Cases of Note -- Vicarious Copyright Liability - Grok Out

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are the copyright concerns it should address for the Web publication?

ANSWER: This can be handled quite simply by revising the copyright transfer form. On that form, the journal should indicate that some papers will appear in print while others will appear only on the journal Website. Then on the copyright transfer form, require that the author transfer the reproduction and distribution rights for both printed and electronic versions. Additional considerations might include what other uses of the article the journal is willing to permit the author. For example, (1) may the author post the article on his or her own Website; (2) if author Website posting is permitted, is there a period of time before the work can be posted, e.g., six months; (3) may the author publish the paper that is published only on the Website in another journal; (4) if yes, only in a printed journal or an electronic journal; (5) may the author reuse the paper as a book chapter; (6) what rights does the author have to reproduce the article in photocopies and distribute to classes; and (7) may the faculty author post the article on a password protected Website for students. Additionally, does the journal want the author to credit the journal Website in any permitted uses? I encourage publishers to grant these rights back to the author.

QUESTION: How can a library stop a patron from burning CDs? The library asks no questions and places no limits on the number of CDs a patron reproduces?

ANSWER: It is important not to assume that CD burning is copyright infringement. It may not be. For example, if a patron owns a copy of a CD and makes a duplicate for use in his or her car, it is not infringement under the Audio Home Recording Act which is sections 101-1010 of the Copyright Act — even the Recording Industry Association of America agrees. (http://www.mindia.org/aha.htm) Or the patron may have a subscription to Audible.com which permits subscribers to downloaded audible books to CDs and other devices. In other words, the copying may be permitted by the law, by a license agreement or as a fair use.

The only duty of the library is to post the notices on reproduction equipment as required under section 108(h)(1) and for the library itself to follow the law. Just as the library does not inquire about the use a patron will make of a photocopy, it should not inquire about copies in other media.

QUESTION: An art museum is trying to put together an online gallery consisting of images of the paintings in its collection. Is artwork automatically copyrighted because it is considered to be unpublished? Does your chart concerning published works apply to artwork? (http://www.unc.edu/~unclag/pubiclic-d.htm) Most of the collection mainly consists of pre-1950 artwork.

ANSWER: Works created before 1978 are covered by the 1909 Copyright Act, and federal copyright applied only to published works. When the work in question is a painting, what does "publication" mean? Publication certainly has a more consistent meaning for books, journals, and the like. The central question is whether display in a gallery or museum constituted publication. Unfortunately, it was not consistently applied from federal circuit to circuit. The majority view was that public display was equivalent to publication, however. For paintings produced between 1923 and 1963 that are considered to be published, the copyright had to be renewed or they entered the public domain after the first 28 years of protection.

Prior to 1978, the majority of courts held that sale of the original work transferred the copyright in that work unless the parties otherwise agreed. So, the museum may actually own the copyright in many of the works in its collection. Moreover, if no claim of copyright was made on the original painting, and there was no effort made by the artist, museum or gallery to prevent public copying, courts in some circuits have held that the work has become public domain.

Generally the "When Works Pass into the Public Domain" chart does apply, but it is not 100% accurate for pre-1978 paintings, depending on the circuit and whether the museum actually acquired the copyright when the original work was purchased either by the museum or by a donor who then gave the painting to the museum.

QUESTION: A faculty in the university has produced a song cycle based on the poetry of Gustavo Adolfo Becquer, a 19th century, Spanish poet. The library has not been able to find any answers concerning his copyrights. It has written publishers, but has received no response. Becquer died in 1870; could his work still be under copyright?

ANSWER: His poetry is public domain. Even in Spain where the copyright term was life of the author plus 50 years, the copyrights would have expired in 1920. Thus, the faculty member is free to prepare a derivative work based on his poems. If the faculty member contributes enough original work, which it sounds as if he has, then derivative work is eligible for copyright protection even though the underlying work is in the public domain. No one can copy the faculty member's song cycle, but others are free to write their own song cycles based on Becquer's poetry.

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


And now for all you peer-to-peer music thieves out there, the resounding Grokster victory over a class of 27,000 companies, conglomerates, combines and song writers that own nearly every single movie and piece of music in the US of A.

The lead sentence of the opinion approaches the sublime. At least for legal writing. "From the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with musical copyright owners...."

Grokster and StreamCast distribute software that permits teenagers with body piercings, tattoos and their caps turned backwards to share computer files. And this can be used to copy digitized music and movies.

Your typical Internet transaction has a "client" personal computer making contact with a "server" that hosts a Web page. The server is a centralized source. And that of course was where Napster went awry, but more about that later.

With peer-to-peer there is no central server. Every computer connects with the others that use similar software and is both server and client.

If this seems like peer-to-peer for dummies you can really sink your teeth into Yochai Benkler, Coase's Penguin, or, Linux and The Nature of the Firm, 112 Yale L.J. 369, 396-400 (2002); Jesse M. Feder, Is Bemused Obscure?: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster, 37 Creighton L. Rev. 859, 852-68 (2004).

Napster operated a centralized indexing software with all its files on it. The client would send a search request and Napster would locate the desired song and transmit it.

StreamCast uses Gnutella open-source software. Our outlaw teenager sends a search request to all computers in the network for that desired song. Open-source means the software is in the public domain. Yes, he even gets that for free.

A Dutch company KaZaa BV developed "supernode" architecture whereby numerous computers operate as indexing servers and our teen accesses the nearest one. This was marketed as "FastTrack" and was initially used by both Grokster and StreamCast. Following a spat with KaZaa, StreamCast developed its
A life's work under one cover.

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—Fortune

"Classic! This handbook is an excellent reference for engineers and quality professionals in any field."
—KEVIN W. WILLIAMS, Vice President—Quality General Motors North America

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—LOU GIULIANO, Chairman, President, and CEO ITT Industries

"Dr. Taguchi's enduring work is of great importance to the field of quality."
—DR. A. V. FEIGENBAUM, President and CEO General Systems Company, Inc.

Available through your vendor.

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variety of Gnutella called "Morpheus."

The only importance of burdening you with this is that Grokster and StreamCast folks can't communicate with one another. They're each in their own virtual worlds. Which limits the theft in some minimal way.

Now, along with all the music stealing, our users can share heavy partying photos, recycled term papers or public domain works. Stealing of course is the biggest part of the traffic, estimated at around 90%.

While the big boys have been in the news bringing college misfits to book for copyright infringement, this suit was against the above two companies and others for secondary liability — to wit: contributory copyright infringement and vicarious copyright infringement.

Contributory copyright infringement

To show this, you need (1) direct infringement by a primary infringer — the outlaw teen; (2) knowledge of the infringement by Grokster; and (3) material contribution to the infringement by Grokster. (1) is a given, so the issue is (2), knowledge.

And How Is It That You Know Stuff?
The controlling case here is Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417 (1984) dating to the days when the movie industry was trying to shut down video tape recorders.

And how quaint and long ago that battle seems.

The Supreme Court said no constructive knowledge of infringement if you could show the product was "capable of substantial" or "commercially significant noninfringing uses." This was derived from the "staple article of commerce" doctrine found in patent law. Id at 440-42.

The Ninth Circuit had already applied this in A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001) ("Napster I"). As there were substantial legit uses of Napster, so constructive knowledge was out and the music owners had to show defendant had reasonable knowledge of specific infringing files. Id at 1027.

On remand of Napster I the district court required plaintiffs to inform Napster of specific files which Napster would then block. This was appealed as A&M Records v. Napster, 284 F.3d 1091 (9th Cir. 2002) ("Napster II"). The 9th Circuit upheld the district court, leaving the burden on plaintiffs of providing names of particular files before Napster was bound to act.

And Grokster? There is no issue of fact whatsoever that Grokster has substantial noninfringing uses.

The Court cites the band Wilco who were jacked around by their record company so they put out an album for free downloading and got so much buzz going that the record company offered them a new contract.

A Google search turns up Wilco as being once all country but now something else that music commentators can't quite define based on much raved over hits like "Summerteeth" and "Yank Marriott Fooriot." None of which means a thing to me.

The Court notes that thousands of other bands have debuted their work through free downloads. As well as noting Gutenberg with its public domain literary works and the Prelinger Archive with movies.

The only response to this by the bloated big boys was that Grokster was mostly used for thrift. But that's not the standard for constructive knowledge.

Your heart and presumably your brain is pure if you produce a product with virtuous uses.

The Seventh Circuit has read Sony differently. In re Ainsley Copyright Litig., 334 F.3d 643, 651 (7th Cir. 2003) added a new factor of "probability of infringement use." But the Ninth Circuit said they were bound by their holding in Napster I and could only overturn their own precedent by the entire court sitting en banc. And they weren't impressed by Ainsley anyhow.

So it's the reasonable knowledge of specific infringement standard.

And On To Material Contribution
Remember we're not dealing with a central server with an index of available files.

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Biz of Acq — Ten Years After: How Positions with a Serials Emphasis have Changed a Decade after the World Wide Web

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**Column Editor's Note:** The author describes and compares advertisements of professional library positions with serials responsibilities, posted ten years apart. He notes many changes in titles, duties and general emphasis, and relates these differences to trends in serials librarianship over the past decade. — AF

**Introduction**

External factors have changed and challenged the ways in which libraries process serials. In her 1997 article, Ann W. Copeland notes a number of factors that confronted serials librarianship from 1980 to 1995, including the implementation of AACR2 in 1981, proliferation of bibliographic utilities that provided MARC format data such as OCLC and RLIN, and respective conversions undertaken as a part of the transition from print to online catalogs.¹

Still more changes have had an impact on the ways in which libraries process serials since the mid-1990s. Most notable is the proliferation of e-journals in the wake of the development of the World Wide Web in 1994. E-journals and databases that provide access to electronic versions of journal articles now account for a considerable and growing portion of library expenditures and subscriptions. At the author's institution, over three quarters of the journal titles to which the Miami University Libraries provide access have at least some issues available electronically. A cursory review of journal literature or SERIALIST postings reveals challenges associated with these resources that include:

- **Check-in and claiming** — libraries must decide if and how they will check in e-journals and deal with failure to provide timely access. Availability of products with embargoes that may last from a few months to several years complicates this process.

- **Determining holdings** — libraries are no longer in the driver's seat for initiating and terminating subscriptions; aggregators may add or remove access to individual titles or entire collections of titles.

  - **Centralized access points** — faculty and students used to be able to walk into libraries and see what titles were available, and in many cases browse through areas devoted to current issues. As the number of titles available electronically overtakes the number of print titles, libraries are struggling with ways to present a similar sense of available titles, and current issues in particular. The use of markup languages and metadata offers one method of meeting this need.

**Possible Approaches**

In the past decade, as many of the changes noted in Copeland's article have now become old hat and the proliferation of e-journals has accelerated, how have positions with a serials emphasis changed?

Any attempt to provide a snapshot of position responsibilities entails certain risks and benefits. Relying on self-reported surveys about duties and the amount of time devoted to them presents several difficulties. The age of infoglut, particularly in email, provides formidable obstacles to obtaining a reliable and balanced sample. In addition, while obtaining self-reported results may provide enlightening or provocative comments, self-reported information is by nature subjective and unreliable, since it is inherently difficult to specify what tasks we do and to quantify the time devoted to them—particularly if trying to make a comparison over an extended period of time. Relying on a sample of position descriptions can be tricky as well. In addition to the challenge of gathering a representational sample, the accuracy of position descriptions is variable in quality. Position descriptions may not be updated frequently while the position is occupied.² Moreover, significant re-writes are more likely to occur when the position is vacant, because vacant positions provide the opportunity to re-envision what the position does and what qualifications are needed for that position independent of the interests, strengths, continued on page 75

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