



Prelude to a Fake Complaint

Senator Orrin Hatch and his colleagues on the Senate Judiciary Committee have introduced the Inducing Infringements of Copyright Act ("The Induce Act") this week. They want us to think the Act is no big deal, and that it targets only the bad guys while leaving the good guys alone. They say that it doesn't change the law; it just clarifies it. But they're wrong. And this legal complaint is the proof.

Take a look. Scared yet? You should be. When the lawyers at EFF first sat down and asked "Whom could we sue under the Induce Act if we were an abusive copyright holder?" the answer was clear: pretty much everybody. Playing the devil's advocates, we knew we could draft a legal complaint against any number of the major computer or electronics manufacturers for selling everyday devices we all know and love – CD burners, MP3 players, cell phones – and that with that complaint, we could file a lawsuit that would survive any attempt to dismiss it before trial, costing the targeted company up to \$1,000,000 per month in legal fees alone. The Induce Act is a nasty, brutish stick in the hands of the wrong plaintiff.

Apple's iPod music player seemed particularly vulnerable to attack. Any major record label could bring a strong lawsuit against Apple for "intentionally inducing" infringement under this new law with the iPod, both because it's plausible to argue that having an iPod enhances the lure of using P2P to download music (gotta fill all that space!) and because all the major record labels still believe that private sharing of songs from your CDs with friends is copyright infringement. We still disagree with the labels on these points, but the reality is that no court has yet convinced them that their legal theories are flawed. We also threw in Toshiba for making the iPod's hard drive and CNET for showing people how to move the iPod's music files.

Under the Supreme Court's ruling in Sony v. Universal (the Betamax VCR case), devices like the iPod and CD burners are legal as long as they have legal uses – what the Court called "substantial non-infringing uses." This has been the rule in the technology sector for the last 20 years. Billions of dollars and thousands of jobs have depended on it. Industries have blossomed under it. And any case brought against Apple or HP or Dell would be immediately dismissed because of it.

Now Senator Hatch and his allies want to tear down that rule and substitute a new one with the Induce Act. With it, the fact that a device or product has legal uses, even lots of them, is irrelevant. Filing a lawsuit under the Induce Act is like dropping a litigation bomb on any company that gives users products that have even the slightest potential to assist in copyright infringement. Technology companies will avoid being innovative, and investors will avoid supporting new technologies for fear of being sued out of existence based on the possible conduct of their customers. If this bill had been law in 1984, there would be no VCR. If this bill had been law in 1995, there would be no CD burners. If

this bill had been law in 2000, there would be no iPod. If this bill becomes law in 2004, we may lose those devices and many more that we haven't even begun to imagine.

Join EFF and our friends in the fight against the Induce Act today.

http://www.eff.org/IP/Apple_Complaint.php

<http://action.eff.org/action/index.asp?step=2&item=2918>

<https://secure.eff.org>

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8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10

11 MAJOR RECORD LABELS) No. _____
12)
13 Plaintiffs,) **COMPLAINT**
14)
14 v.)
15)
15 APPLE COMPUTER, INC., TOSHIBA CORP.,)
and CNET NETWORKS, INC.)
16)
16 Defendants.)
17 _____

18
19 **NATURE OF THE ACTION**

20 1. Plaintiffs, who together own the copyrights in more than 80% of all commercially
21 available sound recordings, bring this action under the Inducing Infringement of Copyrights Act of
22 2004 to stop Defendants Apple Computer, Inc. (“Apple”), Toshiba Corp. (“Toshiba”), and CNET
23 Networks (“CNET”) from continuing to intentionally induce, aid, abet, and profit from the massive
24 infringements of Plaintiffs’ copyrighted works by owners of Apple iPod music players (“iPods”).

25 **THE INDUCE ACT**

26 2. The Inducing Infringement of Copyrights Act (“Induce Act”) was recently signed
27 into law. The Act provides that “[w]hoever intentionally induces any [copyright infringement] shall
28 be liable as an infringer.”

1 3. The Induce Act further defines the term “intentionally induces” to mean
2 “intentionally aids, abets, induces, or procures, and intent may be shown by acts from which a
3 reasonable person would find intent to induce infringement based upon all relevant information
4 about such acts then reasonably available to the actor, including whether the activity relies on
5 infringement for its commercial viability.” Under this law, the Defendants are liable for up to
6 \$150,000 for each song illegally copied by iPod users and all iPods must be declared illegal.

7 **DEFENDANT APPLE COMPUTER’S INFRINGING CONDUCT**

8 4. The iPod is the most popular and successful portable digital music device in the
9 world. As of April 2004, nearly three million iPods had been sold, driven by an international
10 marketing campaign that has vaulted the “mp3 player” from a small, obscure market into a must-
11 have item for every music fan.

12 The Commercial Viability of Apple’s iPod Relies on Copyright Infringement

13 5. A substantial element of the iPod’s commercial viability can be traced to its ability
14 to play infringing music files, whether downloaded over the Internet from peer-to-peer (“P2P”)
15 networks or the result of promiscuous hand-to-hand copying of sound recordings among friends
16 and acquaintances.

17 6. Apple has been fully aware, as has most of the world, that for the past several years,
18 millions of computer users have been engaging in unauthorized reproduction and distribution of
19 music files using P2P software such as Napster, Audiogalaxy, Aimster, KaZaA, Morpheus,
20 Grokster, Limewire, Bearshare, and eDonkey. These networks have been described by some as the
21 biggest piratical bazaar in world history.

22 7. In addition, computer users illegally reproduce and distribute music files in person
23 using the iPod. As detailed further in the report of Professor Joe Expert, attached hereto as Exhibit
24 A, many iPod owners copy CDs from, and use their iPods to “share” their music with, their friends
25 and acquaintances. Plaintiffs maintain that this promiscuous “hand-to-hand” reproduction also
26 constitutes copyright infringement.

27 8. Before the introduction of portable digital music players, the value of the music files
28 derived from infringing sources was limited by the fact that computer users generally had to be

1 sitting at their computers in order to play and enjoy them. Defendant Apple knew this and hence
2 made the calculated decision to intentionally induce and enhance the attractiveness of infringement
3 by providing these infringers with a device to enhance the rewards of their illegal labors – the iPod.

4 9. As detailed further in Professor Expert’s report, the iPod would have been much less
5 attractive to consumers had it been incompatible with the music files downloaded from P2P
6 networks and had it not allowed consumer-to-consumer transfers. Professor Expert’s report also
7 makes it clear that the iPod, in turn, enhanced the attractiveness of P2P networks by offering iPod
8 owners expansive storage capability and lightning-fast data transfer, allowing them to listen to any
9 number of infringing music files when away from the computer.

10 10. Surveys conducted by Professor Expert establish that a majority of iPod owners
11 have used at least some significant portion of their iPods to store and play infringing music files,
12 whether derived from P2P networks or promiscuous hand-to-hand copying. Upon information and
13 belief, Apple was certainly aware of this fact from its own internal marketing research.

14 Apple’s “Rip, Mix, Burn” Campaign Demonstrates Its Intent To Induce Infringement

15 11. Apple has *directly encouraged* music piracy through its “Rip, Mix, and Burn”
16 campaign used to sell both its Macintosh computers and iPod player. There can be no better
17 evidence of inducing infringement than to literally spell out the steps to one’s customers.

18 The Apple iPod’s Storage Capacity Demonstrates Apple’s Intent to Induce Infringement

19 12. The iPod’s remarkable storage capacity also demonstrates Apple’s intent to induce,
20 aid, and abet infringers. For example, Apple itself advertises that its 40 GB iPod can hold “up to
21 10,000 songs.” This amount, over 500 albums, far exceeds the capacity necessary to hold the total
22 CD collection owned by the vast majority of Americans. This suggests that Apple knew and
23 intended that iPod owners would be getting their music from elsewhere, including P2P networks
24 and promiscuous hand-to-hand copying.

25 13. Apple does sell authorized music that is specifically licensed for use with iTunes
26 and its iPod from its iTunes music store. However, the number of songs sold comes nowhere close
27 to the number of songs that Apple knows or reasonably should know are on its customers’ iPods.
28 To fill up a 40 GB iPod with authorized songs from the iTunes music store would cost the average

1 user \$9,999. It is inconceivable that any iPod user would spend almost \$10,000 in order to fill a
2 \$499 iPod. In contrast, there is no question that the iPod's \$499 price is made more palatable to
3 buyers by the availability of the infringing no-cost music available on P2P networks or via friends.

4 14. Thus there can be no doubt that Apple materially relies on illegal infringement by its
5 customers to support the commercial viability of its iPod and to maintain its high price in the
6 marketplace.

7 Apple's Design Choices Demonstrate its Intent to Induce Infringement

8 15. Moreover, Apple has also demonstrated its intent to induce copyright infringement
9 through the decisions it made when designing the iPod and related iTunes software. For example,
10 Apple chose to allow the iPod to reproduce, store, and perform copyrighted works in "MP3" file
11 format, knowing full well that this is the most popular unprotected format used by pirates on P2P
12 networks. Because this format includes no content protection or digital rights management features,
13 it also encourages promiscuous hand-to-hand copying by iPod owners. This decision cannot be
14 seen as anything but an invitation to infringe.

15 16. Apple could have, at a minimum, designed its iPod to play only music files with
16 content protection and further, could have designed its iTunes software to only rip CDs into a
17 protected format that would not allow further promiscuous hand-to-hand copying. Of course, an
18 iPod that only played authorized and protected files such as Apple's own AAC format would be far
19 less popular in the marketplace, and thus, less commercially viable. The iPod's ability to play
20 unprotected MP3 files not only enhances its own value to infringer users but also encourages such
21 users to increase the amount of infringement they perpetrate.

22 17. Plaintiffs are pressing a claim under the Induce Act and not a claim of contributory
23 or vicarious infringement. Hence, the Supreme Court ruling in *Sony Corp. v. Universal City*
24 *Studios, Inc.*, 464 U.S. 417 (1984) has no application to this case, nor is it a defense that Apple has
25 no control over the activities of iPod owners.

26 **DEFENDANT CNET'S INFRINGING CONDUCT**

27 18. Defendant CNET Networks, Inc. ("CNET") is a media company that, among other
28 things, reviews digital music players and instructs its readers on how to use the devices they have

1 purchased.

2 19. As part of this instruction, CNET has intentionally induced, aided, and abetted its
3 readers to infringe Plaintiffs' copyrights. Specifically, in posting a review of Apple's iPod music
4 player on its website, CNET explicitly suggested not only that users "rip" their entire CD collection
5 onto their computers and into their iPod device, but even specifically instructed users on how to
6 make further unauthorized reproductions of these infringing files by copying them between
7 multiple computers:

8 You can use the iPod Mini to share music between multiple computers, but it's not
9 easy, as the player syncs to only one version of iTunes. But there's an alternative.
10 We were able to copy MP3 files from the Mini to a second computer's hard drive in
11 Windows by turning on "View hidden files and folders" and browsing the Mini's
internal directories in My Computer until we found the music. Mac OS X users can
do the same thing if they install TinkerTool.
[<http://www.bresink.de/osx/TinkerTool.html>].

12 The iPod Mini has no compatibility problems transporting data files between
13 computers (Macs or PCs) when you activate the Enable Disk Use function. In this
14 approach, the Mini mounts as a data drive, but it hides music files unless you use the
above-described workaround.

15 20. This so-called "work around" is nothing less than a set of specific instructions to aid
16 and abet users in further acts of infringement, including promiscuous hand-to-hand copying among
17 friends and acquaintances. The link to the "TinkerTool" product in an explicit invitation to
18 conduct such infringements.

19 21. The CNET review has been inducing and continues to induce all users of the
20 Internet through its review at: [[http://reviews.cnet.com/Apple iPod Mini 4GB Green /4505-
21 6490_7-30657036-4.html?tag=top](http://reviews.cnet.com/Apple_iPod_Mini_4GB_Green_/4505-6490_7-30657036-4.html?tag=top)].

22 **DEFENDANT TOSHIBA'S INFRINGING CONDUCT**

23 22. As alleged in previous paragraphs, Apple's iPod is being used to induce massive
24 and uncontrolled copyright infringement.

25 23. Defendant Toshiba supplies the "micro" hard drives that Apple uses in the iPod.
26 Toshiba ships in excess of 100,000 such hard drives to Apple each month.

27 24. At all times relevant to this complaint, Defendant Toshiba knew or should have
28 known that Apple's iPod would be used to induce infringement. Plaintiffs specifically brought the

1 facts detailed herein to Toshiba's attention and asked that Toshiba cease supplying Apple with hard
2 drives until Apple took steps to address the infringing capabilities of the iPod. Toshiba refused
3 Plaintiffs' request.

4 25. With this knowledge, Toshiba intentionally chose to aid, abet, and induce copyright
5 infringement by iPod owners by continuing to supply Apple with hard drives intended for use in
6 iPods.

7 26. The commercial viability of Toshiba's "micro" hard drives depends substantially on
8 consumer demand for the iPod and similar music players that could store thousands of works at a
9 time and could import them quickly from a variety of sources, including illegal music file-sharing
10 and promiscuous hand-to-hand infringement. By supplying tiny hard drives for portable music
11 players not even capable of recording original music, Toshiba clearly knew it was abetting
12 reproduction of copyrighted works on a massive scale.

13 27. Thus, Toshiba materially relied on infringement for the commercial viability of its
14 "micro" hard drives and has clearly demonstrated intent to induce infringement of Plaintiffs' works
15 by continuing to supply Apple.

16 **CLAIM FOR RELIEF**
17 **(Against All Defendants, for Inducing Copyright Infringement Pursuant to 17 U.S.C. § 501(g).)**

18 28. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1
19 through 27 as if fully set forth herein. Based on these facts, each Defendant has intentionally
20 induced, aided, or abetted the massive copyright infringement committed by iPod owners as
21 defined under the Induce Act.

22 29. As a direct and proximate result of Defendants' infringement of Plaintiffs'
23 copyrights and exclusive rights under copyright, Plaintiffs are entitled to damages as well as
24 Defendants' profits pursuant to 17 U.S.C. § 504(b) for each infringement committed by iPod
25 owners.

26 30. Alternatively, Plaintiffs are entitled to the maximum statutory damages, pursuant to
27 17 U.S.C. § 504(c), in the amount of \$150,000 for each work infringed by any iPod owner or, in
28 the case of CNET from each person who read and acted on information contained in CNET's iPod

1 product reviews.

2 31. Plaintiffs further are entitled to its attorneys' fees and full costs pursuant to 17
3 U.S.C. § 505.

4 32. Defendants' conduct threatens to cause, and is causing, and unless enjoined and
5 restrained by this Court will continue to cause, Plaintiffs irreparable injury that cannot be fully
6 compensated for or measured in money. Pursuant to 17 U.S.C. § 502, Plaintiffs are entitled to
7 preliminary and permanent injunctions halting all future sales of the iPod and any Toshiba "micro"
8 hard drive, requiring that Apple take steps to update all iPods sold to date, and prohibiting
9 publication of any material on the CNET website discussing use of the iPod in any manner that
10 would induce further infringement by iPod owners.

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12 DATED: June 24, 2004

13 By _____
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