Avoiding Copyright Pitfalls in
New Internet Business Models and Content Delivery Technologies

Practical tips on avoiding infringement liability in developing and launching new technologies; strategic thinking at the development stage; and marketing considerations.

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I. Copyright 101: Understanding the Basics

A. What Copyright Protects

Copyright protects the authors of “original works of authorship” that are “fixed in a tangible medium of expression,” including literary, dramatic, musical, artistic, and other intellectual works. 17 U.S.C. § 102.

The Copyright Act gives the owner of copyright the exclusive right to do (and to authorize others to do) the following, pursuant to 17 U.S.C. § 106:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
• dependence of business on infringement and methods employed to maximize profits from infringements;
• lack of affirmative steps to prevent infringement, such as the use of hashes, metadata filters or acoustic fingerprinting;
• willful blindness to obvious acts of infringement.


### III. Copyright Liability: Defenses to Claims of Copyright Infringement

#### A. Fair Use

Under 17 U.S.C. § 107, “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” The following factors are to be considered in determining whether the use made of a work is a “fair use:”

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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

#### B. Sony-Betamax Doctrine

Device must qualify as a “staple article of commerce” and must be “capable of commercially significant noninfringing uses,” such as time-shifting uses. _Sony Corp. of Am. v. Univ. City Studios, Inc._, 464 U.S. 417, 423–24 (1984).

#### C. Digital Millennium Copyright Act (17 U.S.C. § 512(a)-(d))

- Provides “safe harbor” from liability for online service providers;
- Required to comply with valid “take down” requests;
- Required to comply with valid DMCA subpoena requests;
- Required to maintain “repeat infringer” policy;
- Required to register DMCA Agent with Copyright Office;
• No duty to monitor site activities.

IV. Technological Developments Implicating Copyright Law

A. Peer-to-Peer Systems

A type of network where computers communicate directly with each other, rather than through a central server. In recent usage, peer-to-peer has come to describe applications in which users can use the Internet to exchange files with each other directly or through a mediating server.

B. Linking

Deep linking, on the World Wide Web, is making a hyperlink that points to a specific page or image on another website, instead of that website's main or home page. Such links are called deep links.

www.wikipedia.org

Inline linking, (also known as hotlinking, leeching, piggy-backing, direct linking, offsite image grabs and bandwidth theft) is the use of a linked object, often an image, from one site into a web page belonging to a second site. The second site is said to have an inline link to the site where the object is located.

www.wikipedia.org

C. User-Generated Content Sites

YouTube.com is a video sharing website where users can upload, view and share video clips

www.wikipedia.org

D. Social Networks/Virtual Communities

MySpace.com is a popular social networking website offering an interactive, user-submitted network of friends, personal profiles, blogs, groups, photos, music and videos for teenagers and adults internationally.

www.wikipedia.org

E. Collaborative Content/Wikis

Wikipedia.org is a free, multilingual, open content encyclopedia project. Wikipedia's articles have been written collaboratively by volunteers around the world, and nearly all of its articles can be edited by anyone with access to the Internet.

www.wikipedia.org
F. Portable Media Players

- Zune (Microsoft);
- iPod/iPhone (Apple);
- Inno (Pioneer/XM Satellite Radio).

G. Search Engines

- Google;
- Yahoo!

V. Recent Copyright Cases Involving New Technologies

A. Litigation Involving Server Copies


B. Litigation Involving Peer-to-Peer Technology

*A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001);
*In re Aimster*, 334 F.3d 643 (7th Cir. 2003);
*MGM Studios, Inc. v. Groksite, Ltd.*, 545 U.S. 913 (2005);

C. Litigation Involving Web Search Technology

*Kelly v. Arriba Software*, 336 F.3d 811 (9th Cir. 2003);
*CoStar v. Loopnet*, 373 F.3d 544 (4th Cir. 2004);
*Author’s Guild v. Google Inc.*, 05 CV 8136 (S.D.N.Y. 2005);

D. Litigation Involving Portable Media Players

*RIAA v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999)
*Atlantic Recording Corp. v. XM Satellite Radio, Inc.*.

E. Litigation Involving User-Generated Content Sites

*Viacom v. YouTube, Inc.>*;
*Tur v. YouTube, Inc.*;
*Football Ass’n Premier League v. YouTube, Inc.*;
UMG Recordings, Inc. v. MySpace, Inc.

F. Credit Cards and New Technology

Perfect 10, Inc. v. Visa Int’l Ass’n, 494 F.3d 788 (9th Cir. 2007)

VI. Rules of the Road

A. Register Copyrighted Works, Including Websites.
   - Creates presumption of ownership;
   - Required for bringing infringement actions.

B. Make Use of DMCA Protections.
   - Register DMCA Agent with Copyright Office;
   - Develop process for complying with valid “take down” requests;
   - Develop process for complying with valid DMCA subpoena requests;
   - Maintain “repeat infringer” policy.

C. Create Terms of Service That Outline Unacceptable Conduct.
   - Inform users of copyright infringement policy;
   - Provide users with means of reporting copyright infringement;
   - Develop process for removal of infringing works.

D. Develop Internal Policies That Outline Unacceptable Conduct.
   - Inform employees of copyright infringement policy;
   - Develop process for addressing infringing conduct.

E. Seek Indemnities from Content Providers to Limit Liability.

F. Avoid Marketing Infringing Aspects of Products and Services.

G. Avoid Tying Ad Revenue or Other Monetary Revenue to Infringing Aspects of Products and Services.

H. Avoid Assisting Users Engaged in Obvious Infringement.

I. Limit or Deny Access to Obvious Infringing Activity.

J. Consider Adoption of Copy-Limiting Technologies in Design Stages of Products and Services (DRM; Filters).
K. Seek Licensing Opportunities.

L. Seek Legal Advice!