Cases of Note -- Supremes Vacate 9th Cir on Grokster -- Vicarious Liability is Alive And Well

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by Bruce Strauch (The Citadel) <strauchb@citadel.edu>


"Sup, Dawg?

"You're remanded, that's what's up, dude. Confronted with software that had both legal and illegit uses, these crazed activists on the Ninth Circuit actually declined to make new law via some three prong test. They told Congress to clarify copyright law. Then the Supremes had to muscle in. No more Grokking out. The party's over.

Du-idee. That is so not cool.

As we know, Grokster and StreamCast have the free software that permits file sharing through peer-to-peer networks. Which is to say, computers talk to one another without a central server. And yes, the use of this for ripping off copyrighted music goes on billions of times per month. And lo and behold, many of these pirates would email Grokster asking questions about copyrighted works. And Grokster would helpfully send guidance. And Grokster advertised itself as a Napster alternative since Napster had been nailed.

"Sup with that?

Napster had a central index with all the music on it that tattooed, body-pierced teenagers could wish to groove to. And they charged for you to tap in. They were sued for facilitating copyright infringement. A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000) and shut down big-time.

How do Grokster and StreamCast make money? By streaming advertising to their users. And of course, the ad rates rise as users multiply.

The District Court gave summary judgment to Grokster and the Ninth Circuit affirmed. Their theory was that Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 held a commercial product could not be liable for infringement unless the Grokster had actual knowledge of piracy and failed to act. The Grokster software had big noninfringing uses and the decentralized nature of the electronic beast kept them ignorant of what was going on.

And what were those noninfringing uses so vital to America's slacker youth? Swapping spring break nude photos, recycled term papers and ... hmmm ... public domain works. That last one ... yes, the college dorms are alive with vibrant youth exchanging favorites from Project Gutenberg. Just kidding. It's all about wannabe bands that hand out their music for free wanting it passed around which kids who think and speak in song lyrics willingly do.

Our Supremes held that the promotion of infringement along with distributing a piracy-capable device creates liability.

Major humane.

Ditto that, dudester.

Okay, let's go to the gruesome majority opinion.

And yes, it's written by that wild party animal Justice Souter you've always longed to swap music files with.

He starts with a long-to-do about FastTrack and Cinetella technology that is meaningless to anyone but the strictest techie who isn't reading this anyhow. Mainly because he's mastering the next BIG THING which is probably anarchic software with no one trying to make money off it so the Music Titans will be frothing and punching at the air.

Then J. Souter gets to the key fact — Grokster and StreamCast set out to capture the Napster market. They got into business as Napster was sued anticipating the big shut-down. StreamCast sent out an ad kit boasting of their potential to capture Napster users.

"We have put this network in place so that when Napster pulls the plug on their free service ... or if the Court orders them shut down prior to that ... we will be positioned to capture the flood of their 32 million users that will be actively looking for an alternative."

StreamCast's Morphine software was designed to search for Top 40 songs which of course were always under copyright. A Grokster newsletter touted their ability to copyright material.

The Court actually references the few folks who desire a free Odean or Shakespeare but says it's small potatoes next to those who want a free latest release by Modest Mouse, whoever that might be.

And can you just see Souter jokking to Modest Mouse in his chambers. Sigh. The J. Souter no one knows.

Tension Between Two Values

And what would those be? Supporting creative pursuits thru copyright versus promoting communication technology innovation by limiting liability for copyright violation.

The Court reasoned that the vast number of infringing downloads made it impossible for Music Titans to effectively go after the pirates.

Plus they're penniless and slapping them around creates even more animosity towards the profit blotted music biz that pitches rebellious behavior in the first place.

So practically pushes them to allowing a suit for secondary liability on a theory of contributory or vicarious infringement. See In re: Master Copyright Litigation, 334 F.3d 643, 645-646 (CA7 2003).


Sony is the only recent case anywhere near on point. Videocassette recorders were sold primarily for "time shifting" which is taping a show and watching it later. Soby showed no intent to promote infringing uses and the VCR had significant noninfringing uses. This approach left "breathing room for innovation." See Sony Corp., supra, at 442.

Now mind you, this is despite the fact that Sony advertised "build a library" of favorite shows.

The Ninth Circuit read Sony to say that a product capable of noninfringing use can never have secondary liability if it is misused. But Sony does not require courts to ignore evidence of intent to promote piracy. "If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the potential for infringement." Sony, 464 U.S., at 439.

Going beyond the characteristics of a product, it's important whether evidence shows a producer meant to promote infringement. Inducing or enticing the commission of an infringement would be a classic case of unlawful purpose. Black's Law Dictionary 790 (8th ed. 2004). So if you don't just expect infringement, but invoke it through advertising then you're liable. Kalem Co. v. Harper Brothers, 222 U.S. at 62-63.

Advertising an infringing use or giving how-to instructions are nice evidence of encouraging direct infringement. Oak Industries, Inc. v. Zenith Electronics Corp., 697 F. Supp. 988, 992 (ND Ill. 1988); Freon, Inc. v. Thermodyne, 315 F.2d 407, 412-413 (CA5 1963) (demonstrations by sales staff of infringing uses supported liability for indecency).

So there's liability if you distribute a device and by clear expression or other affirmative steps foster infringement. Mere knowledge that the device can be used for infringement is not enough. Nortel more standard stuff like offering technical support or product updates. There has to be culpable expression and conduct.

And Some More Facts On Point

Grokster had an electronic newsletter promoting its software capability to access popular and extremely copyrighted music. Anyone could see they were offering the alternative to Napster downloads of music. They even named their software "Swapora."

StreamCast advertised to Napster users its "Open Nap" software. A "fact-finder" could easily see they were likely to promote infringement as an alternative to Napster's massive infringement. And they had those cute ads like "When the lights went off at Napster ... where did the users go?"

This 'fact-finder' thing means summary judgment by the 9th Cir. was wrong. The issue of vicarious liability should have gone to a full trial.

Neither company attempted to develop any sort of filter to cut down on piracy. And since both companies earned money through advertising, high volume use — which really means high volume piracy — upped their revenue.

And now you'll want to return to November 2004 ATG Vol. 16-5 and my insightful analysis (p.72-74) of the Ninth Circuit's opinion including continued on page 64
Biz of Acq — Collaborative Partnerships: Expanding the Vendor/Librarian Relationship

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Column Editor’s Note: Librarians and vendors interact constantly, and the work of one directly affects the other. Ann Branton recognizes the important contributions vendors make to librarianship, and comments on the extended relationship that exists between librarians and vendors. — AF

Introduction

From a technical services perspective, specifically in the acquisitions of library materials, one librarian’s collaborative partnerships with library vendor book vendors can be applied to all areas of doing business with vendors. These includes vendor as service provider, vendor as mentor, vendor as collaborator in research and development, and finally vendor as professional supporter.

More often than not, acquisitions librarians are trained by their experiences during the ups and downs of the annual ordering cycle. We learn by our mistakes as much as our successes, rather than in a library science classroom. As a new supervisor over acquisitions during a very hectic book ordering cycle in 2001, I found that the book vendors were often my best teachers. Vendors provide invaluable service to the library profession when they teach inexperienced librarians responsible for purchasing library materials how the wholesale publishing trade works, and how to master a sharp learning curve in the ordering process.

Vendor as Service Provider

Librarians are more dependent upon professional relationships with vendors than we may realize. The books on our shelves, the spine labels and barcodes we apply on them, and the many services we are able to provide our users are supported in some way by vendors who provide the products and services we in turn provide to our library users. However, for some of the same altruistic rationale that libraries keep their doors open to the communities they serve, vendors too make an ethical commitment in providing direct or indirect access to information resources and services.

Certainly, they have remained steadfast during a period of almost universal economic downturns in our library funding for the past five years. In spite of tight budgets, we enjoy excellent service from our book vendors, and good discounts in spite of a lower volume of orders each fiscal year; I have not seen lower standards in custumer services.

Until my professional duties were expanded over three years ago, direct communication with vendor representatives was minimal, and I was not aware of them as collaborators or potential partners in my more academic view of librarianship. Before putting faces to names, before my business and professional interactions with a single sales representative, vendors were just the Books-a-Million, the Wal-Marts, the Office Depots of the library world. Vendors were large, impersonal warehouses of products I required to fulfill the mission of my library, to perform my responsibilities in support of that mission and to serve the information needs of my community of library users. Since meeting, talking and working more directly with library vendors, however, I have learned that they have been engaged in meeting the expectations of changing library environments, and in anticipating the information needs of libraries and library users, for more than a lifetime.

Many companies, both large and small, have dealt with libraries for decades: Baker & Taylor, Ingram, Blackwell, North and company, Midwest, Ambassador Book Services, and EBSCO, to name a few. Libraries and traditional vendor services have, in essence, grown up together and are familiar, indispensable resources in fulfilling our professional responsibilities. Others are relatively new to the modern library scene as advances in technology introduced new products and services to libraries: OCLC, Sirsi, Auto-Graphs, and Ovid/SilverPlatter are examples. These companies did not exist until the last quarter of the 20th century, yet we can hardly imagine our professional world without them.

Vendor as Mentor

In 2001, I was appointed head of the bibliographic services department at The University of Southern Mississippi Libraries due to my years of experience as head of cataloging, and related administrative duties, managing and supervising people, activities and projects. However, my knowledge of acquisitions was marginal. All I knew about acquisitions was through the ordering work flow in which cataloging staff selected the MARC record that was added to the OPAC, and, in turn, used by the acquisitions staff to generate an order record. The acquisitions personnel, who were more senior in experience with the ordering-receiving cycle, are to be commended for rising to the occasion and adapting to an environment of organizational change and a relatively inexperienced manager of acquisitions.

That same year, I had the opportunity to attend the Charleston Conference in Charleston, SC in the fall of 2001, to learn as much as I could in a few days about the issues and concerns related to collection development, the acquisition of books and serials by libraries, and the impact of the publishing trade on libraries. Among the attendees was a representative from Book House, Inc., a vendor that we used at USM Libraries. Peter Bence was just about the only vendor representative I had met at that time and he made me feel comfortable with the fact that I was new to acquisitions management. During the conference, I asked Peter to be my mentor, for the short term, to educate me about the many aspects of ordering books. Our arrangement was very informal but it provided a friendly contact for me to ask questions about the business aspects of book ordering from the vendor’s perspective. Little did I know that every ordering cycle has its unique challenges.

Peter took time to explain my options in ordering academic or trade publications, and how to evaluate a vendor profile and set up special ser.

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their very quip about old markets always being ruined by new technology.

And this raises two thoughts. (1) If the T.V. moguls had prevailed on Sony, the cost of a VCR would have become prohibitively expensive. No movie rentals. (2) Given that America’s youth has been totally trained to steal music, the next Grokster that comes along will not have to foster infringement. Everyone will know exactly what to do without being told. Which will put them outside this ruling. So why are the Supremes wasting our time with this?

Party on, dude. 😎

Questions & Answers

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fees to the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI) to cover the public performance of music. These royalties go to the composer. In recent years Web casting royalties were added to radio broadcasts that are also transmitted over the Web; these royalties are paid to the record companies and performers through Sound Exchange. So, sound bytes played on the radio are covered under these licenses as is the playing of the entire song.

As to whether this applies to education, it depends on what is meant by this part of the question. If by “education” this means college and high school radio stations, the answer is yes. They also pay annual blanket royalties but the amount is considerably less than for commercial radio. If the question is focused on general educational uses of music, the answer is no. There may be exemptions in the Copyright Act that cover those specific uses, but there is no blanket license for education.

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