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P2P File-Sharing: What the Supreme Court Has an Opportunity to Consider

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2005 B.C. Intell. Prop. & Tech. F. 032901 P2P File-Sharing: What the Supreme Court Has an Opportunity to Consider
Margo E. K. Reder[a1] March 29, 2005

When the United States Supreme Court hears *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* (04-480) on March 29th, it has an opportunity to consider for the first time, the rights, responsibilities and liabilities of p2p network creators and their users, the content industry, and ISPs. Over 25 of the world's largest entertainment conglomerates joined together in petitioning the Supreme Court for a grant of certiorari.[1] Petitioners characterize this case as "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." [2] Respondents agree that the stakes are considerable, observing that this "case raises a question of critical importance at the border between copyright and innovation: when should distributors of p2p software — a multi-purpose tool — be held liable for infringements that may be committed by end-users of the tool?" [3]

This case will review the Ninth Circuit ruling that p2p software providers do not have secondary liability for those copyright infringements possibly committed by actual direct users of the p2p software.[4] The Ninth Circuit followed the paradigm set forth in *Sony Corp. of America v. Universal City Studios, Inc.*, [5] which drew on the staple article of commerce doctrine from patent law.[6] Under this rule, it is "sufficient to defeat a claim of contributory copyright infringement if the defendants showed that the product was capable of substantial or commercially significant noninfringing uses [and thus was a fair use]." [7] The Ninth Circuit first followed this rule in the *Napster* cases.[8] The court reasserted the *Sony*/(*Betamax*) rule in *Grokster*, concluding that since the p2p software was capable of substantial or commercially significant noninfringing uses, the copyright owners must show the software distributors had reasonable knowledge of specific infringing files.[9] Relying on this, it found that since Respondents merely offer for download distributed file-sharing software (p2p software) that is capable of a myriad of uses, including downloading infringing and noninfringing content, no liability could attach as they (1) lacked knowledge of the infringing activity; and (2) did not materially contribute to the infringing conduct.[10] Respondents offered nothing more than executable distributed file-sharing software; they provided neither support, nor storage, nor directory services that would have created a basis for secondary liability.[11]

Grokster's effect

"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." [12] Tremendously disappointed with the Ninth Circuit's refusal to hold the p2p distributors secondarily liable, the content industry turned its attention to filing lawsuits against individual (and usually anonymous or pseudonymous) users who are the actual direct infringers.[13] Hardly an efficient, economical strategy. These lawsuits begin with DMCA subpoena requests to the users' ISPs in an effort to uncover the users' identities.[14] The ISPs became the foot soldiers, for this process.[15] Another effect since *Grokster* is that more p2p software became widely available — and used.[16] Perhaps emboldened and now taking a page from *Grokster*'s playbook, and the *Grokster* decision, software distributors have a blueprint for avoiding legal liability, at least in the Ninth Circuit, at least for now.

If this was a film, the content industry would name it: "The Perfect [Digital] Storm," and true to form, they would produce a sequel, naming it "Star Wars: Attack of the [Digital] Clones." (Central casting call to Jack Valenti.) The innovators on the other hand would counter with their version — all bets are on for the title, "The [Content Industry's] Seven Deadly Sins" (emphasis: avarice); its sequel would be, simply, "Animal Farm." [17]

The Copyright Laws

The confluence of a set of factors has created this scenario that the content industry describes as "inflicting catastrophic, multibillion-dollar harm on petitioners that cannot be redressed through lawsuits against the millions of direct infringers using those services." [18] What Petitioners contend is that the present legal system's protections are insufficient to protect their assets, their business model.

The copyright laws are a product of constitutional mandate, followed by congressional and judicial oversight and interpretation. U.S. Constitution article I, section 8, awards creators a monopoly, for a limited period of time, in order to "promote the Progress of Science and useful Arts." [19] The framers vested Congress with the power to create and amend laws therefor.[20]

The point of the copyright scheme is to act as an incentive program for promoting the progress of science and the arts. Creators are compensated, and the public benefits, too — in that they may create follow-on innovations that are transformative, and later on, when the limited monopoly ends and works enter the public domain. The *Sony* Court

cautioned that copyright owners' rights "are neither unlimited nor primarily designed to provide a special private benefit."^[21] The law balances "the interests of authors and inventors in the control and exploitation" of their works on the one hand — and "society's competing interest in the free flow of ideas, information and commerce on the other hand."^[22]

The fundamental idea behind intellectual property protection is that creators are entitled to limited incentives in order to stimulate the production — and distribution — of new works. We grant limited privileges to creators because we want them to create and share their works for the benefit of society as a whole, not in order to give them total control over how their works are used.^[23]

"The copyright law, like the patent statute, makes reward to the owner a secondary consideration."^[24] The Court construes Congress's role as essentially an economic arbiter of the parties' rights, whereby it is meant to consider: (1) how much will regulation stimulate the producers and so benefit the public; and (2) how much will the monopoly granted be detrimental to the public?^[25]

"The immediate effect of our copyright law is to secure a fair return for an 'author's creative labor.' But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."^[26] Copyright protection "has never accorded the copyright owner complete control over all possible uses of his work."^[27] The law clearly differentiates this form of property — intellectual property — with real, and personal property, in which the law vests more complete ownership rights and remedies.

"[T]he Copyright Act grants the copyright holder … rights … in five qualified ways."^[28] These include the right to reproduce works; prepare derivative works; distribute copies; as well as performance and public display rights.^[29] In recognition of the myriad of changes in communications technologies, Congress has repeatedly amended copyright laws.^[30] Congress's primacy in the field of copyright law is recognized.^[31] Congress has amended copyright law a number of times in response to new technologies. For example, Congress has legislated mandatory licensing, it's modified remedial schemes, it's banned devices that intercept cable and satellite signals, and even has elected not to act.^[32] The array of new copyright laws enacted by Congress, since Sony, include:

- Satellite Home Viewer Act (1988) (establishing compulsory licenses for satellite television broadcasters);^[33]
- Audio Home Recording Act (1992) (adopting technology mandates for digital sound recordings);^[34]
- Digital Performance Right in Sound Recordings Act (1995) (creating new performance rights and compulsory licensing for digital transmission of sound recordings);^[35]
- No Electronic Theft Act (1997) (criminalizing certain noncommercial copyright infringements);^[36]
- Sonny Bono Copyright Term Extension Act (1998) (lengthening terms of protection afforded to copyrighted works);^[37]
- Digital Millennium Copyright Act (1998) (creating new access control right to copyrighted works, so content holders may assert additional claims of circumventing technological protection measures);^[38]
- Small Webcaster Settlement Act (2002) (creating compulsory license scheme for webcasting);^[39] and
- Technology, Education, and Copyright Harmonization Act (2002) (exempting educational and library use from copyright claims in effort to facilitate distance learning).^[40]

Significantly, each of these laws favors copyright holders at the expense of the public's fair use rights. Sony, too, favors copyright holders, in that it creates two new rights as against infringers: secondary liability in the form of contributory and vicarious infringement.

The Sony Case

"The judiciary's reluctance to expand protections afforded by the copyright without explicit legislative guidance is a recurring theme. 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 varied permutations of competing interests that are inevitably implicated by such new technology."^[41]

Despite this, the Supreme Court created new copyright law in one important respect: establishing the doctrine of secondary liability for infringement. This case arose in the context of Sony's sale of betamax-format analog video cassette recorders. Recognizing that consumers would be the direct users, and thus liable for any direct infringement claims (but were not defendants in this lawsuit), the Court considered for the first time, the liability, if any, of device makers.

Noting that the Copyright Act did not "expressly render anyone liable for infringement committed by another,"^[42] the Court imported the patent law "staple article of commerce" doctrine.^[43] The Court established the rule that "the sale of copying equipment … does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses. The question is thus whether the Betamax is capable of commercially significant noninfringing uses."^[44] After exploring the range of uses for VCRs, including the ability of home users to record shows in order to watch them at convenient times, the Court found that the Betamax passed its newly-crafted standard, since the recorder was capable of substantial noninfringing uses,

finding them to be fair uses. This, despite evidence that authorized uses of the Betamax comprised less than 9% of the uses to which it was commonly put.[45] The Court declined to explore every different potential use of the device, finding it sufficient that that a significant number of them would be noninfringing/fair uses. Furthermore, the Marjority expressly rejected the opportunity to refine its standard in a way that would quantify just how much use is commercially significant.[46]

The Sony Dissent

Justice Blackmun criticized the majority's "narrow standard of contributory infringement,"[47] and recommended that the case be remanded for further factual findings. Specifically, Justice Blackmun proposed adopting a proportionality standard, so

that if a significant portion of the product's use is noninfringing, the manufacturers and sellers cannot be held contributorily liable for the product's infringing uses. If [on the other hand] virtually all of the product's use … is to infringe, contributory liability may be imposed; if no one would buy the product for noninfringing purposes alone, it is clear that the manufacturer is purposely profiting from the infringement, and that liability is appropriately imposed.[48]

Significantly, in the 21 years since the Sony decision, Congress has neither adopted this view, nor amended this judicially-created secondary liability theory. Nor has Congress interfered with any of its subsequent interpretations. In fact, the proposed Induce Act can be seen as an endorsement of the Supreme Court's Sony decision in that members of Congress are attempting to fit the (yet another) proposal (that favors copyright holders) into the Sony framework.[49]

Indeed, we consider the same question, 21 years later, of secondary liability. Should the Sony majority's standard prevail,[50] or should the Court reconsider it in favor of the dissent's proportionality theory[51] … or will it ultimately matter, as technologies race ahead, so fast that there is no time, or point, in conducting studies of users' behavior, or even legitimate ways to rationally identify uses and users in an anonymous/pseudonymous age?

The Grokster Case

The Petitioners alleged that the Respondents were liable for contributory and vicarious infringement for their freely distributed p2p software. The Petitioners/copyright owners asserted that over 90% of the files exchanged (by the direct users) involved copyright protected content, of which 70% was owned by the copyright owners.[52]

The Ninth Circuit initially explained the p2p distributed file-sharing software architecture, and differentiated it from the central server software architecture offered by the original Napster company.[53] Secondary liability (both contributory and vicarious) will attach to companies maintaining proprietary centralized indexing software architecture in which a collective index of available files is maintained on their own servers.[54] Next, the court distinguished the Napster facts from the instant case, while noting the copyright owners' assertion taken, "without serious contest by the Software Distributors, that the vast majority of the files are exchanged illegally in violation of copyright law." [55]

The court first considered Petitioners' contributory copyright infringement claim, which requires findings (1) of direct infringement by the users — undisputed in this case; (2) that Respondents had knowledge of this infringement; and (3) that Respondents made material contributions to the infringement. As to the 2nd prong, the Ninth Circuit ruled, per Sony, "if substantial non-infringing use was shown, the copyright owner would be required to show that the defendant had reasonable knowledge of specific infringing files." [56] This rule, of course, asks a court to make a finding on the level of knowledge required. After considerable discovery, the district court found that the p2p software at issue was capable of substantial noninfringing uses, and therefore the Sony doctrine applied.[57] The, the level of knowledge copyright owners must demonstrate is that the Software Distributors had reasonable knowledge of specific infringing files, and failed to act on that knowledge to prevent infringement.[58] As to the 3rd prong, the court determined that Respondents did not materially contribute to the direct users' infringing activities, and that "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.’" [59] The court found that the Software Distributors neither provided the site or facilities for infringement, nor acted as access providers/ISPs.[60] In fact, there's no centralized control — no one's in charge — since no one's responsible, no one's liable. Not a desirable outcome for copyright holders, but there it is.

The court next considered Petitioners' vicarious infringement claim, which requires findings of (1) direct infringement — again, undisputed in this case; (2) direct financial benefit to the Respondents; and (3) the right and ability of Respondents to supervise the direct infringers. As to this 2nd prong, the court upheld a finding of direct financial benefit to Respondents, based upon their advertising revenue.[61] As to the 3rd prong, however, Petitioners' argument fell short. This prong describes a relationship between Respondents and the direct infringers. Yet, it is clear that the parties have no relationship. Respondents do not offer a service; rather, it is a product, in the form of p2p software.[62] Users download Respondents' software in one isolated transaction. The Software Distributors retained no control, such as the right to issue mandatory upgrades, or a point of access for filtering or searching for

infringing files, or a way to block access of individual users. No infringing files passed through Respondents's servers. And while Petitioners claimed that perhaps then, Respondents should not have conceived and distributed such software, the court disagreed, finding that the Respondents did not retain the right and ability to supervise users's conduct. The court added that Respondents have no duty to create an architecture of control — wherein they would retain liability for the infringing activities of their users.[63]

The Ninth Circuit began the Grokster discussion with the following observation, one that easily could be the concluding thought to any copyright infringement case:

[f]rom the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with the 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.[64]

Digitize + Distribute = conflict

In a sense, what we have again is a call for Congress and the courts to make accommodations, as they did 20 years ago, the difference being that this new technology is digital, ubiquitous and free p2p software, with a potential for distribution that's unlimited — rather than the older technology that was analog, and limited, both in its potential to distribute and in its potential for infringement. The internet scales both time and place, and p2p software scales distribution and costs. This "is the story of two sets of innovators. One set consists of authors, artists, and their publishers … [t]he other set consists of digital pioneers who use network technology to connect us … in unprecedented and innovative ways." [65] Two communities confronting each other … whose legal rights, responsibilities and liabilities are calibrated by copyright law — but perhaps more importantly, whose future will be informed by radically changed business and technology models.

The creators:

authors, artists, and their publishers:

creation ~ development ~ registration ~ production ~ distribution ~ assignment ~ license

At once, the best of times, and worst of times.[66] The music industry currently enjoys a near monopoly on performance and recording contracts, numerous accolades in the form of Grammy Awards, and artists recognized for platinum level sales of their works.[67] Yet, it is a mature industry, with a legacy sales-based business model ill-suited for the digital age. The industry is almost daring itself to become irrelevant, by doggedly adhering to its legacy model, along with a playbook consisting of two plays: file lawsuits; and lobby Congress for more protective laws.

The present structure of the recording industry grew out of consumer demand for audio recordings of artists. At the early stages in the distribution of sound recordings, centralized control was necessary in order to produce and distribute the physical products: the records. Typically, artists created the works, and signed on with a company/label within the recording industry which agreed to produce, market, promote, and, finally, to distribute the creative works in retail stores. The industry matured and consolidated, and now, just "[f]ive conglomerates — Sony, EMI Group, Time Warner, Bertelsmann and Vivendi Universal — hold close to 85 percent of the United States music market." [68]

Today though, the industry faces a perfect storm of consumer empowerment and choices due to technology breakthroughs, and disintermediation whereby creators are able to form direct commercial relationships with consumers.[69]

The recording industry has secured longer-than-ever [read: better-than-ever] protection for its intellectual property — most of which they purchased, rather than created … they have criminalized uses of intellectual property … they are currently rallying around the Induce Act[70] … the film industry is pursuing a similar course.[71]… Instead of making money by increasing market share and revenue, they've accomplished this for the most part through the industry's monopolistic structure and through its lobbying efforts. What else could they want?

In their perfect world:

they could forever obliterate p2p software.[72]

they would possess a veto over all future communications technologies.[73]

they would never share, or cede control.[74]

they would make even more money.[75]

they would be able to issue subpoenas from their Washington, D.C. offices, regardless of the rules of civil procedure.[76]

they would be able to join disparate plaintiffs, just because they share the same ISP.[77]

they would be able to have the ISPs automatically offer up the names of subscriber.[78]

they could further lock-down information and innovation.[79]

But it's ultimately a destructive view. Their mission is to create demand for their products — for their artists's ultimately a destructive view. Their mission is to create demand for their products — for their artists's creative works. The creators/copyright holders/labels will only stay relevant if customers find them relevant

— and also pay for the product or service. The new twist on this long-recognized principle is that now customers want the product in a range of formats for use on various platforms. They want the content on their mobile telephones, on their iPods, on their desktops, on their laptops. The copyright holders are tied to their customers, and yet, they still have not addressed this new aspect to their supplier/customer relationship.[80] Imagine if five years ago the labels sponsored online digital music sites and sold portable players. Imagine if they partnered with Apple on 2001 for its iPod launch. The recording industry can't seem to learn from success … they're late to the digital market and they're lobbying to have the Induce Act passed. (Incidentally, Apple would be a prime target should the Induce Act become law.) The recording industry was slow to develop an internet strategy; instead it clings to the familiar legacy model. Perhaps because there is no incentive to change. It's easy and simple to blame the rogue infringers for a problem. But rarely, if ever, is there just one factor at work. The current legal and industry structures certainly don't encourage change. Their vision leads to less innovation and lower capability devices. The recording industry's vision will ultimately impede innovation and progress,[81] in contravention of the copyright mandate set forth in the U.S. Constitution.[82]

The Innovators:

engineers, software developers, code writers, artists; and those who later purchase/use this content:

rip ~ burn ~ mix ~ mash-ups ~ de-construct ~ reinvent ~ copy ~ distribute ~ podcasts ~ blogs ~ mash-ups ~ follow-on innovation ~ fair use ~ free expression ~ quote ~ sample ~ reverse-engineer ~ time-shift ~ platform-shift ~ upload ~ download ~ parody ~ comment ~ criticism

A range of advances in hardware and software, size and scale, combined with consumer-friendly designs and price-points have given us a plethora of ways to communicate and interact with digital content. We continue to improve the ability of devices to record, store, manipulate, and transmit digital information. Many factors have coalesced to create this phenomenon, including:

- the digitization of copyright protected content (now we produce digital clones, rather than analog/celluloid copies that degrade with use and time);
- the internet (allowing for unlimited connectivity);
- increased memory storage;
- increased processor speed;
- increased availability of bandwidth and broadband connections;
- compression technologies (such as the MP3 and MP4 formats);
- drives capable of ripping, writing, or burning large volumes of data;
- portable storage media (including CD-ROMS, DVD-ROMS, iPods); and
- digital communications technologies (including distributed file-sharing/p2p software, email, email attachments, voice mail, VoIP, scanners, digital cameras, PDF formatting, MIDI, 3G technology, and so forth).

And to top it all, marginal distribution costs are negligible. p2p software uses are widespread, and include the Government's ARPAnet, the Military's use of mesh networks in combat; AOL's instant messaging software; photoshare programs; and office collaboration software. p2p software is a neutral tool — it was not created and does not operate solely to infringe copyrights. It's quite simply a software program enabling distributed, rather than centralized, file-sharing. p2p software essentially links together individual computers and distributes their power. p2p groups can then share text, audio, and video files stored on each other's computers. In fact, the fundamental and underlying architecture of the internet is p2p technology — it is "a distributed system of linked computers in which users … freely share content and data stored on each other's computers." [83]

Benefits of p2p

- Creates a distributed & redundant network — more robust/resilient, secure, less susceptible to attack;
- Enables real-time collaborative work with remote partners;
- Is efficient — can reduce server & bandwidth problems; spreads resources across user base;
- Is consumer-centered, powerful, and easy; and
- Is economical and cost-effective — reduces distribution costs of public domain and permissively shared art and speech.[84]

We now have a fantastic array of tools to manipulate media, transform it, and create new works. With these, potentially everyone is a creator, as well as an infringer. There are social benefits, as well as costs, to these digital communications technologies that we recognize as we attempt to reconcile them with copyright laws. The grave legal problem with p2p software, at least from the copyright holders' point of view, is that "it eradicates an important mechanism in copyright enforcement: copying and distribution control." [85] Besides which, by the time one communications technology company is sued out of existence, five more appear [think: Hydra]. Copyright holders are in a perilous position. This is, in the final analysis, though, not a one-line story about rampant willful illegal piracy, as Petitioners assert. Rather, this is primarily a story about an industry that doesn't have the level of control that it wishes for, and one at risk of being made redundant [recall domestic industries of: steel, cotton, clothing, shoes] in the face of innovation and competition. One decision by the Supreme Court will not alter this persistent reality: no matter the outcome, the industry will still have to face another, as-yet-undetermined new technology, and still learn how to compete with free.

What the Supreme Court has an opportunity to do/not to do We live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation … [H]istory has show 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.[86]

The Supreme Court is likely to rule in one of two ways. It could uphold Sony and Grokster, and disregard infringing uses no matter how prevalent, so long as the technology possesses substantial noninfringing uses. Or, it could adopt the Sony dissent’s position, which Petitioners and the Aimster court urge, that proposes to create liability for communications technology providers if there is evidence that their software is used for a disproportionate amount of infringement. Under either scenario, the Court should consider whether it is possible to reduce infringement (and thus accommodate copyright interests) without reducing innovation (or regulating technological change).

Under the first scenario, the Court essentially confirms the status quo. [Interestingly, Petitioners have fared quite well over the years under this status quo. Technologies that initially seemed threatening have "created new business opportunities that have dramatically enhanced the value of copyrighted works." [87]] This view essentially refuses to adopt measures that would curtail legitimate uses, in an effort to curtail illegitimate uses. Petitioners will still complain about a lack of legal remedy [88] — despite the fact that they continue to be able to file suits against direct infringers — it’s just not their desired strategy. [89] What Petitioners really desire is a legal remedy that completely solves all of their current business problems.

The Sony decision instructs that some, actually a lot, of infringing uses are tolerable, and so the Court refused to lock down innovation — because copyright law regulates uses, and enforcement of copyright law should not collaterally damage technological innovation. It was properly concerned that "copyright holders were trying to lever their copyright monopolies into a monopoly over" the technology. [90] Moreover, Congress could have amended the law after Sony, and again 20 years later, after Grokster, if it desired changes to this judicial secondary liability scheme.

Under the second scenario, everything changes. Petitioners, represented by a cadre of well-known and outstanding legal talent, propose a proportionality test — that is, if infringing uses outstrip noninfringing uses on p2p networks by a significant factor, the p2p software creators and distributors will have secondary liability for copyright infringement. [91] If the court adopts this view however, they will create for themselves a set of deliverables that likely exceeds their judicial mandate.

Under this scenario, the evidence needed for a proportionality analysis may be gathered only by violating users’ privacy. [92] This raises the potential for abuse of the subpoena process.

Under this scenario, the Court could second-guess the software developers’ decision-making process regarding the architecture, and functionality, and specifications of products, and thereby veto innovations to communications technologies. [93] Technology companies would hesitate to develop products for fear of lawsuits because they have already seen 321 Studios and SonicBlue sued out of business. [94] This scenario may cause such highly-mobile businesses to off-shore operations.

Under this scenario, is there any end to secondary liability? For example, would Apple Computer be liable for contributory and vicarious copyright infringement based on its manufacturer and sale of iPods? Would Dell be liable for infringement, too? [95]

Under this scenario, courts endorse the recording industry’s business model and subsidize it — and enable it to continue ignoring marketplace realities as well as improvements to technology and innovation.

This case isn’t as much about piracy, as it is about technology and who gets to control it. Petitioner’s view would allow the government to adopt measures that curtail legitimate uses in an effort to curtail illegitimate uses. Their view would also have the effect of imposing secondary liability on manufacturers, distributors and financiers of communications technologies. This could possibly create further civil disobedience. [96]

Petitioners’ framing of the question before the Supreme Court is challenging and interesting, but in the long-run inapplicable, due to ‘quicksilver’ changes in technology that render a specific decision on p2p technology moot; the only constant in technology is change. Should the Court adopt a proportionality test, it will endorse another remedy for the recording industry, in addition to the massive arsenal of infringement, access control and criminal copyright laws already in place. This will be at the expense of individual privacy, fair use and expression, ISP autonomy, as well as domestic technological innovation. Additionally, such a holding would be pyrrhic — illusory, temporary, and finally, damaging.

Real Q … is not necessarily p2p software, but: how to compete with free …

Petitioners must respond constructively to this multi-faceted complex issue. The legal copyright issue, which will be considered, is just one facet. When the MGM v. Grokster case fades away, Petitioners will still have to learn how to exploit, rather than suppress the next new technology — and recognize that new technologies, while initially disruptive, can actually make copyrights more valuable since new markets open. In fact, we still don’t know

definitively whether the impact of p2p technology is positive or negative for copyright holders. Yet, it is clear that the recording industry could exploit this technology at least as easily as hobbyists.

The recording industry shouldn't be able to shift to courts, legislators and individuals the costs of its failure to stay relevant/vibrant/consistently profitable in all of its market sectors. In fact, what the industry has is an opportunity — it could even compete with free p2p networks. It would seem impossible to compete with free, unless, consider … for example, that people pay for water.[97] It is possible to compete with free when certain conditions are met, including (1) an offer of superior products/services, and (2) added value. These are marketplace constants. Regarding the necessity of offering superior products, it is uncontroverted that the industry's audio recordings are superior to the copies available for free on p2p networks. As for adding value, by way of example, in the product sector, Kodak and Hewlett-Packard sell relatively low profit-margin goods, and make money on sales of high profit-margin supplies. In the software industry, companies make a significant investment on the initial software, sell it for a relatively low profit-margin, but then reap profits from sales of higher profit-margin products: the software upgrades. The recording industry has many such options to consider, including subscription services, packaged sets, licensing schemes, sales of music videos, and so forth. And, in fact, industry is competing with free right now — even with its old legacy, sales-based model, and it is surviving. We hear about the disastrous state of affairs within the recording industry, but one suspects reports of the recording industry "death are greatly exaggerated." [98] In the final analysis, the recording industry won't survive by suing its patrons, and patrons won't have access to the creative works if artists are not compensated. The most successful solutions will involve a combination of private, as well as public, initiatives. The industry will thrive when it embraces technology, and creates a truly mobile music market. They will accomplish this only when they better understand their consumers and make their products at least as easy to buy as to steal.

Private Initiatives

The recording industry must consider accepting responsibility for managing the copyright issues within the present legislative and judicial framework. The laws already provide a mandate and mechanism to compensate copyright holders for use. But there is no precedent, or right, to control all uses. Beyond the laws and cases, copyright holders may develop digital rights management (DRM) protocols, enabling the industry to track and control all digital assets, and be compensated for these uses.[99] Importantly, too, beyond DRM, the industry could figure out what users want, how many different platforms they'd like for the same creative work, and so forth. Consumers could have varying rights and access depending on the choices they make. With DRM initiatives, and an array of easy-to-use and pay-for products and services that appeal to users, the recording industry will even more successfully compete with free. Another factor involved is licensing. To the extent that labels and creative producers are willing to license their digital assets, they may be released and available to users — holding back on licensing deals means that everyone loses. Finally, the recording industry must engage with the recording artists in a constructive way — to loop them in and incent these artists, because communications technologies have impacted this relationship, too. Individual recording artists can now bypass the major labels and directly reach their patrons, and create their own permissions protocols under a creative commons license.[100] p2p networks are as available to the recording industry, as they are for bands,[101] and for "digital pirates" distributing those same works for free. The recording industry embarrasses itself when it rejects the remedies Congress has already provided, and when it declares that it can't compete with hobbyists, technologists, or teenagers, and when it pleads for another round of beltway help.

Public Initiatives

Judicial and Congressional assistance to the recording industry is indeed part of the strategy. But it's important for these institutions to understand the limits of their efforts, and to remain focused on fighting abuses of technology and punishing those who misuse it, rather than suppressing the technology itself.

By way of assistance, Congress could perhaps develop a mandatory licensing scheme, whereby it would create an assumption of a certain amount of infringing activity and then automatically collect a royalty on every product or service sold that might potentially be used for infringing activities.[102] A few cents for each computer sold, for each blank DVD sold, and forth. I would urge Congress to consider abbreviating the length of copyright terms, but that is not on the table at this time.[103] This, of course, would promote more creativity. One effect of the longer copyright terms is that copyrighted content is now much more valuable. So the recording industry is more protective of this content — hence it's focused on protecting these present assets, rather than learning how to create more, and compete more. This is a circular argument that they would have us engage in, that since copyrights are more valuable, we must do more to protect them. This deflects attention from the important underlying mandate of achieving the goals of the Copyright Clause.

The Supreme Court should reaffirm the Sony and Grockster decisions. The Sony Court created an acceptable and attainable balance as between copyright and innovation, while respecting fair uses within the framework of copyright infringement laws — where there are remedies as against infringers, but not as against the technology.

In the end, it will be about responding constructively — through exploiting, rather than suppressing, new technologies.

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[1] *MGM v. Grokster*, 380 F.3d 1154 (9th Cir. 2004), cert. granted, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-480).

[2] Petition for a Writ of Certiorari at 1, *MGM v. Grokster*, 380 F.3d 1154 (9th Cir. 2004), cert. granted, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-480).

[3] Electronic Frontier Foundation represents Respondent Streamcast Networks on appeal. See http://www.eff.org/IP/P2P/MGM_v_Grokster/ (Jan. 5, 2005).

[4] *MGM v. Grokster*, 380 F.3d 1154 (9th Cir. 2004).

[5] 464 U.S. 417 (1984) (5-4 decision) (popularly known as the Betamax case).

[6] See 35 U.S.C. § 271(c) (2003) ("whoever … sells … a component … or a material or apparatus for use … constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer").

[7] *Sony*, 464 U.S. at 440-42.

[8] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (Napster I); *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002) (Napster II).

[9] *Grokster*, 380 F.3d at 1160-63.

[10] *Id.*

[11] See, e.g., *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003), cert. denied sub nom., *Deep v. Recording Indus. Ass'n*, 124 S. Ct. 1069 (2004) (upholding injunction on complaint of contributory copyright infringement because site featured proprietary software, tutorials for file-swapping, and hosted a personal information as well as "club" pages, and no evidence of noninfringing uses); *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1011-12 (9th Cir. 2001) (software service liable for contributory copyright infringement since its software architecture featured centralized set of servers and proprietary indexing, and access control).

[12] *MGM v. Grokster*, 259 F. Supp. 2d 1029, 1041 (C.D. Cal. 2003) (Grokster I).

[13] In a highly publicized incident, the RIAA filed its first suit against a 12-year old living in public housing. See *Record Makers Settle First Piracy Lawsuit*, Wash. Times, Sept. 9, 2003, at <http://washingtontimes.com/business/20030909-092505-7691r.htm>.

[14] RIAA attorney Stanley Pierre-Louis conceded that "we were suing people without knowing who they were" because of the anonymous nature of the internet. Address at the Harvard Law School's Journal of Law & Technology Symposium Series (Nov. 16, 2004) (webcast available at <http://jolt.law.harvard.edu/p.cgi/speakers.html>).

[15] See *In re Charter Comm's Corp.*, No. 03-3802, 2005 U.S. App. LEXIS 31 (8th Cir. Jan. 4, 2005) (invalidated RIAA request, ruling that a DMCA 512(h) subpoena may not issue to ISP for information on alleged infringers); *RIAA v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), cert. denied, 125 S. Ct. 347 (2004) (invalidated RIAA request to ISP for subscriber information since ISP performs merely conduit functions and it cannot remove or disable access to data that resides only on subscribers' computers).

[16] See Nick Wingfield, *New File-Swapping Software Limits Sharers to a Select Few*, Wall St. J., Oct. 4, 2004, at B1 (small group software created by Grouper Networks and others "are a sign that high-tech entrepreneurs are becoming increasingly emboldened by recent federal court and regulatory-agency rulings favorable to file sharing").

[17] Acknowledgment due to Judge Kozinski who wrote in the *Mattel, Inc. v. MCA Records, Inc.*, "Barbie" dilution case that "[i]f this were a sci-fi melodrama, it might be called Speech-Zilla meets Trademark Kong." 296 F.3d 894, 898 (9th Cir. 2002), cert. denied, 537 U.S. 1171 (2003).

[18] Brief, *supra* note 2, at 2.

[19] U.S. Const. art. I, § 8, cl. 8.

[20] U.S. Const. art. I, § 8, cl. 18

[21] Sony, 464 U.S. at 429.

[22] *Id.*

[23] Committee for Economic Development, Promoting Innovation and Economic Growth: The Special Problem of Digital Intellectual Property at 61, at http://www.ced.org/docs/report/report_dcc.pdf (last visited Jan. 13, 2005).

[24] Sony, 464 U.S. at 429 (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)).

[25] Sony, 464 U.S. at 429.

[26] *Id.* at 432 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (internal quotations omitted)).

[27] Sony, 464 U.S. at 432.

[28] *Id.* at 432-33.

[29] 17 U.S.C. § 106 (2003).

[30] Sony, 464 U.S. at 430.

[31] *Eldred v. Ashcroft*, 537 U.S. 186, 222, *reh'g denied*, 538 U.S. 916 (2003).

[32] Brief in Opposition of a Writ of Certiorari at 17-18, *MGM v. Grokster*, 380 F.3d 1154 (9th Cir. 2004), cert. granted, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-480).

[33] 17 U.S.C. § 119 (2003).

[34] 17 U.S.C. §§ 1001-1010 (2003).

[35] 17 U.S.C. § 106(6), 114 (2003).

[36] 17 U.S.C. § 506(a) (2003).

[37] 17 U.S.C. § 301-305 (2003).

[38] 17 U.S.C. § 1201-1205 (2003).

[39] 17 U.S.C. §.114 (2003).

[40] 17 U.S.C. § 110(2), 112 (2003).

[41] Sony, 464 U.S. at 431.

[42] *Id.* at 434.

[43] *Id.* at 440. See *supra* note 6.

[44] Sony, 464 U.S. at 442.

[45] Brief in Opposition, *supra* note 32, at 21 n.36.

[46] Sony, 464 U.S. at 442.

[47] Sony, 464 U.S. at 499 (Blackmun, J., dissenting, joined by Justices Marshall, Powell, and Rehnquist).

[48] *Id.* at 491.

[49] For the full text of the Induce Act, see the Congressional site, at <http://thomas.loc.gov/cgi-bin/query/z?c108:S.02560>.

[50] This was accepted without reservation by the Ninth Circuit, first in *Napster*, and again in its *Grokster* decision. *Grokster*, 380 F.3d 1154 (9th Cir. 2004), cert. granted, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-480).

[51] This position has express support in the Seventh Circuit, and is evident throughout Judge Posner's decision in a preliminary injunction motion case. In *re Aimster*, 334 F.3d 643, 653 (7th Cir. 2003), cert. denied sub nom., *Deep v. Recording Indus. Ass'n*, 124 S. Ct. 1069 (2004) (advocating assessment of magnitude and probability of noninfringing as well as infringing uses, so that "if the infringing uses are substantial then to avoid liability as a contributory infringer the provider … must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses.").

[52] *Grokster*, 380 F.3d at 1158.

[53] *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001) (*Napster I*); *A&M Records, Inc. v. Napster*, 284 F.3d 1091 (9th Cir. 2002) (*Napster II*).

[54] *Id.*

[55] *Grokster*, 380 F.3d at 1160.

[56] *Id.* at 1161.

[57] *MGM v. Grokster*, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003).

[58] *Grokster*, 380 F.3d at 1162 & n.9 (expressly affirming circuit court precedent and upholding Sony's interpretation of secondary liability, and distinguishing the Seventh Circuit's proportional infringement theory).

[59] *Grokster*, 380 F.3d at 1163 (quoting *Grokster I*, 259 F. Supp. 2d at 1041).

[60] *Grokster*, 380 F.3d at 1163-64.

[61] *Id.* at 1164.

[62] This potentially has significant ramifications. If Respondents' software is a product, it would seem Sony controls. If however, it is found to be more in the nature of a service than a product, then perhaps there is an open question. The Ninth Circuit found that p2p software alone is a product. *Grokster*, 380 F.3d at 1165. The recording industry differs, and the Seventh Circuit concurred with some aspects of their assertions. In *re Aimster*, 334 F.3d at 648-49. If it is a service, then the Digital Millennium Copyright Act would have some force and effect in the form of the notice and takedown provisions, as well as the Safe Harbor provisions exempting service providers from liability to the extent that they reduce infringement. 17 U.S.C. § 512 (2003). It is also instructive to consider the Congressional scheme with regard to liability of interactive service providers for other conduct. See 47 U.S.C. § 230 (2003), immunizing such providers from liability for acts committed by their users. It is clear then, from these other statutes, that even if p2p software providers were construed to be services, they nevertheless would be exempt from liability.

[63] *Grokster*, 380 F.3d at 1164-66.

[64] *Grokster*, 380 F.3d at 1158. See *supra* note 11 and accompanying text; see also In *re Charter Comm's*, No. 03-3802, 2005 U.S. App. LEXIS 31 (8th Cir. Jan. 4, 2005).

[65] Brief of Amici Curiae Law Professors in Support of Issuance of Writ of Certiorari at 5, *MGM v. Grokster*, 380 F.3d 1154 (9th Cir. 2004), cert. granted, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-480).

[66] Charles Dickens, *A Tale of Two Cities* 1 (1859).

[67] Recording Industry Ass'n, Good-bye, 2004. Hello, 2005!, at <http://www.riaa.com/news/newsletter/122104.asp> (last visited Jan. 25, 2005).

[68] John Borland, Music industry's plans spark concern, CNET News.com, at http://news.com.com/2102-1023_3-274676.html (last visited Jan. 26, 2005).

[69] See *Grokster*, 380 F.3d at 1161-62 (describing phenomenon of recording artists reaping benefits from direct relationship with consumers).

[70] See *supra* note 49. The Induce Act proposes to make technology companies liable for manufacturing or selling

devices that could possibly infringe on copyrights. See Katie Dean, Techies Blast Induce Act, *Wired News*, July 23, 2004, at http://www.wired.com/news/politics/0,1283,64315,00.html?tw=wn_tophead_2 (last visited Jan. 26, 2005).

[71] The Motion Picture Association filed its first lawsuits in 2004. See Electronic Frontier Foundation page at http://eff.org/IP/P2P/MPAA_v_ThePeople/; see also Sarah McBride, Hollywood Sues Over File-sharing Servers, *Wall St. J.*, Dec. 15, 2004, at B3; Chris Taylor, Invasion of the Movie Snatchers, *Time*, Oct. 11, 2004, at <http://www.time.com/time/insidebiz> (last visited Jan. 26, 2005).

[72] See *Grokster*, 380 F.3d 1154 (plaintiffs sought a permanent injunction); *In re Aimster*, 334 F.3d 643 (plaintiffs sought a permanent injunction); *Napster II*, 284 F.3d 1091 (plaintiffs sought a permanent injunction).

[73] See *supra* note 49.

[74] Its monopolistic structure in possible restraint of trade has not gone unnoticed by the Department of Justice's antitrust division. See *supra* note 68. Plaintiffs in *Napster* raised allegations of antitrust, as did the *Sharman Networks* defendants in the *Grokster* case. Finally, webcasters sent a letter to the RIAA regarding such claims. See *Webcaster Alliance Fires Up Antitrust Suit Against RIAA*, at <http://azoz.com/news2/riaa04.html> (last visited Jan. 26, 2005).

[75] See International Federation of the Phonographic Industry, IFPI:05 Digital Music Report, at <http://www.ifpi.org/> (last visited March 26, 2005) (highlighting record earnings for digital download market; quadrupling of legal download sites; and favorable consumer sentiment for purchasing music online); cf. Video Software Dealers Association annual report, at <http://www.vsda.org> (last visited March 26, 2005) (reporting that home videos now account for 60% of Hollywood's revenue and this has changed the way Hollywood does business).

[76] The rules require that a subpoena be filed locally. Fed. R. Civ. P. 45. Consequently the case against an alleged infringer at Boston College had to be re-filed. See http://www.bc.edu/bc_org/avp/law/st_org/iptf/headlines/content/2003121701.html (last visited Jan. 26, 2005).

[77] *Twentieth Century Fox Film Corp. v. Does 1-12*, No. C 04-04862 WHA (N.D. Cal. Dec. 1, 2004) (upholding Judge Ware's order denying Plaintiffs' renewed request for joinder of unrelated defendants).

[78] The courts have not been receptive to this strategy. See *supra* note 15 and accompanying text.

[79] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004), at <http://www.Free-culture.cc/freecontent>.

[80] Likewise customers can't expect to infringe copyrights unlimitedly, and still expect there will be producers of such works in the future.

[81] See Nick Wingfield, *New File-Swapping Software Limits Sharers to a Select Few*, *Wall St. J.*, Oct. 4, 2004, at B1.

[82] U.S. Const. art. I, § 8, cl. 8.

[83] *Piracy of Intellectual Property on Peer-to-Peer Networks*, Hearing Before the House Judiciary Committee's Subcommittee on Courts, the Internet and Intellectual Property (Sept. 26, 2002) (statement of Gigi B. Sohn, President, Public Knowledge), at <http://www.house.gov/judiciary/sohn092602.htm>; see also Brief of Amici Curiae Computer and Communications Industry Association and Internet Archive at 13-17, *MGM v. Grokster*, 380 F.3d 1154 (9th Cir.), cert. granted, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-480).

[84] *Id.*

[85] Elizabeth Miles, Note, *In re Aimster & MGM, Inc. v. Grokster, Ltd.: Peer-to-Peer and the Sony Doctrine*, 19 *Berkeley Tech. L.J.* 21, 26 (2004).

[86] *Grokster*, 380 F.3d at 1167.

[87] Brief in Opposition, *supra* note 32, at 21-22 & n.37; see also Video Software Dealers Association annual report, at <http://www.vsda.org> (last visited March 26, 2005) (reporting that home videos now account for 60% of Hollywood's revenue, and this has changed the way Hollywood does business).

[88] See *supra* note 2, at 2-3 (Respondents' software fosters, and is 'inflicting catastrophic, multibillion-dollar harm on petitioners that cannot be redressed through lawsuits against the millions of direct infringers using those services, and as such, leaves 'these harms unremediated').

[89] See Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 *Antitrust Bull.* 423, 442 (2002)

(“chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem”).

[90] In re Aimster, 334 F.3d at 648.

[91] See supra note 2, at 25-28.

[92] The only way to identify users is to rely on sometimes cryptically-named files, and then try and identify usually pseudonymous users. It’s anything but precise and targeted. See supra note 15.

[93] See Nick Wingfield, supra note 81 (noting Grouper Networks created restrictions in its technology so as to avoid potential of defending against copyright infringement charges); see also Petitioners’ Brief, supra note 2, at 27 (Respondents point out it would be legally significant if there was evidence that software creators “could have taken reasonable steps to prevent infringement”).

[94] See Ashlee Vance, 321 Studios to make DVD copying software no more, The Register, Aug. 4, 2004, at http://www.theregister.co.uk/2004/08/04/321_n0_more/ (last visited March 26, 2005) (detailing how three injunctions forced the company out of business formaking a product that allowed consumers to create back-up copies of their software); Arik Hesseldahl, So Long, SonicBlue, Forbes, Mar. 24, 2003, at http://www.forbes.com/2003/03/24/cx_ah_0324tentech.html (last visited March 26, 2005) (detailing how "Hollywood freaked out" when SonicBlue created a DVR that included a commercial-skipping feature, and so 28 of the leading studios sued SonicBlue).

[95] See Declan McCullagh, Antipiracy bill targets technology, News.com, June 17, 2004, available at http://news.com.com/Antipiracy+bill+targets+technology/2100-1028_3-5238140.html (noting that copyright bill proposes to prohibit some consumer electronics devices) (last visited Feb. 1, 2005).

[96] See, e.g., Lorne Manly & John Markoff, Steal This Show, N.Y. Times, Jan. 30, 2005, at <http://www.nytimes.com/2005/01/30/arts/television/30manl.html> (last visited Feb. 1, 2005) (detailing hobbyists’ efforts to turn copyrighted content in “something more flexible, highly portable and commercial free”); Scott Kirsner, Downhill Battle wages uphill fight vs. music industry, Boston Globe, Jan. 10, 2005, at <http://www.boston.com/business/technology/kirsner/> (last visited Feb. 1, 2005) (detailing copyright industry protest group’s efforts including “Grey Tuesday” civil disobedience day).

[97] See Hearings, supra note 83, at 6 n.16.

[98] Mark Twain wrote this in response to a news report of his death. (1897). See Brief in Opposition, supra note 32, at 28-29 (citing studies and reports of recording industry profits); <http://www.riaa.com> (citing increased value of content industry, but not actual sales figures); Ross Johnson, Video Sales Abroad Are Good News in Hollywood. Shhh., N.Y. Times, Jan. 31, 2005, at <http://www.nytimes.com/2005/01/31/business/media/31dvd.html?oref=login> (citing how Hollywood publicizes its losses (\$3.5 billion every year) – yet refuse to divulge sales and revenue figures) (last visited Feb. 1, 2005). Cf. Dave Ralis, Stop or I’ll sue, <http://www.phillyBurbs.com>, Aug. 4, 2003 (citing tax records of \$1,282,599 salary paid to the Recording Industry CEO in 2003, and citing OpenSecrets.org report of the industry’s multi-million dollar legal budget.)

[99] For examples of digital rights management, see <http://digital-rights-management.org/start.php>; “about DRM,” at <http://www.law.berkeley.edu/institutes/bclt/drm/resources.html>.

[100] See the Creative Commons license program, at <http://creativecommons.org/>.

[101] There are now viable alternatives to the major labels for recording artists, too. See <http://magnatune.com/>.

[102] See supra note 99; see also Digital Rights Management Conference 2005 (conferees focusing on technological, economic, legal, & political aspects of digital rights management), at <http://www.digital-rights-management.org>.

[103] Eldred v. Ashcroft, 537 U.S. 186, 222, reh’g denied, 538 U.S. 916 (2003) (affirming retroactive and prospective extension of copyright terms).