No. ___

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *ET AL.*,
Petitioners,

v.

GROKSTER, LTD., *ET AL.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding, contrary to long-established principles of secondary liability in copyright law (and in acknowledged conflict with the Seventh Circuit), that the Internet-based "file sharing" services Grokster and StreamCast should be immunized from copyright liability for the millions of daily acts of copyright infringement that occur on their services and that constitute at least 90% of the total use of the services.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The petitioners here and appellants below are Metro-Goldwyn-Mayer Studios Inc.; Columbia Pictures Industries, Inc.; Disney Enterprises, Inc.; Warner Bros. Entertainment Inc. (as successor-in-interest to the Filmed Entertainment Division of Time Warner Entertainment Company, L.P.); New Line Cinema Corporation; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal City Studios LLLP (f/k/a Universal City Studios, Inc.); Arista Records, Inc.; Atlantic Recording Corporation; Rhino Entertainment Company; Bad Boy Records; Capitol Records, Inc.; Elektra Entertainment Group Inc.; Hollywood Records, Inc.; Interscope Records; LaFace Records, Inc.; London-Sire Records Inc.; Motown Record Company, L.P.; The RCA Records Label, a unit of BMG Music d/b/a BMG Entertainment; Sony Music Entertainment Inc.; UMG Recordings, Inc.; Virgin Records America, Inc.; Walt Disney Records; Warner Bros. Records Inc.; WEA International Inc.; Warner Music Latina Inc.; Zomba Recording Corporation; Jerry Leiber, individually and d/b/a Jerry Leiber Music; Mike Stoller, individually and d/b/a Mike Stoller Music; Peer International Corporation; Songs of Peer, Limited; Peermusic, Limited; Criterion Music Corporation; Famous Music Corporation; Bruin Music Company; Ensign Music Corporation; Let's Talk Shop, Inc. d/b/a Beau-Di-O-Do Music.

The appellees below and respondents here are Grokster, Ltd. and StreamCast Networks, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

The parent company of Petitioner Metro-Goldwyn-Mayer Studios Inc. is Metro-Goldwyn-Mayer Inc., a publicly traded corporation.

The parent company of Petitioner Columbia Pictures Industries, Inc. is Sony Corporation, a publicly traded corporation.

The parent company of Petitioner Disney Enterprises, Inc. is The Walt Disney Company, a publicly traded corporation.

The indirect parent company of Petitioner Paramount Pictures Corporation is Viacom Inc., a publicly traded corporation.

The parent of Petitioner Warner Bros. Entertainment Inc. (as successor-in-interest to the Filmed Entertainment Division of Time Warner Entertainment Company, L.P.) is Time Warner Inc., a publicly traded company.

The parent of Petitioner New Line Cinema Corporation is Time Warner Inc., a publicly traded company.

The parent companies of Petitioner Twentieth Century Fox Film Corporation are Fox Entertainment Group, Inc. and The News Corporation Limited, both of which are publicly traded corporations.

The parent companies of Petitioner Universal Studios LLLP (f/k/a Universal City Studios, Inc.) are General Electric Company and Vivendi Universal S.A., both of which are publicly traded corporations.

The parent companies of Petitioner Arista Records, LLC (f/k/a Arista Records, Inc.) are Sony Corporation, a publicly traded corporation, and Bertelsmann AG, which is not publicly traded.

The parent company of Petitioner Atlantic Recording Corporation is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner Rhino Entertainment Company is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner Capitol Records, Inc. is EMI Group PLC, which is publicly traded in the U.K.

The parent company of Petitioner Elektra Entertainment Group Inc. is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner Hollywood Records is The Walt Disney Company, a publicly traded corporation.

The parent company of Petitioner Interscope Records is Vivendi Universal S.A., a publicly held French company.

The parent companies of Petitioner LaFace Records, LLC (f/k/a LaFace Records, Inc.) are Sony Corporation, a publicly traded corporation, and Bertelsmann AG, which is not publicly traded.

The parent company of Petitioner London-Sire Records Inc. is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner Motown Record Company, L.P. is Vivendi Universal S.A., a publicly held French company.

The parent companies of Petitioner The RCA Records Label are Sony Corporation, a publicly traded corporation, and Bertelsmann AG, which is not publicly traded.

The parent companies of Sony BMG Music Entertainment (successor-in-interest to Sony Music Entertainment Inc.) are Sony Corporation, a publicly traded corporation, and Bertelsman AG, which is not publicly traded.

The parent company of Petitioner UMG Recordings, Inc. is Vivendi Universal S.A., a publicly held French company.

The parent company of Petitioner Virgin Records America, Inc. is EMI Group PLC, which is publicly traded in the U.K.

The parent company of Petitioner Walt Disney Records is The Walt Disney Company, a publicly traded corporation.

The parent company of Petitioner Warner Bros. Records Inc. is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner WEA International Inc. is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner Warner Music Latina Inc. is WMG Parent Corp., which is not a publicly traded corporation.

The parent companies of Petitioner Zomba Recording, LLC (f/k/a Zomba Recording Corporation) are Sony Corporation, a publicly traded corporation, and Bertelsmann AG, which is not publicly traded.

Petitioner Bruin Music Company is a wholly-owned subsidiary of Petitioner Ensign Music Corporation, which is a wholly-owned subsidiary of Petitioner Famous Music Corporation, the indirect parent company of which is Viacom Inc., a publicly traded corporation.

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JURISDICTION

The Court of Appeals entered its judgment on August 19, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Copyright Act, 17 U.S.C. § 101, *et seq.* The pertinent provisions are reproduced in the Appendix at Pet. App. 57a-60a.

STATEMENT OF THE CASE

This is one of the most important copyright cases ever to reach this Court. Resolution of the question presented here will largely determine the value, indeed the very significance, of copyright in the digital era.

Respondents Grokster and StreamCast facilitate copyright infringement on a scale the Register of Copyrights has called "mind-boggling."[1] Like their notorious predecessor Napster, respondents created and maintain Internet-based services that enable millions of people every day to copy and distribute copyrighted sound recordings and motion pictures without permission – and without paying for them. It is undisputed that those who use Grokster and StreamCast in this way are committing copyright infringement, and that this infringement constitutes at least 90% of the activity on the services. It is equally clear that

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[1] Statement of The Honorable Marybeth Peters, Register of Copyrights, Before the Senate Comm. on the Judiciary, 108th Cong. (Sept. 9, 2003), http://www.copyright.gov/docs/regstat090903.html (Pet. App. 65a-66a).

Grokster and StreamCast have built their businesses to capitalize on this infringement, that they profit handsomely from it, and that they designed their services to disable mechanisms that would prevent the very infringement that sustains their businesses.

The Ninth Circuit's refusal to hold Grokster and StreamCast accountable under these circumstances is a radical departure from principles of secondary liability recognized "in virtually all areas of the law," including copyright. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (*Sony-Betamax*). The Ninth Circuit read *Sony-Betamax* not as endorsing but as rejecting those established principles, and as instead imposing "limitations" and "higher standards" for contributory infringement that foreclose liability here. Pet. App.12a, 13a. But *Sony-Betamax* did not purport to decide how principles of secondary liability apply in circumstances like those present here (indeed, it left such questions open), and it manifestly did not dictate the result the Ninth Circuit reached. Not surprisingly, the Seventh Circuit has reached diametrically opposed conclusions on these same issues in a case involving an Internet-based service that does exactly what Grokster and StreamCast do. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (Posner, J.), *cert. denied*, 124 S. Ct. 1069 (2004).

Review is urgently needed not only to resolve the conflict between the Ninth and Seventh Circuits, but more importantly to clarify the standards for secondary liability applicable to Internet-based services that facilitate copyright infringement. The infringement Grokster and StreamCast foster is inflicting catastrophic, multibillion-dollar harm on petitioners that cannot be redressed through lawsuits against the millions of direct infringers using those services. Left undisturbed, the Ninth Circuit's decision will effectively insulate Grokster and StreamCast from suit nationwide, leaving these harms unremedied.

Indeed, the Ninth Circuit's decision threatens the very foundations of our copyright system in the digital era. The ease with which copyrighted works in digital form can be unlawfully copied and distributed millions of times over on the Internet makes it especially important that traditional principles of secondary copyright liability apply to enterprises that, like respondents, brazenly encourage and profit from infringement. Unless respondents and those like them can be held accountable, copyright will soon mean nothing on the Internet, and the incentives on which our copyright system rests will be imperiled.

A. Factual Background

1. Grokster and StreamCast run infringement-driven businesses. Exploiting widely available "peer-to-peer" technology, these companies created, maintain, and profit from Internet-based services that offer users the ability to obtain a vast array of copyrighted sound recordings and motion pictures without permission and *for free*. By connecting to the Grokster or StreamCast services, individuals can search the computer files of all other users connected to the service and, with a few simple clicks, can copy any desired file directly from the available files of other users (hence the name peer-to-peer).[2] Although peer-to-peer

[2] The software contains a search function that allows users to search for digital files of sound recordings, motion pictures, or other content stored on the computers of any other user logged onto the service. For example, a user seeking recordings by Bruce Springsteen or the motion picture *Spider-Man* simply types the artist's name or the film title in a search window on the user's computer and clicks a search button. Within seconds a list is provided showing copies of the desired works available from other users on the service. With another click, the user downloads a digital copy of the desired work from another user's computer, and within a short time can listen to the song or view the film.

technology can be used lawfully for authorized exchanges of digital files, Grokster and StreamCast use it to profit from copyright infringement. Indeed, there is no dispute that infringement is at least 90% of the activity on the Grokster and StreamCast services and that this infringement occurs millions of times each day. Pet. App. 4a. Grokster and StreamCast have thus created on-line havens for copyright infringement of unprecedented magnitude.

Grokster and StreamCast "depend upon this infringement" to make money. Pet. App. 50a (district court opinion). They do not earn revenue by distributing software, and are thus not "software distributors" in any meaningful sense. Indeed, they do not sell their software at all. They give it away on the Internet, encouraging users to download it onto home and office computers. The software enables Internet users to connect to a vast network of like-minded infringers seeking copyrighted works and offering their own copies of such works to others. It also creates an enduring link between the service and its users whenever they are logged on. Grokster and StreamCast make their money by capitalizing on these ongoing relationships to sell advertising. *That* is their business. Every time a user activates Grokster or StreamCast software, the user's computer automatically connects to a computer server that pumps advertising to the user's computer screen. Grokster and StreamCast "derive substantial revenue" – millions of dollars annually – from advertisers seeking to reach the users of these services. *Id.* Grokster and StreamCast, therefore, have every incentive to attract as many users as possible.[3] As they know full well, and as the district court recognized, the infringing content is what lures users by the millions,

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[3] As StreamCast has explained, "the core value of a peer-to-peer network [is] the network itself and not necessarily the technology." Joint Excerpts of Record 3864. All citations to record evidence are to material in the Joint Excerpts of Record ("JER") that was before the Ninth Circuit.

allowing these companies to reap hefty advertising revenues. *Id.* ("Individuals are attracted . . . because of the ability to acquire copyrighted material free of charge.").

By design, the Grokster and StreamCast services function as an unauthorized 24-hour-a-day worldwide distribution system for copyrighted sound recordings and motion pictures, cutting deeply into the legitimate markets for those works. Each time a Grokster or StreamCast user makes an unauthorized copy of a sound recording or motion picture, that copy is available on the user's computer (as well as the computer of the user from whom the copy was made) to be copied and distributed by other users of the services – resulting in an exponentially multiplying redistribution of perfect digital copies. Indeed, whenever a user is logged on, all the files in the directory created by the Grokster or StreamCast software on the user's computer are automatically available for copying by other users. Because millions of people use Grokster and StreamCast, virtually all of the most popular sound recordings and motion pictures – including many not yet released to the public – are available for free. Users need never again buy a CD, rent a DVD, or log on to legitimate on-line services such as Apple's iTunes or Movielink to purchase authorized digital copies of desired works.

2. It is no accident that the Grokster and StreamCast business models depend on copyright infringement. These companies built directly upon the experience of Napster, the first infringement-driven service that used peer-to-peer technology. Soon after Napster began operations, record companies, songwriters, and music publishers sued to stop the massive infringement occurring on Napster's service, and they obtained a preliminary injunction compelling Napster to block infringing material. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The millions of

Napster users then fled in search of other services that could provide what Napster no longer could.

Seizing the moment, Grokster and StreamCast launched alternative peer-to-peer services "so that when Napster pulls the plug on their free service (or if the Court orders them shut down prior to that), we will be positioned to capture the flood of their 32 million users that will be actively looking for an alternative." JER 3537. Grokster even inserted the word "Napster" into the "metatags" for its website, so that Internet users looking for "Napster" on Google or other search engines would be directed to Grokster. JER 6234. From a user's perspective, Grokster and StreamCast differ from Napster only in the greater variety of their offerings, which include motion pictures, video games, and other digital copyrighted works, as well as the sound recordings that fueled Napster.

3. Although Grokster and StreamCast offer the same service Napster did, they differ from Napster in one technological detail, which is immaterial to their business model but which the Ninth Circuit found dispositive as a matter of copyright law. Napster maintained multiple central servers (*i.e.*, computers operated by Napster itself) with indices of the files available on its users' computers. Napster users searched those indices to find the recordings they wanted – although the files themselves were distributed directly from one user to another (as on Grokster or StreamCast). In imposing liability, the *Napster* court relied in part on the fact that Napster contributed to infringement by providing these indices. Responding to that ruling, and seeking to evade responsibility for infringement while still encouraging and profiting from it, Grokster and StreamCast decentralized the search function on their services. They did so by commandeering the computers of some users as surrogate servers to store the indices of available material. When a Grokster or StreamCast user searches for desired

content, the search is conducted on indices maintained on these user computers (called "supernodes" by Grokster and "ultrapeers" by StreamCast).

4. Just as Grokster and StreamCast engineered the search function to make it more difficult for them to block infringing files, they dismantled other aspects of their services that could have been used to control infringement. When this lawsuit began, for example, a user activating Grokster or StreamCast logged on to the service through a central server requiring a unique user name and a password, and both companies reserved the right to deny access to infringers. After petitioners sued, respondents eliminated the log-in feature. Pet. App. 43a n.7.

At the same time, Grokster and StreamCast refused to implement available filtering technologies that would block the infringing materials on their services. As StreamCast's former Chief Technology Officer has explained, "there are no technical limitations to the ability to filter" (and thereby block) infringing content on the Grokster and StreamCast services, and "the question is not whether file-sharing companies can filter, but whether they will."[4] In stark contrast, to promote their business interests, Grokster and StreamCast have implemented filters to eliminate

[4] Darrell Smith, *The File-Sharing Dilemma*, C-Net News (Feb. 3, 2004), at http://news.com.com/The+file-sharing+dilemma/2010-1027_3-5152 265.html. Respondents disputed their ability to block infringing files, and Grokster in particular claimed that it lacked the power because it was a mere licensee without access to the underlying "source code" for the peer-to-peer software that is the backbone of its system. However, petitioners' evidence showed that "there are methods presently available to prevent unauthorized recordings from being distributed on peer-to-peer systems like those operated by defendants," Ikezoye Decl. ¶ 1, JER 760; Breslin Decl. ¶ 5, JER 722; Kleinrock Decl. ¶ 82, JER 816-17, that blocking could be accomplished "without any significant degradation in the [peer-to-peer] system," Breslin Decl. ¶ 21, JER 727-28; and that blocking was feasible for services such as Grokster's even without access to the "source code," Kleinrock Dep. at 152-59, 184-85; JER 1872-81.

pornographic files, files with "viruses," and "bogus" files (*i.e.*, files that appear to be, but are not, actual media files).

5. Respondents' services (and others like them) inflict massive and irreparable harm. More than 2.6 billion infringing music files are downloaded each month, *see* Lev Grossman, *It's All Free*, Time, May 5, 2003, and between 400,000 and 600,000 copies of motion pictures are unlawfully downloaded each day.[5] Record sales over the past three years are down 31%, and sales of the top 10 selling albums have dropped nearly 50%.[6] Conservative estimates of lost sales of music alone range from $700 million to several billion dollars annually. *See, e.g.*, Simon Dyson, Informa Media Group Report, *Music on the Internet* 25 (4th ed. 2003). Moreover, petitioners stand to lose billions more as computers become faster, as user "bandwidth" grows, and as more consumers become aware of, or emboldened to use, the infringing services Grokster and StreamCast maintain.

B. Proceedings Below

Petitioners – the major motion picture studios and record companies in this country, as well as a certified class of 27,000 music publishers and songwriters – sued seeking an injunction against continuing infringement on the Grokster and StreamCast services. The district court denied relief and granted summary judgment for respondents. Pet. App. 24a-25a.

On appeal, the Ninth Circuit recognized that the Grokster and StreamCast software "enables the user to participate in

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[5] *See* Press Release, MPAA, *MPAA Launches New Phase of Aggressive Education Campaign Against Movie Piracy* (June 15, 2004), *at* http://mpaa.org/MPAAPress/.

[6] *Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Senate Comm. on Governmental Affairs*, 108th Cong. (Sept. 30, 2003) (statement by Mitch Bainwol, CEO, RIAA).

the respective peer-to-peer file-sharing networks," Pet. App. 7a; that "the vast majority of the files are exchanged illegally in violation of the copyright law," *id.* at 8a; that Grokster and StreamCast know their systems are being used for infringement; and that they profit handsomely from, and in direct proportion to, the level of infringement. Despite these undisputed facts, the court concluded that Grokster and StreamCast could not be held liable under either a contributory infringement or vicarious liability theory.

The court believed that *Sony-Betamax* (as the Ninth Circuit had previously interpreted it in *Napster*) imposed "limitations" on well-established principles of contributory infringement, and required a "higher standard" when a defendant's contribution to infringement involves a product or service that has noninfringing uses. Pet. App. 12a, 13a. For those purported "limitations" to apply, the court held, "a product need only be *capable* of substantial noninfringing uses." *Id.* at 11a (emphasis in original).

Applying that test, the Ninth Circuit held that it could not consider the undisputed fact that at least 90% of the activity on Grokster and StreamCast was copyright infringement. Pet. App. 11a (stating that considering such evidence "misapprehends the *Sony* standard"). Ignoring the empirical evidence documenting massive infringing use, and relying instead on anecdotal evidence that some noninfringing material was distributed on the services, the Ninth Circuit held that respondents satisfied the *Sony-Betamax* test.[7] In so

[7] The Ninth Circuit stated that it was "undisputed" that respondents' services were "capable of substantial noninfringing uses." *See* Pet. App. 10a (citing Pet App. 33a). In reality, petitioners presented evidence contesting the extent of *actual* noninfringing uses of respondents' networks; for example, petitioners demonstrated that the public domain works claimed by respondents' affiants to be available on respondents' networks were not, in fact, generally available. *See, e.g.*, JER 0747 (Creighton Decl. ¶ 25). Petitioners also produced evidence that "over 90%" of the material on respondents' services was infringing. Pet. App.

doing, the court stated without analysis or citation that these noninfringing uses have "commercial viability." *Id.* at 12a. The court never explained how it reached that conclusion or what "commercial viability" even meant. What is clear, however, is that the court did not find or even suggest that there was a "substantial market for a non-infringing use" of respondents' services, *Sony-Betamax*, 464 U.S. at 446 n.28 – *i.e.*, that Grokster and StreamCast could have sustained their business based on noninfringing uses.

The Ninth Circuit then went on to apply the "higher standard" it thought *Sony-Betamax* dictated. Specifically, the court required a showing that Grokster and StreamCast "had specific knowledge of infringement at a time at which they contribute[d] to the infringement and fail[ed] to act upon that information" – a standard that appears nowhere in *Sony-Betamax* itself or in the law of secondary liability. *See* Pet. App. 13a (quotation marks omitted; alteration in original). Applying that standard, the Ninth Circuit deemed "irrelevant" the notices of hundreds of thousands of specific infringements provided to Grokster and StreamCast. The court believed that Grokster and StreamCast could not have "acted upon this information" when they received the notices because by then they had already completed the actions that facilitated the infringement (*i.e.*, setting up the infringing services). *Id.*

The Ninth Circuit's conclusion in that regard depended upon the unprecedented assumption that, no matter what the nature of their conduct or the surrounding circumstances, Grokster and StreamCast were under no legal duty either to have designed their services differently in the first place to prevent infringing uses, or to take reasonable steps going forward to do so. The court declared that "the software

4a. The Ninth Circuit stated that petitioners "contended" that the remaining 10% was noninfringing, *id.* at 12a n.10, but that was wrong – petitioners stated only that 10% could not be categorized with confidence.

design is of great import," Pet. App. 13a; indeed, it was outcome determinative. For the Ninth Circuit, it was irrelevant that the software design reflected deliberate, affirmative choices on the part of respondents to disable legal and practical mechanisms for controlling infringement by (among other things) disabling log-in and registration features and eliminating user licensing agreements (which purported to prohibit the infringing use of their systems). *Id.* at 13a; 43a n.7. It was likewise irrelevant to the Ninth Circuit that respondents chose not to upgrade their software to filter out infringing files, even though they filter out other undesirable files. *Id.* at 13a, 18a, 47a.

The same analysis led the Ninth Circuit to conclude that Grokster and StreamCast were not liable on the separate vicarious liability theory. Although the court found that "the elements of direct infringement and a direct financial benefit, via advertising revenue are undisputed in this case," Pet. App. 16a., it absolved Grokster and StreamCast because they allegedly could not control the infringement on their services. As it did in rejecting contributory infringement, the court found irrelevant that Grokster and StreamCast had divested themselves of the ability to control infringement, *id.* at 18a ("given the lack of a registration and log-in process, . . . Grokster has no ability to actually terminate access to filesharing functions"), and that, with the use of software upgrades, they could easily filter out infringing files, *id.* at 70a ("possibilities for upgrading software located on another person's computer are *irrelevant* to determining whether vicarious liability exists") (emphasis added).

Thus, the Ninth Circuit has immunized Grokster and StreamCast from copyright liability for the millions of acts of copyright infringement that occur on their services every day, and that could not occur but for the existence of their services.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law that has not been but should be settled by this Court, and on which the circuits are in conflict: How do principles of secondary liability apply to the unprecedented phenomenon of Internet services such as Grokster and StreamCast, whose overwhelming use is for the unauthorized distribution of copyrighted works to millions of users for free? The answer to that question is of paramount importance to the future of copyright in the digital age.

The Ninth Circuit concluded that Grokster and StreamCast could not be held responsible for the millions of acts of infringement occurring daily on their services. It did so even though infringement is the *primary* use for their services, their business model depends on this volume of infringing use, and, indeed, their advertising revenues are directly tied to the amount of infringement taking place. Remarkably, despite these facts, the Ninth Circuit found it dispositive *in respondents' favor* that they had tied their own hands by disabling mechanisms for blocking infringement on their services – a fact that should establish liability, not preclude it. Pet. App. 13a.

The Ninth Circuit purported to derive its counterintuitive approach from the Court's *Sony-Betamax* decision. *Sony-Betamax* did not, however, resolve the question presented here, much less mandate the radical surgery the Ninth Circuit performed on traditional principles of secondary liability. Under well-established law (which *Sony-Betamax* endorsed), it is both just and economically rational to impose liability on a defendant who knowingly furthers and profits from copyright infringement, especially when the defendant is in a position "to police carefully the conduct" of the direct infringer and chooses not to do so. 464 U.S. at 438 & n.18 (quotation marks omitted). Yet the Ninth Circuit repudiated those standards and adopted a test that, in the words of the

Register of Copyrights, "departed from long-established precedent" and would "eviscerate the doctrine of contributory infringement." Pet. App. 65a-66a. Most fundamentally, the Ninth Circuit's lopsided test ignored *Sony-Betamax*'s core premise that secondary liability rules must "strike a balance" between the copyright owners' "legitimate demand for effective – and not merely symbolic – protection" and the rights of others to engage in "substantially unrelated areas of commerce." 464 U.S. at 442.

In view of the Ninth Circuit's extreme conclusions, it is hardly surprising that the decision below diverges markedly from Seventh Circuit law on the core question this case presents. *See In re Aimster*, 334 F.3d 643 (7th Cir. 2003). In a case involving a peer-to-peer service that was facilitating massive copyright infringement just as Grokster and StreamCast do, the Seventh Circuit read *Sony-Betamax* far differently than did the Ninth Circuit. That court of appeals prescribed a context-specific evaluation of how the defendant's service operates in the real world to determine how best to accommodate *both* the interests of copyright holders in preventing infringement and the public's access to the noninfringing uses of the service. In so doing, the Seventh Circuit deemed critical some of the very factors the Ninth Circuit deemed irrelevant: the relative proportions of infringing and noninfringing uses and the defendant's ability to separate infringing from noninfringing material.

The undoubted legal and practical importance of the question presented in this case, and the conflict between the Ninth and Seventh Circuits, provide ample grounds for this Court to grant review. It is, moreover, imperative that review occur now. The Ninth Circuit's ruling denies petitioners their principal remedy against the staggering harms they are suffering, and it effectively does so on a nationwide basis because, as a practical matter, petitioners are the only ones in a position to challenge respondents. Thus, if the Ninth Circuit's decision stands, Grokster and StreamCast will be home free, and petitioners will be left with only the "impractical[]" and manifestly inadequate option of suing "a multitude of individual infringers." *Aimster*, 334 F.3d at 645. Even worse, new infringement-driven enterprises can set up shop in the Ninth Circuit, emboldened by the notion that they will evade legal responsibility if they follow the roadmap set forth in the decision below and engineer their systems to disable mechanisms for preventing infringement. The Ninth Circuit's decision will also encourage even more people to use Grokster and StreamCast (and the new services the court's decision will spawn) to infringe copyrights with impunity – further eroding respect for copyright on the Internet.

Holding Grokster and StreamCast responsible for the consequences of their conduct would pose no threat to the development and legitimate deployment of peer-to-peer technology. Petitioners seek only to bring an end to the infringement respondents' businesses have made possible – and petitioners have demonstrated that this can be done while preserving the technology's noninfringing uses. Indeed, the Ninth Circuit's legal rule will actually impede technological progress. As long as infringement-driven services such as Grokster and StreamCast continue to flourish, it will be exceedingly difficult for innovative on-line ventures that legitimately distribute recordings and motion pictures in digital format (such as Apple's iTunes, Movielink and the other new services now being launched) to compete on anything approaching an equal footing.

Sheltering Grokster and StreamCast (and others like them) thus poses a grave threat to the very foundations of the copyright law's incentive system for promoting the progress of science and the arts, and will profoundly reshape our nation's system of copyright in the digital era.

I. THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF HOW SECONDARY COPYRIGHT LIABILITY APPLIES TO THE NATIONWIDE DISTRIBUTION OF PROTECTED WORKS OVER THE INTERNET.

There is a pressing need for this Court to clarify the principles of secondary copyright liability applicable to peer-to-peer services that facilitate copyright infringement. By ignoring the fundamental principles of secondary liability, which *Sony-Betamax* reaffirmed, and the crucial differences between that case and this one, the Ninth Circuit converted the Court's carefully circumscribed decision of twenty years ago into a license for companies to contribute to and profit from infringement with impunity.

A. Liability For Secondary Copyright Infringement Has Long Been Imposed Under Established Doctrines That *Sony-Betamax* Reaffirmed.

This case arises against the backdrop of a well-developed body of law governing secondary copyright liability. *See, e.g., Sony-Betamax*, 464 U.S. at 434-39 & n.18; *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). As the Court explained in *Sony-Betamax*, secondary liability "is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." 464 U.S. at 435. Specifically, "contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond the actual duplication of a . . . publication to the products or activities that make such duplication possible." *Id.* at 442. Secondary liability thereby furthers the "basic purposes" of the copyright laws to "stimulate artistic creativity for the general public good." *Id.* at 432 (quotation marks omitted).

Federal courts have long recognized two general theories for determining when secondary copyright liability is appropriate. The first, "contributory infringement," applies when "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted). The second, "vicarious liability," applies when "the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials [by another]." *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963). Both theories reflect the traditional tort principle of placing liability on "gatekeepers" who can most efficiently stop tortious activity. *See, e.g.*, *In re Aimster*, 334 F.3d at 644-45; *see also* Jane C. Ginsburg, *Putting Cars on the "Information Superhighway*," 95 Colum. L. Rev. 1466, 1488 (1995) (describing copyright's historical reliance on gatekeeper liability, rather than enforcement against individual infringers); Tim Wu, *When Code Isn't Law*, 89 Va. L. Rev. 679, 711, 717 (2003).

Sony-Betamax endorsed both types of secondary liability. *See* 464 U.S. at 435 n.17, 437-39. The Court recognized that liability for contributory infringement should sometimes be imposed on defendants whose products or activities make direct infringement possible, *id.* at 442, and rejected as *too narrow* a standard imposing liability only when a defendant "suppl[ies] its products to *identified* individuals *known* by it to be engaging in continuing infringement," *id.* at 439 n.19 (emphasis added). Similarly, when a defendant profits from infringement and "'has the power to police carefully the conduct of'" the direct infringer, the Court stated that vicarious liability "is manifestly just" and "'plac[es] responsibility where it can and should be effectively exercised.'" *Id.* at 438 & n.18 (quoting *Shapiro*, 316 F.2d at 308).

B. *Sony-Betamax* Adapted Established Secondary Liability Law To The Distinctive Situation Presented By That Case.

Sony-Betamax adapted secondary liability principles to a novel context: the potential liability of a manufacturer of equipment – the Betamax video tape recorder – that was principally used for lawful noninfringing purposes, but that was also used incidentally for infringement. 464 U.S. at 421. The Court recognized that principles of secondary liability have to "strike a balance between a copyright holder's legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." *Id.* at 442. To do so in that context, which involved the mere sale of a product, the Court drew on the "staple article of commerce" doctrine from patent law and held that the predominantly noninfringing uses of the Betamax precluded secondary liability.

One striking feature of *Sony-Betamax* is that the main bone of contention was not the standard for secondary copyright infringement, but whether the primary use of the Betamax machine constituted *direct* infringement. The Betamax was used principally for "time-shifting," *i.e.*, recording a free telecast for later one-time viewing in the home. *Id.* at 423. The case did not involve the distribution of copyrighted works – the "transfer of tapes to other persons" – nor did it involve the copying of cable or other programs for which copyright owners charged a fee. *Id.* at 425. The Court held that time-shifting is fair use and therefore noninfringing, because it "merely enables a viewer to see . . . a work which he had been invited to witness in its entirety free of charge." *Id.* at 449. Any harm from time-shifting was "speculative and, at best, minimal.'" *Id.* at 454 (quoting trial court finding).

That holding drove the conclusion that Sony was not secondarily liable. *See id.* at 442; *see also id.* at 493 (Blackmun, J., dissenting) (agreeing that if primary use was fair use, then manufacturer would not be contributory infringer). The Court was concerned that if secondary liability were imposed, the plaintiffs would extend their copyright monopolies over a handful of particular works to an unrelated area of commerce – the sale of Betamax machines for noninfringing timeshifting – by obtaining an injunction against distribution of the Betamax or demanding a royalty for all such distribution. *Id.* at 440-41 & n.21. The district court had found that no practical means existed through which the manufacturer of the Betamax could separate infringing from noninfringing uses; hence, an injunction could not be crafted to stop one while allowing the other. *See Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429, 461-62 (C.D. Cal. 1979); *see also* 464 U.S. at 437-38 (observing that manufacturer had no ongoing relationship after sale). *Sony-Betamax* thus presented an all-or-nothing choice. Under those circumstances, the Court analogized to the "staple article of commerce" doctrine from patent law to bar a copyright holder from obtaining control over copying equipment that had "commercially significant noninfringing uses," 464 U.S. at 440-442, just as a patent holder may not leverage a monopoly over a patented device to gain a monopoly over an unpatented staple item used in the patented device. *See, e.g., Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27 (1931) (owner of patent on refrigeration unit cannot use it to gain monopoly over dry ice), *supplemented*, 283 U.S. 420 (1931).

Sony-Betamax determined that the Betamax's predominant use – noninfringing time-shifting of free, over-the-air broadcast television programs – was "commercially significant." 464 U.S. at 442. There was a substantial commercial market for the Betamax based solely on its use for time-shifting, not to mention its use for noninfringing authorized copying. *See id.* at 446 n.28, 456. As that was plainly enough to meet the "commercially significant" standard, the Court declined to opine whether a lesser showing would also suffice. *Id.*

The Court in *Sony-Betamax* did not hold or even suggest that the existence of commercially significant noninfringing uses is an absolute shield from secondary liability no matter what other factors are present. It did not bar liability where, as here, the *predominant*, fully intended use of a product or service is infringing. It also did not rule out liability where, as here, the creator of the service has an ongoing relationship with the infringers, and its profits depend directly on the volume of ongoing infringing activity on its service. Nor did *Sony-Betamax* suggest that an enterprise is immune where, as here, it can exercise control to prevent infringement but chooses not to do so because its business model depends on voluminous infringing use. None of these issues was presented in *Sony-Betamax*, given the district court's findings, which were made after a full trial: infringement of the two plaintiff's copyrights was minimal and any resulting harm was speculative at most; there was no way to separate infringing from noninfringing uses; and the manufacturer had not in any way induced infringement. *See id.* at 434, 454, 439 n.19; *supra* 17.

Similarly, *Sony-Betamax* did not suggest that the existence of commercially significant noninfringing uses would shield from vicarious liability a defendant who profits from direct infringement and can prevent it in an ongoing relationship. To the contrary, the Court recognized that secondary liability in those situations would be "manifestly just." *Id.* at 438. Sony itself, however, could not be subject to vicarious liability because it neither profited from infringement nor had an ongoing relationship with purchasers allowing it to block infringement. *Id.* at 437-38.

C. Misreading *Sony-Betamax*, The Ninth Circuit's Decision Turns Secondary Liability Principles On Their Head.

Ignoring the carefully circumscribed nature of the Court's analysis in *Sony-Betamax*, the Ninth Circuit misread that decision as virtually dictating that Grokster and StreamCast be shielded from contributory liability. In reality, the factual context here differs from *Sony-Betamax* in critical ways, raising important issues that were either expressly reserved or simply not presented by that case. At the same time, the Ninth Circuit ignored the well-established underlying *principles* of secondary liability, which *Sony-Betamax* reaffirmed, including the need to give meaningful protection to copyrights even while fostering new technologies. By forcing the square peg of this case into the round hole of *Sony-Betamax*, the Ninth Circuit created a completely novel test for secondary liability, unmoored from law or logic, that poses a grave threat to the very existence of intellectual property in the digital era.

First, the Ninth Circuit emptied all meaning from *Sony-Betamax*'s concept of "commercially significant" noninfringing uses. The Ninth Circuit simply pronounced the noninfringing uses "commercially viab[le]" without setting forth any standard for making that determination. Specifically, the court did not attempt to ascertain whether there is "a substantial market for a non-infringing use of" Grokster's or StreamCast's services that could commercially support their advertisement-dependent businesses, 464 U.S. at 442, 447 n.28, or whether (as the district court found) their businesses depend on attracting millions of infringing users. Instead, the Ninth Circuit let respondents establish "substantial noninfringing uses" with anecdotes of how their services were or *might be* used without infringing. If this constitutes commercially significant noninfringing use, then every service or product meets that standard. This case thus presents the issue, expressly left open in *Sony-Betamax*, *id.* at 442, of whether noninfringing uses can be "commercially significant" when the defendant's business depends on *infringing* uses and is not sustainable without them.

Second, the Ninth Circuit read *Sony-Betamax* – refracted through the circuit's *Napster* decision – as absolving a defendant of liability for contributory infringement once substantial noninfringing uses are established, except in one narrow circumstance: when the defendant fails to act on specific knowledge of specific infringement using the current features of the service as designed by the defendant. Pet. App. 10a-11a. Not only is that almost exactly the standard rejected as *too narrow* by *Sony-Betamax*, *see* 464 U.S. at 439 n.19 (refusing to import the standard for contributory infringement that governs trademark law), but it renders legally *irrelevant* critical factors that are present here but were absent in *Sony-Betamax*.

For example, the Ninth Circuit found it irrelevant that "the vast majority of the . . . use [of respondents' services] is for copyright infringement." Pet. App. 11a. Indeed, the Ninth Circuit believed that even to consider the extent of infringement "misapprehend[ed] the *Sony* standard." *Id.* Focusing solely on alleged noninfringing uses, the Ninth Circuit's secondary liability rules ignore the other side of the balance: the "copyright holder's legitimate demand for effective – not merely symbolic – protection of the statutory monopoly." 464 U.S. at 442.

The situation in *Sony-Betamax* was the polar opposite. The predominant use of the Betamax machine – one-time later viewing of free programs without any distribution to others – was fair use. The predominant use of the Grokster and StreamCast services is undisputed infringement. Those services are overwhelmingly used to *distribute* free digital copies of petitioners' works. That use directly supplants existing and future markets for the sale and authorized distribution of those works, inflicting direct and obvious harm upon the recording, music publishing, and motion picture industries. Not even respondents have tried to justify the massive infringement on Grokster and StreamCast as fair use. Thus, even if the minimal noninfringing uses of Grokster and StreamCast could be deemed "commercially significant" within the meaning of *Sony-Betamax*, this case still presents the important question whether the "staple article of commerce" doctrine should be extended to situations where the overwhelming use is for devastating infringement.

Similarly, under the Ninth Circuit's test a defendant's ability to block infringement is rendered irrelevant except in the narrowest circumstances. The entire rationale for importing the "staple article of commerce" doctrine in *Sony-Betamax* was to prevent monopoly leveraging into unrelated areas of commerce. *See* 464 U.S. at 440-42. That concern is not implicated where infringing and noninfringing uses can be separated, so that enforcement of the copyright monopoly to enjoin infringing uses leaves noninfringing uses untouched. Here, Grokster and StreamCast could easily implement technological measures to separate infringing from noninfringing uses but made affirmative choices not to do so and, indeed, disabled aspects of their systems that could be used to that end. The Ninth Circuit, however, held that it must accept as given the way respondents' systems are currently engineered. Pet. App. 13a ("software design is of great import").

With that unprecedented leap, the Ninth Circuit has encouraged infringement-driven services to shield themselves from liability by designing their services to *disable* their ability to block infringement. *See* Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 Colum.-VLA J.L. & Arts 1, 37 (2000) (criticizing "rule that one who deliberately builds an online system in a way that confounds the distinction [between infringing and noninfringing uses] should escape liability"). The Ninth Circuit's rule thus fosters a peculiar kind of "innovation" – it incents enterprises to "innovate" by disabling a system's capacity to prevent infringing uses, irrespective of whether such innovation otherwise makes sense from a business or technical perspective. *Sony-Betamax* cannot possibly have intended that result, and copyright law cannot withstand it.

The Ninth Circuit imported the same misconception into its analysis of vicarious liability. Although the court acknowledged that the issue of vicarious liability was not presented in *Sony-Betamax* and therefore "held that *Sony-Betamax* has no application . . . to vicarious copyright infringement," Pet. App. 16a (quotation marks omitted), it created the same gaping exception to that well-established basis for liability whenever a defendant has engineered its service to disable mechanisms for preventing infringement. Thus, even though Grokster and StreamCast concededly profit directly from infringement and are gatekeepers that could implement measures to block infringing uses or users, they are not liable under the Ninth Circuit's standard precisely because they have chosen not to implement those measures. That turns the law of vicarious liability on its head. Far from "placing responsibility where it can and should be effectively exercised" in order to encourage gatekeepers who profit from the infringement of others "to police carefully," *Sony-Betamax*, 464 U.S. at 437 n.18 (quoting *Shapiro*, 316 F.2d at 308), the Ninth Circuit's new defense to vicarious liability gives gatekeepers a perverse incentive to *avoid* technological measures for controlling infringement by their users.

Finally, the Ninth Circuit's test enables those who (like Grokster and StreamCast) set out deliberately to induce or aid infringement on an unprecedented scale while willfully blinding themselves to specific acts of infringement to escape liability. The only state of mind that matters in the Ninth Circuit is specific knowledge of specific infringement at the precise time the infringement can be stopped using the service as defendants designed it. Nothing in *Sony-Betamax* dictates, or even remotely supports, such a result.

The Court has often granted certiorari to resolve such issues involving the fundamental direction of copyright law – even absent a circuit conflict (which is present here, *see* Point II *infra*). Indeed, the Court did so in *Sony-Betamax* itself. *See also Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 399 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393 (1968). The need for immediate review is more pressing in this case than it was in *Sony-Betamax*. The Ninth Circuit's secondary liability rules shield every enterprise that intentionally sets out to make money by facilitating copyright infringement on the Internet. That ruling threatens not only petitioners' businesses, but also the very foundations of our copyright system in the digital era. Immediate review is manifestly appropriate.

II. THE DECISION BELOW CREATES A DIRECT AND ACKNOWLEDGED CONFLICT WITH THE SEVENTH CIRCUIT'S DECISION IN *AIMSTER*.

The Ninth Circuit's decision creates a direct and acknowledged conflict with the Seventh Circuit's *Aimster* decision, in which Judge Posner affirmed a district court's conclusion that Aimster, a peer-to-peer file-sharing service that operated like the services at issue here, was likely to be found liable as a contributory infringer. Under *Aimster*, a court must assess a system's actual and probable potential infringing and noninfringing uses, and then must balance the costs and benefits to accommodate the interests of copyright holders in preventing infringement while protecting the right of the public to use products for noninfringing uses. The Ninth Circuit expressly rejected that approach, examining only whether the system is theoretically *capable* of noninfringing uses, no matter how improbable, and then permitting liability only when the alleged contributory infringer has specific knowledge of actual infringement and has engineered its system to allow for the prevention of the infringement when the defendant learns it is occurring. This conflict demonstrates that *Sony-Betamax* did not dictate the Ninth Circuit's tortured approach, and it reinforces the need for this Court's review.

A. There Is A Conflict Regarding What Is Necessary To Show Commercially Significant Noninfringing Uses.

The Ninth Circuit and the Seventh Circuit are in direct conflict over what a defendant must show under *Sony-Betamax* to establish that defendant's system is capable of commercially significant noninfringing uses.

The Ninth Circuit requires only a showing that substantial noninfringing uses are possible. *See* Pet. App. 11a (holding that "in order for limitations imposed by *Sony-Betamax* to apply, a product need only be *capable* of substantial noninfringing uses.") (emphasis in original). A service thus may have substantial noninfringing uses even if the current uses are overwhelmingly infringing, and even if the current noninfringing uses would not support the product as a stand-alone business. The Seventh Circuit, in contrast, evaluates not just whether noninfringing uses are possible, *see* 334 F.3d at 651 (holding that it is insufficient merely to show that Aimster's "system *could* be used in noninfringing ways") (emphasis in original), but also "how probable [such uses] are," *id.* at 653, and how important those uses are relative to the infringing uses, *see id.* at 649 (holding that "some estimate of the respective magnitudes of these uses is necessary").

The Ninth Circuit acknowledged that "the Seventh Circuit has read *Sony-Betamax*'s substantial noninfringing use standard differently." Pet. App. 11a n.9. In the Ninth

Circuit's view, the Seventh Circuit's conclusion that "an important additional factor is how 'probable' the infringing uses of a product are," was "premised specifically on a fundamental disagreement with *Napster I*'s reading of *Sony-Betamax*." *Id.* The Ninth Circuit concluded that it simply "d[id] not read *Sony-Betamax*'s holding as narrowly as does the Seventh Circuit." *Id.*

To be sure, the Ninth Circuit suggests weakly that *Aimster* would not help petitioners here because "implicit in the *Aimster* analysis is that a finding of substantial noninfringing use, including potential use, would be fatal to a contributory infringement claim." Pet. App. 11a-12a n.9. But Judge Posner *rejected* that position, holding that "[e]ven when there are noninfringing uses of an Internet file-sharing service . . . the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses." 334 F.3d at 653.

The Ninth Circuit also suggests that somehow the split is not implicated because, "[i]n *Aimster*, no evidence was tendered of any noninfringing product use." Pet. App. 11a-12a n.9. But that just highlights the conflict. Under the Ninth Circuit's approach, no evidence of actual noninfringing use is necessary; the product need only be "capable" of such use. For the Seventh Circuit, "[i]t is not enough . . . that a product or service be physically capable . . . of noninfringing uses." 334 F.3d at 653. Instead, a court must assess "how probable [those uses] are," and whether the service "is *actually* used for any of the stated noninfringing purposes." *Id.* (emphasis in original); *see also id.* at 652-53 (holding that Aimster did not satisfy the *Sony-Betamax* standard even though it was capable of at least five identified noninfringing uses). *Cf.* Pet. App. 11a (deeming irrelevant that "the vast majority of the software use is for copyright infringement").[8]

B. There Is A Conflict On The Consequences Of A Showing Of Substantial Noninfringing Uses.

The Ninth Circuit's decision also conflicts with *Aimster* regarding when liability for contributory infringement may be imposed on a defendant that has demonstrated that its service has "substantial noninfringing uses." In the Ninth Circuit, liability may now be imposed only when the defendant has actual knowledge of specific infringing uses and has already included mechanisms in its system to block such uses. The Seventh Circuit, in contrast, adopted a balancing test: a peer-to-peer service that is capable of substantial noninfringing uses is nonetheless liable if the service facilitates substantial infringing uses and it is not disproportionately costly to take technological steps to curtail the infringing uses.

The two articulated approaches are irreconcilable with respect to the legal significance of evidence that a defendant could have taken reasonable steps to prevent infringement while preserving noninfringing uses. In the Ninth Circuit, such evidence is irrelevant as a matter of law – the existing technological and business structure is taken as a given. The Ninth Circuit thus deemed irrelevant evidence that Grokster and StreamCast could filter out infringing materials, as they filter out files containing pornography and viruses, as well as evidence that they could have employed (and at one time did

[8] Nor can the Ninth Circuit avoid the conflict by its blithe suggestion that there are "a minimum of hundreds of thousands of legitimate file exchanges." Pet. App. 12a n.10. The Seventh Circuit demands a comparison of the "respective magnitudes" of the system's infringing and noninfringing uses. 334 F.3d at 649. The Ninth Circuit's hotly disputed (*see supra* 9 & n.7) conjecture that there might be "hundreds of thousands" of legitimate exchanges pales in comparison to the millions and millions of illegitimate exchanges.

employ) other solutions – such as a registration and login system that made possible the termination of infringing users – to combat infringement without compromising the network's ability to permit legitimate file exchanges. *See* Pet. App. 76a, 82a, 88a, 107a-115a. The Ninth Circuit's approach creates the perverse incentive for a defendant literally to engineer its way out of copyright liability, while still facilitating infringement.[9]

The Seventh Circuit, in contrast, held that the existing software design does not determine copyright liability. The Aimster system, for example, encrypted the file sharing information, limiting Aimster's ability to detect and prevent infringement. The Seventh Circuit held that Aimster failed to justify the need for the encryption capability, 334 F.3d at 653, and the court refused to allow Aimster to engineer willful "blind[ness]" in the "hope that that by so doing it might come within the rule of the *Sony* decision." *Id.*

Compounding the conflict, the Ninth Circuit imposes temporal and knowledge restrictions that are wholly absent from the Seventh Circuit's analysis. In the Ninth Circuit, a defendant must have knowledge of specific acts of infringement, and the knowledge must come at a time when the defendant is in a position to stop *that particular infringement*. The Seventh Circuit imposes no comparable requirements. A defendant with knowledge that the primary use of its service is for infringement is liable if it would not have been disproportionately costly to eliminate or reduce

[9] The Ninth Circuit's approach thus diverges from well-established tort principles that inquire into the risks and benefits of a particular design, including whether there is a feasible alternative design that would make the product less harmful. *Restatement (Third) of Torts: Products Liability* § 2 (1998) ("A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of reasonable alternative designs"); W. Page Keeton, *et al.*, *Prosser & Keeton on the Law of Torts*, § 99 at 699 (5th ed. 1984).

substantially the infringing uses, regardless of whether the defendant knew of specific infringement or had disabled mechanisms that would have prevented that infringement.

In short, as the Ninth Circuit stated, there is "fundamental disagreement" between the Seventh Circuit and the Ninth Circuit.[10] That each court purported to anchor its decision in *Sony-Betamax* yet adopted such sharply divergent legal standards confirms the need for this Court's intervention.

III. IMMEDIATE REVIEW IS URGENTLY NEEDED.

This Court's review is urgently needed. For petitioners, everything is on the line. Petitioners own the copyrights in most of the material infringed on Grokster and StreamCast, and they are the only copyright owners with sufficient resources and incentives to litigate effectively against respondents. As a practical matter, therefore, a denial of review insulates Grokster and StreamCast – two of the most popular peer-to-peer services in the country – from further legal challenge nationwide and ensures that the massive infringements they facilitate will continue unabated.

Further delay also multiplies the irreparable harm that the Ninth Circuit's decision legitimizes. More than 40 million people use peer-to-peer networks, and more than 5 million are on Grokster and StreamCast at any given moment. Frank Ahrens, *States Warn File-Sharing Networks*, Wash. Post, Aug. 5, 2004, at E2. Conservative independent estimates of lost music sales alone range from $700 million to several billion dollars annually, *see supra* 8; adding lost sales for motion pictures raises the aggregate harm to staggering levels.

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[10] *See also* Jesse M. Feder, *Is Betamax Obsolete?:* Sony Corp. of America v. Universal City Studios, Inc. *in the Age of Napster*, 37 Creighton L. Rev. 859, 860 (2004) (noting that *Napster*, *Grokster*, and *Aimster* have "produc[ed] outcomes that are, at least at first blush, startling in their inconsistency").

Nor is the harm limited to established businesses. The blueprint for avoiding liability set forth in the Ninth Circuit's decision threatens legitimate Internet media downloading services – such as Apple's iTunes, RealNetworks' Rhapsody, and CinemaNow – that are just now getting off the ground, thus stifling innovation in the legitimate use of technology to distribute movies, music, and other copyrighted digital works over the Internet.

Finally, leaving the Ninth Circuit's decision intact also sends exactly the wrong message to Internet users because it appears to approve the direct infringement that everyone agrees is unlawful. It is perhaps unsurprising that Grokster and StreamCast have capitalized on the Ninth Circuit's ruling by now touting their services as completely "legal."[11] Denying review thus erodes not only public perception of the value of sound recordings, musical compositions, and motion pictures, but respect for the foundations of copyright law that our Framers believed critical to "motivate the creative activity" of authors and artists, *Sony-Betamax*, 464 U.S. at 429, and to "induce release to the public of the product of their creative genius," *id.* (internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

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[11] *E.g.*, *Morpheus'™ Legitimacy Confirmed! Appellate Court Rules in Favor of Peer-To-Peer Giant StreamCast Networks, Inc.*™, *at* http://www.streamcastnetworks.com/08_19_04_9th_CircuitFinal.html, Pet. App. 75a-79a; *Grokster Wins!*, *at* http://www.grokster.com/ (visited Sept. 13, 2004), Pet. App. 80a-82a; *Latest News: US courts affirm Kazaa 100% legal!*, *at* http://www.kazaa.com/us/index.htm (visited Sept. 13, 2004), Pet. App. 83a-85a.

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October 8, 2004

Appendix A

United States Court of Appeals,
Ninth Circuit.

METRO-GOLDWYN-MAYER STUDIOS, INC.; Columbia Pictures Industries, Inc.; Disney Enterprises, Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal City Studios LLP, f/k/a Universal City Studios, Inc.; New Line Cinema Corporation; Time Warner Entertainment Company, LP; Atlantic Recording Corporation; Atlantic Rhino Ventures, Inc., d/b/a Rhino Entertainment, Inc.; Elektra Entertainment Group, Inc.; London-Sire Records, Inc., LP; Warner Brothers Records, Inc.; WEA International Inc.; Warner Music Latina, Inc., f/k/a WEA Latina, Inc.; Arista Records, Inc.; Bad Boy Records; Capitol Records, Inc.; Hollywood Records, Inc.; Interscope Records; Laface Records; Motown Record Company; RCA Records Label, a unit of BMG Music d/b/a BMG Entertainment; Sony Music Entertainment, Inc.; UMG Recordings, Inc.; Virgin Records America, Inc.; Walt Disney Records, a division of ABC, Inc.; Zomba Recording Corp., Plaintiffs-Appellants,

v.

GROKSTER LTD.; Streamcast Networks, Inc., f/k/a Musiccity.Com, Inc., Appellees,

and

Sharman Networks Limited; LEF Interactive PTY Ltd., Defendants.

Jerry Leiber, individually d/b/a Jerry Leiber Music; Mike Stoller, individually and d/b/a Mike Stollller Music; Peer International Corporation, Peer Music Ltd., Songs of Peer Ltd.; Criterion Music Corporation; Famous Music

Corporation, Bruin Music Company; Ensign Music Corporation; and Let’s Talk Shop, Inc., d/b/a Beau-DI-O-DO Music, on behalf of themselves and all other similarly situated, Plaintiffs-Appellants,

v.

Consumer Empowerment BV, aka Fasttrack; Sharman Networks Limited; LEF Interactive PTY Ltd., Defendants,

and

Grokster Ltd.; Streamcast Networks, Inc., f/k/a Musiccity.Com, Inc., Defendants-Appellees.

Metro-Goldwyn-Mayer Studios, Inc.; Columbia Pictures Industries, Inc.; Disney Enterprises, Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal City Studios LLP, f/k/a Universal City Studios, Inc.; New Line Cinema Corporation; Time Warner Entertainment Company, LP; Atlantic Recording Corporation; Atlantic Rhino Ventures, Inc., d/b/a Rhino Entertainment, Inc.; Elektra Entertainment Group, Inc.; London-Sire Records, Inc., LP; Warner Brothers Records, Inc.; WEA International Inc.; Warner Music Latina, Inc., f/k/a WEA Latina, Inc.; Arista Records, Inc.; Bad Boy Records; Capitol Records, Inc.; Hollywood Records, Inc.; Interscope Records; Laface Records; Motown Record Company; RCA Records Label, a unit of BMG Music d/b/a BMG Entertainment; Sony Music Entertainment, Inc.; UMG Recordings, Inc.; Virgin Records America, Inc.; Walt Disney Records, a division of ABC, Inc.; Zomba Recording Corp., Plaintiffs-Appellants,

v.

Grokster Ltd.; Streamcast Networks, Inc., f/k/a Musiccity.Com, Inc., Defendants-Appellees.

Nos. 03-55894, 03-55901, 03-56236.

Argued and Submitted Feb. 3, 2004.
Filed Aug. 19, 2004.

OPINION

THOMAS, Circuit Judge:

This appeal presents the question of whether distributors of peer-to-peer file-sharing computer networking software may be held contributorily or vicariously liable for copyright infringements by users. Under the circumstances presented by this case, we conclude that the defendants are not liable for contributory and vicarious copyright infringement and affirm the district court's partial grant of summary judgment.

I. Background

From the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with musical copyright owners, often resulting in federal litigation. This appeal is the latest reprise of that recurring conflict, and one of a continuing series of lawsuits between the recording industry and distributors of file-sharing computer software.

The plaintiffs in the consolidated cases ("Copyright Owners") are songwriters, music publishers, and motion picture studios who, by their own description, "own or control the vast majority of copyrighted motion pictures and sound recordings in the United States."[1] Defendants Grokster Ltd. and StreamCast Networks, Inc. ("Software Distributors") are companies that freely distribute software that allows users to share computer

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[1] The plaintiffs in the Leiber case represent a certified class of over 27,000 songwriters and music publishers. The plaintiffs in the MGM case include most of the major motion picture studios and recording companies.

files with each other, including digitized music and motion pictures. The Copyright Owners allege that over 90% of the files exchanged through use of the "peer-to-peer" file-sharing software offered by the Software Distributors involves copyrighted material, 70% of which is owned by the Copyright Owners. Thus, the Copyright Owners argue, the Software Distributors are liable for vicarious and contributory copyright infringement pursuant to 17 U.S.C. §§ 501-513 (2000), for which the Copyright Owners are entitled to monetary and injunctive relief. The district court granted the Software Distributors partial summary judgment as to liability arising from present activities and certified the resolved questions for appeal pursuant to Fed. R. Civ. P. 54(b). *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,* 259 F. Supp. 2d 1029 (C.D. Cal. 2003) ("*Grokster I*").

To analyze the legal issues properly, a rudimentary understanding of the peer-to-peer file-sharing software at issue is required--particularly because peer-to-peer file sharing differs from typical internet use. In a routine internet transaction, a user will connect via the internet with a website to obtain information or transact business. In computer terms, the personal computer used by the consumer is considered the "client" and the computer that hosts the web page is the "server." The client is obtaining information from a centralized source, namely the server.

In a peer-to-peer distribution network, the information available for access does not reside on a central server. No one computer contains all of the information that is available to all of the users. Rather, each computer makes information available to every other computer in the peer-to-peer network. In other words, in a peer-to-peer network, each computer is both a server and a client.

Because the information is decentralized in a peer-to-peer network, the software must provide some method of cataloguing the available information so that users may access it. The software operates by connecting, via the internet, to other users of the same or similar software. At any given moment, the network consists of other users of similar or the same software online at that time. Thus, an index of files available for sharing is a critical component of peer-to-peer file-sharing networks.

At present, there are three different methods of indexing: (1) a centralized indexing system, maintaining a list of available files on one or more centralized servers; (2) a completely decentralized indexing system, in which each computer maintains a list of files available on that computer only; and (3) a "supernode" system, in which a select number of computers act as indexing servers.[2]

The first Napster system employed a proprietary centralized indexing software architecture in which a collective index of available files was maintained on servers it owned and operated. A user who was seeking to obtain a digital copy of a recording would transmit a search request to the Napster server, the software would conduct a text search of the centralized index for matching files, and the search results would be transmitted to the requesting user. If the results showed that

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[2] This is an extremely simplistic overview of peer-to-peer file-sharing networks. There are a number of more complete descriptions available. See, e.g., Yochai Benkler, Coase's Penguin, or, Linux and The Nature of the Firm, 112 Yale L.J. 369, 396-400 (2002); Jesse M. Feder, Is Betamax Obsolete?: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster, 37 Creighton L. Rev. 859, 862-68 (2004)

another Napster user was logged on to the Napster server and offering to share the requested recording, the requesting user could then connect directly with the offering user and download the music file.[3]

Under a decentralized index peer-to-peer file-sharing model, each user maintains an index of only those files that the user wishes to make available to other network users. Under this model, the software broadcasts a search request to all the computers on the network and a search of the individual index files is conducted, with the collective results routed back to the requesting computer. This model is employed by the Gnutella software system and is the type of architecture now used by defendant StreamCast. Gnutella is open-source software, meaning that the source code is either in the public domain or is copyrighted and distributed under an open-source license that allows modification of the software, subject to some restrictions.

The third type of peer-to-peer file-sharing network at present is the "supernode" model, in which a number of select computers on the network are designated as indexing servers. The user initiating a file search connects with the most easily accessible supernode, which conducts the search of its index and supplies the user with the results. Any computer on the network could function as a supernode if it met the technical requirements, such as processing speed. The "supernode" architecture was

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[3] A more complete description of the Napster system is contained in *A & M Records v. Napster,* 239 F.3d 1004, 1011-12 (9th Cir. 2001) ("*Napster I*") and *A & M Records v. Napster,* 114 F. Supp. 2d 896, 905- 08 (N.D. Cal. 2000). The Napster system as described in this opinion and in the *Napster* cases is no longer being used by the company that purchased the Napster assets.

developed by KaZaa BV, a Dutch company, and licensed under the name of "FastTrack" technology.[4]

Both Grokster and StreamCast initially used the FastTrack technology. However, StreamCast had a licensing dispute with KaZaa, and now uses its own branded "Morpheus" version of the open-source Gnutella code. StreamCast users connect to other users of Gnutella-based peer-to-peer file-sharing software.[5] Both Grokster and StreamCast distribute their separate softwares free of charge. Once downloaded onto a user's computer, the software enables the user to participate in the respective peer-to-peer file-sharing networks over the internet.[6]

Users of the software share digital audio, video, picture, and text files. Some of the files are copyrighted and shared without authorization, others are not copyrighted (such as public domain works), and still others are copyrighted, but the copyright

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[4] Since the litigation in this case began, control of the FastTrack software passed from KaZaa to Sharman Networks. KaZaa was named as a defendant in this action, but eventually ceased defending and default judgment was entered against it.

[5] The owners of the FastTrack Software successfully prevented users of the StreamCast version of FastTrack from being able to connect to the Grokster and KaZaa users of FastTrack by using a software upgrade that was not sent to StreamCast users. Peer-to-peer file-sharing software upgrades can be coded in a way that prevents those who do not accept the upgrade from communicating with those who do, but those users who do not accept an upgrade may still be able to communicate with each other. The record indicates this has already occurred, with a number of nonupgraded users still being able to communicate and share files with each other.

[6] A more detailed description of each system is contained in the district court opinion in this case. *Grokster I,* 259 F. Supp. 2d at 1031- 33.

owners have authorized software users in peer-to-peer file-sharing networks to distribute their work. The Copyright Owners assert, without serious contest by the Software Distributors, that the vast majority of the files are exchanged illegally in violation of copyright law.

II. Analysis

The question of direct copyright infringement is not at issue in this case. Rather, the Copyright Owners contend that the Software Distributors are liable for the copyright infringement of the software users. The Copyright Owners rely on the two recognized theories of secondary copyright liability: contributory copyright infringement and vicarious copyright infringement. *Ellison v. Robertson,* 357 F.3d 1072, 1076 (9th Cir. 2004). We agree with the district court's well reasoned analysis that the Software Distributors' current activities do not give rise to liability under either theory.

A. Contributory Copyright Infringement

The three elements required to prove a defendant liable under the theory of contributory copyright infringement are: (1) direct infringement by a primary infringer, (2) knowledge of the infringement, and (3) material contribution to the infringement. *Id.* The element of direct infringement is undisputed in this case.

1. Knowledge

Any examination of contributory copyright infringement must be guided by the seminal case of *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984) ("*Sony-Betamax*"). In *Sony-Betamax,* the

Supreme Court held that the sale of video tape recorders could not give rise to contributory copyright infringement liability even though the defendant knew the machines were being used to commit infringement. In analyzing the contours of contributory copyright infringement, the Supreme Court drew on the "staple article of commerce" doctrine from patent law. *Id.* at 440-42. Under that doctrine, it would be sufficient to defeat a claim of contributory copyright infringement if the defendant showed that the product was "capable of substantial" or "commercially significant noninfringing uses." In applying this doctrine, the Court found that because Sony's Betamax video tape recorder was capable of commercially significant noninfringing uses, constructive knowledge of the infringing activity could not be imputed from the fact that Sony knew the recorders, as a general matter, could be used for infringement. *Id.* at 442.

In *Napster I,* we construed *Sony-Betamax* to apply to the knowledge element of contributory copyright infringement. *Napster I* held that if a defendant could show that its product was capable of substantial or commercially significant noninfringing uses, then constructive knowledge of the infringement could not be imputed. Rather, if substantial noninfringing use was shown, the copyright owner would be required to show that the defendant had reasonable knowledge of specific infringing files.[7] *Napster I,* 239 F.3d at 1027; *see*

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[7] In full, the test adopted in *Napster I* for defendants whose products are capable of substantial or commercially significant noninfringing uses is that "contributory liability may potentially be imposed only to the extent that the defendant (1) receives reasonable knowledge of specific infringing files . . .; (2) knows or should know that such files are available on the Napster system; and (3) fails to act to prevent viral distribution of the works." 239 F.3d at 1027. At this juncture, however, our focus is the standard of knowledge to be applied.

also A & M Records v. Napster, 284 F.3d 1091, 1095-96 (9th Cir. 2002) ("*Napster II*").[8]

Thus, in order to analyze the required element of knowledge of infringement, we must first determine what level of knowledge to require. If the product at issue is not capable of substantial or commercially significant noninfringing uses, then the copyright owner need only show that the defendant had constructive knowledge of the infringement. On the other hand, if the product at issue *is* capable of substantial or commercially significant noninfringing uses, then the copyright owner must demonstrate that the defendant had reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement. *See Napster I,* 239 F.3d at 1027.

In this case, the district court found it undisputed that the software distributed by each defendant was capable of substantial noninfringing uses. *Grokster I,* 259 F. Supp. 2d at 1035. A careful examination of the record indicates that there is no genuine issue of material fact as to noninfringing use. Indeed, the Software Distributors submitted numerous declarations by persons who permit their work to be distributed

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[8] After *Napster I* was decided, the district court on remand required plaintiffs to give Napster notice of specific infringing files, and then required Napster to continually search its index and block all files containing the particular works at issue. *Napster II,* 284 F.3d at 1095-96. The plaintiffs appealed, arguing that "Napster should be required to search for and to block all files containing any protected copyrighted works, not just those works with which plaintiffs have been able to provide a corresponding file name." *Id.* at 1096. We found that the district court had not "committed any error of law or abused its discretion," *id.,* and that "[t]he notice requirement abide[d] by our holding that plaintiffs bear the burden to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content." *Id.* (internal quotation marks omitted).

via the software, or who use the software to distribute public domain works. *See id.* One striking example provided by the Software Distributors is the popular band Wilco, whose record company had declined to release one of its albums on the basis that it had no commercial potential. Wilco repurchased the work from the record company and made the album available for free downloading, both from its own website and through the software user networks. The result sparked widespread interest and, as a result, Wilco received another recording contract. Other recording artists have debuted their works through the user networks. Indeed, the record indicates that thousands of other musical groups have authorized free distribution of their music through the internet. In addition to music, the software has been used to share thousands of public domain literary works made available through Project Gutenberg as well as historic public domain films released by the Prelinger Archive. In short, from the evidence presented, the district court quite correctly concluded that the software was capable of substantial noninfringing uses and, therefore, that the *Sony-Betamax* doctrine applied.

The Copyright Owners submitted no evidence that could contradict these declarations. Rather, the Copyright Owners argue that the evidence establishes that the vast majority of the software use is for copyright infringement. This argument misapprehends the *Sony* standard as construed in *Napster I,* which emphasized that in order for limitations imposed by *Sony* to apply, a product need only be *capable* of substantial noninfringing uses. *Napster I,* 239 F.3d at 1021.[9]

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[9] We are mindful that the Seventh Circuit has read *Sony's* substantial noninfringing use standard differently. *In re Aimster Copyright Litig.,* 334 F.3d 643, 651 (7th Cir. 2003). It determined that an important additional factor is how "probable" the noninfringing uses of a product are. *Id.* at 653. The Copyright Owners urge us to adopt the *Aimster* rationale. However,

In this case, the Software Distributors have not only shown that their products are capable of substantial noninfringing uses,[10] but that the uses have commercial viability. Thus, applying *Napster I, Napster II,* and *Sony-Betamax* to the record, the district court correctly concluded that the Software Distributors had established that their products were capable of substantial or commercially significant noninfringing uses. Therefore, the district correctly reasoned, the Software Distributors could not be held liable for constructive knowledge of infringement, and the Copyright Owners were required to show that the Software Distributors had reasonable knowledge of specific infringement to satisfy the threshold knowledge requirement.

Having determined that the "reasonable knowledge of specific infringement" requirement applies here, we must then decide whether the Copyright Owners have raised sufficient genuine issues of material fact to satisfy that higher standard. As the district court correctly concluded, the time at which such

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Aimster is premised specifically on a fundamental disagreement with *Napster I's* reading of *Sony-Betamax.* We are not free to reject our own Circuit's binding precedent. *See Montana v. Johnson,* 738 F.2d 1074, 1077 (9th Cir. 1984) (holding that only this court sitting en banc may overrule a prior decision by this court). Even if we were free to do so, we do not read *Sony-Betamax's* holding as narrowly as does the Seventh Circuit. Regardless, it is not clear that application of the *Aimster* rationale would assist the Copyright Owners here. Implicit in the *Aimster* analysis is that a finding of substantial noninfringing use, including potential use, would be fatal to a contributory infringement claim, regardless of the level of knowledge possessed by the defendant. In *Aimster,* no evidence was tendered of any noninfringing product use.

[10] Indeed, even at a 10% level of legitimate use, as contended by the Copyright Owners, the volume of use would indicate a minimum of hundreds of thousands of legitimate file exchanges.

knowledge is obtained is significant. Because contributory copyright infringement requires knowledge *and* material contribution, the Copyright Owners were required to establish that the Software Distributors had "specific knowledge of infringement at a time at which they contribute[d] to the infringement, and [ ] fail[ed] to act upon that information." *Grokster I,* 259 F. Supp. 2d at 1036 (citing *Napster I,* 239 F.3d at 1021). As the district court correctly observed, and as we explain further in our discussion of material contribution, "Plaintiffs' notices of infringing conduct are irrelevant," because "they arrive when Defendants do nothing to facilitate, and cannot do anything to stop, the alleged infringement" of specific copyrighted content. *Id.* at 1037. *See Napster II,* 284 F.3d at 1096 ("[P]laintiffs bear the burden to provide notice to Napster of copyrighted works and files containing such works available on the Napster system *before* Napster has the duty to disable access *to the offending content.*") (internal quotation marks omitted) (emphasis added).

In the context of this case, the software design is of great import. As we have discussed, the software at issue in *Napster I* and *Napster II* employed a centralized set of servers that maintained an index of available files. In contrast, under both StreamCast's decentralized, Gnutella-type network and Grokster's quasi-decentralized, supernode, KaZaa-type network, no central index is maintained. Indeed, at present, neither StreamCast nor Grokster maintains control over index files. As the district court observed, even if the Software Distributors "closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption." *Grokster I,* 259 F. Supp. 2d at 1041.

Therefore, we agree with the district court that the Software

Distributors were entitled to partial summary judgment on the element of knowledge.

2. Material Contribution

We also agree with the district court that with respect to their current software distribution and related activities, defendants do not materially contribute to copyright infringement.

In *Napster I,* we found material contribution after reciting the district court's factual finding that "Napster is an integrated service." 239 F.3d at 1022. We "agree[d] that Napster provides the site and facilities for direct infringement." *Id.* (internal quotation marks omitted). We further cited the holding of *Netcom,* which found "substantial participation" based on Netcom's "failure to cancel [a user's] infringing message and thereby stop an infringing copy from being distributed worldwide." *Id.* (quoting *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.,* 907 F. Supp. 1361, 1372 (N.D. Cal. 1995)) (alteration in original). We have also found material contribution where a defendant operated a swap meet at which infringing products were sold and provided utilities, parking, and advertising. *Fonovisa, Inc. v. Cherry Auction, Inc.,* 76 F.3d 259, 261, 264 (9th Cir. 1996).

As indicated by the record, the Software Distributors do not provide the "site and facilities" for infringement, and do not otherwise materially contribute to direct infringement. Infringing messages or file indices do not reside on defendants' computers, nor do defendants have the ability to suspend user accounts. *Grokster I,* 259 F. Supp. 2d at 1037, 1039-41.

While material contribution can be established through provision of site and facilities for infringement, followed by a failure to stop specific instances of infringement once knowledge of those infringements is acquired, the Software Distributors have not provided the site and facilities for infringement in the first place. If the Software Distributors were true access providers, failure to disable that access after acquiring specific knowledge of a user's infringement might be material contribution. *Netcom,* 907 F. Supp. at 1375. Or, if the Software Distributors stored files or indices, failure to delete the offending files or offending index listings might be material contribution. *Napster I,* 239 F.3d at 1022. However, the Software Distributors here are not access providers, and they do not provide file storage and index maintenance. Rather, it is the users of the software who, by connecting to each other over the internet, create the network and provide the access. "Failure" to alter software located on another's computer is simply not akin to the failure to delete a filename from one's own computer, to the failure to cancel the registration name and password of a particular user from one's user list, or to the failure to make modifications to software on one's own computer.

The Copyright Owners have not provided evidence that defendants materially contribute in any other manner. StreamCast maintains an XML[11] file from which user software periodically retrieves parameters. These values may include the addresses of websites where lists of active users are maintained. The owner of the FastTrack software, Sharman, maintains root nodes containing lists of currently active supernodes to which users can connect. Both defendants also communicate with users incidentally, but not to facilitate infringement. All of these activities are too incidental to any direct copyright

[11] XML is an abbreviation for Extensible Markup Language. A markup language the reader may be more familiar with is HTML, which stands for HyperText Markup Language.

infringement to constitute material contribution. No infringing files or lists of infringing files are hosted by defendants, and the defendants do not regulate or provide access.

While Grokster and StreamCast in particular may seek to be the "next Napster," *Grokster I,* 259 F. Supp. 2d at 1036, the peer-to-peer file-sharing technology at issue is not simply a tool engineered to get around the holdings of *Napster I* and *Napster II.* The technology has numerous other uses, significantly reducing the distribution costs of public domain and permissively shared art and speech, as well as reducing the centralized control of that distribution. Especially in light of the fact that liability for contributory copyright infringement does not require proof of any direct financial gain from the infringement, we decline to expand contributory copyright liability in the manner that the Copyright Owners request.

B. Vicarious Copyright Infringement

Three elements are required to prove a defendant vicariously liable for copyright infringement: (1) direct infringement by a primary party, (2) a direct financial benefit to the defendant, and (3) the right and ability to supervise the infringers. *Napster I,* 239 F.3d at 1022. "Vicarious copyright liability is an 'outgrowth' of respondeat superior," imposing liability on those with a sufficiently supervisory relationship to the direct infringer. *Id.* (citing *Cherry Auction,* 76 F.3d at 262). In *Napster I,* we held that *Sony-Betamax* "has no application to . . . vicarious copyright infringement" because the issue of vicarious liability was "not before the Supreme Court" in that case. *Id.*

The elements of direct infringement and a direct financial benefit, via advertising revenue, are undisputed in this case.

1. Right and Ability To Supervise

We agree with the district court that there is no issue of material fact as to whether defendants have the right and ability to supervise the direct infringers in this case. Allocation of liability in vicarious copyright liability cases has developed from a historical distinction between the paradigmatic "dance hall operator" and "landlord" defendants. *Cherry Auction,* 76 F.3d at 262. The dance hall operator is liable, while the landlord escapes liability, because the dance hall operator has the right and ability to supervise infringing conduct while the landlord does not. *Id.* Thus, the "right and ability to supervise" describes a relationship between the defendant and the direct infringer.

A salient characteristic of that relationship often, though not always, is a formal licensing agreement between the defendant and the direct infringer. *See, e.g., Napster I,* 239 F.3d at 1023; *Cherry Auction,* 76 F.3d at 261; *Shapiro, Bernstein & Co. v. H.L. Green Co.,* 316 F.2d 304, 306 (2d Cir. 1963) (cited as the landmark case in *Cherry Auction,* 76 F.3d at 262). Indeed, *Napster I* found especially important the fact that Napster had an express policy reserving the right to block infringers' access for any reason. 239 F.3d at 1023 ("[A]bility to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise.").

In *Cherry Auction,* we held that the right and ability to supervise existed where a swap meet operator reserved the right to terminate vendors for any reason, promoted the swap meet, controlled access by customers, patrolled the meet, and could control direct infringers through its rules and regulations. 76 F.3d at 262-63. Similarly in *Napster I,* we found Napster had the right and ability to supervise Napster users because it controlled the central indices of files, users were required to register with Napster, and access to the system depended on the validity of a user's registration. 239 F.3d at 1011-12, 1023-24.

It does not appear from any of the evidence in the record that either of the defendants has the ability to block access to individual users. Grokster nominally reserves the right to terminate access, while StreamCast does not maintain a licensing agreement with persons who download Morpheus. However, given the lack of a registration and log-in process, even Grokster has no ability to actually terminate access to filesharing functions, absent a mandatory software upgrade to all users that the particular user refuses, or IP address-blocking attempts.[12] It is also clear that none of the communication between defendants and users provides a point of access for filtering or searching for infringing files, since infringing material and index information do not pass through defendants' computers.

In the case of StreamCast, shutting down its XML file altogether would not prevent anyone from using the Gnutella network. In the case of Grokster, its licensing agreement with KaZaa/Sharman does not give it the ability to mandate that root nodes be shut down. Moreover, the alleged ability to shut down operations altogether is more akin to the ability to close down an entire swap meet or stop distributing software altogether, rather than the ability to exclude individual participants, a practice of policing aisles, an ability to block individual users directly at the point of log-in, or an ability to delete individual filenames from one's own computer. *See Napster I,* 239 F.3d at

[12] IP address-blocking will not be effective against a user who, like most persons, does not have a permanent IP address, but is rather assigned one each time he connects to the Internet.

1023-24; *Cherry Auction,* 76 F.3d at 261-62. The sort of monitoring and supervisory relationship that has supported vicarious liability in the past is completely absent in this case.

The district court here found that unlike Napster, Grokster and StreamCast do not operate and design an "integrated service," *Grokster I,* 259 F. Supp. 2d at 1045, which they monitor and control. We agree. The nature of the relationship between Grokster and StreamCast and their users is significantly different from the nature of the relationship between a swap meet operator and its participants, or prior versions of Napster and its users, since Grokster and StreamCast are more truly decentralized, peer-to-peer file-sharing networks.

The district court correctly characterized the Copyright Owners' evidence of the right and ability to supervise as little more than a contention that "the software itself could be altered to prevent users from sharing copyrighted files." *Grokster I,* 259 F. Supp. 2d at 1045. In arguing that this ability constitutes evidence of the right and ability to supervise, the Copyright Owners confuse the right and ability to supervise with the strong duty imposed on entities that have already been determined to be liable for vicarious copyright infringement; such entities have an obligation to exercise their policing powers to the fullest extent, which in Napster's case included implementation of new filtering mechanisms. *Napster II,* 284 F.3d at 1098 ("The tolerance standard announced *applies only to copyrighted works which Plaintiffs have properly noticed* as required by the modified preliminary injunction. That is, Napster must do everything feasible to block files from its system which contain noticed copyrighted works.") (emphasis added). But the potential duty a district court may place on a vicariously liable defendant is not the same as the "ability" contemplated by the "right and ability to supervise" test. Moreover, a duty to alter software and files located on one's own computer system is quite different in kind from a duty to alter software located on another person's computer. We agree with the district court that possibilities for upgrading software located on another person's computer are irrelevant to determining whether vicarious liability exists. *Grokster I,* 259 F. Supp. 2d at 1045; *see also Napster I,* 239 F.3d at 1024 ("Napster's reserved 'right and ability' to police is cabined by the system's current architecture.").

C. Turning a "Blind Eye" to Infringement

The Copyright Owners finally argue that Grokster and StreamCast should not be able to escape vicarious liability by turning a "blind eye" to the infringement of their users, and that "[t]urning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability." *Napster I,* 239 F.3d at 1023. If the Software Distributors had a right and ability to control and supervise that they proactively refused to exercise, such refusal would not absolve them of liability. *See id.* However, although that rhetoric has occasionally been employed in describing vicarious copyright infringement, there is no separate "blind eye" theory or element of vicarious liability that exists independently of the traditional elements of liability. Thus, this theory is subsumed into the Copyright Owners' claim for vicarious copyright infringement and necessarily fails for the same reasons.

III.

Resolution of these issues does not end the case. As the district court clearly stated, its decision was limited to the specific software in use at the time of the district court decision. The Copyright Owners have also sought relief based on previous versions of the software, which contain significant -- and perhaps crucial -- differences from the software at issue. We express no opinion as to those issues.

As to the question at hand, the district court's grant of partial summary judgment to the Software Distributors is clearly dictated by applicable precedent. The Copyright Owners urge a re-examination of the law in the light of what they believe to be proper public policy, expanding exponentially the reach of the doctrines of contributory and vicarious copyright infringement. Not only would such a renovation conflict with binding precedent, it would be unwise. Doubtless, taking that step would satisfy the Copyright Owners' immediate economic aims. However, it would also alter general copyright law in profound ways with unknown ultimate consequences outside the present context.

Further, as we have observed, we live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation. *AT & T Corp. v. City of Portland,* 216 F.3d 871, 876 (9th Cir. 1999). The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude.

Indeed, the Supreme Court has admonished us to leave such matters to Congress. In *Sony-Betamax,* the Court spoke quite clearly about the role of Congress in applying copyright law to new technologies. As the Supreme Court stated in that case, "The direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress." 464 U.S. at 456 (quoting *Deepsouth Packing Co. v. Laitram Corp.,* 406 U.S. 518, 530, 92 S. Ct. 1700, 32 L. Ed. 2d 273 (1972)).

In this case, the district court correctly applied applicable law and properly declined the invitation to alter it. We affirm the district court, and remand for resolution of the remaining issues.

AFFIRMED.

Appendix B

United States District Court,

C.D. California.

METRO-GOLDWYN-MAYER STUDIOS, INC., et al., Plaintiffs,

v.

GROKSTER, LTD., et al., Defendants.

Jerry Lieber, et al., Plaintiffs,

v.

Consumer Empowerment BV a/k/a Fasttrack, et al., Defendants.

And Related Counterclaims

No. CV 01-08541 SVW PJWX, CV 01-09923 SVW PJWX.

April 25, 2003.

ORDER GRANTING DEFENDANTS GROKSTER, LTD.'S AND STREAMCAST NETWORKS, INC.'S MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO DEFENDANTS GROKSTER, LTD. AND STREAMCAST NETWORKS, INC.

WILSON, District Judge.

I. INTRODUCTION

Plaintiffs bring these actions for copyright infringement under *17 U.S.C. §§ 501*, et seq. The Court has jurisdiction pursuant to

28 U.S.C. § 1331. Plaintiffs[1] and Defendants StreamCast Networks, Inc. and Grokster, Ltd. ("Defendants") filed cross-motions for summary judgment with regard to contributory and vicarious infringement. Plaintiffs contend that Defendants' conduct renders them liable for copyright infringement committed by users of Defendants' software. Defendants argue, however, that they merely provide software to users over whom they have no control, and thus that no liability may accrue to them under copyright law.

Both parties believe that there are no disputed issues of fact material to Defendants' liability, and thus that there are no factual disputes requiring a trial. Instead, both sides maintain that the only question before the Court (as to liability) is a legal one: whether Defendants' materially undisputed conduct gives rise to copyright liability.

For the reasons stated herein, the Court GRANTS Defendants'

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[1] Plaintiffs in the *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* case, CV 01-8541, consist of two groups: 1) the "Motion Picture Studio Plaintiffs": Metro-Goldwyn-Mayer Studios, Inc.; Columbia Pictures Industries, Inc.; Disney Enterprises, Inc.; New Line Cinema Corp.; Paramount Pictures Corp.; Time Warner Entertainment; Twentieth Century Fox Film Corp.; and Universal City Studios, Inc.; and, 2) the "Record Company Plaintiffs": Arista Records, Inc.; Atlantic Recording Corp.; Rhino Entertainment; Bad Boy Records; Capitol Records; Elektra Entertainment; Hollywood Records, Inc.; Interscope Records; LaFace Records; London-Sire Records; Motown Record Co., LP; BMG Entertainment; Sony Music Entertainment, Inc.; UMG Recordings, Inc.; Virgin Records America, Inc.; Walt Disney Records; Warner Brothers Records, Inc.; WEA International, Inc.; WEA Latina, Inc.; and Zomba Recording Corp.

Plaintiffs in the *Lieber v. Consumer Empowerment BV* case, CV 01-9923, the "Music Publisher Plaintiffs," are a class of professional songwriters and music publishers.

Motions for Summary Judgment and DENIES Plaintiffs' Motion for Summary Judgment with respect to Defendants Grokster and StreamCast.

II. FACTUAL/PROCEDURAL BACKGROUND

A. *General Background*

These cases arise from the free exchange of copyrighted music, movies and other digital media over the Internet. When the actions were originally filed, Defendants Grokster, Ltd. ("Grokster"), StreamCast Networks, Inc. (formerly known as MusicCity Networks, Inc.) ("StreamCast"), and Kazaa BV (formerly known as Consumer Empowerment BV) ("Kazaa BV"), distributed software that enabled users to exchange digital media via a peer-to-peer transfer network. In the *Metro-Goldwyn-Mayer v. Grokster* case, CV-01-8541, Plaintiffs are organizations in the motion picture and music recording industries, and bring this action against Defendants for copyright infringement, pursuant to *17 U.S.C. §§ 501*, et seq. In the *Lieber v. Consumer Empowerment* case, CV-01-9923, Plaintiffs are professional songwriters and music publishers bringing a class action against the same Defendants for copyright infringement, although their Complaint lists separate causes of action for contributory infringement and vicarious infringement. The cases have been consolidated for discovery and pretrial purposes.

Each Defendant distributes free software, which users can download free of charge. Although Grokster, StreamCast and Kazaa BV independently branded, marketed and distributed their respective software, all three platforms initially were powered by the same FastTrack networking technology. The FastTrack technology was developed by Defendants Niklas

Zennström and Janus Friis, who also launched Kazaa BV.[2] FastTrack was then licensed to Kazaa BV, Grokster and StreamCast for use in each company's file-sharing software. As a result, users of these software platforms essentially were connected to the same peer-to-peer network and were able to exchange files seamlessly.

However, StreamCast no longer uses the FastTrack technology. Rather, StreamCast now employs the "open" (i.e., not proprietary) Gnutella technology, and distributes its own software--Morpheus--instead of a branded version of the Kazaa Media Desktop. Grokster, meanwhile, continues to distribute a branded version of the Kazaa Media Desktop, which operates on the same FastTrack technology as the Sharman/Kazaa software.

B. *Operation of the StreamCast (Morpheus) and Grokster Software*

Although novel in important respects, both the Grokster and Morpheus platforms operate in a manner conceptually analogous to the Napster system described at length by the district court in *A & M Records, Inc. v. Napster, Inc.,* 114 F. Supp. 2d 896 (N.D. Cal. 2000).

In both cases, the software can be transferred to the user's computer, or "downloaded," from servers operated by

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[2] Since this case was originally filed, the operation of the "Kazaa system" has passed from Kazaa BV to Defendant Sharman Networks. In addition, Kazaa BV has apparently ceased defending this action. Because Kazaa BV has failed to defend this action, the Court will enter default against Defendant Kazaa BV (an Order regarding the entry of default will issue separately). The remainder of this Order relates only to Plaintiffs' claims against Defendants Grokster and StreamCast.

Defendants. Once installed, a user may elect to "share" certain files located on the user's computer, including, for instance, music files, video files, software applications, e-books and text files. When launched on the user's computer, the software automatically connects to a peer-to-peer network (FastTrack in Grokster's case; Gnutella in the case of Morpheus), and makes any shared files available for transfer to any other user currently connected to the same peer-to-peer network.

Both the Morpheus and Grokster software provide a range of means through which a user may search through the respective pool of shared files. For instance, a user can select to search only among audio files, and then enter a keyword, title, or artist search. Once a search commences, the software displays a list (or partial list) of users who are currently sharing files that match the search criteria, including data such as the estimated time required to transfer each file.

The user may then click on a specific listing to initiate a direct transfer from the source computer to the requesting user's computer. When the transfer is complete, the requesting user and source user have identical copies of the file, and the requesting user may also start sharing the file with others. Multiple transfers to other users ("uploads"), or from other users ("downloads"), may occur simultaneously to and from a single user's computer.

Both platforms include other incidental features, such as facilities for organizing, viewing and playing media files, and for communicating with other users.

C. *Limitations of this Order*

Because Plaintiffs principally seek prospective injunctive relief, the Court at this time considers only whether the *current versions* of Grokster's and StreamCast's products and services subject either party to liability. This Order does not reach the question whether either Defendant is liable for damages arising from *past* versions of their software, or from other past activities.

Additionally, it is important to reiterate that the instant motions concern *only* the software operated by Defendants StreamCast (the Morpheus software) and Grokster (the Grokster software). Defendant Sharman Networks, proprietor of the Kazaa.com website and Kazaa Media Desktop, is *not* a party to these Motions. Accordingly, the Court offers no opinion in this Order as to Sharman's potential liability.

III. SUMMARY JUDGMENT STANDARD

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Tarin v. County of Los Angeles,* 123 F.3d 1259, 1263 (9th Cir. 1997). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

That burden may be met by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325, 106 S. Ct. at 2554. Once the moving party has met its initial burden, *Rule 56(e)* requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial.

See id. at 324, 106 S. Ct. at 2553; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

When deciding cross-motions for summary judgment, a district court retains the responsibility to examine the record to ensure that no disputed issues of fact exist, despite the parties' assurances to that effect. *Fair Housing Council of Riverside County, Inc. v. Riverside Two,* 249 F.3d 1132, 1136-37 (9th Cir. 2001); *see Chevron USA, Inc. v. Cayetano,* 224 F.3d 1030, 1038 n.6 (9th Cir. 2000).

However, the Court is not obligated "to scour the record in search of a genuine issue of triable fact. [The Court] rel[ies] on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir. 1996) (citations and internal quotation marks omitted). Furthermore, only genuine disputes -- where the evidence is such that a reasonable jury could return a verdict for the nonmoving party --"over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248, 106 S. Ct. at 2510; *see also Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must offer specific evidence from which a reasonable jury could return a verdict in its favor).

IV. DISCUSSION

Plaintiffs argue that Defendants are liable for both contributory and vicarious copyright infringement. As a threshold matter, in order to find either contributory or vicarious infringement liability, Plaintiffs must demonstrate that Defendants' end-users are themselves engaged in direct copyright infringement. *A & M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1013 n.2 (9th Cir. 2001) ("*Napster*") (citation omitted) ("Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.").

A. *Direct Infringement*

To establish a prima facie case of copyright infringement, Plaintiffs must show: (1) copyright ownership of the allegedly infringing material, and (2) unauthorized copying of the work that is the original. *Id.* at 1013 (citations omitted). With regard to the second prong, "[Plaintiffs] must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106." *Id.*

With regard to copyright ownership, Defendants, along with the Record Company and Motion Picture Studio Plaintiffs, have stipulated for purposes of these Motions that the sound recordings referenced in the First Amended Complaint are owned by each Plaintiff asserting ownership. (*See* Lapple Decl., Ex. 10; MGM Plaintiffs' First Amended Complaint ("FAC"), Exs. A and B (list of sound recordings)).

While the Music Publisher Plaintiffs have refused to join in the stipulation, the Court assumes that Plaintiffs could establish ownership or control of at least some of the copyrights listed in their Second Supplemental Rule 26 Disclosures.[3] (*See* Breen

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[3] The Court notes that this issue is moot in light of the Court's ruling.

Additionally, because the Music Publisher Plaintiffs did not stipulate to the ownership of the copyrights in question, Defendant StreamCast filed a Rule 56(f) motion requesting further discovery regarding the Music Publisher Plaintiffs' ownership of the copyrights in question. *See* Fed. R. Civ. P. 56(f). While StreamCast contends that with further discovery, the evidence will

Decl. ¶ 7 & Ex. A; Dozier Decl. ¶¶ 8, 10 & Exs. A-B; Stoller Decl. ¶¶ 17-21 & Exs. B-F; Lieber Decl. ¶ 3; Jaegerman Decl. ¶¶ 5-7 & Exs. A-E; Goldsen Decl. ¶ 4 & Exs. A-E; I. Robinson Decl. ¶¶ 6-8 & Exs. A-E.)

Furthermore, it is undisputed that at least some of the individuals who use Defendants' software are engaged in direct copyright infringement of Plaintiffs' copyrighted works. In *Napster,* the Ninth Circuit explained: "[T]he evidence establishes that a majority of Napster users use the service to download and upload copyrighted music. . . . And by doing that, it constitutes -- the uses constitute direct infringement of plaintiffs' musical compositions, recordings." *Napster,* 239 F.3d at 1013-14 (quoting transcript from district court proceedings) (internal quotation marks omitted).

Just as in *Napster,* many of those who use Defendants' software do so to download copyrighted media files, including those owned by Plaintiffs, (*see, e.g.,* Pls.' Statement of Uncontroverted Facts ("Pls.' SUF") 3(j), 3(t); Griffin Depo. 278:5-10 and Ex. 291), and thereby infringe Plaintiffs' rights of reproduction and distribution. *See Napster,* 239 F.3d at 1014 (citations omitted). Thus, for purposes of these motions, Plaintiffs have established direct infringement of their copyrighted works by some end-users of Defendants' software.[4]

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show that the Music Publisher Plaintiffs do not actually own or control several of the copyrights in question, ownership of at least some of the copyrights is not disputed. Thus, this allegedly disputed fact does not affect the Cross-Motions for Summary Judgment, but would have been relevant in a later phase of the litigation. However, this Motion also is moot in light of the Court's ruling. Accordingly, the Court DENIES Defendant Streamcast's Rule 56(f) Motion.

[4] Defendants argue that Plaintiffs should not be able to sue for copyright infringement because they misuse their copyrights by violating U.S. antitrust

B. *Contributory Infringement*

Under the doctrine of contributory copyright infringement, one is liable for contributory infringement if "with knowledge of the infringing activity, [he/she] induces, causes or materially contributes to the infringing conduct of another[.]" *Napster,* 239 F.3d at 1019 (citations and internal quotation marks omitted).

There are two factors that come into play in determining liability for contributory infringement: (1) knowledge, and (2) material contribution. The secondary infringer must "know, or have reason to know of [the] direct infringement." *Adobe Systems Inc. v. Canus Prods., Inc.,* 173 F. Supp. 2d 1044, 1048 (C.D. Cal. 2001) (citations and internal quotation marks omitted). Furthermore, with regard to the second element, "liability [for contributory infringement] exists if the defendant engages in personal conduct that encourages or assists the infringement." *Napster,* 239 F.3d at 1019 (citation and internal quotation marks omitted).

1. Knowledge of Infringing Activity

In order to be held liable for contributory infringement, the secondary infringer must know or have reason to know of the direct infringement. *See Napster,* 239 F.3d at 1020. Evidence of actual knowledge of *specific acts* of infringement is required for contributory infringement liability. *Id.* at 1021.

In *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984), sale of video

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laws. Because the Court denies Plaintiffs' Motion for Summary Judgment, *see infra,* the Court does not reach the issue of copyright misuse.

cassette recorders ("VCR"s) did not subject Sony to contributory copyright liability, even though Sony knew as a general matter that the machines could be used, and were being used, to infringe the plaintiffs' copyrighted works. Because video tape recorders were capable of both infringing and "substantial noninfringing uses," generic or "constructive" knowledge of infringing activity was insufficient to warrant liability based on the mere retail of Sony's products. *See id.* at 442, 104 S. Ct. 774. "[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement" if the product is "capable of substantial noninfringing uses." *Id.*

Here, it is undisputed that there are substantial noninfringing uses for Defendants' software--e.g., distributing movie trailers, free songs or other non-copyrighted works; using the software in countries where it is legal; or sharing the works of Shakespeare. (*See* Ian Decl. ¶¶ 11-13; Newby Decl. ¶ 12; Prelinger Decl. ¶¶ 11-18; Kahle Decl. ¶¶ 14-20; Mayers Decl. ¶ ¶ 5-8, 11, 14-17; Sinnreich Decl. ¶¶ 1-6; Busher Decl. ¶¶ 8-34; Hoekman Decl. ¶¶ 3-9.) For instance, StreamCast has adduced evidence that the Morpheus program is regularly used to facilitate and search for public domain materials, government documents, media content for which distribution is authorized, media content as to which the rights owners do not object to distribution, and computer software for which distribution is permitted. (*See* Newby Decl. ¶ 12; Prelinger Decl. ¶¶ 11-18; Kahle Decl. ¶¶ 14-20; Hoekman Decl. ¶¶ 3- 4, 5-7, 8, 9; Ian Decl. ¶¶ 11-13; Sinnreich Decl. ¶¶ 8-24, 33, 34; Mayers Decl. ¶¶ 5-7, 14-17; Busher Decl. ¶¶ 1-12.) The same is true of Grokster's software. (*See, e.g.,* Mayers Decl. ¶¶ 6-7; Pls.' Ex. 34 (D. Rung Depo. Ex. 7) at 3562-64 (describing Grokster's partnership with GigAmerica, a company which claimed to host music from 6,000 independent bands and musicians as of May

2002).)

Furthermore, as the Supreme Court has explained, the existence of substantial noninfringing uses turns not only on a product's *current* uses, but also on potential *future* noninfringing uses. *See Sony,* 464 U.S. at 442, 104 S. Ct. 774; *see also Napster,* 239 F.3d at 1020-21. Plaintiffs do not dispute that Defendants' software is being used, and could be used, for substantial noninfringing purposes.

In light of *Sony,* the Ninth Circuit in *Napster* refused to "impute the requisite level of knowledge to Napster merely because peer-to-peer file-sharing technology may be used to infringe plaintiffs' copyrights." 239 F.3d at 1020-21. Just as Sony could not be held liable for contributory infringement simply because it sold video tape recorders that could be used unlawfully, Napster would not be liable simply because it distributed software that could be used to infringe copyrights. "[A]bsent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material." *Napster,* 239 F.3d at 1021 (citing *Sony,* 464 U.S. at 436, 442-43, 104 S. Ct. 774).

Rather, liability for contributory infringement accrues where a defendant has actual -- not merely constructive -- knowledge of the infringement at a time during which the defendant materially contributes to that infringement. *See Napster,* 239 F.3d at 1020-22.

In other words, as the Ninth Circuit explained, defendants are liable for contributory infringement only if they (1) have specific knowledge of infringement at a time at which they contribute to the infringement, and (2) fail to act upon that information. *See Napster,* 239 F.3d at 1021 (citation omitted) ("We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement.").

With respect to Napster's "actual knowledge" of infringement, the court cited: (1) a document authored by one of Napster's founders mentioning "the need to remain ignorant of users' real names and IP addresses 'since they are exchanging pirated music'"; and (2) the fact that the Recording Industry Association of America notified Napster of more than 12,000 infringing files on its system, some of which were still available. *Id.* at 1020, n.5 (citation and internal quotation marks omitted).

In this case, Plaintiffs point to a massive volume of similar evidence, including documents suggesting that both Defendants marketed themselves as "the next Napster," that various searches were performed by Defendants' executives for copyrighted song titles or artists, that various internal documents reveal Defendants were aware that their users were infringing copyrights, and that Plaintiffs sent Defendants thousands of notices regarding alleged infringement. (*See, e.g.,* Hardison Depo. 173:8-20 & Ex. 129; Creighton Decl. ¶¶ 19-20 & Exs. 10-17; Charlesworth Decl. ¶¶ 4-19 & Exs. A-P; Breen Decl. ¶¶ 5-10 & Ex. A; Weiss Depo. 126:19-127:22; Kleinrock Decl. ¶¶ 23-28; D. Rung Depo. 221:5-222:8; M. Rung Depo. 31:10-17, 73:3-74:17; Weiss Depo. 89:23-91:6; Kallman Depo. 78:19-79:1; Weiss Depo. 85:12-18, 217:7- 221:12; 227:8-233:1,234:18-235:19, 329:13-331:23, 595:12-596:3 & Ex. 24; Hardison Depo. 87:1-15; 122:8-21; 170:17-171:3 & Exs. 110, 115 & 129; Borkowski Decl. Ex. 31; Griffin Depo. 157:7-12;

159:2-17; 161:5-162:10 & Ex. 260; J. Tung Depo. 75:13-77:25; Bodenstein Decl. ¶ 3 & Exs. 1-7.) In other words, Defendants clearly know that many if not most of those individuals who download their software subsequently use it to infringe copyrights.

However, Defendants correctly point out that in order to be liable under a theory of contributory infringement, they must have actual knowledge of infringement at a time when they can use that knowledge to stop the particular infringement. In other words, Plaintiffs' notices of infringing conduct are irrelevant if they arrive when Defendants do nothing to facilitate, and cannot do anything to stop, the alleged infringement.

This distinction is illustrated by *Religious Tech. Center v. Netcom On-Line Communication Servs., Inc.,* 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*"), a case informing the Ninth Circuit decision in *Napster.* The *Netcom* court distinguished a line of cases cited by the plaintiff, which concerned a landlord's liability for contributory infringement in the landlord-tenant context. These cases held "that there is no contributory infringement by the lessors of premises that are later used for infringement unless the lessor had knowledge of the intended use at the time of the signing of the lease." *Id.* at 1373 (citation and footnote omitted).

In other words, once the lease is signed, the landlord has no control over his/her tenant's use of the premises for infringing activities. Thus, any knowledge of the infringement that the landlord acquires after the tenant is in control is insufficient to establish contributory infringement liability, because there is nothing the landlord does to facilitate the infringement, or could do to stop it. In contrast, the *Netcom* court explained that "Netcom not only leases space but also serves as an access provider, which includes the storage and transmission of information necessary to facilitate [the end user's] postings to [an Internet newsgroup]. Unlike a landlord, Netcom retains some control over[ ] the use of its system." *Id.* at 1373-74.

It was critical to the court that the allegedly infringing messages were transmitted to Netcom, briefly resided on servers controlled by Netcom, and then were distributed by Netcom to other Internet systems. *See id.* "With an easy software modification Netcom could identify postings that contain particular words or come from particular individuals[,]" and delete those postings from its system (thereby preventing their propagation). *Id.* at 1376. Furthermore, Netcom was able to suspend user accounts -- as it had done on at least 1,000 occasions -- and preclude any access and distribution by a particular user through Netcom servers. *Id.*

Accordingly, the relevant time frame for purposes of assessing contributory infringement covered the entire "relationship" between Netcom and its users. Thus, the contributory infringement claim was to be decided not based on Netcom's knowledge at the time it entered into the relevant user agreement, but rather based on any knowledge acquired or possessed while Netcom contributed to the alleged infringement -- i.e., "when Netcom provided its services to allow [the end user] to infringe plaintiffs' copyrights." *Id.* at 1374 (citation omitted). The *Netcom* court denied summary judgment because there was "a genuine issue as to whether Netcom knew of any infringement [ ] before it was too late to do anything about it." *Id.*

Here, it is undisputed that Defendants are generally aware that many of their users employ Defendants' software to infringe copyrighted works. (*See, e.g.,* Grokster's Mot. at 15

("[Grokster] is of course aware as a general matter that some of its users are infringing copyrights.").) The question, however, is whether *actual knowledge of specific infringement* accrues at a time when either Defendant materially contributes to the alleged infringement, and can therefore do something about it.

2. Material Contribution to the Infringing Activity of Another

As noted *supra,* "liability [for contributory infringement] exists if the defendant engages in personal conduct that encourages or assists the infringement." *Napster,* 239 F.3d at 1019 (citation and internal quotation marks omitted). To be liable for contributory infringement, Defendants must "materially contribute[ ]" to the infringing activity. *Id.* (citations and internal quotation marks omitted).

The original formulation of this doctrine "stems from the notion that one who *directly contributes* to another's infringement should be held accountable." *Fonovisa, Inc. v. Cherry Auction, Inc.,* 76 F.3d 259, 264 (9th Cir. 1996) (emphasis added) (citations omitted). Traditionally, one is liable for contributory infringement if, "with knowledge of the infringing activity, [he or she] induces, causes or materially contributes to the infringing conduct of another[.]" *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.,* 443 F.2d 1159, 1162 (2d Cir. 1971) (cited by *Fonovisa,* 76 F.3d at 264). The Ninth Circuit concluded in *Napster* that "liability exists if the defendant engages in personal conduct that encourages or assists the infringement." 239 F.3d at 1019 (citation and internal quotation marks omitted).

In concluding that Napster materially contributed to the infringement, the Ninth Circuit relied on the district court's finding that "without the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts." *Napster,* 239 F.3d at 1022 (quoting *A & M Records, Inc. v. Napster,* 114 F. Supp. 2d at 919-20) (internal quotation marks omitted).

The district court explained that "Napster is an integrated service designed to enable users to locate and download MP3 music files." *A & M Records v. Napster,* 114 F. Supp. 2d at 920. Furthermore, the Ninth Circuit agreed with the district court that because Napster provided the "site and facilities" for direct infringement, Napster materially contributed to the infringement. *Napster,* 239 F.3d at 1022.

In reaching this conclusion, the *Napster* court followed the reasoning of *Fonovisa, Inc. v. Cherry Auction, Inc.,* 76 F.3d 259, an earlier Ninth Circuit case. In *Fonovisa,* the defendant operated a swap meet where many of the vendors sold counterfeit goods. *Id.* at 260. In concluding that the plaintiff's allegations supported its claim for contributory infringement against the defendant swap meet operator, the court found significant that the defendant did more than provide the space for vendors to sell their goods. The defendant provided other services -- utilities, parking, advertising, plumbing, customers -- which enabled the infringement to occur in large quantities. *Id.* at 264.

The court further explained that the defendant did not have to directly promote the infringing products to be held liable--it was enough that the defendant provided "the site and facilities for known infringing activity [.]" *Id.* While the defendant attempted to persuade the court that it provided rental space alone, the court explained that the defendant swap meet operator "actively str[ove] to provide the environment and the market for counterfeit sales to thrive. Its participation in the sales cannot be termed 'passive,' as [the defendant] would prefer." *Id.*

While Napster provided its software free of charge, the district court explained, and the Ninth Circuit agreed, that Napster was no different than the swap meet operator in *Fonovisa* --"The swap meet provided services like parking, booth space, advertising, and clientele. [Citation.] Here, Napster, Inc. supplies the proprietary software, search engine, servers, and means of establishing a connection between users' computers." *A & M Records v. Napster,* 114 F. Supp. 2d at 920; *see also Napster,* 239 F.3d at 1022 ("The district court correctly applied the reasoning from *Fonovisa,* and properly found that Napster materially contributes to direct infringement.").

Furthermore, in addition to the software, Napster provided a network--the "site and facilities" for the infringement to take place. Napster hosted a central list of the files available on each user's computer, and thus served as the axis of the file-sharing network's wheel. When Napster closed down, the Napster file-sharing network disappeared with it.

As noted *supra,* the court in *Netcom* reached similar conclusions. Netcom was distinct from a landlord because it was also an "access provider," and because it stored and transmitted the allegedly infringing newsgroup posts at issue in the case. *Netcom,* 907 F. Supp. at 1373-74. Netcom's services were "necessary to facilitate" the infringing postings of which Netcom allegedly had been notified. *Id.* If Plaintiffs could prove Netcom's knowledge of these postings, Netcom would be liable "for contributory infringement since its failure to simply cancel [the end user's] infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation in [the end user's] public distribution of the message." *Id.* at 1374 (citation omitted) (quoted in *Napster,* 239 F.3d at 1022).

Thus, here, the critical question is whether Grokster and StreamCast do anything, aside from distributing software, to actively facilitate -- or whether they could do anything to stop -- their users' infringing activity.

Plaintiffs argue that Defendants, like Napster, do much to facilitate the actual exchange of copyrighted files, and thus materially contribute to the infringement. In their original Motion, Plaintiffs -- who lumped together the activities of Grokster and StreamCast with those of Kazaa BV -- asserted that these Defendants provide the "means, environment, and support . . . that enable users to . . . locate, distribute and copy" copyrighted works. (Pls.'s MSJ at 21.)

As Plaintiffs' own Proposed Statement of Uncontroverted Facts reflects, however, the facts are somewhat distinct -- though materially undisputed -- with respect to each Defendant.

a. Grokster

Grokster currently distributes a branded version of the Kazaa Media Desktop, originally licensed by Consumer Empowerment BV (and now controlled by Sharman). (*See* D. Rung Decl. ¶ 3.) Grokster does not have access to the source code for the application, and cannot alter it in any way. (D. Rung Decl. ¶ 3.) Grokster's primary ability to affect its users' experience derives from its ability to configure a "start page" and provide advertising automatically retrieved by the Grokster client software. (D. Rung Decl. ¶ 3.)

Grokster does not operate a centralized file-sharing network like that seen in *Napster.* Rather, the Grokster-licensed Kazaa Media Desktop software employs FastTrack networking technology, which is licensed by Sharman and is not owned by Grokster.

One of the central features distinguishing FastTrack-based software from other peer-to-peer technology is the dynamic, or variable use of "supernodes." A "node" is an end-point on the Internet, typically a user's computer. A "supernode" is a node that has a heightened function, accumulating information from numerous other nodes. (Smith Opp. Decl. ¶¶ 70-71.) An individual node using FastTrack-based software automatically self-selects its own supernode status; a user's node may be a supernode one day and not on the following day, depending on resource needs and availability of the network.[5] (Smith Opp. Decl. ¶ 72.)

This creates a two-tiered organizational structure, with groups of nodes clustered around a single supernode. When a user starts his/her software, the user's computer finds a supernode and accesses the network. The process of locating a supernode has varied over time. The undisputed evidence is that the Grokster software is preset with a list of "root supernodes," each of which functions principally to connect users to the network by directing them to active supernodes. While Grokster may briefly have had some control over a root supernode, Plaintiffs do not dispute that Grokster no longer operates such a supernode.[6] Thus, the technical process of

[5] It is unclear whether or to what extent entities other than Grokster can control this process or other aspects of the FastTrack network, but there is no evidence -- and Plaintiffs do not argue -- that Defendants have any such role.

[6] While it appears that the primary root supernodes on the FastTrack

locating and connecting to a supernode -- and the FastTrack network -- currently occurs essentially independently of Defendant Grokster.[7]

Once a user is connected to the network, his/her search queries and results are relayed among supernodes, maximizing the breadth of the search pool and minimizing redundancy in search traffic. This also reflects a critical distinction from Napster. Napster utilized, in effect, a single "supernode" owned and operated by Napster. The company's central servers indexed files from, and passed search queries and results among, all Napster users. All Napster search traffic went through, and relied upon, Napster.

When users search for and initiate transfers of files using the Grokster client, they do so without any information being

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network have been and are operated by Kazaa BV/Sharman, it is not alleged that Grokster operates these supernodes.

[7] The initial version of FastTrack licensed to Grokster did obligate Grokster to operate a registration server. (*Id.* at ¶ 7.) A new user was required to register a unique username and e-mail address, and each subsequent use of the Grokster software verified this information against the Grokster registration server. (*Id.*) If during a subsequent use the username was blocked or removed, the user would be unable to use certain functions (such as instant messaging), though the file-sharing functions remained operative. (*Id.; see also* Kleinrock Dep. 211:2-12, Page Decl. Ex. M.) Accordingly, operation of the registration server did not provide a means for controlling either access to the network or file-sharing. Furthermore, the FastTrack software has been modified such that it no longer requires a registration database, thereby denying Grokster this role in controlling access to the FastTrack network. (*Id.* at ¶ 8.) Although Grokster continues to operate a voluntary registration server, the server is not integral to a user's network access--it can essentially be bypassed merely by registering a new username and password.

transmitted to or through any computers owned or controlled by Grokster. (*Id.* at ¶ 6.)

b. StreamCast

Certain versions of StreamCast's Morpheus product prior to March 2002 were, like Grokster today, based on the FastTrack technology. However, the current iteration of StreamCast's Morpheus is distinct in important respects from Grokster's software. First, Morpheus is now a proprietary program owned and controlled exclusively by StreamCast. In other words, StreamCast, unlike Grokster, has access to the source code for its software, and can modify the software at will. Second, Morpheus is based on the open-source Gnutella peer-to-peer platform and does not employ a proprietary protocol such as FastTrack.

Gnutella is a "true" peer-to-peer network, featuring even more decentralization than FastTrack. A user connects to the Gnutella network (comprised of all users of Gnutella-based software, including not only Morpheus but that distributed by companies such as "LimeWire," "BearShare," "Gnucleus" and others) by contacting another user who is already connected. This initial connection is usually performed automatically after the user's computer contacts one of many publicly available directories of those currently connected to the Gnutella network.[8] (Smith Opp. Decl. ¶¶ 32-33.) Plaintiffs do not

[8] These "directories" include both Gnutella clients that transmit IP addresses of other clients ("hostcaches") and websites that host lists of IP addresses for currently-connected computers ("G web caches.") Other methods of connecting to the Gnutella network include manually acquiring (i.e., by word-of-mouth) and inputting the IP address of an individual known to be connected, or querying Internet Relay Chat rooms where lists of active addresses are posted. The current version of Morpheus is preconfigured to query particular hostcaches and G web caches.

dispute that StreamCast does not itself operate any of these directories or compensate those who do for their use by Morpheus users. (*See* Smith Depo. T. 509:15-509:22; 510:18-511:2.)

Instead of using supernodes, search requests on the Gnutella network are passed from user to user until a match is found or the search request expires. (Gribble Opp. Decl. ¶¶ 27-31.) When a user selects a file, the transfer is initiated directly between the two users. (Gribble Opp. Decl. ¶¶ 32-33.)

c. Analysis

Plaintiffs appear reluctant to acknowledge a seminal distinction between Grokster/StreamCast and Napster: neither Grokster nor StreamCast provides the "site and facilities" for direct infringement. *Napster,* 239 F.3d at 1022. Neither StreamCast nor Grokster facilitates the exchange of files between users in the way Napster did. Users connect to the respective networks, select which files to share, send and receive searches, and download files, all with no material involvement of Defendants. If either Defendant closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption. (*See, e.g.,* Gribble Decl. ¶¶ 7, 13, 18, 21, 23, 27, 32, and 34; D. Rung Decl. ¶ 6.)

In contrast, Napster indexed the files contained on each user's computer, and each and every search request passed through Napster's servers. *Napster,* 239 F.3d at 1012. Napster provided the "site and facilities" for the alleged infringement, *id.* at 1022, affording it perfect knowledge and complete control over the infringing activity of its users. If Napster deactivated its computers, users would no longer be able to share files through the Napster network.

The evidence of contributory infringement cited by Plaintiffs with respect to these Defendants is not material. For instance, in their Statement of Uncontroverted Facts, Plaintiffs propose the following fact: "Defendants' systems enable, and provide an infrastructure for, users to search for, reproduce and distribute copyrighted sound recordings, motion pictures and other types of works without the authorization of the copyright owner." (Pls.' SUF 4(b)). If established by the record, the fact that Defendants provide an "infrastructure" for file-sharing would be of obvious significance in light of the *Napster* cases.

Plaintiffs, however, present no admissible evidence to create a genuine dispute regarding this fact. Rather, characteristic of the evidence cited are (1) a handful of isolated technical support e-mails from Grokster and StreamCast employees sent in response to users who encountered difficulties playing copyrighted media files;[9] and (2) evidence of previously unmoderated discussion forums in which some Grokster users searched for, and discussed the propriety of exchanging, copyrighted files. (*See* Pls.' SUF 4(b); *see also* Pls.' *SUF* 4(p).)

As an initial matter, the record indicates that Defendants have undertaken efforts to avoid assisting users who seek to use their software for improper purposes. More critically, technical assistance and other incidental services are not "material" to the alleged infringement. To be liable for contributory infringement, "[p]articipation in the infringement must be substantial. The authorization or assistance must bear a direct relationship to the infringing acts, and the contributory infringer

[9] None of the e-mails appear to reference any of the copyrighted works to which Plaintiffs have attempted to limit this Motion.

must have acted in concert with the direct infringer." *Marvullo v. Gruner & Jahr,* 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000) (citation omitted); *accord Arista Records, Inc. v. MP3Board, Inc.,* 2002 U.S. Dist. LEXIS 16165, at *16 (S.D.N.Y. Aug. 28, 2002). Here, the technical assistance was rendered *after* the alleged infringement took place, was routine and non-specific in nature, and, in most cases, related to use of *other companies'* software (e.g., third-party media player software).

The only "technical assistance" that would bear on this analysis would be that which suggests Defendants somehow facilitate or contribute to the actual exchange of files. Plaintiffs cite no such evidence. Indeed, Plaintiffs cite two e-mails to Defendant Grokster in which users complained that copyrighted files they had attempted to download contained computer viruses. (D. Rung Depo. Ex. 64, 66.) In both cases, Grokster responded with a "stock" statement explaining that Grokster has no "control over who uses the system or what is shared through it," and could not block the files. (*Id.*) This, despite the fact that the files at issue were viruses that presumably could have posed a risk to Grokster's users.

Additionally, Plaintiffs allege that Defendants communicate with users (both directly and through information displayed on a web "start page"), and can prompt users to initiate modifications or upgrades to the client software. (*See* Pls.' SUF 4(c), (e), (f), (k).) Even if this is true,[10] it is irrelevant. Whether Defendants can communicate with the users of their software and provide updates says nothing about whether Defendants facilitate or enable the exchange of copyrighted files at issue in these cases.

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[10] There is no admissible evidence that establishes, for instance, that Defendant Grokster controls the file-sharing functionality of the software it distributes.

Finally, in their effort to establish material contribution, Plaintiffs rely in large part on a declaration by Leonard Kleinrock, a professor of computer science and pioneer of Internet technology. (*See* SUF 4(a-p); Kleinrock Decl.) However, the cited portions of Prof. Kleinrock's Declaration essentially restate Plaintiffs' undisputed allegations (e.g., that Defendants have, in the *past,* operated centralized file-sharing networks or, in some previous instances, maintained FastTrack supernodes, or that Defendants provide centralized yet incidental services, such as "start pages" and chat rooms). (*See, e.g., id.* ¶ 37.) Additionally, Prof. Kleinrock's conclusion that Defendants "materially facilitate" the alleged infringement, (*see id.* ¶ 3(b)), is in the nature of a legal conclusion and reserved to the Court.

Defendants distribute and support software, the users of which can and do choose to employ it for both lawful and unlawful ends. Grokster and StreamCast are not significantly different from companies that sell home video recorders or copy machines, both of which can be and are used to infringe copyrights. While Defendants, like Sony or Xerox, may know that their products will be used illegally by some (or even many) users, and may provide support services and refinements that indirectly support such use, liability for contributory infringement does not lie "merely because peer-to-peer file-sharing technology may be used to infringe plaintiffs' copyrights." *Napster,* 239 F.3d at 1020-21 (citation omitted). Absent evidence of active and substantial contribution to the infringement itself, Defendants cannot be liable.

Because there are no disputed issues of fact material to this analysis, summary judgment is granted for Defendants.

C. *Vicarious Infringement*

The doctrine of vicarious infringement, an expansion of traditional respondeat superior, extends liability for copyright infringement to "cases in which a defendant 'has a right and ability to supervise the infringing activity and also has a direct financial interest in such activities.'" *Napster,* 239 F.3d at 1022 (quoting *Fonovisa,* 76 F.3d at 262 (citation omitted)).

There are two elements required for vicarious infringement: (1) financial benefit, and (2) the defendant's right and ability to supervise the infringing conduct. As opposed to contributory infringement, one can be liable for vicarious infringement without knowledge of the infringement. *Adobe Systems,* 173 F. Supp. 2d at 1049 (citation omitted) ("Lack of knowledge of the infringement is irrelevant.").

1. Financial Benefit

To be liable for vicarious infringement, a defendant must have a "direct financial interest in the infringing activity." *Napster,* 239 F.3d at 1023 (citing *A & M Records, Inc. v. Napster, Inc.,* 114 F. Supp. 2d 896, 921-22). The Ninth Circuit held in *Fonovisa* that financial benefit may be shown "where infringing performances enhance the attractiveness of the venue to potential customers." 76 F.3d at 263. Further, "[f]inancial benefit exists where the availability of infringing material 'acts as a "draw" for customers.'" *Napster,* 239 F.3d at 1023 (quoting *Fonovisa,* 76 F.3d at 263-64).

Here, it is clear that Defendants derive a financial benefit from the infringing conduct. The ability to trade copyrighted songs and other copyrighted works certainly is a "draw" for many users of Defendants' software. As a result, Defendants have a user base in the tens of millions. (Pls.' SUF 5(a).)

In *Fonovisa,* the court explained: "[T]he defendants reap substantial financial benefits from admission fees, concession stand sales and parking fees, all of which flow directly from customers who want to buy the counterfeit recordings at bargain basement prices." 76 F.3d at 263. Just as customers were attracted to the swap meet in *Fonovisa* because of the sale of counterfeit goods, *id.,* individuals are attracted to Defendants' software because of the ability to acquire copyrighted material free of charge.

While those who use Defendants' software do not pay for the product, Defendants derive substantial revenue from advertising. For example, StreamCast had $1.8 million in revenue in 2001 from advertising. (SUF 5(b); Griffin Depo. 446:1-14.) And as of July of 2002, StreamCast had $2 million in revenue and projects $5.7 million by the end of the year. (Griffin Depo. 455:7, 456:2-3.) Grokster also derives substantial revenue from advertising. (D.Rung.Depo.140:21-141:1.) The more individuals who download the software, the more advertising revenue Defendants collect. And because a substantial number of users download the software to acquire copyrighted material, a significant proportion of Defendants' advertising revenue depends upon the infringement. Defendants thus derive a financial benefit from the infringement.[11]

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[11] This conclusion is essentially undisputed by Defendants. (*See* StreamCast's Memo of P & A in Supp. of Partial Summ. Judgment re: Vic. Infringement; StreamCast's Reply; StreamCast's Opp. to Pl.'s Mot.; Grokster's Memo of P & A in Supp. of MSJ at 16.)

2. Right and Ability to Supervise the Infringing Conduct

As noted *supra,* vicarious liability arose from the agency doctrine of respondeat superior. *See Gershwin,* 443 F.2d at 1162. The doctrine ultimately was expanded to include other situations where a defendant has the "right and ability to supervise the infringing activity" of another. *Fonovisa,* 76 F.3d at 262 (citing *Gershwin,* 443 F.2d at 1162).

In *Fonovisa,* the Ninth Circuit held that the plaintiff's complaint alleged sufficient control. 76 F.3d at 263. The court concluded that the defendant swap meet operator had the right to supervise (or "police") the infringing conduct for the following reasons: the defendant had the right to terminate vendors for any reason; the defendant promoted the swap meet; the defendant controlled the access of customers to the booth area; the defendant patrolled the small booth area; the defendant could control direct infringers through its rules and regulations; and the defendant promoted the show. *Id.* at 262-63.

The Ninth Circuit identified similar influence and control in *Napster.* Most notably, Napster had the "right and ability to supervise its users' conduct[,]" including the central indices of files being shared and exchanged. *Napster,* 239 F.3d at 1023 (citing district court opinion). Moreover, Napster users were required to register with Napster, and access to the file-sharing system depended upon a user's valid registration. *Id.* at 1011-12, 1023-24. As a result, Napster possessed -- and frequently exercised -- the power to terminate access for users who violated company policies or applicable law. *Id.* at 1023. The "ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise" the infringing conduct. *Id.* Together, the centralized search indices and mandatory registration system gave Napster both "knowledge" of what was being exchanged, and an ability to police those exchanges.

Similarly, in a case involving vicarious liability for operation of a peer-to-peer file-sharing network, a district court in Illinois explained that the defendant had "the right and ability to supervise" the infringing conduct because the defendant had the ability to terminate users and control access to the system. *In re: Aimster Copyright Litig.,* 252 F. Supp. 2d 634, 654-55 (N.D. Ill. 2002).

Defendants argue principally that they do not have the ability to control the infringement as did these other defendants. Because they have no ability to supervise or control the file-sharing networks, or to restrict access to them, Defendants maintain that they cannot police what is being traded as Napster could. Plaintiffs contend, however, that the software itself could be altered to prevent users from sharing copyrighted files. Indeed, Napster was obligated to exercise its "right to police" to the fullest extent, which included implementing new client software filtering mechanisms. *See Napster,* 239 F.3d at 1023-24.

Plaintiffs note that Defendants' software already includes optional screens for pornographic/obscene file names, and that it could just as easily screen out copyrighted song titles. Likewise, they note that the software searches "meta data" -- information beyond the filename contained in the file itself, including artist, title, album, etc. -- and that an effective "meta data" screen could likewise be implemented quite easily. Finally, Plaintiffs contend that Defendants could with relative ease employ emerging "digital fingerprinting" technology that would block out a substantial percentage of copyrighted songs. Defendants dispute the feasibility and efficacy of these remedies.

However, whether these safeguards are practicable is immaterial to this analysis, as the obligation to "police" arises only where a defendant has the "right and ability" to supervise *the infringing conduct. See Napster,* 239 F.3d at 1023; *Fonovisa,* 76 F.3d at 262. Plaintiffs' argument -- that Defendants could do more to limit the functionality of their software with respect to copyrighted works -- forgets the critical distinction, broached above, between the Napster "system" and the software distributed by Defendants.

The infringement in *Napster* took place across an "integrated service" designed and operated by Napster. *See Napster,* 239 F.3d at 1022 (quoting district court). Napster possessed the ability to monitor and control its network, and routinely exercised its ability to exclude particular users from it. *See id.* In a virtual sense, the "premises" of the infringement were the Napster network itself, and Napster had a duty to exercise its reserved right and ability to police those premises to the fullest extent possible. The client software was an essential component of the integrated Napster system, and Napster's obligation to police necessarily extended to the client software itself.

Such is not the case here. Defendants provide software that communicates across networks that are entirely outside Defendants control. In the case of Grokster, the network is the propriety FastTrack network, which is clearly not controlled by Defendant Grokster. In the case of StreamCast, the network is Gnutella, the open-source nature of which apparently places it outside the control of *any* single entity.

While the parties dispute what Defendants feasibly could do to alter their software, here, unlike in *Napster,* there is no admissible evidence before the Court indicating that Defendants have the ability to supervise and control the infringing conduct (all of which occurs *after* the product has passed to end-users). The doctrine of vicarious infringement does not contemplate liability based upon the fact that a product could be made such that it is less susceptible to unlawful use, where no control over the *user* of the product exists.

Accordingly, there are no genuine issues of fact material to this claim, and summary judgment is appropriate.

V. CONCLUSION

The Court is not blind to the possibility that Defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefitting financially from the illicit draw of their wares. While the Court need not decide whether steps could be taken to reduce the susceptibility of such software to unlawful use, assuming such steps could be taken, additional legislative guidance may be well-counseled.

To justify a judicial remedy, however, Plaintiffs invite this Court to expand existing copyright law beyond its well-drawn boundaries. As the Supreme Court has observed, courts must tread lightly in circumstances such as these:

> The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. [Citations.] Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the

> market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the raised permutations of competing interests that are inevitably implicated by such new technology.
>
> In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never calculated such a calculus of interests.

Sony, 464 U.S. at 431, 104 S. Ct. 774 (citations omitted); *accord Teleprompter Corp. v. Columbia Broadcasting System, Inc.,* 415 U.S. 394, 414, 94 S. Ct. 1129, 39 L. Ed. 2d 415 (1974).

Therefore, for the reasons stated, the Court HEREBY GRANTS the following Motions:

1) Defendant Grokster, Ltd.'s Motion for Summary Judgment [132-1];
2) Defendant StreamCast Networks, Inc.'s Motion for Partial Summary Judgment Re: Contributory Infringement [140-1]; and
3) Defendant StreamCast Networks, Inc.'s Motion for Partial Summary Judgment Re: Vicarious Infringement [142-1].

The Court HEREBY DENIES Plaintiffs' Motion for Summary Judgment [146-1], with respect to Defendants Grokster, Ltd. and StreamCast Networks, Inc. only. In addition, the Court HEREBY DENIES AS MOOT Defendant StreamCast Networks, Inc.'s Rule 56(f) Motion [322-1].

IT IS SO ORDERED.

Appendix C

STATUTORY PROVISIONS INVOLVED

Title 17. Copyrights

Chapter 1. Subject Matter and Scope of Copyright

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

* * * *

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

* * * *

§ 114. Scope of exclusive rights in sound recordings

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): Provided, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

* * * *

Appendix D

Statement of Marybeth Peters The Register of Copyrights before the Committee on the Judiciary

United States Senate
108th Congress, 1st Session
September 9, 2003

Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks

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Mr. Chairman, Senator Leahy, Members of the Committee, good afternoon. It is always a pleasure to appear before this Committee and I thank you for inviting me to present the views of the Copyright Office today at this very timely hearing. As you were among the leaders in drafting and enacting the Digital Millennium Copyright Act ("DMCA"), I know that these issues are important to you, as they are to me.

I. Background

In 1999, a young man named Shawn Fanning developed a use of the Internet that allowed people to identify and copy music files from other people's computers. As you know, this model popularized peer-to-peer technology and a company called Napster tried to turn it into a profit-making business. Napster became phenomenally popular in a remarkably short period of time, boasting millions of registered users the very next year. But it quickly became clear that Napster was being used extensively (by millions of users) for the purpose of copying and distributing an unprecedented number of copyrighted works, primarily sound recordings of musical works.

That was the scene when you held a hearing on July 11, 2000, Mr. Chairman, entitled "Music on the Internet: Is There an Upside to Downloading?" At that hearing, Mr. Hank Barry, then the CEO of Napster, stated "It is my firm belief that the consumers who use Napster are *not* committing copyright violations."[1] We did not agree with that assessment,[2] and we were heartened when the Ninth Circuit found that "Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction . . . and distribution."[3] Napster was unable to find a way to continue operations and faded away.

The void left by Napster's departure was filled by other businesses utilizing peer-to-peer technology, such as Aimster, Grokster, and Kazaa. While some of these applications can be differentiated from Napster in terms of their internal technical operation, they still follow the same basic peer-to-peer model as Napster and it is apparent that an overwhelming number of their customers are using it for the same purpose as they and others had used Napster - copying and distributing copyrighted works. By now it is well-settled that those users are infringing copyright. Notwithstanding that, there are still some who contend that such uses are not infringing.[4]

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[1] Submitted Testimony, Hank Barry, p. 7 (emphasis in original).

[2] *See* Brief for the United States as *Amicus Curiae* at 11, n.1, 18, *A&M Records, Inc. v. Napster*, 293 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401 & 00-16403).

[3] *A&M Records v. Napster*, 293 F.3d 1004, 1014 (9th Cir. 2001) (hereinafter "*Napster*").

[4] Los Angeles Times, "Tone Deaf to a Moral Dilemma?" (Sept. 2, 2003).

Mr. Chairman, make no mistake. The law is unambiguous. Using peer-to-peer networks to copy or distribute copyrighted works without permission is infringement and copyright owners have every right to invoke the power of the courts to combat such activity. Every court that has addressed the issue has agreed that this activity is infringement.[5] It can also be a crime and the perpetrators of such a crime are subject to fines and jail time.

Some have tried to rationalize or justify their illegal behavior by attacking the victim with allegations of inflated profits or unfair dealings with recording artists on the part of the recording industry. These diversionary tactics do not alter the fundamental fact that they are trying to defend illegal activity that takes place on peer-to-peer networks. For those who do not have sympathy for the recording industry, there are other victims as well. Since Napster, subsequent versions of peer-to-peer networks permit infringement of the works of other copyright owners, large and small, from motion picture studios to independent photographers and needlepoint designers. With broadband connections becoming more and more widespread, it is increasingly more common that the larger files containing full-length motion pictures are copied back and forth.[6] This problem is not shrinking; it is not static; it is growing.

There are some who argue that copyright infringement on peer-to-peer systems is not truly harmful to copyright owners and may even help them generate new interest in their

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[5] *See Napster* at 1014; *In re: Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003) (hereinafter "*Aimster*"); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1034-35 (C.D. Cal. 2003) (hereinafter "*Kazaa*").

[6] *See* Gary Gentile, "Online Movie Service Quickens Downloads," Associated Press, September 3, 2003.

products. The law leaves that judgment to the copyright owner and it ought not be usurped by self-interested third parties who desire to use the copyright owner's work.

II. Copyright Liability of Peer-to-Peer Proprietors

Copyright law has long recognized that those who aid and abet copyright infringement are no less culpable than the direct infringers themselves.[7] There are two types of this secondary liability. Contributory infringement occurs when "[o]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another."[8] For purposes of this test, knowledge can be either actual or constructive – that is, having reason to know.[9] Vicarious liability occurs when one "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."[10]

Both of these concepts were brought to bear in the case against Napster. The Ninth Circuit agreed with the District Court that Napster had actual knowledge of the infringements it was facilitating from, for example, notices from aggrieved copyright owners.[11] There was little question but that Napster provided a material contribution in the form of "the site and facilities" for infringement.[12] http://www.copyright.gov/docs/regstat090903.html- N_12_#N_12_. Thus, Napster was determined to be a contributory infringer.

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[7] See *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911).
[8] *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).
[9] *Id.*
[10] *Id.*
[11] *Napster* at 1020-21.
[12] *Id.* at 1022 (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (hereinafter "*Fonovisa*")).

The Ninth Circuit also considered whether Napster was vicariously liable. It had no difficulty agreeing with the District Court that the infringing material on its network was a "draw" for customers, thus providing a direct financial benefit from the infringing activity.[13] The Ninth Circuit also agreed with the District Court that Napster had the ability to police its system, and thus that it had the right and ability to supervise its users' conduct.[14] Accordingly, Napster was found to be vicariously liable as well.

Thus it was that many felt reassured that the Ninth Circuit had confirmed that copyright law provides an effective and efficient way in which to address the massive infringements that can and do occur on peer-to-peer networks. Unfortunately, the *Napster* decision was not the final word on the matter.

Earlier this year, the Central District of California surprised many when it held that Grokster and Kazaa are not liable as secondary copyright infringers.[15] This decision departed from long-established precedent. For example, the court held that in order to establish contributory liability, it must be shown that "a defendant has actual – not merely constructive – knowledge of the infringement at a time during which the defendant materially contributes to that infringement."[16] Were such a standard to be adopted it would eviscerate the doctrine of contributory infringement as it would be almost impossible to meet. It would encourage the kind of sophistry we have seen from the proprietors of some peer-to-peer applications: a denial of knowledge of infringements by their customers in the face of clear and uncontested evidence that

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[13] *Id*. at 1023 (quoting *Fonovisa* at 263-64).
[14] *Id*. at 1023-24.
[15] *Kazaa*, 259 F. Supp. 2d 1029.
[16] *Id*. at 1036.

such infringement is occurring on a mind-boggling scale. Mr. Chairman, these are people whose business plan is dependent upon massive copyright infringement and any application of the law that allows them to escape liability for lack of knowledge of those same infringements is inherently flawed.

Not only was the *Kazaa* decision wrong on the law, it has serious policy consequences as well. The historical doctrines of secondary liability have served copyright owners, courts, and the public well – they provide copyright owners with the ability to obtain relief against the root cause of a series of infringements without costly, inefficient, and burdensome suits against numerous individuals.[17] Without a viable doctrine of contributory liability, this option is severely curtailed and may present the copyright owner with the unenviable choice of either accepting unremedied infringements or filing numerous suits against the individual direct infringers.

If today's hearing leaves the Committee with the impression that the law is in flux with regard to the liability of proprietors of peer-to-peer technology, that is because it is. On one side is the *Napster* decision of the Ninth Circuit and the *Aimster* decision of the Seventh Circuit, both finding liability, albeit through different paths of analysis. On the other side is the *Kazaa* decision of the Central District of California, finding no liability for Kazaa and Grokster. Hanging over all of these cases is the Supreme Court's decision in *Sony*. It is perhaps a commentary on that opinion that almost twenty years later, we still have such uncertainty

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[17] *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 437, n.18 (hereinafter "*Sony*") (citing the "dance hall cases"); *Fonovisa*, 76 F.3d 259 (suit against the operator of a swap meet for infringing activity of third-party vendors).

that three courts seem to interpret and apply it in three different ways. I believe that the correct application of the doctrines of secondary liability and the *Sony* case should produce findings of liability for the proprietors of Kazaa and Grokster as well as Napster and Aimster. If the case law evolves so as to compel the opposite result, I believe that *Sony* should be revisited either by the Supreme Court or by Congress.

III. Suits Against Individuals

Unless and until the *Kazaa* decision is overruled, copyright owners are faced with the unenviable choice to which I referred earlier. They can either resign themselves to unremedied infringements on a previously unimaginable scale, or they can file infringement actions against individual peer-to-peer users. The recording industry has chosen the latter route.

While copyright owners have expressed regret that they have felt compelled to take this step, they need offer no apologies. As I have already said, people who use peer-to-peer technology for the unauthorized reproduction or distribution of copyrighted works are breaking the law. Surprisingly, many people do not appear to realize this. I have long advocated more public education about copyright. In a perfect world, this could be done in classrooms and with billboards. But ours is not a perfect world, and public education can also be accomplished through enforcement of copyright.

The threats of litigation and even the publicity about the subpoenas obtained by the RIAA have made clear to everyone that the so-called "file-sharing" of copyrighted works is not an innocent activity without legal consequences.

As a result, it is becoming more and more difficult for people engaged in such activity to claim that they did not know what they were doing is against the law. Of course, for some users of peer-to-peer technology, even knowledge that what they are doing is illegal will not be a sufficient disincentive to engage in such conduct. But whether or not these infringers know or care that it is against the law, the knowledge that such conduct may lead to expensive and burdensome litigation and a potentially large judgment should have a healthy deterrent effect. While we would like to think that everyone obeys the law simply because it is the law and out of a sense of obligation, we also know that laws without penalties may be widely ignored. For many people, the best form of education about copyright in the internet world is the threat of litigation. In short, if you break the law, you should be prepared to accept the consequences. Copyright owners have every right to enforce their rights in court, whether they are taking action against providers of peer-to-peer services designed to profit from copyright infringement or against the persons engaging in individual acts of infringement using such services.

IV. Statutory History and Interpretation of Subsection 512(h)

It is common sense that in order to be able to take action against the users of peer-to-peer networks, the copyright owner must know who those users are.[18] Congress foresaw this need and addressed it by including in the DMCA a process by which copyright owners can learn basic

[18] The existence of section 512(h) is plain evidence that Congress did not view any existing procedures by which a suit could be filed against an unknown defendant as acceptable alternatives for copyright owners.

identifying information about alleged infringers from their internet service providers ("ISPs").[19]

The DMCA began as an effort to implement the 1996 WIPO Internet treaties.[20] Neither those treaties nor any other international instrument directly address the potential secondary liability of ISPs. However, as the treaty implementing legislation moved forward in Congress, representatives of ISPs demanded that the legislation also limit their liability under such circumstances.[21] Congress heeded this call and provided the ISPs with a huge benefit - virtually no liability for qualifying ISPs. This was balanced by a carefully developed set of obligations in the DMCA. Among those balancing obligations was the requirement that ISPs "expeditiously" respond to subpoenas to provide identifying information about subscribers accused of copyright infringement so that the controversy could be settled in court.

At the time the DMCA was drafted, at least one representative of ISPs assured this Committee that ISPs desired a solution whereby "service providers and content owners . . . work as a partnership. . . ."[22] http://www.copyright.gov/docs/regstat090903.html-N_22_#N_22_ It was asserted by that same representative that "[l]iability for copyright infringement should fall where it belongs, on the Web site operators, on those who create an infringing work or on those who reproduce it or perform it with actual

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[19] *See* 17 U.S.C. § 512(h).

[20] *See Hearings on S. 1121 Before the Senate Judiciary Committee*, 105th Cong. 25 (statement of George Vradenburg, III) (representing "over 1,400 Internet service providers, content creators, telephone companies, among others. . .).

[21] *Id.*

[22] *Id.*

knowledge of the infringement . . . ."[23] The ability of copyright owners to utilize subsection 512(h) is a critical part of that partnership as is copyright owners' ability to impose liability against those who infringe copyright. It is regrettable that at least one major ISP now rejects the compromise and the balance of the DMCA.

Some now claim that the subpoena power of subsection 512(h) is inapplicable to the activity described in subsection 512(a). As the United States District Court for the District of Columbia recently held, the plain language of subsection 512(h) demonstrates that this interpretation is not correct.[24] I agree with the court's analysis.

Subsection 512(h) instructs service providers to expeditiously respond to a subpoena. The definition of "service provider" in section 512(k) always includes service providers which qualify for the safe harbor in section 512(a). The court reasoned that this demonstrates Congress' intent to apply the subpoena power to "all service providers, regardless of the functions a service provider may perform under the four categories set out in subsections (a) through (d)."[25]

It has also been argued that the subpoena power applies only to subsection 512(c) because subsection 512(h)(2)(A) requires a copyright owner to supply "a copy of a notification described in subsection (c)(3)(A)". However, as the District Court pointed out, subsection 512(h) "is written without limitation or restriction as to its application."[26] It does not

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[23] *Id.*

[24] *In re: Verizon Internet Services, Inc., Subpoena Enforcement Matter*, 240 F. Supp. 2d 24, 30 (D.D.C. 2003).

[25] *Id.* at 31.

[26] *Id.* at 33.

require that a notice be delivered. Had Congress wished to limit the application of the subpoena power, it would have simply said so in the law. It did not.[27]

The statutory text confirms the policy of compromise behind subsection 512 – that copyright owners and ISPs work together to remedy infringement. Limiting the subsection 512(h) subpoena provisions as some have proposed would remove an important tool that parties need to remedy infringement efficiently in the peer-to-peer context.

When it enacted the DMCA, Congress did not carve out an exception from subsection 512(h) for transitory digital network communications, the activity covered by subsection 512(a). Service providers which engage in that activity received the benefits and burdens of the same bargain that service providers engaged in the other activity covered by section 512 received. In exchange for a powerful limitation on liability, they undertook some obligations, including the obligation to identify alleged infringers when served with a subsection 512(h) subpoena. When you enacted section 512, you made the right choice. There is no reason for the courts or Congress to have second thoughts about that decision.

I understand that the majority if not all of the 512(h) subpoenas that have been sought, have been sought in the United States District Court for the District of Columbia. Apparently this has necessitated the clerk of that court assigning additional staff to handle the workload. I do not take a position as to whether it is appropriate for a copyright owner to go to a single district court for subpoenas to service providers located outside that district. However, I am sympathetic to concerns about efficiency of the courts and fairness to ISPs located elsewhere in the country. There

[27] *Id.*

would certainly be advantages to the filing of these subpoena requests in the districts in which the ISPs are located.

V. Constitutional Challenges to Subsection 512(h)

The United States has intervened in the Verizon-RIAA litigation to defend the constitutionality of the DMCA. The Copyright Office has assisted the Justice Department in this effort and we firmly believe that subsection 512(h) is appropriate and constitutional. Although I am not an expert on constitutional law and I am not here to represent the Department of Justice, I will briefly summarize the arguments the United States made in its brief to the District Court.

The claim that subsection 512(h) violates the case and controversy requirement of the Constitution is belied by a review of other federal laws providing similar procedures, at least one of which has a 150 year pedigree.[28] The 512(h) procedure is also similar to discovery in advance of federal litigation pursuant to Federal Rule of Procedure 27, which finds its origins in the Judiciary Act of 1789.[29] Further, the subpoena power provided in subsection 512(h) does relate to cognizable Article III controversies, namely potential copyright infringement action as well as a dispute between the copyright owner and the ISP over access to the subscriber information.[30]

The claim that subsection 512(h) violates the First Amendment does not withstand scrutiny. Subsection 512(h)

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[28] Brief for Intervenor United States of America, p. 6, *In re: Verizon Internet Services, Inc., Subpoena Enforcement Matter*, 257 F. Supp. 2d 244 (D.D.C. 2003) (No. 03-MS-0040 (JDB)).
[29] *Id*. at 10-11.
[30] *Id*. at 9, 13.

does not proscribe spoken words or expressive or communicative conduct,[31] nor is there a realistic danger that it will significantly compromise a recognized First Amendment protection.[32] Section 512(h) merely requires a service provider to identify a person who appears to be engaging in copyright infringement, a necessary step before the copyright owner can initiate legal action. That action may range from an email or letter demanding that the alleged infringer cease and desist from the unlawful conduct to the filing of a lawsuit for copyright infringement. Section 512(h) does not offend the First Amendment any more than the filing of a lawsuit for copyright infringement. In fact, it is an essential tool for a copyright owner who intends to file such a lawsuit. Moreover, indeed, section 512 imposes sanctions on those who misuse the subpoena power, which serve to provide a safeguard.[33]

Although not addressed in the Government's briefs in intervention, I think it is important to put into context the privacy claims that some now put forward. Users of peer-to-peer networks are, by definition, opening their computers up to the world. There may be an illusion of anonymity to that activity, but we have come to learn that such connections can also make available the user's social security number, credit card numbers, and other vital information. By contrast, the 512(h) subpoena process typically involves disclosure to the copyright owner of no more than the subscriber's name, email address, phone number, and perhaps street address. This hardly seems like an invasion of privacy.

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[31] *Id*. at 15-16.
[32] *Id.* at 16-18.
[33] *Id*. at 17-18.

VI. Conclusion

The DMCA represents a carefully crafted and balanced bargain which utilizes the incentives created by pre-existing doctrines such as secondary liability as well as enlightened self-interest to encourage all stakeholders to work cooperatively to realize the potential of the Internet while respecting legal rights. Some are now selectively challenging key components of that bargain, particularly in the context of peer-to-peer technology. Taken together, the positions of Kazaa and Grokster, along with the arguments now made by Verizon, if they prevail, will leave copyright owners with little or no remedy against the most widespread phenomena of infringement in the history of this country. We know from past experience with Napster and current experience with Kazaa and Grokster that without a judicial remedy, this infringement will not stop, regardless of the availability of lawful alternatives. It is thus incumbent upon this Committee and this Congress to see to it that if the judiciary fails to enforce the DMCA and therefore fails to provide the protection to which copyrighted works are entitled, the legislature does.

Appendix E

MORPHEUS'™ LEGITIMACY CONFIRMED! APPELLATE COURT RULES IN FAVOR OF PEER-TO-PEER GIANT STREAMCAST NETWORKS, INC.™

Lower Bench Ruling Upheld in Landmark Decision; Morpheus to Continue Legal Development of New and Innovative File-Sharing Software

Los Angeles, August 19, 2004 - In what is sure to be hailed a landmark decision, the 9th Circuit U.S. Court of Appeals has upheld the legitimacy of peer-to-peer file-sharing application Morpheus. The decision deals a crushing blow to twenty-eight of the world's largest entertainment companies litigious attempt to curb the creation of new technologies for digital content delivery and distribution in a ruling that confirms that development and distribution of the Morpheus software does not violate copyright law.

"We value the role that copyright has played in our society, however it is innovation that has been the foundation of America and what has made our country great. As CEO, I am proud that Morpheus has become the first American P2P company to successfully win its fight for the right to continue to develop innovative new distributed communications technologies. In today's ruling, the 9th Circuit Court has affirmed our strong conviction from Day One that developing Morpheus was not just legally our right, but morally was the right thing to do." Michael Weiss, CEO of StreamCast Networks, Inc., which produces the Morpheus software, stated. "The timing of this decision could not be better as Morpheus is about to release the 3rd generation of peer-to-peer technology called NEOnet-a technology that has been under development since 2001. I predict this new version scheduled for release in September will become the most talked about advancement in P2P for the coming years."

"For over a century, the entertainment industry has fought new technologies, and they have been wrong every single time. We have always known that, like the VCR or the photocopier, there are a wide range of legitimate uses for our software, and the legal precedents, as well as history itself, have always been in our favor. In the end, it will be the plaintiffs themselves that stand to benefit most from our victory. I hope that with today's decision, the entertainment industry will seize the opportunity to embrace innovative technologies, like Morpheus, and begin to view us as the primary channel for the distribution of digital media to reach the masses."

"We feel the decision by the 9th Circuit is correct and well-supported by legal precedent and copyright law," Matthew Neco, General Counsel/VP Business Affairs, added. "The ruling will ultimately be shown to benefit copyright holders as well as society at large, which is the purpose of copyright law in the first place, and also allows innovation to advance without being hobbled by the entertainment industries. A huge amount of gratitude goes to our legal team of Fred Von Lohmann and Cindy Cohn from the Electronic Frontier Foundation and Charles Baker with the law firm of Porter & Hedges, LLP."

"This is a landmark decision in the still-evolving arena of software copyright law. Our foes characterized us as 'Napster, Jr.'; we proved them wrong," states Charles S. Baker, litigation partner with the law firm of Porter & Hedges, LLP, and lead counsel for StreamCast. "You buy a car; you can drive the speed limit or push down on the accelerator and go 90 mph. It's the consumer's choice - the car manufacturer can't be held responsible if you break the law," explains Baker. "This case is about the consumer's freedom of choice."

"Today's ruling will ultimately be viewed as a victory for copyright owners. As the court recognized today, the entertainment industry has been fighting new technologies for a century, only to learn again and again that these new technologies create new markets and opportunities," said EFF Senior Intellectual Property Attorney Fred von Lohmann, who argued the appeal before the Ninth Circuit. "There is no reason to think that file sharing will be any different."

The ruling asserts Judge Wilson's well-written decision, essentially confirming that distribution of the software is legal because the product is capable of substantial non-infringing uses and because StreamCast cannot control the various uses of the software. StreamCast is no more liable for copyright infringement for Morpheus than Sony was for distributing its Betamax VCR. Major entertainment companies have unsuccessfully argued they could sue the technology company behind the Morpheus, and other P2P software companies, claiming developers should be responsible for the public's use of the software to infringe copyrights.

"I only hope that members of Congress will head the advice of the judges in their warning to consider the grave consequences of satisfying the economic aims of the entertainment industry by expanding exponentially the reach of the doctrines of contributory and vicarious copyright infringement," continued Weiss.

In the court's decision written by Judge Thomas, the justices go on record stating, 'The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude.'

"Perhaps the strong recommendations of the justices will empower members of Congress to stand up for the right of innovation even in the face of unprecedented lobbying efforts of the entertainment industry to thwart it," added Weiss. "With this phase of litigation behind us, we're looking forward to getting back to what we do best: continuing to develop technologies that enable the most robust, efficient and cost-effective means of delivering the widest array of content to the widest possible audience in the shortest amount of time," StreamCast's Weiss concluded.

The Morpheus peer-to-peer file sharing software product allows millions of people to connect directly to each other and to search, share and download all types of digital media files, including audio, video, games, images, software and documents that are in the public domain or where the owner has consented to its use without payment. Over 125 million copies of Morpheus have been downloaded by users making it the 3rd most popular downloaded software in the history of the Internet according to CNET, operators of www.download.com. Morpheus 4.1.1 is available for download free of charge at www.morpheus.com

About StreamCast Networks, Inc.
StreamCast Networks, Inc., creators of the Morpheus software product is a leading global communications technology company that is revolutionizing Internet digital media distribution and communications via software that enables users to communicate directly with one another on an unprecedented scale. Users according to CNET's download.com have downloaded over 124 million copies of Morpheus.

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Appendix F

Grokster News

August 19, 2004

GROKSTER WINS!

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE OF MGM vs GROKSTER AFFIRMED THE DISTRICT COURT'S PREVIOUS RULING.

Today the United States Court of Appeals for the Ninth Circuit affirmed the previous District Court ruling denying the motion picture and recording industries request to shut Grokster down.

This is an important ruling for the technology community as a whole not merely the peer-to-peer community. This ruling clarified four important points, as presented by Fred von Lohmann of the Electronic Frontier Foundation.

The Court made clear that, for purposes of the "Betamax defense" announced by the Supreme Court in 1984, the important question is whether a technology is merely capable of a substantial noninfringing use, not the proportion of noninfringing to infringing uses. The opposite rule, urged by the entertainment industry, would kill off new technologies prematurely, as infringing uses tend to be common until the incumbent entertainment industries adjust their business models to take advantage of the new opportunities created by the new technology. (When there were no pre-recorded videocassettes, the VCR was doubtless used for more infringement than it was after there were Blockbusters on every corner.)

The Court also explained that, in order to trump the Betamax defense, a copyright owner must show that the technology developer had (1) knowledge of specific infringements (2) at a time when it could do something about those infringements. The entertainment industry, in contrast, had argued that it should be enough to simply deliver a pile of "infringement notices" to the technology developer after the fact. Such a rule would have all kinds of companies in peril. (Imagine Xerox receiving a pile of infringement notices about photocopiers that it had sold the year before -- should it be liable for infringing activities at every Kinko's in America?)

The Court also clarified that copyright law does not require technology developers to design only the technologies that the entertainment industry would approve. The plaintiffs had argued that vicarious liability principles should be interpreted to require that all innovators design their technologies to minimize the possibility of infringing uses. Of course, short of inviting Hollywood lawyers into engineering meetings, such a rule would have left innovators subject to eternal legal harassment for "not doing enough."

Finally, and perhaps most important, the Court observed that, in the long run, a competitive, unfettered market for innovation ends up helping copyright owners (even if it doesn't help today's entertainment industry oligopolists). In fact, today's ruling will likely be remembered as yet another example of the courts rescuing the entertainment industry from its own short-sightedness. In the words of the Court, "Further, as we have observed, we live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation. The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player."

Appendix G

LATEST NEWS: US COURTS AFFIRM KAZAA 100% LEGAL!

SHARMAN NETWORKS

Peer-to-Peer Software Ruled Legal In The U.S.

August 20, 2004 - Sharman Networks' Responses To Ninth Circuit Court Decision

For Immediate Release

PEER-TO-PEER SOFTWARE RULED LEGAL IN THE U.S.

August 20, 2004, Sydney, Australia - Sharman Networks, distributor of the popular peer-to-peer Kazaa software, today stated it was extremely pleased with the decision of the Ninth U.S. Circuit Court of Appeals which overnight affirmed Judge Stephen Wilson's ruling that the distribution by Grokster and Morpheus of peer-to-peer software does not violate U.S. copyright law.

"This is a victory for the technology industry and fans, artists and owners of entertainment content," said Rod Dorman, lead trial council for Sharman Networks in the U.S."

"As a result of this decision, Sharman Networks will be filing a motion for summary judgement, nearly identical to the successful motions filed by Grokster and Morpheus, and we are confident that Judge Wilson will find that our product, Kazaa, is a lawful product as well."

Mr Dorman said the court ruling sends some clear messages. “Firstly, litigation is not the answer,” he said. “Entertainment industry executives in the U.S. must now embrace peer-to-peer technology and work with software developers and other partners to commercialise it. It is time for them to take their business back from their lawyers and steer it into the future of digital distribution.”

“It also sends a message to users of peer-to-peer software that they must use the software responsibly. At the same time, users are entitled to the respect of the entertainment industry.”

Mr Dorman pointed out that the Ninth Circuit decision had no precedential effect on the legal proceedings currently underway in Australia. “The doctrines of vicarious and contributory copyright infringement have been established in the U.S. by the courts,” he said. “Although analogous doctrines are recognised by Australian courts, the principles to be applied are not identical.”

“Regardless, the reasoning of the Ninth Circuit decision is powerful, sound and persuasive. In addition, and more importantly, we are a global community and there should be consistent doctrines governing the application of copyright law to the Internet worldwide. I expect that the Australian court will consider the reasoning of the Ninth Circuit during its deliberations.”

Commenting on the U.S. court ruling, Nikki Hemming for Sharman Networks, said: “This is a fantastic result for the peer-to-peer community. This ruling reinforces similar decisions in other courts around the world that P2P is legal. Our message to the entertainment industry is to stop litigating and start partnering with us. Legislation is not the answer, commercialisation of P2P is."

"We have been committed from day one to building a better way for people to buy their digital entertainment; to communicate and to reach out to each other. This is an important positive step for us and P2P technology."

ENDS-

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