Direct and Indirect Infringement

Copyright Law – Professor Grimmelmann
Class 21 – November 11, 2008

today

- contributory infringement
- vicarious infringement
- the volitional "defense" to direct infringement
- deferred until next time: *Sony* and *Grokster*

context on secondary liability

- the word "authorize" in § 106 gives courts common-law authority to apply traditional tort doctrines of joint and several liability
- e.g., *respondeat superior* is available
  - it's also the source for contributory and vicarious infringement doctrines
- "secondary" = "indirect" = joint and several

a few hypoes on *respondeat superior*

- Wendy owns WendyPrint; Ed works there
- if Ed prints infringing concert posters for a client, on WendyPrint's equipment, who's liable? Ed? WendyPrint? Wendy?
- what if Wendy had directed Ed to print the posters?
- what if Ed infringes off-duty? if Wendy does?

Shapiro v. H.L. Green

- Jalen sells infringing records, but …
  - where do the sales take place?
  - does Green have any supervisory rights?
  - what's the financial relationship?
  - how does Green participate day-to-day?
  - how do they advertise themselves?

Shapiro as a backward-looking case

- this is a *respondeat superior* case about the employee/contractor distinction
- compare the landlord/tenant cases with the dance-hall cases
  - why are bands employees for tort purposes while tenants aren't?
  - which analogy better fits the facts here?

Shapiro as a forward-looking case

- "When the **right and ability** to supervise coalesce with an obvious and **direct financial interest** in the exploitation of copyrighted materials"
  - does Green have right and ability?
  - does it have a direct financial interest?
  - does it have knowledge of infringement?

the policy of vicarious infringement

- in what sense is copyright infringement "strict liability" in *Shapiro*?
- what incentives does this rule give Green? what effect would the opposite rule give?
- explain the significance of the "save harmless" clause in the Green-Jalen contract? what effect will it have here?

A&M Records v. Abdallah

- what's a "time-loaded" cassette tape? what's the role it plays in large-scale infringement?
- did Abdallah himself make infringing tapes?
- what was his role in the infringements?
- what evidence established it?

Abdallah: contributory infringement

- "one who, with **knowledge of the infringing activity,** induces, causes or **materially contributes** to the infringing conduct of another"
  - does Abdallah have knowledge?
  - did Abdallah materially contribute?
- BTW, is Abdallah a vicarious infringer?

Cartoon Network (again)

- how does the recording piece of the system work? under what circumstances does it record a show to a hard drive?
- the volitional infringement doctrine in effect charges the infringement to the subscriber's account rather than Cablevision's. why?

Cartoon Network policy

- in what sense does the court reject "strict liability?" is it the sense we saw in *Green*?
- if the customer is an infringer, is Cablevision contributorily liable? vicariously? *is* the customer an infringer? should we draw this firm direct/contributory infringement line?
- how does this holding dovetail with the public-performance holding from last week?

case study: *Netcom*

- think of the documents as being like the Tom Cruise video for Scientology
  - Netcom both hosts files itself and transfers them to other hosting sites
- who, if anyone, is a direct infringer? is Netcom vicariously liable? contributorily?
  - do these results seem right to you?

next time

the *Sony* doctrine, inducement liability, and peer-to-peer