

The Copyright Law is An Ass: A Brash New Installment in this Fascinating Ongoing Series!

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Yvette Joy Liebesman, *Downstream Copyright Infringers*, **Kan. L. Rev** (forthcoming), available on [SSRN](#).

This article is a fine example of smart and accessible copyright scholarship that identifies and clearly describes a perplexing aspect of the current law, and then succinctly proposes sensible solutions. The somewhat startling problem that Saint Louis University Law Prof Yvette Joy Liebesman identifies is this: A consumer who purchases authorized downloads of musical recordings, intending to behave legally and in consummately copyright law compliant manner, may actually be guilty of copyright infringement if the songs she purchases in digital format turn out to infringe the copyrights of other songs, such as by including unauthorized samples of vocal or instrumental riffs.

Liebesman points out that based on the ways the pertinent statutory provisions of the Copyright Act were written and interpreted, had the same people purchased the same songs, but with the copies embedded in vinyl or written on a compact disk, they would not be vulnerable to liability infringement for owning them. But the recording industry has been so eager to frighten off prospective unauthorized downloading of music that it persuaded Congress and the courts to construct a legal regime under which even legal downloaders are at risk, facing strict infringement liability for completely innocent acts of (e.g.) purchasing songs from iTunes and loading them on an iPod. This group of potential defendants includes me, and most of you reading this.

Suing people who had paid for authorized downloads would, of course, make the large music companies look preternaturally nasty and greedy. While they have not hesitated to aggressively pursue their own customers in the past, the goal of that litigation was to persuade the public to engage in only legal downloading of music. To suddenly signal to the world that not even purchasing songs from mainstream online outlets will keep consumers safe from copyright suits would seem against the rational self-interest of the entire industry. Consumers would reasonably conclude they might as well engage in illegal downloads if the risks of legal downloads are comparable, or forgo downloading altogether.

So perhaps it seems upon preliminary consideration that Liebesman has simply identified an arcane legal anomaly that while interesting, is unlikely to have significant practical importance. But in an age of so called “copyright trolls” it would be unwise to be so sanguine. As Liebesman explains, an individual copyright holder who had won an infringement claim against a commercially successful musician could see a class action as a money machine. A musician who had part of her song non-permissively copied may never have a hit song herself, but could “hit the lottery” by suing the millions of customers who downloaded a hit song that had infringed her copyright. The logistics might be complicated, but a lawyer with free time and a fast Internet connection could plausibly convince a large number of consumers they were better off paying a few hundred dollars to settle quickly than trying to defend against a complicated law suit.

Liebesman ends the piece by proposing several legislative solutions. I’m inclined to endorse her suggestion of express immunity for consumers who made good faith legal downloads because I think it would be the most palatable to the music companies, and therefore the simplest to adopt. I highly recommend this article for its clear and entertaining presentation of what might seem like turgid

copyright law geekery in the voice of a less gifted writer.

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