



**Technology and Employer Update:
Court Eliminates Defenses for Downloading Copyrighted Materials**

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In a recent decision, the Seventh Circuit Federal Appellate Court has rejected the "fair use" defense for downloading music, or copyright protected materials, through person-to-person (P2P) applications, i.e. KaZaA, Limewire, Bearshare, and Edonkey. This decision, while primarily concerning the liability of individual downloaders, should also be reviewed by businesses that provide Internet access to their employees.

In the decision, the court, presided by Judge Easterbrook, considered the issue of whether P2P file sharing through services similar to KaZaA were excused by the Fair Use Doctrine. *BMG Music et al. v. Cecilia Gonzalez*, 2005 U.S. Dist., LEXIS 910. The case before the court involved Cecilia Gonzalez who used KaZaA to download 1,370 copyrighted songs during a few weeks and kept them on her computer until she was caught. Gonzalez's position was that she was "sampling" music to determine what songs she liked enough to buy at retail. At trial, Gonzalez conceded that she never owned legitimate copies of 30 of the songs. Therefore, summary judgment of infringement was entered based on the 30 songs never owned and the trial judge awarded BMG Music \$22,500 in statutory damages, calculated at \$750 per song.

The first issue addressed by the 7th Circuit was whether defendant had a right to a jury. The Court of Appeals agreed with the District Court that there is no right to a jury based on *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1980), holding that a claim for statutory damages under Section 504(c) is a suit at law in which the 7th Amendment does not apply.

The second issue addressed by the Seventh Circuit was defendant's fair use defense. The opinion by the Seventh Circuit has essentially eliminated the fair use defense for P2P sharing and places primary liability on those who download in a P2P arrangement.

The defendant, Gonzalez, argued before the court that her activities were protected as fair use. Previously, a licensed broadcast for one transmission could be recorded and "time-shifted" for one-time future viewing. *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1980) (Betamax). Under the Fair Use Doctrine and defense, the court must take into account:

- (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.

In this case, the court held Gonzalez was not engaged in non-profit use as she downloaded, and kept, entire copyrighted songs which could be sold individually or as an entire album. Upon the fourth consideration, Gonzalez argued before the court that downloading music similar to listening to radio broadcast is a form of sampling, "try before you buy." The court based its rulings that due to the increased P2P file sharing activities, sales of recorded music have dropped by approximately 30%. In addition, the internet does offer means to properly compensate artists by selling individual songs at such sites as iTunes and Napster.com. Finally, the court referred to "teasers," 30-second samples on sites like Amazon.com which were licensed for distribution of copyrighted material.

As unauthorized copying and P2P sharing cases are brought before district courts throughout the country, this case stands for the proposition that a person who downloads files through sites similar to KaZaA will be found liable for copyright infringement and the Fair Use Doctrine will not be a valid defense.

The decision should also be noted by employers. Simply stated, if you are a business, protect yourself. Businesses must establish that music downloading and other "non-work" use of a computer and the Internet is outside the scope of employment and a sanctionable offense. Established employee guidelines, specifically defining computer, software and electronic use, can serve as a defense to claims against an employer in the event an employee uses a computer illegally. In addition, firewalls, prohibiting access to known P2P websites, and controlling activities essential considerations for any business. By creating employee guidelines prohibiting music sharing and clearly defining use and purpose of electronic equipment, a business can protect itself against copyright infringement claims arising from employee downloading.
