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A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004 (9th Cir. 2001)

INTRODUCTION

Copyright registration procures for the creators of an artistic composition, exclusive lifetime domain over the composition, (plus an additional 70 years) to determine who will benefit financially from the work and how it may be used. The landmark case A&M Records Inc. v. Napster Inc. crystallized issues at the conflux of music recording technology, the internet and the enforcement of copyrights in the 21st millennium. Prior to A&M v. Napster, the advent of new recording and duplicating technologies had already signaled challenges to copyright infringement regulation,[1] but this case became a defining event for the enforcement of copyright regulation in cyberspace. The implications were immediately apparent to legal scholars, major players in the music business, and participants in a fledgling, not yet captioned, social media network.

FACTS

In August 1999 college students Shawn Fanning and Sean Parker launched an internet operation based on software designed by Fanning to locate and make the sharing of digital music files easier. Their "MusicShare" software could be downloaded free of charge by anyone who registered on their website. Users of the site who wanted to trade music they already owned would create directories on their home computers from which MusicShare recognized titles and created a composite search index. When logged on to Napster's servers, searchers could link to the files they sought and transfer copies directly between their personal computers.

The site swiftly drew a huge following, (estimated at 80 million in 2001) and its young

1 *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984); *Cubby Inc. v. Compuserve, Inc*. 776 F. Supp. 135, 141 (S.D.N.Y 1991), *Polygram Int'l Publishing Inc. v. Nevada/TIG, Inc*. 855 F. supp. 1314, 1325-26 (D. Mass. 1994); and *Recording Industry Ass'n of America v. Diamond Multimedia Systems Inc*. 180 F3d 1072, 1079 (9th Circuit 1999), among others.

innovators achieved pop icon status in the national music media and mainstream media. In the opposing camp, executives of the major music labels and some music stars were justifiably alarmed that the enterprise was driven by the untrammeled use of their purloined copyrighted product.

PROCEDURAL HISTORY

On December 6, 1999 a conglomerate of recording industry organizations filed a complaint against Napster in the United States District Court for the Northern District of California, alleging contributory and vicarious infringement of music copyrighted to artists signed to their labels. Napster requested Summary Judgment which was dismissed. Plaintiffs', however, were initially successful in their request for an injunction to stop all infringing activity promoted by Napster. Napster's appeal of the injunction was rewarded the following year on remand, in part, from the Ninth Circuit.

Defendant's Response

On counterclaim, Napster asserted protection under the Home Audio Recording Act of 1992, (AMHRA) citing its fair use provisions. They alleged their users were copying material they already owned, for personal use and in a manner consistent with sampling or time shifting. They pointed out that some artists sanctioned the sharing of their music.

Napster also sought safe harbor in the Digital Millennium Copyright Act Section 512(i) (1998), (DMCA) as an internet service provider.

Napster's position was that it met all five tests required by DMCA, namely, that:

1. Third parties initiated transmission of MP3s, Napster did not,
2. Transmission of the files was an automatic technical process and was not subject to any input from Napster,
3. Napster did not select the recipients of the MP3 files or distribute the files to them,
4. It did not store any files from the transactions or copy them, and
5. Napster's system did not attach or affect the files during transmission

ISSUE

At issue was whether Napster knew or had reason to know about the copyright infringing

activity, whether it assisted or contributed and if Napster, knowingly, benefitted financially from that infringing activity by its users.

HOLDING

On October 2, 2000 the Ninth Circuit Court of Appeals issued a temporary stay of the injunction, ordering the lower court to make the plaintiffs responsible for providing Napster with a list of all their copyrighted works to facilitate the terms of the injunction. This was, however, the only concession to Napster's appeal and counterclaim.

The Ninth Circuit Judges held that Napster Inc. vicariously infringed and also contributed to the infringing activity of others. They agreed with Chief District Judge, Marilyn Patel's findings that: Napster was not an Internet Service Provider; the unauthorized copying of the recordings interfered with the owners' exclusive right to determine who benefitted financially from the reproduction of their creations and, further, that the number of files downloaded equated commercial use. It was also held that the popularity of the site was driven by music sharing which created a financial advantage for other aspects of its operations.

Time Shifting as a fair use defense under the AMHRA was invalidated because traditional time shifting generates only a small number of copies which are not distributed wholesale to the public. Napster's sampling defense was also rejected on the grounds that when the industry permits sampling the downloads are designed to expire after a very short time and portions permitted for sampling were typically less than 60 seconds long. [2]

REASONING

Contributory Infringement

Napster's position was that its role in linking users was equivalent to that of an Internet Service Provider (ISP). The Ninth Circuit disagreed, finding that Napster did not own a transmission channel it merely facilitated others in finding information on the internet and was not acting as a passive conduit in doing so whereas, traditional Internet Service Providers passively transmit and route information between their subscribers via networks they own or control.

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2 239 F3d 1064 A&M Records Inc. v. Napster, Inc. http://OpenJurist.org. Accessed 11/3/2011

Evidence that principals at Napster touted the facility with which MusicShare found music files and how easy it was to download them was cited to deny their claim of passivity. Plaintiffs' discovery that Sean Parker had acknowledged some of their users were sharing "pirated" music also did not help.

Further, as an ISP Napster should also have been policing any infringing activity and disconnecting users who refused to stop. The Court ruled Napster could not avail itself of protections under the Digital Millennium Copyright Act.

Vicarious Infringement

Regarding Napster's appeal to the American Home Recording Act the Judges for the Ninth Circuit reasoned that works of music, being highly creative, attached the strongest copyright protections and found that Napster's users were copying entire recordings which, as established in Hustler Magazine, Inc. v. Moral Majority, Inc., "militates against a finding of fair use."[3]

Although conceding that the copied music was not being re-sold, the court found akin to Sega Enterprises Ltd. v. MAPHIA, that downloading to avoid purchasing legal copies constituted commercial use. [3]

Citing Infinity Broadcast Corp. v. Kirkwood and UMG Recordings, Inc. v. MP3.com, Inc the panel held that neither Napster nor its users contributed any valuable alteration to the works copied.'[3]

The lower courts reliance on two studies; one by Dr. Deborah Jay demonstrating that users of Napster on college campuses bought fewer CDs and another by Nielsen Soundscan attributing loss of revenue from traditional music purchases to the effects of file sharing was also supported by the Ninth Circuit panel. [3]

A&M Records v. Napster Inc as a Landmark case

Before Napster revealed the extent of public interest in communicating and sharing material goods via the internet the ramifications of enforcing copyright regulations in this milieu had not been scrutinized. Allowing Napster Inc. to prevail would have signaled carte blanche to the public

3 239 F3d 1064 A&M Records Inc. v. Napster, Inc. http://OpenJurist.org. Accessed 11/3/2011

to download and share their music files. I believe the specter of that outcome also influenced the decision on appeal. [4]

Although this case did not reach the United States Supreme Court, it drew amicus curiae input on behalf of dozens of disparate commercial and academic interests who were either concerned a decision in this case could implicate media integral to their businesses, lead to stifling regulations or render them vulnerable to piracy. Consequently, A&M Records v. Napster incited national and international debate within business, academic and legal circles about the application of copyright law to this new medium and its effect on future developments.

It is said: "Timing is everything." That is certainly averred in this case. In 1996 two treaties were signed by member states of the World Intellectual Property Organization: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.[5] In 1998, Napster, Inc.'s inaugural year, The Digital Millennium Copyright Act was signed into law in the United States. A&M Records, Inc. v. Napster, Inc. therefore, was contested in this recently fortified copyright enforcement climate.

The young founders of this enterprise whose initial goal had been to create an exchange service for use within college communities found themselves with a creation that could not be contained. Despite the advent of the MP3 format in 1998, it seemed the captains of the music business did not anticipate the appeal of the digital music format. Their shortsightedness, ironically, was Napster's undoing. Once potential music buyers signaled their demand for this medium, Napster and operations like theirs became targets. In the typical knee jerk reaction of a monopoly enterprise, A&M affiliates acted swiftly to destroy the interloper and maintain their market share.

Sadly, Napster Inc. was the litmus test for today's digital pay-for-play business model and collateral damage in the war for profits that ensued. Its young innovators paid dearly for pre-empting titans of the music industry who were out of touch with their own constituents. But to their enduring acclaim they also previewed current social media platforms from which there is

4 Aspects of the Digital Millennium Copyright and the Home Recording Acts might have afforded an umbrella but allowing Napster to avail them would have scuttled the concerted effort to contain the damage.

5 http://www.wipo.int/freepublications/en/ecommerce/450/wipo_pub_l450in.pdf.

now no turning back. Facebook, Spotify, Rapture, and iTunes, for example, all have, as one basis for their utility and popularity, music and file sharing features that were influenced, if not directly inspired, by Napster[6] Its own founders developed later Napster-like iterations such as Plaxo an online address book which underpins LinkedIn.[7]

During the controversy and later, independent studies were done to determine whether online sharing of music files diluted CD sales. Several results showed that its effect might have been more beneficial than detrimental. Had these studies been done as research and development in preparation for the launch of MusicShare, the outcome might have been different.[8]

6 "The study looked at the whole "lifecycle" of how consumers use music, from how people first find out about it, to how they obtain it, listen to it, share it, organise [sic] it and collect it. A major finding from this was the importance of sharing music in both conventional and new media formats. In other work we have discussed the results from this study more generally (Brown, et al., 2001)."

7 Cota, Jim. "Find your address book perplexing? Consider Plaxo." *Indianapolis Business Journal* 6 Sept. 2010: 30A. *Small Business Collection*. Web. 2 Dec. 2011. Document URL http://go.galegroup.com/ps/i.do?id=GALE%7CA237601372&v=2.1&u=cuny_queensboro&it=r&p=GPS&sw=w

8 Napster's mistake was that it did not act more quickly to forge a co-operation with the record labels. This oversight was exacerbated by a lack of guidance from some of its investors who foresaw its potential and mistakenly assumed the music industry would be obligated to offer an alliance in order to benefit from the MusicShare technology.

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