WIKI'S, SHARED FILES AND DOWNLOADED TUNES:

COPYRIGHT LAW IN A DIGITAL AGE

By David E. Fleenor and James M. Francis[1]

> "There is a fundamental change taking place in terms of how corporations create value and arguably, in terms of the core architecture of the corporation. I think it's the biggest change in a century in the ways that companies build relationships and interact with other entities, institutions in the economy and in society and arguably, the nature of the corporation itself."
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> — Don Tapscott, co-author of *Wikinomics: How Mass Collaboration Changes Everything*

The internet pushed us headlong into the information age. Now the playing field has changed yet again. We live in a "collaborative information" age. We do not simply view information, we interact with it. In fact we transform the information we are viewing. The most popular social media web sites – *Wikipedia*, *YouTube*, *Facebook*, *Twitter* – consist primarily of information and content that has been uploaded by users with only a marginal amount of oversight by the operator of the site. Typically, because the information is posted at the time it is uploaded, the host site by design has little if any ability to filter content prior to publication. Thus the site becomes a constantly changing landscape, limited only by the controls put in place by the host of the site and the imagination of its users.

Don Tapscott, the author of the introductory quote, is not overstating the facts. The impact of the collaborative approach extends far beyond social networking sites, to the interactions between businesses and their customers and interactions between businesses and their competitors.

The word WIKI itself, ubiquitous today, unknown a few years ago[2] illustrates the point. Wiki was originally a Hawaiian word meaning fast. It was adopted as the name of a software program in 1994 that allowed easy editing of interlinked web pages. The word then became a noun denoting a website that used WIKI software. Now it has morphed again into a generic term for an interactive web site.

The most well known WIKI is *Wikipedia*, an online encyclopedia that has come to replace Britannica as the most used encyclopedia in the world. *Wikipedia* encourages its users to both write articles for inclusion on the site and to edit or expand existing articles. *Wikipedia* maintains policies and guidelines, and seeks a neutral point of view and a consensus as to the accuracy.[3]

This concept of a collaborative website development is not limited to encyclopedias. *YouTube* contains millions of videos. These are uploaded by users. *Amazon* sells books, DVDs and CDs – but it allows its users to post comments and reviews that are in turn accessed by readers. It facilitates independent book dealers selling used copies of books that are in competition with Amazon. Newspapers on their websites allow and encourage user comments. These are just a few examples.

Integral to the collaborative theme is the easy sharing of files. The availability of cheap storage combined with broadband internet access at very high speeds and the relative ease of copying digital media, facilitates this on a grand scale. This began on college and university campuses in the late 1990's. Students had access to both high digital transfer rates and computers with large hard drives. Mix in rock and roll music and a bevy of sites like Napster that purported to give "free" access to the world's digital music library, and by some estimates 80% of university transfer capacity was used to download music.[4]

File sharing facilitates a quantum leap in the availability of information of all types -audio, video, text and graphic. It unfortunately also blurs the traditional notions of intellectual property ownership. First the issue arises of who owns the information collaboratively created, the site owner or the users themselves. This issue can be solved by the site user with a well drafted user agreement. That only addresses the rights between the site owner and the user. What if the user did not own or have rights to the content he uploaded?

The issue then becomes what are the ownership rights to the underlying content and the rights of a licensee to use it in a collaborative site. Ownership rights in intellectual property are not absolute. Implicit in the concept of "fair use" is a requirement to determine what is in the public's interest.[5] It is too simplistic to say that only the copyright owner has the right to make a copy[6] and the analysis ends there. If I buy a music compact disk ("CD") or a movie on a digital video disk ("DVD"), I clearly have the right to watch or listen to it. By statute I may also have the right to make an archival copy to protect my copy. I would have the right to listen to it or watch it with my friends. Yet if my friends are virtual friends, and I use the medium of the internet to "share" my copy with them, the problems start. Copyright law was designed to deal with the technology of Gutenberg, not Gates. With each new advance in technology – analog recording, motion pictures, and now digital file transfer via the internet – copyright law has evolved to address the issue of ownership and its boundaries.

As further evidence of the impact technology has had on intellectual property, search engines have been developed for the sole purpose of crawling through

the web to find evidence of the unauthorized use of images (www.tineye.com) as well as the unauthorized "borrowing" of text (www.copyscape.com). These search engines utilize novel algorithms to search for recognizable arrangements of pixels. How far away is a search engine that can recognize arrangements of sound? Not far off apparently. At least two *Apple iPhone* applications[7] apparently allow users to hum a few bars or sing a line or two after which it retrieves information about the song and provide links to purchase the digital copy through *iTunes*.

Consequently, as technology improves and is adapted to help detect potential infringement, the creativity of would be infringers keeps them one step ahead. The BitTorrent file sharing protocol breaks up a file into smaller sections, called blocks, and allows it to be distributed piecemeal and subsequently reassembled. A server, called a "tracker," manages the file transfer process by directing network traffic and sharing the bandwidth burden among various end users. This complicates matters for the copyright owner in that a BitTorrent end user typically maintains only part of a file rather than the entire file, thus making detection and deterrence difficult.[8]

We are now in the transition phase with a series of cases winding their way through the system – cases that will ultimately decide how collaborative we can be. The sorting out of the application of the law will also determine how much control the intellectual property owners can retain.

The Backdrop – Napster and the Legal Response of the Recording Industry

Beginning in June 1999 and continuing until July 2001, the first of the popular online file sharing sites "Napster" was created by, not surprisingly, a college student. Napster allowed users to copy and distribute the MP3 files amongst themselves, primarily music MP3s. The site was a peer-to-peer file sharing service. No MP3 files were centrally stored[9] but Napster did maintain a central index of users and files. To copy a file, you had to find a user that had the file you wanted and make a copy from their storage. Many reasons were urged for allowing this model. CD's had become too expensive. The content of a particular CD might consist of only one song a user really wanted. The traditional distribution system stifled new artists from entering the market. File sharing allowed sampling of music that might ultimately result in a sale. Napster argued that the Audio Home Recording Act[10] implicitly legalized peer to peer file sharing. Of all these reasons, only the last had any real legal basis, the rest were merely excuses for digital theft.

The music recording industry through its trade group the Recording Industry Association of America ("RIAA") denounced "file sharing" as "file theft" and began a series of lawsuits that ultimately resulted in Napster and its progeny being shut down.[11] Other services tried to work around the Napster case by eliminating the centralized indices. In a decision by the United States Supreme Court, *MGM Studios v. Grokster*,[12] the court held that one who distributes a device with the object of promoting its use to infringe copyright is liable to the resulting acts of infringement of third parties using the device. Thus, the facilitation offered by the *Napster* and *Grokster* sites was viewed as the same type of copyright infringement as the actual file sharers. The Ninth Circuit had previously ruled in Grokster's favor citing an early U.S. Supreme Court Case[13] that had created a "safe harbor" for someone who produced a device that could be used for infringement.

The Safe Harbor of the Digital Millennium Copyright Act

In 1998, reacting to both the internet and the digitalization of information, Congress amended the Copyright Act by passing the Digital Millennium Copyright Act ("DMCA"). The DMCA did the following:

- Made it a crime to circumvent anti-piracy measures built into most commercial software
- Outlawed the manufacture, sale, or distribution of code-cracking devices used to illegally copy software.

The DMCA did provide a safe harbor for online service providers who merely allow users to post material that infringes copyrights. To avail itself of this safe harbor, a service has to demonstrate that it meets the statutory definition of a "service provider" and that it does not have actual knowledge of the infringing material, that it is not aware of facts or circumstances that make the infringing activity apparent and that it acts expeditiously to remove infringing material when it is brought to the service provider's attention.

The future of commercial websites that utilize user generated content ("UGC") depends on how the courts ultimately interpret "right and ability to control" under the DMCA. Should the UGC industry lose this battle, the next issue facing them is the dispute over what constitutes "direct financial benefit." The courts have, so far, not interpreted a paid subscription service to a website to be a direct financial ben-

efit that is derived from the user generated content.[14]

It is worth noting that the DMCA safe harbor does not extend beyond qualifying online service providers (including websites). Thus user groups that carve out territory within a qualifying online service provider cannot depend on the DMCA safe harbor as a defense to infringement. This potentially has the most impact on blogs found on blog hosting websites like Blogger and Blogspot. These blogs are essentially user groups operating within the domain of the host website and thus should not be able to claim the benefit of the DMCA safe harbor.

The Current Major Cases

In the post-Napster DMCA world the question has shifted. Now the owner of a copyright that is being infringed must determine who is the best party to sue in order to enforce his rights. For all but the most well financed industry groups such as the RIAA, it is a cost prohibitive exercise to go after all of the potentially millions of users of a site that has infringing material on it. It would be much easier to sue the site itself – Google, Microsoft and others. This brings into play issues of fair use and the safe harbors discussed above. That is the caselaw that is currently developing in the various courts.

Perfect 10, Inc. v. Amazon.com, Inc.,[15]

This action was initiated by Perfect 10, Inc., the owner of copyrights in photographs of models, against Google, Inc., the dominant internet search engine and Amazon. The suit alleged direct, vicarious and contributory copyright infringement.

Google's image search engine provides responses to queries entered by users. The response includes a thumbnail image, which is a reduced, lower resolution version of images stored on third-party computers. When a user clicks on a "thumbnail image" the user's browser creates a rectangular area that contains two separate blocks of information. The top section contains information from the Google webpage. The bottom part of the display is a framed version of the third party site. Perfect 10's copyrighted images appear unlicensed on third party websites. These sites are searchable using the Google engine. Beginning in 2001, Perfect 10 informed Google that it viewed both the thumbnail images and the framed linking to the full sized images as infringing its copyrights. In 2004 Perfect 10 filed suit against Google. Suit against Amazon was filed in 2005. Amazon had by contractual agreement, linked to Google's image search engine. The two cases were ultimately consolidated.

At the District Court level, Perfect 10 moved for preliminary injunctions against both defendants. The District Court granted a portion of the injunctive relief against Google and denied the injunctive relief against Amazon.com. Both Perfect 10 and Google appealed the District Court's decision. The District Court stayed the effect of the

injunction pending the appeal.

The United States Court of Appeals for the Ninth Circuit affirmed in part, reversed in part and remanded the action for further proceedings. The effect of the Ninth Circuit's opinion was to dissolve the District Court's injunction. The Ninth Circuit held that Google's use of thumbnail copies of Perfect 10's constituted copyright infringement. The Court went on to hold that:

> We conclude that Perfect 10 is unlikely to succeed in overcoming Google's fair use defense, and therefore reverse the district court's determination that Google's thumbnail versions of Perfect 10's images likely constituted a direct infringement.[16]

The Court determined that Google and Amazon could be secondarily liable for third party infringement if they knew of the infringing activities and had not taken reasonable steps in response. The Court remanded that portion of the action for a factual determination of concerning secondary liability. The Court declined to consider whether the DMCA provided a "safe harbor" for the defendants since that had not been addressed at the trial court level. The case is now back before the trial court.

Viacom v. YouTube [17]

This action was brought by media giant Viacom against Google's subsidiary YouTube. Viacom claimed a billion dollars in damages. At issue are brief excerpts of Viacom properties which are posted on the YouTube site. The clips are posted by YouTube users. The suit was filed in March 2007. The parties are still wrangling over the form of the complaint so it is unlikely a decision will be rendered in the case for years to come. YouTube's defense is the safe harbor provisions of the Digital Millennium Copyright Act. YouTube styles itself a service provider. The DMCA shifts the burden of monitoring infringement from service providers to content providers. The citation to the YouTube case deals only with a motion to amend the complaint to add a count for punitive damages. That motion was denied.

The threshold issue for application of the DMCA Safe Harbor is whether YouTube is in fact a service provider. This will turn on whether the conduct at issue is

- Transitory communications;
- System caching;
- Information storage; or
- Information location tools such as a search engine.

See 17 U.S.C. Sections 512(a)-(d). If this threshold is met, YouTube will have to show that it had no actual knowledge of the infringement, it moved expeditiously to disable access and that it received no financial benefit directly attributable to the infringing activity.

MPAA v. Real Networks [18]

The Motion Picture Association of America filed suit against Real Networks to enjoin the sale of "RealDVD". RealDVD would allow a user to copy and store DVD's on a computer hard drive. The MPAA contends that RealDVD violates provisions of the DMCA. Also at issue is "FACET," the next generation DVD player. FACET would have the ability to store 900 DVD's.

Capitol Records v. Thomas [19]

This is the first case brought by the music industry against an individual related to file sharing to reach a verdict. It has now reached two verdicts. The first verdict was in October of 2007 wherein the plaintiffs were awarded a judgment of statutory damages against the defendant in the amount of $9,250 per downloaded song for a total award of $220,000. Ms. Thomas, the single mother of two, had been sued for the downloading activity, possibly of her children, on the Napster-like site KAZAA. The trial court in an order nearly a year later, granted defendant's motion for a new trial. The Judge granted the motion because of an erroneous jury instruction that stated that the plaintiffs did not have to show actual distribution.

At issue along with the jury instruction was whether the award was excessive. The Court did not rule on this, but took the extraordinary step of addressing it in a call for revision of the Copyright Act. The Court said:

> The Court would be remiss if it did not take this opportunity to implore Congress to address liability and damages in peer-to peer network cases such as the one currently before this Court. The Court begins its analysis by recognizing the unique nature of this case. The defendant is an individual, a consumer. She is not a business. She sought no profit from her acts. …. The

parties point to no case in which large statutory damages were applied to a party who did not infringe in search of commercial gain.[20]

Despite this clear indication that the Court viewed $220,000 as excessive for downloading 24 songs, the second jury in June of 2009 again ruled in favor of the plaintiffs and awarded a whopping $80,000 per song for a total judgment of $1,920,000. Post trial motions for a remittitur are pending.

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The Users Strike Back

While the recording industry has been aggressive in going after the sites like Napster and even individual users like Ms. Thomas, file sharers are beginning to react to what is perceived as an overly aggressive misuse of copyright law. Stephanie Lenz, a Pennsylvania mom, posted a 29 second video clip of her son dancing in the kitchen of their home on YOUTUBE. After the clip had been viewed 28 times, mostly by family and friends, Ms. Lenz was informed that it had been taken down at the request of Universal Music. The clip contained Prince's "Let's Go Crazy" in the background. Ms. Lenz reacted by filing a lawsuit against Universal alleging that a) her use was a fair use under the copyright act and that b) Universal's actions constituted bad faith under the DMCA. Much to Universal's chagrin the claim has survived summary judgment.[21] YouTube in the interim has reposted the video and at the writing of this article the video has been viewed nearly a million times.

Ms. Lenz's action is being underwritten by the Electronic Frontier Foundation, a non-profit group whose aim is to foster free speech, fair use and consumer's rights, particularly on the internet.

Additionally, efforts appear to be underway to bring a class action lawsuit against the RIAA for its overzealous use of litigation and especially for the use of blanket complaints and discovery requests that only differ by heading. The RIAA routinely sends out batches of hundreds of "pre-litigation letters" at a time, sympathetically offering to let recipients settle copyright infringement claims "at a discounted rate" before those claims go to trial. Tanya Andersen, a single mother who received threats from the RIAA that they would "financially ruin" her if she did not agree to their settlement offer, not only fought back against the RIAA, had her case dismissed with prejudice and was awarded approximately $108,000 for her attorneys' fees and costs[22], but also returned the favor with an action for malicious prosecution.[23] The court has yet to rule on Ms. Andersen's motion for class action status and has indicated that it will allow Ms. Andersen to develop her evidence of a perceived violation of RICO based upon the recording industry's alleged failure to perform any reasonable due diligence prior to engaging in blanket threats and the filing of form complaints.

Conclusion

The genie is out of the bottle. The RIAA may have stopped sites such as Napster and significantly cut down on peer-to-peer file sharing, however, the public has shown a clear preference for obtaining music in the digital download format. I-Tunes and Rhapsody have supplanted the traditional record store. Thus the way music is delivered to the end user has transformed. A crystal ball would likely indicate that collaborative sites are here to stay as well. The rights of copyright owners will not be totally ignored.

Copyright law has responded to changing technologies as diverse as the photocopier, the videotape and the internet. While the internet and the digitalization of information on a mass scale provide new challenges, ultimately the law will respond with a balancing of the rights of copyright owners and the rights of the public to access and use information.

ENDNOTES

1. The authors wish to thank Jeffrey Frey and James Payne, Research Librarians for Stoll Keenon & Odgen's Lexington, Kentucky office for their thoughtful comments and suggestions on earlier drafts of this article.
2. "Wiki" first appeared in the Oxford English Dictionary in 2007.
3. *See* "About Wikipedia" at the Wikipedia website http://en.wikipedia.org/wiki/wikipedia:about.
4. *http://en.wikipedia.org/wiki/napster*. Interestingly, this Wikipedia statement currently seeks a source for the statement.
5. 17 U.S.C. Section 107. The "fair use" analysis looks at the purpose and character of the use. A use that benefits the public interest like an educational use is more likely to be viewed as a "fair use."

6. 17 U.S.C. Section 106. Clearly the right to reproduce a work and the right to create a derivative work are central to copyright ownership. The concept of fair use, 17 U.S.C. Section 107, makes it clear that these rights are not absolute.
7. *Shazam* and *Midomi*.
8. http://en.wikipedia.org/wiki/bittorrent_(protocol).
9. See Wikipedia Napster Article.
10. 17 U.S.C. Sections 1001-1010. The legislative history indicated that making digital copies for family members or for use in portable playing devices was not actionable. It took some leap of faith to view the Napster model as this type of copying.
11. *A&M Records v. Napster, Inc*., 239 F.3d 1004 (9th Cir. 2001).
12. 545 U.S. 913 (2005).
13. *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984).
14. *CoStar Group, Inc. v. LoopNet, Inc.,* 373 F.3d 544 (4th Cir. 2004) and *Perfect 10, Inc. v. CC Bill LLC*, 481F.3d 751, 767 (9th Cir. 2007).
15. 487 F. 3rd 701 (9th Cir 2007).
16. *Id*. at 733.
17. Case No. C08 – 04 548 MHP.
18. United States District Court for the Northern District of CA. The case has been assigned to the Hon. Marilyn Patel, the same judge who decided the Napster case.
19. Case No. 06-1497 (June 19, 2009, D. of Minn.). This case was originally styled *Virgin Records v. Thomas* and many news reports still refer to it by that title.
20. *Id*. Memorandum of Law and Order dated Sept. 24, 2008 at page 41.
21. 572 F. Supp. 2d 1150 (N.D. Cal. 2008). In a subsequent unpublished opinion the District Court declined to certify the issue of fair use for an interlocutory appeal. 2008 WL 4790669 (Oct. 28, 2008 N.D. Cal.).
22. *Atl. Recording Corp. v. Andersen*, 2008 U.S. Dist. LEXIS 48357 (D. Or. June 24, 2008).
23. *Andersen v. Atl. Recording Corp.et al., 3:07-cv-00934-BR (D. Or filed June 22, 2007).*