
- Collective directory to show availability of currently connected client computers
- Uploading file names violates distribution right
- Downloading files violates reproduction right
- Fair Use?
 - Purpose & character
 - Not transformative
 - Commercial
 - Nature of the work
 - Amount used
 - Effect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

additional material above and beyond casebook



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.



Tiffany (NJ) Inc. v. eBay, Inc. (2d Cir. 2010)

- Contributory liability:
 - Intentional inducement, or
 - Knowledge and material contribution
- Setting equity considerations aside, who is the lowest-cost enforcer of Tiffany's rights?
- General knowledge versus specific knowledge
 - *Tiffany*: Contributory defendant must have specific knowledge of infringing acts and fail to act on that knowledge; general knowledge is not sufficient
- Inwood Laboratories Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 854 (1982) ("If a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit.")
- See also
 - Louis Vuitton v. Akanoc Solutions, 658 F.3d 936 (9th Cir. 2011) (finding website host contributorily liable; host received multiple notifications but failed to take down listings of infringing merchandise; \$31.5 million in damages)

Credit Card Service Provider Liability

- Perfect 10, Inc. v. Visa Intern. Service Ass'n, 494 F.3d 788, 83 U.S.P.Q.2d 1144 (9th Cir. 2007) (affirming 12(b)(6) dismissal of contributory trademark infringement claim against credit card companies)
 - "Perfect 10 has not alleged that Defendants have the power to remove infringing material from these websites or directly stop their distribution over the Internet. At most, Perfect 10 alleges that Defendants can choose to stop processing payments to these websites, and that this refusal might have the practical effect of stopping or reducing the infringing activity. This, without more, does not constitute "direct control." See Lockheed Martin, 194 F.3d at 985 ("While the landlord of a flea market might reasonably be expected to monitor the merchandise sold on his premises, [defendant] NSI cannot reasonably be expected to monitor the Internet.") (citation omitted)."
 - But see (Kozinski, J., dissenting)
- Gucci America, Inc. v. Frontline Processing Corp., 721 F. Supp. 2d 228 (S.D. N.Y. 2010)
 - Durango (agent) could be liable for intentional inducement contributory liability
 - Woodforest and Frontline (credit card processors) could be liable for knowledge and material contribution contributory liability