NEW YORK LAW SCHOOL

DigitalCommons@NYLS

Media Center

History & Archives

Spring 2001

National Entertainment Law Moot Court Competition Best Petitioners' Brief

Andra H. Feiner

Carol A. Giuliano

Jessica M. LaMarche

Follow this and additional works at: https://digitalcommons.nyls.edu/media_center

Recommended Citation

Feiner, Andra H.; Giuliano, Carol A.; and LaMarche, Jessica M., "National Entertainment Law Moot Court Competition Best Petitioners' Brief" (2001). *Media Center*. 117.
https://digitalcommons.nyls.edu/media_center/117

This Media Law and Policy, volume 9, no. 2, Spring 2001 is brought to you for free and open access by the History & Archives at DigitalCommons@NYLS. It has been accepted for inclusion in Media Center by an authorized administrator of DigitalCommons@NYLS. For more information, please contact camille.broussard@nyls.edu, farrah.nagrampa@nyls.edu.

VOLUME IX MEDIA LAW & POLICY NUMBER 2

NATIONAL ENTERTAINMENT LAW MOOT COURT COMPETITION BEST PETITIONERS' BRIEF

Andra H. Feiner, Carol A. Giuliano, & Jessica M. LaMarche
New York Law School

A Note to the Reader

The following brief was submitted by the New York Law School Moot Court Association and awarded Best Petitioners' Brief at the Third Annual National Entertainment Law Moot Court Competition hosted by Pepperdine Law School. New York Law School competed against teams from fifteen different schools around the country. A fact pattern is given to New York Law School one month prior to the competition where students research and write a brief to argue at the competition. The brief is printed in its entirety although minor formatting changes have been made for the purpose of publication.

Docket No. 00-0079

In the Supreme Court of the United States

SEPTEMBER TERM, 2000

Layer Three Music Liberation Front, Inc.,
A California Corporation,
and
The University of Oz,
and
The University of Atlantis,

Petitioners,

-against-

Douglas "Jammy D." Drizzi, an individual,
and
Blitzkrieg Music Partnership, a New York Partnership,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

QUESTIONS PRESENTED

I. UNDER THE "SAFE HARBOR" PROVISION OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, SECTION 1008 OF THE AUDIO HOME RECORDING ACT OF 1992, AND SONY CORP. V. UNIVERSAL CITY STUDIOS., 464 U.S. 417 (1984), ARE MLF AND THE UNIVERSITIES PROTECTED FROM VICARIOUS AND CONTRIBUTORY LIABILITY, GIVEN THAT MLF IS A SERVICE PROVIDER, THAT THE USE OF LTL SOFTWARE IS NONCOMMERCIAL, AND THAT LTL SOFTWARE IS CAPABLE OF SUBSTANTIAL NON-INFRINGING USES.

II. UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), ARE MLF AND THE UNIVERSITIES PERSONS THAT CONSTITUTE AN ENTERPRISE, AND MAY TREBLE DAMAGES BE AWARDED TO RESPONDENTS UNDER §§ 2314 AND 2315 OF THE NATIONAL STOLEN PROPERTY ACT ("Act"), GIVEN THAT CONGRESS DID NOT INTEND TO INCLUDE COPYRIGHT INFRINGEMENT WITHIN THE ACT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATE SUPREME COURT CASES

CIRCUIT COURT CASES

DISTRICT COURT CASES

Lockheed Martin Corp. v. Network Solutions, Inc.,
985 F. Supp. 949 (C.D. Cal. 1997)

Religious Technology Ctr. v. Netcom On-Line Communication Services, Inc.,
907 F. Supp. 1361 (N.D. Cal. 1995)

United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 8

17 U.S.C. § 512(a)

17 U.S.C. § 1008

18 U.S.C. § 1961(1)

18 U.S.C. § 1961(3)

18 U.S.C. § 1961(4)

18 U.S.C. § 1962(c)

18 U.S.C. § 1964

18 U.S.C. § 2314

18 U.S.C. § 2315

SECONDARY SOURCES

Melville B. Nimmer & David Nimmer, Nimmer on Copyright (MB),
12.04 [A][1] at 12-68 (1998)

MISCELLANEOUS AUTHORITIES

H.R. Conf. Rep. No 105-796 (1998)

137 Cong. Rec. S21305 (daily ed. Aug. 1, 1991) (statement of Sen. DeConcini)

S. Rep. 102-294 (1992)

STATEMENT OF JURISDICTION

After a trial, the District Court ruled in Defendants' favor on Plaintiffs' claims of copyright infringement and civil racketeering. The United States Court of Appeals for the Ninth Circuit reversed the district court's judgement. This Court granted Petitioner's writ of certiorari on September 11, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a) (1994).

STATEMENT OF THE CASE

A. Substantive History

On July 27, 1999, Respondents Douglas Drizzi, a rap artist known as "Jammy D.," and Blitzkrieg Music Partnership filed an action against Petitioners, Layer Three Music Liberation Front, Inc. ("MLF"), the University of Oz, and the University of Atlantis (collectively "the Universities"). (R. at 664.) MLF is an Internet company that operates MLF.com. (R. at 664.) Respondents alleged that MLF and the Universities are contributorily and vicariously liable for violating the Copyright Act of 1976. Respondents further alleged that MLF and the Universities violated the Racketeering Influenced and Corrupt Organizations Act ("RICO"). (R. at 664.)

MLF creates LayerThreeLiberation ("LTL") software, which allows Internet users to download MP3[1] digital audio files from MLF.com., free of charge. (R. at 665.) MLF allows its users to trade MP3 music files stored on their computers. (R. at 667.) The Universities provide their students with a high-speed Internet connection. (R. at 667.)

MLF provides an Internet service that allows its users to download LTL software. (R. at 665.) Users who install the LTL software connect directly to the MLF system. (R. at 665.) LTL software generates a list of files on the user's computer that the user may share with other MLF users. (R. at 666.) A list of these files is reproduced in the directory/index on the MLF server; that allows LTL software users to locate specific MP3 files by searching a list of users and files available at the time. (R. at 666.) Once a file is selected, the LTL software directly connects the user and host computers enabling a file transfer via the Internet. (R. at 666.) LTL software is specifically designed so that no file is routed through an MLF server. (R. at 666.) An MP3 file player is incorporated into the software, allowing users to listen to their selected files. (R. at 666.) The MLF server also hosts a chat room for registered users. (R. at 666.)

MLF's "terms of use" mandates compliance with copyright law. (R. at 666.) MLF warns its users that it will terminate the accounts of those who repeatedly fail to comply with the Digital Millennium Copyright Act ("DMCA"). (R. at 666.) Moreover, MLF reserves the right to terminate the account of any user who commits a single copyright infringement. (R. at 667.) MLF does not charge its users for service, software, or downloads. (R. at 667.) MLF's income is generated by on advertising. (R. at 667.) Over seventy percent of the MP3 files traded through MLF are copyright-protected recordings. (R. at 667.) The copyright owners do not receive royalties for the downloaded MP3 files. (R. at 667.) Respondents authorize their fans to make "bootleg" recordings during their concerts. (R. at 664.) Additionally,

[1] MP3 stands for MPEG1, layer three, or Moving Picture Exports Group 1, audio layer 3, and is a format that compresses digital audio into smaller files that are nearly equivalent in quality to Compact Discs. This format facilitates transferability over the Internet.

respondents support the proliferation of music, in all forms, so long as they exercise control over the fruit of their artistic labor. (R. at 665.)

Respondents further allege that MLF and the Universities comprise an enterprise under the civil RICO Act that is engaged in facilitating the piracy of copyright protected sound recordings. (R. at 668.)

B. Procedural History

On July 27, 1999, Respondents sued MLF and the Universities for contributory and vicarious copyright infringement and for violating the civil RICO Act. (R. at 664.) The district court ruled in favor of MLF and the Universities on both the vicarious copyright infringement and the RICO issues. (R. at 668.) The district court ruled that § 512 of the DMCA does not apply to MLF's service and that MLF and the Universities qualify as a service provider. The district court also found 17 U.S.C. §1008 shields MLF's users' activities and that MLF's service is capable of substantial non-infringing uses. The district court also ruled that MLF and the Universities do not constitute an enterprise and their activities do not constitute "racketeering activity" under RICO.

Respondents appealed to the United States Court Of Appeals for the Ninth Circuit. That court reversed the district court's decision holding that MLF and its activities are not protected under § 512 of DMCA, § 1008 or Sony Corp. v. Universal City Studios, 464 U.S. 471 (1984). Further, the Ninth Circuit held MLF and the Universities have violated RICO and are liable for treble damages. This Court granted certiorari on September 11, 2000.

SUMMARY OF THE ARGUMENT

I

MLF and the Universities are not vicariously or contributorily liable for copyright infringement. Section 512(a) of the DMCA contains a "safe harbor" provision for Internet service providers that legitimately copy digital audio files. Section 1008 of the AHRA protects consumers who make digital copies of legitimately purchased goods for personal purposes. Furthermore, MLF is protected under Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984), because LTL software is capable of substantial non-infringing uses. MLF has no direct control over any MP3 file transfer between its users. Individuals download the LTL software from the Internet to facilitate a connection between MLF users. Therefore, MLF should not be held liable for copyright infringement.

II

MLF and the Universities did not violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") because they are not "persons" that constitute an enterprise within the meaning of 18 U.S.C. § 1961(3) & (4) and § 1962(c). Accordingly, Respondents are not entitled to treble damages for copyright infringement under §§ 2314 and 2315 of the National Stolen Property Act. Copyright infringement does not equate to theft, conversion, or fraud within the meaning of §§ 2314 and 2315. Furthermore, civil RICO is unconstitutional and treble damages under § 1964(c) are unjust.

ARGUMENT

I. MLF AND THE UNIVERSITIES ARE NOT LIABLE FOR COPYRIGHT INFRINGEMENT UNDER SECTION 512 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT ("DMCA"), SECTION 1008 OF THE AUDIO HOME RECORDING ACT OF 1992 ("AHRA") AND SONY CORP v. UNIVERSAL CITY STUDIOS, INC., 464 U.S. 417 (1984)

MLF and the Universities are not vicariously and contributorily liable for copyright infringement. Section 512(a) of the DMCA provides a "safe harbor" provision for Internet service providers that shields them from claims of vicarious and contributory copyright infringement. In addition, § 1008 of the AHRA provides protection for consumers who make digital copies of legitimately purchased goods for their own purposes.

To prevail on a vicarious or contributory infringement claim, a plaintiff must show direct infringement of copyright on a third party. A&M Records, Inc. v. Napster, Inc., Nos. C 99-5183 MHP, C 00-0074 MHP, 2000 WL 1182467, at *5 (N.D. Cal. Aug. 10, 2000) (citing Sony Corp. of Am. v. Universal City Studios, Inc.,

464 U.S. 417, 434 (1984)). In the case at bar, MLF is an Internet service provider that distributes its LTL software. The LTL software facilitates the transfer of digital audio recordings between its consumers at no charge. (R. at 665.) Respondents' claims of vicarious and contributory liability fail because MLF does not directly infringe on Respondent's copyrighted music. Therefore, MLF and the Universities are not liable for copyright infringement.

A. The DMCA Safe Harbor Provision Protects MLF From A Claim For Copyright Infringement Because MLF Is An Internet Service Provider ("ISP").

Under the "safe harbor" provision of DMCA § 512(a), MLF is protected against claims of copyright infringement because MLF is an ISP. A "service provider" offers "the transmission, routing, or providing of connections for digital online communications, between or among points as specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." 17 U.S.C. § 512(k)(1)(A). ISPs perform the services necessary to maintain websites that enable users to communicate directly with one another. Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 961 (C.D. Cal. 1997). ISPs provide computers the necessary connections for Internet communications. Id. Here, MLF provides the Universities' students with the necessary steps to connect users. This results in the MP3 file transfers that would not occur without the MLF server. (R. at 665, 666.) However, the file transfers actually take place over the Internet directly. Therefore, § 512 protects MLF because MLF constitutes a service provider.

According to § 512 of the DMCA, liability for online copyright infringement is limited to four types of activity: transitory digital network communications, system caching, user storage, and information location. The "safe harbor" provision of the DMCA offers affirmative defenses to service providers if a court finds that service provider vicariously liable for copyright infringement. H.R. Conf. Rep. No. 105-796, at 73 (1998). The DMCA provides that a service provider shall not be liable for copyright infringement if "the transmission of the material was initiated by or at the direction of a person other than the service provider." 17 U.S.C. § 512(a)(1). The district court in Napster, noted that the content of the actual MP3 file is transferred over the Internet between users, not through the Napster servers. See 2000 WL 1182467, at *5. Moreover, the court in Napster found that the service created and promoted by Napster, Inc. to facilitate the downloading of music files for free, does not injure copyright holders. Id. As in Napster, MLF enables users who obtain its software to exchange MP3 music files with other users of LTL software. (R. at 665.) Like Napster, the actual MLF music files are transferred over the Internet between users directly, not through the MLF server. (R. at 666). Moreover, MLF users, not MLF, transmit the MP3 music files themselves. (R. at 666.) MLF provides the software that makes this transmission possible. Therefore, under § 512(a), MLF is a

service provider that is not responsible for copyright infringement resulting from downloading its LTL software.

B. Section 1008 Of The AHRA Shields MLF And LTL Consumers From Copyright Infringement.

Title 17 U.S.C. § 1008 of the AHRA protects MLF and LTL consumers from copyright infringement claims. Section 1008 bars any action against MLF's and LTL consumers, namely the Universities. Section 1008 provides in relevant part:

> No action may be brought under this title alleging infringement of copyright based on the manufacture, importation or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device,. . . or based on the noncommercial use by a consumer of such a device or medium for making digital music recordings or analog music recordings.

17 U.S.C. § 1008. Respondents brought these copyright claims under § 1008. However, § 1008 expressly bars Respondents from bringing these actions under this title against MLF or LTL consumers. MLF users are "consumers" within the meaning of § 1008. Their sharing of MP3 files is noncommercial because MLF does not charge its users for its service. (R. at 667.) Accordingly, Respondents may not bring this action under § 1008 against MLF or the Universities because sharing MP3 files is a noncommercial use.

Furthermore, Congress does not impose limits on the uses of Internet technology. Article I, § 8, of the Constitution requires Congress to promote the progression of the sciences and the arts. U.S. CONST. art. 1, § 8, cl. 8. The Internet was designed as an scientific research tool to facilitate widespread communications including art forms. ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996). Congress did not intend to, nor did it, set a limit on the quantity of digital audio recordings that a consumer can copy. 137 Cong. Rec. S21305 (daily ed. Aug. 1, 1991) (statement of Sen. DeConcini). Until Congress sets a limit on the amount of digital audio recordings consumers can make, no court may anticipate such a number.

1. Section 1008 protects MLF's users from an infringement action based on the noncommercial use of LTL software.

Section 1008 prohibits a copyright infringement action against a consumer for the noncommercial use of LTL software. Section 1008 extends its protection to all consumers who copy music recordings for personal use. See Recording Industry Assoc. of Am. v. Diamond, 180 F.3d 1072, 1078 (9th Cir. 1999). The purpose of § 1008 is to ensure that the consumers' right to make digital audio recordings of

copyrighted music for their private use is upheld. Id. (citing S. Rep. 102-294 at 86 (1992)). Congress intended to distinguish between commercial and noncommercial copying. Diamond, 180 F.3d at 1079. Section 1008 protects consumers who copy digital audio music files without intending to make a profit. Id. Section 1008 affords immunity to all noncommercial consumer copying. Id. at 1078. The sound recording device in Diamond, known as the "Rio," is consistent with the essential purpose of §1008: to facilitate personal use. Id. at 1080 (citing S. Rep. 102-294 at 86 (1992)). That purpose is to ensure a consumer's right to reproduce digital audio files for personal, noncommercial use. Id.

LTL software is analogous to the Rio because LTL software facilitates privately recording MP3 files. Like Rio's users, MLF's users are also noncommercial copiers. MLF is not directly connected to its users; rather, the actual music file transmission occurs via the Internet directly between users, not through MLF servers. (R. at 666.) Therefore, under § 1008 MLF users are engaged in noncommercial copying.

2. The use of LTL software by MLF users will not adversely affect the potential market for copyrighted works.

LTL software will not adversely affect the potential market for copyrighted works. If the use of a copyrighted work is noncommercial, the plaintiff bears the burden of showing a meaningful likelihood that it would adversely affect the potential market for the copyrighted work if it became widespread. Napster, 2000 WL 1182467, at *13; see also Sony, 464 U.S. at 451. Due to the noncommercial nature of the sharing of digital audio recordings by MLF's users, there is no adverse effect on the potential market of copyrighted works. In the past two years, college campuses have experienced a gradual four-percent decline in compact-disc sales. (R. at 667.) However, this evidence is not significant enough to conclude that the entire market of compact-disc sales is declining. Therefore, the use of LTL software to transfer music files over the Internet will not adversely affect the market of copyrighted works.

3. Congress does not impose quantitative limits on the use of Internet technology.

Congress does not limit the number of copies a consumer can make of legitimately purchased copyright protected digital audio works. Article I, § 8, of the United States Constitution vests Congress with the power to define the impact of copyright monopolies, the duration of protecting copyrighted works, and the types of works covered. U.S. CONST. art. I, § 8, cl. 8. The constitutional mandate that Congress "promote the Progress of Science and useful Arts" has not changed in more than two centuries. See Mazer v. Stein, 374 U.S. 201, 219 (1954). Within the last

century, the Internet began as an experimental scientific project to promote the progression of widespread communication. Reno, 929 F.Supp. at 831.

The Ninth Circuit below erred in contemplating that Congress imposed a limit on the quantity of digital audio recordings a consumer may copy. Section 1008 does not set a quantitative allocation that would abuse the rational limits Congress intended. (R. at 671.) The widespread use of LTL software is the type of scientific technology Congress provided for in Article I, § 8. Until Congress changes the language of § 1008 to include a limit on the quantity of digital recordings, it is not this Court's role to infer what those limits are. Therefore, MLF and its consumers may not be held liable for copyright infringement under § 1008.

C. MLF Is Protected Under Sony Because LTL Software Is A Technology Capable Of Substantial Non-Infringing Uses.

LTL software is capable of substantial non-infringing uses protected by this Court's decision in Sony. Selling copying equipment, like selling other articles of commerce, is permissible if the equipment is widely used for legitimate, unobjectionable purposes or, indeed if it is merely capable of substantial non-infringing uses. Sony, 464 U.S. 417. In Sony, this Court found that the manufacturer of videotape recorders does not intentionally induce buyers to make infringing uses of copyrighted television programs or sell products to individuals who are identified to Sony as copyright infringers. See id. at 439.

In Sony, this Court reviewed Sony Inc.'s Betamax, a videotape recorder ("VTR"). Sony's Betamax allows television viewers to record programs they cannot watch at the time the program is actually aired. Id. at 418. This use of the Betamax is known as "time-shifting," and it actually increases the viewing audience. Id. MLF is the home videotape recorder of the Internet. Like the Betamax, LTL software is capable of non-infringing uses such as the authorized recording of digital audio files for future enjoyment. (R. at 666.)

"Space-shifting" is the act of copying a musical recording into another "space" on the user's hard-drive. Diamond, 180 F.3d at 1079. In Diamond, the Ninth Circuit analogized the method of space shifting to Sony's method of time-shifting. Id. MLF provides a service that allows music to be space-shifted through the Internet. Space-shifting, like time-shifting, has a substantial capability for non-infringing uses because MLF's users do not intend to profit from this practice. Therefore, MLF is protected against claims of copyright infringement under this Court's decision in Sony.

D. MLF And The Universities Are Not Vicariously Liable For Copyright Infringement.

The Ninth Circuit below erred in finding that MLF and the Universities are vicariously liable for copyright infringement. Because MLF has no direct control

over its users' activity, this Court may not impose vicarious liability against MLF. An entity may be held vicariously liable if it has the right and ability to supervise the infringing activities. Gershwin Publ'g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971). The Second Circuit in Shapiro, Bernstein & Co. v. H.L. Green Co., set forth a two-part test to ascertain vicarious liability in all copyright cases. 316 F.2d 304, 307 (2d Cir. 1963). A court must find independent evidence that (1) a defendant had direct control of the infringing activity and (2) that a defendant received a financial benefit. See Artists Music, Inc. v. Reed Publ'g, (U.S.A.), Inc., 31 U.S.P.Q. 2d 1623, 1626 (S.D.N.Y. 1994) (citing Shapiro, 316 F.2d at 307).

Here, MLF users store MP3 files on the hard drives of their computers. (R. at 666.) The MLF software reads a list of those files and adds it to the list of available files for other users to share. (R. at 666.) MLF does not retain the ability to assert control over MP3 files that are available to its users. (R. at 666.) When a user is not signed onto the LTL software, the files on their hard drive are not available. Furthermore, MLF does not have a direct financial interest in its users' activities. The only financial benefit MLF incurs is through advertising income. (R. at 667.) Actual control requires sufficient evidence of "some continuing connection between the two parties in regard to the infringing activity." Id. at 110. The court in Religious Technology Ctr. v. Netcom On-Line Communication Services, Inc., (in which the defendant provided Internet access to a bulletin board service operator (BBS) and a user posted plaintiff's copyrighted documents on the BBS, found a genuine issue of fact regarding control, but dismissed the vicarious liability claim on the financial-benefit prong of the Shapiro test. 907 F. Supp. 1361 (N.D. Cal. 1995). The court concluded that technology did not exist to give Netcom, the defendant, sufficient, actual control of the infringing activity. See id. at 1376 n.23.

Similarly, MLF does not have continuing connection with its users or with the Universities. MLF merely provides the software. (R. at 666.) No continuing connection exits between MLF and its users when the copying of the digital audio recordings occurs. Therefore, MLF may not be vicariously liable for copyright infringement.

E. MLF And The Universities Are Not Contributorily Liable For Copyright Infringement.

Since MLF and the Universities had no direct knowledge of their users' actions, MLF and the Universities may not be contributorily liable for copyright infringement. Contributory liability requires an inquiry into a level of knowledge that is absent from the inquiry for vicarious liability. See Melville B. Nimmer & David Nimmer, Nimmer on Copyright (MB), 12.04[A][1], at 12-68 (1998). The court in Gerswhin, established the test for contributory liability: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer.'" 443

F.2d at 1162; see also Universal Studios v. Sony Corp. of Am., 659 F.2d 963, 975 (9th Cir. 1981) rev'd on other grounds, 464 U.S. 417 (1984). To succeed against a copyright claim, a defendant must prove the affirmative defenses of fair use and substantial non-infringing use. See Napster, 2000 WL 1182467, at *11. A copyright infringement claim consists of two elements: (a) ownership of a valid copyright and (b) copying of original elements of the copyrighted works. Id. at *17.

In Sony, this Court found that a VTR manufacturer and seller was not liable for contributory infringement, although the VTR manufacturer and seller had constructive knowledge that some of its purchasers were likely to use the recorders to make unauthorized tapes of copyrighted television programs and movies. 464 U.S. 417.

Here, MLF is similar to the VTR manufacturer, since MLF may have constructive knowledge that its users engage in copyright infringement. Because LTL is similar to the Betamax, this Court should hold, as it did in Sony, that MLF and the Universities are not contributorily liable.

II. MLF AND THE UNIVERSITIES DID NOT VIOLATE THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), AND RESPONDENTS ARE NOT ENTITLED TO TREBLE DAMAGES FOR COPYRIGHT INFRINGEMENT UNDER §§ 2314 AND 2315 OF THE NATIONAL STOLEN PROPERTY ACT ("Act").

RICO does not apply to MLF and the Universities. Thus, Respondents cannot successfully allege a civil RICO claim against them. To state a civil RICO claim, a plaintiff must allege that the defendants violated of § 1962(c). 18 U.S.C. § 1962(c); Sedima S.P.R.L. v. Imrex Corp., 473 U.S. 479, 496 (1985). To violate § 1962(c), a defendant must (1) conduct (2) an enterprise (3) through a pattern (4) of racketeering activity. See id. The alleged predicate acts a plaintiff must list are defined in 18 U.S.C. § 1961(1) as acts indictable or punishable under various state and federal laws. Moreover, to constitute an enterprise under § 1961(4), the defendants must be "persons" under § 1961(3). See 18 U.S.C. § 1961(3) & (4). If defendants engage in a pattern of racketeering activity in a manner forbidden by these provisions, and if the racketeering activities injure a plaintiff's business or property, the plaintiff has a claim for treble damages under § 1964(c). Sedima, 473 U.S. 479, 495. However, copyright infringement does not equate with theft conversion, or fraud. See Dowling v. United States, 473 U.S. 207 (1985). However, a plaintiff may not be awarded treble damages for a copyright infringement claim under §§ 2314 and 2315.

Here, MLF and the Universities are not "persons" that constitute an enterprise engaged in racketeering activities under § 1961(3) & (4). The Universities provide their students with access to the Internet for educational purposes, while MLF distributes LTL software to users who download digital audio music recordings. Neither of these activities injured Respondents in their business.

Therefore, Respondents do not have a claim for treble damages under § 1964(c). Moreover, Respondents' copyright infringement claims are not covered under §§ 2314 and 2315. Additionally, MLF and the Universities did not violate the RICO statute since RICO does not apply to MLF and the Universities. Accordingly, this Court should hold that MLF and the Universities did not violate RICO and that an award of treble damages is unjust.

A. MLF And The Universities Are Not "Persons" That Constitute An Enterprise Within The Meaning of 18 U.S.C. § 1961(3) & (4) And § 1964 (c).

Under RICO, MLF and the Universities do not qualify as "persons" that constitute an enterprise. Section 1961(3), defines "persons" as any individual or entity capable of holding a legal or beneficial interest in property. As defined in RICO, an enterprise "includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Conducting an enterprise that affects interstate commerce does not, in itself, violate § 1962(c). Sedima, 473 U.S. at 481. To win a RICO claim, a plaintiff must prove a pattern of racketeering activity and show at least two racketeering predicate acts that are related and amount to, or threaten the likelihood of, continued criminal activity. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989). Merely committing of predicate offenses alone does not violate § 1962. Sedima, 473 U.S. at 481. Furthermore, a RICO claim must fail if a plaintiff cannot show that a defendant's enterprise has caused harm to plaintiff's business or property. Id. If plaintiff fails to show an injury, then defendant did not violate § 1962(c) and plaintiff may not recover under § 1964(c).

Respondents have no claim under these tests. MLF and the Universities do not work as a continuing unit. They are therefore, not "associated in fact." See 18 U.S.C. § 1961(4). MLF simply makes its LTL software available through the Internet, not specifically to the Universities. (R. at 665.) The Universities provide students with a high-speed Internet connection equipped with numerous service providers, including, but not limited to MLF. This connection facilitates downloading the LTL software. (R. at 667.) MLF functions solely as an ISP. Money does not change hands between MLF and the Universities. (R. at 667.) Once the LTL software is downloaded through that high-speed Internet connection, MLF has no further interaction with its users. (R. at 666.)

Under § 1961(1), MLF and the Universities' ordinary business activities do not constitute a pattern of racketeering amounting to a continuous criminal activity. Nor are the Respondents' copyright infringement claims predicates acts under §§ 2314 and 2315. Respondents claim that they suffered an injury to their business resulting from MLF and the Universities. To the contrary, since MLF has existed online, Respondents have enjoyed an increase in their record sales. Therefore, because Respondents have failed to show that MLF and the Universities caused them

an injury and because Respondents have failed to prove an enterprise exists between MLF and the Universities, Respondents are not entitled to any recovery under § 1964(c).

B. Even If MLF And The Universities Are "Persons" That Constitute A RICO Enterprise, Treble Damages May Not Be Awarded.

Copyright infringement does not fall within §§ 2314 and 2315 of the Act. Thus, this Court may not award treble damages to Respondents. Section 2314 lists a predicate act under RICO. A predicate act is committed, according to § 2314, when (1) the defendant transported "goods, wares, or merchandise" in interstate or foreign commerce; (2) those goods have a value of "$5,000 or more"; and (3) defendant "knows the same to have been stolen, controverted or taken by fraud." Dowling, 473 U.S. at 214. The Dowling Court considered whether bootlegged phonorecords are unauthorized copyrighted material. Id. The Court concluded that the phonorecords were not stolen, converted, or taken by fraud under § 2314. Id. at 207. Moreover, the Dowling Court held that Congress has the authority to regulate copyrights through Article I, § 8, cl. 8, of the Constitution, and that Congress did not intend to include copyright infringement in § 2314. Id. at 220.

Here, Respondents allege that MLF and the Universities knowingly participated in transferring MP3 files that contained Respondents' songs and sound recordings and that their transfer constitutes interstate transportation and receipt of stolen property. Respondents allege that this transfer equates to a racketeering injury within §§ 2314 and 2315. (R. at 672.) However, even if this Court considers these alleged unauthorized transfers to violate copyright law, copyright infringement claims does not fall within the meaning of § 2314.

1. Copyright infringement does not equate to theft, conversion, or fraud within §§ 2314 and 2315 of the Act.

The Act does not provide that copyright claims must be included within §§ 2314 and 2315. Section 2314 covers physical goods that have been stolen, converted, or taken by fraud. Dowling, 473 U.S. at 216. Section 2315 provides that the goods must be valued at more than $5,000. The property rights of a copyright holder are distinct from a possessory interest of the owner of ordinary goods. Dowling, 473 U.S. at 217; United States v. LaMacchia, 871 F. Supp. 535, 537 (D. Mass. 1994). A copyright infringer does not assume physical control of the copyright or deprive its author of its use. Dowling, 473 U.S. at 217. Section 2314 permits transporting of bootleg records across state lines because bootleg records are not "stolen, converted, or taken by fraud." Dowling, 473 U.S. at 216. As in Dowling, MLF and the Universities are not liable for the unauthorized transfer of the MP3 files

through LTL software, even though the files contain copyrighted musical compositions and even though the artists did not receive royalties. (R. at 667.) These unauthorized transfers did not deprive Respondents of the use of their copyrighted works. Therefore, MLF and the Universities' interference with Respondents' copyright does not equate with theft, conversion, or fraud within the ambit of §§ 2314 and 2315.

2. Congress did not intend for §§ 2314 and 2315 to include copyright infringement.

Congress has shown no intent to include copyright infringement within the language of §§ 2314 and 2315. Section 2314, was an extension of the National Motor Vehicle Theft Act (NMVTA), and § 2315 provides the required monetary value to qualify under § 2314. Dowling, 473 U.S. at 218. Congress enacted the NMVTA and the Act to address the need for federal action in an area normally left to state law. United States v. Turley, 352 U.S. 407, 417 (1957). Accordingly, there is no need for supplemental federal action; Congress already has the express authority to protect copyright in the Copyright Act of 1976. See U.S. CONST. art I, § 8, cl.8. Therefore, Congress did not intend for copyright infringement claims to fall within the purview of §§ 2314 and 2315.

3. The civil RICO statute is unconstitutional and the treble damages are unjust.

An award for treble damages would be unconstitutional and unjust because MLF and the Universities would be forced to pay excessive damages. 18 U.S.C. § 1964(c) provides that persons injured in business or property may recover threefold the damages sustained. Here, the district court agreed with MLF and the Universities that civil RICO provides damages to plaintiffs far in excess of what is reasonable as compensatory or even punitive. (R. at 673.) To recover under RICO, plaintiffs merely need to show that they were damaged by one of the predicate acts listed in § 1961(1). (R. at 673.) However, this would make RICO damages available to plaintiffs who know they are not victims of any racketeering activity. (R. at 673.) Therefore, this Court should uphold the district court's and the Court of Appeals for the Ninth Circuit's decision that civil RICO is unconstitutional and unjust, and should not be applied to MLF and the Universities.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the decision of the Court of Appeals for the Ninth Circuit.

Respectively submitted,

Andra H. Feiner
Carol A. Giuliano
Jessica M. La MarchW

New York Law School

APPENDIX A

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

APPENDIX B

RELEVANT STATUTORY PROVISIONS

Digital Millennium Copyright Act 17 U.S.C. § 512 (a). Limitations on liability relating to material online.

(a) Transitory digital network communications.-- A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the infringement and transient storage of that material in the course of such transmitting, routing, or providing connections, if--

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than an anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connection; and

(5) the material is transmitted through the system or network without modification of its content.

17 USC Section 1008. Prohibition on certain infringement actions

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a devise or medium for making digital musical recordings or analog musical recordings.

18 U.S.C. Section 1961. Definitions

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

18 U.S.C. Section 1962 (c)

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. Section 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including

a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 USC Section 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting;

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $ 5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $ 5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof--

Shall be fined under this title or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. This section also shall not apply to any

falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money.

18 USCS SECTION 2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps

Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $ 5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $ 500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof--

Shall be fined under this title or imprisoned not more than ten years, or both.
This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money.

For purposes of this section, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.