

APPEAL NO. 03-55894 AND 03-55901

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

GROKSTER, LTD., et al.
Appellees.

JERRY LEIBER, et al.,
Appellants,

v.

MUSICCITY.COM, INC., et al.
Appellees.

On Appeal from UNITED STATES DISTRICT COURT, CENTRAL
DISTRICT OF CALIFORNIA, METRO-GOLDWYN-MAYER STUDIOS
INC., et al. v. GROKSTER, LTD., et al., Case No. 01-08541 SVW (PJWx)
(Consolidated with CV 01-09923 SVW (PJWx))
HONORABLE STEPHEN V. WILSON

**APPELLEE GROKSTER, LTD.'S
BRIEF**

KEKER & VAN NEST, LLP
MICHAEL H. PAGE - #154913
MARK A. LEMLEY - #155830
STACEY L. WEXLER - #184466
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: (415) 391-5400
Facsimile: (415) 397-7188

Attorneys for Appellee
GROKSTER, LTD.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee Grokster, Ltd. makes the following disclosure:

No publicly held company owns 10% or more of the stock of Grokster, Ltd..

TABLE OF CONTENTS

	<u>Page</u>
I. JURISDICTIONAL STATEMENT	1
II. QUESTIONS PRESENTED ON APPEAL	2
III. INTRODUCTION	3
IV. STATEMENT OF THE CASE	8
V. STATEMENT OF FACTS	10
A. Grokster	10
B. Grokster’s Responses to Appellants’ Notices of Alleged Infringement	12
C. Substantial Noninfringing Uses of Peer-to-Peer Technology	17
D. The District Court’s Findings of Fact.....	22
VI. SUMMARY OF ARGUMENT	25
VII. ARGUMENT.....	26
A. Under <i>Sony</i> , Grokster is Not Liable for Contributory Copyright Infringement	26
1. The Provider of a Product Capable of Substantial Noninfringing Uses Cannot Be Contributorily Liable.....	26
2. The District Court Did Not Improperly Add “Ability to Control” to the Standard for Contributory Liability, Or Improperly Narrow The Knowledge Requirement.....	29
3. Appellants Create “Limitations” on Sony Contrary to Established Caselaw	33
a. Knowledge of Infringement Does Not “Render <i>Sony</i> Inapplicable”	33
b. <i>Sony</i> is not limited to “commercial” noninfringing uses	37

**TABLE OF CONTENTS
(cont'd)**

	<u>Page</u>
c. <i>Sony</i> is not Limited to Sellers Who Have No Further Contact With Purchasers.....	38
d. <i>Sony</i> is Not Limited to Cases That do Not Involve Distribution	41
e. <i>Sony</i> Contains No “Designed For Infringing Use” Limitation.....	42
B. Grokster is Not Vicariously Liable	44
1. Grokster Has no Ability to Control the Activity of its Customers.....	45
2. <i>Sony</i> Does Not Include an Exception for Products That Could Have Been Designed Differently	49
3. Grokster Has No Ability to Distinguish Infringing from Noninfringing Uses, and No Ability to Redesign its Product To Do So.....	51
VIII. CONCLUSION.....	54

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>A&M Records v. Napster</i> , 284 F.3d 1091 (9 th Cir. 2002).....	52
<i>A&M Records, Inc. v. Napster</i> , 239 F.3d 1004 (2001).....	passim
<i>A&M v. Abdallah</i> , 948 F. Supp. 1449 (C.D. Cal. 1996).....	30, 43
<i>Arista Records v. MP3Board</i> , 2002 U.S. Dist. LEXIS 16165 at *15.....	39
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 254 (9 th Cir. 1996).....	passim
<i>In re Aimster</i> , 334 F.3d 643 (7 th Cir. 2003).....	passim
<i>Metro-Goldwn-Mayer Studios, Inc. v. Grokster</i> , 259 F. Supp. 2d 1029	1
<i>Religious Tech. Ctr. v. Netcom</i> , 907 F. Supp. 1361 (N.D. Cal. 1995).....	32
<i>Sony v. Universal City Studios</i> , 464 U.S. 417 (1984).....	passim
<i>Universal Studios, Inc. v. Sony Corp.</i> , 480 F. Supp. 429 (C.D. Cal. 1979).....	31
<i>Vault Corp. v. Quaid Software, Ltd.</i> , 847 F.2d 255 (5th Cir. 1988).....	27
Statutes	
28 U.S.C. §1292(a).....	1
28 U.S.C. §1292(a)(1).....	1

TABLE OF AUTHORITIES
(cont'd)

	<u>Page(s)</u>
28 U.S.C. §1292(b)	1
Fed. R. Civ. P. 54(b)	1, 9

Other Authorities

<i>Niccolo Machiavelli, The Prince</i> (1513) at 17	29
U.S. Const. Article 1, Section 8	46

I. JURISDICTIONAL STATEMENT

Appellants' statement of jurisdiction is incorrect. The MGM Plaintiff-Appellants' Brief ("MGM Brief") claims jurisdiction based on 28 U.S.C. §1291(a)(1), which does not exist. Assuming Appellants intended to refer to §1292(a)(1), they are mistaken. Appellants initially purported to appeal by authority of §1292(a)(1), claiming that the order below was a denial of a motion for injunctive relief. It was not. This Court ordered Appellants to show cause why that appeal should not be dismissed. While that issue was pending, the district court at Appellants' request amended its Order to enter Fed. R. Civ. P. 54(b) partial summary judgment as regards the "current versions" of Grokster's and Streamcast's software, while retaining jurisdiction and expressly not reaching "the question whether either Defendant is liable for damages arising from past versions of their software, or for other past activities." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 259 F. Supp. 2d 1029, 1033, JER7652 (cited herein as "Order") at 6; JER7707. In the alternative, the district court certified its order for interlocutory appeal under 28 U.S.C. §1292(b). Accordingly, this Court dismissed the pending briefing regarding §1292(a) jurisdiction as moot, and granted leave for interlocutory appeal under §1292(b).

II. QUESTIONS PRESENTED ON APPEAL

This appeal presents two questions for decision by this Court:

First, under the controlling authority of *Sony v. Universal City Studios*, 464 U.S. 417 (1984) (“*Sony*”), does the distribution to the general public of a tool—a piece of hardware or software—expose the distributor of that tool to contributory liability when the end user of that tool uses it to infringe the copyrights of others? So long as that tool is capable of noninfringing uses, the answer is plainly “no.”

Second, under the controlling authority of *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (2001) (“*Napster*”) and *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 254 (9th Cir. 1996) (“*Fonovisa*”), can the supplier of a piece of software be held vicariously liable for alleged copyright infringements committed by users of that software? When the supplier does not have the ability to control that conduct, the answer is again plainly “no.”

III. INTRODUCTION

Twelve-year-old Brianna sits down at her computer. Half of her allowance goes to buying CDs of Britney Spears, The Dixie Chicks, Christine Aguilera, and Jennifer Lopez. She has just purchased a Panasonic MP3 player: a tiny device that allows her to carry around dozens of her favorite songs on a tiny microchip. But first she needs to load those songs into the device, in the popular MP3 compressed audio format. She could “rip” them from the CDs she already owns (a process of translating the digital files on her CDs into the ten-times more compact MP3 format), but that process is complicated and confusing. Instead, she decides to download MP3 versions of those songs.

Brianna turns on her family’s new Sony Vaio computer. Like millions of other users, Brianna’s family—having been besieged with ads encouraging them to “Rip. Mix. Burn.”—purchased a computer with a built-in CD burner, modem, and audio and video recording and playback software. The computer first loads the Microsoft Windows operating system. Brianna then connects to the internet, by launching AOL Version 8.0. Brianna is an AOL subscriber, and AOL has recently automatically sent her an update to the current version. The AOL software, along with the Microsoft operating system, activates Brianna’s 3Com modem and connects her to AOL. Once connected to the AOL network, Brianna uses AOL’s instant messaging to ask a friend about music swapping software. The friend points Brianna to an AOL “message board,” where she reads users’ comments concerning various software programs. The users’ comments teach Brianna that it is best to use a broadband connection, through network providers such as AT&T Broadband, Time Warner cable,

or her local phone company, but those connections are more expensive, so she sticks with her AOL dialup account. The message boards also explain to Brianna that she can find any song she wants simply by using any search engine (such as Yahoo or AltaVista) within her Microsoft or AOL browser. She can also share files via her AOL Instant Messenger. But she also learns that file-sharing software such as Morpheus, Grokster, or Kazaa is easier to use.

Brianna uses her browser to download a copy of Grokster, which is then stored on her computer's hard drive. She then starts her copy of Grokster, and she enters search terms for the songs she wants. Without any involvement of any computer or server operated by Grokster, her software searches the computers of other Grokster, Kazaa, and iMesh users and finds copies of the songs she wants. She downloads those songs from other users, routed to her through various commercial internet service providers. In the process, she notices an ad on the Grokster site for a new band, MaddWest. She clicks on the ad to download a copy of their new song. When she goes to play it, she notices that it is digitally protected by Microsoft's digital rights management software, but that she has been given a 30-day free license to play the song. After 30 days, if she likes the song, she will need to buy a license. She then shuts down her copy of Grokster.

Next, she wants to organize those songs into a playlist, and listen to them on her computer. Again using her AOL or Microsoft browser, she downloads one of the most popular MP3 "players," WinAmp, from its AOL-owned author and distributor. Using WinAmp, she listens to her favorites songs, and decides on a sequence. She then copies those songs into her MP3 player, using Microsoft and Sony software and hardware. She also decides to make a CD of her selections. Using MusicMatch

software that came free with her Sony computer (software that also would have allowed her to “rip” the songs from her CDs in the first place and share them with others), she inserts a Memorex writable CD into her computer’s drive, and creates a new CD with dozens of her favorite songs, in the order she has chosen.

Appellants contend that what Brianna has done is illegal, although she has already bought copies of the songs she has downloaded. The record companies who claim to hold the copyrights in those songs could sue her for infringement. They recently have begun doing just that, filing suits against hundreds of individual filesharers around the nation. But suing one’s own twelve-year-old customer, for using the products one’s corporate parent has sold to her, is hardly an inspired business plan.

So who can the record companies sue? Why not sue anyone who sold or gave Brianna any of the tools she used? After all, Brianna could not have committed her crimes without the aid of a host of co-conspirators, each of whom are aware that there are millions of Briannas involved in this massive international crime spree. Sony, AOL-Time Warner, Microsoft, AT&T Broadcom, Memorex, MusicMatch, WinAmp, Yahoo, 3Com, the chip makers, the drive manufacturers—and Grokster—all provide tools that enable Brianna to commit her crimes, all profit (or hope to someday) from providing those tools, and all know that a major use of their products is the massive piracy alleged in this lawsuit. By Appellants’

logic, all of these co-conspirators are culpable.

The district court's opinion rejecting that proposition is not—as Appellants style it—an “abdication” of copyright law: the district court neither “sharply departed from the law of this Circuit” nor “dramatically redrew the law of secondary infringement.” Rather, the opinion below is a straightforward application of controlling law to the facts of *this* case. Appellants struggled mightily below to reprise *Napster*, repeating the “this case is just like *Napster*” refrain at every turn. But as the district court correctly decided, *Grokster* is *not* *Napster*. There is no conflict between this Court's *Napster* opinion and the holding in this case. As this Court held in *Napster*, “To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use.” *Napster*, 239 F.3d at 1021. In so holding, this Court followed the established authority of *Sony*: there is no contributory liability for distributing a product if that product is “capable of substantial noninfringing uses.” *Sony*, 464 U.S. at 442.

This is the law, regardless whether it serves Appellants' commercial interests. Liability attached in *Napster* *not* because of the inherent capabilities of the software, but because of *Napster*'s ongoing ability to control the activities of individuals using that software. And by the same principle, liability does not attach to *Grokster*. Just as *Sony* had no ability to dictate what its customers did with the VCRs *Sony* sold them, *Grokster* has no ability to control what users do

with the Grokster software.

Appellants understandably dislike *Sony*. It requires them to sue people who actually infringe their rights, rather than simply tagging whatever convenient supplier of tools they choose (and they of course choose to sue only those suppliers they do not themselves own or do business with). Recognizing that the opinion below correctly applied *Sony* as written, Appellants therefore try to rewrite the Supreme Court's opinion, urging upon this Court a series of invented "exceptions" to *Sony*. As the district court held below, and as the Seventh Circuit has already held in response to Appellants' same assertion of those purported *Sony* exceptions in *In re Aimster*, 334 F.3d 643 (7th Cir. 2003) ("*Aimster*"), none of those "exceptions" are to be found in *Sony*: indeed, most of them were expressly rejected by the Supreme Court nearly twenty years ago.

What Appellants really seek here is legislation. Under the guise of "tweaking" *Sony* a bit, they ask this Court to legislate the shape of technological innovation. Appellants want a very different allocation of liability, and thus a very different allocation of the burden of policing their own copyrights, than current law provides. Under Appellants' view, creators and distributors of content-neutral tools are deputized to police the copyrights of every content creator in the world, under penalty of liability for the acts of unknown and uncontrolled others. Creators and distributors of technology are also required to design and implement their inventions in whatever manner best suits Appellants' view of what that

technology *could* do to deter infringement, and would be required in the process to guess as to the nature and proportions of future uses of their products.

But Appellants' version of secondary liability was expressly urged on the Supreme Court in *Sony*, and expressly rejected: the minority opinion championed that theory, but the majority rejected it, holding that Sony's secondary liability was to be judged on the basis of the product it actually created and sold, not by reference to a product it might have built more to the plaintiffs' liking.

Undeterred, Appellants now ask this Court to ignore the Supreme Court's directive on this point, arguing that because "defendants" could have shouldered the burden of policing Appellants' copyrights by designing a product for that purpose, they should therefore be held liable for the uses to which the actual product was put. This argument is squarely foreclosed by both *Sony* and *Napster*.

IV. STATEMENT OF THE CASE

There is no material factual dispute in this case, particularly as to Grokster. What Grokster and its software does and does not do is straightforward and undisputed. And there is no dispute that peer-to-peer filesharing software is widely used for both infringing and noninfringing purposes. That record, however, is persistently clouded by Appellants, in two significant ways. *First*, Appellants continue a tactic employed below, indiscriminately ascribing facts and allegations to "Defendants" generically, regardless whether the cited evidence concerns

Grokster, StreamCast, Kazaa, or Sharman.¹

Second, Appellants successfully limited the motions below to the question whether Grokster's (and StreamCast's) current software infringes a small Appellant-selected test set of copyrighted works. The Order was thus limited to the question of the legality of the distribution of that current software. Appellants then sought Rule 54(b) certification to this Court, severing all claims concerning *past* versions and *past* actions and leaving those pending and undecided below. Accordingly, the *sole* issue on appeal is the legality of the distribution of Grokster's and StreamCast's current software. Notwithstanding that procedural posture, Appellants spend a large portion of their briefs reciting their unadjudicated factual claims concerning prior versions of the Morpheus, Grokster, and Kazaa software, as well as earlier products distributed by other companies. Those issues

¹ For but a few examples: Appellants allege (1) that "Defendants" make millions in advertising revenues, citing evidence of StreamCast's income (*compare* MGM Brief at 9 *with* evidence cited), (2) that "Defendants" did not respond at all to notices of alleged infringement, when the uncontested evidence is that Grokster did (*see infra* at 12-15), (3) that "Defendants" designed their products in particular ways, when Grokster has no role at all in designing the FastTrack software, (4) that "Defendants" could modify their products to filter infringing content, when Appellants' own expert admitted it was not possible for Grokster to do so without access to the Fast Track source code (*see infra* at 48), (5) that "MusicCity and Grokster took deliberate steps to cover up their knowledge of the infringements," citing to no evidence regarding Grokster (*compare* Leiber Brief at 15 *with* evidence cited), and (6) that "Music City and Grokster actually tried to block the efforts of companies retained by copyright owners . . .," citing evidence unrelated to Grokster (*compare* Leiber Brief at 17 *with* evidence cited). There is hardly a page in any of Appellants briefs—below or to this Court—that does not try to ascribe the conduct of others to Grokster.

are not before this Court.² The district court's ruling is narrowly tailored to a single, legal question: whether distribution of the *current* versions of Grokster and Morpheus gives rise to contributory or vicarious liability. Liability for past versions, and past actions related to those versions, has yet to be adjudicated below, much less appealed to this Court.

V. STATEMENT OF FACTS

A. Grokster

Grokster Ltd. is a small, family-run business: until recently, its sole personnel were Daniel Rung, his son Matthew, and his brother Michael. JER197. They distribute the Grokster software product under license from Kazaa BV. *Id.* The Grokster software is functionally identical to the Kazaa Media Desktop, which is distributed by Sharman Networks: both products, and others, enable users to exchange files of any sort with other users via the FastTrack protocol. Grokster has no role in the design of the Grokster product, no access to the source code for the product, and no more understanding of the inner workings of the product than any other outside observer. JER198. By analogy to the *Sony* case, if Kazaa BV is the manufacturer of the VCR, Grokster is Circuit City: Grokster gets to put its brand name on the box and bundle its own advertising with it, but can't change the

² Appellants will no doubt argue that prior activities and products are relevant to establish constructive knowledge that many of their users illegally download copyrighted works. But that fact is not in dispute: while the proportions of use were disputed below, there is no factual that there is both substantial infringing use and substantial noninfringing use.

way it works inside.

Grokster's income is derived from two sources, neither of which is determined by or dependent on the uses to which its product is put. *First*, advertisers pay for the ads that are periodically sent to users and displayed on their computers. *Second*, Grokster receives payment from publishers of other software, not at issue in this case, which is "bundled" with the Grokster software. JER0117.

Grokster, as a licensed redistributor, has no ability to control the uses to which its product is put. When users search for files, the search requests and results are never sent to Grokster: they are transmitted between users without any contact with Grokster, just as electronic communications among users of Microsoft's Outlook or Explorer products are invisible to Microsoft. JER197-98. Grokster has no way of knowing what files are being exchanged, or by whom. The only communications Grokster receives from its users' computers are (1) requests for the content of Grokster's "start page," a typical HTML web page that promotes various authorized content from independent artists, and (2) automatic periodic requests to "ad servers," which in response send advertising content to the users. *Id.* Grokster's responses to those requests, and the resulting content and ads, are Grokster's *only* control over the functioning of the Grokster software, and are unrelated to the filesharing activities of the users: the Grokster application requests and displays ads regardless whether the user is sharing infringing files, noninfringing files, or no files whatsoever. *Id.*

Grokster does not even know the identities of its users. With earlier versions of the FastTrack software, when a user first installed the software he or she was prompted to register a user name, which along with the user's email address was transmitted to Grokster's registration server. Each subsequent time the application was launched, the user name would be checked against the central registration server. Subsequent versions of FastTrack, however, dispensed with user registration, apparently because technological advances enabled the FastTrack software to distinguish between redundant user names without requiring a central registration database. JER198-99.

After the authors of the FastTrack software dispensed with the mandatory registration feature, Grokster was left with no way to reach its new users directly, other than by posting notices on its "start page" or its website. Grokster, however, regularly publishes a newsletter, designed primarily to inform users of independent musicians and artists who have authorized the distribution of their work via peer-to-peer networks. Accordingly, Grokster continued to encourage its users to register their user names and email addresses with Grokster, and to sign up for the Grokster newsletter. A minority of users did so. As a result, Grokster retained the ability to communicate with some, but not all, of its users. *Id.*

B. Grokster's Responses to Appellants' Notices of Alleged Infringement

At the outset of this lawsuit, Appellants from time to time sent Grokster notifications of alleged infringements of their works. Grokster cooperated with

Appellants in responding to those notices, contacting the users in question and conveying the Appellants' demands that they cease infringing activities. For example, several of the Appellants retained a company named MediaForce to besiege Grokster with literally thousands of individual emails, each identifying one alleged infringer. JER0200; 0219-21. Grokster voluntarily created an automated program to process those emails, extract the user name, retrieve the corresponding email address from its user database, and send a notice to the user. That notice told the user that, if a second such notice was received, his or her registration would be terminated. Grokster also advised MediaForce how to continue to format its notices so that the automated process would function, and further instructed MediaForce that, in order to trigger Grokster's "repeat offender" policy, it need only include the words "REPEAT OFFENDER" in the subject line of a notification. JER0222-27. MediaForce responded that it would do so. JER0228.

Curiously, however, almost as soon as Grokster had set up this system, MediaForce simply stopped sending notifications. JER0200-21. In deposition, MediaForce's president testified that the notifications were terminated at the instruction of the client, but that he had no idea why that instruction had been given. JER0970-79. More significantly, in the months in which MediaForce monitored Grokster traffic and sent thousands of "cease and desist" notices, MediaForce *never once notified Grokster of a single repeat offender. Id.*; JER0200. Despite the apparent efficacy of the notices, the Appellants terminated

the process. Grokster can only conclude that the abandoned notification process was part of a failed effort to build a litigation record of nonresponsiveness on Grokster's part, rather than a good faith effort to address and discourage alleged infringement.

That conclusion is bolstered by the actions of other Appellants. Grokster also periodically received notifications from the Recording Industry Association of America ("RIAA") and the Motion Picture Association of America ("MPAA"), and set up processes to forward them to users. The RIAA and MPAA, however, also stopped sending notifications once it became clear that Grokster would not simply ignore them. JER0201. Similarly, the Harry Fox Agency (which represents the class action Appellants) forwarded a series of "summaries" of alleged infringements. In response, Grokster offered to set up yet another automated notification system, and offered to coordinate the technological details with Harry Fox personnel. JER0993-4. Harry Fox declined, responding that "your offer to notify users of the Grokster system and service of their infringing activity is a meaningless gesture. Grokster users who copy and distribute copyrighted music without authorization need no notice that their conduct is unlawful."³

JER0996-7. Grokster nevertheless proceeded to send notices to the users identified

³ This language echoed the incessant mantra of Appellants: the Grokster "system and service . . . system and service . . . system and service . . ." repeated at every turn in hopes the district court would not notice that all Grokster does is distribute a product.

by Harry Fox manually. JER0201.

Grokster's efforts, however, went further. Grokster, like many software companies, provides its users with free user forums, where users can share information concerning its products. Grokster also, like most software companies, provides an email address to which users may direct technical support questions. Notwithstanding that Grokster had only two active workers, it voluntarily undertook the considerable burden of actively monitoring those forums and responding to those questions, manually reviewing each of the thousands of messages before posting, deleting those with inappropriate content (in particular any reference to apparent copyright infringement), and sending appropriate responses. JER 0201-02.

Grokster's policy is to delete any posting that encourages or even refers to the copying of anything Grokster recognizes as unauthorized content. Mr. Rung spent a considerable amount of time at this task, dealing with hundreds of messages daily, and deleted many hundreds of such postings. JER0202. Indeed, in instances where Mr. Rung became aware of infringing conduct, he often berated the user involved, suggesting that he or she should pay for copyrighted content. Ironically, Appellants quote and cite one such instance as evidence that Grokster "advised [its] users how to download copyrighted works. *Compare JER4959 with MGM Brief at 29.*

In order for one person to handle the volume of communications, the review

was by necessity cursory; in most instances, where the subject line of a posting or a quick review of the message revealed the nature of the technical question, Mr. Rung inserted a stock, prewritten technical answer in the reply and moved on. Not surprisingly, once in a while an email with a reference to an apparently infringing work slipped through. JER0201-02. Appellants found only two such examples among the thousands of technical questions and other emails received and reviewed by Grokster. JER4968, 4980. Both of those responses cited by Appellants are examples of stock technical advice inadvertently provided to people who included the names of apparently infringing works in their technical questions.⁴ Those two responses, moreover, did not refer to works before the district court, and are equally irrelevant to this appeal. It was Appellants, after all, that insisted—over Appellees’ strenuous objections—that they be permitted to hand pick a small set of “Phase 1” works on which to bring their motion for summary judgment. Order at 8. By doing so, Appellants were able to limit the court’s review to works they were confident did not have the ownership and “work for hire” issues that plagued them in the *Napster* case. Having prevailed in that effort, however, Plaintiffs cannot selectively re-expand their motion on appeal when it suits their purposes, alleging contributory infringement of works to which

⁴ Although one of the two is in fact an example of the folly of assuming infringement based solely on file names: the user complained that, upon downloading a file that appeared to be “resident evil,” it turned out to be “some old boxing movie.” JER4980.

they have not established title and which they excluded from their motion below.

None of the works mentioned in the proffered evidence was at issue before the district court. Order at 8; *Compare* JER4968, 4980 (mentioning *Lord of the Rings*, *Resident Evil*, and *Big Fat Liar*) with JER0059-61 (listing Phase 1 works).

C. Substantial Noninfringing Uses of Peer-to-Peer Technology

Grokster's Terms of Service forbid any use of the Grokster software to infringe the copyrights of others. JER1000. In contrast, Grokster actively promotes and encourages the use of its software for the sharing of authorized content. The Grokster "start page" and newsletter consist of reviews and promotional material designed to introduce the work of various independent artists who are not among the tiny minority blessed with major label or studio contracts, and instead are using the growing world of peer-to-peer file exchange software to distribute their work. JER0953-66; 0199-200; 0204-17. Grokster has entered into partnerships with several groups of independent artists, all of whom expressly authorize distribution of their works via peer-to-peer networks. Grokster partner GigAmerica represents approximately 7000 independent artists, virtually all of whom have authorized distribution of their music via Grokster. Each week, GigAmerica artists are featured on Grokster's start page. Featured GigAmerica artists routinely have their songs downloaded thousands of times a week. JER0953-0966. Grokster partner J!VE Media works with content providers to package digitally-protected free content and distribute it via the Gnutella and

FastTrack networks. Its clients include the Priority Records division of EMI (whose promotional video for recording artist Lil' Romeo was downloaded by 400,000 people, 60% of whom did so via peer-to-peer networks) and Koch International (the world's third-largest independent music label, for whom J!VE Media distributes music videos), among others. JER0190-95. Grokster partner ReelMind promotes its free distribution of independent films via Grokster. JER0200.

The authorized content created and distributed by Grokster's partners, however, is just the tip of the growing iceberg of authorized, noninfringing uses of peer-to-peer filesharing. Peer-to-peer filesharing provides dramatic advantages over traditional means of content distribution, which require huge and inefficient capital-intensive means of production and distribution. Records and CDs must be produced in factories, packaged, and shipped throughout the world. At each stage in the chain, warehouses, trucks, stores, and the like must exist to support the system. And of course, each player in that capital-intensive chain must extract its costs and profit. As a result, traditional music distribution leaves little if any income for the artists: only those few artists who achieve mass success make any money. JER 0387-99. As a corollary of the capital-intensive nature of the industry, record companies are by nature conservative: when it takes millions of dollars of development and marketing to create a successful product, companies will by necessity stick to "safe" bets that can be depended on to sell to millions. The

economics of the industry move inevitably to the lowest common denominator.

By contrast, peer-to-peer distribution is a near-perfect system: it reduces “transaction costs” (i.e., the costs of distribution unrelated to the creative process) essentially to nothing. Not only is there no need for stores, trucks, and plastic boxes, there is not even a need for large banks of servers feeding copies to each user: The consumers become the distributors, propagating content among themselves at no cost to the artist.⁵ When combined with digital rights management systems already available, the result is a marketplace with no “middle men” and no overhead, where the fruits of the artist’s labor fall to the artist, not the manufacturer and distributor. Great for artists, but not so good for middle men.

The experience of the band Wilco provides a dramatic example of the legitimate power of free internet distribution. Wilco was a moderately successful band on AOL Time Warner’s Reprise Records. When Wilco delivered a new album, *Yankee Hotel Foxtrot*, Reprise declined to release it, feeling it had no commercial potential, and Wilco repurchased the work from Reprise. Wilco then decided to release the entire album for free downloading. In the first month alone,

⁵ This central feature of peer-to-peer technology—that the clients are also the servers, and thus there is both no need for central servers and no problem “scaling” the system infinitely (as by definition the supply grows with the demand)—distinguishes Defendants’ products from those of Amici FullAudio, Roxio, *et al.* Although their amicus brief goes to great lengths to argue that peer-to-peer technology is not inherently bad or good—a proposition with which Grokster wholeheartedly agrees—they fail to note that none of those amici in fact operate peer-to-peer systems. They are each traditional “one-to-many” systems, sharing Appellants’ vested interest in quashing a next-generation technology superior to

their website received 200,000 unique visitors, and all of the songs are now widely and legally available on the FastTrack network. That widespread interest prompted bids from various record labels, and Wilco was signed to a new contract by Nonesuch Records—another AOL Time Warner label. Nonesuch released the album, which debuted at #13 on the Billboard charts. By the time briefs were filed in the district court, the album was Wilco's best selling ever, having already sold in excess of 300,000 units. On May 20, 2003, Yankee Hotel Foxtrot was certified gold by the RIAA. *see* www.riaa.com/gp/database. Thus a record rejected by one AOL Time Warner label as having no commercial potential became, as a result of free internet distribution, a hit record for another AOL Time Warner label.

JER0174-75.

Other record companies have also discovered—belatedly—the value of peer-to-peer distribution. Lava/Atlantic Records—a division of Appellant Atlantic—distributed, for free, songs from current albums of a number of its artists (including a Simple Plan and Grade 8) via GigAmerica and Grokster. JER0953-57. Commercial ventures such as Altnet, Trymedia (JER0528), Microsoft, GigAmerica, and others (including both record labels and movie studios) are already making legitimate use of peer-to-peer networks. Altnet, for example, is still in its infancy, and yet it is already using the FastTrack technology to distribute hundreds of titles, from music to movies to video games. Altnet has distributed

their own.

millions of authorized preview copies of video games from Infogrames and Macromedia, generating sales of tens of thousands of full versions of those games. They have distributed hundreds of thousands of authorized copies of songs by both unsigned artists and artists signed to commercial labels, including over 100,000 downloads of Brooke Allison's music (an artist distributed by Appellant EMI), and a quarter of a million copies in one month alone of songs by Redline artist Noise Therapy. And they have teamed up with Microsoft and Lion's Gate to distribute trailers for the feature film "Rules of Attraction," and with Palm Pictures to distribute copies of documentary films.⁶ JER7537-39.

More recently, Appellants have themselves realized the incredible marketing and demographic value of Defendants' products. The record industry now employs research firms such as BigChampagne to track and analyze traffic on Kazaa, Morpheus, and Grokster, and uses that data to target marketing and promotional efforts:

"It's fantastic,' says Jeremy Welt, head of new media at Maverick Records, an AOL Time Warner label. 'It actually shows us what people are doing of their own accord.' And because radio is beginning to take BigChampagne seriously, Welt says, Maverick can use the figures to persuade stations to increase spins. 'The fact is, P2P is a likely distribution channel for our wares,' says Jed Simon, head of new media for DreamWorks Records. 'If we're going to be intelligent businesspeople, it behooves us to

⁶ Remarkably, despite the abundance of such specific (and quantified) evidence of noninfringing uses in the record, Appellants contend that "none of the declarants who referred to the non-infringing uses of the services addressed the magnitude or substantiality of such uses." Leiber at 21 (emphasis in original) and that "Defendants did not present any contrary evidence as to the substantiality of claimed noninfringing uses." MGM Brief at 41.

understand it.””

See <http://www.wired.com/wired/archive/11.10/filesshare.html>.

Thousands of musical groups authorize free distribution of their music. Independent filmmakers distribute their works via peer-to-peer. Project Gutenberg has released thousands of public domain literary works for free sharing. JER0528. The Prelinger Archive distributes thousands of previously unavailable historic public domain films. JER0513-17. Distributed networking initiatives, market research companies, advertisers, individuals sharing all manner of graphic and text files, software vendors giving away freeware and shareware programs (JER626-629), and established artists authorizing sharing of live recordings are but a few of the exciting uses to which peer-to-peer networks have already been put, even in their infancy.

D. The District Court’s Findings of Fact

Based on this factual record, the district court made the following findings of fact:⁷

- ***“[I]t is undisputed that there are substantial noninfringing uses for Defendants’ software... Plaintiffs do not dispute that Defendants’ software is being used, and could be used, for substantial noninfringing purposes.”*** Order at 12-13.
- ***“Grokster does not have access to the source code for the [Grokster] application, and cannot alter it in any way.”*** Order at 20.

⁷ Underlined emphases in original, bold emphases added.

- “[T]here is *no admissible evidence* before the Court indicating that Defendants have the ability to supervise and control the infringing conduct (all of which occurs after the product has passed to end-users).” Order at 32.
- “*Grokster does not operate a centralized file-sharing network like that seen in Napster*. Rather, the Grokster-licensed Kazaa Media Desktop software employs FastTrack networking technology, which is licensed by Sharman and is not owned by Grokster.” Order at 20.
- “When users search for and initiate transfers of files using the Grokster client, they do so *without any information being transmitted to or through any computers owned or controlled by Grokster*.” Order at 22.
- “Users connect to the respective networks, select which files to share, send and receive searches, and download files, all *with no material involvement of Defendants*. If either Defendant closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption.” Order at 24.
- “The evidence of contributory infringement cited by Plaintiffs with respect to these Defendants is not material. . . . If established by the record, the fact that Defendants provide an ‘infrastructure’ for file-sharing would be of obvious significance in light of the Napster cases. Plaintiffs, however, present no admissible evidence to create a genuine dispute regarding this fact.” Order at 24-25.
- “Defendants have undertaken efforts to *avoid* assisting users who seek to use their software for improper purposes.” Order at 25.

- “Isolated technical support emails from Grokster and StreamCast employees” “[were] rendered after the alleged infringement took place, [were] routine and non-specific in nature, and, in most cases, related to the use of other companies’ software (e.g., third-party media player software.”⁸ “Plaintiffs cite no . . . evidence” of technical assistance “which suggests Defendants somehow facilitate or contribute to the actual exchange of files.” Order at 24, 25.
- “Defendants provide software that communicates across networks that are *entirely outside Defendants’ control*. In the case of Grokster, the network is the proprietary FastTrack Network, which is clearly not controlled by Defendant Grokster.” “[T]he technical process of locating and connecting to a supernode—and the FastTrack network—currently occurs essentially independently of Defendant Grokster. It is unclear whether or to what extent entities other than Grokster can control this process or other aspects of the FastTrack network, but *there is no evidence—and Plaintiffs do not argue—that Defendants have any such role.*” Order at 21 & n.5; 32.

Based on those undisputed facts, the district court granted partial summary judgment in Grokster’s and StreamCast’s favor, and denied Appellants’ cross-motions. Accordingly, the district court did not need to reach, and did not rule upon, Defendants’ affirmative defenses, including copyright misuse. Order at 10, n.4; JER8324-30.⁹

⁸ The district court also held that “[n]one of the e-mails appear to reference any of the copyrighted works to which Plaintiffs have attempted to limit this Motion.” Order at 25, n. 9.

⁹ As a result, should this Court reverse, it cannot—as Appellants urge—enter

VI. SUMMARY OF ARGUMENT

The district court correctly applied the controlling authority of *Sony* and *Napster* to the undisputed facts of this case. Because it was undisputed below that (1) there are substantial noninfringing uses of Grokster's software, (2) Grokster does nothing other than distribute that software to end users who then use it without Grokster's knowledge or control, and (3) any knowledge Grokster obtains concerning infringing conduct by individual users is received after the product has passed from Grokster to the end user, Grokster cannot be held liable for contributory infringement. *See* Section VII(A), *infra*.

Neither can Grokster be found liable for vicarious infringement. It is undisputed that Grokster has no ability to control the actions of users of the current version of its product—the only version that was at issue before and adjudicated by the court below. Appellants' argument that Grokster's vicarious liability should be measured not by reference to its existing product, but rather by Appellants' speculation as to a different product Grokster *might* have designed, is foreclosed both (1) by the fact that Grokster did not design the product at all, but rather merely distributes it, and (2) by the clear authority of both *Sony* and *Napster*. *See* Section VII(B), *infra*.

summary judgment in Appellants' favor, but would rather have to remand for litigation of those defenses.

VII. ARGUMENT

A. Under *Sony*, Grokster is Not Liable for Contributory Copyright Infringement

The recording industry's hostility to the Sony decision is both understandable, given the amount of Internet enabled infringement of music copyrights, and manifest—the industry in its brief offers five reasons for confining its holding to its specific facts. But it is being articulated in the wrong forum.

In re Aimster Copyright Litigation, 334 F.3d 643, 649 (7th Cir., 2003) (Posner, J.)

1. The Provider of a Product Capable of Substantial Noninfringing Uses Cannot Be Contributorily Liable

This Court's analysis of contributory copyright infringement is controlled by the Supreme Court's landmark decision in *Sony*. In that case, various holders of copyrights in motion pictures and programs broadcast on commercial television sued Sony, seeking to enjoin the manufacture and distribution of the Sony Betamax video cassette recorder ("VCR") on the ground that a substantial use of those VCRs was the creation of infringing copies of the plaintiffs' works. It was undisputed that such use occurred, and the trial court, in denying an injunction, "assumed that Sony had constructive knowledge of the probability that the Betamax machine would be used to record copyrighted programs." *Id.* 464 U.S. at 426. The Supreme Court, however, agreed that generalized knowledge that customers were infringing copyrights was not sufficient to make Sony a contributory infringer.

In so holding, the Court expressly rejected the plaintiffs' contention that, where a substantial proportion of the alleged use is infringing, contributory liability should attach. In *Sony*, the respondents (both of whom are Appellants here as well) argued that noninfringing uses of the Betamax VCR were dwarfed by the allegedly infringing uses, and thus that the staple article of commerce doctrine should not apply. The dissent in *Sony* agreed, noting that the evidence of non-infringing use was at best only 7% of all use, and urged a decision based upon the proportions of infringing and non-infringing use. *Sony*, 464 U.S. at 493-94. The majority, however, disagreed, and held that—in order to avoid contributory liability—a new technology “need *merely be capable* of substantial noninfringing uses.” *Sony*, 464 U.S. at 442.¹⁰ This Court in *Napster* agreed, applying the *Sony* rule to filesharing software: “To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use.” *Napster*, 239 F.3d at 1021; *see also Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988) (single noninfringing use suffices).

The *Sony* and *Napster* courts also recognized the second flaw in Appellants'

¹⁰ In so holding, the *Sony* court recognized that—just as here—not all copyright holders might choose to deny authorization for copying of their works: “It is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights: even if respondent’s competitors were ill-advised in authorizing home videotaping, that would not change the fact that they have created a substantial market for a paradigmatic noninfringing use of Sony’s product.” *Sony*, 464 U.S. at 447.

position here: the courts cannot decide the fate of a new and useful technology based upon the proportions of use of that technology in its infancy. Rather, courts must look to the capability of future noninfringing use as well:

We depart from the reasoning of the district court that Napster failed to demonstrate that its system is capable of commercially significant noninfringing uses. The district court improperly confined the use analysis to current uses, ignoring the system's capabilities. Consequently, the district court placed undue weight on the proportion of current infringing use as compared to current and future noninfringing use.

Napster, 239 F.3d at 1021 (emphasis added; citations omitted).

At the time the *Sony* case was decided, Hollywood was decrying the advent of VCRs as the end of civilization as we know it. The predominant use of VCRs was for home copying of copyrighted works, and Hollywood had not yet grasped the vast potential market for pre-recorded tapes—a market that today dwarfs the studios' income from first-run theaters. Had the *Sony* court based its decision solely on the current state of the market, rather than looking to potential uses, Hollywood would have succeeded in banning a technology that today is its biggest market. This is hardly an isolated instance: virtually every new technology, from piano rolls to vinyl records to radio to cassette tapes to cable television to digital audio tapes to mp3 players, has initially been met with desperate predictions of doom and concerted efforts to ban those technologies in the courts and in Congress. And in each instance, at the time of those initial efforts, the legal and profitable ways to exploit the new technology were not apparent to the movie and

recording industries. Only as the technologies matured (and only because the courts declined to ban them in their infancy) did the substantial noninfringing uses of those technologies develop and come to dominate. Nor is this a recent phenomenon: As Machiavelli observed half a millennium ago, “an innovator has as enemies all the people who were doing well under the old order, and only halfhearted defenders in those who hope to profit from the new.” *Niccolo Machiavelli, The Prince* (1513) at 17.

These earlier examples differ from the current landscape in one way, however: the pace of technological and cultural development has quickened, so that even while this litigation was still in the trial court, peer-to-peer filesharing had already developed myriad noninfringing uses. As detailed *supra* at 17-22, evidence of substantial noninfringing uses (both commercial and noncommercial) of Defendants’ products abounds, leading the district court to hold that “it is undisputed that there are substantial noninfringing uses for Defendants’ software.” Order at 12-13.

2. The District Court Did Not Improperly Add “Ability to Control” to the Standard for Contributory Liability, Or Improperly Narrow The Knowledge Requirement

Appellants and Amici assail the district court’s opinion as improperly applying *Sony* in two ways: (1) by improperly borrowing the requirement of “ability to control” from vicarious liability law and making it an additional element of contributory liability (MGM Brief at 32-33), and (2) by narrowing the concept

of “actual knowledge” to apply only to knowledge of infringing acts at “the very moment” of infringement. MGM Brief at 34.

These arguments misunderstand the law of contributory liability. To be liable for contributory liability, one must make a material contribution “with *knowledge* of the infringing activity.” *Napster*, 239 F.3d at 1019. Just as in traditional aiding and abetting law, *scienter* is an element of contributory liability. If one sells a product to another, one does not thereby automatically become liable for any torts committed by the buyer. Selling someone a car does not make one liable for the subsequent vehicular manslaughter committed by the driver, even if that crime could not have been committed without the car. Conversely, if someone asks you to sell them some dynamite to blow up his neighbor’s house, complying with that request knowing it will aid in the commission of a crime makes you an aider and abetter.¹¹

The *Sony* substantial noninfringing use rule is thus, at its heart, an evidentiary rule. Suppose the seller has no specific knowledge that any of its customers intend to misuse its product, but knows as a general matter that its product enables misuse? Can we infer from those circumstances that the seller has the requisite *scienter*? As *Sony* held, borrowing from established patent law principles, the answer turns on whether there are also noninfringing uses. If one sells a product that is *only* capable of infringing uses, then we can infer the knowledge that one has provided a material contribution: after all, there is nothing

¹¹ Thus, the defendant in *A&M v. Abdallah*, 948 F. Supp. 1449 (C.D. Cal. 1996), was liable for custom making blank tapes preloaded for bootlegging specific records, while Memorex is not liable for selling blank tapes.

legitimate the buyer can do with the product. Conversely, if one's product has both legitimate and illegitimate uses (such as a VCR, or a photocopier), and one does not know that the person buying it intends the latter, one does not have the requisite *scienter*, even if one "knows" as a statistical certainty that many or most of the purchasers will infringe. *Napster*, 239 F.3d at 1020 ("The *Sony* Court decline to impute the requisite level of knowledge ..."; *Universal Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429, 459 (C.D. Cal. 1979) ("This court agrees with defendants that their knowledge was insufficient to make them contributory infringers.")). In that circumstance, *Sony* tells us that we cannot infer particular knowledge from general. Why? Because at the time of sale—the time at which one can decide whether to provide or withhold the means of infringement—the seller does not have the knowledge on which to base that decision.

Which leads us to the role of "ability to control" in contributory infringement. Appellants are correct that "ability to control" is not a *separate* element of contributory infringement. It is instead merely another way of asking, analyzing, and answering the question of *scienter*. At the time any individual obtains Defendants' software, Defendants have no knowledge of the purposes to which that individual will put the software. Under *Sony*, the substantial noninfringing uses of that software prohibit the inference of *scienter*. And because *a fortiori* any notice that a particular user is misusing the software has to come *after* that user acquires it, that knowledge comes after the time at which Defendants can act upon that knowledge by withholding their product.

In this situation, therefore, liability can only attach if Defendants commit

another act, or provide further material assistance to that user, after they acquire the requisite specific knowledge. This, in turn, requires that we ask and answer the question whether there is any point *after* distribution of their software at which Defendants can make a further decision to give or withhold assistance (or even to actively interfere) based on that knowledge. In other words, the question whether Defendants have any ability to control their users activities after they acquire the software is the same question as whether they knowingly provide material assistance.

This analysis underlies the district court's holding the "Plaintiffs' notices of infringing conduct are irrelevant if they arrive when Defendants do nothing to facilitate, and cannot do anything to stop, the alleged infringement." Order at 14; *see also Religious Tech. Ctr. v. Netcom*, 907 F. Supp. 1361 (N.D. Cal. 1995), noting that this rule is rooted in the landlord-tenant contributory liability cases holding "that there is no contributory infringement by the lessors of premises that are later used for infringement unless the lessor had knowledge of the intended use at the time of the signing of the lease." *Id.* at 1373.¹² The district court followed the *Netcom* court's reasoning that the determining question was thus "whether Netcom knew of any infringement [] before it was too late to do anything about it." *Id.*

Appellants and their amici fundamentally misunderstand and miscast this

¹² The same analysis underlies the *Sony* Court's distinction between the "dance hall cases" and the "landlord-tenant" cases. *Sony*, 464 U.S. at 437, n.18. In each of the former cases, the proprietor's ability to control continued after acquisition of knowledge of infringement, while in the latter it did not.

holding. The district court did not—as Appellants and amici claim—require proof “of knowledge of specific infringements *at the very moment* users were infringing,” (MGM Brief at 34), or “*at the moment in time* when a file is copied,” (AFMA *et al* Amicus at 28), or “*when it occurs*” (Law Professors’ Amicus at 17) (emphases added). Rather, the district court asked whether the requisite knowledge was obtained *before* Defendants lost any ability to act or refrain from acting on that knowledge, or only *after*. As the undisputed evidence was the latter, the district court correctly concluded that the knowledge element required for contributory liability was absent.¹³

3. Appellants Create “Limitations” on Sony Contrary to Established Caselaw

In a further effort to avoid the controlling precedent of *Sony*, Appellants attempt to read into that opinion a series of “limitations” which, they assert, make the Supreme Court’s holding irrelevant to this case. None of these purported “limitations,” however, finds support in the caselaw.

a. Knowledge of Infringement Does Not “Render *Sony* Inapplicable”

Appellants first argue (MGM Brief at 39) that Defendants’ knowledge of specific infringements, based on notices provided by Appellants, takes Defendants’

¹³ This distinguishes *Fonovisa*, 76 F.3d 254, on which Appellants rely for the proposition that after-acquired knowledge suffices. MGM Brief at 33-34. Although in *Fonovisa* the defendant acquired knowledge after some infringing acts, that knowledge was acquired *in time for the defendant to act on it* by policing its premises, and thus the defendant was culpable for failing to do so.

products beyond the reach of *Sony*¹⁴. This argument is based upon an isolated quotation from *Napster*, that “Napster’s actual, specific knowledge of direct infringement renders *Sony*’s holding of limited assistance to Napster.” 239 F.3d at 1020. This citation of *Napster*, however, is incomplete: this Court found that Napster’s actual knowledge of direct infringements gave rise to liability only because, having received that knowledge, Napster failed to exercise its ability to stop that infringement. “We agree that if a computer system operator learns of specific infringing material available on his system ***and fails to purge such material from the system***, the operator knows of and contributes to direct infringement.” *Id.* at 1021. Because every file request was routed through Napster’s own indices, the *Napster* Court found that Napster had the technological ability to discriminate between infringing and noninfringing uses, and to prevent the former while allowing the latter. In the language of *Fonovisa*, adopted by this

¹⁴ Curiously, the Leiber Appellants knowledge argument is quite different. Their brief devotes most of its effort to decrying Defendants’ “willful blindness” and purported denial that infringements occur. They attack a strawman: no one denies that many users of Defendants’ products are infringing copyrights. The question, of course, is whether liability for those infringements can be transferred to the noninfringing Defendants. The Leiber Appellants then struggle to debunk the invented claim that Grokster is unaware of infringements, arguing that Grokster has deliberately encrypted communications between its users. Leiber Brief at 13-14. Grokster has never made anything remotely approaching such a claim: not only does Grokster not claim to be unaware its users infringe, it has never decided to encrypt anything, and in any event never receives any of the communications between its users at all. Moreover, *any* user of Grokster’s software can see the results of any search, unencrypted. We can only assume that the Leiber Appellants have simply borrowed this argument from briefs in the *Aimster* case, where the defendant did make such claims.

Court in *Napster*, specific knowledge triggered Napster's obligation to "police" its "premises" to the extent it could, and gave rise to liability when Napster failed to do so. *Id.* at 1024.

The result in this case is different because the *facts* are different:

"Plaintiffs appear reluctant to acknowledge a seminal distinction between Grokster/Streamcast and Napster: neither Grokster nor StreamCast provides the 'site and facilities' for direct infringement."

Order at 23. Because Grokster has no ability to see, filter, or block the files being shared by its users, and no ability to alter the functioning of the FastTrack software, there is nothing on its "premises" it can "police", and thus it cannot act on its knowledge of infringing use.

Appellants' attempt to remake the *Sony* doctrine, so that knowledge begets liability regardless whether there is any way to act on that knowledge, knows no bounds: as soon as a manufacturer is told that its product has been used to infringe a copyright, that manufacturer becomes liable, regardless whether it has any control of the infringement, and regardless of the existence or proportion of noninfringing uses. Consider the implications, were Appellants' distorted version of *Sony* the law. Send a letter to Xerox, identifying instances in which its photocopiers have been used to copy books, and photocopiers become illegal. Send a letter to Sony, identifying instances in which its VCRs have been used to copy movies, and Sony becomes liable for all infringements. Send a letter to Microsoft, forwarding the same information Appellants sent to the Defendants in

this case (after all, every single copy of Grokster, Kazaa, and Morpheus runs on Windows), and the most popular operating system in the world is banned.

Just as any other vendor of hardware or software connected to the internet, Grokster is aware that some of its users are infringing copyrights. But just as any other software provider, Grokster has no way of controlling the use to which its software is put once the customer acquires it. Microsoft knows its users steal songs. AOL knows its users infringe copyrights: Indeed, Plaintiffs' own enforcement agent MediaForce has identified AOL as the single largest infringement venue in the world. JER0987-91. Sony, Dell, Compaq, and Apple all know that their customers are using their computers for nefarious purposes: that's why they sell them with modems, broadband capability, CD-Rom burners, and MP3 player software built in, and advertise them with slogans like "Rip. Mix. Burn." Broadband vendors know that music and video piracy is the "killer app" driving their services into millions of homes. Makers of blank CDs "know" that piracy is likely the single largest share of their market. But each of these companies, just like Grokster, makes products that are capable of noninfringing uses. In *Sony*, it was undisputed that Sony knew that some of its customers were infringing, and yet Sony was not liable because—just as here—Sony had no way to know, at the time it could refuse to sell its product, that the buyer intended to use it to infringe. And in *Napster*, were the law as Appellants urge, this Court would have had no need to look beyond the fact that Appellants gave Napster notice of

infringement: the next step in this Court’s analysis, looking at what Napster could or could not do to act on that notice, and holding that knowledge triggered Napster’s obligation to police, “cabined by the system’s current architecture,” was apparently irrelevant surplusage. 239 F.3d at 1023-24.

More recently, In *Aimster*, the Seventh Circuit rejected the same argument, by the same Appellants:

We also reject the industry’s argument that *Sony* provides no defense to a charge of contributory infringement when, in the words of the industry’s brief, there is anything ‘more than a mere showing that a product may be used for infringing purposes.’ . . . [I]t was apparent that the Betamax was being used for infringing as well as noninfringing purposes—even the majority acknowledged that 25 percent of Betamax users were fast forwarding through commercials. [citation]—yet Sony was held not to be a contributory infringer.

334 F.3d at 649.¹⁵

b. *Sony* is not limited to “commercial” noninfringing uses

Appellants next contend that *Sony* does not apply because the substantial noninfringing uses of Defendants’ software are not “commercial.” Putting aside the evidence of numerous current legitimate commercial uses, Appellants’ argument misunderstands the meaning of “commercially significant” in *Sony*. Although they cite to the Supreme Court’s language at page 442 of the opinion, they fail to appreciate the rest of that paragraph. Having asked whether the

¹⁵ Apparently, the Seventh Circuit accepted Appellants’ claim that *Napster* suggested “that actual knowledge of specific infringing uses is a sufficient condition for deeming a facilitator a contributory infringer,” and declared that suggestion to be error. *Id.* As noted above, however, *Napster* did not so hold.

Betamax was capable of “commercially significant noninfringing uses,” the Court then answered that question by holding that “one potential use of the Betamax plainly satisfies this standard, however it is understood: private, *noncommercial* time-shifting in the home.” *Sony*, 464 U.S. at 442 (emphasis added). Thus the standard is not—as Plaintiffs would have it—whether one can make money off the noninfringing uses themselves (otherwise private, noncommercial time-shifting would not have sufficed), but rather whether those noninfringing uses, commercial or otherwise, would lead one to obtain the product that enables them. *See also Aimster*, 334 F.3d at 652-53 (listing five separate examples of uses that would satisfy *Sony*’s noninfringing use standard, *all* of which are noncommercial).

c. **Sony is not Limited to Sellers Who Have No Further Contact With Purchasers**

Plaintiffs’ next “gloss” on *Sony* is that it is inapplicable unless the seller “ceases any contact with or supervision of its customers at the point of sale.” JER0708; *see also* MGM Brief at 40 (*Sony* “inapplicable where Defendants do much more than simply sell a product (‘a staple article’) to an end user.”) This proposed limitation wildly overstates the holding of *Sony*, and would render the *Sony* doctrine a nullity. Virtually every business maintains an ongoing relationship of some sort with its customers: they offer warranty service, fix defects, provide user manuals, offer telephone and internet support and advice, sell parts and supplies, and the like. In the world of software in particular, ongoing involvement

with customers is the norm. The question is not whether a manufacturer has any further interaction with its customers: if that were the test, every single supplier of every piece of equipment used by alleged infringers would be liable, from Microsoft (which provides the operating system) to the ISP (who provide the connectivity) to the hardware manufacturers (who provide the computers and disk drives and modems) to AOL (which provides the media players), *ad infinitum*.

The relevant standard is not whether Grokster maintains any “ongoing relationship” with its users—of course it does, like any other software provider—but rather whether Grokster “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another”

Napster, 239 F.3d at 1019. If a mere ongoing relationship sufficed to establish liability, the *Napster* Court would not have needed to go on to analyze the *nature* of the ongoing contact. But the *Napster* Court did just that, taking pains to “make a clear distinction between the architecture of the Napster system and Napster’s conduct in relation to the operational capacity of the system.” *Id.* at 1020. The *Napster* Court upheld the district court’s finding of a likelihood of success not because of some amorphous concept of “ongoing contact,” but rather specifically because Napster “could block access to the system by suppliers of the infringing material, and [] failed to remove the material.” *Id.* at 1022.¹⁶

¹⁶ See also *Arista Records v. MP3Board*, 2002 U.S. Dist. LEXIS 16165 at *15; JER0708 (“Merely supplying the means to accomplish an infringing activity cannot give rise to the imposition of liability for contributory infringement”

The district court performed the same analysis here, wading through the Appellants' incessant litany that "Defendants" do "much more" than distribute software. As to Grokster, the district court correctly concluded that Grokster does *nothing* other than distribute a piece of software used by others beyond its control. Grokster does not assist customers in finding material, does not design the software, cannot change the software, does not encourage or condone piracy, does not own or operate the "network" (which is the internet itself), and would have no effect on the use of the product if it ceased operations entirely. Once the adjectives and hyperbole were stripped away, the *only* evidence of any alleged acts by Grokster apart from distributing its product that could even conceivably be termed knowing assistance to an infringer consisted of two isolated and inadvertent customer service emails, which the district court correctly found both immaterial and irrelevant.¹⁷ Order at 24-25. Simply put, there is no "more" here, let alone "much more." Appellants' recitation of "Defendants'" purported material support

Participation in the infringement must be substantial. The . . . assistance must bear a direct relationship to the infringing acts, and the contributory infringer must have acted in concert with the direct infringer."; analyzing evidence to determine whether defendant had actively assisted its users.)

¹⁷ Those emails were irrelevant both because of their innocuous and inadvertent nature and because they concerned works expressly excluded from the motions before the court. Moreover, assigning liability based upon isolated failures in a not-quite-perfect attempt to discourage infringement would be the worst sort of perverse incentive: after all, Appellants complain that "Defendants" do nothing to discourage their users from infringing. But if liability attaches when an attempt to filter users' postings is anything short of perfect, defendants will take the safer course of declining to review or filter those comments at all.

to infringers (MGM Brief at 46-52) consists entirely of three sorts of claims: (1) those that merely recast the act of providing the Grokster product in terms like “providing the means to establish connections,” “enabling the formation,” “providing an infrastructure,” (2) those that ascribe activity or control to “Defendants” generally, but in fact have nothing to do with Grokster (“taking steps to maintain the anonymity of their users”, “advertising the infringing use of their networks,” etc.), and (3) normal customer support functions entirely unrelated to the exchange of infringing material. None of these allegations constitute knowing contribution to infringement.

d. Sony is Not Limited to Cases That do Not Involve Distribution

Plaintiffs also assert that *Sony* is inapplicable here because it applies only to products that allow the *copying* of works, not products that allow the *distribution* of works. In support of this new “limitation,” Plaintiffs rely on a snippet from *Sony*, wherein the Supreme Court noted that “[n]o issue concerning the transfer of tapes to other persons . . . was raised.” MGM Brief at 40. quoting *Sony*, 464 U.S. at 425.

This argument fails for obvious reasons. *First*, the quoted language is taken not from *Sony*’s discussion of contributory infringement, but from the discussion of fair use: in that context, whether the recordings at issue were for the purpose of “time shifting” rather than distribution was clearly relevant. The Court did not, however, make reference to this distinction—let alone rely on it—in its holding on

contributory infringement.

Second, this “limitation” on *Sony* is flatly inconsistent with controlling authority in this Circuit. If—as Plaintiffs suggest—the mere fact that Grokster’s software enables users to distribute files takes it beyond the scope of *Sony*, then the same would have been true of the Napster software. This Court, however, held precisely the opposite, holding that “[w]e are bound to follow *Sony*, and will not impute the requisite level of knowledge to Napster simply because peer-to-peer filesharing technology may be used to infringe plaintiffs’ copyrights.” *Napster*, 239 F.3d at 1020-21. The Court then proceeded to determine that Napster’s actual knowledge of specific infringements, and its ability to block infringing users based on that knowledge, disqualified it from asserting the *Sony* defense. But if *Sony* said what Plaintiffs urge—that the mere ability to distribute works vitiates the defense—this Court’s *Napster* analysis would have stopped at that point. So too would have the court’s analysis in *Aimster*. Instead, that court similarly analyzed whether Aimster affirmatively encouraged or aided in infringing activity, and found that—unlike *Sony* or Grokster—it did. *Aimster*, 334 F.3d at 651.

e. *Sony* Contains No “Designed For Infringing Use” Limitation

Appellants’ final argument for the inapplicability of the *Sony* doctrine is hardly an argument at all; it merited only two sentences in Appellants’ brief below, and a single phrase in MGM’s opening brief. JER0710; MGM Brief at 41 (Defendants’ software is “designed to enable and facilitate unlawful distribution”).

The argument does, however, flow as subtext throughout Appellants' briefs, which have the persistent flavor of "we all know what these products are really for," and thus merits response. Appellants argued below that Sony "does not apply where a defendant specifically designed a system for infringing use." JER0710. But in support of that argument, Plaintiffs relied on *A&M Records v. Abdallah, Inc.*, 948 F. Supp. 1449 (C.D. Cal. 1996), a case in which the defendant sold blank audio cassettes that had been specially loaded with precisely the correct amount of tape to make bootleg copies of commercial albums. Moreover, the defendant was clearly aware of the use to which the tapes would be put, because he was provided with the original recordings, and himself timed them in order to determine the length of the blank tapes. Thus in that case the time-loaded cassettes were not "staple articles," but instead were specially manufactured for—and suitable only for—a known infringing purpose. This is not an "exception" to *Sony*, but rather merely restates *Sony's* holding that a product with no noninfringing uses is beyond *Sony's* reach.

The only other authority cited below for this proposition, the *Aimster* district court opinion, relied in turn on *Abdallah*, and improperly based its holding on whether the "primary" use of the product is infringing or noninfringing. That opinion conflicts with the law of this Circuit: the *Napster* Court expressly rejected a test based on the current proportion of infringing and noninfringing uses: "The district court improperly confined the use analysis to current uses, ignoring the

system's capabilities." 239 F.3d at 1021.¹⁸ Instead, as the Supreme Court established in *Sony*, the product "need merely be capable of substantial noninfringing uses." 464 U.S. at 442. On appeal the *Aimster* appellate court declined to reach the question at all, noting that "the balancing of costs and benefits is necessary only in a case in which substantial noninfringing uses, present or prospective, are demonstrated." The court found that Aimster had failed to introduce *any* evidence of a single noninfringing use. 334 F.3d at 650. By contrast, the district court here found ample evidence of noninfringing uses. Finally, and most fundamentally, this argument has no application to *Grokster*, which didn't design the product at all.

B. Grokster is Not Vicariously Liable

Appellants' claims of vicarious infringement fare no better than their contributory liability claims. Under this Court's precedents in *Fonovisa* and *Napster*, a defendant may be liable for vicarious copyright infringement only when

¹⁸ This Court's *Napster* opinion thus renders irrelevant Professor Olkin's survey, which purports to establish that 70% of all file sharing infringes Appellants' copyrights. That survey was in addition fatally flawed in numerous respects, and the district court rightly disregarded it. Professor Olkin deliberately excluded from his survey non-musical file sharing that by his own admission may constitute as much as half of all filesharing, tailored his search terms to include only English language words (thus excluding any results consisting of fanciful trademarks such as WinZip, WinAmp, Kazaa, and others), and so artificially limited his search results that 95% of the Grokster results came from only four Grokster users. For a detailed analysis of the deficiencies of that survey, see Grokster's Reply at JER7362-71. Moreover, if Professor Olkin's study were to be credited at all, it is fatal to the claims of the movie studio Appellants: in all of the thousands of files downloaded and analyzed in that study, there is not a single motion picture shared by a Grokster user. Not one. JER7369-70.

it “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Napster*, 239F.3d at 1022 (quoting *Fonovisa*, 76 F.3d at 262). It is undisputed, however, that Grokster has absolutely no ability to supervise or control the allegedly infringing conduct of its users.

1. Grokster Has no Ability to Control the Activity of its Customers

As set forth above, the activities of users of the Grokster software are entirely independent of and invisible to Grokster. Indeed, were Grokster to vanish from the earth entirely, the filesharing functions of the Grokster software would continue unabated.¹⁹ JER0198; Order at 24. But from the opening phrases of Appellants’ complaint, throughout every argument in this case, one mantra is repeated over and over: “This case is exactly the same as *Napster*.” But of course, repetition *ad nauseum* cannot make this true. Grokster is different from Napster because it lacks precisely the attributes that led this Court to enjoin Napster. Napster provided a service, directly helping its users find specific copyrighted songs. Grokster provides no such service. Grokster merely provides a computer program – and one it resells at that. Selling a product that can be used by others to infringe is simply not equivalent to providing a service that *helps* others infringe. This Court drew this distinction in *Napster* when it explained why Napster could not benefit from the *Sony* decision:

¹⁹ Appellants on reply below posited a vague theory that, in a sort of electronic entropy, the functioning of the FastTrack system might degrade over time without some ongoing involvement by its authors. Putting aside the tentative nature of this speculation, it at best relates only to Kazaa, which is not before this Court. Regardless whether periodic code updates by the authors of FastTrack are required, the disappearance of *Grokster* would have no impact.

We are compelled to make a clear distinction between the architecture of the Napster system and Napster's conduct in relation to the operational capacity of the system. . . .

Napster, 239 F.3d at 1020.

The distinction this Court drew between a service and a product was a critical one, not only because it reconciles *Napster* with *Sony*, but because it erects a barrier against the imposition of unreasonable liability. Providers of a service that has both infringing and noninfringing uses are in an ongoing relationship with their clients, and may be charged with distinguishing the illegal uses from the socially valuable ones. Napster could, at least in theory, permit only legal copies of songs to be traded on its system. A software reseller has no such freedom. The product being provided is unitary, and is either legal or illegal. Where the product serves valuable social purposes – where it has or is capable of noninfringing uses – *Sony* draws the line in favor of legality. Drawing that line preserves the careful balance inherent in the Copyright Act: to reward creative effort only as a means to encourage the development of the “useful arts and sciences.” U.S. Const. Article 1, Section 8. Banning technologies that are capable of noninfringing uses disturbs that careful balance.

That balance is preserved by making liability for the actions of others coextensive with one's ability to control those actions. As the *Napster* court made clear, the obligation to police Napster's customers extended only as far as its ability to do so: one cannot be held liable for failing to do the impossible: “[T]he

boundaries of the premises that Napster ‘controls and patrols’ are limited. Put differently, Napster’s reserved ‘right and ability’ to police is cabined by the system’s current architecture.” *Napster*, 239 F.3d at 1023-24 (citations omitted). Accordingly, this Court found that, as Napster did not have access to the contents of the exchanged files, but only their titles, authors, and related information, Napster’s duty to police was limited to what it could do with the information available to it. Grokster’s ability to police is much more severely limited than Napster’s was: the architecture of the FastTrack software is such that Grokster has no ability to supervise its users’ activities at all, and thus cannot be held liable for failing to exercise that nonexistent control. And to the extent Grokster has any *indirect* influence over the conduct of its users, it has exercised that influence fully, forwarding infringement notices, proselytizing for independent artists, and scouring its chat rooms to remove any encouragement of infringing content.

Indeed, it is entirely unclear what more Appellants want Grokster to do to enforce their copyrights for them. Appellants decline to say, for good reason: what Appellants want is for Grokster to cease distributing its product entirely. For when Plaintiffs argue that Grokster has the ability to “supervise” or “control” its users’ actions, they don’t mean the ability to control the uses of its current product. Not only did Appellants present no evidence of Grokster’s ability to control the core operation of the software: they affirmatively and correctly argued the opposite, stating that both Grokster and Streamcast “admitted” that “Kazaa had

ultimate control of the network.” JER0671. Rather, they mean the assumed ability to have designed a different product in the first instance. Grokster does not even have this trivial notion of control, as it has no control over the design of a product it merely repackages and distributes. Even if the district court had found—contrary to the evidence—that the other Defendants could implement an effective filtering system by redesigning their products, it was simply impossible for Grokster to do so.²⁰

Thus in Grokster’s case, the “ability to control” urged by Appellants is nothing more than the ability to just go away. If this were “control” for vicarious liability purposes, *Sony* would be a nullity, as any manufacturer has the “control” implicit in its ability to refrain from making its product at all. To equate this with the “control” necessary to incur liability as a vicarious infringer is akin to saying that one has the ability to control the editorial content of a television station by dint of one’s ability to blow up the transmitter. Apparently recognizing this reality, Appellants instead deluged the district court with countless examples of Grokster’s alleged “control” of functions wholly unrelated to the underlying claims of copyright infringement, some of which were true of Grokster, some of which were false, but none of which were relevant to the question before the Court: whether Grokster has the “right and ability to supervise *the infringing activity*.” *Napster*,

²⁰ Indeed, Plaintiffs’ own expert, Professor Kleinrock, admitted that he could not even determine whether it was possible for Grokster to implement a filtering system without access to the FastTrack source code. JER8211-12.

239 F.3d at 1022. On that question, Plaintiffs utterly failed to meet their burden.

2. *Sony* Does Not Include an Exception for Products That Could Have Been Designed Differently

Appellants cannot dispute that Grokster has and had no ability to control the users of its *current* software. Thus Appellants craft from whole cloth one last “exception” to *Sony*: that it “does not apply where the infringing activity can be avoided while permitting alleged noninfringing uses to continue,” (JER0710; JER1026), and then apply that maxim not to the existing Grokster product, but rather to an imaged product they wish Grokster had designed instead. The obvious problem with this argument is that the *Sony* court itself rejected precisely the same argument. In that case, the plaintiffs argued that Sony should be held liable because it could have designed its VCRs to include copy protection—the same argument Plaintiffs urge here. That argument, however, garnered only a minority: Justice Blackmun, in dissent, argued that liability should attach because “Sony may be able, for example, to build a VTR that enables broadcasters to scramble the signal of individual programs and ‘jam’ the unauthorized recording of them.” 464 U.S. at 494 (Blackmun, J., dissenting). The *majority*, however, rejected this argument, correctly basing its opinion on the device that was manufactured, regardless whether a different one more to the liking of the plaintiffs could be imagined. The *Napster* Court also rejected this argument, holding that “Napster’s reserved right and ability to police is cabined by the system’s *current architecture*.” 239 F.3d at 1024 (emphasis added). For that reason, the *Napster*

Court rejected the broad scope of the district court's injunction, holding that it was error to require Napster to redesign its system to filter based on the content of users' files, rather than to filter based on the information available to Napster via the existing architecture of the Napster software. *Id.* at 1027.

Sony and *Napster* are clear on this point: the ability to control must be judged based upon the capabilities of the product at issue, not based on variants to that product that the plaintiff wishes had been designed and sold. Were the rule otherwise, VCRs themselves would be illegal, because they could be built to not record at all, or to record only what content providers dictated. Photocopiers would likewise be taboo, as they were designed and sold with nary a thought to policing the actions of their users. Radios, once considered the death of copyright, would have been banned from the earth long before any artist received a penny of royalties. And of course, there would be no CD's, and no digital audio at all, because no single innovation in the past fifty years has done more to enable the easy creation of multiple, good-as-the-original illegal copies than digital audio. But all of these key technological innovations are legal, notwithstanding the clear degree to which each has facilitated and encouraged massive copyright infringement, because as designed and sold they are each technologies that are also capable of noninfringing uses, regardless whether one can imagine an alternate design that would better suit Appellants' interests.

3. Grokster Has No Ability to Distinguish Infringing from Noninfringing Uses, and No Ability to Redesign its Product To Do So

Even were this Court to ignore *Sony* and hold that the legality of the software at issue here is dependent on what other design decisions its authors might have made, it is undisputed that Grokster had no role in the design of the FastTrack software, no access to the source code, and no ability to alter the architecture of that software. Holding Grokster liable for the design decisions of software it merely licenses and distributes would be no different than holding Circuit City liable for the failure of Sony to build copy protection into its VCRs.

More fundamentally, however, even as regards the other defendants in this case, Appellants claims that “filtering” methods are practicable are unsupported and were rightly dismissed by the district court.²¹ Despite Appellants’ litigation-based claims, no online filesharing system has ever successfully implemented such a system, despite years of efforts by Appellants’ declarants and others. As Plaintiffs own declarants note, both text-based and fingerprinting filtering systems were designed and implemented in the Napster case. JER0722. Plaintiffs fail to note, however, that the Napster system *failed*: after many months of costly development and testing, both the district court and this Court rejected those

²¹ Appellants note, repeatedly, that Grokster includes a primitive “adult content” filter that can block searches that contain words that are associated with such content, *a la* George Carlin’s “seven dirty words” list, and then claim that this is evidence of the practicality of copyright filtering. This is akin to claiming that one’s ability to light a campfire is proof of one’s ability to build a nuclear power plant.

systems as ineffective, and refused to allow Napster to deploy them. *A&M Records v. Napster*, 284 F.3d 1091 (9th Cir. 2002). Indeed, Appellants themselves are quite candid about the failings of the filtering system they championed in *Napster*--when it suits their purposes. In advocating for their own form of injunction in the *Aimster* case, Appellants told that court, at the same time as it was telling the court in this case that filtering was trivially simple, that:

Napster initially chose to employ ‘text-based filtering,’ which did not block, for example, files containing misspellings in artist names or song titles. This method, as implemented by Napster, proved porous and **wholly ineffective**.

....

‘[T]ext-based filtering,’ similar to that used by Napster, **cannot effectively filter copyrighted works in an online environment**.

JER8198.

Having made this representation to the *Aimster* court, Appellants cannot now be heard to assert to this Court that text-based filtering is a viable alternative. Apparently recognizing this, Plaintiffs instead touted “digital fingerprinting” technologies as their solution *du jour*, submitting declarations from three companies (Audible Magic, JER0759-66; Relatable, JER0720-28; and Gracenote, JER0753-58) they claimed establish that “[t]here exist today sound technologies that would allow defendants to identify the content of an audio or video file based on its actual acoustic or visual properties.” JER0704. The depositions of those declarants, however, revealed that those “commercial,” “sound” technologies are

nothing of the sort: rather, they are nothing but vague proposals for a fingerprinting system they hope might prove viable down the road, but which are to put it mildly “not yet ready for prime time.” None of those “sound” technologies had in fact ever been deployed, none had ever even been tested in anything approaching a real-world environment, and none of the companies involved had any realistic prospects of survival, let alone success. JER8226-301.²² At best, those technologies are vague hopes that might, at some point in the future, form part of a licensed online distribution system. They certainly came nowhere near establishing, as a matter of uncontested fact, that any of the Defendants herein had, or today have, the ability to control the allegedly infringing activities of their users. This is true as to all Defendants: Plaintiffs have failed to show that any of the products at issue here could be modified to allow only noninfringing activity. It is particularly true of Grokster which—even were such technologies practical for designers of filesharing systems—has no ability to make *any* modifications to the FastTrack software.

In short, the district court correctly concluded that “[T]here is no admissible evidence before the Court indicating that Defendants have the ability to supervise and control the infringing conduct (all of which occurs after the product has passed

²² The myriad failings of each proposed filtering system were discussed in detail in Grokster’s opposition brief below at JER8319-23, to which we refer the Court for those details. As those details are designated confidential by those third parties, we do not repeat them herein.

to end-users).” Order at 32. As Grokster cannot control the allegedly infringing activity, Grokster cannot be held liable for vicarious infringement.

VIII. CONCLUSION

For the foregoing reasons, Grokster respectfully requests that this Court affirm the partial judgment below.

Dated: September 17, 2003

KEKER & VAN NEST, LLP

By: 

MICHAEL H. PAGE
Attorneys for Appellee
GROKSTER, LTD.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the forgoing Appellee Grokster, Ltd.'s Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,874 words.

Dated: September 17, 2003

KEKER & VAN NEST, LLP

By: _____

MICHAEL H. PAGE
Attorneys for Appellee
GROKSTER, LTD.

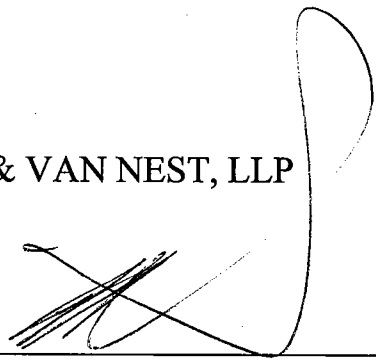
STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Appellee requests that oral argument of this appeal be permitted. Appellee Grokster, Ltd. submit that oral argument will assist this Court in deciding the appeal.

Dated: September 17, 2003

KEKER & VAN NEST, LLP

By: _____

A handwritten signature in black ink, appearing to read 'Michael H. Page', is written over a horizontal line. The signature is stylized and includes a large, vertical loop on the right side.

MICHAEL H. PAGE
Attorneys for Appellee
GROKSTER, LTD.

PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Kecker & Van Nest, LLP, 710 Sansome Street, San Francisco, California 94111.

On September 17, 2003, I served the following document(s):

APPELLEE GROKSTER LTD.'S BRIEF

- by **FEDERAL EXPRESS**, by placing a true copy thereof in a sealed envelope addressed as shown below. I am readily familiar with the practice of Kecker & Van Nest, LLP for correspondence for delivery by FedEx Corporation. According to that practice, items are retrieved daily by a FedEx Corporation employee for overnight delivery.
- by **PDF (PERSONAL)**, by transmitting via PDF a true copy thereof on this date. The transmission was complete and without error.

CLERK OF THE COURT OF APPEALS	ORIGINAL AND 15 COPIES
COUNSEL FOR EACH PLAINTIFF	TWO COPIES
COUNSEL FOR EACH DEFENDANT	ONE COPY

Russell J. Frackman
George M. Borkowski
Mitchell Silberberg & Knupp LLP
11377 West Olympic Boulevard
Los Angeles, CA 90064
Telephone: 310/312-2000
Facsimile: 310/312-3100
*Attorneys for the Record Company
Plaintiffs/Appellants (Other than the Time
Warner record company Plaintiffs-Appellants)*

David E. Kendall
Robert J. Shaughnessy
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: 202/434-5000
Facsimile: 202/434-5029
*Attorneys for the Motion Picture Studio
Plaintiffs/Appellants (Other than the Time
Warner Studio Plaintiffs-Appellants)*

Robert M. Schwartz
O'Melveny & Myers, LLP
1999 Avenue of the Stars, Suite 700
Los Angeles, CA 90067-6035
Telephone: 310/553-6700
Facsimile: 310/246-6779
*Attorneys for the Time Warner
Plaintiffs/Appellants*

Steven B. Fabrizio
Jenner & Block, LLC
601 Thirteenth Street, NW, Suite 1200 South
Washington, DC 20005
Telephone: 202/639-6040
Facsimile: 202/661-4823
*Attorneys for the Record Company Plaintiffs-
Appellants (Other than the Time Warner
record company Plaintiffs- Appellants)*

Matthew J. Oppenheim
Dean Garfield
Recording Industry Association of America,
Inc.
1330 Connecticut Avenue, N.W., Suite 300
Washington, DC 20036
Telephone: 202/775-0101
Facsimile: 202/775-7253
*Attorneys for the Record Company Plaintiffs-
Appellants*

Gregory P. Goeckner
Mark D. Litvack
15503 Ventura Boulevard
Encino, CA 91436-3103
Telephone: 818/995-6600
Facsimile: 818/382-1797
*Attorneys for the Motion Picture Studio
Plaintiffs-Appellants*

Charles S. Baker
Munsch Hardt Koph & Harr, P.C.
600 Congress Avenue, Suite 2900
Austin, TX 78701
Telephone: 512/391-6115
Facsimile: 512/391-6149
*Attorneys for MusicCity.com, Inc. (now known
as StreamCast Networks, Inc.) and MusicCity
Networks, Inc.*

David B. Casselman
Wasserman Comden Casselman & Pearson
LLP
5567 Reseda Boulevard, Suite 330
Tarzana, CA 91357-7033
Telephone: 818/705-6800
Facsimile: 818/705-8147
*Attorneys for LEF Interactive Pty Ltd. and
Sharman Networks Ltd.*

Cindy A. Cohn
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
Telephone: 415/436-9333 x 123
Facsimile: 415/436-9993
*Attorneys for MusicCity.com, Inc. (now known
as StreamCast Networks, Inc.) and MusicCity
Networks, Inc.*

Lawrence M. Hadley
Hennigan, Bennett & Dorman LLP
601 South Figueroa Street, Suite 3300
Los Angeles, CA 90017
Telephone: 213/694-1200
Facsimile: 213/694-1234
*Attorneys for LEF Interactive Pty Ltd. and
Sharman Networks Ltd.*

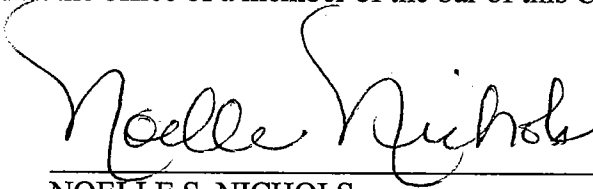
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Carey R. Ramos
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: 212/373-3000
Facsimile: 212/757-3990
Attorneys for Plaintiffs/Appellants

Kelli L. Sager
Davis Wright Tremaine LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017-2566
Telephone: 213/633-6800
Facsimile: 213/633-6899
Attorneys for Plaintiffs/Appellants

Executed on September 17, 2003, at San Francisco, California.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction this service was made.

A handwritten signature in cursive script that reads "Noelle Nichols". The signature is written in black ink and is positioned above a horizontal line.

NOELLE S. NICHOLS