

How litigation changed peer-to-peer file sharing

Richard Dickinson and Alex Watt of Arnold & Porter examine international case law

The phrase “peer-to-peer file sharing” still sounds like it should be a new concept. Despite the activity having now been with us for a considerable period of time, it has a zappy, technical and obtuse-sounding name that sounds more Web 2.0 than something that has been knocking around in one form or another since the late seventies. In that time, it has changed considerably, and those changes have had an effect upon the way that lawyers involved in making claims to prevent illegal peer-to-peer file-sharing have had to make their claims.

For those of you who have heard of peer-to-peer file-sharing but as yet do not know what it is: essentially it is simply a very efficient means of sharing electronic files among large groups of people online. This sharing takes place between a network of computers connected over the internet who

make their files available for copying between the other users, or “peers”, on the network.

The reason this is interesting to lawyers is the same reason it is interesting to file sharers. The files in question might consist of music, films, television programmes or (nowadays) books, which are usually shared and copied for free, usually in breach of copyright.

Peer-to-peer file-sharing is not the only new means of copying digital files, but even relative to an era of massive change it is an area that is growing incredibly quickly. The sheer power of using the internet as a superdistribution channel means that while the scale of infringement is already massive, there is still lots of potential for it to grow. Given that 95% of the singles chart sales are already digital sales¹, for companies like record labels and film studios that is a very scary prospect indeed.

Consequently, over the course of the past 10 years, litigation launched by entities representing the interests of such companies (such as the RIAA in the US) has focused upon targeting the sources of these new technologies, as well as individuals copying material in breach of copyright². Attacking the source of the copying technology has the benefit, if it is successful, of knocking out the means by which *anyone* may copy using that technology. However, attacks such as these have further helped to change those technologies, as new technologies are developed specifically to avoid similar litigation.

Betamax

A useful place to start is the 1984 Sony or “Betamax” case, *Sony v Universal City Studios*³, which concerned illegal tape-to-tape

recording. In that case the US Supreme Court had to decide whether or not Sony could be held liable for the illegal copying of video tapes that the Sony Betamax video machine was capable of. Of course, like any video recorder, the Betamax video machine could be used for both permissible and illicit recording. A similar case was heard in the UK some four years later in *CBS Songs v Amstrad*.

The US Supreme Court ultimately found Sony was not liable for creating a technology that some customers may use for copyright infringing purposes, so long as the technology was also capable of “substantial non-infringing uses”. The House of Lords in the UK similarly held that where a device had other legitimate uses a company could not be held liable for the other illicit uses the device was put to.

Napster

Napster was founded in 1999, and it effectively marked the launch of peer-to-peer file sharing on a scale that could be considered a serious commercial threat (though it is a legal site now it was not always so). Since then peer-to-peer file sharing has exploded and now costs (according to the BPI) the UK music sector an estimated £200m in 2009 alone, with some 7.3 million people in this country engaged in unlawful file-sharing⁴.

In 2000 the RIAA filed a US lawsuit against Napster, in *RIAA v Napster*. Napster raised a variety of defences, which included defences that had been successful in the *Betamax* case (above), in addition to various other ones – including that the claimants’ themselves were infringing because they were selling mp3 players.

Napster lost and was shut down (as a peer-to-peer file-sharing site), unable to deal with the costs of the initial injunction awarded against it.

Grokster – and a different network structure

In 2003 MGM Studios and others (essentially the RIAA again) launched a claim in the US courts against KaZaA, Grokster and Streamcast in *MGM Studios and others v Grokster and others*. Initially the RIAA did not fare well – the court felt that given the different structure of the new peer-to-peer services it could distinguish the previous case. It is therefore of assistance now to look at how peer-to-peer networks organise themselves in order to understand this.

Napster had a centralised architecture, which means that all of the information about each of the files that were available over the Napster network were held with

the central servers that Napster controlled. This made prosecution for copyright infringement fairly straightforward once courts had decided that the defences that had been deemed sufficient in the *Betamax* case were no longer sufficient in the case of peer-to-peer file-sharing.

Once Napster had fallen, however, peer-to-peer networks evolved so that they could operate as an entirely decentralised peer-to-peer network. This meant that the software that linked them required no reference to a central server; the network needed no central hub indexing and facilitating the copying of all of the files across the network – instead it allowed all of the networked computers access to each other directly. Grokster was one of these networks, and this change in structure gave them a number of advantages when it came to defending themselves against claims made by the RIAA.

Grokster (and others) argued that not only were they not complicit in the copying of material, since file sharers made no reference to them or their servers when the infringement occurred, they had no actual knowledge of any copyright infringement that was taking place. Because they had structured their network differently they had afforded themselves with more substantive defences to claims made against them for direct infringement and contributory infringement.

The differences were so marked that the ninth circuit held that Grokster should also be able to rely upon the precedent set with the *Betamax* ruling. MGM and others appealed to the Supreme Court, and the Supreme Court reversed the decision of the 9th Circuit Court of Appeals, saying that it had misinterpreted the *Betamax* decision.

The Supreme Court stated that it did not follow from *Betamax* that the existence of significant non-infringing uses would automatically absolve a defendant from liability against a claim for infringement by third parties. The Supreme Court held that the existence of significant non-infringing uses would not be sufficient if there was a clear intent to induce infringement – and since the services were marketed to users and advertisers as a substitute for Napster – in the *Grokster* case they said that there was.

Bit Torrent

A slight technical variation on the network structure used in the Grokster matter is Bit Torrent. The two main differences that Bit Torrent has is that it uses a tracker to monitor and assist in the organisation of peers downloading files, and a tit-for-tat policy that was built in to assist in the

prevention of bottlenecks, which used to slow older peer-to-peer networks down.

The best known instance of legal action against such a website was the litigation against the Piratebay website. The Piratebay case was a criminal case rather than a civil one. In that instance, the new structure did not assist the defendants at all, and not only were the founders of the site fined £2.4 million but were also sentenced to a year in jail, however, the ruling has not successfully shut down the site which is still operating at the time of writing.

Usenet – a different structure again

Did this mean that peer-to-peer file-sharing was dead? Or did it simply mean that it would evolve another structure that will get around the legal problems implicit in the last structure? One of the RIAAs most recent major file-sharing targets was one of the oldest peer-to-peer networks – Usenet.

Usenet is one of the oldest computer networks still in use. It is literally just an abbreviation of the words “user network”. Usenet was conceived of in 1979 and established in 1980 by Tom Truscott. Essentially it is simply a very old form of electronic forum. User articles are posted into “news groups” – which are themselves organised into hierarchies of subjects or as we call them now “threads”. For a short time Usenet was the internet community and a surprising amount of our internet terminology comes from it; the word “Newbie”, meaning “newcomer or new person to a forum”, and even the acronym FAQ for frequently-asked questions are both claimed to have hailed from it.

Additionally many important early landmarks were announced upon Usenet. For example, Tim Berners-Lee announced the launch of the world wide web upon it and Linus Torvalds announced the open source Linux project there, and it was where Marc Andreessen announced “Mosaic”, which was the first windows-based internet browser and the format for internet as we know it today.

As Usenet expanded, its users started to use the Usenet network to leave more than just messages. Over the years Usenet became a repository for an enormous amount of the sort of desirous content that file sharers want. As with the original news articles, this content is stored upon a mesh of servers at the core of the internet, in binary code – this also makes Usenet very fast.

The problem for the RIAA however, was that no one actually owns Usenet. Usenet is simply a massive network of self-propagating

hubs of files. For example, if you wanted to remove a file from the Usenet system, (ie to take something down), you would have to have issued the takedown request to the origin server to which the content has been posted, but before it had been propagated to other servers. The chances of catching anything that early are minimal.

Another problem is that unlike other peer-to-peer services, on Usenet, users distributing content are not typically immediately identifiable to all other users by their network address. Usenet users are able to completely obscure their names, and their IP address would be unobtainable once it has been propagated past the original server.

However, to surf Usenet, users need to pay for a "newsgroup" service that will provide access, and this is what the RIAA have successfully most recently targeted. In October 2007 the RIAA filed a claim against www.usenet.com, one of the many newsgroups that allowed access to Usenet, and in June 2009 the RIAA prevailed in a victory that was said to further 'erode' the *Betamax* defence.

Commentators suggest that Usenet presents an ideal forum for the next iteration of peer-to-peer file-sharing. However, it remains to be seen whether it will be able to evolve again in a way that will have an impact upon the way copyright infringement is pursued by copyright owners.

Peer-to-peer file-sharing in the UK

The major difference between copyright legislation within the UK and the US, insofar as it relates to peer-to-peer file-sharing, is that in the US there is the concept of contributory copyright infringement, whereas in the UK the concept is not enshrined within legislation (though there is some such protection provided within common law⁶). It has often (though not always) been the concept of contributory copyright infringement that has proved crucial to claimants in the US seeking to show that the central point from which any peer-to-peer file-sharing operation was being organised, should be deemed to be infringing, if not directly then at least vicariously by contribution.

In the UK, however we have no such legislation and indeed, until very recently, there had been no case law dealing with claims made against a peer-to-peer website itself. In fact the leading UK case in this area is *Polydor Limited and others v Brown*⁶, which was not a claim made against a website but which concerned an individual music file-sharer, who had connected a computer

running peer-to-peer software to the internet with copyrighted music files placed in a shared file directory. The defendants were found to have communicated a copyright work to the public infringing copyright.

On that basis, the court granted summary judgment in favour of the record companies. The court was satisfied, based on the evidence, that Brown had infringed copyright. More specifically, Brown had committed copyright infringement by 1) Connecting a computer to the internet where the computer was running peer-to-peer software; and, 2) Placing music files containing copies of the record companies' copyright works in a shared directory. For the purposes of Section 20 of the CDPA, which states: "The communication to the public of the work is an act restricted..."⁷ The mere fact that infringing files were present, and were made available to others, was enough for it to be deemed an act of copyright infringement.

On the basis that Brown had committed a primary act of copyright infringement, it was irrelevant whether he knew or had reason to believe that his actions amounted to copyright infringement: ignorance was no defence. The important point that this judgment confirmed for copyright owners, was that the infringing act was deemed to occur when a computer running peer-to-peer software is connected to the internet, and files protected by copyright are placed in a shared directory without authorisation.

Oink!

Despite all of the above decisions, the latest case in the UK in this area has gone completely the other way. In September 2008, criminal charges of fraud and copyright infringement were brought against Alan Ellis, the founder of file-sharing website OiNK, a bit torrent website with a similar structure to Piratebay. In January 2010, he was found not guilty of conspiracy to defraud copyright owners, by a unanimous verdict at Teeside Crown Court.

Crucial to this verdict was the lack of any legislative concept of vicarious or contributory copyright infringement. Alan Ellis was able to defend himself by saying that he did not take part in the copyright infringement and that he was effectively "just like Google", a search engine, only he focused on connecting people that wanted access to music.

At the time of writing this is a recent result and, in the light of the cases discussed above, and others around the world, perhaps a surprising one. In response to this decision

the BPI has stated that "This is a hugely disappointing verdict. The defendant made a large amount of money by exploiting other people's work without permission. The case shows that artists and music companies need better protection."

The official response itself is interesting as it does not appear to claim that the decision was wrong but that perhaps the legislation providing the basis for the decision did not adequately protect copyright owners. It remains to be seen whether the BPI and copyright owners will now fight for a change to the law to give copyright owners such "better protection". What will be interesting is to see whether by the time such legislation has been enacted (if that is a route pursued) the technologies by which file sharing is carried out have again evolved so as to make an attack more difficult again. ☹

Notes

1. According to the British Phonographic Industry (the "BPI") website at the time of writing.
2. According to the Electronic Frontier Foundation website at the time of writing, one of the groups set up to protest against the heavy-handed way in which the RIAA has pursued its claims, by this time last year the RIAA had issued, settled or threatened legal action to over 30,000 individuals.
3. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
4. According to the BPI website at the time of writing.
5. *Abkco Music & Records Inc. V. Music Collection International Limited and Another* [1995] RPC 657 (CA).
6. *Polydor Limited and others v Brown and others* [2005] EWHC 3191 Ch.
7. *Copyright, Designs and Patents Act 1988 s 20.*

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