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Dude, Not Me

By: Jim Astrachan

I was trying to explain to a client that he didn't need to be the person violating a copyright to be liable for infringement. We were talking about the concepts of direct infringement and contributory infringement. We were discussing the client's business, software that would enable, he said, free, online exchange of copyrighted music. I tried to explain that there are three actors involved: the person who makes the digital music available online; the person who downloads the music; and the client, who makes proprietary software available for free and enables people to download the copyrighted music. The discussion was not going well as the client could not understand the concept of contributory infringement. Maybe I was doing a bad job of explaining.

Direct Infringers

I explained that the people who use the proprietary software to download and upload copyrighted music are called direct infringers. This is simply because acts of uploading and downloading infringe the music owners' exclusive rights under the Copyright Act to distribute and reproduce their music. "Well, I don't do that," my client said. "I'm more like the dude you described who performs a public service when he distributes free software that enables copying."

"Hold on," I replied. "I didn't describe your distribution of software as a 'public service.' You are like the third category of player I described, who does not escape liability just because he doesn't copy or distribute." For a very brief moment I thought I saw a flicker of understanding in the client's eyes, but just as quickly it was gone. "Let me continue," I said. "The third player is, well, the enabler. Without his, or your, software there would be no upload and no download. That person, then, is the 'contributory infringer'."

Contributory Infringement

"Under the doctrine of contributory infringement," I offered, "you will be held liable for copyright infringement if you have knowledge that infringing uploading and downloading is occurring and you have induced, caused, or materially contributed to the infringing activities." The client said, "Huh?" I broke down this concept into two bite size pieces: Knowledge of, and material contribution to, the infringing activity. The flicker of understanding again appeared in his eyes but stayed longer this time. Seizing the moment I quickly continued. "You must have known, or had reason to know, that those persons who were using your software would be violating music copyrights," I told him. "And, the distribution by you of free software enables the infringement to occur."

He asked me to continue. "Look," I said, "for you to be held liable for the infringement of others as a contributory infringer, you must have known, or should have known, that your software would be used to infringe music copyrights. It is not enough that your software would merely enable infringement. A Plaintiff will need to prove that you knew of specific infringing acts."

I gave him an example using a case decided by the United States Supreme Court dealing with manufacturers and distributors of video cassette recorders. "Sure, the VCRs could be used for infringing activities, but that alone did not subject Sony to liability because its machines could be used for both infringing and non-infringing activities," I explained. "Because the potential non-infringing use of the VCR was substantial, the Supreme Court refused to find that generic or constructive knowledge of potentially infringing acts was sufficient to hold Sony liable for contributory infringement based on the retail sale of its VCRs."

The client was now sitting upright, fully absorbed and participating in the discussion. "Okay," he said. "What about the fact that my software can be used to download and upload music that is copyrighted and music that is not?"

"Red herring," I said. "The issue is not whether there may be non-infringing uses for your software, but what is the state of your knowledge about how the software is used. For example, might you have memos in your files between officers of your company admonishing them to 'remain ignorant of users' real names and IP addresses since they are exchanging pirated music? Have you been notified by agents of music owners that you have infringing materials stored on your system or that your software is used to enable infringement?"

"Neither," the client replied. "In fact, we are very careful to cast a blind eye where we think we are about to learn of something bad."

"I am sorry to tell you, I said, that willful blindness is, in fact, knowledge under the Copyright Law. At least where the circumstance should have alerted you to the

existence of infringement via your software, I reminded him. That a person who knows or strongly suspects that he is involved in slippery activities and who takes steps to assure that he fails to obtain full or exact knowledge of the activities is held to have criminal intent because a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind."

"OK, I got it. What if I employ encrypted software so I can't learn what my users are doing?", he asked.

"Haven't you been listening, even a little bit?", I groaned in exasperation. "No, that would be the classic case of willful blindness. You can't use encryption to shield yourself from actual knowledge of the copying for which your software is used."

I asked if I could see the tutorial that accompanied his software, and sure enough it contained examples of file sharing and the only music employed in the examples was copyrighted.

"Well," I ruminated, "it seems to me that you have more than enough knowledge of actual infringement, and that it would seem your software enables infringement to occur. The only real question is whether your software really does enable the infringement. Personally, I think it does, but we will need to study exactly what it does, and whether infringing activities can continue without it."

"Let me think about it, and perhaps I'll call you tomorrow, or next month", he said.

"Better write a detailed memo to the file", I thought.

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