

Monday, September 22, 2008

Defending online copyright infringement.

Computer hard drive. (Image from Pacific Northwest Laboratory's website). On May 23, 2008, I blogged about bucking the trend of 94% of federal criminal prosecutions resulting in guilty pleas, by proceeding to a jury trial in Alexandria, Virginia, federal court for alleged criminal copyright infringement. Wired's blog -- parroting the assertion of the Recording Industry Association of America's news release -- describes my trial as the first federal trial for online criminal copyright infringement that primarily involved music; that does not mean that others have not entered guilty pleas for such accusations, because they have. On September 19, 2008, I went to sentencing with my client for this online copyright infringement case. Fortunately, the judge varied substantially below the sentencing guidelines, saying that they are excessive for my client's case, after having addressed such factors as the sentences of co-conspirators that were much lower than my client's sentencing guidelines (of course, those who plead guilty get the opportunity for a lower offense score due to acceptance of responsibility) and the below-guidelines sentence of a federal criminal defendant in another conspiracy case who was sentenced earlier this month for the same type of conspiracy as well as choate online copyright infringement. Although the sentencing judge did not agree with me, I vigorously contested the sentencing guidelines, including my assertion that the guidelines should look at the loss to the alleged victims, and not at retail price multiplied by the number of times the item was downloaded. I argued that even though the guidelines comments for copyright infringement say to use retail value, I said that they are but comments, and do not jibe with the theft guidelines to which the reader is further referenced for infringement exceeding \$5,000, which theft guidelines discuss loss, not the value of the infringed items. On that topic, here is a relevant excerpt from my sentencing memorandum: The seminal treatise on Copyright law acknowledges the difficulty in precisely calculating industry loss from infringement of copyrighted material: "Most such efforts [at gauging the extent of piracy] are either anecdotal or uncritically dependent on data provided by trade associations and other interested parties, since those engaged in pirating intellectual property have not been considerate enough to compile statistics for academic researchers." [Quoting from W. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* 6 (1995).] But a problem in methodology attaches here: to the extent that the pertinent figures rely on an assumption that current infringers would pay list price rather than cease using the pirated product, then they represent the very high end among a spectrum of possibilities. Particularly where high-priced software packages are at stake, the actual receipts of the proprietors "even in the unlikely event that piracy could be wholly obliterated" might turn out to be far lower than those industry projections. Melville Nimmer & David Nimmer, *Nimmer on Copyright*, § 15.01[A][1] at 15-3. Furthermore, a recent scholarly and in-depth professorial study that includes an analysis of relevant raw data, helps blunt the notion that industry loss can be gauged by such an oversimplistic approach as assigning a retail value to each allegedly infringed item multiplied by each download: "The Internet provides a natural crucible to assess the implications of reduced protection because it drastically lowers the cost of copying information. In this paper, we analyze whether file sharing has reduced the legal sales of music. While this question is receiving considerable attention in academia, industry, and Congress, we are the first to study the phenomenon employing data on actual downloads of music files. We match an extensive sample of downloads to U.S. sales data for a large number of albums. To establish causality, we instrument for downloads using data on international school holidays. Downloads have an effect on sales that is statistically indistinguishable from zero. Our estimates are inconsistent with claims that file sharing is the primary reason for the decline in music sales during our study period." F. Oberholzer-Gee and K. Strumpf, "The Effect of File Sharing on Record Sales" An Empirical Analysis, *Journal of Political Economy*, 2007, vol. 115, no. 1 (this article is available in full at http://digital.music.cornell.edu/files/political_economy_filesharing.pdf (last visited September 17, 2008) (emphasis added)). If you are defending online copyright infringement cases, please let me know. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:30