

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. <u>Sony</u> 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>
<b>Cases</b>	
<i>A&amp;M Records v. Napster</i> , 284 F.3d 1091 (9 <sup>th</sup> Cir. 2002).....	52
<i>A&amp;M Records, Inc. v. Napster</i> , 239 F.3d 1004 (2001).....	passim
<i>A&amp;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 <sup>th</sup> Cir. 1996).....	passim
<i>In re Aimster</i> , 334 F.3d 643 (7 <sup>th</sup> 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
<b>Statutes</b>	
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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.<sup>1</sup>

*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

---

<sup>1</sup> 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.<sup>2</sup> 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

---

<sup>2</sup> 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."<sup>3</sup>

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

---

<sup>3</sup> 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.<sup>4</sup> 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

---

<sup>4</sup> 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



