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File-Sharing Software and Copyright Infringement: Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.

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File-Sharing Software and Copyright Infringement: Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.

Summary

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. is a Ninth Circuit Court of Appeals decision considering allegations of contributory and vicarious copyright infringement by companies which distribute peer-to-peer file-sharing software. The software facilitates direct copyright infringement by its users. It is the first decision to reject infringement claims against and find in favor of companies distributing the software. To date, other digital media file-sharing software decisions have found in favor of the copyright holders, most notably *A & M Records, Inc. v. Napster, Inc.* and *In re: Aimster Copyright Litigation.* But in *Grokster*, the court granted summary judgment for the software companies. This report provides a general overview of peer-to-peer file-sharing technology and then examines why *Grokster* produced a result different from those in other peer-to-peer software litigation. On December 10, 2004, the U.S. Supreme Court granted a writ of certiorari to hear an appeal in the *Grokster* case.

One explanation for *Grokster* is the differences in the technological design of the various peer-to-peer systems. While the pioneering file-sharing network Napster provided exclusively for the exchange of audio files, the software companies sued in *Grokster* employ more advanced peer-to-peer technology that allows the additional sharing of video clips, text documents, and computer programs. The *Grokster* court acknowledged these expanded capabilities as legitimate uses of the software, and thus became the first court to accept the "substantial, noninfringing uses" defense to copyright infringement liability, a defense developed by the U.S. Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.* Two months after the U.S. district court decision in *Grokster*, the Seventh Circuit Court of Appeals in *Aimster* also expressed qualified support for application of the *Sony* defense to file-sharing software, but nevertheless upheld a preliminary injunction against Aimster because the software company failed to demonstrate that its peer-to-peer service was ever actually used for any substantial noninfringing purposes.

Another factor determinative to the *Grokster* court was the software companies' limited contribution to the infringing activity of its software users, and their limited ability to police their networks. Whereas Napster actively provided on-going services and technical support to its users in locating and downloading music files, the *Grokster* defendants distribute software that operates across peer-to-peer networks outside of their control and supervision. This more sophisticated software allows users to connect to each other and swap files directly, without the need for a centralized search index or website to facilitate the file transfers, as Napster had maintained.

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File-Sharing Software and Copyright Infringement: Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.

Background. File-sharing software programs that create "peer-to-peer" (P2P) network connections between computers enable the transmission of data and communications over the Internet. A variety of P2P programs, such as those offered by Grokster, Ltd., StreamCast Networks, Inc., and Kazaa BV, are typically available for free download from the distributors' websites. After installing a P2P program (called a "client application") onto the computer, the user runs the application to connect to the computers of other users of that particular P2P software who are currently "on-line." The client application allows users to "share" files located on their computer hard-drives. Once users make files available for sharing with each other, anyone who uses the same company's software to connect to the respective P2P network may locate and download desired files easily and at no cost. For example, a user of the Grokster software can directly access files saved on another Grokster user's computer hard-drive. Or a user can search for a particular file name, such as an MP3 song title, across all users' computers connected to the Grokster network, and then download a copy of that file onto his or her computer.

The motion picture and music recording industries brought several legal actions alleging copyright infringement against companies that distribute file-sharing software. Prior to *Grokster*, nearly all of the cases found in their favor, including *A & M Records, Inc. v. Napster, Inc.*[1] and *In re: Aimster Copyright Litigation*.[2] However, in *Metro-Goldwyn-Mayer Studios, Inc. (MGM) v. Grokster, Ltd.,*[3] the defendant software distributors were found not liable for copyright infringement. *Grokster* is the first P2P file-sharing case to date involving allegations of music piracy where a court has shielded P2P software companies from liability.

***MGM Studios, Inc. v. Grokster, Ltd.* in U.S. District Court.** Plaintiffs, twenty-eight organizations in the motion picture and music recording industries, sued several P2P companies for contributory and vicarious copyright infringement. The plaintiffs and defendant companies Grokster and StreamCast Networks filed cross-motions for summary judgment because "the only question before the [c]ourt (as to

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[1]239 F.3d 1004 (9th Cir. 2001).

[2]252 F.Supp.2d 634, 648 (N.D. Ill. 2002), *aff'd,* 334 F.3d 643 (7th Cir. 2003).

[3]259 F.Supp.2d 1029 (C.D. Ca 2003) *aff'd,* 380 F.3d 1154 (9th Cir.), *cert. granted,*___ S.Ct. ___, 2004 WL 2289054, 73 U.S.L.W. 3247 (U.S. Dec 10, 2004) (No. 04-480).

liability) is a legal one: whether [d]efendants' materially undisputed conduct gives rise to copyright liability."[4]

The court granted a summary judgment determining that defendant companies, Grokster and StreamCast, were not secondarily liable for copyright infringement committed by users of their P2P software (called Grokster and Morpheus, respectively).[5] Finding no evidence that the defendants had any material involvement in their users' infringing conduct, the court held that Grokster and StreamCast were not liable for contributory infringement.[6] Summary judgment was also warranted on the vicarious infringement claim, the court reasoned, because there was no evidence showing that the P2P companies had the right or ability to supervise the conduct of end-users of their products.[7]

Contributory Infringement. To succeed on a claim of contributory or vicarious infringement, plaintiffs must first demonstrate that at least some users of defendants' software are themselves engaged in *direct* infringement of plaintiff's copyrighted works. The district court declared that "many of those who use [d]efendants' software do so to download copyrighted media files, including those owned by [p]laintiffs, and thereby infringe [p]laintiffs' rights of reproduction and distribution."[8]

The concept of contributory infringement has its roots in tort law and the notion that one should be held accountable for directly contributing to another's infringement.[9] For contributory infringement liability to exist, a court must find that the secondary infringer "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."[10]

Although defendants were "generally aware" that their software programs were being used by their customers for infringing activities, the court found that level of knowledge insufficient to establish liability for contributory infringement.[11] The court relied on the 1984 U.S. Supreme Court case, *Sony Corp. of America v. Universal City Studios, Inc.*,[12] which ruled that Sony's sale of video cassette recorders (VCRs) did not subject the manufacturer to liability for contributory copyright infringement. The Court explained that since VCRs are capable of both infringing and noninfringing uses, generic knowledge of and potential infringement

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[4] 259 F.Supp.2d at 1031.

[5]This summary judgment only applies to software offered by defendants Grokster and StreamCast Networks. Another defendant, Sharman Networks, distributor of Kazaa Media Desktop software, was not a party to these summary judgment motions. *See id.* at 1033.

[6]*Id.* at 1043.

[7]*Id.* at 1046.

[8]*Id.* at 1034-1035.

[9]Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996).

[10]*Napster,* 239 F.3d at 1019.

[11]*Grokster,* 259 F.Supp.2d at 1037-1038.

[12]464 U.S. 417 (1984).

were insufficient to impose liability on the Betamax VCR manufacturer, Sony.[13] The *Grokster* court analogized P2P software to the VCR, finding the former to be capable of substantial current and potential future noninfringing uses, such as searching for files available in the public domain or downloading content that has been authorized for distribution by the copyright holder.[14]

The court agreed with the software companies' argument that in order to be liable for contributory infringement, the requisite level of knowledge is actual knowledge of *specific* infringement at a time when either defendant materially contributes to the infringement, and can use that knowledge to stop it.[15] Although the plaintiffs had sent the defendants thousands of notices regarding infringing conduct, the notices are "irrelevant if they arrive when [d]efendants do nothing to facilitate, and cannot do anything to stop, the alleged infringement."[16]

The court also determined that neither Grokster nor StreamCast had satisfied the second element of contributory copyright infringement liability, namely, encouraging, assisting, or materially contributing to the infringing activity. Aside from distributing the P2P software, Grokster and StreamCast do not do anything actively to facilitate their users' infringing activity.[17] Using the Grokster and Morpheus client applications to connect to each other directly, individuals can send and receive files without having any network traffic pass through servers owned or controlled by defendant companies. This decentralized file-sharing network is distinctly different from the Napster system, in which all search requests went through and relied upon Napster's central servers. Applying the reasoning of *Fonovisa, Inc. v. Cherry Auction, Inc.,*[18] a case which found contributory copyright infringement by operators of a swap meet where vendors were selling counterfeit records to swap meet attendees, the *Napster* court determined that Napster materially contributed to the infringing conduct by providing the "site and facilities" for direct infringement. In contrast, the *Grokster* court stated that neither Grokster nor StreamCast provides the "site and facilities" for direct infringement, and the companies did not actively and substantially participate in the exchange of files between their users.[19]

Vicarious Infringement. Liability for vicarious copyright infringement is warranted in cases where the defendant "has a right and ability to supervise the

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[13]*Grokster,* 259 F.Supp.2d at 1035, citing *Sony,* 464 U.S. at 442.

[14]The court cited, for example, "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 id.*

[15]*Id.* at 1038.

[16]*Id.* at 1037.

[17]*Id.* at 1039-1043.

[18]*Fonovisa*, *supra* note 9. The court found that swap meet organizers materially contributed to the infringing activity of the vendors by providing "support services" such as booth space, parking, utilities, advertising, plumbing, and customers.

[19]*Grokster,* 259 F.Supp.2d at 1041-1043.

infringing activity and also has a direct financial interest in such activities."[20] The district court noted that although the defendants offered their P2P software free to the public, they derive substantial revenue from advertising. The more people who download the software, the higher the revenue generated. The defendants therefore had a "direct financial interest" in the infringing conduct.[21]

Nonetheless, in the court's view, Grokster and StreamCast lacked the ability to supervise or control their users' conduct because they could not terminate users or restrict access to the P2P networks. The court distinguished the defendants' software from the Napster integrated "system." While Napster possessed the ability to monitor and police its file-sharing network, and often exercised its ability to exclude particular users from the network, the *Grokster* defendants merely distribute the P2P software and have no similar power over the end-users of the software once it has passed into their hands.[22]

***Grokster* in the Ninth Circuit Court of Appeals.** At the outset, the court noted that the question of direct infringement, although undisputed, was not before it. Rather, the issue was one of secondary, i.e., contributory and/or vicarious copyright infringement liability, and it fully concurred in the district court's "well reasoned analysis" that defendants were not liable under either theory.

Contributory Infringement. The three elements required to prove contributory copyright infringement are (1) direct infringement by a primary infringer, (2) knowledge of the infringement, and (3) material contribution to it. The Court of Appeals generally tracked the reasoning of the lower court and concluded that the architecture of the P2P systems precluded the defendants from having requisite knowledge of and making a material contribution to copyright infringement.

The court invoked the "staple article of commerce" doctrine from patent law, cited by the Supreme Court in *Sony,* for the proposition that "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.'"[23] With respect to the "knowledge"element, as interpreted by the Ninth Circuit in its *Napster* decision, this means:

> [I]f 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

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[20] *Fonovisa,* 76 F.3d at 262, citing Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F2d. 1159, 1162 (2d. Cir. 1971).

[21] "Just as customers were attracted to the swap meet in *Fonovisa*, because of the sale of counterfeit goods, individuals are attracted to Defendants' software because of the ability to acquire copyrighted material free of charge." *Grokster,* 259 F.Supp.2d at 1044.

[22] *Id.* at 1045.

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

> shown, the copyright owner would be required to show that the defendant had reasonable knowledge of specific infringing files.[24]

Because the court found that there is no question that P2P software is capable of substantial noninfringing uses, it would *not* impute constructive knowledge of infringement by others to the defendants. They must have "reasonable knowledge of specific infringement" to satisfy the knowledge requirement. And, the copyright owners needed to establish that the software distributors had specific knowledge of the infringement at a time in which they contributed to it and failed to act upon their knowledge. This knowledge standard was not met by the plaintiffs' after-the-fact notices of infringement. By the time they arrived, the software distributors could not prevent it.

In the court's view, the software distributors did not, indeed, could not materially contribute to infringing activity as a consequence of the P2P program structure, discussed below. The distributors do not provide a "site and facility" for the infringement, the infringing material does not reside on the defendants' computers, nor do they have the ability to suspend user accounts.

Vicarious Infringement. In order to establish vicarious infringement, a copyright owner must demonstrate (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.[25] Concurring with the district court, the Court of Appeals found it to be undisputed that there was both direct infringement and the defendants benefitted financially from the software via advertising revenue. But "the right and ability to supervise infringers" was missing. The court reiterated the lower court's finding that the communication between the defendants and their users does not provide a point of access for filtering or searching for infringing files since infringing material and index information do not pass through the defendants' computers.

The Court of Appeals considered and rejected the argument that "a right to supervise" could be interpreted to mean that the distributors had a responsibility to alter the software to prevent users from sharing copyrighted files. Only where one has already been determined to be liable for vicarious infringement does a duty to exercise "police" powers arise. It also rejected what it characterized as a "blind eye" theory of liability for vicarious infringement. Copyright owners argued that "turning a blind eye to detectable acts of infringement for the sake of profit" should give rise to liability.[26] But the court found that there is no separate "blind eye" theory or element of vicarious liability that exists independently of the traditional elements of liability.

In closing, the Court of Appeals echoed the district court in declining to interpret copyright liability law to achieve public policy goals that might protect copyright owners' economic interests but alter general copyright law in profound

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[24] *Id.* (Citations omitted.)

[25] *Id.* at 1164.

[26] *Id.* at 1166.

ways with unknown ultimate consequences. That function is the prerogative of the Congress.

Grokster Compared to Napster and Aimster. In the *Napster* and *Aimster* cases, the courts found that the plaintiff record companies would likely prevail on their contributory and vicarious infringement claims and granted preliminary injunctions against the defendant companies.[27] The distinction in the outcome in *Grokster* is based, in large part, on the technological differences in the design of the file-sharing networks in question and, to some extent, judicial uncertainty over the reach of the standards articulated by the U.S. Supreme Court in *Sony*.

P2P Network Architecture. Unlike Napster and Aimster, Grokster and Morpheus software users connect to file-sharing networks with no central database server. Instead, Grokster provides for dynamic "root supernodes," which are a group of randomly chosen computers which are connected to the P2P network at a particular time. The Grokster software "self-selects" its supernode status for the day; a user's computer can function as a supernode one day and not on the following day.[28] As a supernode, a connected P2P user's computer acts as an index server, collecting information about shared files located on other users' computers. "Normal" Grokster clients connect to their "neighborhood" supernode to perform searches for files.[29] This creates a "two-tiered" organizational distribution structure for the P2P network, with groups of regular Grokster users clustered around a single supernode.[30] All search traffic and information passes through these personal computers acting as supernodes, none of which are owned or controlled by Grokster.

StreamCast's Morpheus network operates in an even more decentralized fashion. While Grokster licenses proprietary FastTrack networking technology from Sharman Networks, StreamCast bases its Morpheus program on a non-proprietary, "open-source"[31] technology called Gnutella.[32] The Gnutella P2P network can be accessed using not only Morpheus software, but also other Gnutella-based software distributed by companies such as "BearShare" and "LimeWire." Unlike Grokster's supernode architecture, search requests on the Gnutella network quickly pass from user to user until a matching file is found or until the search request expires. The

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[27]The Aimster service was renamed "Madster" in January 2002, after a ruling by the National Arbitration Forum panel that the Internet domain name "aimster.com" violated the trademark for America Online (AOL)'s instant messaging service. To avoid confusion, this report will continue to refer to the file-sharing service as "Aimster."
See [http://www.usatoday.com/tech/news/2002/02/01/aimster-now-madster.htm].

[28]*Grokster,* 259 F.Supp.2d at 1040.

[29][http://www.grokster.com/helpfaq.html#Is%20Grokster%20a%20distributed%20network]. Only connected computers that are particularly powerful or have fast Internet connections are chosen as "supernodes."

[30]*Grokster,* 259 F.Supp.2d at 1040.

[31]Open-source refers to any software program whose "source code" (the software programming language) is made freely available to the public for use or modification by other software developers. *See* [http://www.opensource.org/docs/definition.php].

[32]*Grokster,* 259 F.Supp.2d at 1041.

query can reach over 8,000 other computers on the Gnutella network before expiring.[33]

While Aimster and Napster actively assisted their end-users in locating specific files and facilitating the download transactions, Grokster did not. Aimster provided an illustrated tutorial on its website which "methodically demonstrated how to transfer and copy copyrighted works over the Aimster system."[34] The Court of Appeals in *Aimster* referred to this tutorial as "an invitation to infringement," overtly encouraging Aimster users to infringe copyrights.[35] Aimster also offered its users a $4.95 monthly subscription service called "Club Aimster," which presented a list of the "top forty" most frequently downloaded songs by Aimster users. This list included a "play" button next to each song that allowed users to click on it to download the music file from wherever it was located in the Aimster network to the requesting member's computer.[36]

Napster similarly provided substantial assistance to its users through its server, maintained as a collective directory of shared MP3 files available on each connected user's computer. Any Napster user could run a search on this centralized index for a desired song title in order to transfer a copy of the file from the "host user" (the individual sharing the file) to the requesting user's hard-drive.[37]

Therefore, when the Napster network was terminated, its demise prevented any further P2P file-sharing among its users. But, because Grokster and StreamCast operate decentralized networks, "if either [company] closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption."[38] According to the *Grokster* court, this is a "seminal distinction" between Grokster/StreamCast and Napster which formed the basis for its judgment that the defendants did not materially contribute to infringing activity.[39]

Substantial, Noninfringing Use. In *Sony*, the U.S. Supreme Court found that despite the fact that VCRs could be used by consumers to infringe copyrights, manufacturers were not liable for contributory copyright infringement because the VCR was capable of "substantial noninfringing uses."[40] The Court identified private, noncommercial "time-shifting" of broadcast television as a noninfringing fair use of

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[33]*See* [http://computer.howstuffworks.com/file-sharing.htm/printable].

[34]*Aimster,* 252 F.Supp.2d at 643.

[35]*Aimster*, 334 F.3d at 651.

[36]*Id.* at 652.

[37]*Napster,* 239 F.3d at 1012.

[38]*Grokster,* 259 F.Supp.2d at 1041.

[39]*Id.*

[40]*Sony,* 464 U.S. at 456.

the technology.[41] It emphasized that the primary use of the VCR was fair, and, in addition, it had the potential to be used for time-shifting sports, educational, religious and other programming that was authorized for copying or was copied without objection from the copyright holder.[42]

As a result of *Sony*, "substantial, noninfringing uses" became a judicially recognized defense to claims of contributory infringement. The defense arises from the Court's dicta that "[t]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes... [I]t need merely be capable of substantial noninfringing uses."[43] The Seventh and Ninth Circuits disagree, however, on the scope and proper application of *Sony*'s legal principles.

The *Grokster* court determined that the defendants' P2P software satisfied the *Sony* test for substantial noninfringing uses. Analogizing P2P software companies to manufacturers of VCRs and copy machines, the court noted that the Grokster and Morpheus programs are used for both lawful and unlawful ends, and therefore the software distributors cannot be liable without evidence of active and substantial contribution to the infringement itself.[44] Compared to the Napster file-sharing network, which *functioned primarily* to exchange copyrighted audio files, the Morpheus and Grokster software *may be used* to transfer a variety of different file types.[45] The more versatile capability of the *Grokster* defendants' P2P software was a critical factor in the courts' decisions. But the Court of Appeals also takes a somewhat rigid and formulaic approach to the application of *Sony's* mandates.

In comparison, the Seventh Circuit in *Aimster* expressed a more limited and flexible view of *Sony's* scope. It found that the *Sony* doctrine is applicable to software services as well as to "articles of commerce," but was inclined to weigh and balance the factors necessary to establish contributory infringement. For example, while it agreed with the recording industry "that the ability of a service provider to prevent its customers from infringing *is a factor to be considered* in determining whether the provider is a contributory infringer...[i]t is not necessarily a controlling factor[.]"[46] Unlike the Ninth Circuit, which categorically rejected the idea of "willful blindness" as a factor in determining whether an infringer has actual knowledge" of infringement,

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[41]Time-shifting refers to the practice of recording a broadcast television program to view it at a later time, and then erasing it afterwards. *See Sony,* 464 U.S. at 423.

[42]*Id.* at 444.

[43]*Sony,* 464 U.S. at 442.

[44]*Grokster,* 259 F.Supp.2d at 1043.

[45] StreamCast produced evidence that its 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." *Id.* at 1035.

[46]*Aimster*, 334 F.3d at 648. (Emphasis supplied.)

the Seventh Circuit ruled that "[w]illful blindness is knowledge, in copyright law ... as it is in the law generally."[47]

And, with respect to "substantial noninfringing use," the Court of Appeals in *Aimster* rejected the music industry's argument that the *Sony* defense could not withstand anything more than a "mere showing that a product may be used for infringing purposes." In fact, it went so far as to say that actual knowledge of specific infringing uses alone could constitute a sufficient condition for deeming a facilitator liable for contributory infringement.[48] Nor would it accept that *Sony* confers immunity from contributory infringement liability when software is capable of substantial noninfringing use:

> We ... do not buy Aimster's argument that ... all Aimster has to show in order to escape liability for contributory infringement is that its file-sharing system *could* be used in noninfringing ways, which obviously it could be. Were that the law, the seller of a product or service used *solely* to facilitate copyright infringement, though it was capable in principle of noninfringing uses, would be immune from liability for contributory infringement. That would be an extreme result, and one not envisaged by the *Sony* majority.[49]

Thus, although a product or service may be physically capable of noninfringing uses, the Seventh Circuit Court of Appeals emphasized the degree of probability that the software is or would be employed for noninfringing use. Specifically, "[w]hen a supplier is offering a product or service that has noninfringing as well as infringing uses, some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement."[50]

Grokster takes a broader reading of the "capability" aspect of *Sony*. It rejects the "primary use" analysis applied by the *Aimster* court, and focuses on the fact that Grokster and Morpheus are being used, and *can be used*, for substantial noninfringing purposes.

Conclusion. Since the district court's decision in *Grokster* cast doubt on the viability of legal action against P2P software companies, copyright holders focused their enforcement efforts against direct infringers themselves. Despite the "impracticability or futility of a copyright owner's suing a multitude of individual infringers,"[51] the music recording industry is currently pursuing exactly that course of action, filing lawsuits against particularly egregious P2P swappers of copyrighted music.[52] Whether this effort by the music industry will significantly slow illegal file-sharing or help to deter future infringement remains to be seen. Another unknown is

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[47] *Id.* at 650.

[48] *Id.* at 649.

[49] *Id.* at 651. (Emphasis in original.)

[50] *Id.* at 649.

[51] *Id.* at 645.

[52] *See generally,* [http://www.riaa.com/news/newsletter/062503.asp].

the reaction of consumers to these legal attacks aimed directly at individual P2P software users.

The *Aimster* and *Grokster* decisions indicate that copyright owners seeking to enforce their rights in P2P file-swapping litigation may encounter more difficulty overcoming legal obstacles to proving contributory copyright infringement. Since Napster, the next generation of P2P technologies has become increasingly decentralized, permitting file exchange between computer users without significant intermediary assistance by a software company. This P2P software also is "dual-use" in character – capable and increasingly utilized for both noninfringing and infringing purposes – raising the possibility of greater success by software companies in invoking the *Sony* defense to claims of contributory copyright infringement.

Largely as a consequence of *Napster*, some assert that the new generation of P2P companies deliberately designed their software to exploit perceived "loopholes" in the application of traditional copyright law to emergent digital technologies. Indeed, the district court in *Grokster* acknowledged this possibility, noting that the "[d]efendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefitting financially from the illicit draw of their wares."[53]

The ultimate impact of *Grokster* on copyright law in uncertain. Some Members of Congress reacted to the *Grokster* decision by introduction of S. 2560, the Inducing Infringement of Copyrights Act of 2004, 108th Cong., 2d Sess. (2004). This bill would codify criteria to establish secondary liability for copyright infringement. Perhaps as a consequence of the divergent interpretations of *Sony* by the Ninth and Seventh Circuits, the U.S. Supreme Court has agreed to review the *Grokster* decision. In doing so, it may clarify the relationship between *Sony* and secondary liability for copyright infringement.

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[53] *Grokster,* 259 F.Supp.2d at 1046.