NAPSTER & AIMSTER

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INTERNET CAUCUS

- Slides for my talk on course website
- Will deliver them next time because more relevant to that session than this
- Congressional committee staffers very much hope SCt will decide *Grokster* in a way that will make legislation unnecessary
  - More verbal support for Sony than I expected
- Viet Dinh: Grokster built system to evade liability; built business on infringement; no commercially SNIUs
- David Green (MPAA): wrong to allow Grokster to make money by drawing users to site to infringe MPAA/RIAA works; # of tests possible to reach this bad conduct

RECAP ON SONY

- 9th Cir ruled in favor of Universal on the charge of contributory infringement
  - the primary use of Sony's Betamax machine was to make time-shift copies of television programs, which 9th Cir said were infringing because they were "unproductive" (consumed the work, not made new 1)
  - Sony materially contributed to the infringement by supplying its customers with the means (the Betamax machine) for engaging in infringement, knowing that its customers would use it to infringe

SONY RECAP

- Supreme Court reversed:
  - Not contributory infringement to make/sell technology with substantial non-infringing uses (SNIUs)
    - indeed, need merely be capable of SNIUs
  - Making copies of TV programs for time-shifting purposes is fair use (later cases: space-shift OK too)
  - Presume private noncommercial copying is fair; only overcome if proof of meaningful harm
    - effect: shift burden of proof to plaintiff
  - When new technology poses novel questions, courts should construe narrowly, allow Congress to decide

ISSUES IN P2P CASES

- What does “capable” of SNIUs mean?
  - Was this just dicta? Who bears burden of proof?
- How does one define “substantial”?
  - By proportion of infringing and NIUs of p2p file-sharing technologies?
  - Substantial as long as not far-fetched, illusory, etc.?
- Architecture of p2p system
  - Ability to supervise/control? Are developers required to make this possible?
  - What if design to evade liability, to facilitate infringement?
- Knowledge and intent
  - What do you have to know and when do you have to know it?
  - Is willful blindness the same as knowledge? What constitutes willful blindness?
  - Why should those who intentionally design technology to enable infringement (which then happens) or build business on infringement be exempt from liability?

NAPSTER-AIMSTER ?s

- *Playboy v. Frena* meets *Sony Betamax*?
- Why did Napster & Aimster think they qualified for the *Sony* safe harbor?
- Why did RIAA firms think that *Sony* did not provide a safe harbor to these defendants?
- How different were the 9th and 7th Circuit rulings from plaintiffs’ theories?
- Are the 9th and 7th Cir’s decisions consistent with *Sony*? How different?

PLAYBOY v. FRENA

- Frena ran a commercial bulletin board service enabling customers to trade scanned photos of Playboy bunnies
  - Customers paid fees for service
  - Customers typically up- and downloaded digital images of the bunnies
  - Frena claimed to know nothing about what people were doing on his site (implausible)
- Held liable for direct infringement
  - theory: his computer distributed copies to the public
- After DMCA passed in 1998, shift to 2nd liability

NAPSTER & AIMSTER

- Thought they could win because their systems were *capable of* SNIUs
  - Some uses of their systems were, they argued, non-infringing (but how substantial were they?)
- Argued that personal use copying was entitled to *Sony* presumption of fairness, and produced some evidence that P2P sharing led to more sales of CDs so fair use
- Hoped courts would think P2P was a new technology issue that Congress hadn't anticipated, and so construe secondary liability narrowly
- Argued lack of specific knowledge of infringement & lack of control over users

NAPSTER cf. SONY

- SCt was only willing to say time-shifting = FU
  - copying by Napster users went well beyond this
- Not “private” (home) copying akin to *Sony*
  - Anonymous exchanges with millions worldwide
- Distribution of many millions of copies, not just occasional copy by owner of Betamax machines
- Napster provided a service, not a technology
  - one-off transaction vs. ongoing relationship
  - Centralized search & directory function
- Content being copied via p2p is not being made available “for free” via broadcast spectrum, as in *Sony*

NAPSTER cf. SONY

- Napster service undercut RIAA firm services
- Evidence of harm to markets for CDs
  - disputed, but DCt made fact-finding of harm
- File-sharing has the flavor of commercial use because of barter exchange—like the swap meet in *Fonovisa*
  - Feeling obliged to upload in exchange for being able to download (Strahilevitz, Charismatic Code)
- Ability to supervise & control users
  - Napster had “repeat infringer” exclusion policy
  - Napster could watch live trades in infringing materials through centralized search/directory system

LESSONS LEARNED

- What lessons did the recording industry learn from the *Sony* decision?
  - Sue en masse
  - Allow/encourage composers, music publishers, & performing artists to join suit
  - Sue for vicarious as well as contributory infringement
  - Get preliminary injunction, don't wait till full trial to minimize installed base problem
  - Develop litany of distinguishing features between Napster & Sony
  - Make much of engineers' statements
  - Offer digital music services to show harm to market (don't stipulate no harm to date)

PRO-NAPSTER FACTORS

- Many non-infringing uses
  - Space-shifting (9th Cir in RIAA v. Diamond)
  - Sampling (listen before buy)
  - Out of print works
  - Public domain/licensed works (e.g., new bands)
  - 1008 exemption
- Capability for many NIUs (e.g. sw patches)
- Wide availability of music to the public
  - Often said to be the "end" for which © = means
- Distinguishable from *Frena* because customers were copying from one anothers' computers, no central repository of files being shared or copying by Napster

PRO-NAPSTER FACTORS

- RIAA firms behaving as a cartel, unwilling to license to digital music startups
- Napster tried to make a deal with RIAA firms (Bertelsmann invested)
- Congressional hearings about imperfections in digital music market
- RIAA firms may have brought the p2p crisis on themselves by not adopting new business models to draw traffic
- 512(a) defense

NAPSTER (9th) cf. SONY

- 9th Circuit claimed to follow *Sony;* yet, adapted it
  - File sharing not fair because "non-transformative", harm
  - Because Napster had actual and constructive knowledge of user infringements, *Sony* defense is inapplicable
    - Criticized by later commentators (Goldstein treatise)
  - Napster materially contributed to user infringement because it provided "sites and facilities" for infringement
  - *Sony* inapplicable to vicarious infringement charge
  - Centralized features of Napster's architecture gave it the right and ability to supervise and control users
  - Financial benefit to Napster because the ability to use system to copy copyrighted music attracted users
- But Ct did chastize the DCt for not taking capabilities into account & did say burden on © owners to identify works
  - Napster liable because of conduct, not architecture

AFTERMATH

- Napster tried to develop “filter” to stop trading in © files
  - Disputes about its compliance
- Trial court agreed to allow Napster to pursue charges that A&M et al. had engaged in anti-competitive behavior
- But Napster eventually shut down by injunction
- Assets (TM) sold to another firm (Roxio) that provides licensed digital music to subscribers

OTHERS AT RISK

- Hummer Winblad sued because of its $15M investment in Napster (Hank Barry as CEO)
- Bertlesmann also was also sued for investing
- Why not Napster’s law firm too? Its ad agency or publicist?
- Visa was recently sued for processing credit card transactions for site with allegedly infringing pictures on it (dismissed by DCt)
- Site that referred its users to alleged infringer’s site held as contributory infringer (prelim inj)

AIMSTER

- What lessons did John Deep learn from the Napster decision?
- Was Aimster's system more or less culpable than Napster's?
- How consistent is Judge Posner's decision with *Sony*? With *Napster*?
- Do you agree or disagree with Judge Posner's analysis?

AIMSTER

- Decentralize your architecture
- Minimize right & ability to control users
  - Encryption provided to allow anonymous file trading
  - "Buddies" trade files online in chatroom (default = all users are "buddies")
- Let others provide the sites & facilities for infringement
  - P2P system designed to be used in connection with AOL's instant messaging software (with which users transfer files)

AIMSTER ON *SONY*

- Plaintiffs' proposed limits on *Sony* are addressed to the wrong audience (i.e., tell it to Congress)
- 7th Cir. recognized numerous NIUs of Aimster
  - problem: Aimster failed to show that software was actually being used for any of them (burden of proof)
- Space-shifting uses of swapped files may be fair
- SCt used contributory and vicarious interchangeably in *Sony*, so SNIU defense can be defense to vicarious claim as well
  - disagreed with 9th Cir. on this point

AIMSTER LIMITS ON *SONY*

- Merely being capable of SNIUs insufficient
- Consider magnitude of infringing cf. actual or probable SNIUs as part of cost/benefit tradeoff
- Burden of proof on defendant to show SNIUs
- Consider ability of & costs to service provider in inhibiting user infringement in cost/benefit tradeoff ("disproportionately costly")
- Willful blindness to infringement by providing encryption = knowledge of infringement
- Presume harm from infringing uses

AGGRAVATING FACTORS

- Aimster actively promoted infringement by providing computerized tutorial for users to show how to file-swap copyrighted music
- Default setting allowed sharing of files with all users unless designate particular buddies
- Aimster software allowed searching for matches
- Charged $ for “club” membership to enable easier infringement (e.g., swap of top 40 files)
- Encryption to prevent specific knowledge of which users were infringing as to what music

TECHNOLOGY PERSPECTIVE

- Internet is p2p technology system
- File-sharing technologies are among the oldest applications for Internet traffic
- End to end architecture of Internet doesn’t permit network to know whether bits are ©
- P2P is very efficient means of distribution of digital content
- Filtering technologies are unlikely to succeed in stopping infringement
- Other technical means to reduce or eliminate infringement—how costly? how foreseeable?

LESSONS ABOUT LAW

- Hard cases make bad law?
- Easy cases make bad law?
- Unsympathetic defendants make bad law?
- Sony was overbroad, and later cases wisely limited its holding?
- Congress should regulate because changes to Sony safe harbor have implications far beyond parties to lawsuits?
- Not possible to enforce © in digital environment