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

BEEZER, Circuit Judge.

Plaintiffs are engaged in the commercial recording, distribution and sale of copyrighted musical compositions and sound recordings. The complaint alleges that Napster, Inc. ("Napster") is a contributory and vicarious copyright infringer. On July 26, 2000, the district court granted plaintiffs' motion for a preliminary injunction. The injunction was slightly modified by written opinion on August 10, 2000. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp.2d 896 (N.D.Cal.2000). The district court preliminarily enjoined Napster "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner." *Id.* at 927.

We entered a temporary stay of the preliminary injunction pending resolution of this appeal. We affirm in part, reverse in part and remand.

I

We have examined the papers submitted in support of and in response to the injunction application and it appears that Napster has designed and operates a system which permits the transmission and retention of sound recordings employing digital technology.

In 1987, the Moving Picture Experts Group set a standard file format for the storage of audio recordings in a digital format called MPEG-3, abbreviated as "MP3." Digital MP3 files are created through a process colloquially called "ripping." Ripping software allows a computer owner to copy an audio compact disk ("audio CD") directly onto a computer's hard drive by compressing the audio information on the CD into the MP3 format. The MP3's compressed format allows for rapid transmission of digital audio files from one computer to another by electronic mail or any other file transfer protocol.

Napster facilitates the transmission of MP3 files between and among its users. Through a process commonly called "peer-to-peer" file sharing, Napster allows its users to: (1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users; (2) search for MP3 music files stored on other users' computers; and (3) transfer exact copies of the contents of other users' MP3 files from one computer to another via the Internet. These functions are made possible by Napster's MusicShare software, available free of charge from Napster's Internet site, and Napster's network servers and server-side software. Napster provides technical support for the indexing and searching of MP3 files, as well as for its other functions, including a "chat room," where users can meet to discuss music, and a directory where participating artists can provide information about their music.

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IV

We first address plaintiffs' claim that Napster is liable for contributory copyright infringement. Traditionally, "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir.1971); *see also Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir.1996). Put differently, liability exists if the defendant engages in "personal conduct that encourages or assists the infringement." *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir.1998).

The district court determined that plaintiffs in all likelihood would establish Napster's liability as a contributory infringer. The district court did not err; Napster, by its conduct, knowingly encourages and assists the infringement of plaintiffs' copyrights.

A. Knowledge

Contributory liability requires that the secondary infringer "know or have reason to know" of direct infringement. *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845 & 846 n. 29 (11th Cir.1990); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1373-74 (N.D.Cal.1995) (framing issue as "whether Netcom knew or should have known of" the infringing activities). The district court found that Napster had both actual and constructive knowledge that its users exchanged copyrighted music. The district court also concluded that the law does not require knowledge of "specific acts of infringement" and rejected Napster's contention that because the company cannot distinguish infringing from noninfringing files, it does not "know" of the direct infringement. 114 F. Supp.2d at 917.

It is apparent from the record that Napster has knowledge, both actual and constructive,[5] of direct infringement. Napster claims that it is nevertheless protected from contributory liability by the teaching of *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984). We disagree. We observe that Napster's actual, specific knowledge of direct infringement renders *Sony* 's holding of limited assistance to Napster. We are compelled to make a clear distinction between the architecture of the Napster system and Napster's conduct in relation to the operational capacity of the system.

The *Sony* Court refused to hold the manufacturer and retailers of video tape recorders liable for contributory infringement despite evidence that such machines could be and were used to infringe plaintiffs' copyrighted television shows. *Sony* stated that if liability "is to be imposed

[5] The district court found actual knowledge because: (1) a document authored by Napster co-founder Sean Parker mentioned "the need to remain ignorant of users' real names and IP addresses 'since they are exchanging pirated music' "; and (2) the Recording Industry Association of America ("RIAA") informed Napster of more than 12,000 infringing files, some of which are still available. 114 F. Supp.2d at 918. The district court found constructive knowledge because: (a) Napster executives have recording industry experience; (b) they have enforced intellectual property rights in other instances; (c) Napster executives have downloaded copyrighted songs from the system; and (d) they have promoted the site with "screen shots listing infringing files." *Id.* at 919.

on petitioners in this case, it must rest on the fact that *they have sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies* of copyrighted material." *Id.* at 439, 104 S.Ct. 774 (emphasis added). The *Sony* Court declined to impute the requisite level of knowledge where the defendants made and sold equipment capable of both infringing and "substantial noninfringing uses." *Id.* at 442 (adopting a modified "staple article of commerce" doctrine from patent law).

We are bound to follow *Sony*, and will not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights. *See* 464 U.S. at 436, (rejecting argument that merely supplying the " 'means' to accomplish an infringing activity" leads to imposition of liability). We depart from the reasoning of the district court that Napster failed to demonstrate that its system is capable of commercially significant noninfringing uses. *See Napster,* 114 F. Supp.2d at 916, 917-18. The district court improperly confined the use analysis to current uses, ignoring the system's capabilities. *See generally Sony*, 464 U.S. at 442-43, (framing inquiry as whether the video tape recorder is "*capable* of commercially significant noninfringing uses") (emphasis added). Consequently, the district court placed undue weight on the proportion of current infringing use as compared to current and future noninfringing use. *See generally Vault Corp. v. Quaid Software Ltd.,* 847 F.2d 255, 264-67 (5th Cir.1988) (single noninfringing use implicated *Sony*). Nonetheless, whether we might arrive at a different result is not the issue here. *See Sports Form, Inc. v. United Press Int'l, Inc.,* 686 F.2d 750, 752 (9th Cir.1982). The instant appeal occurs at an early point in the proceedings and "the fully developed factual record may be materially different from that initially before the district court...." *Id.* at 753. Regardless of the number of Napster's infringing versus noninfringing uses, the evidentiary record here supported the district court's finding that plaintiffs would likely prevail in establishing that Napster knew or had reason to know of its users' infringement of plaintiffs' copyrights.

This analysis is similar to that of *Religious Technology Center v. Netcom On-Line Communication Services, Inc.,* which suggests that in an online context, evidence of actual knowledge of specific acts of infringement is required to hold a computer system operator liable for contributory copyright infringement. 907 F. Supp. at 1371. *Netcom* considered the potential contributory copyright liability of a computer bulletin board operator whose system supported the posting of infringing material. *Id.* at 1374. The court, in denying Netcom's motion for summary judgment of noninfringement and plaintiff's motion for judgment on the pleadings, found that a disputed issue of fact existed as to whether the operator had sufficient knowledge of infringing activity. *Id.* at 1374-75.

The court determined that for the operator to have sufficient knowledge, the copyright holder must "provide the necessary documentation to show there is likely infringement." 907 F. Supp. at 1374; *cf. Cubby, Inc. v. CompuServe, Inc.,* 776 F. Supp. 135, 141 (S.D.N.Y.1991) (recognizing that online service provider does not and cannot examine every hyperlink for potentially defamatory material). If such documentation was provided, the court reasoned that Netcom would be liable for contributory infringement because its failure to remove the material "and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation" in distribution of copyrighted material. *Id.*

We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement. *See Netcom,* 907 F. Supp. at 1374. Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. *See Sony,* 464 U.S. at 436, 442-43, 104 S.Ct. 774. To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use.

We nevertheless conclude that sufficient knowledge exists to impose contributory liability when linked to demonstrated infringing use of the Napster system. *See Napster,* 114 F. Supp.2d at 919 ("*Religious Technology Center* would not mandate a determination that Napster, Inc. lacks the knowledge requisite to contributory infringement."). The record supports the district court's finding that Napster has *actual* knowledge that *specific* infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material. *See Napster,* 114 F. Supp.2d at 918, 920-21.[6]

B. Material Contribution

Under the facts as found by the district court, Napster materially contributes to the infringing activity. Relying on *Fonovisa,* the district court concluded that "[w]ithout the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts." *Napster,* 114 F. Supp.2d at 919-20 ("Napster is an integrated service designed to enable users to locate and download MP3 music files."). We agree that Napster provides "the site and facilities" for direct infringement. *See Fonovisa,* 76 F.3d at 264; *cf. Netcom,* 907 F. Supp. at 1372 ("Netcom will be liable for contributory infringement since its failure to cancel [a user's] infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation."). The district court correctly applied the reasoning in *Fonovisa,* and properly found that Napster materially contributes to direct infringement.

We affirm the district court's conclusion that plaintiffs have demonstrated a likelihood of success on the merits of the contributory copyright infringement claim.

V

We turn to the question whether Napster engages in vicarious copyright infringement. Vicarious copyright liability is an "outgrowth" of respondeat superior. *Fonovisa,* 76 F.3d at 262. In the context of copyright law, vicarious liability extends beyond an employer/employee relationship to cases in which a defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Id.* (quoting *Gershwin,* 443

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[6] As stated by the district court: "Plaintiff[s] ... demonstrate that defendant had actual notice of direct infringement because the RIAA informed it of more than 12,000 infringing files. See Creighton 12/3/99 Dec., Exh. D. Although Napster, Inc. purportedly terminated the users offering these files, the songs are still available using the Napster service, as are the copyrighted works which the record company plaintiffs identified in Schedules A and B of their complaint. See Creighton Supp. Dec. ¶¶ 3-4." 114 F. Supp.2d at 918.

F.2d at 1162); *see also Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325-26 (D.Mass.1994) (describing vicarious liability as a form of risk allocation).

Before moving into this discussion, we note that *Sony* 's "staple article of commerce" analysis has no application to Napster's potential liability for vicarious copyright infringement. *See Sony,* 464 U.S. at 434-435, *see generally* 3 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* §§ 12.04[A][2] & [A][2][b] (2000) (confining *Sony* to contributory infringement analysis: "Contributory infringement itself is of two types--personal conduct that forms part of or furthers the infringement and contribution of machinery or goods that provide the means to infringe"). The issues of Sony's liability under the "doctrines of 'direct infringement' and 'vicarious liability' " were not before the Supreme Court, although the Court recognized that the "lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn." *Id.* at 435 n. 17. Consequently, when the *Sony* Court used the term "vicarious liability," it did so broadly and outside of a technical analysis of the doctrine of vicarious copyright infringement. *Id.* at 435 ("[V]icarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another."); *see also Black's Law Dictionary* 927 (7th ed. 1999) (defining "vicarious liability" in a manner similar to the definition used in *Sony*).

A. Financial Benefit

The district court determined that plaintiffs had demonstrated they would likely succeed in establishing that Napster has a direct financial interest in the infringing activity. *Napster,* 114 F. Supp.2d at 921-22. We agree. Financial benefit exists where the availability of infringing material "acts as a 'draw' for customers." *Fonovisa,* 76 F.3d at 263-64 (stating that financial benefit may be shown "where infringing performances enhance the attractiveness of a venue"). Ample evidence supports the district court's finding that Napster's future revenue is directly dependent upon "increases in userbase." More users register with the Napster system as the "quality and quantity of available music increases." 114 F. Supp.2d at 902. We conclude that the district court did not err in determining that Napster financially benefits from the availability of protected works on its system.

B. Supervision

The district court determined that Napster has the right and ability to supervise its users' conduct. *Napster,* 114 F. Supp.2d at 920-21 (finding that Napster's representations to the court regarding "its improved methods of blocking users about whom rights holders complain ... is tantamount to an admission that defendant can, and sometimes does, police its service"). We agree in part.

The ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise. *See Fonovisa,* 76 F.3d at 262 ("Cherry Auction had the right to terminate vendors for any reason whatsoever and through that right had the ability to control the activities of vendors on the premises."); *cf. Netcom,* 907 F. Supp. at 1375-76 (indicating that plaintiff raised a genuine issue of fact regarding ability to

supervise by presenting evidence that an electronic bulletin board service can suspend subscriber's accounts). Here, plaintiffs have demonstrated that Napster retains the right to control access to its system. Napster has an express reservation of rights policy, stating on its website that it expressly reserves the "right to refuse service and terminate accounts in [its] discretion, including, but not limited to, if Napster believes that user conduct violates applicable law ... or for any reason in Napster's sole discretion, with or without cause."

To escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability. *See, e.g., Fonovisa*, 76 F.3d at 261 ("There is no dispute for the purposes of this appeal that Cherry Auction and its operators were aware that vendors in their swap meets were selling counterfeit recordings."); *see also Gershwin*, 443 F.2d at 1161-62 (citing *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir.1963), for the proposition that "failure to police the conduct of the primary infringer" leads to imposition of vicarious liability for copyright infringement).

The district court correctly determined that Napster had the right and ability to police its system and failed to exercise that right to prevent the exchange of copyrighted material. The district court, however, failed to recognize that the boundaries of the premises that Napster "controls and patrols" are limited. *See, e.g., Fonovisa*, 76 F.3d at 262-63 (in addition to having the right to exclude vendors, defendant "controlled and patrolled" the premises); *see also Polygram*, 855 F. Supp. at 1328-29 (in addition to having the contractual right to remove exhibitors, trade show operator reserved the right to police during the show and had its "employees walk the aisles to ensure 'rules compliance' "). Put differently, Napster's reserved "right and ability" to police is cabined by the system's current architecture. As shown by the record, the Napster system does not "read" the content of indexed files, other than to check that they are in the proper MP3 format.

Napster, however, has the ability to locate infringing material listed on its search indices, and the right to terminate users' access to the system. The file name indices, therefore, are within the "premises" that Napster has the ability to police. We recognize that the files are user-named and may not match copyrighted material exactly (for example, the artist or song could be spelled wrong). For Napster to function effectively, however, file names must reasonably or roughly correspond to the material contained in the files, otherwise no user could ever locate any desired music. As a practical matter, Napster, its users and the record company plaintiffs have equal access to infringing material by employing Napster's "search function."

Our review of the record requires us to accept the district court's conclusion that plaintiffs have demonstrated a likelihood of success on the merits of the vicarious copyright infringement claim. Napster's failure to police the system's "premises," combined with a showing that Napster financially benefits from the continuing availability of infringing files on its system, leads to the imposition of vicarious liability.

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X

We affirm in part, reverse in part and remand.

We direct that the preliminary injunction fashioned by the district court prior to this appeal shall remain stayed until it is modified by the district court to conform to the requirements of this opinion. We order a partial remand of this case on the date of the filing of this opinion for the limited purpose of permitting the district court to proceed with the settlement and entry of the modified preliminary injunction.

SELECTED SECTIONS OF THE COPYRIGHT ACT

17 U.S.C. § 102: Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 106: Exclusive rights in copyrighted works

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 107: Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 512: Limitations on liability relating to material online

(a) **Transitory digital network communications.**--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if--

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

(b) **System caching.—**

(1) *Limitation on liability*.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which--

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the

material from the person described in subparagraph (A), if the conditions set forth in paragraph (2) are met.

(2) *Conditions*.--The conditions referred to in paragraph (1) are that—

(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii) is consistent with generally accepted industry standard communications protocols; and

(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

(c) **Information residing on systems or networks at direction of users.—**

(1) *In general*.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

* * *

(d) **Information location tools.**--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

(1)(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

* * *

(j) **Injunctions.**--The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:

(1) *Scope of relief.*--

(A) With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

(2) *Considerations*.--The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

(3) *Notice and ex parte orders*.--Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

(k) **Definitions.—**

(1) *Service provider*.--

(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

(2) *Monetary relief*.--As used in this section, the term "monetary relief" means damages, costs, attorneys" fees, and any other form of monetary payment.

(l) **Other defenses not affected.**--The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.

(m) **Protection of privacy.**--Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

(n) **Construction.**--Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

17 U.S.C. § 1201: Circumvention of copyright protection systems

(a) **Violations regarding circumvention of technological measures.**--

(1)(A)No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter [i.e., October 28, 1998].

(B) The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine--

(i) the availability for use of copyrighted works;

(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;

(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and

(v) such other factors as the Librarian considers appropriate.

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that--

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection--

(A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) **Additional violations.**--

(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that--

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(2) As used in this subsection--

(A) to "circumvent protection afforded by a technological measure" means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

(B) a technological measure 'effectively protects a right of a copyright owner under this title' if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

(c) **Other rights, etc., not affected.**

(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

(2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

* * *

(e) **Law enforcement, intelligence, and other government activities.**--This section does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State. For purposes of this subsection, the term "information security" means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

(f) **Reverse engineering.**--

(1) Notwithstanding the provisions of subsection (a)(1)(A), a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.

(2) Notwithstanding the provisions of subsections (a)(2) and (b), a person may develop and employ technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable the identification and analysis under paragraph (1), or for the purpose of enabling interoperability of an independently created computer program with other programs, if such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under this title.

(3) The information acquired through the acts permitted under paragraph (1), and the means permitted under paragraph (2), may be made available to others if the person referred to in paragraph (1) or (2), as the case may be, provides such information or means solely for

the purpose of enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under this title or violate applicable law other than this section.

(4) For purposes of this subsection, the term "interoperability" means the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged.

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17 U.S.C. § 1203. Civil remedies

(a) **Civil actions**.--Any person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.

(b) **Powers of the court**.--In an action brought under subsection (a), the court--

(1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation, but in no event shall impose a prior restraint on free speech or the press protected under the 1st amendment to the Constitution;

(2) at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;

(3) may award damages under subsection (c);

(4) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;

(5) in its discretion may award reasonable attorney's fees to the prevailing party; and

(6) may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under paragraph (2).

(c) **Award of damages.**--

(1) In general.--Except as otherwise provided in this title, a person committing a violation of section 1201 or 1202 is liable for either--

(A) the actual damages and any additional profits of the violator, as provided in paragraph (2), or

(B) statutory damages, as provided in paragraph (3).

(2) Actual damages.--The court shall award to the complaining party the actual damages suffered by the party as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.

(3) Statutory damages.--

(A) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1201 in the sum of not less than $200 or more than $2,500 per act of circumvention, device, product, component, offer, or performance of service, as the court considers just.

(B) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1202 in the sum of not less than $2,500 or more than $25,000.

(4) Repeated violations.--In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 1201 or 1202 within 3 years after a final judgment was entered against the person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

(5) Innocent violations.--

(A) In general.--The court in its discretion may reduce or remit the total award of damages in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.

(B) Nonprofit library, archives, educational institutions, or public broadcasting entities.--

(i) Definition.--In this subparagraph, the term "public broadcasting entity" has the meaning given such term under section 118(g).

(ii) In general.--In the case of a nonprofit library, archives, educational institution, or public broadcasting entity, the court shall remit damages in any case in which the library, archives, educational institution, or public broadcasting entity sustains the burden of proving, and the court finds, that the library, archives, educational institution, or public broadcasting entity was not aware and had no reason to believe that its acts constituted a violation.

17 U.S.C. § 1204. Criminal offenses and penalties

(a) **In general.**--Any person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain--

(1) shall be fined not more than $500,000 or imprisoned for not more than 5 years, or both, for the first offense; and

(2) shall be fined not more than $1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

(b) **Limitation for nonprofit library, archives, educational institution, or public broadcasting entity.**--Subsection (a) shall not apply to a nonprofit library, archives, educational institution, or public broadcasting entity (as defined under section 118(g).

(c) **Statute of limitations.**--No criminal proceeding shall be brought under this section unless such proceeding is commenced within 5 years after the cause of action arose.

17 U.S.C. § 1205. Savings clause

Nothing in this chapter abrogates, diminishes, or weakens the provisions of, nor provides any defense or element of mitigation in a criminal prosecution or civil action under, any Federal or State law that prevents the violation of the privacy of an individual in connection with the individual's use of the Internet.