

Punishing Innocent Downloaders Violates Free Speech, Professor Argues

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As record labels are dramatically increasing lawsuits over music piracy, a University of Arkansas law professor argues that the law's automatic punishment of illegal downloading violates the First Amendment.

In his recent article, "Copytraps," assistant professor Ned Snow emphasizes that Internet users who mistakenly believe that it is legal to download music from a Web site - when, in fact, it is *illegal* - face harsh penalties for downloading. If a copyright holder has not authorized the downloading, regardless of a Web site's representations or appearance, the downloader is liable and can be fined a minimum of \$750 per downloaded song. This automatic punishment, Snow argues, represents a penalty for innocent Internet users who have no means to know that the material offered on a Web site infringes a copyright.

Internet users face a sort of "copytrap" when they encounter a Web site that falsely represents the downloading as legal. With no way to know whether a Web site's representation is true, a downloader is likely to be deceived and thus face harsh penalties under the law.

"The very potential for copytraps, with automatic penalties assessed against the innocent downloader, raises First Amendment concern," Snow said. "The First Amendment comes into play because downloading is a form of speech. Downloading is the same as copying, and copying is a form of expression."

Because downloading is a form of expression, the First Amendment

protects the act of downloading when the downloader has permission to make a copy. Snow contends that the First Amendment protects the act of legal downloading. Legal downloading, however, is chilled by the potential for "copytraps," Snow argues. The automatic and severe punishment of innocent downloaders makes Internet users reluctant to download material that seems legal.

"Internet users who are aware of the law or who have fallen victim to a 'copytrap,' are much more wary of sites purporting to offer legal downloads," Snow said.

This reluctance or wariness is the essence of Snow's argument, that "copytraps" may inhibit users from downloading legal material, and that inhibition represents a restraint on speech protected by the First Amendment. Furthermore, Snow says that most Internet users trust Web sites to determine the legality of downloading.

"Most Internet users continue to download without inhibition," he said. "We haven't seen significant decreases in legal downloading. But that fact doesn't matter in the eyes of the law. First Amendment law makes it clear that the *possibility* of inhibition is sufficient to find a law unconstitutional. And that possibility is glaringly evident in the download context."

Snow points out that the automatic punishment of copyright law applies to whatever expression may be downloaded. Stories, pictures and videos are all subject to strict punishment under copyright law. Given that the very structure of the World Wide Web is predicated on users' ability to copy or download, the potential for punishing innocent downloaders is vast. Snow says that the extent of risks that Internet users assume by downloading is only beginning to be seen, as illustrated by the recent *EMI v. Thomas* case, in which a federal jury delivered a \$222,000 verdict against a 30-year-old Minnesota woman for file-sharing.

According to the New York Times, since 2003 record labels have threatened lawsuits against approximately 30,000 people. Many settle out of court for, on average, about \$4,000, as indicated by a record-industry trade association.

Snow's article is available for free download at ssrn.com/abstract=1019577. It is presently under review for publication.

Source: University of Arkansas School of Law

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