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## CBS Interactive Can't Escape Claims of Inducing Piracy

Can editorial commentary be held legally responsible for the theft of music and movies? A district court judge suggests yes, allowing Alki David's lawsuit against the network for promoting and distributing Limewire to go forward.

**BY ERIQ GARDNER** JULY 16, 2012 4:58AM





CBS



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Before there was **Barry Diller's** Aereo, there was **Alki David's** FilmOn, a company that streams live TV online. In November 2010, broadcasters won an injunction against FilmOn, leading David to challenge CBS' "hypocrisy" on the subject of piracy.

To prove the point, David rounded up some hip hop and R&B artists and filed a lawsuit against **CBS Interactive** on the theory that **Leslie Moonves's** digital division had contributed to the rise of anything-goes file-sharing illegalities by running a money-making business that pointed users to P2P software like Grokster and Limewire.

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CBS called the claims a "desperate attempt to distract copyright holders like us from continuing our rightful claims."

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subsidiary CNET Networks induced the infringement of copyrights. CBS was more successful in convincing U.S. District Judge **Dale Fischer** to toss allegations premised on vicarious and contributory copyright infringement, but because the company couldn't get rid of the lawsuit entirely, it may soon face a jury for allegedly promoting and fostering copyright theft with articles and download links.

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As we wrote when [the lawsuit](#) was first filed, the issues raised are analagous to a bank robbery: One can hold responsible the guy who physically takes the money, and even the individual who drives the getaway vehicle, but how about the individual who sells the car and promotes it as being fast enough to evade the police?

In the lawsuit filed by David, CBS Interactive is alleged to have built its software download sites in a way that made it easy and popular to attain file-sharing software. Users also got a chance to read on CBS Interactive how to use the software and how to remove digital rights protections on the files.

These efforts were successful, as 95 percent of all LimeWire downloads were sourced to CBS' profitable websites, according to the complaint.

On defense, CBS made the same argument that many accused of facilitating copyright infringement often do — that one can only be held liable for contributing to copyright infringement with specific knowledge of infringing material on these networks. Basically, CBS argued that it was too far way from the point of the crime to know what was happening.

Judge Fischer agrees to an extent.

“Allegations that Defendants had knowledge that the overarching purpose of the P2P software was piracy are not enough to satisfy the knowledge standard laid out by the Ninth Circuit in *Napster*,” writes the judge, adding that CBS was never notified of infringement of the plaintiffs' works nor had the ability to learn of it.

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And even if they removed P2P software from their website, the judge notes that they couldn't disable the software itself and prevent future infringement. This amounts to deciding not to punish the bank robber's car salesman because the robber could have bought a getaway vehicle from someone else.

But on the other hand, in a decision that should command attention by anyone who runs a news organization, the judge decides that free speech doesn't protect words that are offered in concert with business activity. Here's what Judge Fischer has to say:



**“Defendants here are alleged to have distributed specific P2P software, while simultaneously providing explicit commentary on that software’s effectiveness in infringing copyright. Such behavior moves beyond opinion into the realm of conduct and does not directly implicate any First Amendment issues. Defendants’ argument that a finding of inducement in this case would make it difficult to counsel future parties on the proper boundaries of editorial content is greatly overstated.”**

In short, promoting a crime and offering the tools for a crime in tandem can be cause for trouble. CBS Interactive is now facing a damages trial for not making sufficient distinction between editorial on subsidiary CNET and product offerings from subsidiary Download.com.



imitations of the first amendment. Nevertheless, he's scored a win on the point he was trying to make.

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