

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COPY

DAVID E. KENDALL (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029

*Attorneys for the Motion Picture Studio Plaintiffs
(Other than the Time Warner studio plaintiffs)*

RUSSELL J. FRACKMAN (SBN 49087)
MITCHELL SILBERBERG & KNUPP LLP
11377 West Olympic Boulevard
Los Angeles, CA 90064-1683
Telephone: (310) 312-2000
Facsimile: (310) 312-3100

*Attorneys for the Record Company Plaintiffs
(Other than the Time Warner record company plaintiffs)*

ROBERT M. SCHWARTZ (SBN 117166)
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, Seventh Floor
Los Angeles, CA 90067-6035
Telephone: (310) 553-6700
Facsimile: (310) 246-6779

Attorneys for the Time Warner Plaintiffs

CAREY R. RAMOS (*pro hac vice*)
PAUL WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 757-3900
Attorneys for the Music Publisher Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

GROKSTER, LTD., et al.,

Defendants.

Case No. CV 01 08541 SVW (PJWx)
(Consolidated with CV 01 09923 SVW
(PJWx))

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT**

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

**[FILED UNDER SEAL PURSUANT
TO PROTECTIVE ORDER]**

JERRY LEIBER, et al.,

Plaintiffs,

v.

CONSUMER EMPOWERMENT BV
a/k/a FASTTRACK, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES iii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

I. DEFENDANTS ARE LIABLE FOR CONTRIBUTORY INFRINGEMENT 3

 A. Defendants Misconstrue the "Knowledge" Required for Contributory Liability 3

 B. There Is Extensive Undisputed Evidence of Defendants' Actual and Constructive Knowledge of Infringement 6

 C. Defendants' Arguments That They Lack Sufficient Knowledge Are Baseless 8

 D. Given the Undisputed Evidence of Defendants' Knowledge, Sony-Betamax Is Not a Defense 11

 E. Sony-Betamax Does Not Apply for Many Additional Reasons 12

 F. There Is No Evidence That Defendants' Systems Have Commercially Significant Noninfringing Uses 14

II. DEFENDANTS ARE LIABLE FOR VICARIOUS INFRINGEMENT 15

 A. Vicarious Liability Requires Only that the Defendant Have the **Ability** to Exercise Supervision or Control Over Infringers 15

 B. MusicCity Possesses the Ability to Supervise or Control Users of Its Gnutella-Based System 17

 1. MusicCity Controls Its Software and System 18

 2. The Current Morpheus System Demonstrates Numerous Ways in Which MusicCity Controls or Supervises Its Users' Activities 19

 a. Central-Server Control Via the "Auto.xml" File 19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- b. Other Central-Server Interactions with Users 21
- c. Automatic Distribution of Files *Against* Users' Wishes 22
- 3. MusicCity's Ability to Supervise or Control Is Sufficient for Vicarious Liability 23
- C. Grokster Has the Ability to Supervise and Control Its Users 26
- III. DEFENDANTS' POLICY ARGUMENTS ARE SPURIOUS 30
- IV. THE DUTCH JUDGMENT DESERVES NO DEFERENCE 31
- CONCLUSION 35

TABLE OF AUTHORITIES

CASES:

1

2

3

4 A&M Records, Inc. v. Abdallah, 948 F. Supp. 1449 (C.D. Cal. 1996)..... 13

5

6 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896

7 (N.D. Cal. 2000), aff'd in part, vacated in part,

8 239 F. 3d 1004 (9th Cir. 2001) 3, 8, 14

9 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)..... 2, *passim*

10 A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002)..... 6, 25

11 In re Aimster Copyright Litigation, 2002 WL 31006142

12 (N.D. Ill. Sept. 4, 2002) 2, *passim*

13 Alesayi Beverage Corp. v. Canada Dry Corp., 947 F. Supp. 658

14 (S.D.N.Y 1996) 34

15 Bata v. Bata, 163 A.2d 493 (Del. 1960)..... 33

16 Bank of Montreal v. Keogh, 612 F.2d 467 (9th Cir. 1980))..... 35

17 Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136 (9th Cir. 2001)..... 34

18

19 Broadcast Music, Inc. v. Hartmarx Corp., 9 U.S.P.Q.2d 1561

20 (N.D. Ill. 1988)..... 29

21 Casella v. Morris, 820 F.2d 362 (11th Cir. 1987)..... 10

22 Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996) 4, 16, 23, 34

23

24 Fonovisa, Inc. v. Napster, Inc., 2002 WL 398676

25 (C.D. Cal. Jan. 28, 2002) 4, 5, 6, 10

26 Gershwin Publ'g Corp. v. Columbia Artists Management, Inc.,

27 443 F.2d 1159 (2d Cir. 1971) 15, 16, 17, 23,

28 25

1 Gordon & Breach Science Pub., S.A. v. Am. Instit. of Physics,
2 905 F. Supp. 169 (S.D.N.Y. 1995) 34

3 Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 138, 40 L.Ed. 95 (1895)..... 33

4 Kalem Co. v. Harper Brothers, 222 U.S. 55, 32 S.Ct. 20,
5 56 L.Ed. 92 (1911)..... 30

6 Liu v. Price Waterhouse LLP, 302 F.3d 749 (7th Cir. 2002) 18

7
8 Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146
9 (C.D. Cal. 2002)..... 31

10 Playboy Enters., Inc. v. Russ Hardenburgh, Inc.,
11 982 F. Supp. 503 (N.D. Ohio 1997) 4

12 PolyGram International Publ'g, Inc. v. Nevada/TIG, Inc.,
13 855 F. Supp. 1314 (D. Mass. 1994)..... 15

14 RCA/Ariola International, Inc. v. Thomas & Grayston Co.,
15 845 F.2d 773 (8th Cir. 1988) 16

16 Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304
17 (2d Cir. 1963)..... 29

18 Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417,
19 104 S.Ct. 774, 78 L.Ed.2d 574 (1984)..... 1, 12, 13, 14,
20 30

21 Southern Nights Music Co. v. Moses, 669 F. Supp. 305
22 (C.D. Cal. 1987)..... 29

23 Twin Brooks Corp. v. Walt Disney Co., 83 F.3d 1162 (9th Cir 1996) 34

24 Trevino v. Gates, 99 F.3d 911 (9th Cir. 1996)..... 33

25 Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988)..... 12

26 Warner Brothers, Inc. v. Lobster Pot, Inc., 582 F. Supp. 478
27 (N.D. Ohio 1984)..... 29

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATUTES:

17 U.S.C. § 117 12

17 U.S.C. § 512 31

Digital Millennium Copyright Act,
Pub.L. No. 105-304, 112 Stat. 2860 31

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976),
reprinted in 1976 U.S.C.C.A.N. 5659 30

MISCELLANEOUS:

Restatement (Second) of Conflict of Laws 34

INTRODUCTION AND SUMMARY OF ARGUMENT¹

1
2
3 Defendant Grokster's motion for summary judgment and Defendant Music-
4 City's two separate motions for partial summary judgment make a narrow attack on
5 Plaintiffs' claims.² Defendants do not contest that they materially contribute to the
6 infringing activity of their users (one of the two elements of contributory liability),
7 nor that they derive a financial benefit from their users' infringements (one of the two
8 elements of vicarious liability). Those omissions are understandable, because the
9 evidence of Defendants' material contribution to and financial benefit from copyright
10 infringement is undisputed and overwhelming. See Pltfs. SJ Mem. 20-23, 31-33.

11 Instead, as to contributory liability, Defendants focus on only the "knowledge"
12 element and their contention that Sony Corp. v. Universal City Studios, Inc., 464 U.S.
13 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984) ("Sony-Betamax"), shelters their
14 conduct from liability. As to vicarious liability, Defendants say only that they do not
15 have the right and ability to supervise or control their users' activity. MusicCity's
16 version of these arguments is doubly narrow. It seeks summary judgment only as to
17

18 ¹ This Memorandum is based on all the materials filed in support of Plaintiffs'
19 Motion for Summary Judgment on Liability or, Alternatively, Partial Summary
20 Judgment (filed Sept. 9, 2002), including the Memorandum in support of that Motion
21 ("Pltfs. SJ Mem."), Plaintiffs' Second Corrected [Proposed] Statement of Uncontro-
22 verted Facts and Conclusions of Law ("Pltfs. SJF"), and the exhibits appended to the
23 Second Declaration of George M. Borkowski ("Borkowski Decl."). In addition,
24 Plaintiffs rely on the following declarations and accompanying exhibits filed
25 concurrently with this Memorandum: (a) Declaration of Jeffrey H. Blum ("Blum
26 Decl."); (b) Declaration of Jacqueline Charlesworth ("Charlesworth Opp. Decl."); (c)
27 Declaration of Frank Creighton ("Creighton Opp. Decl."); (d) Declaration of Eduard
28 A.P. Engels ("Engels Decl."); (e) Declaration of Elissa Hecker; (f) Declaration of
Ellis Horowitz ("Horowitz Decl."); (g) Declaration of Ingram Olkin ("Olkin Decl.");
(h) Declaration of Charles Sanders ("Sanders Opp. Decl."); (i) Declaration of Gordon
Shock; (j) Declaration of Patrick F. Sullivan; (k) Declaration of Joseph M. Terry
("Terry Decl.").

² MusicCity's brief in support of its Motion for Partial Summary Judgment Regard-
ing Vicarious Infringement is cited herein as "MC-V Mem." Its brief in support of its
Motion for Partial Summary Judgment Regarding Contributory Infringement is cited
as "MC-C Mem." Grokster's brief is cited as "Grokster Mem." Defendant Kazaa
BV has not moved for summary judgment, and has advised Plaintiffs that it does not
intend to oppose their motion for summary judgment. For that reason, the Court
should grant Plaintiffs' motion as against Kazaa under Local Rule 7-12. As used in
this brief, the term "Defendants" refers only to Grokster and MusicCity.

1
2 its conduct since March 1, 2002, when it began using the "Gnutella" protocol in its
3 Morpheus copying and distribution system. It does not seek summary judgment as to
4 its conduct during the preceding year when its system employed the "FastTrack"
5 protocol used by Grokster and Kazaa.

6 This case is governed by the Ninth Circuit's decision in A&M Records, Inc. v.
7 Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), and the well-established principles of
8 secondary liability that it followed. Those principles are not limited in their applica-
9 tion to the unlawful system in Napster, as Judge Aspen of the Northern District of
10 Illinois recognized recently in applying them to enjoin contributory and vicarious
11 infringement in a case involving a different peer-to-peer copying and distribution
12 system. See In re Aimster Copyright Litig., 2002 WL 31006142 (N.D. Ill. Sept. 4,
13 2002). Application of those principles compels the conclusion that Defendants are
14 liable as a matter of law.

15 Defendants are liable for contributory infringement. They have at least as
16 much knowledge of their users' infringing activities as Napster did. It would be
17 difficult for anyone who pays the slightest bit of attention *not* to know about the
18 infringement taking place on Defendants' systems. Plaintiffs have determined that
19 90% or more of the files distributed by users of the FastTrack network, as accessed
20 via Grokster, are likely infringing copies of commercially released copyrighted
21 works, and at least 75% of the files infringe copyrights of the Plaintiffs in this action.
22 Olkin Decl. ¶ 16. As in Napster and Aimster, the Sony-Betamax defense cannot
23 immunize Defendants' facilitation of infringement, for many independent reasons.

24 Defendants are also vicariously liable. The findings regarding the high propor-
25 tion of copyrighted content distributed on the FastTrack network merely reflect what
26 is obvious to even a casual user – Defendants' systems make available for quick and
27 easy copying vast quantities of copyrighted works, including virtually any popular
28 sound recording, musical composition, or motion picture that one could care to name.
Defendants make money by displaying advertising to the millions of users drawn to

1
2 their systems by the ready availability of infringing content. That their systems have
3 been contrived to employ a somewhat different peer-to-peer technology than Napster
4 to achieve the same result is a distinction without a legal difference. Like Napster,
5 Defendants maintain continuous interactions with their users and have the ability to
6 supervise and control their users' activity. Defendants could use that ability to
7 prevent infringement, but they have elected not to do so. The reason why is obvious.
8 As in Napster, the ability to copy myriad media files without payment is "the glitter-
9 ing object" that attracts Defendants' "financially-valuable user base." A&M Records
10 Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 922 (N.D. Cal. 2000), aff'd in pertinent
11 part, 239 F.3d 1004 (9th Cir. 2001). As in Aimster, Defendants' "raison d'etre
12 appears to be the facilitation of and contribution to infringement on a massive scale."
13 Aimster, 2002 WL 31006142, at *1. Because they are in the business of copyright
14 infringement, Defendants do what they can to promote, not thwart, their users'
15 unlawful activity. Defendants' summary judgment motions should be denied.

16 I. DEFENDANTS ARE LIABLE FOR CONTRIBUTORY INFRINGEMENT.

17 A. Defendants Misconstrue the "Knowledge" Required for 18 Contributory Liability.

19 "Contributory liability requires that the secondary infringer 'know or have
20 reason to know' of direct infringement." Napster, 239 F.3d at 1020 (citations
21 omitted). In Napster, the Ninth Circuit noted that "Napster has knowledge, both
22 actual and constructive, of direct infringement." Id. (footnote omitted). The Court of
23 Appeals approvingly cited the district court's holding that Napster had acquired
24 sufficient knowledge of infringement from multiple different sources – including not
25 only notices identifying thousands of infringing files offered for download (copying)
26 by Napster users, but also a Napster executive's generalized admission that users "are
27 exchanging pirated music" (which the Ninth Circuit classified as proof of actual
28 knowledge); as well as company executives' recording industry and intellectual
property experience, and their own use of the Napster system (which the Court of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Appeals held was proof of constructive knowledge). *Id.* n.5. In short, the Ninth Circuit applied what has been accepted as the settled rule in contributory liability cases involving both physical-goods and online infringement – any of a variety of different facts can suffice to establish the defendant’s knowledge.³

Nevertheless, MusicCity insists that, under Napster, only one species of evidence suffices to prove actionable knowledge “in an online context” – evidence that the copyright holder provided the defendant with “the necessary documentation” to show that there is “specific infringing material” on the defendant’s system. MC-C Mem. 15. As an initial matter, the record here contains undisputed evidence of exactly that type. Plaintiffs repeatedly have provided Grokster and MusicCity (both before and after the latter’s switch to the Gnutella platform) specific notices of literally millions of files on their systems that contain Plaintiffs’ copyrighted works, along with identification of the user names and Internet protocol addresses of the users distributing those files (*i.e.*, making the files available for copying by other users). Plifs. SLF 3(a), 3(b).⁴ Those notices suffice to prove knowledge even under MusicCity’s erroneously restrictive view of the law.

Moreover, the precise argument that MusicCity now advances was considered and rejected in Fonovisa, Inc. v. Napster, Inc., 2002 WL 398676 (N.D. Cal. Jan. 28, 2002). There, Napster argued that, in light of the Ninth Circuit’s decision in Napster, “actual knowledge of specific acts of infringement is necessary for liability,” and

³ See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 261 (9th Cir. 1996) (letters from sheriff giving flea market operator generalized knowledge of infringing activity held sufficient); Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 514 (N.D. Ohio 1997) (“Defendants had at least constructive knowledge that infringing activity was likely to be occurring on their” online bulletin board service).

⁴ MusicCity asserts that, since it switched Morpheus to the Gnutella platform in March, the notices it has received from Plaintiffs merely have identified members of the general Gnutella user population who are hosting infringing files, without specifying whether those users are using the Morpheus system in particular. MC-C Mem. 15-16. MusicCity simply misreads the notices. All of the infringing files listed in Plaintiffs’ notices since March were found in the “shared folder” of users running the Morpheus application. Creighton Opp. Decl. ¶ 11-12; Charlesworth Opp. Decl. ¶ 3.

1
2 such knowledge "can only come in the form of notice of specific copyrighted works
3 from plaintiffs." Id. at *5. But Judge Patel held that the Court of Appeals in Napster
4 "did not create a new knowledge standard for contributory infringement. Instead, the
5 court relied on the traditional formulation that either constructive or actual knowledge
6 is sufficient." Id. The Ninth Circuit's reference to Napster's receipt of notice of
7 specific infringing files and subsequent failure to block access to those files "is
8 merely exemplary. It is not an exclusive list of conduct necessary to give rise to
9 contributory liability. Nor should the court's language be interpreted as mandating a
10 showing of actual knowledge." Id. at *7.

11 Likewise, in Aimster, the court held that the defendants' knowledge was
12 sufficiently shown by notice letters they received, the content of the their web site,
13 and user statements in defendants' online chat rooms and bulletin boards – evidence
14 that is present here as well – and that "[e]ach of these elements, taken together *or*
15 *even individually*, would conclusively demonstrate Defendants' knowledge of the
16 infringing activity taking place on the Aimster system." 2002 WL 31006142, at *12
17 (emphasis added). "It may be that, due to Aimster's encryption scheme, defendants
18 are unaware of the actual specific transfers of specific copyrighted material between
19 specific users of the Aimster system. However, there is absolutely no indication in
20 the precedential authority that such *specificity* of knowledge is required in the
21 contributory infringement context." Id. at *13 (emphasis in original). "Constructive
22 knowledge may also meet the knowledge requirement." Id.

23 The Ninth Circuit noted in Napster that "if a computer system operator learns
24 of specific infringing material available on his system," the operator has "*sufficient*
25 knowledge . . . to impose contributory liability." 239 F.3d at 1021 (emphasis added).
26 But the court did not hold that the defendant's knowledge of specific infringing
27 material on the system is *necessary* to liability, or that actionable knowledge cannot
28 be shown by other types of evidence, such as communications from direct infringers,
see, e.g., Pltfs. SUF 3(j), 3(p), or the defendant's own admission that infringement

1
2 occurs. In fact, the court went out of its way to list other types of evidence that show
3 knowledge. Napster, 239 F.3d at 1020 n.5.⁵

4 **B. There Is Extensive Undisputed Evidence of Defendants'**
5 **Actual and Constructive Knowledge of Infringement.**

6 As in Napster, and unlike in Sony-Betamax, the evidence of Defendants'
7 knowledge here consists of far more than their awareness that their technology is
8 technically capable of aiding infringement. Plaintiffs have compiled an extensive
9 record showing beyond dispute that Defendants have acted with actual and
10 constructive knowledge of their users' infringements. That knowledge has come
11 from numerous sources, see Plrfs. SJ Mem. 23-30; Plrfs. SUF 3(a)-3(r), including
12 what MusicCity erroneously contends is the only permissible source of knowledge –
13 notice letters from the Plaintiffs that identify millions of specific infringing files
14 being distributed by Defendants' users, Plrfs. SUF 3(a), 3(b). But the record also
15 contains other undisputed evidence that is independently sufficient to establish
16 Defendants' knowledge. That evidence, more fully discussed in Plaintiffs'
17 Memorandum in support of their motion for summary judgment and the
18 accompanying statement of uncontroverted facts, includes the following:

- 19 • Both MusicCity and Grokster (through an affiliate) operated blatantly
20 infringing "OpenNap" services, and then, after the Ninth Circuit's decision in
21 Napster, sought to lure and "migrate" OpenNap users and their infringing files to the
22 Morpheus and Grokster services, respectively. Plrfs. SUF 3(c)-(e).

23
24 ⁵ The Court of Appeals in Napster held that, *as a matter of a preliminary injunction*
25 *remedy*, copyright owners in that case bore a burden "to provide notice to Napster of
26 copyrighted works and files containing such works available on the Napster system
27 before Napster has the duty to disable access to the offending content." 239 F.3d at
28 1027. But this "burden-shifting statement . . . addressed only the scope of injunctive
relief." Fonovisa v. Napster, 2002 WL 398676, at *9. Napster had the burden of
removing infringing files of which it otherwise had "reasonable knowledge." A&M
Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1095 (9th Cir. 2002) ("Napster II")
(affirming order requiring Napster to shut down). The Ninth Circuit never suggested
that specific notice is a prerequisite of *liability*. See Fonovisa v. Napster, 2002 WL
398676, at *27-37.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

• After launching the Morpheus service, MusicCity's computers captured data from the system confirming that users were searching for music of top-selling recording artists. Pltfs. SUF 3(h).⁶

• Defendants' users have often discussed their distribution or copying of specific copyrighted works in chat rooms and message boards maintained and monitored by Defendants, and in e-mail messages sent directly to Defendants. Pltfs. SUF 3(j).

• Defendants have given users specific advice on how to download copyrighted content. Pltfs. SUF 3(p). See Aimster, 2002 WL 31006142, at *12 ("tutorial" on use of system to infringe copyrights demonstrates defendant's knowledge).

• Defendants' executives have used their systems to search for and download copyrighted works. Pltfs. SUF 3(k). See Napster, 239 F.3d at 1020 n.5.

• MusicCity has promoted Morpheus with materials featuring examples of infringing files. Pltfs. SUF 3(l), 3(n). See Napster, 239 F.3d at 1020 n.5.

• Defendants' executives have experience in businesses based on copyrighted content and are sophisticated in intellectual property matters. Pltfs. SUF 3(o). See Napster, 239 F.3d at 1020 n.5.

⁶ MusicCity not only knew that its users were infringing copyrights but was concerned that the quantity of popular media files available on its system might not be as large as on competitors' systems. In April 2001, as MusicCity was just about to launch the FastTrack-based version of Morpheus, a senior officer wrote to the then-CEO: "Mike, I downloaded bearshare [a competing Gnutella-based client application] to compare, and they are much larger, *I typed garth brooks and got 2700 songs, on Morpheus I got 60.*" Borkowski Decl., Ex. 11, p. 1237 (emphasis added). A few days later, a MusicCity employee, apparently testing Morpheus, wrote to MusicCity's chief technical officer: "I seem to be having problems finding music content, a lot of non results even on stuff like Elton John, *but I guess that our network should make a difference since we have greater numbers.*" Borkowski Decl., Ex. 11, p. 1188 (emphasis added); see also Borkowski Decl., Ex. 11, p. 969 (user complains that there were no videos on the system of Muddy Waters, Buddy Guy or the Kinks. MusicCity replied: "Maybe you should load some up"). MusicCity also was aware of the illegality of its conduct. See Borkowski Decl., Ex. 11, pp. 1082, 1760, 1885; Smith Dep. 553:18-554:2 (Terry Decl., Ex. 9, pp. 385-86). MusicCity even discussed ways of avoiding enforcement actions. Borkowski Decl., Ex. 11, pp. 1482 ("Could we set up two sites, one music city, one infinite music to make it harder to shut one down, then have to go after another"), 1792.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

• Defendants protect their own intellectual property. Pltfs. SUF 3(s). See Napster, 239 F.3d at 1020 n.5.

• Defendants have received and are aware of media reports noting the widespread piracy on their systems. Pltfs. SUF 3(t).

In addition, and most basically, Defendants at all times have had the ability to use their systems like any other user to see what is obvious to everyone – that a huge proportion and absolute number of the available files consist of copyrighted works. See Napster, 239 F.3d at 1024 (“As a practical matter, Napster, its users and the record company plaintiffs have equal access to infringing material by employing Napster’s ‘search function’”). Plaintiffs’ statistical sample, obtained simply by downloading files available on the FastTrack network using the Grokster application, determined that 90% of the files distributed by FastTrack users are likely infringing copies of commercially released copyrighted works, and at least 75% of the files infringe the copyrights of Plaintiffs in this action. Olkin Decl. ¶ 16; Creighton Opp. Decl. ¶¶ 5-6. Compare Napster, 114 F. Supp. 2d at 903 (72.5% of files infringed copyrights of plaintiffs). Defendants could have verified the massive infringement on their systems at any time. Their decision instead to ignore their users’ infringement does not allow them to escape liability. See Aimster, 2002 WL 31006142, at *13 (defendants’ self-imposed ignorance of infringing activity does not prevent finding of actionable knowledge).

C. Defendants’ Arguments That They Lack Sufficient Knowledge Are Baseless.

MusicCity suggests that the only knowledge of infringement that is relevant is knowledge it has acquired since switching Morpheus to the Gnutella platform. MC-C Mem. 15-16. But MusicCity’s decision in March 2002 to implement a new protocol for its system did not magically cleanse it of the knowledge of infringement it acquired while its system employed the FastTrack protocol, nor does that decision shield MusicCity from liability for its subsequent conduct. While using FastTrack,

1

2 MusicCity built a base of millions of users. Pltfs. SUF 5(a). It also received
3 numerous notices from Plaintiffs that identified millions of infringing files made
4 available for copying by Morpheus users. Pltfs. SUF 3(a), 3(b). Before it launched
5 its Gnutella-based system, it had both actual and constructive knowledge, from many
6 sources, of the massive infringement by Morpheus users. Pltfs. SUF 3(a)-(t).

7 After being ousted from the FastTrack network, MusicCity plainly anticipated
8 – and did everything it could to ensure – that a large number of its FastTrack-era
9 users would use the new Gnutella-based version of Morpheus in precisely the same
10 way they had used prior incarnations. In the brief period between the FastTrack
11 ouster and the unveiling of the Gnutella-based version, MusicCity assured its users on
12 its website: “[W]e . . . are committed to [getting] you *back up on the network* as
13 soon as possible.” See Supp. Decl. of Frank Creighton in Further Opposition to
14 Motion for Partial Summary Judgment of Defendants (filed Feb. 28, 2002), Ex. 36
15 (emphasis added). Shortly after making the switch to Gnutella, MusicCity told its
16 users: “*All of your shared files from the previous version of Morpheus are*
17 *automatically transferred into the new Morpheus [Preview Edition]* – you won’t
18 lose *any* of your content!” Terry Decl., Ex. 12, p. 596 (emphasis added). MusicCity
19 thus not only had every reason to expect that a large proportion of the infringing files
20 made available by its users in the FastTrack era would continue to be made available
21 by those same users in the Gnutella era – it guaranteed that it would happen.

22 MusicCity asserts that Plaintiffs’ infringement notices do not give it actionable
23 knowledge because they “arrive after the distribution of the Morpheus program, at a
24 time when [MusicCity] has no ability to act upon the notices.” MC-C Mem. 16.

25 First, as a matter of undisputed fact, MusicCity *does* have the ability to act on
26 Plaintiffs’ notices. At all times, it retains the ability to combat rather than promote
27 the unauthorized copying and distribution of copyrighted works that takes place on its
28 system. See *infra* at 17-26; Pltfs. SJ Mem. 35-41.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Second, as a matter of law, MusicCity's argument improperly attempts to import the vicarious-liability concept of "control" or "supervision," see Napster, 239 F.3d at 1022, into the doctrine of contributory infringement, where it has no place. See, e.g., Casella v. Morris, 820 F.2d 362, 365 n.4 (11th Cir. 1987) ("the question of Morris' 'control' is irrelevant to contributory infringement analysis"). Contributory liability requires only that the defendant knowingly and materially contribute to infringing conduct. Napster, 239 F.3d at 1019. As noted above, a defendant may be held liable even if it never receives a notice of specific infringing files, so its professed inability to act on such notice is irrelevant. Contrary to MusicCity's suggestion, MC-C Mem. 15, Napster did not engraft "ability to act" upon infringement notices as an additional requirement of contributory liability. Napster simply cited failure to block infringing files after notice (as Defendants here have also failed to do) as one way – but certainly not the *only* way – that a computer system operator can knowingly contribute to infringement. 239 F.3d at 1021. "Conduct sufficient for liability may take forms other than a combination of actual knowledge and failure to block access." Fonovisa v. Napster, 2002 WL 398676, at *7.

Grokster, for its part, admits that it is "aware as a general matter that some of its users are infringing copyrights." Grokster Mem. 15. In this setting, such an admission disposes of the issue. "General" knowledge that users are engaged in infringement is sufficient for contributory liability. See Napster, 239 F.3d at 1020 n.5 (knowledge shown by general statement of Napster executive that users "are exchanging pirated music"); Aimster, 2002 WL 31006142, at *13. Moreover, although it is not necessary for liability, Grokster has much more than "general" knowledge of infringement. See supra at 6-8. There is, for instance, abundant undisputed evidence that it has received *specific* actual knowledge of users' infringing activity from multiple sources, including Plaintiffs' notices of infringement and communications with its users. Plrfs. SUF 3(a), 3(b), 3(j), 3(k), 3(p). Grokster has given users advice on how to download specific copyrighted works. E.g., GR06581, GR04524

1
2 (Borkowski Decl., Ex. 12, pp. 2360, 2354) ("Grokster Support" giving advice on how
3 to download *Lord of the Rings*, *Resident Evil*, and *Big Fat Liar*); see also Pltfs. SJ
4 Mem. 26-28. Grokster's assertion that it "has no way of knowing what files are being
5 exchanged, or by whom," Grokster Mem. 3, ignores the many occasions on which
6 users have *told Grokster* what infringing files they have downloaded. Pltfs. SUF 3(j).
7 In any case, the "exchange" or downloading of files does not represent the totality of
8 infringing conduct. The unauthorized distribution of copyrighted works is also
9 infringement, and Plaintiffs' notices have given Grokster knowledge of many in-
10 stances of unlawful distribution. Pltfs. SUF 3(a), 3(b). Grokster's knowledge of
11 infringing activity by its users is more than sufficient to satisfy the "knowledge"
12 element of contributory liability.

13 **D. Given the Undisputed Evidence of Defendants' Knowledge,**
14 **Sony-Betamax Is Not a Defense.**

15 As definitively interpreted by the Ninth Circuit, Sony-Betamax precludes
16 imposition of contributory liability only where it is based *solely* on the defendant's
17 constructive knowledge that its technology is capable of being used for infringement.
18 Napster, 239 F.3d at 1021 (a system operator "cannot be liable for contributory
19 infringement merely because the structure of the system allows for the exchange of
20 copyrighted material"). Actual or constructive knowledge *from any other source*
21 "renders Sony's holding of limited assistance," id. at 1020, "[r]egardless of the
22 number of [the system's] infringing versus noninfringing uses," id. at 1021.

23 Despite the Ninth Circuit's narrow reading and application of Sony-Betamax,
24 Defendants go on at length about the supposed existence of "substantial non-infring-
25 ing uses" of their systems, as though this provides some sort of freestanding defense
26 unrelated to the "knowledge" element of contributory liability. MC-C Mem. 11-15;
27 Grokster Mem. 9-14. Indeed, MusicCity argues explicitly that the existence of nonin-
28 fringing uses furnishes a defense *even if* the defendant knows it is aiding infringe-

1
2 ment. MC-C Mem. 14-15. That view has no basis in the law.⁷ Remarkably,
3 MusicCity cites Napster in support of its position, but, for the reasons just noted, that
4 case compels precisely the opposite reading. MusicCity also relies upon Vault Corp.
5 v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988), but that case did not involve a
6 defendant that acted with knowledge of infringement.⁸

7 Simply put, where the defendant's knowledge of infringement is shown by
8 evidence other than the mere capacity of its technology for infringing use, it does not
9 matter how substantial the noninfringing uses are or may someday be. Because
10 Defendants indisputably have actual knowledge of infringement, as well as construc-
11 tive knowledge derived from facts other than the mere capability of their systems to
12 aid infringement, the Sony-Betamax doctrine has no application to this case.

13 **E. Sony-Betamax Does Not Apply for Many Additional Reasons.**

14 Although the Court need not reach these issues, there are a host of other
15 reasons why, as a matter of law, Sony-Betamax cannot furnish a defense here:

16 • Sony-Betamax does not provide a defense where, as here, the defendants
17 maintain an ongoing relationship with their users. Sony-Betamax, 464 U.S. at 437;

18
19 ⁷ MusicCity argues (without citation) that in Sony-Betamax, "Sony was admittedly
20 in possession of general knowledge regarding the infringing uses of the Betamax."
21 MC-C Mem. 14 n.7. But in the Supreme Court, the plaintiffs' sole argument as to
22 knowledge was that the defendants were liable "merely" by virtue of their awareness
23 that the Betamax *could* be used to infringe. See 464 U.S. at 428.

24 ⁸ MusicCity characterizes Vault as a case in which "the Fifth Circuit allowed the
25 invocation of the Sony-Betamax defense despite actual knowledge." MC-C Mem. 14
26 n.8. That artful wording fails to note precisely what it was that the Vault defendant
27 knew. The defendant manufactured computer diskettes that allowed users to make
28 copies of third-party computer programs sold in copy-protected form. The Copyright
Act specifically permits users to make "archival" copies of a computer program
without the permission of the copyright owner. 17 U.S.C. § 117(b) (2000). The
defendant in Vault admitted it had "actual knowledge that its product is used to make
unauthorized copies of copyrighted material." 847 F.2d at 262. But in that setting,
"unauthorized" was not the same as "infringing" – a substantial use of the product
was to make unauthorized, but nevertheless noninfringing, archival copies of
programs. *Id.* Here, by contrast, the unauthorized distribution and copying of a
copyrighted work clearly constitutes infringement. Napster, 239 F.3d at 1014. To the
extent that Vault possibly could be read to hold that the existence of noninfringing
uses furnishes a defense where the defendant knowingly contributes to infringement,
the decision is inconsistent with Napster and is not good law within this Circuit.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Aimster, 2002 WL 31006142, at *15 (“Unlike the case in Sony, the instant case involves an ongoing relationship between the direct infringers (the users) and the contributory infringers (the Defendants)"); Pltfs. SJ Mem. 46-47. In Sony-Betamax, the defendants’ last contact with the direct infringers was at the point of selling the Betamax videotape recorder. By contrast, Defendants here maintain a variety of continued interactions with their users. Pltfs. SUF 8(a)-(g); infra at 18-22, 26-28.

- Sony-Betamax does not provide a defense where, as here, the defendants facilitate not only unlawful reproduction but also unlawful *distribution* of copy-righted works. Sony-Betamax, 464 U.S. at 425; Aimster, 2002 WL 31006142, at *15 (“there is nothing to suggest that Sony extends to protect the unauthorized and wide-spread *distribution* of infringing works”); Pltfs. SJ Mem. 48; Pltfs. SUF 2(a)-(e).

- Sony-Betamax does not provide a defense where, as here, the defendants specifically designed their technology for infringing use. Aimster, 2002 WL 31006142, at *16 (“Aimster is a service specifically designed to aid the infringing activities of its users and, on that basis alone, should not be eligible for Sony’s pro-tections”); A&M Records, Inc. v. Abdallah, 948 F. Supp. 1449, 1456 (C.D. Cal. 1996); Pltfs. SJ Mem. 48; Pltfs. SUF 10. Similarly, “the Court in Sony approvingly cited the district court’s finding that Sony had not ‘influenced or encouraged’ the unlawful copies,” Aimster, 2002 WL 31006142 at *16, unlike the Defendants here.

- Sony-Betamax does not provide a defense where, as here, the defendants can prevent the infringing uses of their technology while preserving the non-infringing uses. Pltfs. SJ Mem. 48; Pltfs. SUF 7(a)-(f).

- Finally, Sony-Betamax is relevant only to claims for contributory infringement, and “has no application to . . . vicarious copyright infringement.” Napster, 239 F.3d at 1022.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

F. There Is No Evidence That Defendants' Systems Have Commercially Significant Noninfringing Uses.

Only if Defendants could overcome *all* of the hurdles noted above, which they cannot, would this Court need to reach the issue of whether their systems are capable of "commercially significant noninfringing uses." Sony-Betamax, 464 U.S. at 442; Napster, 239 F.3d at 1021. (Defendants habitually omit the critical phrase "*commercially significant*." See, e.g., MC-C Mem. 13, 14; Grokster Mem. 2, 10, 12).

Even if the Court considers this issue, Defendants have not discharged their burden of submitting evidence sufficient to create a triable issue of fact, let alone to have the matter resolved in their favor as a matter of law.⁹ Defendants' declarations on the issue largely talk about the noninfringing uses of the Internet or peer-to-peer technology generally, not of Defendants' systems specifically.¹⁰ Indeed, many of Defendants' declarants admit that they have never even used Defendants' systems to ascertain the availability of the non-infringing content described in their declarations.¹¹ And none of the declarants who refer to the noninfringing uses of the systems addresses the magnitude or substantiality of such uses, or their commercial

⁹ MusicCity incorrectly claims that Plaintiffs bear the burden of negating the existence of commercially significant noninfringing uses. MC-C Mem. 10. A plaintiff bears only the burden of making out a *prima facie* case on the two elements of contributory liability – knowledge and contribution. Then, if the plaintiff's showing of "knowledge" rests entirely on the bare capacity of defendant's product to infringe, it is an *affirmative defense* that the product is capable of substantial noninfringing uses. Napster, 114 F. Supp. 2d at 912. Defendants themselves plead the Sony-Betamax doctrine as an affirmative defense. See MusicCity Answer to MGM Am. Compl. at 9; MusicCity Answer to Leiber Am. Compl. at 13-14; Grokster Answer to MGM Am. Compl. at 5; Grokster Answer to Leiber Am. Compl. at 9-10. Defendants thus bear the burden of proof on the issue. Plffs. SJ Mem. 44.

¹⁰ See, e.g., Ian Decl. ¶¶ 7-14; Newby Decl. ¶¶ 10-12; Kahle Decl. ¶¶ 8-20; Prelinger Decl. ¶¶ 17-18; Sinnreich Decl. ¶¶ 4-44.

¹¹ See Ian Dep. 15:9-16:8 (Terry Decl., Ex. 2, pp. 13-14); Kahle Dep. 55:1-68:4 (Terry Decl., Ex. 3, pp. 19-32); Prelinger Dep. 68:16-21 (Terry Decl., Ex. 6, p. 58); Sinnreich Dep. 60:10-12 (Terry Decl., Ex. 7, p. 60).

1
2 significance, i.e., whether Defendants could sustain a commercial business built on
3 those uses. Those declarants admit they have no information on the subject.¹²

4 That Defendants cannot find anyone to vouch for the commercial significance
5 of noninfringing uses is hardly surprising. The overwhelming volume of the files
6 available on Defendants' systems are copyrighted sound recordings, audiovisual
7 works, and other works that are distributed without authorization of the copyright
8 owner. Pltfs. SUF 3(a); Olkin Decl. ¶ 16. There is no reason to believe that Defen-
9 dants – which, after all, set out to build businesses on providing access to infringing
10 content, not the King James Bible, Pltfs. SJ Mem. 4-10 – could sustain a commercial
11 enterprise if the only files on their systems were public domain and other noninfring-
12 ing works, which are typically available for free at multiple locations on the Internet.

13 II. DEFENDANTS ARE LIABLE FOR VICARIOUS INFRINGEMENT.

14 A. Vicarious Liability Requires Only that the Defendant Have the 15 Ability to Exercise Supervision or Control Over Infringers.

16 Vicarious liability in copyright law rests on a simple proposition: if someone
17 makes money from others' infringing activity and has the ability to supervise or
18 control the activity, that person – rather than the copyright owner – should bear the
19 cost of the infringement. See, e.g., PolyGram Int'l Publ'g, Inc. v. Nevada/TIG, Inc.,
20 855 F. Supp. 1314, 1325 (D. Mass. 1994). Vicarious liability does not require that
21 the defendant *actually* exercise supervision or control over the direct infringers. It is
22 enough that it has the *ability* to do so. Where the defendant is "in a position to police
23 the infringing conduct," its "failure to police the conduct" gives rise to liability.
24 Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162-63 (2d

25
26 ¹² See Egbert Dep. 53:1-4, 73:18-74:21, 75:8-78:10 (Terry Decl., Ex. 1, pp. 5-11);
27 Ian Dep. 62:6-14 (Terry Decl., Ex. 2, p. 15); Kahle Dep. 58:24-68:4 (Terry Decl., Ex.
28 3, pp. 22-32); Mayers Dep. 25:7-21, 32:20-34:14, 37:11-24 (Terry Decl., Ex. 4, pp.
34-38); Newby Dep. 29:15-31:9, 63:21-25, 73:19-74:13 (Terry Decl., Ex. 5, pp. 42-
44, 48, 50-51); Prelinger Dep. 31:4-32:6, 49:6-51:3 (Terry Decl., Ex. 6, pp. 53-57);
Sinnreich Dep. 61:16-62:6, 81:14-20, 192:6-193:6, 236:18-239:9 (Terry Decl., Ex. 7,
pp. 61-63, 66-67, 72-75).

1
2 Cir. 1971). "To escape imposition of vicarious liability, the reserved right to police
3 must be exercised to its fullest extent." Napster, 239 F.3d at 1023.

4 Vicarious liability is imposed even where the defendant has no formal right to
5 supervise or control the direct infringers, but nevertheless is able to exercise de facto
6 supervision over them because they look to the defendant for direction or instruction.
7 See RCA/Ariola Int'l. Inc. v. Thomas & Grayston Co., 845 F.2d 773, 782 (8th Cir.

8 1988); Gershwin, 443 F.2d at 1163. Further, the defendant's ability to supervise or
9 control need not rise to the level of an ability directly to dictate or prevent the
10 activities of the direct infringers. It is sufficient that the defendant have "'pervasive
11 participation in the formation and direction' of the direct infringers, including
12 promoting them (i.e. creating an audience for them)." Fonovisa, Inc. v. Cherry Auc-
13 tion, Inc., 76 F.3d 259, 263 (9th Cir. 1996) (quoting Gershwin, 443 F.2d at 1163).

14 On this issue, courts have steadfastly rejected attempts by defendants to exalt form
15 over substance or to structure their affairs so they can deny responsibility for
16 infringements from which they profit. "Turning a blind eye to detectable acts of
17 infringement for the sake of profit gives rise to liability." Napster, 239 F.3d at 1023.

18 Defendants make no effort to dispute the obvious fact that they profit from the
19 pervasive infringing activity of their users. See Pltfs. SJ Mem. 31-33. Nor could
20 they. They profit by displaying advertising to users drawn by easy access to a near-
21 limitless selection of copyrighted works. Pltfs. SUF 5(a)-(f). Defendants contest
22 only the "supervision or control" element of vicarious liability. Reduced to its
23 essence, their argument is that they cannot be held vicariously liable because, unlike
24 Napster, they do not operate central servers that perform indexing and search
25 functions (although it is undisputed that their central servers interact with users in a
26 variety of ways). MC-V Mem. 14-18, Grokster Mem. 16-18. That very argument,
27 however, was recently considered and rejected by Judge Aspen in Aimster:

28 The concept that Aimster catalogues all available files for download
in a single, centralized database is hotly contested by the parties. The

1
2 reason for this debate is that a critical aspect of the Napster decision
3 was that Napster operated a central directory of all the files available
4 in its system. According to [defendants], Aimster contains no such
5 central database. Plaintiffs disagree. . . . [W]e find that there is insuf-
6 ficient evidence to resolve this conflict. However, our decision today
7 can be and is based on considerations independent of this evidentiary
8 insufficiency. In other words, the reasoning of this opinion [finding
9 likely vicarious liability] would hold *regardless of whether or not*
10 *Aimster maintains a central database of files available for transfer.*

11 Aimster, 2002 WL 31006142, at *3 n.6 (emphasis added).

12 Contrary to Defendants' suggestion, the Ninth Circuit in Napster did not devise
13 a set of formalistic new vicarious liability rules for the Internet. That decision
14 applied settled principles established in non-Internet precedents such as the court's
15 earlier decision in Fonovisa v. Cherry Auction and the Second Circuit's widely cited
16 decision in Gershwin.¹³ Napster, 239 F.3d at 1023-24. Under the principles
17 enunciated in Napster and its antecedents, Defendants' ability to supervise and
18 control their users is more than enough to subject Defendants to vicarious liability.

19 **B. MusicCity Possesses the Ability to Supervise or Control**
20 **Users of Its Gnutella-Based System.**

21 The undisputed facts – including many that have come to light since the parties
22 filed their cross-motions for summary judgment (as MusicCity waited until after the

23 ¹³ In Gershwin, 443 F.2d at 1159, the defendant organized and assisted local non-
24 profit associations that staged community concerts. Among its functions was to help
25 generate audiences for the concerts, to serve as agent for some of the performers, and
26 to arrange the printing of programs listing the musical compositions to be performed.
27 However, the defendant did not select the compositions, did not own or control the
28 performing venues, and "had no formal power to control either the local association
or the artists." Id. at 1163. After the plaintiff's composition was performed without
permission, the Second Circuit upheld a summary judgment of vicarious liability
because the defendant had "pervasive participation in the formation and direction" of
the direct infringers; promoted and created an audience for them; and "was in a
position to police the infringing conduct of its artists." Id. Moreover, "the local
association depended upon [the defendant] for direction in matters such as this." Id.

1
2 filing of these motions to produce to Plaintiffs the source code and other files detail-
3 ing the functionality of its current Gnutella-based system¹⁴) – make clear that
4 MusicCity retains the ability to supervise or control the activities of Morpheus users.

5 **1. MusicCity Controls Its Software and System.**

6 Software is the result of innumerable conscious decisions made by those who
7 develop it. Horowitz Decl. ¶ 7. MusicCity controls the design of the Morpheus
8 software, how to distribute it to users, how frequently to update it, which features to
9 add to it, which features to delete, which central servers will communicate with a
10 Morpheus user, and who may access the Morpheus system and on what terms. As
11 MusicCity's own expert notes, software "applications are not cast in stone and
12 services should not remain immutable once they have been released and are in use by
13 applications and users." Gribble Dep. 297:5-298:25 (Terry Decl., Ex. 8, pp. 378-79).

14 When it suits its own purposes, MusicCity takes full advantage of its ability to
15 revise the Morpheus software. In the first seven weeks after launch of Morpheus 2.0
16 (the current Gnutella-based version of Morpheus) in August of this year, MusicCity
17 produced approximately *eighteen* separate upgrades to the software – or one new
18 version every two to three days. Smith Dep. 584:22-585:25 (Terry Decl., Ex. 9, pp.
19 414-15). The ability quickly to distribute to its users updated versions of the software
20 – with, in the words of MusicCity's expert, "*enhancements that change the file*
21 *sharing capabilities*," Gribble Dep. 292:3-5 (Terry Decl., Ex. 8, p. 373) (emphasis
22 added) – is so important to MusicCity that it designed its system so that users'
23 software communicates with a MusicCity central server at a regular interval (initially
24 *once every hour*, now once per day) to see whether a new version is available. Smith

25
26 ¹⁴ "The source code of a program is its operating instructions in a format that a
27 computer programmer can read and use to maintain and revise a program." *Liu v.*
28 *Price Waterhouse LLP*, 302 F.3d 749, 752 n.1 (7th Cir. 2002). MusicCity provided
the source code to its testifying expert "a few weeks" before the filing of the
summary judgment motions. Gribble Dep. 28:1-11 (Terry Decl., Ex. 8, p. 109).
Defendants have filed herewith the Declaration of Prof. Ellis Horowitz, which
discusses his analysis of the belatedly produced code.

1
2 Dep. 610:21-611:23 (Terry Decl., Ex. 9, pp. 440-41). If so, MusicCity sends the user
3 a message inviting the user to download the new version. Horowitz Decl. ¶ 26.

4 By continually changing how its software works and quickly making those
5 changes available to the public, MusicCity maintains control over its relationship
6 with its users in a way that no manufacturer of a VCR or other tangible good possibly
7 could. Moreover, because it controls the system, *MusicCity controls how much*
8 *control it exerts over its users and over the functionality of its system at any given*
9 *time*. Horowitz Decl. ¶¶ 18-20, 49. Thus, for MusicCity to assert that “control[ling]
10 the file-sharing activities of Morpheus users” is “impossible” in light of “the current
11 architecture” of its software, MC-V Mem. 16, is merely to state that it would have to
12 change the software to do so, which it already does on a near-constant basis.

13 **2. The Current Morpheus System Demonstrates Numerous Ways in**
14 **Which MusicCity Controls or Supervises Its Users' Activities.**

15 MusicCity's current ability to supervise or control use of its system is substan-
16 tial, and its contacts with users of the system are persistent. That is precisely what
17 one would expect of a company that makes money by sending advertisements to
18 users, whom it must keep satisfied enough to continue using Morpheus – and not
19 some competitor's system.

20 **a. Central-Server Control Via the “Auto.xml” File**

21 MusicCity currently maintains centralized and immediate control over the
22 functionality of the software on its users' computers. Horowitz Decl. ¶¶ 7, 21-24, 36-
23 37, 40-49. At regular intervals (formerly once an hour, now once per day), every
24 Morpheus 2.0 user application communicates with a set of MusicCity central servers
25 to read what Morpheus calls the “auto.xml” file – a set of instructions that commands
26 the software on the user's computer to perform certain tasks. Smith Dep. 603:8-
27 604:18 (Terry Decl., Ex. 9, pp. 433-34); Gribble Dep. 66:19-25, 218:8-18 (Terry
28 Decl., Ex. 8, pp. 147, 299). Merely by changing the contents of this central server
file, MusicCity can change the behavior of the software on its users' computers

1
2 without changing the actual user software itself. Horowitz Decl. ¶¶ 25, 40. In
3 addition, MusicCity has the ability to change the user software to enhance or diminish
4 the central control that can be exercised by means of this "auto.xml" file. *Id.* ¶ 49.

5 Most significantly, as MusicCity's chief technical officer has admitted, and as
6 tests by Plaintiffs' experts have confirmed, *the "auto.xml" file gives MusicCity the*
7 *ability to "force" upgrades – i.e., to compel users to accept the download and*
8 *installation of an updated version of the application without the users' consent.*
9 Smith Dep. 650:4-651:7, 661:1-4 (Terry Decl., Ex. 9, pp. 480-81, 490); see also
10 Horowitz Decl. ¶¶ 7, 25-39. With this feature, MusicCity is able to replace the entire
11 Morpheus application (or any part of it) for every user running Morpheus 2.0. *Id.* ¶ 7.
12 Thus, MusicCity has sufficient control over its system to be able, if it wished (or if
13 this Court ordered it), to add to the current Morpheus application features that imple-
14 ment filtering, "fingerprinting," or some other copyright-protection technology. See
15 Pltfs. SJ Mem. 40-43; Pltfs. SJF 7(a)-(f).

16 The "auto.xml" file also gives MusicCity the ability to make other changes
17 from a central location that affect the operation of the software on all its Morpheus
18 2.0 users' computers. MusicCity's expert agrees that these "tuning parameters,"
19 adjustable at will by MusicCity, affect functions that are "part of the Morpheus file
20 sharing functionality." Gribble Dep. 223:14-224:6 (Terry Decl., Ex. 8, pp. 304-05).
21 These "tuning parameters" perform the following tasks, among others:

22 • They adjust variables that affect how communications (and, in particular,
23 user search requests) are propagated throughout the network, *id.* at 223:17-21;
24 Horowitz Decl. ¶¶ 40, 43.

25 • They adjust a variable that causes the user software to filter out all
26 search results that do not support the descriptions of available files (called "meta-
27 data") in the format used by Morpheus. Smith Dep. 683:22-685:21 (Terry Decl., Ex.
28 9, pp. 513-15). MusicCity could in effect prevent its users from obtaining search

1
 2 results from anyone but other Morpheus users – creating a private network within the
 3 larger universe of Gnutella users. See Horowitz Decl. ¶ 41.

4 • They add Internet addresses of “bootstrap” servers. MusicCity thus can
 5 always ensure, from a central location, that users have enough addresses of such
 6 servers to continue to connect to the Gnutella network. Smith Dep. 675:14-18 (Terry
 7 Decl., Ex. 9, p. 505); Horowitz Decl. ¶ 46.

8 • They adjust how often the client application communicates with the
 9 MusicCity server that hosts the “auto.xml” file itself. Smith Dep. 604:23-606:12
 10 (Terry Decl., Ex. 9, pp. 434-36). MusicCity recently used this feature to decrease the
 11 frequency of such communications to once a day. Id.

12 **b. Other Central-Server Interactions with Users**

13 MusicCity services users and tracks their software through many other central-
 14 server communications. For example, one MusicCity server (or group of related
 15 servers) provides changeable content for the Morpheus “Home” page, allowing
 16 MusicCity “to broadcast messages and information to Morpheus software users.”
 17 Smith Decl. ¶ 31; Horowitz Decl. ¶ 52(a). Another MusicCity server communicates
 18 with users to assist in the delivery of advertising to them, including permitting
 19 MusicCity to adjust how ads appear on the users’ screen. Id. ¶ 52(b).

20 A third MusicCity server receives various pieces of data from the user’s com-
 21 puter, including the beginning and ending time of the user’s last session of Morpheus
 22 use. That information allows MusicCity to determine how many users are connecting
 23 to the system, and how long each stays connected. Id. ¶ 52(c). Significantly, this
 24 central server also receives from each user *a unique numerical identifier* generated
 25 once by each user’s software and then sent at each login to a MusicCity central server
 26 each time the user launches the software. Id. This identifier uniquely identifies each
 27 user’s Morpheus software, which permits MusicCity and its business partners to track
 28 unique copies of the software, Smith Dep. 721:17-722:21 (Terry Decl., Ex. 9, pp.
 551-52). The most recent version of the Morpheus source code causes the software

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

to ask users, on installation, to give additional information (such as their name, age, and gender), which is relayed to MusicCity central servers, associated with that user's unique identifier. Horowitz Decl. ¶ 52(c) n.2. (A chart illustrating the numerous central-server communications relied upon in the Morpheus system is discussed at Horowitz Decl. ¶ 53 and attached at Exhibit 4 thereto.)

c. Automatic Distribution of Files *Against* Users' Wishes

One recently uncovered fact further demonstrates that MusicCity's characterization of itself as a neutral "communication tool" (like an e-mail service or an envelope), MC-V Mem. 2-3, is a fiction. It also demonstrates the extent to which MusicCity can exert control over a user's computer for its own business purposes.

MusicCity asserts (without citation to the record) that it "has no involvement whatsoever with the search and transfer of files of users who choose to utilize the P2P networking functions of the Morpheus software." *Id.* at 6-7. But, quite to the contrary, review of recently produced source code and testing by Plaintiffs' experts reveal that, upon first installation, Morpheus 2.0 deprives the user of the choice whether to distribute certain files, by *automatically* searching for file directories associated with other popular file distribution and copying services (such as Kazaa, iMesh, LimeWire, BearShare, and others), and then *automatically* making those files available for copying by other users. Horowitz Decl. ¶¶ 54-58. Morpheus does this *even if the user has deliberately opted not to make those files available for copying.* For example, one of these other services, Kazaa, gives a user an opportunity to check a box to "disable file sharing," by which act the user expresses his intent *not* to make available to others the files in his Kazaa directory. *Id.* ¶ 55. Morpheus 2.0 *overrides* the wishes of users who have checked that box. *Id.*; *see also id.*, Ex. 5 (showing Morpheus 2.0's automatic, unauthorized distribution of the Beatles' "When I'm 64").

This is merely one more example showing that MusicCity is in the business of earning revenue by maximizing the amount of pirated content its users have access to, so that it in turn can maximize the number of users exposed to the advertising it deliv-

1
2 ers. To achieve that end, it will even take control of the files on a user's computer to
3 distribute those files without the user's prior consent.

4 3. MusicCity's Ability to Supervise or Control Is Sufficient for
5 Vicarious Liability.

6 These undisputed facts render immaterial the artfully narrow assertions of
7 MusicCity declarants Darrell Smith and Steven Gribble as to how the Morpheus
8 system operates. Even if it were true that MusicCity "has no involvement" – present
9 tense – in its users' use of the peer-to-peer functions of Morpheus, Smith Decl. ¶ 28,
10 it is undisputed that it *could have* such involvement if it wished, through its control of
11 the "auto.xml" file, through any of its frequent software updates, or otherwise. To be
12 subject to vicarious liability, a defendant need not *actually* exercise supervision or
13 control over infringers' activities; indeed, it is the *failure* of a defendant to exercise
14 its right and ability "to prevent the exchange of copyrighted material" that makes it
15 culpable for vicarious infringement. See Napster, 239 F.3d at 1023.

16 In addition, MusicCity's role, in its OpenNap, FastTrack, and now Gnutella
17 eras, in forming millions of strangers into an online community of infringing
18 Morpheus users is, in itself, enough supervision and control to subject it to vicarious
19 liability. See Gershwin, 443 F.2d at 1162 (defendant's "pervasive participation in the
20 formation and direction" of direct infringers sufficed to establish actionable control);
21 accord Fonovisa, 76 F.3d at 263 ("[a]s the promoter and organizer of the swap meet,
22 Cherry Auction wields the same level of control over the direct infringers as did the
23 Gershwin defendant").

24 MusicCity's contention that it lacks legally sufficient supervision or control
25 rests on an incorrect view of the law. MusicCity suggests that every iteration of the
26 Morpheus application has to be analyzed in isolation. See MC-V Mem. 8 ("Once the
27 software leaves the hands of [MusicCity], it has no control over what the ultimate
28 user does with it"). Plaintiffs' claim, however, is directed at MusicCity's *conduct*,
not the Morpheus *technology*. It is undisputed that MusicCity has a continuous

1
2 relationship with its users. It is the totality of that relationship, not the delivery of a
3 discrete version of Morpheus, that is the proper focus.

4 MusicCity argues that it does not have any "control" over users because
5 Morpheus is, in effect, a perpetual motion machine – users supposedly could continue
6 to copy and distribute files even if MusicCity ceased to exist. MC-C Mem. 17; MC-
7 V Mem. 7. This claim, even if true,¹⁵ does not absolve MusicCity of liability. First,
8 it simply ignores the reality of MusicCity's current ongoing participation, promotion,
9 supervision, and control of its users' activity. Second, it ignores the ability to control
10 or supervise that MusicCity has possessed, but failed to exercise, over the Morpheus
11 software it distributes. MusicCity purposely declined to employ anti-infringement
12 safeguards in its software. Having unlawfully let the cow out of the barn, MusicCity
13 cannot be heard to interpose the animal's escape as its own defense. In any event, a
14 defendant does not have to be a "but for" cause of infringing activity to be vicariously
15 liable. For example, the flea market operator in Fonovisa v. Cherry Auction was not
16 essential to the infringement there either; the vendors of bootleg recordings could
17 have just sold their wares somewhere else. The point in that case, and the point here,
18 is that – regardless of whether different infringing acts could take place under
19 different circumstances – the defendant has the ability to supervise or control the
20 infringing activity at issue. That is all that is needed for vicarious liability.

21 MusicCity invokes the Ninth Circuit's statements in Napster that "the bound-
22 aries of the premises that Napster 'controls and patrols' are limited." 239 F.3d at
23 1023; see MC-V Mem. 14. MusicCity reads that language to mean that it cannot be
24 held liable because its servers do not host any indices of infringing files. Id. at 15.

25
26 ¹⁵ In its January 2002 motion for partial summary judgment, MusicCity made the
27 very similar claim that nothing could stop its users from exchanging files with the
28 FastTrack-based version of Morpheus. Memorandum of Points and Authorities of
SteamCast Networks, Inc. (formerly known as MusicCity.com, Inc.) and MusicCity
Networks, Inc. in Support of Motion for Partial Summary Judgment (Jan. 25, 2002),
at 7. Within weeks, its users were completely shut out of the FastTrack network.
Pltfs. SUF 6(m).

1
2 However, vicarious liability may be imposed even where the defendant does not own
3 *any* "premises" that is involved in the infringing activity. See, e.g., Gershwin, 443
4 F.2d at 1160-63. Napster did not suggest that a central index is the only circumstance
5 that can give rise to vicarious liability for a peer-to-peer file copying and distribution
6 system, especially where precisely the same functions and facilitation of infringement
7 exist in a less centralized structure. See Aimster, 2002 WL 31006142, at *3 n.6.

8 Likewise, the Court of Appeals' observation that "Napster's reserved 'right and
9 ability' to police [its system] is cabined by the system's current architecture,"
10 Napster, 239 F.3d at 1024, is of no assistance to MusicCity. In a later appeal in the
11 Napster litigation, the Ninth Circuit made clear that by "architecture" it simply meant
12 the general structure of the peer-to-peer system, not every detail of its original
13 implementation. A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1098 (9th Cir.
14 2002) ("Napster II"). When it became clear after remand from the original appeal
15 that Napster was able to identify files based not only on their filenames but also on
16 the actual content of the file, the district court ordered Napster to shut down its
17 service until it implemented an effective filtering system based on audio fingerprint-
18 ing technology. Id. at 1097. Rejecting Napster's protest that that order disregarded
19 the "current architecture" of its system, the Ninth Circuit noted that the "new filtering
20 mechanism does not involve a departure from Napster's reserved ability to police its
21 system." Id. at 1098. Here, as in Napster II, MusicCity could, without altering its
22 system's peer-to-peer architecture, exercise its reserved supervision and control to
23 implement effective filtering or fingerprinting technologies. Pltfs. SUF 7(d)-(e).

24 Finally, in an argument that is emblematic of its entire defense, MusicCity
25 maintains that it cannot be vicariously liable because, unlike Napster, it "maintains no
26 contractual relationship with Morpheus users" that allows it to terminate users, MC-
27 V Mem. 16, and because it trumpets its supposed lack of control on its own web
28 page, id. at 17. But, of course, MusicCity's alleged lack of an express contractual
relationship with users is entirely a situation of its own creation. Until its switch to

1
 2 the Gnutella platform in the midst of this litigation, MusicCity *did* require users to
 3 agree to license terms as a condition of using its system, and those terms gave
 4 MusicCity the right to permanently ban users from the network. Pltfs. SUF 6(c).
 5 MusicCity still identifies its users by a unique identifier. It clearly *could* impose
 6 license terms on those users for its Gnutella-based system – user licenses are virtually
 7 universal in the software business, even for software given away over the Internet.
 8 Horowitz Decl. ¶ 20. It has simply declined to do so. MusicCity seems to view
 9 Napster not as a judicial condemnation of infringement, but as a checklist of steps
 10 one can take to achieve the same result as Napster but with legal impunity – e.g., do
 11 not reserve an express right to terminate. Such an elevation of form over substance is
 12 clearly not anything that the Court of Appeals intended or that copyright law permits.

13 **C. Grokster Has the Ability to Supervise and Control Its Users.**

14 Unlike MusicCity, Grokster still employs the FastTrack technology under
 15 license from Kazaa. Since launching its FastTrack-based system in July 2001,
 16 Grokster has had the ability to control users' activities in many ways, either directly
 17 or through Kazaa. See generally Pltfs. SJ Mem. 34-43. The manifestations of
 18 Grokster's control have included (but are by no means limited to) the following:

- 19 • Grokster has created and promoted a user base that makes its system an
 20 effective vehicle for infringement. Grokster provides detailed written instructions to
 21 its users about how to use its copying and distribution system, including a "news-
 22 letter," chat room, and bulletin board. Pltfs. SUF 4(p), 9(h). It closely monitors and
 23 exercises control over bulletin board postings. Pltfs. SUF 6(p). Grokster also offers a
 24 personalized "support" function through which it responds individually to user
 25 requests for assistance concerning the use or operation of its system. Pltfs. SUF 8(g),
 26 9(i). Indeed, Grokster has tried to set itself apart from other peer-to-peer copying and
 27 distribution services by publicly touting the value of its support function. D. Rung
 28 Dep. 153:6-154:7 (Borkowski Decl., Ex. 5, pp. 708-09); D. Rung Dep. Ex. 7

1
2 (Borkowski Decl., Ex. 34, p. 3584). On numerous occasions, Grokster has actively
3 assisted its users in locating and downloading infringing content. Pltfs. SUF 3(p).

4 • Grokster, like MusicCity, directly controls the user environment. While
5 running the Grokster application, a user's computer is in regular communication with
6 servers operated by Grokster or third parties with whom Grokster has contracted.
7 Pltfs. SUF 6(f)-(g), 9(a), 9(d). Among other things, those servers deliver advertising
8 to the user, Pltfs. SUF 9(b), and supply the user with the content of the "start" page.
9 D. Rung Decl. ¶ 4.

10 • Grokster's Terms of Service reserve the right to terminate users and
11 block unlawful content, and Grokster claims to have banned users. Pltfs. SUF 6(c).

12 • For many months, Grokster operated a "registration server" that required
13 every user to enter a user name and email address upon first using the system. The
14 user name would be transmitted to that server at the time of each subsequent use of
15 the system. Pltfs. SUF 4(d). Grokster decided to stop operating a central registration
16 server, but nevertheless requests and collects user names and email addresses from
17 those users who are willing to provide them. Grokster Mem. 4. "As a result,
18 Grokster has the ability to communicate with some, but not all, of its users." Id.

19 • For a time, Grokster itself controlled and operated a "supernode" on the
20 FastTrack network, which performed indexing and search functions identical to those
21 performed by Napster's "central servers," and also provided its users with the Internet
22 Protocol addresses of other network supernodes and was thus essential to users'
23 ability to access the system as an initial matter. Pltfs. SUF 4(h), 4(j), 6(g).

24 • As Kazaa's licensee, Grokster has cooperated and participated in
25 Kazaa's many actions to improve, and limit access to, the FastTrack system. Pltfs.
26 SUF 4(c), 4(k), 4(o), 6(i), 6(l), 6(m). The FastTrack system is a "closed" one; a user
27 cannot enter it without using the Grokster application or some other application
28 licensed by Kazaa. Pltfs. SUF 4(a), 6(h). At Kazaa's request, Grokster has issued
numerous upgrades of the Grokster application to its users. Pltfs. SUF 4(c), 4(k),

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

6(b), 6(i), 6(m); D. Rung Dep. 107:17-109:1, 234:13-24 (Borkowski Decl., Ex. 5, pp. 685-87, 751); GR10170 (Terry Decl., Ex. 14, p. 598). Kazaa and Grokster issued an upgrade to exclude from the system a group of computer hackers who had devised a way to access the FastTrack network without using a Kazaa-licensed application. Pltfs. SUF 6(i). They also issued an upgrade that enabled them permanently to exclude users of MusicCity's Morpheus application from the system. Pltfs. SUF 6(m).

- Finally, Grokster has declined to employ available anti-infringement technologies such as filtering or fingerprinting in its system. Pltfs. SUF 7(d)-(e).

Contending that these and other facts do not add up to supervision or control sufficient for vicarious liability, Grokster raises some of the same legal arguments as MusicCity – that its own computers are not directly involved in its users' copying and distribution, Grokster Mem. 3, and that users could continue to employ the Grokster software for copying and distribution even if Grokster went out of business, *id.* at 16. Those arguments lack merit for the reasons already explained.

Grokster advances two additional arguments. First, it suggests that, because it is simply a licensee of the FastTrack technology, and purportedly does not have access to the source code for the program, it does not have any control over the design or capabilities of its system. *Id.* at 3. That argument has no factual support. Grokster's license agreement with Kazaa provides that, if Grokster "has additional requirements in terms of features and functionality, FastTrack [*i.e.*, Kazaa] will be able to develop these on behalf of [Grokster]; provided, however, that the cost of such modifications will be the responsibility of [Grokster]." GR10906 (Borkowski Decl., Ex. 12, p. 2489). Thus, Grokster has an undisputed contractual right to dictate modifications to its system. Whether it has access to the source code is irrelevant. In any case, it could implement effective filtering on its own even without access to the source code. Kleinrock Dep. 151:17-159:16, 184:11-185:17 (Terry Decl., Ex. 10, pp. 574-84).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Moreover, even if Grokster did *not* have these rights, it still would be subject to vicarious liability. It cannot dodge liability by the simple expedient of hiding behind its licensor. A defendant that profits from infringement cannot avoid liability by contractually ceding supervision of its operations to another party. See, e.g., Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 309 (2d Cir. 1963) (the doctrine of vicarious infringement prevents parties from “creating a buffer against liability while reaping the proceeds of infringement”); Broadcast Music, Inc. v. Hartmarx Corp., 9 U.S.P.Q.2d 1561, 1563 (N.D. Ill. 1988); Warner Bros., Inc. v. Lobster Pot, Inc., 582 F. Supp. 478, 483 (N.D. Ohio 1984).

Grokster also argues that, in response to infringement notices from Plaintiffs or their representatives, it has “do[ne] all that is within its power to contact the users in question and convey Plaintiffs’ demands that they cease infringing activities.” Grokster Mem. 4. It also says it has advised each such user that, if cited for infringement a second time, “his or her registration would be terminated.” Id. at 5. But far from providing a defense, this argument confirms Grokster’s liability. The acknowledgement that it can terminate users who infringe copyrights is a concession that it has some ability to control users and prevent infringement. It is undisputed that Grokster has failed to exercise that power “to its fullest extent,” Napster, 239 F.3d at 1023, to prevent infringing activity on its system. Large numbers of users hosting infringing content have been allowed to continue using the system. Grokster’s limited response to infringement notices – simply to tell known infringers that they really should stop infringing – is no exercise of its power at all. Southern Nights Music Co. v. Moses, 669 F. Supp. 305, 306 (C.D. Cal. 1987). And Grokster’s self-imposed policy that it will not act against infringement until after receiving documentation of a user’s *second* offense falls far short of its legal obligation.

III. DEFENDANTS' POLICY ARGUMENTS ARE SPURIOUS.

Sizeable portions of Defendants' briefs are given over to dire warnings that holding them answerable for infringement will mean the end of the Internet and technological innovation. Defendants seem to question the very legitimacy of the doctrines of contributory and vicarious copyright infringement. MC-C Mem. 17-18, Grokster Mem. 19-21. Secondary liability, however, has been an established part of copyright law for almost a century, e.g., Kalem Co. v. Harper Bros., 222 U.S. 55, 32 S. Ct. 20, 56 L. Ed. 92 (1911), and has been endorsed by Congress, see H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674, and the Supreme Court, Sony-Betamax, 464 U.S. at 434-38; Kalem, 222 U.S. at 62-63. Where, as here, a small number of defendants facilitate and profit from massive direct infringement by millions of individuals, imposing secondary liability is obviously the most effective way to stop the violation of law. To say that Plaintiffs should leave Defendants alone and pursue only the direct infringers, MC-C Mem. 18; Grokster Mem. 2, is to say that vast numbers of infringements should go without remedy. That this case involves "technology" does not mean that the rules of secondary liability carry less force than in other settings. See Napster, 239 F.3d at 1028 ("We are at a total loss to find any 'special circumstances' simply because this case requires us to apply well-established doctrines of copyright law to a new technology").

Defendants argue that, because this case involves "complex" interests, MC-V Mem. 9, liability should not be imposed absent an explicit statutory mandate. (They seem to believe that the Copyright Act has no application to them unless it expressly mentions peer-to-peer copying and distribution technology.) But in the end there is nothing "complex" about this case. It is obvious that the millions of users who utilize Defendants' systems to copy and distribute copyrighted works are infringers, Napster, 239 F.3d at 1014, and it is equally obvious that Defendants could, but have chosen not to, prevent infringing uses of their systems while permitting whatever lawful uses there might be, Pltfs. SJ Mem. 40-43. In any event, Congress already *has* amended

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

the Copyright Act to balance the various interests involved in the online reproduction and distribution of copyrighted works, in the 1998 Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998). See Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1173-80 (C.D. Cal. 2002). That statute, codified in pertinent part at 17 U.S.C. § 512, limits the remedies available against an online "service provider" for aiding or enabling users' infringing activity if the service provider complies with its provisions and takes certain steps to curb such activity. Defendants' make no effort in their motions to suggest that they qualify for the protection of the DMCA, and they plainly do not.

Defendants warn that any theory of liability applicable to them would also ensnare countless other companies that provide hardware, software, or services for the Internet. See Grokster Mem. 2. But Defendants are not liable merely because they "provide tools" that people use to infringe. Id. They are liable because they provide tools *and services* knowing and *intending* that they will be used to infringe on an enormous scale and specifically *intending* to profit *directly* from that unlawful activity; and because they could take steps to prevent infringement but refuse to do so. Legitimate technology providers do not meet those conditions:

Defendants urge us to consider . . . the collateral, unintended effect of making liable *every* Internet service provider as long as the provider's service could be said to be the "but for" cause of the infringing activity of some of its users. . . . Yet this argument ignores the reality of Defendants' service as compared to the search engines and instant messengers to which they claim such similarity.

Aimster, 2002 WL 31006142, at *14 (emphasis in original).

IV. THE DUTCH JUDGMENT DESERVES NO DEFERENCE.

Grokster - which is chartered in Nevis and operates from California and Nevada - argues that this Court should not even reach the merits of Plaintiffs' claims because an intermediate court in the Netherlands held in a truncated proceeding

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(currently on appeal) that Grokster’s licensor, Kazaa, did not infringe certain Dutch copyrights. Grokster Mem. 21-24. The Court should reject that argument.

The Dutch proceeding was initiated by Kazaa. It sued Vereniging Buma and Stichting Stemra (collectively, “Buma/Stemra”), two organizations that represent certain owners of copyrights in musical compositions in the Netherlands. Engels Decl. ¶¶ 2, 4.¹⁶ Kazaa sought judicially to compel those organizations to resume previously terminated negotiations over the terms of a license that would allow Kazaa users to “stream” musical works lawfully over the Kazaa system. Id. ¶¶ 3-4. Buma/Stemra then counterclaimed for copyright infringement. Id. ¶ 6. The form of proceeding was dictated by Kazaa as the original plaintiff. As permitted under Dutch law, Kazaa elected to bring a “summary proceeding.” Id. ¶ 5. Such a proceeding is distinguished from a proceeding “on the merits.” Id. A Dutch summary proceeding is an informal adjudication in which the initiating party files a writ seeking an injunction (damages and declaratory relief are not available), the parties immediately exchange relevant documents, and after briefing the court renders a decision – typically within about two weeks after the initiation of the proceeding. Id. There is no opportunity for depositions of witnesses or any other type of discovery; there is no compulsory process to obtain documents or information from third parties; and the court does not hear any live testimony before ruling. Id.

The District Court of Amsterdam, the court of original jurisdiction, ruled that Kazaa was liable for copyright infringement, and ordered it to take steps to prevent distribution and copying of musical works in Buma/Stemra’s repertoire. Id. ¶ 7. Buma/Stemra was ordered to resume negotiations with Kazaa. Id. This ruling came twenty days after Kazaa initiated the proceeding. Id. ¶¶ 4, 7. Both sides appealed to the Amsterdam Court of Appeal. The Court of Appeal reversed the judgment of the

¹⁶ The declarant, Eduard A.P. Engels, is a Dutch lawyer who has represented Buma/Stemra in the proceeding at issue. Engels Decl. ¶¶ 1-2.

1
2 lower court. Id. ¶ 9; Page Decl., Ex. F. Buma/Stemra has appealed that decision to
3 the Supreme Court of the Netherlands. Engels Decl. ¶ 10.

4 The decision of the Amsterdam Court of Appeals deserves no deference here.
5 First, "a foreign judgment is to be given only such binding effect as would be
6 accorded to it by courts of the jurisdiction rendering the judgment." Bata v. Bata, 163
7 A.2d 493, 504 (Del. 1960). The outcome of a summary proceeding does not bind the
8 parties (let alone non-parties) even under *Dutch* law. If, after a summary proceeding,
9 a party commences a proceeding on the merits against the same adversary concerning
10 the same subject matter, the trial court in that proceeding *is not bound* by the decision
11 in the summary proceeding. Engels Decl. ¶ 5. Facts and issues determined in a
12 summary proceeding (or on appeal from such a proceeding) have no binding effect
13 outside that particular informal proceeding. Id. Grokster's remarkable contention is
14 that a United States court should consider itself bound by a Dutch decision that would
15 not bind a Dutch court.

16 Second, principles of comity do not allow deference to the judgment of a
17 foreign court unless "there has been opportunity for a full and fair trial abroad before
18 a court of competent jurisdiction." Hilton v. Guyot, 159 U.S. 113, 202, 16 S. Ct. 138,
19 40 L. Ed. 95 (1895). That condition was not met in the Dutch summary proceeding.
20 The decision of the Amsterdam Court of Appeals was the result of a process that
21 bears no resemblance to any sort of binding adjudication in the United States.
22 Although the court ruled on heavily factual issues, Buma/Stemra had no opportunity
23 for any real fact development. There was no discovery other than an exchange of
24 documents between the parties, and no cross-examination of witnesses. It is bizarre
25 for Grokster to suggest that, after a year of fruitful discovery in the present case, the
26 Court should not address the issues on the merits, but should simply adopt a non-
27 binding ruling made on a drastically abbreviated record in another country.

28 Third, to justify deference to a prior judgment, the "issue at stake must be
identical to the one alleged in the prior litigation." Trevino v. Gates, 99 F.3d 911,

1
2 923 (9th Cir. 1996). The party invoking a foreign judgment “bears the burden of
3 proving that the issues resolved in [the] prior proceeding and those raised currently
4 are identical.” Alesavi Beverage Corp. v. Canada Dry Corp., 947 F. Supp. 658, 666
5 (S.D.N.Y. 1996). The issues involved in the Kazaa-Buma/Stemra litigation were
6 different in many ways from those here. The Dutch proceeding involved Dutch
7 copyrights arising under Dutch law. Engels Decl. ¶ 11. This case involves U.S.
8 copyrights arising under U.S. law. The two are entirely different subject matters. See
9 Twin Books Corp. v. Walt Disney Co., 83 F.3d 1162, 1167 (9th Cir. 1996) (“copy-
10 right laws have no extraterritorial operation”). Moreover, “[i]ssues are not identical
11 when the standards governing them are significantly different.” Alesavi Beverage
12 Corp., 947 F. Supp. at 666. It is evident from the opinion of the Amsterdam Court of
13 Appeals that that court did not recognize the concepts of vicarious and contributory
14 copyright infringement in any form familiar to U.S. law. The court stated that, “to
15 the extent that there are copyright-relevant acts, those acts are carried out by users of
16 the [Kazaa] computer program and not by Kazaa. The providing of the means to
17 disclose or multiply of copyrighted works is not in itself an act” of infringement
18 under Dutch law. Engels Decl. ¶ 9. Compare Fonovisa v. Cherry Auction, 76 F.3d at
19 264 (“providing the site and facilities for known infringing activity is sufficient to
20 establish contributory liability”).

21 Additionally, owners of copyrights in sound recordings and motion pictures
22 were not parties to the Dutch proceeding. Nor were the Music Publisher Plaintiffs in
23 privity with Buma/Stemra for purposes of the Dutch proceeding. See Sanders Opp.
24 Decl. ¶¶ 3-6. “[M]ere commonality of interest does not suffice” – the parties against
25 whom the foreign judgment is being offered must have “had sufficient opportunity to
26 litigate in the [foreign] action.” Gordon & Breach Science Publ., S.A. v. Am. Instit.
27 of Physics, 905 F. Supp. 169, 179 n.9 (S.D.N.Y. 1995); see also Restatement
28 (Second) of Conflict of Laws § 98 (foreign judgment may be recognized in the U.S.
“so far as the immediate parties and the underlying claim are concerned”). This

1
2 requirement is constitutionally mandated. See Bird v. Glacier Elec. Coop., Inc., 255
3 F.3d 1136, 1141 (9th Cir. 2001) ("for the purpose of comity analysis," due process
4 requires that the foreign action must have occurred after "proper service or voluntary
5 appearance" of the party against whom the foreign judgment is offered).

6 Finally, the Amsterdam Court of Appeals decision rested heavily on the
7 opinion of an expert proffered by Kazaa for the first time on appeal. Engels Decl. ¶
8 8; Page Decl., Ex. F. The circumstances of that expert opinion – where Kazaa
9 apparently withheld from the expert the source code for its software, which would
10 have contradicted his opinion on Kazaa's alleged inability to control its system,
11 Engels Decl. ¶ 8; Kleinrock Decl. ¶¶ 67-74, 76-97, Plrfs. SUF 6(a)-(q), 7(a)-(f) – calls
12 into question whether this Court should give any consideration to the outcome of the
13 proceeding in which that opinion was offered, especially when those circumstances
14 are now under review by the Supreme Court of the Netherlands. See Bank of
15 Montreal v. Keogh, 612 F.2d 467, 470 (9th Cir. 1980).¹⁷

16 CONCLUSION

17 For the reasons stated, Defendants' motions for summary judgment should be
18 denied, and summary judgment on liability should be entered in favor of Plaintiffs.
19
20
21
22
23
24
25

26 ¹⁷ Further, although Kazaa purports to have defaulted in the present action, see n.2,
27 supra, it has appealed certain portions of the Dutch proceeding. See Blum Decl. ¶¶ 2-
28 5. It is telling that Kazaa, while flouting this Court's authority, nevertheless attempts
to secure a legal advantage by vigorously litigating in the Netherlands. The Court
should not reward this type of forum shopping by according the outcome of the Dutch
proceeding any deference.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

By: David F. Kendall /son
David E. Kendall

DAVID E. KENDALL
ROBERT J. SHAUGHNESSY
THOMAS G. HENTOFF
WILLIAMS & CONNOLLY LLP

GREGORY P. GOECKNER
MARK D. LITVACK
MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

IAN B. NORMAN

Attorneys for Plaintiffs Metro-Goldwyn-Mayer Studios Inc., Columbia Pictures Industries, Inc., Disney Enterprises, Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, and Universal City Studios, Inc.

ROBERT M. SCHWARTZ
MARVIN S. PUTNAM, JR.
JANE E. LIPPMAN
O'MELVENY & MYERS LLP

Attorneys for Plaintiffs Time Warner Entertainment Company, L.P., New Line Cinema Corp., Atlantic Recording Corp., Atlantic Rhino Ventures Inc. d/b/a Rhino Entertainment Co., Elektra Entertainment Group, Inc., London-Sire Records Inc., Warner Bros. Records Inc., WEA International Inc., and Warner Music Latina Inc.

RUSSELL J. FRACKMAN
GEORGE M. BORKOWSKI
STEVEN B. FABRIZIO
NICOLE L. HARRIS
MITCHELL SILBERBERG
& KNUPP LLP

MATTHEW J. OPPENHEIM
DEAN GARFIELD
RECORDING INDUSTRY
ASSOCIATION OF AMERICA

Attorneys for Plaintiffs Arista Records, Inc., Bad Boy Records, Capitol Records, Inc., Hollywood Records, Inc., Interscope Records, LaFace Records, Motown Record Company, L.P., The RCA Records Label, a unit of BMG Music d/b/a BMG Entertainment, Sony Music Entertainment Inc., UMG Recordings, Inc., Virgin Records America, Inc., Walt Disney Records, and Zomba Recording Corporation

CAREY R. RAMOS
AIDAN SYNNOTT
THEODORE K. CHENG
MATTHEW KALMANSON
MELANIE BREEN
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

KELLI L. SAGER
ANDREW J. THOMAS
JEFFREY H. BLUM
EDWARD M. ANDERSON
DAVIS WRIGHT TREMAINE LLP

Attorneys for Plaintiffs Jerry Leiber, individually and d/b/a Jerry Leiber Music, Mike Stoller, individually and d/b/a Mike Stoller Music, Peer International Corporation, Peer Music Ltd., Songs of Peer, Ltd., Criterion Music Corporation, Famous Music Corporation, Bruin Music Company, Ensign Music Corporation, Let's Talk Shop, Inc. d/b/a Beau-Di-O-Do Music, on behalf of themselves and all other similarly situated