

WRF Copyright Practice Files *Amicus* Brief on Behalf of Internet Companies

January 6, 2004

Wiley Rein & Fielding copyright attorneys Bruce G. Joseph and Scott E. Bain filed an on behalf of a group of the nation's leading Internet companies and trade associations in the case of CoStar Group, Inc. et al. v. LoopNet Inc. The brief, filed in the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia, opposes efforts by the plaintiff and the major motion picture studios and record labels to impose per se copyright liability on Internet service providers for copyright infringement by the users of their systems.

Plaintiff CoStar sought to impose liability on defendant LoopNet as a result of copyrighted photographs posted by LoopNet's users on LoopNet's commercial real estate web site. CoStar argued that the copying and display of the photographs by LoopNet's servers should impose direct, per se liability on LoopNet regardless of LoopNet's knowledge of, or involvement in, the infringement. It argued that, because of technical defects, the actions were not insulated from liability by the service provider protections added to copyright law by the Digital Millennium Copyright Act (DCMA), and that the DMCA supplanted the requirement of a "volitional act" as a prerequisite to liability as a direct infringer. That doctrine was first applied to the Internet in *Religious Tech. Ctr. v. Netcom On-Line Communications Svcs., Inc.*, 907 F.Supp. 1361 (N.D. Cal. 1995). CoStar argued in the alternative that LoopNet's screening of the photographs for obvious defects should constitute the "volitional act" needed to give rise to direct liability.

The WRF brief argues that the Netcom rule was not altered by the DMCA, which added an additional layer of defenses in favor of service providers and explicitly preserved all "other defense[s]" to a claim of infringement. The brief also points to the many passages in

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the DMCA's legislative history discussing Congress's intent to leave existing doctrines of infringement "unchanged." The brief then traces the history of the law to show that those who provide the equipment, facilities or means used by others to infringe have traditionally not been subject to strict liability as a direct infringer, but only to secondary liability, which requires consideration of knowledge and the ability to control the infringement. In the CoStar case, the plaintiff had settled all claims of secondary liability. In addition, the brief argues that LoopNet's screening and deleting of obviously defective user postings was a beneficial activity that should not constitute the volitional act needed to give rise to direct liability.

WRF filed the brief on behalf of Amazon.com, Inc., BellSouth Telecommunications, Inc., eBay Inc., Google Inc., Verizon Communications Inc., and Yahoo! Inc., and trade associations Computer & Communications Industry Association, U.S. Internet Industry Association, NetCoalition and U.S. Internet Service Provider Association.

WRF's Copyright Practice Group attorneys litigate, negotiate, and counsel technology providers, copyright owners and alleged infringers in copyright and digital copy protection matters. The group, led by Bruce G. Joseph, has been particularly active in computer and Internet-related issues. The group also has been at the center of recent policy debates in diverse areas including the appropriate scope of liability for Internet service providers, limitations on the use of special subpoenas to identify Internet users and approaches to content protection in consumer electronics and computer products.