MUSIC LAW UPDATES

Don’t Shoot The Messenger: Copyright Infringement in the Digital Age

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From the humble VHS machine to Internet file swapping, the issue of hardware and software – which has both infringing and non-infringing uses – has long troubled the courts on a global basis. Recently, different technologies have faced their scrutiny: since 2000 a number of cases have been focused on peer-2-peer file swapping on the Internet, but manufacturers and others who provide, produce, write and manufacture software and/or hardware capable of copyright infringement, have also found themselves at the receiving end of lawsuits.

In 2003 the Motion Picture Association of America (MPAA) launched an action in the High Court of England & Wales against 321 Studios – which produces software which allows the copying of DVDs by consumers. The MPAA has already filed an action in the US (December 2002) seeking to prohibit the sale of 321 Studios' software titles *DVD X Copy* and *DVD Copy Plus.* The MPAA also wants any profits from sales as recovery of damages.

321 Studios says it has sold a total of 150,000 copies of the two software titles and 321 Studios insists that its software does not violate the *Digital Millennium Copyright Act* (DCMA) in the US which outlaws providing information or tools to circumvent copy-control technology. At the same time the movie studios are using the DMCA against a software package produced by Tritton Technologies. The studios have filed a suit in a Manhattan court to block the sale of *DVD CopyWare* which allows DVD owners to backup their DVD collection to DVD-R media.

Also named in the suit are three website hosts selling the software. Paramount and Twentieth Century Fox both maintain that Tritton's software will allow mass copying of DVDs by circumventing the built-in Content Scrambling System (CSS) encryption present on most commercially produced DVDs. But Tritton maintains its innocence – pointing out that the software can only be used to backup legitimately owned DVDs, a right guaranteed to software owners years ago, by the courts.

In a similar vein, US satellite transmission giant DirecTV has launched a nationwide campaign of cease and desist letters and filed nearly 9,000 federal lawsuits in response to the purchase of smart card readers, emulators, loopers, reprogrammers, bootloaders, and blockers. The Electronic Frontiers Foundation (EFF) add this to the debate:

> *Satellite TV giant DirecTV has sent ominous letters to an estimated 100,000 individuals, accusing them of purchasing "pirate access devices" and threatening to haul them into court for stealing television channels. The letters tell the unlucky recipients that the prospect of an expensive legal battle will go away if they pay up, usually to the tune of $3,500. Yet, in too many cases, the targets of the letters never intercepted DTV's signal; they're only guilty of owning smart card technology. This dragnet is catching innocent security professionals, hobbyists, and entrepreneurs. Without proof of a violation of law, DTV's unsubstantiated threats to sue are an abuse of the legal system* (Electronic Frontiers Foundation Newsletter,16th August 2003, Vol.16, No.21).

Clearly it is arguable that smart card readers and their various derivatives do have legitimate uses, including computer security and scientific research.

But it is the Recording Industry Association of America's (RIAA) actions against individual file swappers in the USA which have really grabbed the headlines. Having fought to obtain subscriber and user details from the likes of cable provider Verizon and Universities who offer their students internet access (see below), the RIAA filed 261 lawsuits against individuals who the RIAA claim are 'chronic' abusers of internet download services (9th September 2003). US Copyright law allows for damages of up to $150,000 per track infringed although the RIAA have said they are open to offers of settlement from the individuals concerned.

The Globe and Mail (10th September 2003, www.globeandmail.com) reported the story of how twelve-year-old Brianna Lahara's love for TV theme songs, Christina Aguilera and the nursery song *If You're Happy and You Know It made* her a target of the multibillion-dollar U.S. recording industry. Brianna, a user of KaZaA, promised never again to share songs over the Internet and her mother agreed to pay $2,000 (U.S.). The RIAA issued a statement announcing that Brianna's mother had settled for $2,000 and quoting the little girl as saying*: "I am sorry for what I have done. I love music and don't want to hurt the artists I love."* Ms. Torres added, "*We understand now that file-sharing the music was illegal. You can be sure Brianna won't be doing it any more*."

Several groups are organising to fight the RIAA and help those being sued. "*More lawsuits is not the answer*," said Wendy Seltzer, a lawyer with the EFF. "*Does anyone think that suing 60 million American file-sharers is going to motivate them to buy more CDs? File-sharing networks represent the greatest library of music in history, and music fans would be happy to pay for access to it, if only the record industry would let them*."

The RIAA have offered an amnesty programme for those who have already downloaded. Under the amnesty program, dubbed the *Clean Slate Program* the RIAA claims files-sharers can avoid lawsuits if they sign a declaration pledging that they will delete all copyrighted music files from their hard drives and MP3 players and never again share or download music illegally. The amnesty program is only available to people who the RIAA has not yet sued or subpoenaed. The EFF, calling the offer a *shamnesty,* has maintained that the recording industry should offer file-sharers a real amnesty, for example, an opportunity to pay a reasonable monthly fee for to access the music using file-sharing software. But in law it is clear that actually **making the copy** without permission **is illegal** – but what about providing the **means** – the hardware or software – to make that illegal copy?

A useful starting point when looking at the legal issues is the 1984 'Sony' or Betamax' case where the US Supreme Court had to decide whether or not the Betamax video machine was an illegal instrument of contributory copyright infringement. In **Sony –v- Universal City Studios** 104 US 774 (1984). The Court had to determine the legality of the Betamax machine which could both play pre-recorded films and videos legally and also could be used record infringing material illegally. The Court held on a 5-4 split that the machine was **not illegal**. The UK case of **CBS Songs –v- Amstrad** (1988) RPC 567 came to a similar decision; the House of Lords found that there was no infringement in the marketing of a twin cassette deck which clearly could be used for infringing purposes – copying music cassettes without permission. Whilst it is clear that the copying of copyright material without permission **is** an infringement in almost all jurisdictions, the provision of a service or equipment to facilitate such copying, where that service or equipment has other legitimate uses, **may not** be an infringement or illegal.

More recently the entertainment industries have turned their attention to the internet and in particular to internet service providers (ISPs), telecommunications companies and software providers such as Verizon, Napster and Aimster. As with hardware with infringing and non infringing uses, the issue is not wholly clear. A number of decisions have held that ISPs and others are potentially liable for contributory and vicarious copyright infringement, or are illegal. Clearly subscribers and individual users of the service actually swapping files containing copyright material or copying CDs and DVDs without permission are infringing copyright; however there are a number of conflicting decisions which suggest that the provision of a facilitating service, software or equipment does not necessarily mean that the provider of such service etc is liable for infringements.

The '*Napster'* case provides an example of where the courts have found infringement. In **RIAA –v- Napster** (2000) the US District Court held that the Napster file swapping service was illegal in an action brought by the RIAA against Napster. Napster presented a number of defences to prove the legitimacy of its file swapping service: these included the argument that the service had non-infringing as well as infringing uses; that its service actually boosted record sales; and that the plaintiffs were themselves in the business of facilitating file-swapping citing RIAA member Sony's manufacture of MP3 players. In July 2000 Judge Marilyn Patel rejected all of Napster's defences including a 'Betamax' defence and granted an interim injunction against the file swapping service; Napster was effectively closed down.

Alongside Napster, perhaps the most comprehensive victory for copyright owners was the RIAA's action against **Aimster** (2002). Here the court granted an order which was exactly what the record industry wanted in their fight against the unauthorised uploading and downloading of music; In 2001 Aimster applied to the US District Court to have its service declared legal. The RIAA and other trade bodies representing copyright owners reacted by filing lawsuits against Aimster alleging contributory and various vicarious copyright infringements. The court agreed with the RIAA and in granting a preliminary injunction held that that **Aimster had clear knowledge of infringements** taking place on its service, that **Aimster materially contributed to these infringements**, that **Aimster could supervise** the infringements if it so wanted and that **Aimster had benefited financially** from the infringements. Judge Marvin Aspen went as far as to say that Aimster was *"a service whose very raison d'etre appears to be the facilitation of and contribution to copyright infringement on a massive scale".*

The final Court Order (2003) provided that Aimster must immediately prevent users from uploading and downloading copyright works (or shut down if it cannot so do) and employ technological measures to prevent copyright infringement. The Federal Court of Appeal followed the fist instance decision and concluded that Aimster showed 'wilful blindness' to copyright infringement and could have limited infringement. The court went further and said that the plaintiff would only have had to show financial loss if Aimster had proved substantial non-infringing uses and it was for Aimster to show that its service had non-infringing uses.

But Courts have not always followed this approach. In the case of **MGM Studios and others –v- Grokster & Streamcast Networks** (2003) the RIAA suffered a serious setback. Judge Stephen Wilson held that the ***sale of copy equipment … does not constitute contributory infringement if the product is capable of substantial non-infringing uses***. In October 2001, the plaintiffs sued KaZaA, Grokster and StreamCast Networks for contributory and vicarious copyright infringement, and nearly a year later, each side moved for an expedited ruling on liability. The District Court ruled in favour of Streamcast Networks and Grokster on April 25th2003. The decision can be distinguished from the Napster and Aimster in as much that

i. the software had non-infringing uses;
ii. the defendants had no actual knowledge of specific infringements and could not supervise infringements - unlike Napster there was no centralised system.

The claims against KaZaA and Sharman Networks, which later acquired the KaZaA business, are still pending before the district court. The Grokster decision is currently being heard by the Federal Appeals Court whose starting point was the US Supreme Court decision in the 1984 'Betamax' case.

In another example, the Federal Court of Canada (in the **Tariff 22 case** brought by the Canadian collection society SOCAN) held that an ISP was exempt from making any copyright royalty payments when its service was used to transmit copyrighted musical recordings where the ISP provides nothing more than the 'means of telecommunications necessary'. But the Court went on to say that if an ISP facilitated the speedy delivery of such material and **went beyond providing a service which was necessary to communicate** then it was not covered by the exemption and would be liable to pay royalties.

A third decision from the Netherlands also provides a different approach to the Napster decision. Here the Dutch collection societies BUMA and STEMRA brought an action against **KaZaA BV**. The Dutch court held that the activities of KaZaA did not infringe copyright. The Court held that KaZaA could not

prevent the exchange of copyright material by subscribers so the service itself was not unlawful even if the activities of subscribers were illegal.

In a fourth case, Norwegian teenager **Jon Johansen** was exonerated and acquitted of all criminal charges for writing and circulating a programme, DECSS which decoded DVDs so that users could play their own DVDs on their own computers. The Norwegian government has appealed that decision, and the case is currently scheduled for re-trial in December 2003**.**

But these four decisions are, to an extent, an 'exception to the rule'. A number of jurisdictions have found both actual users **and** the facilitators liable for copyright infringement. The main battle ground has been between copyright owners (such as the RIAA, MPAA and BPI) and, variously, ISPs and software manufacturers whose services and programmes are used by their subscribers to swap copyright material on the internet along with actions against equipment providers.

A widely reported decision has been **RIAA –v- Verizon (2003).** This case arose out of the facts that Telco Verizon refused to comply with a RIAA subpoena asking it to disclose the identities of individuals who used Verizon and KazaA software to swap copyright music on Verizon's service without permission. Verizon argued that it had no liability as it was merely transmitting material and not storing it and in all events the identity of potential file swappers must be protected. The US District Court (Judge John Bates) dismissed both defences and decided that the RIAA was entitled to the information that it sought and that the doctrine of privacy would not apply to protect consumers. This decision was upheld on appeal. The privacy debate continues; in both Australia and the US, educational institutions are resisting subpoenas issued by copyright owners asking for access to or information about students who have used the Institutes' computer systems to download or swap files.

The privacy debate aside, Courts have reached similar conclusions to the illegality of facilitating copyright infringement in other jurisdictions: in the UK case of **Sony Music Entertainment (UK) Ltd –v- Easyinternetcafe Ltd (2003)** the High Court of Justice (Mr Justice Smith) held that Easyinternetcafes were guilty of copyright infringement by allowing customers to download music without permission and then burn CD copies of these at easyinternet's chain of cafes. In **JASRAC –v- MMO (2003)** the Tokyo District Court (Presiding Judge Toshiaki Iimura) held that an online music file-swapping service provided by MMO violated copyright law and as MMO administered the service and financially benefited from providing the service they were liable for damages to Japanese music publishing collection society JASRAC.

It can be seen that ISP's have taken note of these decisions and reacted accordingly where they feel that they will almost certainly be subject to injunctions and further actions if they do not revise the service they provide to subscribers. **Yahoo** reached a settlement with Sony Music Entertainment in 2003 after an action was brought against Yahoo's **Launch** music portal. The lawsuit alleged that Yahoo's web radio service gave listeners so much choice is determining playlists that the listener was in effect creating a 'virtual album' (which of course could then be copied, swapped and downloaded).

But the issue is far from settled and the result of the MPAA's new action against DVD copying software will be interesting. There are also a number of appeals pending on some of the judgements detailed above - both the Supreme Court of Canada (Tariff 22) and the Dutch Appeal Court (KaZaA) have yet to reach their decisions and the US District Court's decision in the Morpheus/Grokster case is subject to appeal.

The core issue of the legitimacy of facilitating software, services and equipment is complicated and sensitive – complicated in many jurisdictions by issues of consumer privacy and consumer rights alongside financial considerations. The decisions will of course be reached not only on the basis of legal doctrine and precedent but also on the actual facts in each case – and issues of actual 'control' of a service, the financial benefits to service providers and whether non-infringing uses can be show.

Having looked at the precedents, I have set out below a non-exhaustive list of tests which Courts might consider (in part or in full) when looking at a service provider, software or technology that has infringing and non infringing uses:

a. **Are there [substantial] non-infringing uses?** (*Sony Betamax, MGM v Grokster, Tariff 22, CBS v Amstrad*) and can the **defendant prove this** (*RIAA v Aimster)*
b. **Does the provider have clear knowledge of infringing uses?** 'Wilful blindness' is no defence (*RIAA v Aimster*, *MGM v Grokster, RIAA v Napster*).
c. **Is the provider able to supervise infringement if it so wanted?** (*RIAA v Aimster*, *BPI v easyinternetcafe*)
d. **Has the provider materially contributed to infringements?** (*Tariff 22, RIAA v Aimster)* eg could a provider remove an encryption system? Does the provider provide any assistance to those who do infringe?
e. **Does the provider financially benefit from infringing uses** even where the provider is not infringing itself? (*RIAA v Aimster, STEMRA/BUMA –v KazaA, JASRAC v MMO)*

But the whole issue is further complicated by the consolidation of ownership in the music and entertainment industries. AOL Time Warner is a company with businesses on both sides of the divide: it owns AOL and two major cable companies along with a major record label, film and TV interests. Sony owns not only a major record label, Sony Music, but is also a major producer of music equipment including recording equipment and MP3 players. RIAA member BMG is now the owner of Napster. It is interesting to note that the MPAA, RIAA and BPI, whilst powerful groups, are dwarfed by the telecommunications industry, software producers and hardware manufacturers who are often the target of the entertainment industries successful legal actions and legislative lobbying.

Conversely the entertainment industry itself is facing mounting criticism – particularly after the recent spate of actions against individuals and academic institutions. The exploitation of copyright is at the heart of the recording industry and of course the record labels need to protect their valuable copyrights if they are to have a business. The recent actions by the RIAA and others against companies, organisations and individuals involved in piracy and file swapping are evidence of the label's determination to realise value from their copyrights. But a number of serious problems face the entertainment and record industry and leave it open to criticism; firstly, commentators argue that the major record labels 'missed the boat' when it came to the world wide web – even now Apple leads the way with legitimate downloads through its i-tunes service. It seems inconceivable that an industry which is based on the exploitation of copyright could have failed to understand and plan for the Internet but this is what seems to have happened. Some commentators point to the film industry's comprehensive commercial reaction to the threat of the VHS machine and wonder why the record industry has 'failed ' to implement a business plan to deal with both the threat and opportunities presented by the Internet.

Secondly, it can be argued that whilst taking the 'moral high ground' with piracy and in particular peer-2-peer file swapping, the record labels' own house is hardly in order. Campaign groups such as the Recording Artists Coalition point out that contracts with artists are often wholly one sided in favour of labels and accounting provisions to artists obscure and unfair. Thirdly consumer groups argue that the public have long felt 'ripped off' by CD pricing and it is no secret that the basic manufacturing cost of a CD is under US$1. The major record labels were investigated for price fixing in the US between 1995 and 2002 and in 2002 a US$143 million anti-trust settlement was awarded against the five top US distributors of CDs (BMG, EMI, Warners/Elektra/Atlantic, Sony and Universal) and the three largest US CD retailers (TransWorld, Tower and Music Land).

Finally, campaign groups such as the Electronic Frontiers Foundation now routinely publicly explore issues related to consumer rights and consumer privacy and some campaign groups are going further and questioning the very essence of copyright law.

In the UK we are allowed to copy television programmes to 'time shift' for easy viewing. But what about copying music and films onto recordable CDs and DVDs? What if I want to download music I already 'own' (having brought the CD) onto my computer disc? Am I liable to an action to copyright infringement just because I back up the software I have legitimately purchased? Will owning a MP3 player be a criminal offence? Ultimately the issue of infringement in the digital arena well may be taken out of the courts and **legislation** may well resolve these issues although the entertainment industry will no doubt consider this alongside new technologies to protect their copyrights.

ADDENDUM 02/03/04
The Californian federal court has now reached a decision in the '321' case, firmly siding with the major motion picture studios and ruling that a company creating tools that people can use to make backup copies of their DVDs **is** liable under copyright law. Citing the Digital Millennium Copyright Act (DMCA), the court ordered 321 Studios, creator of the DVD backup tools, to stop selling its DVD Copy Plus and DVD-X COPY products within seven days. 321 Studios plans to appeal the ruling.

ADDENDUM 11/07/05
Supreme Court rules software manufacturers can be liable for user's infringements MGM v Grokster with a new test:
The US Supreme Court has ruled that software developers violate federal copyright law when they provide individuals with the means to share copyrighted files without authorisation. The court stressed that P2P technology has legitimate uses and added that file-sharing service operators can only be held liable if their intention was to encourage copyright infringement. "We hold that one who distributes a device with the object of promoting its use to infringe copyright ... is liable for the resulting acts of infringement by third parties."

ADDENDUM 01/08/05
Supreme Court decision in MGM v Grokster Law Updates - August 2005

For further information, see previous Law Updates and:

Sony –v- Universal City Studios (1984) 104 US 774

CBS Songs –v- Amstrad (1988) *RPC 567*

BUMA & STEMRA –v- KazaA BV (2002) *M Business, Winter 2002* MCPS/PRS

RIAA –v Aimster (2003) *M Business Autumn 2003* MCPS/PRS

MPAA –v- Studio 321(2003) http://www.pcworld.com/news/article/0,aid,108133,00.asp

RIAA –v- Napster (2000) http://news.com.com/2104-1023_3-243698.html

Johansen Case (2002) http://www.eff.org/IP/Video/DeCSS_prosecutions/Johansen_DeCSS_case/

RIAA –v- MIT (2003) http://www-tech.mit.edu/V123/N31/31riaa.31n.html

RIAA –v- Aimster (Madster)
(2002) http://straitstimes.asia1.com.sg/techscience/story/0,4386,209749,00.htmlhttp://zdnet.com.com/2100-1106-956644.html

Cornish, W (2003) *Intellectual Property* Sweet & Maxwell: London

MGM Studios & Others -v- Grokster & Streamcast Networks (2003) case number 03-55894, 03-55901 & 03-56236 US Court of Appeals Ninth Circuit

Further Reading:

http://www.fortune.com/fortune/technology/articles/0,15114,517663,00.html

Websites of interest:

www.recordingartistscoalition.com

www.eff.org

www.riaa.com

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