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THE RECORDING INDUSTRY VS. XM RADIO: A FLASHBACK TO SONY?

by Cortney Arnold

In the spring of this year, the [Recording Industry Association of America](#) (“RIAA”) brought a lawsuit against [XM Satellite Radio](#) (“XM”), the manufacture of the [Pioneer Inno](#) (the “Inno”). The Inno is a portable XM radio receiver that records live music, acts as an MP3 player, and offers downloads from online music services. Songs stored on the device from its broadcasts can’t be copied and can only be played for as long as a customer subscribes to XM’s radio service. See [Daniel Greenberg, A Music Player Only the RIAA Can’t Love](#), WASH. POST, May 21, 2006, at F07.

RIAA asserts three broad violations by XM of the [Copyright Act](#). First, RIAA alleges that the Inno directly causes “massive wholesale infringement” of its copyrights. Second, RIAA alleges that the Inno’s features constitute inducement to piracy by turning its radio service into a music-download service without authorization. Finally, RIAA maintains that XM is contributorily and vicariously liable for the copyright violations of its subscribers. RIAA seeks \$150,000 in damages for every song copied by XM Satellite customers using the Inno. See [Complaint for Declaratory and Injunctive Relief and Damages](#).

RIAA’s lawsuit boils down to debate over the rule for the fair use exception laid down in *Sony Corp. of America v. Universal City Studios, Inc.*, [464 U.S. 417 \(1984\)](#), (also known as the “Betamax Case”). In *Sony* the Court ruled that the making of individual copies of complete television shows for purposes of time-shifting (i.e. record now, watch later) does not constitute copyright infringement, but is fair use. Since a party cannot be contributorily or vicariously liable for infringement without a finding of direct infringement by the consumer, the Court therefore ruled that Sony, the manufacturers of home video recording devices, were not liable for infringement.


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RIAA's copyright infringement argument should be rejected under *Sony*. The Inno's recording capabilities are used by paying subscribers for purposes of time-shifting and listening to previously purchased music. As will be shown, such uses fall under the fair use exception provided for in *Sony*. In the current RIAA case, XM subscribers are paying for a subscription radio service. And while the subscribers are able to record the songs onto the Inno and listen to them again in the future, such recordings cannot be transferred onto other media and they only remain available on the Inno for as long as the subscriber pays for the XM service. Subscribers canceling their subscriptions would be forced to buy an actual copy of the song from another source in order to play it. Such recording (as well as playback of previously purchased music) is very comparable to the Betamax (VHS) at issue in *Sony* and also to recording tape players that come with the majority of stereo systems available today. Since the Supreme Court ruled that using VHS technology, which does allow for the transfer of recordings onto other media, falls within the fair use exception, the court should not rule against the Inno technology, which is much more restrictive on transferring of recordings.

Moreover, in *Sony* the Court determined that the sale of copying equipment does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable, substantial, non-infringing purposes. In the RIAA case, the Inno has a number of legitimate, non-infringing uses, such as listening to XM's radiocasts, legitimately downloading music from other music services, listening to one's personal music collection, and listening to media in the public domain. Taking the Inno off the market because it has some (arguably) infringing uses hinders the distribution of XM content and also prevents customers from using the product for uses that are clearly legal. Such fair uses must be upheld under the fair use exception, as they go to the heart of copyright protection, i.e., the promotion of arts and sciences. The fair use exception strikes a balance between the interests of authors, artists, and inventors and society's competing interest in the free flow of ideas, information, and commerce. Should the RIAA be allowed to prohibit one of the emerging technologies that allows for this free flow of information, it will, in its effort to protect copyright, in fact, chip away at the goals copyright protection promotes.

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Max Oldham :: 12/19/06 at 9:01 pm

“RIAA’s lawsuit boils down to debate over the rule for the fair use exception”

I could be wrong, but isn’t the XM legal team likely to cite AHRA 1992, which legalizes digital audio recorders? I assume that under the provisions of that Act, Pioneer incorporated a SCMS into the hardware, and sends money for each unit sold to the Library of Congress (which itself distributes the proceeds per statute, much of it I believe ending up at record companies). If so, it’s not clear why the RIAA thinks it has a case, unless perhaps they require XM to insert a DRM into the broadcast stream and argue their point under DMCA 1998.

Laurence H Levin :: 1/21/07 at 7:55 pm

Moreover, once the radio breaks or is replaced, all of the recorded content is lost.