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11
12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 WESTERN DIVISION

15 METRO-GOLDWYN-MAYER STUDIOS,
INC., et al.,
16
17 Plaintiffs,
18 v.
19 GROKSTER, LTD., et al.,
20 Defendants.

Case No. CV 01-08541 SVW (PJWx)

21 JERRY LEIBER, et al.,
22
23 Plaintiffs,
24 v.
25 GROKSTER, LTD., et al.,
26 Defendants.

Case No. 01-09923 SVW (PJWx)

**GROKSTER, LTD.'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Date: December 2, 2002
Time: 1:30 p.m.
Judge: The Honorable Stephen V. Wilson

26 AND RELATED COUNTERCLAIMS
27
28

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I. INTRODUCTION

1
2 Plaintiffs' Opposition Brief ("Opp.") adds little to the arguments raised in
3 their opening brief and addressed in Grokster's opposition to that brief ("Grokster
4 Opp."). One of the drawbacks of cross-motions on the same subject is that they
5 inevitably lead to redundant briefing. Grokster attempts herein to minimize that
6 effect, by focusing on material new to the dialogue since our own opposition. The
7 new parts of Plaintiffs' arguments are quite limited: they consist primarily of a
8 new, even more dramatically restrictive reading of the Sony¹ doctrine—one which
9 would leave Sony as the law only in cases where the Plaintiff had failed to tell the
10 Defendant of the alleged infringement—and a purportedly scientific survey which
11 fails to help one group of Plaintiffs while hurting the other.

II. ARGUMENT

A. Plaintiffs' Revisions to Sony Render it a Nullity

12
13
14 In Grokster's Opposition to Plaintiffs' own motion for summary judgment,
15 we discussed Plaintiffs' attempt to read a series of "limitations" into the Sony
16 doctrine, and demonstrated why those "limitations" are unsupported by either law
17 or fact. Although Plaintiffs repeat those same arguments, nearly verbatim, in their
18 Opposition brief, we will not repeat our response herein, instead referring the
19 Court to the discussion at pages 5 through 11 of Grokster's Opposition.

20 In addition to reprising their purported "limitations," however, Plaintiffs'
21 Opposition goes even farther, arguing that any knowledge—general or specific,
22 past or present, before or after distribution of the product—that one's product has
23 been used for infringing purposes renders the Supreme Court's holding a nullity:

24 Simply put, where the defendant's knowledge of infringement is
25 shown by evidence other than the mere capacity of its technology for
26 infringing use, it does not matter how substantial the noninfringing
27 uses are or may someday be. Because Defendants indisputably have
28 actual knowledge of infringement, as well as constructive knowledge
derived from facts other than the mere capability of their systems to
aid infringement, the Sony-Betamax doctrine has no application to

¹ Sony Corp. of Amer. v. Universal City Studios ("Sony"), 464 U.S. 417 (1984).

1 this case.

2 Opp. at 12 (emphasis added).

3 This proposition turns Sony entirely on its head. In place of Sony's holding
4 that, in order to escape contributory liability, a product "need merely be capable of
5 substantial noninfringing uses," Sony, 464 U.S. at 442,² Plaintiffs' formulation of
6 the Sony doctrine does precisely the opposite: as soon as a manufacturer is told
7 that its product has been used somewhere, by someone, to infringe a copyright, that
8 manufacturer becomes liable, regardless whether it has any control of the
9 infringement, and regardless of the existence or proportion of noninfringing uses.

10 Consider the implications, were Plaintiffs' twisted version of Sony the law.
11 Send a letter to Xerox, identifying instances in which its photocopiers have been
12 used to copy books, and photocopiers become illegal. Send a letter to Sony,
13 identifying instances in which its VCRs have been used to copy movies, and Sony
14 becomes liable for all infringements. Send a letter to Microsoft, forwarding the
15 same information Plaintiffs have sent to the Defendants in this case (after all, every
16 single copy of Grokster, Kazaa, and Morpheus runs on Windows), and the most
17 popular operating system in the world is banned.³

18 Plaintiffs would of course love a world in which they can turn to any
19 convenient defendant to address the piracy they allege. They would love a world
20 where they could claim damages from any of the software or hardware providers
21 whose tools are used by alleged infringers (other than those related to Plaintiffs, of
22 course), provided only that they first give those providers notice of the alleged

23 _____
24 ² Plaintiffs accuse Grokster of omitting the phrase "commercially significant" from
this quotation. Opposition at 14. Not so; the quotation is correct.

25 ³ Plaintiffs' formulation also ignores the question whether Grokster has made any
26 contribution to any users' alleged infringing activity after purportedly acquiring
27 knowledge of that activity. Where liability is premised on distribution of a
28 product, it makes no sense to assign liability based on acquisition of information
after the transaction. If you sell someone a car, and he then goes on a cross-
country crime spree, you do not become liable for aiding and abetting once the
police inform you of that fact. Contributory liability is only appropriate where
knowledge of illegal intent precedes the alleged contribution.

1 infringement. But that is not, obviously, the law. Sony is the law, and under Sony
2 manufacturers of products capable of substantial noninfringing uses are not liable
3 for contributory infringement.

4 **B. Plaintiffs Fail to Rebut Grokster's Showing of Noninfringing Uses**

5 Recognizing the untenability of their newfound version of the Sony doctrine,
6 Plaintiffs also attempt to convince the Court that, although there are indisputably
7 noninfringing uses of the FastTrack software, those uses are currently not
8 sufficiently important, and suggesting without citation that the correct standard is
9 “whether Defendants could sustain a commercial business built on those uses.”
10 Opp. at 15. In so arguing, Plaintiffs ignore the plain and controlling authority of
11 both Sony (which requires only that the product be capable of noninfringing use)
12 and Napster⁴ (where the Ninth Circuit expressly held it was error to base the Sony
13 analysis solely on current uses). They also ignore the ample evidence of multiple
14 current noninfringing uses. See Grokster Motion for Summary Judgment at 6-9,
15 11-13, and supporting declarations.

16 Plaintiffs also misunderstand the meaning of “commercially significant” in
17 Sony. Although they cite to the Supreme Court’s language at page 442 of the
18 opinion, they fail to read on through the rest of the paragraph. Having asked
19 whether the Betamax was capable of “commercially significant noninfringing
20 uses,” the Court then answered that question by holding that “one potential use of
21 the Betamax plainly satisfies this standard, however it is understood: private,
22 noncommercial time-shifting in the home.” Sony, 464 U.S. at 442 (emphasis
23 added). Thus the standard is not—as Plaintiffs would have it—whether one can
24 make money off the noninfringing uses themselves (otherwise private,
25 noncommercial time-shifting would not have sufficed), but rather whether those
26 noninfringing uses, commercial or otherwise, would lead one to obtain the product
27 that enables them.

28

1 Plaintiffs offer only unsupported speculation that noninfringing uses will
2 never catch on—speculation that is clearly at odds with the commercial ventures
3 such as Altnet, Trymedia, Microsoft, GigAmerica, and others (including both
4 record labels and movie studios) and noncommercial ventures (such as the
5 Gutenberg Project and the Prelinger Archive) who are already making legitimate
6 use of peer-to-peer networks. Altnet, for example, is still in its infancy, and yet it
7 is already using the FastTrack technology to distribute hundreds of titles, from
8 music to movies to video games. As set forth in the accompanying declaration of
9 Altnet CEO Kevin Bermeister,⁵ Altnet has distributed millions of authorized
10 preview copies of video games from Infogrames and Macromedia, generating sales
11 of tens of thousands of full versions of those games. They have distributed
12 hundreds of thousands of authorized copies of songs by both unsigned artists and
13 artists signed to commercial labels (including over 100,000 downloads of Brooke
14 Allison’s music—an artist distributed by EMI, and a quarter of a million copies
15 last month alone of songs by Redline artist Noise Therapy). And they have teamed
16 up with Microsoft and Lion’s Gate to distribute trailers for the recent feature film
17 “Rules of Attraction,” and with Palm Pictures to distribute copies of documentary
18 films.

19 Peer-to-peer technology in general, and the FastTrack software in particular,
20 thus already has myriad legitimate uses, both commercial and noncommercial. It
21 is important to note, however, the dangerous underlying premise of Plaintiffs’
22 formulation of Sony: only commercial distribution of music or movies counts.
23 This is the real policy battle being waged here: before the Internet, distribution of
24

25 ⁴ A&M Records v. Napster (“Napster”), 239 F.3d 1004 (9th Cir. 2001).

26 ⁵ Altnet, and many other noninfringing users of FastTrack, were described in detail
27 in the Declaration of Aram Sinnreich, filed with Grokster’s opening brief. As
28 Plaintiffs have questioned Mr. Sinnreich’s competence (primarily because,
although he is a recognized expert in the field, he does not have a doctorate
degree), we submit herewith the Declaration of Altnet’s CEO, attesting to the same
facts.

1 content was “one-to-many”: it took large organizations and significant capital to
2 print books, to record and press records, to produce and display movies, or to
3 create and broadcast television and radio shows. Each technological advance
4 reduces those transaction costs, and enables more and more people to create and
5 distribute works, without need for the media empires that once controlled all
6 distribution and seek to retain that control here. Peer-to-peer filesharing over the
7 Internet is the ultimate “many to many” distribution system: its great power and
8 value is precisely that it allows creative expression to become “noncommercial.”

9 C. The Olkin Study Is Fatally Flawed

10 Recognizing, as they must, that even today there are substantial
11 noninfringing uses of Defendants’ products, Plaintiffs instead fall back on arguing
12 that those uses are a minority, and thus not worthy of consideration. The
13 centerpiece of Plaintiffs’ argument—and indeed, the only “factual” showing they
14 attempt in opposition—consists of a study conducted by Stanford Professor Ingram
15 Olkin. Professor Olkin’s study, however, is riddled with errors.⁶ Although
16 Professor Olkin is undoubtedly an expert in theoretical statistics, his expertise in
17 any area relevant to this case is simply nonexistent. His entire experience with the
18 software at issue in this case consists of a single instance in which he watched his
19 grandson use Grokster to search for files. Not once did he attempt to use the
20 software himself, or attempt to ascertain how the search functions of Grokster
21 operate. Page Reply Decl., Exh. F (“Olkin Depo.”), 63:20-64:15. Not
22 surprisingly, that inexperience led to numerous fatal errors in his study.

23 _____
24 ⁶ While Grokster is extremely—and rightfully—critical of Professor Olkin’s study,
25 we do not thereby mean to impugn Professor Olkin’s personal integrity: in fact,
26 Professor Olkin is personally known to, and respected by, undersigned counsel.
27 Most of the serious flaws in his study appear to stem rather from his complete lack
28 of familiarity with the technology and behaviors at issue here, combined with the
fact that the study was conducted almost entirely by unnamed others, with little or
no supervision by Professor Olkin. Indeed, it appears that Professor Olkin’s
participation was limited primarily to having his assistant select a random set of
English words, turning those words over to Plaintiffs’ counsel and consultants, and
then blessing the end result. Olkin Depo. 54-60.

1. Professor Olkin Searched The Wrong Fields

1 First, Professor Olkin does not even know what sorts of files he searched for.
2
3 At his deposition, he testified that his search covered only audio and video (as
4 opposed to document, image, and software) files: it was only after his counsel
5 requested a break and conferred with him that he suddenly became aware that his
6 search had also covered other sorts of files. Id., 39:4-21; 41:4-16. Because
7 Professor Olkin did not even know that his own study included software,
8 documents, and images, he of course gave no consideration to whether his search
9 methodology was appropriate for such files.

10 Second, Professor Olkin believes that his searches, using random English
11 words, looked for matches only in the “title” field of users’ files. Id., 41:2-3 (“My
12 understanding is that we searched the file names, not the metadata.”); 41:17-18
13 (“the search word was a search of the filenames, not of the metadata.”). When
14 confronted with examples where search results were returned with titles that did
15 not match the search terms used, Professor Olkin nonetheless maintained that only
16 the title fields were searched. Id., 65:14-15 (“Well, I’m almost certain it does not
17 search metadata.”).

18 Professor Olkin is wrong. As clearly shown in the documents produced by
19 Plaintiffs, each of the searches conducted were set to search “everything.” Olkin
20 Depo., 42:1-16 & Exh. 3. Although Professor Olkin was apparently unaware of
21 this, as a result each search term was matched not just against titles, but also
22 against all of the “metadata” associated with each file. Reply Rung Decl., ¶¶ 2-4.
23 “Metadata” is additional data stored along with the contents of some files: for
24 MP3 data, for example, users typically include in the metadata such things as the
25 name of the album, keywords indicating genre, the name of the person posting the
26 file, and anything else the user chooses to put there. Id. Thus—although Professor
27 Olkin was at a loss to explain why, having himself never used the software at all—
28 his search for the word “about” returned (for example) a song entitled “U Turn” by

1 the artist “Usher.” Olkin Depo. 42:12-43:2 & Exh. 3. Why? Because, unknown
2 and unconsidered by Professor Olkin, somewhere in the metadata associated with
3 that file the word “about” appeared. See Reply Declaration of Michael Page
4 (“Page Reply Decl.”), Exh. E (screen shot of Grokster search for Usher’s “U-
5 Turn,” showing metadata including phrase “All About You.”).

6 Why is this significant? Because different sorts of files can have differing
7 amounts of metadata. If (a question Professor Olkin twice refused to answer at
8 deposition, Olkin Depo., 65:6-15; 40:11-41:3) music files typically have more
9 words in their metadata than do other types of files, a seemingly random search
10 will in fact return a vastly higher number of audio files than other files.⁷ Because
11 Professor Olkin failed to understand that he was in fact searching metadata, and
12 failed to consider or determine whether metadata is evenly distributed among
13 classes of files, his results were invisibly skewed towards whatever files contain
14 the most metadata.

15 **2. Professor Olkin Improperly Searched Only For Whole English**
16 **Words**

17 Third, Professor Olkin inexplicably chose to search using only words from
18 an English dictionary. This skewed his results, in Plaintiffs’ favor, in two distinct
19 ways. To begin with, it of course eliminated files whose titles and descriptions
20 were in foreign languages. As a result, Professor Olkin’s survey failed to account
21 for all of the international uses of Grokster (including uses in the Netherlands,
22 where use of the FastTrack protocol has been adjudged legal). Those legal uses
23 were barred from Plaintiffs’ survey entirely. More importantly, the choice to limit
24 search terms to English words eliminated another substantial noninfringing use:

25 _____
26 ⁷ To understand this, suppose you are trying to select random people by giving
27 them each a numbered lottery ticket and then drawing numbers at random. If each
28 person has one ticket, each person has an equal chance of being selected. But if
each member of one class of person (or file) has only one ticket (or word in its
searched fields) and each member of another class of person (or file) has ten tickets
(or words in its searched fields), members of the latter class will be overselected by

1 video games and software whose filenames are not English words at all. Thus—to
2 cite but two examples—Professor Olkin admitted that his searches were incapable
3 of detecting copies of games such as “Yahtzee” and “9MM,” both of which are
4 being distributed via the FastTrack network by Trymedia. *Id.*, 61:19-62:11.⁸

5 Professor Olkin can offer no coherent reason for the deliberate choice to
6 limit his search methodology to English words: after all, the more logical method
7 would be to use short random strings such as single letters or common letter pairs
8 such as “st,” “th,” or the like. Simple strings such as these—unlike English
9 words—do not discriminate among language or type of word. But in an attempt to
10 explain why he nonetheless limited his search to English words, Professor Olkin’s
11 declaration can offer only that random strings “would not replicate how FastTrack
12 users typically search.” Olkin Decl., ¶ 11. Of course not: users “typically” want
13 to find a specific file, not a random result. But the point of Professor Olkin’s
14 survey was—or rather should have been—to find random files.

15 3. Professor Olkin Surveyed Only a Handful Of Users

16 Fourth, having already skewed his results toward English language audio
17 files (coincidentally the files most likely to be owned by his music label clients)
18 Professor Olkin’s methodology then inexplicably threw away most of those files,
19 replacing them with even less random ones. Professor Olkin started with a list of
20 words, and used each one as a search term. In the majority of instances, the search
21 returned zero results (not surprising, when searching for words such as
22 “andromonecious” or “autoschediastical,” neither of which offers up a catchy song
23 title).⁹ Other more common words, however, returned numerous results,

24
25 a factor of ten.

26 ⁸ Similarly, searching for English words will fail to find such popular (and legally
27 distributed) software titles as WinZip, WinAmp, and Eudora—and of course
28 Morpheus, Kazaa, and Grokster.

⁹ In this regard, the choice to select words from an unabridged dictionary is
curious, as the utility of search terms that are not found in smaller dictionaries is
questionable at best. The list of words used is attached to the Page Reply Decl. at

1 presumably up to Grokster's default limit of 200.¹⁰ But instead of using all of
2 those results, Professor Olkin then chose to throw out all but the first result from
3 each search. Then, having thrown out most of the results, he replaced them by
4 downloading all of the other filenames offered by the user associated with the first
5 result. Olkin Depo., 43:2-44:11. This further skewed the results in two obvious
6 ways. First, people do not listen to music or view television or collect books or
7 pictures at random. People who own one song by a given artist are more likely to
8 own other songs by that artist than songs by random other artists. Thus, by
9 throwing away (somewhat) random sets of files and replacing them with additional
10 files from the same user, Professor Olkin has shrunk the variety of his sample
11 drastically. And second, by throwing away the vast amount of users, and then
12 populating his sample with multiple files from a drastically smaller number of
13 users, Professor Olkin has failed to provide any meaningful information about the
14 composition of the universe of Grokster users, and has instead provided data about
15 only a handful.

16 This may sound hyperbolic, given the size of Professor Olkin's sample—
17 after all, he initially assembled a set of over 31,000 files, which were then
18 winnowed down to 1,600 for analysis. But it most assuredly is not hyperbole: as a
19 result of the inexplicable decision to populate a purportedly random selection
20 with—in one instance—nearly a thousand files from a single Grokster user,
21 Professor Olkin has rendered his statistical conclusions nearly meaningless. In the
22 entire set of 31,647 files in Professor Olkin's survey, he has collected filenames
23 from only 18 Grokster users! Moreover, 44% of those files come from a single
24 user, 69% come from the top two users, and 95% come from only four users!¹¹

25
26 Exh. G.

27 ¹⁰ We say "presumably" because Plaintiffs did not produce all of the results, but
instead only "screen shots" showing the first 28 or so.

28 ¹¹ See Page Reply Decl., ¶ 7. Of the 18 identified Grokster users, 8 were sharing
only 1 file, and only 5 were sharing more than 11 files.

1 The flaw in this methodology is obvious: for example, one of the 18 Grokster
2 users in Professor Olkin’s study had a copy of Lionel Hampton’s version of
3 Stardust. By Professor Olkin’s logic, it would be valid to conclude that 6% of all
4 Grokster users are sharing copies of Lionel Hampton’s recordings: a conclusion
5 that, although it bodes well from an aesthetic standpoint, is unlikely to be true.¹²
6 Similarly, because of the tiny and unbalanced sample, the particular tastes of a
7 single user constitutes nearly a majority of the entire Grokster sample: if that user
8 happens to collect Indian ragas, Professor Olkin would conclude that 44% of all
9 files being shared by all Grokster users are sitar music. And indeed, Professor
10 Olkin himself explains in his declaration that, in order to state his conclusions
11 “with 95% confidence of error that is no greater than 3%,” standard statistical
12 methodology requires a sample size of 1067 items. Olkin Decl. ¶ 8. But Professor
13 Olkin’s survey falls far short, basing its conclusions on a sample of only 18
14 Grokster users.

15 **4. Professor Olkin Deliberately Excluded Entire Classes of**
16 **Noninfringing Works From His Study**

17 But these are not the most glaring of Professor Olkin’s errors. Fifth, and
18 most egregiously, Professor Olkin deliberately and knowingly excluded an
19 additional entire class of files from his searches. While the errors discussed
20 above—although basic and obvious—can perhaps be explained as inadvertent, this
21 one was not. Grokster contains a feature known as an “adult content filter.” It is a
22 crude but effective filter, designed to block—should the user so choose—search
23 results that contain words commonly associated with adult or pornographic
24 content. It utilizes what is in effect an oversized version of George Carlin’s

25 _____
26 ¹² Counting all of the files from each user skews the results in another way as well.
27 Someone who collects and listens to all the works of Miles Davis will accumulate
28 hundreds of individual files, each containing one version of one song. Someone
who collects and reads all of the works of William Shakespeare, by contrast, may
have only one file (the Gutenberg Project version of the Complete Works of
William Shakespeare is a single text file). Merely counting files, without

1 infamous list, and simply blocks any search result that contains one or more of
2 those words. When a copy of Grokster is first downloaded, the adult content filter
3 is by default set at “on,” for obvious reasons: if a user chooses to be exposed to
4 such content, it should be by affirmative choice. Reply Rung Decl., ¶¶ 5-6.

5 Professor Olkin was aware that his searches were done with this filter turned
6 on—indeed, he testified that the choice to leave it turned on was discussed with
7 Plaintiffs’ counsel. Olkin Depo., 7-13. But Professor Olkin nonetheless not only
8 chose to leave that filter on, he also chose not to disclose that fact in his declaration
9 (other than by the cryptic remark that his searches “were conducted through the
10 Grokster user software without any changes to its default settings,” Olkin Decl.
11 ¶ 13). When asked whether he thought that remark was sufficient to alert the
12 reader that he had filtered his results, he testified “I thought—I thought it was—I
13 thought it was clear to people who know what the default actually does.” Olkin
14 Depo., 12:11-13:6.

15 As a result, Professor Olkin’s survey deliberately—and silently—simply
16 excluded an entire category of works. As Professor Olkin testified, he has no idea
17 what percentage of the total filesharing on the FastTrack network is adult content,
18 and in fact cannot even say it is less than half of all content.¹³ And thus he has no
19 idea whether the percentages he testifies to have any bearing on reality. But there
20 can be no question that choosing to filter adult content has a dramatic effect. In an
21 admittedly unscientific example, the undersigned counsel conducted two searches
22 of video content using Grokster. In each instance, the search term was the single
23 letter “t.” Those two searches, conducted a minute apart, are attached to the Reply
24 declaration of Michael Page as Exhibits A and B. The first, with the adult content
25

considering the nature of those files, gives a distorted view of the world.

26 ¹³ Olkin Depo. at 14:15-25 (“Q: Do you have an understanding, as you sit here
27 today, of what percentage of the files shared by users of the FastTrack system are,
28 in fact, files that would be blocked by the adult content filter? A: No, I do not. Q:
Do you have any reason to think it’s less than 50 percent of the files? [objection]
A: I don’t—I honestly don’t know.”)

1 filter off, returned 25 results. Of those 25, 14 were “erotica,” 4 were apparently
2 non-erotic (“comedy,” “sports,” or “series”), and the remaining 7 were
3 unidentifiable. The same search, with the adult content filter off, returned 6 results
4 (2 “music,” 1 “sports,” 1 “movie,” and 2 unknown).¹⁴

5 **D. Professor Olkin’s Study Establishes That the Movie Studio Claims Are**
6 **Baseless**

7 While Professor Olkin’s study is in many respects worthless, it does
8 establish one interesting point, albeit certainly not one Plaintiffs set out to
9 establish. If—as Plaintiffs maintain in dismissing Defendants’ evidence of
10 noninfringing uses—minority tastes don’t count, then the movie studio Plaintiffs
11 have a big problem. Once Professor Olkin generated his list of 1,600 files, those
12 files were forwarded to representatives of each group of plaintiffs, who then
13 attempted to identify infringing files. The RIAA (Declaration of Frank Creighton)
14 and the Harry Fox Agency (Declaration of Elissa Hecker) each provided detailed
15 declarations, identifying by name and copyright owner each title for which they
16 claim copyright. Based on those declarations, Plaintiffs proudly proclaim that they
17 own the copyrights over 75% of the files, and can opine that an additional 15%
18 likely infringe the rights of others, leaving “only” 10% as noninfringing uses.

19 But the declaration submitted on behalf of the movie studio plaintiffs is quite
20 different. While the music plaintiffs identify, by name and purported owner, each
21 file they claim infringes,¹⁵ the studios do not. Instead, they submit only the
22 declaration of a “Case Manager at Williams & Connolly, Gordon Shock. Mr.
23 Shock does not say what or how many files he reviewed, or what he found, or who
24 he claims owns the content. Instead, he merely states that “[n]early all of the

25 _____
26 ¹⁴ Moreover, those 31 results included items in Korean, Russian, German, French,
27 and Dutch. We emphasize that this experiment was conducted only once: the
28 result was not selected as the best among many, or even two.

¹⁵ We note, however, that Plaintiffs fail to identify even one title in Professor
Olkin’s study that is at issue in this motion: Plaintiffs do not identify any files
matching any of their hand-selected Phase I works.

1 [unidentified and unnumbered] files that I viewed contained motion pictures,
2 television episodes, music videos, or concert footage. And nearly all of the works
3 that I viewed were accurately described by their file names.” Shock Decl., ¶ 3
4 (emphasis added). Mr. Shock’s declaration then takes a quiet but dramatic left
5 turn, going on to discuss the ownership not of the files found by Professor Olkin,
6 but instead of a completely different set of titles: the works selected by the
7 Plaintiffs for inclusion in Phase I, an apparently deliberate and artful non sequitur.
8 Mr. Shock’s declaration bears careful scrutiny, and we urge the Court to read it
9 carefully and determine what it actually says, and does not say.

10 Plaintiffs have engaged in the artifice of Mr. Shock’s declaration for an
11 obvious—if deceptive—reason: Plaintiffs appear to have failed to find a single
12 motion picture traded by a Grokster user anywhere in the 1600 files selected by
13 Professor Olkin. Not one. Indeed, they have located only 7 filenames that even
14 appear to be movies traded by Kazaa users: less than one-half of one percent of the
15 sample. And although they classify and count each of these seven files as
16 “confirmed infringing works owned or controlled by Plaintiffs,” (Creighton Decl.,
17 ¶ 5), they carefully avoid making any more detailed representations to this Court
18 about the contents of these files, because some of them are not what they are
19 claimed to be at all. For example, a file that by its title appears to be a copy of the
20 film “The Crocodile Hunter” is actually an advertisement for another Sony Pictures
21 film, “Enough”: the file is a short trailer for that film, repeated over and over. As
22 Plaintiffs’ own consultant has testified, this practice is known as “spoofing,”
23 wherein the studios flood a peer-to-peer network with thousands of misnamed
24 files. Confidential Page Reply Decl., Exh. A. In some instances, over ninety-nine
25 percent of apparent copies of a movie are actually spoofs. Id. Unfortunately, in
26 this case Plaintiffs have managed to spoof themselves, their expert, and the Court:
27 The file identified by Professor Olkin’s study as “Men in Black II” and attested to
28 by Plaintiffs as a “confirmed infringing work” is also a spoof, created and

1 distributed by Plaintiffs, containing only over an hour of black screen. *Id.*, Exh. A
2 at 3; Page Reply Decl. ¶ 11. In other words, these files are commercial,
3 noninfringing uses of Defendants' products by the Plaintiffs themselves. It is thus
4 no wonder that Mr. Shock's declaration so carefully avoids the specifics.

5 Putting aside the "spoof" files, Professor Olkin's study succeeded in finding
6 only 4 partial copies of the identified movies,¹⁶ none of them shared by Grokster
7 users: zero percent of Grokster files, and a fraction of one percent of all files. If—
8 as Plaintiffs represent to this Court —Professor Olkin's study is a competent and
9 accurate representation of what files are and are not being shared on the FastTrack
10 network, and if—as Plaintiffs also assert—10% is not sufficient to count as
11 "substantial," the Court need spend no further time on the claims of the movie
12 studios. By their own evidence, they have no case.¹⁷

13 **E. Plaintiffs Cannot Establish Vicarious Liability, As Grokster Cannot**
14 **Control The Allegedly Infringing Activity of Its Users.**

15 Although Plaintiffs' Opposition focuses primarily on contributory
16 infringement, Plaintiffs also repeat their refrain that Grokster "is in a position to
17 police the infringing conduct." Opp. at 15, quoting Gershwin Publ'g Corp. v.
18 Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162-63 (2d Cir. 1971). Just as in
19

20 ¹⁶ The file labeled as "Slackers" was actually a piece of a different film. The files
21 labeled "Vanilla Sky" and "Kung Pow" were low-quality excerpts from those
22 films, apparently filmed by someone with a camcorder in a movie theater (as from
23 time to time patrons' heads appear in front of the screen). "Minority Report"
24 turned out to be a blurry excerpt of about 13 minutes from the middle of the film,
25 with Japanese subtitles. Of the seven, only "The Shipping News" was a
26 reasonably-high-quality copy of the identified film; from the superscript that
27 appears on it, it appears to have been copied from a "screener" (a promotional copy
28 distributed by the studio to a reviewer). Page Reply Decl., ¶ 11.

¹⁷ Plaintiffs also fail to offer any evidence that any of the files identified by
Professor Olkin were in fact illegally copied by anyone other than themselves.
Instead, they repeat their unsupported assertion that merely offering to distribute a
work is actionable distribution. Opp. at 11. This is not the law: there is no such
thing as attempted copyright infringement. "Infringement of the distribution right
requires an actual dissemination of . . . copies." National Car Rental Sys. v.
Computer Assocs. Int'l, Inc., 991 F.2d 426, 434 (8th Cir. 1993); see discussion at
Grokster's Opposition Brief, 3-5.

1 their own opening brief, Plaintiffs base their argument on a potpourri of allegations
2 of “control” by Grokster over virtually everything but the allegedly infringing
3 conduct: control over the “user experience,” control over a newsletter, control
4 (briefly and unknowingly) over a supernode, control over advertising, control of
5 the graphics on its webpage, etc., etc. These examples have been discussed at
6 length in previous briefing, and have nothing to do with the relevant question:
7 does Grokster have the ability to control what files users do and do not share?

8 Plaintiffs have made no showing of such control, and can make no such showing.

9 Two arguments in this regard, however, require additional response. First,
10 Plaintiffs argue repeatedly that Grokster’s purported ability to “terminate” user
11 registrations is evidence of “control.” But Plaintiffs’ argument deliberately
12 obscures the facts here. The current Grokster software does not require a user
13 registration at all: that feature was removed by Kazaa, without any input or control
14 from Grokster. Declaration of Daniel B. Rung, ¶¶ 7-9. In response, Grokster
15 began encouraging users to register anyway, but those registrations have nothing to
16 do with the operation of the filesharing features of the software. Instead, they
17 apply only to the Grokster newsletter and forums. Terminating those registrations,
18 as Grokster has done in the past, does nothing to prevent filesharing. Moreover,
19 even when the FastTrack software did require registration, termination of that
20 registration could not effectively prevent filesharing: a terminated user could
21 simply re-register in another name, and even if Grokster’s registration servers shut
22 down completely, users could still share files (although unrelated functions such as
23 instant messaging would fail, as they required unique user names for addressing).

24 Id., ¶ 7.

25 Second, Plaintiffs argue that Grokster has failed to exercise what little
26 control it has. Grokster’s continuing voluntary registration process does give
27 Grokster the ability to communicate with those of its users who register, and
28 Grokster has consistently used that ability, to the full extent it is able, to discourage

1 infringing activity. Grokster has responded to every single notice it has received
2 from any of the Plaintiffs herein, at considerable effort and expense, sending cease-
3 and-desist notices to all users it could identify.¹⁸ Grokster also advised Plaintiffs of
4 its willingness to terminate any user registration in the event cease-and-desist
5 notices failed to prove effective, and even set up separate protocols for forwarding
6 notifications of repeat offenders. But in all of the months since Plaintiffs started
7 sending notifications, none of them has ever identified a single user who has
8 continued to share allegedly infringing files after being sent a cease-and-desist
9 notice. On the basis of the evidence Plaintiffs have adduced, it is thus reasonable
10 to conclude that Grokster's efforts to police its users have been entirely effective.
11 After all, had Plaintiffs managed to locate a repeat infringer among the thousands
12 of searches they have performed, they surely would have mentioned it to Grokster
13 and this Court.

14 More importantly, those efforts have been all Grokster can do. As the
15 Napster court made clear, vicarious liability can only attach upon a showing that
16 the defendant both has the ability to "police its premises," and has failed to do so to
17 the extent it can. Plaintiffs' proof fails on both counts.¹⁹

18 **F. Plaintiffs, Having Championed The Dutch Trial Court's Ruling, Seek**
19 **To Disown The Case Now That They Have Lost On Appeal**

20 Plaintiffs also go to great lengths to dissuade this Court from considering the
21 results in parallel litigation against Kazaa in the Netherlands. This is a fascinating
22 reversal of tactics on Plaintiffs' part: when they won at the trial court level in
23

24 ¹⁸ Those notices warned users that, should Grokster receive a second complaint
25 about them, their user registrations would be terminated. The notices did not
26 advise users that they would be able to re-register under other names; to do so
27 would obviously have weakened the deterrent effect.

28 ¹⁹ Plaintiffs also repeat their argument that Grokster could implement effective
filtering technology. As we demonstrated in opposition to Plaintiffs' own motion,
the filtering technology urged by Plaintiffs is at best a vague hope that a
technological solution might be reached at some point in the future. See
Grokster's Opposition at 11-17.

1 Holland, they repeatedly championed that result to this Court, and urged this Court
2 to rely on the Dutch trial court decision. See, e.g., Plaintiffs’ Feb. 15, 2002 MPA
3 in Opposition to Motion for Partial Summary Judgment at 4; Plaintiffs’ Feb. 15,
4 2002 Opposition to Grokster’s Joinder at 2. In so doing, Plaintiffs most decidedly
5 did not describe that decision as “truncated,” “informal,” “drastically abbreviated,”
6 bearing “no resemblance to any sort of binding adjudication in the United States,”
7 and thus deserving “no deference.” Instead, they quoted at length from and
8 submitted copies of the trial court opinions, arguing that “[o]ne court has already
9 seen through the argument of [Kazaa]” and describing Kazaa’s argument that it
10 does not control its users’ activities as “particularly disingenuous, given that it has
11 been ordered by a Netherlands court to shut down its service . . .”

12 But now that the appellate court²⁰ in the Netherlands has reversed the trial
13 court decision, Plaintiffs hope this Court will not remember the emphasis they
14 placed on the now-reversed decision in their favor. Where a Dutch trial court
15 decision was worthy of prominent mention, citation of the contrary decision of a
16 higher court is reduced to a “remarkable contention.”

17 Plaintiffs miss the point. Regardless of their new-found disdain for Dutch
18 procedure, the fact remains that, by decision of a Dutch appellate court,
19 distribution of the FastTrack software is legal in its home jurisdiction.²¹ Any
20 contrary decision by this Court would effectively trump that sister state’s decision
21 concerning its own citizens. Moreover, because of the Dutch decision, distribution
22 of Kazaa and Grokster software via the FastTrack protocol (a common event, as
23 evidenced by Professor Olkin’s own research; see Creighton Decl., Exh. 1) is itself
24 a substantial noninfringing use in the only jurisdiction to have decided the
25

26 ²⁰ Or, in Plaintiffs’ words, an “intermediate court.” In Plaintiffs’ lexicon, a trial
27 court is “one court,” but an appellate court is only an “intermediate court.”

28 ²¹ Plaintiffs go so far as to describe Kazaa’s choice to litigate in its home nation,
rather than halfway around the world, as “telling,” as “flouting this Court’s
authority,” and as “forum shopping.”

1 question.

2 **III. CONCLUSION**

3 Little, if anything, has changed in the months of discovery and briefing since
4 Grokster first told this Court that this was at its heart a simple case. Grokster
5 distributes a tool it did not create and cannot rewrite, which allows its users to
6 search for and exchange with each other any sort of file. Some of those users
7 apparently and regrettably choose to use that tool to exchange copyrighted works
8 without authorization. Others indisputably use that tool for lawful, noninfringing
9 purposes. Grokster has no ability to monitor and control its users' activities, any
10 more than Microsoft can control what files its users send to each other using
11 Outlook, and Grokster has no ability to prevent the exchange of particular works.

12 Plaintiffs have made no factual showing to the contrary. Their showing has
13 been limited to innuendo and speculation that Grokster could have designed or
14 distributed a different product more to their liking, combined with highly suspect
15 and disputed analysis purporting to show that infringing uses outweigh legitimate
16 uses.

17 Plaintiffs' survey evidence, however, even if credited, is simply irrelevant.
18 Whatever the proportions of different uses, today or in the future, there can be no
19 dispute that Grokster (and Morpheus and Kazaa) is capable of substantial
20 noninfringing uses. Under Sony, that is all this Court need find to grant summary
21 judgment in Grokster's favor on contributory infringement. And regardless
22 whether the Court credits Plaintiffs' speculations that digital fingerprinting might
23 someday succeed where prior efforts have failed, that "evidence" is irrelevant as
24 well. There is no legitimate dispute that Grokster cannot control the actions of
25 those who use the product at issue in this case. Under Napster, that is all this Court
26 need find to grant summary judgment in Grokster's favor on vicarious
27 infringement.

28 ///

1 Dated: November 4, 2002

KEKER & VAN NEST, LLP

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3 By: 

4 MICHAEL H. PAGE
5 Attorneys for Defendant
6 GROKSTER, LTD.

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