BMG Music v. Gonzalez

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On December 9, 2005, the U.S. Court of Appeals for the Seventh Circuit handed down an opinion addressing the fair use implications of Internet file-sharing by end users. Although the thread of end-user infringement ran through all of the high-profile secondary liability file sharing cases leading up to the Supreme Court's decision in *MGM Studios v. Grokster*, 125 S. Ct. 2764 (2005),[2] the Seventh Circuit's decision in *BMG Music v. Gonzalez*[3] is the first time a court of appeals has confronted the liability of a specific end-user. In an opinion authored by Judge Easterbrook, a panel of the Seventh Circuit affirmed the district court's ruling on summary judgment that the end-user downloading constituted direct copyright infringement.

The defendant, Cecilia Gonzalez, had downloaded approximately 1,370 songs over a period of weeks. The court of appeals stated that "[h]er position is that she was just sampling music to determine what she liked enough to buy at retail." Gonzalez argued that downloading for the purpose of sampling was permitted under the fair use doctrine, 17 U.S.C. § 107. The motion for summary judgment, however, focused on 30 songs that Gonzalez admitted that she had downloaded, never purchased or owned, but never deleted. The court of appeals ruled that such downloading was not protected by fair use, and that Gonzalez had therefore infringed the plaintiffs' copyright.

The Seventh Circuit first distinguished the downloading of the 30 songs from the videotaping of a television broadcast permitted by the Supreme Court in *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984)(*Betamax*). The court stated that the "premise of *Betamax* is that the broadcast was licensed for one transmission and thus one viewing. *Betamax* held that shifting the time of this single viewing is fair use." Here, by contrast, there was no license covering a single transmission – the files Gonzalez obtained were posted in violation of copyright – and Gonzalez kept the files so that she could listen to them repeatedly.

The Seventh Circuit then considered the fair use defense in more detail. With respect to the first fair use factor, whether the use is commercial in nature, the court stated that Gonzalez was not engaged in a "nonprofit" use. With respect to the third factor, the amount of the work used, the court stated that Gonzalez downloaded and kept

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[2] *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003); *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1014 (9th Cir. 2001).

[3] 2005 U.S. App. LEXIS 26903 (7th Cir. Ill. Dec. 9, 2005)

whole copyrighted songs. The court found that "as with poetry, copying of more than a couplet or two is deemed excessive."

Turning to the fourth factor, the effect of the use on the market for the work, the Seventh Circuit rejected Gonzalez's argument that the downloading served a promotional or advertising purpose that improved the value of the work. The court of appeals observed that "the Supreme Court thought otherwise in *Grokster*, with considerable empirical support." The court of appeals claimed that as file sharing has increased, record sales have dropped 30%. The Seventh Circuit concluded that "music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying originals." The Seventh Circuit noted that the Ninth Circuit in *Napster* also rejected the sampling argument.

The Seventh Circuit proceeded to discuss the harm unauthorized downloading causes to markets other than the sale of compact discs. The court stressed that there existed "a market in ways to introduce potential costumers to music." This market, which included traditional radio, webcasting, and online sampling, generated revenue for copyright owners. These "authorized previews share the feature of evanescence; if a listener decides not to buy (or stops paying the rental fee), no copy remains behind." The court concluded that "copiers such as Gonzalez cannot ask courts (and juries) to second-guess the market and call wholesale copying 'fair use' if they think that authors err in understanding their own economic interests…."

Finally, the Seventh Circuit addressed the statutory damages awarded to the plaintiff. Under 17 U.S.C. § 504(c)(1), a prevailing plaintiff can recover statutory damages of between $750 and $30,000 for each work infringed. The plaintiff here sought the minimum, $750, for each of the 30 songs Gonzalez downloaded. Gonzalez claimed that because she thought her downloads were fair uses, she was an innocent infringer and the damages should be reduced to $200 per song, as permitted by section 504(c)(1). The court ruled that she was not entitled to the innocent infringer reduction because section 402(d) bars reduction if a copyright notice appeared on a copy of the work to which the defendant had access. Although the copies Gonzalez downloaded lacked copyright notices, the court found that she did have access to CDs with copyright notice: "Gonzalez readily could have learned, had she inquired, that the music was under copyright."

Because Gonzalez was not legally eligible for the innocent infringer reduction, and because the plaintiff only requested the minimum statutory damage amount of $750, the Seventh Circuit found that the district court properly awarded statutory damages on summary judgment, and that Gonzalez was not entitled to a trial before a jury to determine the amount of statutory damages. The court ruled that Gonzalez would be entitled to a trial only if the plaintiff asked for more than $750 per work, and a jury would need to exercise its discretion on the amount of damages that would be just.

The Seventh Circuit's decision that Gonzalez's downloading did not constitute fair use, and that the plaintiff could recover $750 in statutory damages for each of the 30 songs infringed, breaks no new ground. The Supreme Court in *Grokster* found that file

sharing constituted "infringement on a gigantic scale," and the Ninth Circuit in *Napster* rejected the fair use arguments made by the defendant here. Moreover, many courts have awarded far larger amounts of statutory damages when multiple works are infringed. *See UMG Recording v. MP3.com*, 2000 U.S. Dist. LEXIS 17907 (S.D.N.Y. Nov. 16, 2000).

The opinion is nonetheless noteworthy because it contains questionable *dicta* concerning several points. First, the opinion offers an extremely narrow view of the Supreme Court's landmark *Betamax* decision: that time shifting for a single viewing constitutes fair use. This narrow reading calls into doubt – at least in the Seventh Circuit – the activity of "librarying" or "archiving" video enabled by both the video cassette recorders and personal video recorders. But the Supreme Court in *Grokster* mildly endorsed archiving as "not necessarily infringing." *Grokster* at 2777 (citing *Betamax*, 464 U.S. at 424, 454-55).

Second, the Seventh Circuit found that Gonzalez's downloading for personal use was not a "nonprofit" use. Perhaps the court meant that this personal use was not "for nonprofit educational purposes" referenced in section 107(1).

Third, the Seventh Circuit compared Gonzalez's downloading with a thief's shoplifting. The Supreme Court, however, in *Dowling v. United States*, 473 U.S. 207, 217 (1985) distinguished between infringement and theft because "interference with copyright does not easily equate with theft, conversion, or fraud." The Seventh Circuit's equating of downloading with shoplifting continues an unfortunate trend in judicial decisions and policy discussions of blurring the significant distinctions between intellectual property and tangible property.