

Our Byzantine System of Secondary Copyright Infringement

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Is this secondary liability in U.S. copyright law?

- (A) Vicarious infringement
- (B) Contributory infringement
- (C) Subject to the *Sony* defense
- (D) *Grokster* inducing infringement

Cox combines (B)–(D) into a unified intent-based contributory infringement test

No

Not even close

In this paper

- A thorough survey of all the secondary liability doctrines in U.S. copyright law
- Describe the system *as a system*
- Critique the system *as a system*
- Some suggestions for how to fix things?

What's included?

- *Secondary liability*: liability for someone else's completed act of direct infringement
- *Quasi-secondary liability*: liability for conduct that could facilitate infringement, regardless of whether there is such infringement
- *Scaffolding doctrines*: doctrines needed to make the system of secondary liability work
- ... plus some near misses

Common-law doctrines

Common-law doctrines (pre-Cox)

1. *Vicarious infringement*: (1) right and ability to supervise (2) direct financial interest
2. *Contributory infringement*: (1) knowingly (2) induces, causes, or materially contributes
3. *Sony doctrine*: not infringement to distribute a device with substantial noninfringing uses
4. *Inducing infringement*: (1) distribute a device, (2) to promote infringement, (3) as shown by clear expression etc.

What Cox does

5. *Contributory infringement*: (1) induces, causes, or materially contributes, with (2) intent, which consists of (a) inducement, or (b) making a contribution tailored to infringement
 - Raises the *Gershwin* standard to intent
 - Glosses *Sony* and *Grokster* in terms of intent
6. Sotomayor would have left (2) open-ended

But also!

7. ~~*Infringement by authorization*~~: (1) issuing a purported license (2) without the right to do so
 - Probably killed by *Subafilms*
8. *Agency law*
 - *Respondeat superior* remains viable
 - An agent's actions and knowledge are imputed to their principal (often invisibly)

Channeling doctrines

Who is the direct infringer?

9. *Volitional conduct*: the person who most directly caused a system to copy a work
 10. *Server test*: the operator of the server from which the distribution or display takes place
- These often cut in opposite directions

State of mind

States of mind

- 11. *Direct infringement*: no mental state
- 12. *Willful infringement*: knows, is willfully blind to, or acts in reckless disregard
- 13. *Innocent infringement*: honest and reasonable belief in non-infringement

Criminal infringement

Criminal infringement

14. *Criminal infringement*: (1) infringement that is (2) willful and (3) for private gain &c.
15. *Aiding and abetting*: (1) knowingly (2) aid and abet another (3) who commits criminal infringement
16. *Causing*: (1) willfully (2) cause another (3) to commit acts constituting criminal infringement
17. *Attempts*: attempt to infringe criminally

Conspiracy

Conspiracy = (1) intentionally (2) agree with another (3) to commit a crime

18. **18 USC 371**: (1) conspiracy (2) to criminally infringe

19. **Pinkerton**: Conspiracy to commit *any* crime subjects the conspirator to liability for (1) any criminal infringement that is (2) reasonably foreseeable and (3) in furtherance of the conspiracy

20. **RICO**: Criminal infringement is a predicate crime

Section 512

Section 512

scope questions

- Does § 512 ...
 - ... displace common-law doctrines?
 - ... displace the volitional conduct doctrine?
 - ... apply beyond the enumerated services?
- Courts generally answer “no,” “no,” and “no”

Section 512

secondary liability

21. *§ 512(c)(1)(A), (c)(3) quasi-contributory*: (1) [material contribution] (2) actual knowledge, red-flag reason-to-know, or constructive knowledge via notice
22. *§ 512(c)(1)(B) quasi-vicarious*: (1) direct financial benefit (2) right and ability to control
23. *§ 512(i)(1)(A) repeat infringer suspension*: who is one? what is a reasonable policy?

Paracopyright

Section 1002: SCMS

Serial Copy Management System (SCMS) = DRM for digital audio recording devices (DARs)

24. § 1002(a): all DARs must *implement* SCMS

25. § 1002(c): prohibits (1) *distributing* etc.
devices or services that (2) circumvent SCMS

These are quasi-secondary; neither requires underlying infringement

Section 1201: circumvention

26. § 1201(a)(1) prohibits circumventing DRM
that “*controls access*”

27. § 1201(b)(1) prohibits circumventing DRM
that “*protects a right of a copyright owner*”

Both of these are quasi-secondary; neither requires
underlying infringement

Section 1201: trafficking

§ 1201(a)(2) (but not 1201(b)!) prohibits trafficking in technology ...

28. “*primarily designed for*”

29. “*limited commercially significant ... use other than*”

30. “[knowingly] *marketed ... for use in*”

... circumvention

Arguably these map onto the Cox intent prongs

Section 1202: copyright management information

- 31. § 1202(a)(1): (1) knowingly (2) with intent to [facilitate] infringement, (3) provide (4) false CMI
- 32. § 1202(a)(2): (1) knowingly (2) with intent to [facilitate] infringement, (3) distribute (4) false CMI
- 33. § 1202(b)(1): (1) intentionally (2) remove or alter (3) CMI
- 34. § 1202(b)(2): (1) distribute (2) CMI (3) knowing that (4) it has been removed or altered
- 35. § 1202(b)(3): (1) distribute or perform works (2) knowing that (3) CMI has been altered or removed (4) knowing [or with reason to know] it will [facilitate] infringement

Some critiques

Is this bad?

Because it seems bad?

- Too many inconsequential variations
- Overlapping but inconsistent tests
- Confused relationship of statutory codification to common-law elaboration
- Loopholes and traps for the unwary

What to do?



Questions