

Copyright Law

Prof. Madison

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Topics:

- Litigation Considerations: Who is a Possible Defendant?
- Who is a Potential Licensee?
- Mixing Statutory and Common Law Concepts

The faces of infringement: Who is liable and how? Or, who must bargain?

1. **Direct** infringement (§ 501(a): “Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer”)
2. **Contributory** infringement (non-statutory)
3. **Vicarious** infringement (non-statutory)
4. **Special problems:** Device manufacturers and distributors, Internet Service Providers, and On-Line Service Providers (facilitators)
5. **Criminal** copyright infringement (save for later)

Styles of enforcement / regulation:

1. Lawsuits / bilateral licensing (specific © owner v. identified users/ depts)
2. Compulsory and statutory licensing (all qualifying users, regardless of © owner’s intent or preference (§§ 111, 114, 115, 119))
3. Regulatory licensing (§§ 1001 etc., a/k/a AHRA; § 1201 of the DMCA)
4. Collective rights organizations (CROs): Voluntary industry self-regulation (ASCAP, BMI, Harry Fox); authorized in the Copyright Act
5. Statutory exceptions (§ 110)

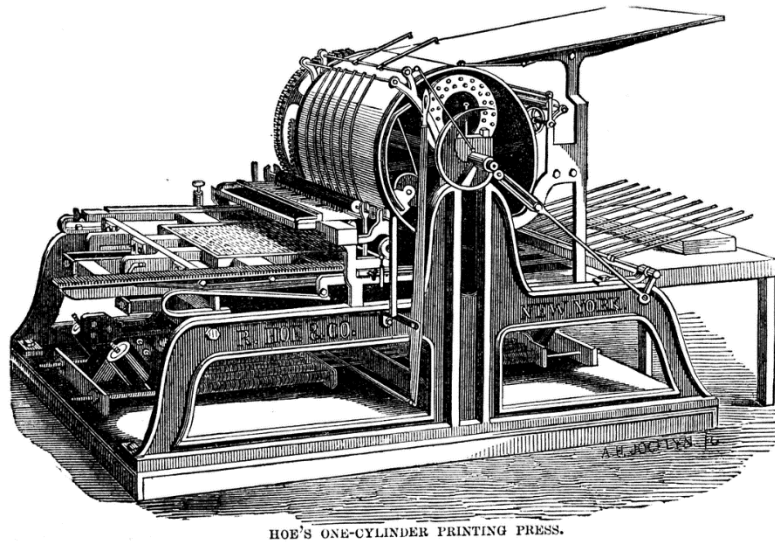
Remember the plaintiff’s case: (i) Ownership of a valid ©; (ii) unauthorized exercise of one or more of the rights specified in § 106.

The Faces of Infringement

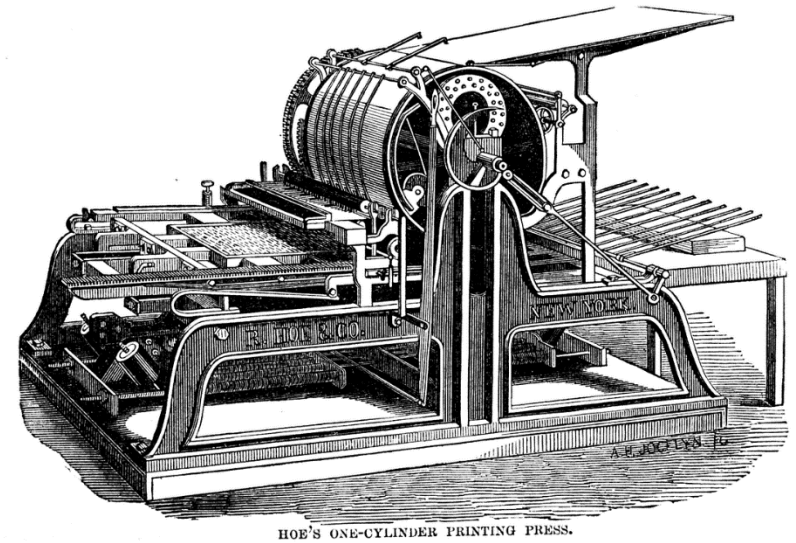
Who is liable, and how? In practice, the answer becomes the answer(s) to: *Who can/ must police/monitor a market or system for potential infringements and decide whether to pursue enforcement? Nb. repeats of intersections of economic incentives, “free riding” arguments, ethics, and IT as adding to © owner’s economic power (more formats, more markets!) and/or threatening it (more infringement!)*

- a. Direct infringement (Section 501(a): “Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer”)**
 - i. General understanding: Strict liability; no proof of “intent to infringe” required.
 - ii. Is any causation or volitional act required? Meaning: must the plaintiff prove (or may the defendant disprove “intent to [copy]”)?
- b. Contributory infringement (borrowed from tort law)**
 - i. Knowledge of the infringement
 - ii. Material contribution
- c. Vicarious infringement (borrowed from tort law)**
 - i. Right and ability to control the infringing activity
 - ii. Direct financial benefit from the infringement

The Faces of Infringement



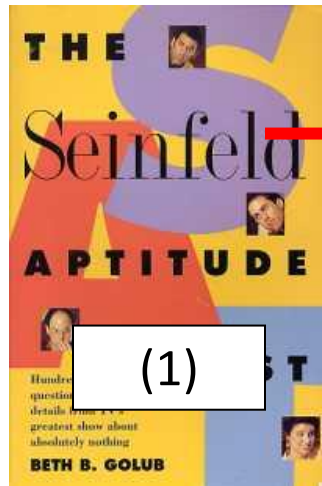
VS.



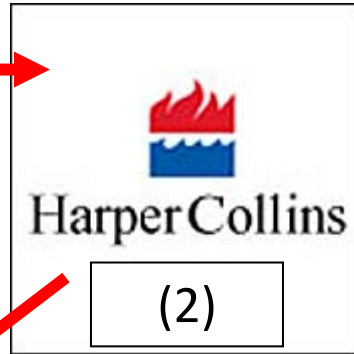
The original, historical context of lawsuits for copyright infringement:
publisher (printer) vs. publisher (printer)

- Millar v. Taylor (1769)
 - Donaldson v. Becket (1774)
 - Wheaton v. Peters (1834) (US Supreme Court)
- “Battle of the Booksellers” in England**

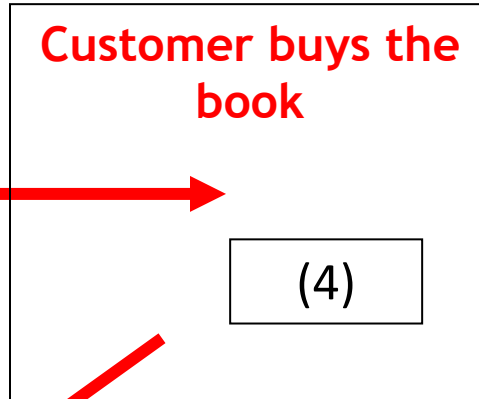
The Faces of Infringement: Who Commits **Direct** Copyright Infringement?



Book publisher



Customer buys the book



- (1) Author copies material without authorization (**Author may violate §§ 106(1), (2) unless § 102(b), § 107 help**)
- (2) Book is reviewed, edited, and published by a major publisher, which sells the books (**Publisher may violate § 106(3), also can invoke §§ 102(b), 107**)
- (3) Major book retailers, which stock thousands of books (**Retailer may violate § 106(3), also can invoke §§ 102(b), 107**)
- (4) Customers (**no liability!**)
- (5) One customer, a law professor, reads aloud from the book to an audience of law students (**Speaker may violate § 106(4), also can invoke §§ 102(b), 107**)

(1)

(2)

(3)

(4)

(5)

The Faces of Infringement: What Changes in a Computer Network World?

41 CONTINUED:

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PICARD
[repeats]
What are you doing?

OWENSEN
I need a sample of your blood. What do your B-9 friends say? Resistance is futile.

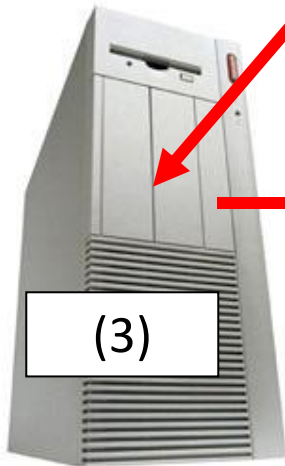
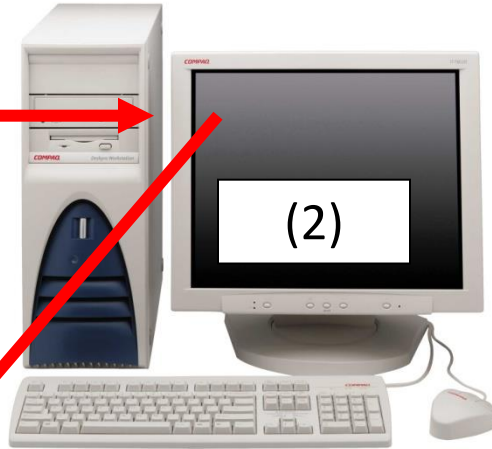
The doctor takes a quick sample of Picard's blood as Picard glances to the B-9.

OWENSEN (CONT'D)
Yes... I learned there might be an existing prototype from a Cardassian historian. They went to a great deal of trouble to find it and scatter it about on Solara III. I know it would pique your curiosity -- not conveniently make the Borgprise the closest ship to Romulus when I contacted Starfleet. The bait you couldn't resist.

[The B-9s]
[The B-9s]

PICARD
What's this all about?
    
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(CONTINUED)



Who commits direct copyright infringement?

- (1) A copyrighted work is uploaded (Uploader may violate §§ 106 (1), (3) (cf §§ 102(b), 107))
- (2) The upload is processed by software supervised by a human BBS operator and is forwarded *automatically* to an ISP (Does the human violate §§ 106 (1), (3)? *No.*)
- (3) The ISP, Netcom, carries the BBS on Usenet (an internet service), by *automatically* forwarding its contents (Does the ISP violate § 106 (1), (3)? *No.*)
- (4) Every human USENET subscriber around the world has access to the work and might download it (Subscriber may violate § 106 (1) but is unlikely to be sued.)

RTC v. Netcom On-Line Comm.
(N.D. Cal. 1995)

(5)



The Faces of Infringement, Continued

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Dance hall daze: Copyright law holds dance hall operators liable for infringements by the performers (public performances!) IF the operators have the **ability to control** the performance and **\$\$\$ benefit** from it (**vicarious** liability) AND/OR if they **know** of the infringing activity and **contribute substantially** to it (**contributory** liability). Mere landlords are usually not liable.

The Copyright Law

The copyright law of the United States (Title 17, U.S. Code) governs the making of reproductions of copyrighted work.

The person using the reproduction equipment is liable for any infringement.

For more information on the laws regarding copyrights contact the United States Copyright Office at 202.707.3000.

The FedEx Kinko's policy requires written permission from the copyright holder in order to reproduce any copyrighted works.

Our primary objective is to take care of your needs. We sincerely appreciate your understanding and cooperation in complying with the FedEx Kinko's copying policy. Thank you for your business.

Please see a FedEx Kinko's team member to obtain a Copyright Permission Request form.



Experience the freedom of total control.



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The new Sony Betamax SL-5800 frees you from the restraints of time, memory and circumstance. And makes you master of them all.

Mastering time, memory and circumstance.

The Betamax gives you the power to alter the fabric of time itself. You can record one channel while watching another.

You can program it to record a variety of shows on four different channels for up to fourteen days in advance. And with our optional BetaDisk tape-changer you can even record up to twenty solid hours of consecutive programming.

If having all this programming at the palm of your hand seems a bit overwhelming, we've got some more good news for you.

Mastering motion.

The Sony Betamax SL-5800 has a remarkable feature called BetaScan that allows you to find any single image from through the thousands of images on a tape many hours long. BetaScan lets you go fast forward or reverse without interrupting the image on the screen. A Variable BetaScan feature lets you adjust the speed at which you can view the tape from five times up to twenty times normal speed. A Variable slow motion feature allows you to go from Freeze Frame up to one-third

normal speed. And our Freeze Frame is really frozen. In clear and still and optically true, without noise lines or distortion.

Mastering space.

The Betamax also has a Time Commander Remote Control feature that lets you utilize Variable BetaScan, Variable Slow-motion, Frame-by-Frame Advance and Freeze Framing, without moving from the comfort of your bed or easy chair.

Mastering the medium.

The elegant, sophisticated technology of the Betamax SL-5800 gives you a new kind of freedom. It lets you record whether you're home or away. It gives you access to a vast variety of programming that you can buy or rent. And a Sony Portable Videotape Camera enables you to actually make your own programs and play them back instantly.

The Sony Betamax SL-5800 lets you shape and mold television to conform to your desires, to satisfy your own particular needs and interests. It allows you to make the final decision about what you'll watch and the way you'll watch it. It presents you with an almost infinite possibility of choices. And that's what freedom is all about.



SONY
THE ONE AND ONLY

Mastering time, memory and circumstance. © 1984 Sony Corp.

Cherry AUCTION SWAP MEET

- HOME
- LOCATION
- EVENTS
- SWAP MEET
- VENDOR INFO
- AUTO SWAP
- ABOUT



Welcome

Thank you for visiting our website. Cherry Avenue Auction is open Tuesdays and Saturdays all year 'round. We're Fresno's oldest and biggest outdoor market, where vendors and shoppers come together in a casual, family-friendly place. We're located in southwest Fresno's Raisin belt, affectionately known as the "Easton Area." Local families, carrying on the tradition from previous generations, farm most of the area.

Located on the northeast corner of American and Cherry Avenue, the Market has 54 acres of open air shopping! Over 200 shade trees, grassy areas and shade canopies that cover many of the Market's walkways, help keep you cool, even during the summer. Visit us today and enjoy a full day of shopping!

For your added comfort, Cherry Avenue Auction also has: ATM machine, Arcade, Bounce house, Pony rides AND... great fair-style food! Bring your appetite, our vendors "aim to please" and offer both carryout and sit down dining.

Great staff, great attractions, great fun and most importantly – great bargains and discount shopping await you! Check out the rest of our site to learn more about Cherry Avenue Auction.

Thank you,
Neil and Mitch Burson

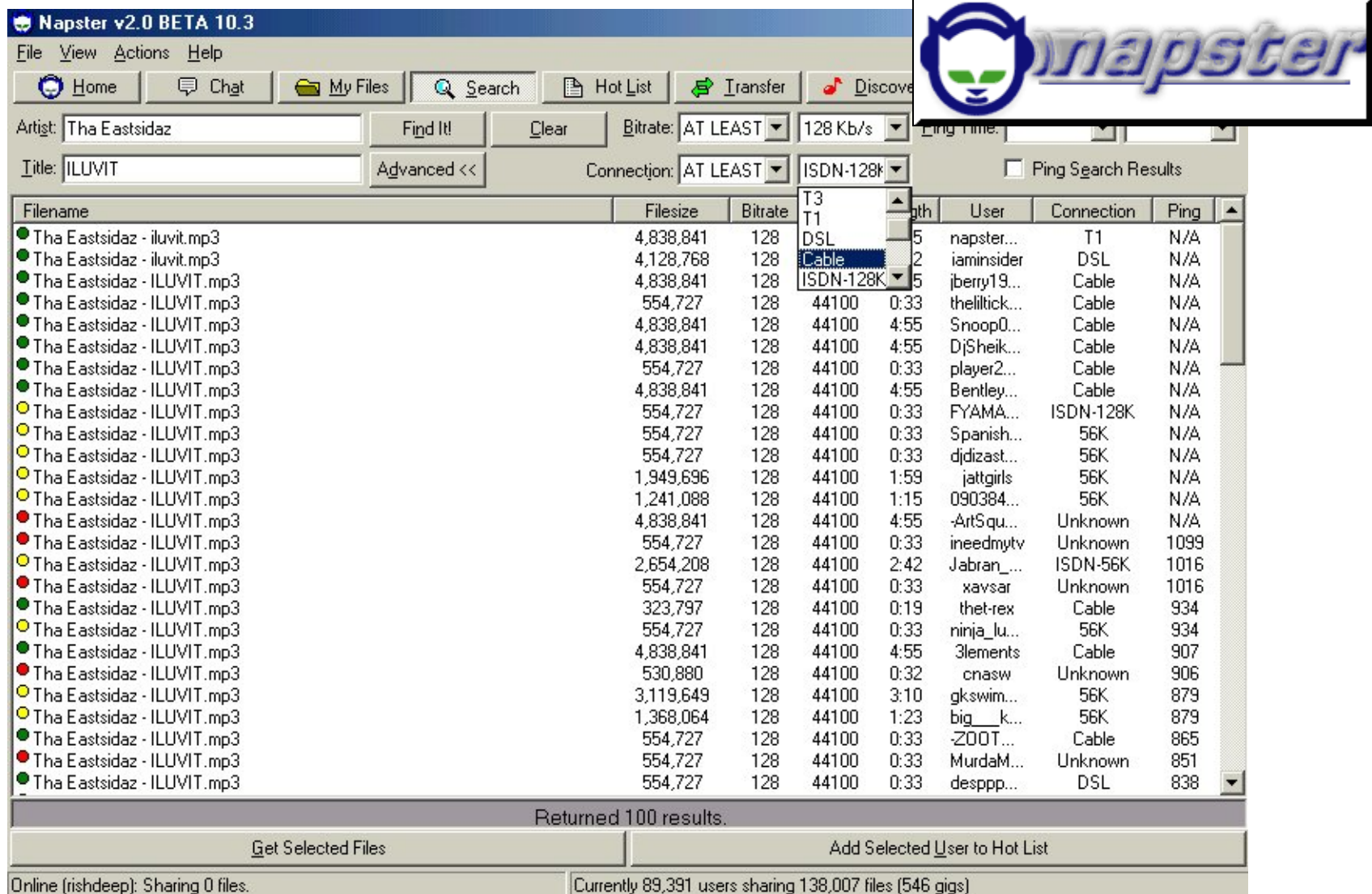


A swap meet:
More like a landlord/tenant relationship (no knowledge, no control) or a "dance hall" (knowledge, control)?

Fonovisa, Inc. v. Cherry Auction, Inc. (9th Cir. 1996)



The Faces of Infringement: What Does Knowledge and Control Mean Today?



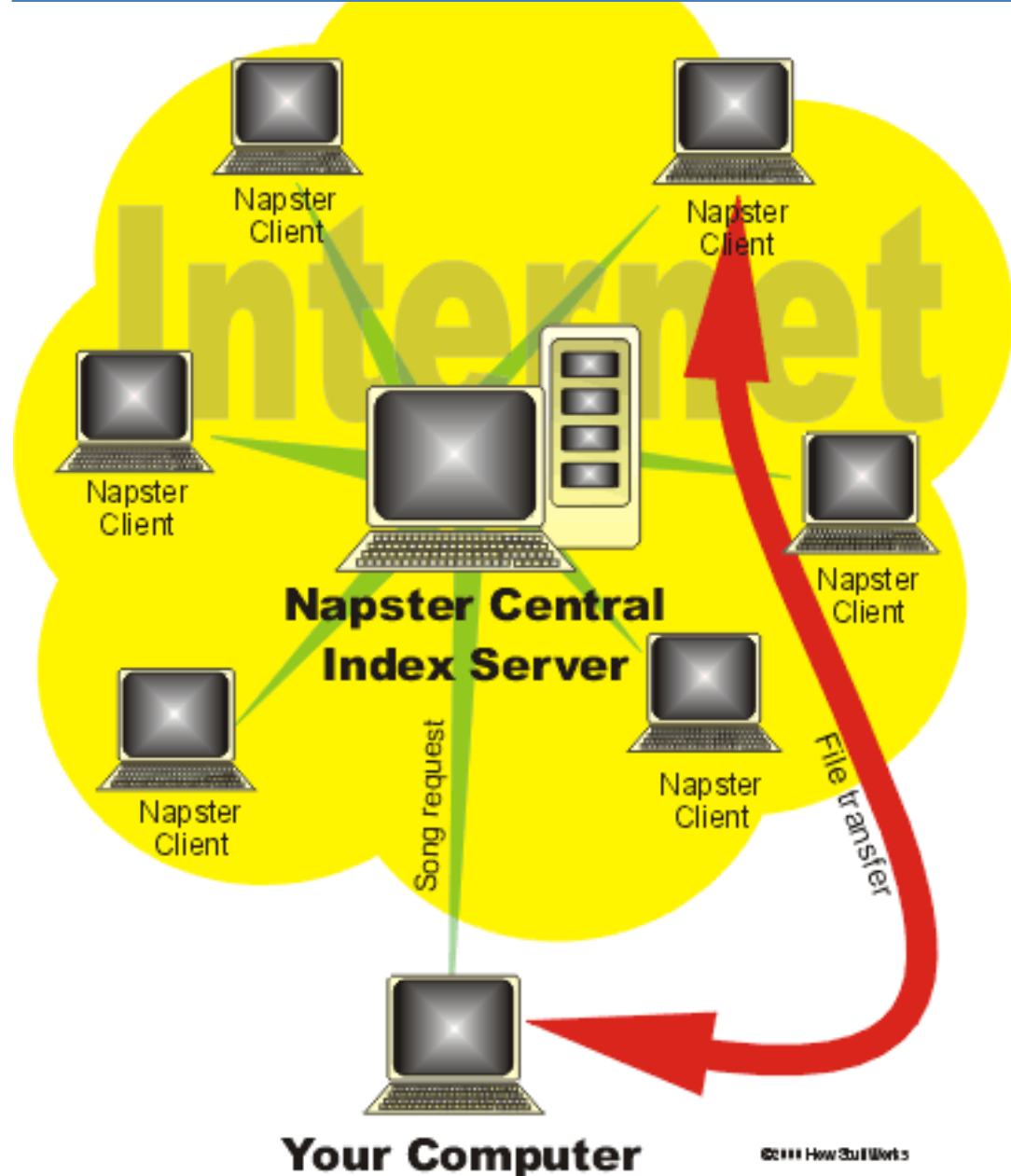
The screenshot shows the Napster v2.0 BETA 10.3 interface. The search criteria are Artist: Tha Eastsidaz and Title: ILUVIT. The search results table is as follows:

Filename	Filesize	Bitrate	Length	User	Connection	Ping
Tha Eastsidaz - iluvit.mp3	4,838,841	128	5	napster...	T1	N/A
Tha Eastsidaz - iluvit.mp3	4,128,768	128	2	iaminsider	DSL	N/A
Tha Eastsidaz - ILUVIT.mp3	4,838,841	128	5	jberry19...	Cable	N/A
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	theliltick...	Cable	N/A
Tha Eastsidaz - ILUVIT.mp3	4,838,841	128	44100	Snoop0...	Cable	N/A
Tha Eastsidaz - ILUVIT.mp3	4,838,841	128	44100	DjSheik...	Cable	N/A
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	player2...	Cable	N/A
Tha Eastsidaz - ILUVIT.mp3	4,838,841	128	44100	Bentley...	Cable	N/A
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	FYAMA...	ISDN-128K	N/A
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	Spanish...	56K	N/A
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	djdizast...	56K	N/A
Tha Eastsidaz - ILUVIT.mp3	1,949,696	128	44100	jattgirls	56K	N/A
Tha Eastsidaz - ILUVIT.mp3	1,241,088	128	44100	090384...	56K	N/A
Tha Eastsidaz - ILUVIT.mp3	4,838,841	128	44100	-ArtSqu...	Unknown	N/A
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	ineedmytv	Unknown	1099
Tha Eastsidaz - ILUVIT.mp3	2,654,208	128	44100	Jabran_...	ISDN-56K	1016
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	xavsar	Unknown	1016
Tha Eastsidaz - ILUVIT.mp3	323,797	128	44100	thet-rex	Cable	934
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	ninja_lu...	56K	934
Tha Eastsidaz - ILUVIT.mp3	4,838,841	128	44100	3lements	Cable	907
Tha Eastsidaz - ILUVIT.mp3	530,880	128	44100	cnasw	Unknown	906
Tha Eastsidaz - ILUVIT.mp3	3,119,649	128	44100	gkswim...	56K	879
Tha Eastsidaz - ILUVIT.mp3	1,368,064	128	44100	big__k...	56K	879
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	-ZOOT...	Cable	865
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	MurdaM...	Unknown	851
Tha Eastsidaz - ILUVIT.mp3	554,727	128	44100	desppp...	DSL	838

At the bottom of the interface, it states: "Returned 100 results." and "Currently 89,391 users sharing 138,007 files (546 gigs)".

A&M Records, Inc. v. Napster, Inc. (9th Cir. 2001)

The Faces of Infringement: What Does Knowledge and Control Mean Today?



A&M Records, Inc. v. Napster, Inc. (9th Cir. 2001)

Does the centralized Napster system architecture automatically imply that Napster knows about / can control infringing activity on its system?

If not, what else must the plaintiff show in order to hold Napster liable?

The Faces of Infringement: What Does Knowledge and Control Mean Today?

query: "Baby Go Home.mp3"



VS.

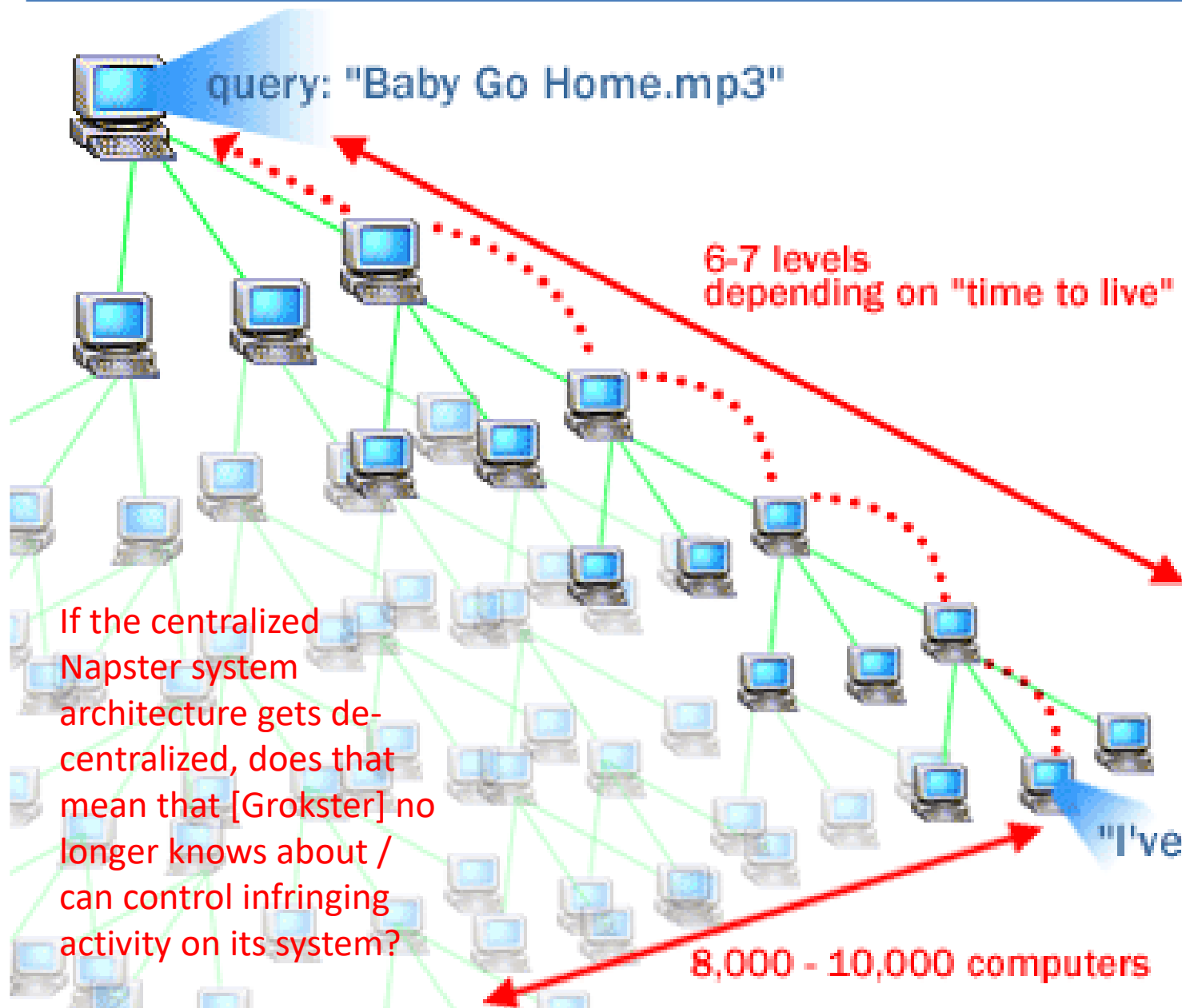


6-7 levels
depending on "time to live"

If the centralized
Napster system
architecture gets de-
centralized, does that
mean that [Grokster] no
longer knows about /
can control infringing
activity on its system?

"I've got it!"

8,000 - 10,000 computers



The Faces of Infringement: What Does Knowledge and Control Mean Today?



VS.

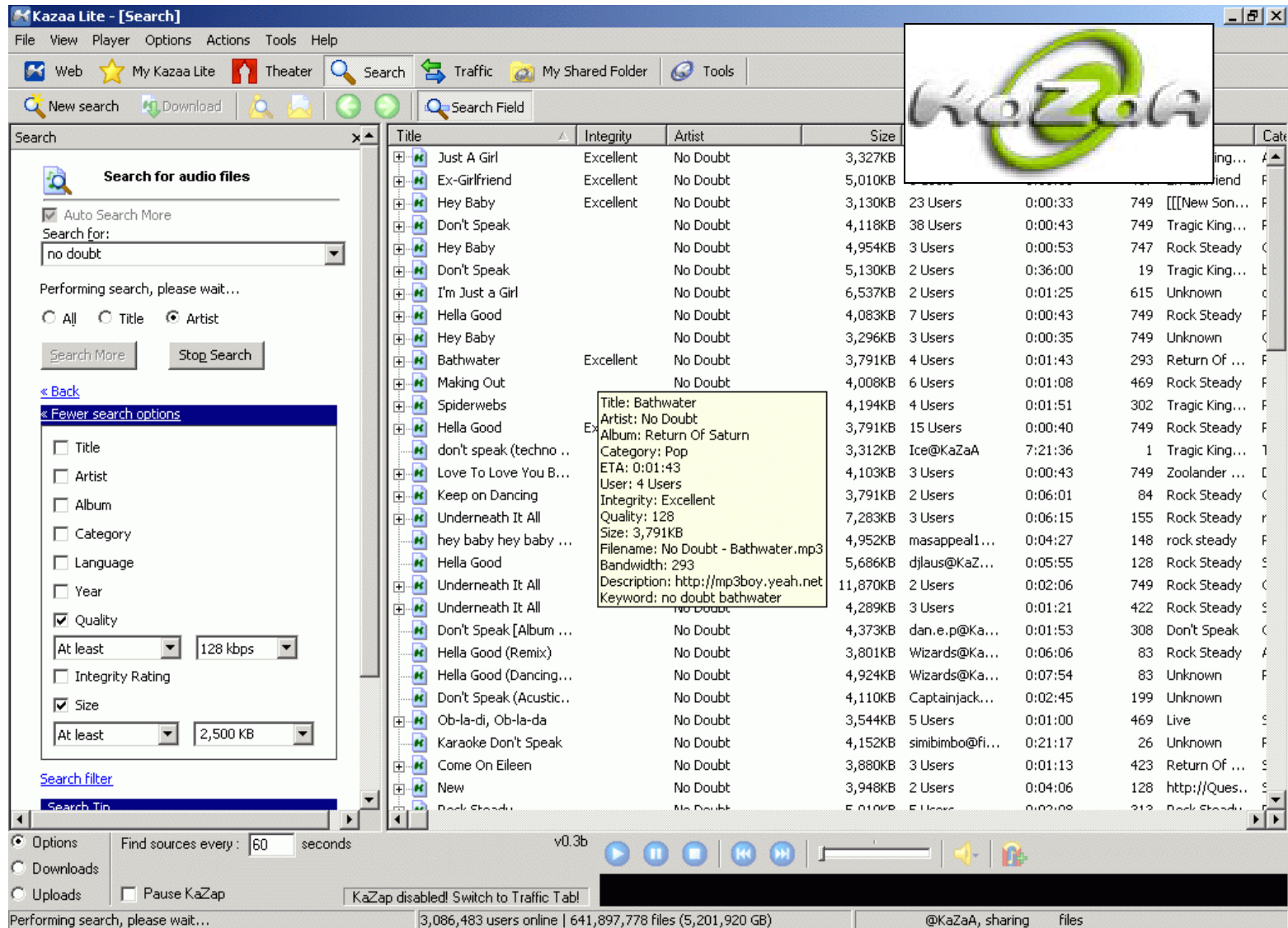


What is “inducement”? A species of contributory liability, or a new theory? And what becomes of *Sony v. Universal*?

(i) Limit *Sony* to the idea of “intent”; (ii) restrict *Sony*’s view of “substantial” noninfringing use; (iii) keep *Sony* as is.

MGM Studios, Inc. v. Grokster, Ltd (U.S. 2005)

The Faces of Infringement: What Does Knowledge and Control Mean Today?



The Kazaa / Grokster user interface was functionally indistinguishable from the Napster system interface. Does the UX/UI matter, or does the technical side matter? Both?

The Faces of Infringement

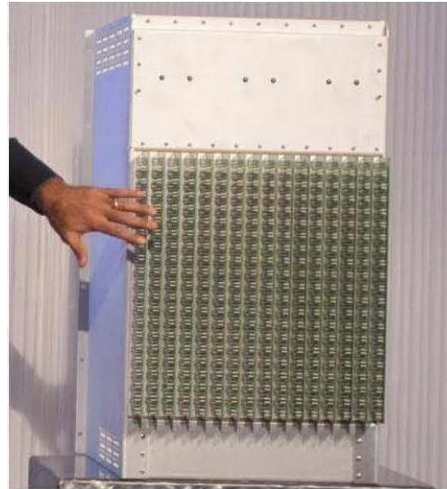
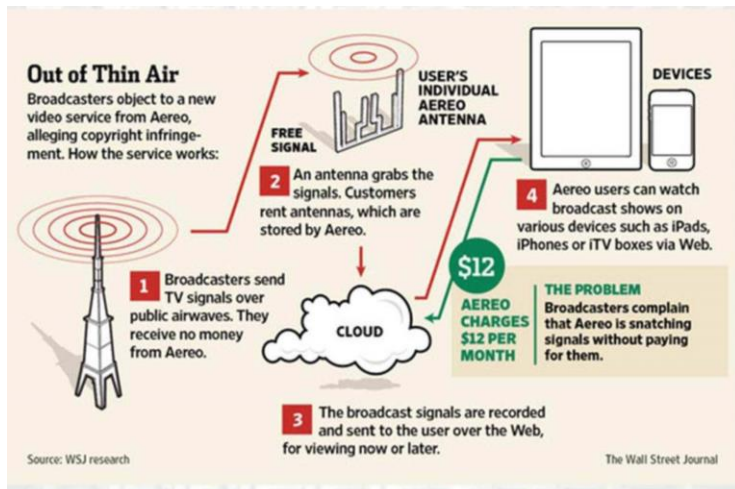
Notes regarding contributory and vicarious infringement:

1. Still non-statutory (see *Sony v. Universal City Studios* (U.S. 1984))
2. Do the doctrines apply equally to device cases and non-device cases?
 - a. Sales of devices that facilitate copyright infringement do not support secondary liability so long as the devices are “capable of substantial noninfringing use.” See *Sony*.
 - b. Do the doctrines focus on the defendant’s actions or on the harm that (arguably) results? Both? See *Grokster* (and cases since)
3. Do courts blur the doctrines together?
 - a. Knowledge by the defendant (contributory infringement) vs.
 - b. Control by the defendant (vicarious infringement)
4. How should these doctrines apply to Internet services?
 - a. Internet service providers (*RTC v. Netcom*: some “knowledge” (notice?) of infringement is required before they are liable)
 - b. File swapping/sharing/hosting/cloud software and services (*Napster* and *Grokster*: “knowledge”/notice may be inferred partly from tech design, partly from ???)
 - c. YouTube and other social media. Is this a device (a technology), or a service?
5. Problems of *scale*: applying an analog law to a digital, networked world

The Faces of Infringement: the volitional conduct problem

ABC, Inc. v. Aereo (US 2014): Aereo designed a system – thousands of individual antennas, each of which can be assigned to an individual Aereo subscriber to record and re-transmit broadcast TV content to that subscriber – based on *Cablevision*.

- Does *Aereo* infringe the public performance right in broadcast TV content? Is Aereo publicly performing the works (as a *direct* infringer)?
- The Supreme Court majority: yes (nb. why, under § 106?); no discussion of whether the company has made an affirmative choice to perform anything.
- Dissent: the company made no such choice; if there is a public performance, then the *customers* are publicly performing the works.
- Is Aereo engaged in contributory or vicarious infringement?



An Aereo antenna, and an Aereo antenna array



The End