THE COPYRIGHT & NEW MEDIA LAW
newsletter

Editorial

Happy 10th Birthday, Napster! It is hard to believe it has already been 10 years. A decade ago, the original Napster revolutionized the way people discovered and enjoyed music, and life has never been the same. For those of you who are either too old or too young to have been part of Generation-N, the Napster generation, the free service was launched by Sean Fanning of Hull, Massachusetts in 1999. Napster was the first successful peer-to-peer distribution system. However, unlike true peer-to-peer systems in operation today, Napster operated central servers that maintained lists of connected file-sharers. The history of Napster itself is less important than what it spawned in music and all forms of digital content. However, it is interesting to review the rise, fall and resurrection of the company.

A year after it was formed, Napster was sued by several record labels for copyright infringement. After losing at the District Court and the U.S. Court of Appeals, the case was remanded. On remand, the District Court ordered Napster to monitor the activities of its network and to block access to infringing material when notified of that material's location. Napster was unable to do this, and so it shut down its service in July 2001. Napster filed for bankruptcy in 2002 and sold its assets. It had already been offline since the previous year owing to the effect of the court rulings.

Who could have guessed that Napster, whose service started as a free way to obtain music, would ultimately emerge today as an iTunes competitor, with a business model that respects the rights of the copyright holders in the music it sells.

The new Napster, recently announced that for as little as $5 per month, you get five unrestricted MP3 downloads and unlimited access to Napster's on-demand music streaming service. But this editorial is not about Napster's current business model, but about what Napster unleashed.

Whether Napster unleashed it, or Napster's arrival coincided with it, 1999 marked a significant change in the way in which digital consumer information was perceived. The illegal sharing of free music on Napster, followed by the wildly popular $0.99 iTunes, ended up killing formerly profitable retail music chains such as Tower Records. But the bankruptcy of Tower foreshadowed some larger dislocations in the content industry. As more information was distributed in digital form, businesses and consumers often forgot that the free bits were not in fact, free, but protected by copyright law. And even in the digital age, the copyright holder decides how, when and where her works may be duplicated and distributed.

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It is this shift in our perception of information which is making our lives so interesting because it threatens established models of commerce. And the transformation has just begun. Just ask any newspaper how their readers value their product. Should newspapers' Web site content be free? Or should the content be walled off to paid subscribers only? Every information provider is experimenting, and what is clear is that there is no such thing as a "standard business model" in the digital world. It is also clear that business models based upon the theft of someone else's intellectual property are unlikely to be successful. Just ask Napster. The roller coaster ride of that brand has lessons for all of us. ■

Lesley Ellen Harris
Editor

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News Brief
COPYRIGHT IN AFRICA

Researchers in South Africa, Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal and Uganda are working together on the African Copyright and Access to Knowledge Project (ACA2K), which is funded by the IDRC (Canada) and the Shuttleworth Foundation (South Africa). This Project is probing the relationship between national copyright environments and access to knowledge in the eight above-mentioned countries. For more information about this research project, see: www.aca2k.org.

News Brief
TARIFF SET FOR EDUCATIONAL USES IN CANADIAN SCHOOLS

The Copyright Board of Canada has certified a tariff for the reproduction of literary, dramatic and artistic works in books, newspaper, magazines and other publications, for the use in primary and secondary level educational institutions in Canada outside of Quebec. The previous rate of $2.45 CDN per full-time equivalent student per year is now set at $5.16 per full-time equivalent student per year. See: cb-cda.bc.ca.

SERU — AN ALTERNATIVE TO LICENSES

By Linda Beebe

Licensing may be particularly burdensome for small publishers with few titles. There is also significant strain on librarians who must manage large portfolios of licenses, attempt to systematize their work with publishers, and maintain consistency across diverse licenses for the use of digital content. For both parties, the consequent delay in supplying access to content for users is a continuing problem. Enter the picture: SERU.

Developing an Alternative

In 2005, Judy Luther (Informed Strategies) and Selden Lamoureux (University of North Carolina Chapel Hill) began talking about potential alternatives to license agreements at several conferences. Their idea: Find an alternative to traditional licenses that would suit the needs of both librarians and publishers.

In October 2006, a group of librarians, publishers, lawyers, and one subscription agent met in Washington, D.C. to craft a best practice option. The meeting was sponsored by the Association for Research Libraries ("ARL)", the Scholarly Publishing and Academic Resources Coalition ("SPARC"), the Society for Scholarly Publishing ("SSP"), and the Association of Learned and Professional Society Publishers ("ALPSP"). Over the next several months Karla Hahn (ARL) and Judy Luther led the group in developing a draft statement.

Members of the group noted that publishers and librarians have a very long history of working cooperatively in non-litigious relationships. With the emergence of electronic resources and their accompanying licenses, the two groups have continued to work through issues and concerns without legal action. Recognizing that each new license is a separate bilateral agreement, the group noted two instances of successful collaboration that eliminated the need for such agreements. In the first, CrossRef eliminated the need for bilateral reference linking agreements among publishers and established the DOI as a protocol.

In the second, Project COUNTER brought librarians and publishers together with technologists to agree on a working Code of Practice for delivering usage statistics.

The goal of the working group was to create a Code of Practice that would rely on existing law and common understandings to eliminate the need for a site license. The document itself would describe a brief list of expectations that could be shared by publishers and librarians. Participants recognized that a Code of Practice might not serve for all publishers, all products, or all situations. Instead, they sought to create a document that might initially be adopted for smaller sales. Then, they reasoned, if the Code of Practice became broadly understood and seen as successful, there may be growing interest in using the approach in grander licensing situations. As they crafted language, participants worked hard to avoid legal terms such as jurisdiction, warranties, and liabilities. Anything that looked like a license, they reasoned, would result in a regular license negotiation that would not save either libraries or publishers any work.

SERU

What, then, evolved as SERU? SERU is an acronym for Shared Electronic Resource Understanding. Once the group was satisfied that its document was in a good draft form, the National Information Standards Organization ("NISO") posted the document in a trial phase as a Best Practice from June 20 to December 20, 2007. Following a successful trial, the NISO board approved SERU as part of its Recommended Practice series (NISO-RP-7-2008).

The core of SERU is a series of Statements of Common Understandings for Subscribing to Electronic Resources. (For the full document, see: www.niso.org/publications/rp/RP-7-2008.pdf.) The first statement of SERU describes what constitutes a subscription: the right to use subscribed content for a specified time period on payment of an agreed upon fee. This statement also includes the proviso that the publisher has secured the right to provide access to this content, and it notes that authorized users have access, generally without any restriction on concurrent users.

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The second statement describes the subscribing institution and its authorized users. Generally, a subscriber is understood to be a single institution. Authorized users are expected to be defined in "institutionally appropriate ways that respect the business needs of the publisher." The statement includes descriptions of the populations generally understood to be authorized users in educational institutions and in public libraries and other cultural memory institutions such as museums and archives. The statement excludes alumni unless publisher and subscriber explicitly agree to include them. Authorized users may have remote access to subscribed content; however, walk-ins may use the content only when they are on the institution's premises.

Use of materials governed by the applicable copyright law is next in the series. For users in the United States, the U.S. copyright law is the governing force, and fair use as set out in the U.S. *Copyright Act* is applicable to the content in question. Some of the accepted uses are interlibrary loan and ad hoc sharing of single articles by individuals for scholarship or private study. Users of SERU in other countries may agree to governing laws of their own countries.

Further SERU Statements

SERU also includes a statement on inappropriate use. This statement recognizes that the material provided in a subscription is a valuable business asset for the publisher and that misuse could negatively affect the publisher's business. The subscribing institution must employ appropriate measures to limit access to authorized users and to inform them of appropriate uses of the content. Publishers should notify subscribing institutions of questionable activity such as systematic downloads, and suspension of access may be necessary after notification. Publishers should employ appropriate techniques to distinguish true misuse from legitimate activity.

The fifth statement addresses confidentiality and privacy. Both parties will respect the privacy of users and not disclose any personal information to any third party "without the user's consent unless required to do so by law."

The online performance and service provision statement includes the requirement that content with a print equivalent should be replicated as completely and promptly as possible. Among the performance expectations are generally uninterrupted availability, minimal disruption of service for maintenance, and competitive response time. The statement also references industry standards and best practices and cites some in existence at that time such as identifiers, usage statistics, link resolution, accessibility and authentication.

The final statement of "Common Understandings" addresses archiving and perpetual access, noting that both parties recognize the responsibility to preserve electronic resources. It calls for providing access to subscribed content following a termination of the subscription and indicates the multiple ways this access might be achieved. Reasonable annual fees for providing continuing access are included.

The Process

Publishers who wish to sell some or all of their products using the SERU approach for some or all transactions and libraries who wish to use SERU in acquiring content from such publishers sign up on a NISO registry (www.niso.org/workrooms/seru/registry/). In the registry, the parties indicate their willingness to forego a negotiated written license. As of mid-April 2009, the registry included 30 publishers, 80 libraries and 8 consortia.

When a library decides to subscribe to a product, the sales document is a purchase order. A binding contractual agreement does not require a license. Instead, the invoicing, purchase order and payment process is generally considered sufficient. The purchase order may include a statement referencing SERU, such as "In the absence of a separate license agreement, the _________ library follows the SERU guidelines as published at the NISO SERU Web site: www.niso.org/publications/rp/RP-7-2008.pdf." Publishers are asked to link to the SERU document on this Web site as well.

(Continued on Page 9, right column)

ELECTRONIC UPGRADE TO U.S. REGISTRATION WORTH THE WAIT

By Fred J. Sharp

The Washington Post (May 19, 2009) published an article entitled *"© 2009? Wishful Thinking, Perhaps, as Backlog Mounts"* by Lyndsey Layton. In this article, the Washington Post discussed the delay in the U.S. Copyright Office due to the switch from a paper filing system to an electronic filing system. The article then related several stories about individual persons who have to wait more than a year for their registration to be processed. (Read the entire article at: www.washingtonpost.com/wp-dyn/content/article/2009/05/18/AR2009051803171.html.)

Instead of addressing how the copyright system works, Ms. Layton incorrectly wrote that "[a] claim filed with the government offers legal protection — it is the only way to stop someone else from copying a work," implying that the rights inherent through a copyright are only granted if the work has been registered. Ms. Layton further portrays the Copyright Office as disadvantaging individual creators while pandering to "major publishing houses or those willing to spend $685 for a 'special handling fee' that expedites registration." Unfortunately, Ms. Layton's conclusions are unfounded.

Automatic Copyright

The U.S. *Copyright Act*, section 408(a), provides that "registration is not a condition of copyright protection." Copyright registration in the United States is not a "rights-creating" mechanism; rather it is an "enforcement" mechanism. As is true in all Berne Convention countries, copyright protection in the U.S. is automatic upon creation of a work in a fixed form. However, U.S. courts do not have jurisdiction over copyright claims which are not registered in the U.S. Copyright Office. Registration can occur after infringement, or in some states (depending on which judicial circuit they are situated in), even after a case has been filed.

Advantages of Registering a Work

There are advantages to registering an artistic work with the U.S. Copyright Office. A work which has been registered prior to the date of infringement may receive "statutory damages" in lieu of compensatory or actual damages. Additionally, the date of registration provides evidence of the date of creation of a work, avoiding the need for external evidence to determine the date.

A copyright holder who has registered his work prior to infringement may elect statutory damages instead of actual damages. Statutory damages for copyright infringement include attorneys fees and an amount determined by the presiding judge, from $750-$30,000 according to 35 U.S.C. §§ 504. Actual damages are limited to either lost profits from the copyright holder or any income the infringer unjustly gained from the use of the copyright, which must be proved by other evidence.

In addition to the option for statutory damages, a registered copyright provides conclusive proof of creation as of the date of registration. This evidence is helpful for an author who sues a later infringer who challenges the author's date of creation, or worse, claims prior creation.

Injunctive Relief

An alternative remedy to statutory or actual damages is a procedure known as "injunctive relief," an order by the court against the alleged infringer prohibiting him from continuing to copy the copyright-protected work, punishable by contempt. The *Copyright Act* is unclear as to whether registration is necessary to pursue injunctive relief, leading to different results in various circuits. Iowa, situated in the 8th Circuit, is governed by the holding in *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345 (8th Cir. 1994); that copyright registration is not necessary to pursue an injunction against an infringer.

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Advantages to Electronic Filing

The U.S. Copyright Office move to an electronic filing system will afford users tremendous benefits, eventually. Before the electronic filing system was implemented, creators could expect to wait six months or more to receive a registration. While the transition has resulted in ballooning wait times (18 months for a paper submission and 6 months for an electronic submission according to the latest Copyright Office newsletter), once the paper backlog has been cleared creators can expect much shorter wait times. Electronic filing also allows creators to pay online, check status electronically, and realize a reduced registration fee of $35 (from $45).

The copyright system backlog caused by the transition to electronic filing is far from desirable, but will eventually improve efficiency and result in shorter wait times for copyright registration. The success of electronic filing has already been realized in the United States Patent and Trademark Office ("USPTO").

In 1998, the USPTO instituted the TEAS (Trademark Electronic Application System) to accept electronic filings of trademark applications. According to the 1999 USPTO annual report, the period of pendency for a first action on a trademark dropped from 7.2 months at the end of Fiscal Year 1998 (October 1, 1997 – September 30, 1998) to 4.6 months at the end of Fiscal Year 1999 (October 1, 1998 – September 30, 1999). These pendency numbers have continued to fall as the system has become more widely used and the examining attorneys at the Trademark Office are more familiar with the system. In Fiscal Year 2008, the pendency for a first action has fallen to 3 months. The trademark electronic filing system has improved efficiency and reduced wait times while trademark filings have increased from 230,000 in 1998 to over 400,000 in 2008.

For those who are not interested in waiting for the Copyright Office to sort out the backlog, the Copyright Office does afford an expedited registration process, "special handling," for $685. This process is limited to those who have (a) pending litigation; (b) customs matters; or (c) contract or publishing deadlines necessitating expedited issuance of a certificate. Those who meet these restrictions and are willing to pay the extra fee can expect to have a certificate of copyright within several weeks.

Conclusions

Fortunately, unlike patents and trademarks which must be examined and issued in order to receive the full force of the law, copyrights are afforded protection as of the date that the application is filed. Even if a copyright takes years to be registered, the creator is afforded protection as of the first date of creation. Compared to patents, which are unenforceable until the end of a lengthy examination process (the USPTO's goal is three years from filing to issuance), copyright holders may publish and distribute their creations with the assurance of copyright protection once the work is in a fixed form. While the backlog in processing copyright-protected works in the Copyright Office is unfortunate, creators are not losing any protection due to the backlog. ■

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THE EFFECTS OF NOTICE AND TAKEDOWN SYSTEMS ON COPYRIGHT INFRINGEMENT

By Nicholas Dietz

It is safe to say that no invention since the printing press has had nearly as much impact on the dissemination of information as the Internet. Yet it is arguable that certain national and international regulations have prevented the Internet from achieving its full potential. The very nature of the Internet, notably the enormous amount of content, its relative ease of use, and the substantial anonymity it provides end-users has resulted in an explosion of copyright infringement. But the numerous attempts to combat such infringement have proven more damaging to the Internet's raison d'être than the infringement itself, as the broad scope of copyright regulations have led to the removal of a substantial amount of legitimate content.

Internet Service Providers

Internet Service Providers, or ISPs, are usually defined as the companies that provide users with Internet access via cable modems, dial-up service, and the like. However, under the leading regulatory approaches of copyright infringement (those of the United States ("US") and the European Union ("EU")), the term ISPs has been expanded to include additional actors, such as university or corporate Internet (and intranet) systems, as well as many Web sites that allow third parties to post content. ISPs receive such a constant torrent of user complaints alleging copyright infringement that it would be misguided to expect them to review all, or even most, complaints. Nevertheless, it is quite reasonable to assume ISPs will not simply presuppose every complaint is valid and quickly remove all allegedly infringing content without so much as a cursory investigation. Yet, in both the US and EU, this scenario is fairly typical.

Among the most common claims of copyright infringement made against ISPs are those by publishers claiming that excerpts from books or magazines have been illegally copied and posted on Web sites. Also common are TV and movie production companies charging users of Web sites such as YouTube for uploading copyright-protected video clips, and claims by the Recording Industry Association of America ("RIIA"), which represents nearly all record companies and distributors in the US, against peer-to-peer file-sharing sites of copied songs. Fortunately for ISPs based in the United States, Section 17 USC 512 of the *Digital Millennium Copyright Act* ("DMCA"), which regulates US-based ISPs, holds that they are not liable for the copyright infringement of third parties.

The U.S. Approach

To combat Internet copyright infringement, §512(c)(3)(A)(i-vi) of the DMCA established a "notice and takedown system" for unauthorized posts, stating that allegations of copyright infringement must provide the relevant ISP with: (i) the complainant's signature; (ii) the identity of the allegedly infringed work; (iii) enough information about the allegedly infringing work to enable the ISP to locate it (e.g., a Web site URL); (iv) the complainant's contact information; (v) a statement that the complaint is being made in good faith; and (vi) a statement, under penalty of perjury, that the information provided in the complaint is accurate. While these provisions are perfectly legitimate, subsequent sections are problematic.

DMCA Section 512(g)(1) waives ISPs' liability for the takedown of a Web site or post, "regardless of whether the material or activity is ultimately determined to be infringing," as long as the ISP informs the alleged infringer of the complaint against him – even if this notification is only provided after the site has already been taken down. In other words, an ISP may remove a perfectly legitimate Web page without consequence.

The only recourse available to a party whose Web site has been wrongfully taken down is to file a "Counter-Notice" with the ISP, under §512 (g)(2)(C), contending that he did not infringe on the complainant's copyright. The ISP must then re-post the material at issue within 10 to 14 days of receiving the Counter-Notice.

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This is unless the complainant has also brought action against the alleged infringer in court. This means that a Web site can be removed for at least 10 days based solely on an *allegation* of infringement and even then will only be re-posted if the alleged infringer takes action. In addition, by suing the alleged infringer, the complainant can prolong the Web site's absence indefinitely, regardless of the suit's merits.

Only Section 512(f) of the DMCA attempts to limit copyright holders abuse of the system, holding that a claimant who "knowingly materially misrepresents" content as infringing will be liable for any resulting damages (including costs and attorneys' fees) incurred by the alleged infringer. However, it is the alleged infringer who must *prove* the claimant acted "knowingly," a task requiring a good deal of time and money. Additionally, it is not easy to determine what monetary damages an alleged infringer incurred due to the removal (even temporarily) of his legitimate Web site.

The European Union Approach

While the US system for regulating Internet copyright infringement is problematic, the approach followed by the European Union is even more flawed. Internet Service Providers based in EU Member States are governed by the Electronic Commerce Directive of 2000 (Directive 2000/31/EC), also known as the "E-Commerce Directive." Article 14.1(a-b) of the Directive states that an ISP will not be held liable for a third party's copyright infringement as long as the ISP was unaware of the specific infringement – or even potential infringement – and, after learning of it, "acts expeditiously to remove or to disable access to the information."

EU-based ISPs thus face a heavier burden under the E-Commerce Directive than do their US counterparts under the DMCA. This is because the Directive holds EU ISPs liable not only in cases of obvious infringement, but also in situations where an ambiguous action is ruled to be infringement. Additionally, in order to allege copyright infringement, an EU complainant need not submit a formal complaint to the ISP; such a complaint will be "taken into account," but is not required. It is no surprise then that ISPs in the EU nearly always err on the side of the complainant rather than risk possible liability.

For example, a 2004 study of the Netherlands' notice and takedown system, which implemented the E-Commerce Directive, found that complaints made to 10 Dutch ISPs alleging that Web posts containing a well-known writer's works from 1871 infringed on his copyrights, resulted in fully 7 of the 10 ISPs removing the Web sites in question.[1] A similar study of British ISPs in 2003 used as its allegedly infringing text an excerpt from John Stuart Mill's 1869 book, *On Liberty*, discussing the importance of free speech (with the irony assuredly intended) and achieved comparable results.[2] Despite the frequent removal of non-infringing Web sites, including instances in which the disputed work is clearly in the public domain), the E-Commerce Directive, unlike the DMCA, makes no mention of procedures for re-posting wrongly-removed content. Similarly, the Directive provides no guidance on combating fraudulent infringement complaints.

Flaws in the U.S. and EU Systems

The problems of the U.S.'s DMCA-based notice and takedown system are largely attributable to the sheer number of complaints ISPs receive. The European system, on the other hand, is additionally hampered by greater ISP fears of liability. European Union ISPs do not enjoy the same broad immunity from the actions of third parties as their US counterparts and thus EU ISPs remove third party posts at the mere hint of trouble. This crucial difference has lead to rival notice and takedown systems, operating on opposite ends of the free speech spectrum. The fearful European ISPs suppress enormous amounts of legitimate content, while the more liberal American ISPs permit a great deal of copyright infringement.

Conclusions

The regulation of copyright-protected works on the Internet, indeed of all Internet content, comes down to a fundamental choice between two current unappealing options.

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These options are permitting certain laws to go un-enforced in order to uphold the principle of freedom of speech, or restricting a great deal of perfectly legal content in the name of law and order. Although the sheer size of the Internet guarantees that no regulatory model will be exemplary, the current systems can certainly be improved upon. At the very least, Internet Service Providers should not remove disputed content before the alleged infringer has submitted a Counter-Notice. Requiring ISPs to examine the statements of adversarial parties, rather than base their decisions on one party's allegations alone, would lead to a significant reduction in the number of legitimate Web sites taken down. This would lessen the negative impact of the notice and takedown system on the free exchange of ideas across the Internet. ■

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[1] Sjoera Nas, The Multatuli Project: ISP Notice & Take Down, October 27, 2004, at 6.

[2] Id.at 2.

(Continued from Page 4)

Positive Response

Many publishers and customers have greeted SERU with enthusiasm. Among those is the giant publisher Springer. Springer's Director of Network Sales, Robert Boissy, said "Springer has adopted SERU as a means to streamline the sales cycle wherever possible, removing obstacles for those clients who have difficulty processing detailed legal documents, and allowing for improved cash flow for our growing portfolio of online publications." Janet Morrow, who heads Non-Print Management at Northeastern University Libraries, is equally positive: "In my opinion, SERU is a return to the relative sanity of the print environment. With a single agreement we can return to our former relationship with publishers of them wishing to sell us their material - our wishing to buy their materials - and a simple purchasing transaction granting both wishes! At a University where every agreement is reviewed by our legal department, a single document on which we can base multiple publisher transactions offers some relief from the unbearably expensive licensing process in which we've all become mired."

Barely more than a year into implementation, SERU appears to hold great promise for reducing the costs of sales transactions for both publishers and librarians. Those who have used it also report a significant reduction in the time it takes to make content available to users. Planned initially to alleviate the burdens for small publishers, SERU also benefits large publishers especially in low-cost and low-risk sales relationships. ■

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LARGE JURY AWARD IN FILE-SHARING RETRIAL

By Lesley Ellen Harris

A federal jury in a U.S. District Court in Minneapolis ruled in June 2009 that 32 year old Jammie Thomas-Rasset pay $1.92 million to the RIAA and Capitol Records for posting music on the file-sharing site KaZaA. Ms. Thomas-Rasset was accused of willful infringement by sharing 24 songs on the Internet. Some of the songs are: "Pour Some Sugar on Me", "Bills, Bills, Bills", and "Don't Stop Believin'". Not surprising, newspapers report that Thomas-Rasset gasped and her eyes widened as the dollar amount of her damages was read.

The U.S. *Copyright Act* sets out statutory damages between $750 and $30,000 per infringement. However, the Act allows a jury to increase that amount to $150,000 per track if the infringement is willful. The jury in this case set the damages at $80,000 per song. This was a retrial; in the first trial, the damages were set at $9,250 per song. An appeal is possible, as are motions on the constitutionality of such large damages.

Rationale for Award

The evidence in this case pointed towards Thomas-Rasset infringing copyright, however the large award may be in part due to the jury thinking that Thomas-Rasset lied about certain facts in the case. Things such as Thomas-Rasset's hard drive being switched out of her computer one month after her alleged infringement, and claiming that she did not receive notices about her alleged infringements by instant message through KaZaA and once by FedEx package from her ISP, Charter, were all factors the jury took into account. During the retrial, Thomas-Rasset took the stand and pleaded innocent, saying that she did not even know what KaZaA was before the case had begun. However she had an account on KaZaA that had been linked to her cable modem and had written a paper on Napster in college in which she concluded that Napster's original status was legal under U.S. copyright law.

The Jury

Who was in this jury? Nineteen people were called up for questioning to appear on the jury. None of these persons had any opinion on the recording industry, when asked. And none of them (including some college students and recent graduates) said they ever used Napster, KaZaA or a P2P file-sharing program. Four of the potential jurors seemed to have experience with file-sharing friends (these persons were not selected) and the 12-person jury resulted in five men and seven women including retirees and college students. Several of the jurors testified that they could not use computers without assistance and most others seemed to be casual users, not overly familiar with the testimony in the case about MAC addresses, IP addresses, KaZaA, instant messages, share folders, MP3s, metadata and other computer usage and terminology. These jurors were then given instructions by Judge Michael Davis, including no blogging, no posting on Facebook and no tweeting.

The RIAA

This is the first and so far the only music file-sharing case to go to trial. Over the past five years, the RIAA has threatened approximately 35,000 people and has been settling most cases in the $3,000 to $5,000 range. The recording industry estimates that approximately 300 of these cases are still unsettled, with less than 10 accused infringers actively fighting their accusations. As of December 2008, the Recording Industry Association of America ("RIAA") has stopped suing individuals for file-sharing. Instead, the RIAA is focusing on getting Internet Service Providers to take action in the face of illegal file-sharers.

The RIAA stated in a press release following this large jury award: "We appreciate the jury's service and that they take this as seriously as we do. We are pleased that the jury agreed with the evidence and found the defendant liable." *Ars Technica* states that there are hints that the RIAA may not try to collect the award. Thomas-Rasset who believes the jury did their job and said that she was not going to hold it against them also said that collecting the money from her would be "like squeezing blood from a turnip." Cara Duckworth, on behalf of the RIAA, has said that the industry has always been and is still willing to settle with Thomas-Rasset.

Conclusions

So, we have an almost $2 million verdict for sharing 24 songs. What does this mean? According to the lawyers for Thomas-Rasset, Kiwi Camara and Joe Sibley, each jury approaches a case differently and this jury's conclusions do not have precedent with the next jury. Note that Camara and Sibley are representing two others being sued by the RIIA, Brittany English and Joel Tenenbaum, both university students. Electronic Frontier Foundation Senior staff attorney Fred von Lohmann thinks the verdict could hurt the recording industry and make it appear as if the current copyright law has its flaws. Another perspective, that of a free-market think tank, Progress & Freedom Foundation, defended the verdict stating that it was reasonable. The Foundation's Center for the Study of Digital Property, Tom Sydnor, stated that "legally acquiring a license to give copies of a song to potentially millions of KaZaA users might well have cost $80,000 per song" and "if the jury concluded that the defendant falsified her testimony, it could fairly seek to punish and deter such flagrant wrongdoing."

Surely, the message is clear: copyright infringement will not be tolerated by the courts and misrepresenting facts may result in large monetary awards, more than anticipated for an illegal activity of this sort. An appeal or settlement in this case will help shed some light on the future of similar situations. ■

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News Brief
CANADA TO START COPYRIGHT CONSULTATIONS

The Canadian government plans to start a copyright revision process in mid-June. The consultation process will allow written submissions from interest groups, and schedule some in-person hearings. The government intends to table a copyright revision bill by the end of 2009.

News Brief
A QUICK AND EASY WAY TO SURRENDER COPYRIGHT

Creative Commons has launched CC0 (read: CC Zero), a universal waiver available to anyone who wants to permanently surrender copyright and database rights they own in a work. This would result in the work being freely available similar to the situation when copyright duration expires.

COPYRIGHT QUESTIONS & ANSWERS

Question: Can a library scan an article from a journal that it has in print format in its collection?

Answer: Owning a print article does not mean that you own the copyright/reproduction rights in that article. If you want to digitize an article in your possession, you need to obtain permission from the rights holder of the article before digitizing it. If you are obtaining permission to digitize the article, you may at the same time, ask for additional permissions such as the right to post the article on your intranet or circulate it internally in PDF.

Question: Why do we have to occasionally pay for journals that are very old and obviously in the public domain?

Answer: There are several possibilities. One, there may be a new copyright in a collection of journals and you are paying a fee for the collection as a whole rather than the underlying individual public domain journals. Two, the journals may be edited and the new portions of the journals may have a new copyright in them. Third, you may be paying a fee to access the journals rather than a copyright fee.

Question: Do you need permission to include a painting or sculpture which appears in the background of a photograph of a person?

Answer: Some countries have exceptions from copyright law for the incidental inclusion of copyright-protected works in other copyright-protected material. Generally, for the exception to apply, the use must be incidental and not deliberate. For example, the exception may allow a journalist to photograph a person with a painting in the background.

Email your questions to: editor@copyrightlaws.com or post them at: www.copyrightanswers.blogspot.com.