

Copyright Owners' Tentative Proposal
October 5, 2004

(g)(1) Whoever manufactures, offers to the public, or provides a covered peer-to-peer product, when the person knows, or is aware of facts or circumstances from which it is apparent, that such covered peer-to-peer product is a substantial cause of covered viral infringement, shall be liable as an infringer if –

(A) the majority of the revenues, including revenues from advertising, of the covered peer-to-peer product result from covered viral infringement; or

(B) the availability of copies or phonorecords resulting from covered viral infringement is the principal reason the majority of users are attracted to the covered peer-to-peer product. Survey evidence may be used to show that the requirements of this subparagraph are satisfied.

(2) For purposes of this subsection –

(A) the term “covered viral infringement” shall mean widespread infringement of section 106(3) by means of digital transmissions using a covered peer-to-peer product, where such infringement results in copies or phonorecords from which further infringing copies or phonorecords often are made widely available using a covered peer-to-peer product; and

(B) The term “covered peer-to-peer product” shall mean a widely available device, or computer program for execution on a large number of devices, communicating over the Internet or any other publicly available network and performing or causing the performance at each such device all of the following functions:

(i) providing search information relating to copies or phonorecords available for transmission to other devices;

(ii) locating other devices that provide information relating to copies or phonorecords available for transmission that is responsive to search requests describing desired copies or phonorecords; and

(iii) transmitting a requested copy or phonorecord to another device that located the copy or phonorecord through such other device’s performance of the function described in clause (ii);

unless the provider of the device or computer program has the right and ability to control the copies or phonorecords that may be located by its use.

(3) [With respect to a claim of a violation of this subsection, the court shall only permit discovery on the questions of whether the product is a peer-to-peer product and whether

the product results in covered viral infringement until it determines that the plaintiff has presented a prima facie case that the product is a covered peer-to-peer product and that use of the product results in covered infringement.] [Note: Awaiting BSA companies GC responses per Emery.]

(4) Limitations on Remedies.

(A) No award of statutory damages under section 504(c) shall be made for a violation of this subsection unless the copyright owner sustains the burden of proving, and the court finds, that such violation was committed willfully.

(B) In granting injunctive relief under section 502 for a violation of this subsection, the court shall, to the extent practicable, limit the scope of the injunctive relief so as not to prevent or restrain noninfringing uses of the covered peer-to-peer product.

(5) No court shall apply a doctrine of secondary liability to the cause of action created by this subsection.

(6) Nothing in this subsection shall enlarge or diminish liability for direct infringement or the doctrines of vicarious liability and contributory infringement, including any defenses thereto or any limitations on rights or remedies for infringement.

(7) A service provider performing any of the functions described in subsections (a), (b)(1), (c)(1), and (d) of section 512, [without regard to subsections (c)(1)(A) through (C) or (d)(1) through (3),] where the “material” with regard to which the service provider is performing such function is a covered peer-to-peer product, whose service is used by a third party not acting in concert with the service provider to violate this subsection shall not be liable under this subsection for such use. [Jule idea?]

(8) A service provider that primarily hosts on its website, or advertises, the sale or offering for sale of covered peer-to-peer products by third parties through its website shall not be liable under this subsection for offering for sale such covered peer-to-peer products if the service provider complies with the conditions set forth in section 512(c)(1) with regard to such products and the service provider’s service itself does not meet the conditions set forth in paragraphs (1)(A) and (B). [This is Halpert’s proposed eBay language. Why does it not conflict with, or is it not covered by, paragraph (7)?]