UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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HONORABLE STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE, PRESIDING

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METRO GOLDWYN MAYER STUDIOS, Plaintiff (s), vs. GROKSTER, LTD., et al, Defendant (s).	)	CV 01-8541-SVW
JERRY LEIBER, et al, Plaintiff (s), vs. CONSUMER EMPOWERMENT BV, et al, Defendant (s).	)	CV 01-9923-SVW

Hearing: Various Motions

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MONDAY, DECEMBER 2, 2002
LOS ANGELES, CALIFORNIA

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LOS ANGELES, CALIFORNIA, MONDAY, DECEMBER 2, 2002

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(COURT IN SESSION at 1:30 p.m.)

THE CLERK: Item number eight, CV 01-8541-SVW, Metro-Goldwyn-Mayer Studios, Inc., et al versus Grokster, Ltd., et al and CV 01-9923-SVW, Jerry Leiber, et al versus Consumer Empowerment BV, et al.

Counsel, please make your appearances.

MR. BAKER: Good afternoon, your Honor.

Charles Baker, Fred von Lohmann, for StreamCast.

MR. PAGE: Good afternoon, your Honor.

Michael Page, on behalf of Grokster.

MR. KENDALL: Good afternoon, your Honor,

David Kendall for the non-AOL Time Warner Motion Picture Studio plaintiffs.

MR. FRACKMAN: Good afternoon, your Honor.

Russell Frackman, for the non-AOL Time Warner Record Company plaintiffs.

MR. SCHWARTZ: Good afternoon, your Honor.

Robert Schwartz, for the AOL Time Warner plaintiffs.

Good afternoon, your Honor.

Carey Ramos, for the Leiber plaintiffs.

May I, just for the Court's information, note that I have with me with in the courtroom today songwriter, Lamont Dozier, who is one of the class plaintiffs, your Honor.

THE COURT: There's no special place to start so we might as well begin with the issues concerning contributory negligence. Let me throw out a question and perhaps we can use that question to begin the argument.

Let me ask the plaintiffs this question, other than distributing the software, what did Grokster and StreamCast do to materially contribute to the infringement. I ask the question that way because it appears to me that that question could be resolved as a matter of law.

And I ask that question because as you will recall in the Napster opinion, the Court did make a statement about the fact that supplying software alone is not enough.

And I think it is clear that there is a difference between the Napster configuration and this configuration. Napster did have substantial control over the network. And the question is, what control over the network did Grokster or do Grokster and StreamCast have beyond supplying the software? And, is that enough?

Let's begin there.

MR. KENDALL: Your Honor, may it please the Court:

What the defendants contribute is much more than mere software. They have put together an integrated package of services.

THE COURT: Can I just interrupt at the beginning because when you say defendants, I have to ask you to parse

that out a bit because I think that a different argument could be made for KAZAA than StreamCast and Grokster.

So it would be helpful to me when you make your argument, if you would differentiate defendants, especially KAZAA, from StreamCast and Grokster; and when we do get to the vicarious liability argument, to distinguish between Grokster and StreamCast.

MR. KENDALL: Your Honor, I'll do that. When I say defendants here with respect to contributory infringement, I'll be talking about Grokster and Music City then. Because I think what they contribute is very much the same.

They contribute much more than software. Software is part of it but they contribute a series of services. They contribute communications devices. They contribute many ways of interacting with their users by bulletin boards, message boards, chat rooms, excuse me, and service support so that they can communicate directly with their infringers, the direct users, direct infringers who are their users, when the users are having problems, for example, with sound or video.

So just as the Court in the Ninth Circuit said -- it really didn't spend too long in Napster as to whether Napster had contributed the facilities for infringement, because the Court there said if you contribute the site and the facilities for known infringing activity, you can be

liable as a contributory infringer if you have the requisite knowledge.

So here in addition to simply the software, we have this daily communication with the users. We have various upgrades of software. We have a whole system of actions that both Grokster and Music City have taken, vis-a-vis, their users.

Now, on the control, your Honor then asked about control, I think on the contributory part of our claim, we don't have to show control. We do have to show control when it comes to vicarious liability. Let me put aside first KAZAA because KAZAA BV, whom we've moved for summary judgment against, is in, perhaps, a separate category. It originates the software.

I don't think, though, that gives the defendants Grokster and Music City any safe Haven because they're licensees. They don't really quite make that argument. They are liable for vicarious infringement because of what they do with the control they have over the network.

First of all, I think Napster is a helpful guide. The Ninth Circuit said that the ability to block infringers' access is one measure of control. Both Grokster and Music City have that right. The terms of service of each give them that right.

THE COURT: Are you moving on to control now?

MR. KENDALL: Your Honor, I was. I thought your question --

THE COURT: I really wanted to remain --

MR. KENDALL: All Right.

THE COURT: -- you're getting into the ability to police and so forth. I want to stay on this question of contributory negligence and trying to understand your argument as to beyond supplying the software, what else did they do.

MR. KENDALL: They really have put together in the way in the physical world Cherry Auction put together an auction site. They have created a place where infringement can take place.

And again, I don't want to eliminate the importance of the software itself. That does provide the connectivity. It provides the search engine. They've provided there an indexing function.

Your Honor mentioned the Napster Central Index. Here with respect to Fast Track, all these defendants have done is moved out. They sort of out-sourced that indexing function. The functionality, though, is the same from the user's viewpoint.

In fact, what these people have done is a little better than Napster because you get movies, also. They've also had -- again, they've provided enhancements which

contribute to infringement, for example, with their Fast Stream and Smart Stream features.

Now, your Honor, what that means is you can take downloads from many sources get a download quicker. Or if something is cut off, Smart Stream will switch you to another source. That can only have reference, your Honor, to a system in which you're infringing and their many copies of a popular work out there.

So they have with knowledge that their users are infringing, using their system to infringe, they've enhanced their software. They kept giving updates. They've really protected the facilities by in encryption.

Now, again, your Honor, KAZAA, the record is clear, KAZAA originally licensed the software to both Music City until February of this year and to Grokster, still. They are, nevertheless, the beneficiaries of the encryption. This is like the stone wall around the auction site in Fonovisa.

They've done all those things. And the constant inter-relatedness is a very big part of their contribution to infringement. They have that inter-relatedness because they need to serve adds.

Another thing that these defendants have, and I put KAZAA in that when I say these defendants, is they've got a business plan. They push out advertising to those sites in

order for them to make money.

Here, from the user's perspective, the user has a better deal than the user had in Fonovisa. Because in Fonovisa, once you got inside the swapmeet, you had to actually pay for the infringing material. Here, they're making it available to you for free. So they contribute really all the elements of the system of infringement and that's great deal more than merely, as they would say, contributing the software.

THE COURT: All right.

MR. FRACKMAN: Your Honor, may I add something to that?

THE COURT: Yes.

MR. FRACKMAN: I think --

THE COURT: Do you agree that it's just a question of law, there aren't any disputed facts, as you see it?

MR. FRACKMAN: As I see it, there are no disputed facts, your Honor.

And the disputed facts are that these defendants fall squarely within the Napster case. And I agree with your Honor, there -- the issue of contribution and the issue of control are two separate issues. Contribution is a different standard than control.

THE COURT: It requires knowledge, for one.

MR. FRACKMAN: Contributory infringement requires

knowledge but it does not require control.

THE COURT: But with regard to vicarious liability, it doesn't require knowledge but it does require control.

MR. FRACKMAN: Exactly, your Honor.

That's why the contribution standard is different than, and in my view, lesser than the control. If you look for guidance from the Napster opinion -- in Napster, your Honor, they said that's all we do, Judge. Judge Patel, all we do is provide software.

Well, the fact of the matter is, you start off, I submit, with the analysis that contribution can be providing software that sets up a proprietary, in many respects, closed network system that is designed for infringement.

There's nothing in the law that says providing software or a product -- and I cite your Honor, for example, to the GAV case that I tried in front of Judge Waters, where he held that providing a product of a timed cassette designed for infringement can be contributory infringement.

But that's not all we have here, your Honor, just like it wasn't all we had in Napster.

THE COURT: Let me just interrupt for a moment. You say that supplying the software alone which, in your view, creates this network can be the basis for contributory negligence.

MR. FRACKMAN: Infringement, yes, your Honor.

THE COURT: Infringement.

How then do you deal with the part of the Napster case which said that merely supplying the software isn't enough?

MR. FRACKMAN: I'm not sure, to be perfectly honest with your Honor, where you're reading from. If, your Honor, is referring to the Sony-Beta Max discussion --

THE COURT: Maybe that's it.

MR. FRACKMAN: -- on contribution, that is somewhat of a separated issue, although, there is obviously the overlap.

Supplying the software can't be enough to supplying the product if it is capable of a substantial amount of infringing use, can't be enough to supply the knowledge requirement under the Betamax decision. But there's nothing in Napster and nothing in Betamax that says it can't be enough to be a material contribution.

And that is a -- maybe it's not so subtle a distinction but it clearly is a subtle distinction. And if you read -- I know, your Honor has read the Napster opinion, that is a distinction in the opinion.

And if we focus on contribution, my first point to your Honor would be providing software to set up a proprietary closed network for infringement certainly is contribution. Without that software, there is no Morpheus

network. Without that software, there is no Grokster network. Without that software, there is no KAZAA network. But that's just, I would submit to the Court, just the beginning.

It is designed to be -- the defendants designed this to be a distribution network. It's not -- to use the Betamax example, it's not -- here's the software, good-bye, you're not going to see me anymore. It's a monetized network that they need to -- that they need to propagate in order to derive the benefit.

And in one of their earlier documents from StreamCast through it's proprietary -- I'm quoting -- through it's proprietary Morpheus peer-to-peer technology, StreamCast has established one of the largest and fastest growing internet digital media distribution channels.

So they set it up as an ongoing distribution channel. And then what do they do with it, your Honor. They do more than just supply the software. What they do with it is they started off with seed servers during the Fast Track period that they both ran. Servers that directed the user -- servers that directed the user to the supernode to hook up with.

Without that direction, there was no network and there was no infringement. Those were seed servers that were operated --

THE COURT: Was that apparatus a part of the software?

MR. FRACKMAN: No, no.

That was on the server side by the client -- by the -- by the defendant. It was on the server side. It was one of several servers but it was a key server.

And in fact, your Honor, to refer to the document again, there's a document -- all of this is before the Court, it's I.D. 176153, to Darryl Smith, who is the CEO of the Music City, from one of the creators of the Fast Track software, and he says, second issue is that a lot of users are complaining on Music City message board that they can't connect with the network. I think the reason for this is that none of your seed supernodes is running.

Inability to connect with the network because of their seed supernode not running.

Another document, your Honor, and it really comes out of their own documents, this is again to Darryl Smith, this time from Mr. Zenstrom, who, your Honor may remember is one of the leaders of KAZAA. However, should you choose to shut the service down for any reason, you can not just turn off the power switch of the network. You have to block access for all users in the KAZAA server first.

Another document: Hi, Darryl. From, Nicholas. I see that your supernodes are still not reachable. Any idea

when it will be available. If the supernodes are not up, you can not launch. Users will not be able to use the application. That's 168217.

I could go on but I'll give your Honor one more. If the KAZAA dot com and Music City dot com registration servers weren't running, the network would stop growing completely, and over time with attrition, would disappear.

Now, what's the difference, your Honor. Now, what's the difference, your Honor, between what they're doing and what Napster did. Well, you could say that the difference, at least the argument that they make is, we're not centralized. But I think the evidence is to the contrary.

They are centralized in this respect. But what they do, your Honor, is, they outsource that centralization. They point, they point -- at least, in the Fast Track phase, the point the user to the supernode. And they give the user through the seed server, the IP address of the supernode.

And in fact, one of the things that they say, your Honor, when they describe in one of their documents what a supernode is, this is ID 344476, explaining supernodes, they should be like small Napster servers. And indeed, your Honor, that's what supernodes are.

Without this entire network, and if your Honor looks at the documents, and I can cite you chapter and verse, what they're talking about here is not an application; in other

words, not software. What they're talking about is a network.

And if I may, document number 280697, from Mike Weiss, CEO, StreamCast Network. We use the universal language of music as the starting points and the anchor for building our network. We realize that the core value of peer-to-peer network was the network itself and not necessarily the technology. And they say that again many times.

They are talking about building a network that they are involved in, that they -- that would not exist without them.

You have the supernode servers during the Fast Track period. You have the seed servers. You have the log in servers. You have the log in for a period of time during the Fast Track period. During the Morpheus 2.0 period, you had, I would submit to the Court, even more.

Morpheus server communicates directly with the users everyday. It used to be every hour. They were able and are able to change the communications protocol so that they can communicate at will. Your Honor, that's more than Napster had. Napster could not communicate at will with its users.

They can communicate at will. Through this central server communication they control, among other things, many aspects of the searching function; circumventing firewalls;

extracting medi data; flow controls; and several others that we've cited in our papers to you.

They also, Morpheus did, 2.0, they also searched the hard drives of the users through their 2.0 and required without notice those users to share on the Morpheus system those files that those users had in share files for other systems like KAZAA, and I-Mesh, even if they had stopped sharing them. They actually provided the material for sharing.

They can force, as your Honor probably knows from the papers, Morpheus can force an upgrade. They can force a user to change the program in his computer, to download, and to start to install a new program.

What all of this means, your Honor, is that they are providing not software -- they wouldn't -- they wouldn't be in business if that's all they were providing because they're providing it for free.

They are providing and promulgating a network through a series of servers, through a series of interactions. They are providing through that not only the consumers for the product, but the product itself, which is, collectively, our clients' copyrighted works.

And, your Honor, it -- just as in Napster, without what they've done, we wouldn't be here because we wouldn't have the massive infringement that we have over these

networks.

THE COURT: Do you the defendants wants to respond just on this issue.

MR. BAKER: Yes, your Honor.

Again, your Honor, I'd like to limit it just to the question you had asked and not go on to these control issues which it sounds like Mr. Frackman's been arguing about.

But going back to what the Court had asked: What additional services that plaintiffs claim that we offer in addition to distributing our software. And I wrote down five things here, your Honor.

Number one, communication with users. They claim that is a service.

Number two, that as part of our ability to -- when we communicate with our users, we can provide upgrades, software upgrades.

Number three, we send advertisements to our users.

Number four, this issue about supernodes. Again, they claim this is another one of these services that facilitates what our users do with the software.

Number five, there's this registration or log in server. And I believe Mr. Frackman just discussed how it works and inter-operates, too.

But the key issue here is that in all those instances, they have yet to point out to a fact where one of

these incidental services somehow relates to the allegations of contributory infringements. In other words, do these services enhance the contribution. And what we've argued to the Court and what we've said is that they are not enough facts here.

We disagree that we do not -- excuse me -- with the proposition that we substantially contribute to the infringement.

Now, what we've seen are these incidental services that are being offered by our servers to our users. For example, there's advertisement. But what the plaintiffs don't say is that the advertisement doesn't direct the user how to download and how to exchange music files and any copyrighted material.

What we're doing is we're sending advertisements for various products. It has nothing to do -- I think the key question the Court has to look at, do these services somehow enhance, relate, or direct the allegations of infringement, and they do not.

The other thing that's important that we'd like to distinguish to is the distinction between the Fast Track software and our Gnutella software. The whole discussion about the root supernodes, first of all, I want to clarify for the record, there is ample evidence that, yes, we had a root supernode. It was a back-up supernode.

It operated for one month. And when it didn't operate, which is more often than not, the users continued to get on the network. And why is that? Because that root supernode is not essential for the users to log on to the network.

Typically, what happened in the Fast Track system is that the users would go to a KAZAA maintained root supernode and log on in that fashion. There were other ways, other back-up mechanisms, too, for example, the users could actually type in IP addresses and go to specific supernodes that they were aware of. We were not the only root supernode out there.

In fact, as I just said, we were a back-up supernode only in existence for a month. And after that, the users continued to go on and get on to the network.

Under our Gnutella version, your Honor, there's no such thing as a root supernode. When our users want to get on to the network, when one of our users decides that they would like to get on, instead of going through a root supernode, they connect directly to another computer. So there is no root supernodes. And I wanted to distinguish that for the record.

If the Court goes back and looks at the Fonovisa case, and the court, the Ninth Circuit in that case, talks about siting facilities. What is it that the auction

company was offering in addition to offering the site. They had also offered this incidental facilities. Not only do we not offer the site, which is the site of infringement, in Fonovisa, they did. That vendor had the premises there. The premises of infringement occurred within their policing powers, within their premises.

The underlying infringement when it occurs, it occurs on the user's computer, in this situation, your Honor. That's the number one distinction. Number two, let's look at the incidental services that the vendor was providing in Fonovisa.

THE COURT: I'm aware of that.

MR. BAKER: Okay. The point I'd like to make is that those services substantially related to the underlying infringement. Our services do not. The advertisement, for example.

And communications with our users does not --

THE COURT: You're not providing bathrooms.

MR. BAKER: I'm sorry?

THE COURT: You're not providing bathrooms.

MR. BAKER: That's right. And the parking or any of the other underlying facilities that enhance that.

A couple other points, your Honor. They're talking about this closed network. Again, I'd like to focus on Gnutella and Fast Track and the distinction between us and

Napster. Napster had the closed network. And they also had siting facilities.

And the underlying -- in addition to the software, the key incidental services that they provided was the central servers. That is -- without the central servers, the users of Napster could not find the files they were looking for. We don't provide that. That is the key element that's missing in this case for the incidental services that the Fonovisa court found that you've got to have in addition to, for example, providing just the software.

Second thing with respect to Napster. Again, closed network versus open network. As I've told the Court, I believe it's throughout the record that not only in the Fast Track version but also the Morpheus version, our users can continue to communicate with one another without StreamCast being there.

If StreamCast were to disappear tomorrow, if all these servers were to shut down, not send communications, all these servers were to shut down and not send any type of advertisement, these users would be able to log on and communicate with one another irrespective of whether we're around or not. I think that is extremely critical for this Court to look at.

THE COURT: Now, you're moving for summary judgement,

also.

MR. BAKER: Yes, we are, only under the Gnutella version of our software which is the software we're distributing today.

THE COURT: And you don't see any disputed facts then on this question. You see it as a question of law.

MR. BAKER: Yes, your Honor --

THE COURT: All the facts that are out there.

MR. BAKER: We say that either it's a question of law or the facts are just -- that there are no supporting facts that they have been able to show that can support the reason why summary judgment shouldn't be entered.

THE COURT: In other words, you're accepting the five elements that you summarized and your argument is that they don't make it.

MR. BAKER: Yes, your Honor. That they do not amount, that those five elements do not amount as a matter of law, given what those elements do, that those elements, as a matter of law, to substantially or materially contributing to the underlying infringement.

THE COURT: All right.

MR. BAKER: Thank you.

MR. PAGE: Predictably, my answer to the question of what we do other than distribute software is similar to Morpheus'. In Grokster's case, that really is all we do.

We didn't write it. We don't have access to the source code. We simply sub-license it and ship it on to our customers.

THE COURT: Well, is does that difference make a difference on the question of contributory infringement? It could very well on the question of vicarious liability. But why does it have any significance on the question of contributory infringement?

MR. PAGE: Only in the sense that that's all we do.

I agree that the control issues come in on vicarious except in one way. The problem with the plaintiffs' approach to contributory infringement here is that it's essentially a game of liability tag.

They've taken the temporal element out of it entirely. For example, Xerox sells photocopiers. They sell thousands of them to people all over. Most -- some people use them, they believe some people use them illegally.

If the owner of, for instance, a series of textbooks, if they found out the a copy shop is bulk copying for students, sends a letter to Xerox and goes, your copiers are being used in massive infringement here. Now you know about it, now you're liable.

No court in the world would hold Xerox liable for that infringement. If Xerox then turned around and went, yeah, we don't care, and sold 10 more to the same store,

that would be a different story. But finding out about infringement conducted with your product after you've distributed it can't give rise to liability or else, everyone who provides any --

THE COURT: Now, you're talking about the knowledge element.

MR. PAGE: And that's central to contributory --

THE COURT: Well, I haven't focused on that yet. But since you brought it up, you could complete your argument on that and I'll invite a response from the plaintiff.

MR. PAGE: Okay. The issue is whether one gives knowing contribution to an illegal act. And in order to do that, one must have the knowledge at the time one acts. And that feeds back into what do we do other than distribute software.

Grokster is a software company like any other software company. They provide pretty routine services. They have a website with frequently asked questions. They have technical support. They ship updates. They create new -- you know, they respond to complaints from their users but so does everyone else.

To go back to the Xerox example, you have this shop with massive infringement going on using Xerox's computers. Xerox continues to sell those people toner. Without that toner, that infringement couldn't happen.

They continue to -- you know, people sell them paper. They have service guides to keep the machines running. None of that is contribution to the infringing conduct. It's simply part and parcel of making the product work.

Providing a seed server that let's someone use start using the software is neutral as to what the person does with software. It's just part and parcel of making it work.

It's necessary for it to work for all the non-infringing uses, too. And as we presented the Court with already, there are scores of substantial non-infringing uses out there that these ancillary services that they claim are part and parcel of grand conspiracy are necessary to.

That's the rule of Sony. If they're non-infringing uses, you cannot assume someone knows at the time they sell a product that it's going to be used for illegal purposes.

THE COURT: But the facts in this case and the facts in Napster in terms of the type of evidence regarding knowledge seem very similar. In other words, Napster also talked about actual knowledge and then it reviewed the record and it concluded that there was enough evidence of actual knowledge.

Now, some of the knowledge that was characterized as actual knowledge might appear to be more in the realm of constructive knowledge. But, nevertheless, the Court found that the knowledge element was satisfied.

It seems to me that, here, the plaintiffs are pointing to the same type of evidence that the Napster approved by way of knowledge. What's the difference between the record here and what the Napster court seemed to be relying on?

MR. PAGE: It's the temporal issue. In Napster, when the plaintiffs gave them notice of specific users who were infringing, Napster then continued to make -- take acts or allow actions that they had control over which contributed to those infringements. Here, we don't get knowledge until after we've done the only thing we do, which is distribute from software.

THE COURT: I understand.

MR. PAGE: We can't -- so we haven't aided the infringement at a time when we had knowledge.

THE COURT: Understood.

MR. PAGE: That's the difference.

Let me invite the plaintiffs, if they wish, to respond. You can respond to two matters. One, we're still talking about contributory negligence. And now, counsel has injected the elements of knowledge. And you can respond to that issue or element, too.

MR. KENDALL: Your Honor, just a few more words on the contribution. Just as Fonovisa provided a place where infringement could occur in realtime; it didn't actually

sell infringing tapes but made it possible for people to get together and infringe; so in virtual space have these defendants provided the site and facilities for infringement.

So I think that if you -- you don't have -- if you think about Fonovisa, for example, nothing Fonovisa did was itself involved in an act of direct infringement. it simply made it possible for that infringement to occur at a time when it had knowledge.

Now, let me get to knowledge point. First of all, Mr. Page said all Grokster does is sell software or -- excuse me -- give away software, distribute software. They have, and it's all there in the record, a lot more that they do with their users to help facilitate infringement.

Here's one example, GRO07574, an e-mail from a user to Grokster support. Question: I downloaded Fast and Furious and Mummy Returns, two films, and I can only hear the sound, can't watch the video. What would I have to download to watch movies?

Answer: This is from Grokster support. Grokster uses windows media player as its media player. Please get it and install it from and then it gives a link.

The -- often, Grokster fails under its own test. For example, Grokster monitors these boards, these message boards. And it had one user who was complaining about not

being able to find a particular software game to download. And Mr. Dan Rung, a CEO of Grokster, who was then on the Board, e-mailed back: Why are you complaining? Everything that you get out of our network is free. You could always do the legal thing and go buy the game, we suppose.

One final answer or one final example, your Honor, the casualness with which this infringement occurs is just truly amazing. It's open and notorious. It's exhibited in many ways. Most recently, when Grokster filed its reply to our opposition to their summary judgment, they attached to the reply declaration of Daniel Rung, the Grokster CEO, and this reply declaration is directed only to a technical point about searching Medi Data.

But Mr. Rung provided two pages of his search results. This is not something we generated. It's something that Mr. Rung put into make his point. But he made a far broader point. We have a page, your Honor, of copyrighted music.

They know that this copyrighted music is out there and on their system. Here, just in one page, we have examples from Bob Dillon, REM, Eminem, Cold Play, and so forth, a whole page. They know what is going on.

The knowledge elements I really do want to move to that, is a knowledge of infringing activity. It is not a knowledge necessarily of a specific infringement when

it happens.

When you look at what Napster recognized as both actual knowledge and constructive knowledge, I think you have a lot more than that here. First of all, you have the very same kinds of evidence of knowledge.

For example, much of the pile of papers before your Honor consists of our notices to them. It's not contested that the studios, the record labels, the music publishers have apprised them of these infringements which are going on their system, infringing content being offered.

Second, we have communication about how infringement works. I've just given you some examples from Grokster. There are others from Music City. Does anybody have a copy to Eve's latest CD, Scorpion?

They can see what's going on there, your Honor. They know what in their system is doing. They admit in their papers that, well, they have some knowledge that infringement is going on.

In its own motion, Grokster, for summary judgment, filed on September 9, Grokster stated it is, of course, aware as a general matter that some of its users are infringing copyrights. It has knowledge its users are infringing because it's tried to migrate users, both Music City and Grokster, from other infringing systems.

In the case of Music City, it spent a lot of time and

effort developing a network of what I'll call Napster fugitives and migrating them through their own Open Nap system to the Morpheus system.

And Grokster did the same thing when Audio Galaxy was shut down because of copyright infringement -- or it agreed not to promote and to distribute infringing files. Grokster developed a special migration tool to get them over there into the Grokster system.

There's been massive publicity, your Honor, about these systems infringing. We put that publicity in the record. If your Honor were to declare recess right now, any person sitting of this courtroom could walk out of here, go to their computer, log on to the Grokster service or the Music City Morpheus service and copy any popular work by the plaintiffs.

Everybody knows that's what their that systems are for. This is not an aberration. This is the way the systems were set up to work. They know it. We put into our declarations the publicity that they have used to promote themselves. They often will quote things from an article which again, later in the article, discusses the piracy on their systems.

Now, your Honor, one of the most important documents I think before the Court is the response to our statement of uncontested facts. These were filed by Music City and

Grokster on October the 21st. They are long documents, your Honor. But in thinking about summary judgment, it does become apparent that there is a great amount of agreement on the facts.

I want to get to the knowledge points. For example, they admit in their own statement, they call them statement of disputed facts. They often quibble with our interpretation, but the facts are there and admitted.

They admit, for example, that their executives are sophisticated in intellectual property, experience, that they protect their own intellectual property. Those were two things the Morpheus court identified as indicating knowledge.

Their executives have actually downloaded infringing content. They, therefore, know directly that infringing content is there and people are infringing because their own executives are doing that. We have all that in the record. And they promote their own services by using infringing contents.

I think my favorite example of this is a sales document which is prepared and it has a screen shot of infringing content. But then in the e-mail, another screen shot is given with those names blurred out and the statements made in e-mail, here's an example of keeping the examples but covering our assets. Your Honor, they know

exactly what they're going and providing the tools for infringement when they do it.

THE COURT: They rely upon this temporal distinction. You maintain that that's just not a valid distinction.

MR. KENDALL: I do, indeed, your Honor.

And it is -- that's a matter of law. And I think in the second Fonovisa case, Judge Patel addressed that. There's really -- there are two Fonovisa cases; one is the Ninth Circuit case we've been talking about.

But recently on January 28 of this year, in one of the Napster cases involving Fonovisa, Judge Patel rejected the argument that Napster was making after the remand from the Ninth Circuit that there had to be this specific knowledge about the particular infringing file.

She says this would give rise to strategic ignorance of monstrous proportions. It would encourage the worse form of willful blindness.

It has never been the case, your Honor, that you have to have knowledge of a particular infringement so long as you have actual or constructive knowledge that infringement is going on. That's the test for contributory liability.

It was restated in Aimster. The Aimster defendant tried the same argument and Judge Aspen in Chicago said that simply wasn't required. There was all kinds of indicia of knowledge, generally, of copyright infringement.

So we think that -- they've admitted knowledge. Their one safe harbor, they think, is, well, we don't have knowledge of a particular download by a particular user. That's not required, your Honor. But in some of those answers, some of those e-mails I read you from support, they in fact did have that knowledge before infringement occurred and helped it to happen.

THE COURT: All right.

I have to -- you want to make some comment.

MR. FRACKMAN: I want to address those points, your Honor, if I may.

THE COURT: Do them as succinctly as you can.

MR. FRACKMAN: I will.

THE COURT: And then I'll give you a chance to respond.

MR. FRACKMAN: That, unfortunately, will be my biggest challenge of the day but I will do it.

To pick up where Mr. Kendall left off. The knowledge any issue is answered directly by the Napster court in the Ninth Circuit where it affirmed Judge Patel, saying, the district court also concluded that the law does not require knowledge of specific acts of infringement and rejected Napster's contention that because the company can not distinguish infringing from non-infringing files, it does not know of the direct infringement.

And that was indeed, your Honor, carried forward by Judge Patel in the Fonovisa and Napster decision. That was sort of in between the two Ninth Circuit Court of Appeal's decisions in Napster. And the issue there was frame exactly the way the defendants framed frame it here.

And what Judge Patel said, effectively Napster believes that there was can be no contributory copyright infringement until plaintiffs submit a list of copyrighted works and infringing files and Napster fails to disable those works.

And then she says, contrary to Napster's contention A&M Records, the Napster opinion, did not create a new knowledge standard for contributory infringement. Then indeed, she goes on to say, it would be silly to have a standard where infringement can continue unabated and with impunity until we find every specific file that's infringing and give notice and then they refuse or fail to take it down.

Secondly, your Honor, as Mr. Kendall alluded to, even if that's silly -- and I say that word advisedly -- standard applied here, it happened. We gave them notice on the record company's side, eight million infringing files. 80,000 different sounds recordings, repeated notice.

And as we've placed before the Court in Mr. Creighton's declaration in connection with the summary

judgment motion, all of those complaint works still remain on the systems.

THE COURT: Their answer, I think, is that at the time you gave the defendant that notice, they didn't have the ability of doing anything about it.

MR. FRACKMAN: Well, isn't that a catch-22 then, your Honor. It just doesn't work.

THE COURT: That's part of the argument.

MR. FRACKMAN: I might also say, it imports, if you parse it out, it imports a control standard, vicarious liability standard into contributory infringement. That's exactly what Judge Patel said the Ninth Circuit was not doing. Control has nothing to do with contributory infringement.

THE COURT: All right. I understand your argument.

MR. FRACKMAN: If I may, your Honor, just to go back to your point very quickly, Mr. Kendall did cover it, in terms of the contribution.

This is Napster. What they do is Napster. What they provide is exactly the way the Ninth Circuit described. And I won't read it for the Court. It's at page 1011 of 239 F.3rd. How Napster facilitates the transmission of, in that case, empty three files.

In Napster, as here, the infringement did not take place on or through the Napster servers. Napster simply

facilitated that transmission, that copying, and that distribution. That is exactly what these defendants do here. It could not happen without them in this particular situation for their particular users.

The fact that they outsource one aspect of it, the indexing function, the fact that they outsource that, makes no difference in terms of what the contribution is. And that's what Judge Aspen found in the Aimster case.

And I would submit there isn't any reason, basis, to make that very fine distinction in terms of what the contribution -- what the contribution is here.

THE COURT: All right. Thank you.

I'll give the defendants -- I'm going to have to bring this to some sort of close, at least this issue. We have other issues to deal with.

Do you want to respond?

MR. PAGE: Very briefly, your Honor.

The problem with that argument is --

THE COURT: I mean, I hear the arguments are being repeated somewhat. So say something new.

MR. PAGE: What Mr. Frackman has just told you is that as soon as you get constructive or actual knowledge that your product has been used in an infringement, you're liable. The problem is you can take word Grokster out of every sentence he spoke and replace it with the word

Microsoft and they're liable for all infringements.

They provided the operating system for every one of those infringements. They know just as everyone else does that some people out there are using their software to infringe. They have ongoing relationships with their customers. They send upgrades. They have help screens. They do everything.

They're not liable because there are non-infringing uses of their product, as well. And for the same reason, we're not liable.

THE COURT: All right.

Let's take a short recess and then move on to vicarious infringement.

(RECESS TAKEN at 2:50 p.m.)

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(COURT IN SESSION, at 3:00 p.m.)

THE COURT: Let me ask the plaintiffs this question, just assume this set of facts: Assume that your arguments regarding the additional functions that the defendants provided beyond the software don't allow the conclusion that they qualified as control and -- I mean controlling the networks.

And assume that your argument that supplying the software itself was adequate to constitute contributory infringement.

If the Court accepted your argument that merely supplying the software was enough, would the Court also have to make a finding as to the defendants' knowledge of the infringing uses that were being utilized by the users of the software? And if so, to what extent.

In other words, would the Court have to conclude that the defendants knew that everybody was buying the software to do what you claim, that is, download and infringe on copyrighted works?

Would they have to show it was a substantial part of why people use the software?

And if that is an element, what does the record show in that regard?

I mean, you've offered some anecdotal evidence. How can I make a ruling on anecdotal evidence. I just sort of thought that through during the recess so I hope that's understood.

Can someone, plaintiffs, give me their response in that regard?

MR. KENDALL: Your Honor, let me try.

THE COURT: Let me say this, what I'm really looking to is some response in terms of whether merely supplying the software is enough knowing that the software has the potential to contribute to infringement, or whether supplying the software with the knowledge that the users,

the majority or a substantial amount, however the test is described, are and have been infringing. How do you address that?

MR. KENDALL: Your Honor, I think that there is, at one point, simply preparing software nothing that conceivably somewhere down range it can be used to infringe.

Now, virtually any technology from the Xerox machine, on, can be used to infringe. I think that at that pole, if you will, there would be no liability.

In this case -- and I just want to understand. Your Honor, let me say something about the software that is at issue here because I think it may have gotten lost in the earlier interchanges.

The similarities to this Fast Track system and Napster is very great. The difference is really in the indexing function alone. When you sit down and you say I want the latest Eminem song, you type that in, on the Fast Track system, that goes not to a central indexing server, but to a supernode on the network controlled by the defendants. Part of their network.

And if the search result can be found in the supernode, you get a response back and then you download it just as you did in Napster from another user. That's the only difference.

So I think if the Court is saying eliminate all the

services; the customer support and everything that these people provide --

THE COURT: Just for the same of argument, I haven't made a decision on that.

MR. KENDALL: I understand.

But given the similarity of this software, given the functionality, almost being identical to Napster, I think that would be enough if -- and I'm moving to the knowledge point now -- I do believe that there has to be for contributory infringement, knowledge.

Now, it doesn't have to be knowledge of a particular infringement. Here, I think we've shown in a great many different ways --

THE COURT: I'll accept that. But --

MR. KENDALL: Okay.

THE COURT: -- but not knowledge of a specific infringement. But what type of general knowledge?

MR. KENDALL: I think that you gain general knowledge. And again, this can be constructive. If you look at your network and you find what is it being used for.

We've given you evidence that of the files available on the network, 90 per cent are copyrighted. Now, what that tells you is people are using this network to infringe. We put in the evidence.

We had Dr. Olkin of Stanford do a standard sample as

he did in Napster. And indeed, the numbers are about the same as they were in Napster. Here, 75 per cent of that random sample are copyrighted products. Another 15 per cent are also copyrighted. We just couldn't make the determination for the remaining 10 per cent.

You get the knowledge in some sense by what the publicity about you is and by the interactions you have with your users.

You asked the question whether we had quantitative or merely anecdotal evidence. I think the Olkin study is quantitative evidence.

So I think that -- now, again, your Honor, there are other things we could say about control, but I think if that's responsive to the Court's question, I'll leave it there.

THE COURT: Yes, it is.

MR. FRACKMAN: May I add to that, your Honor, a bit?

THE COURT: Yes.

MR. FRACKMAN: I harken back, your Honor, to Napster because I think on this issue it is controlling and it is direct. The Court -- we're not asking the Court because Sony-Betamax would not let us ask this Court or the Ninth Circuit in Napster to assume or to attribute knowledge merely because the defendants service and system and product can be used for infringement.

What we are asking the Court to do is to find knowledge for each and every one of the same reasons that the Ninth Circuit in Napster affirmed the finding of knowledge. And that is really in footnote five at page 239 F.3rd page 1020.

And here's what the Court said. The Court enumerated the following: First, actual knowledge, because a document authored by the Napster co-founder mentioned the need to remain ignorant of users' real names because they are exchanging pirated music.

There are a ton of those kinds of documents in this case. One, for example, the Rung deposition, Exhibit 38, responding to a user who's asking for a particular game. and the response is from support at Grokster: And why are you complaining. Everything that you get out of our network is free. You could always do the legal thing and go buy the game, we suppose. Very similar type of statement.

THE COURT: All right.

MR. FRACKMAN: Second, the Recording Industry Association informed Napster of more that 12,000 infringing files. Same thing here. Much more than 12,000.

Third, the district court found constructive knowledge because Napster's executives have recording industry experience. Same thing here, 75 years of experience I think the Music City people say.

Constructive knowledge. They were in the music business. They were in the intellectual property business. Mr. Weiss, a former CEO, testified over and over and over again about how he knew about getting licenses for copyrighted material.

In fact, if you go in the history, your Honor, that's in the record, Music City started out seeking licenses. When they determined it would be too expensive for their streaming system, they stopped seeking licenses. But they knew well, constructively.

(B) They have enforced intellectual property rights in other instances. Same thing here: Patents, copyright notices for all of the defendants on their websites and otherwise.

(C) Napster executives have downloaded copyrighted songs from the system. Exactly the same evidence here. We've got screen shots from their -- from their --and interrogatory answers before the Court showing that they used the system to download material.

Indeed, they have promoted the site with screen shots listing infringing files. Exactly the same thing here. Rolling Stones; Sting; Beetles, over and over again. Screen shots. So exactly the same type of information compounded or supported by Dr. Olkin's empirical survey.

THE COURT: All right.

Let's -- did you want to be heard?

MR. RAMOS: Your Honor, just very briefly.

THE COURT: Yes.

MR. RAMOS: I wanted to address the question of knowledge that your Honor posed. I think it's important here in considering the knowledge of defendants to consider, also, a high degree of willful blindness that's going on here.

Today's Los Angeles Times on the front page reports a UCLA student who hasn't bought a CD in four years because she can get all her songs off these services.

We have looked --

THE COURT: Am I to take judicial knowledge of the L.A. Times?

MR. RAMOS: Your Honor, I believe it's a matter of the Federal Rules of Evidence you probably can't.

MR. PAGE: Your Honor, we object.

THE COURT: There's a --

MR. RAMOS: My -- my -- my point --

THE COURT: One moment. There's a very famous anecdote in the Ninth Circuit on that time in an antitrust case. The Ninth Circuit cited the New York Times in an antitrust case of 30, 35 years ago in a footnote.

And the chief judge of the Ninth Circuit then was an old westerner who didn't use too many words but the words he

used were pretty sharp. Judge Haynes. And he wrote the dissent in that case. Because Judge Healey, you know, wrote this opinion.

And he was from Texas. So he said if we're going to rely on the New York Times as a source of our opinions, pretty soon, we'll be citing the -- some town -- the Texas Bugle, I think, or the Modesto Bugle or some newspaper.

So you have to be careful about the newspapers you cite. You could be citing the, I don't know, the Waco Times.

MR. RAMOS: Your Honor, my point is not to offer the article for the truth of what it contains. But I think even the Modesto Bugle, if there is such a newspaper, has reported what is going on in these services.

And all the defendants have to do is go on, as I believe at the first appearance we had before your Honor, you indicated you had gone on, and we have gone on, and we have gone on for our plaintiffs, including Mr. Dozier, to look for songs like Stop In The Name Of Love and other great Motown hits that he wrote; for Leiber and Stoler, who are here, as well, to look for Jailhouse Rock and numerous other songs they own and they're all on there. You can get everything on there.

THE COURT: Well, you're making a common sense argument.

MR. RAMOS: Well, forgive me for making it.

THE COURT: That's a big stretch you're making because you're assuming that the law and common sense are partners.

MR. RAMOS: Your Honor, I -- I hope that the law and common sense join in this case.

The one further thing I would say is, as I began, there's a lot of willful blindness going on here. And I think it is clear that all these songs are available up there.

My colleagues have spoken to the study that was done showing over 90 per cent of these songs are copyrighted. But they continue to distribute that software. They don't just know that it has the potential to do this, they now know it's being used to do this. And you can still get it from those sites. It is still up there.

THE COURT: All right. Thank you.

MR. RAMOS: Thank you.

THE COURT: I'm not going to allow you guys to respond because the question was really directed at the plaintiff.

But I want to move on to the vicarious infringement question. And there the argument seems to be the defendants can police the network. And the defendant argues that it can't because technologically, it can't alter its software

to accomplish what the plaintiffs think that it can accomplish.

And so as the first question, since this is summary judgment, I want to see whether that question is embedded in a factual dispute which is not resolvable on summary judgment or whether it isn't. And that assumes the legal arguments as you have set them out.

I'm sort of starting at the back.

MR. KENDALL: Your Honor, with regard to summary judgment for vicarious liability, of course, there are two elements. And the task is made easier here because they don't contest the financial profit from the infringing activities. That can be taken as admitted. They make millions of dollars from this exploitation of our copyrighted use.

The legal test, we've spoken about control or pleasing, it's really often spoken of as supervision, the right and ability to supervise. Sometimes the cases use control. I think that's an important distinction.

It doesn't have to be a control that flips the switch on or off because, remember, knowledge is, of course, not a part of vicarious infringement liability. This liability grew up out of cases where people were profiting by infringement. They had some sort of authority over the premises.

But --for example, the person who rents out a dance hall. The band comes in and plays infringing music. The cases held that the owner of the dance hall could be liable since he was profiting if he had some power over the dance hall.

Now, he was not there with his chin on the shoulder of the musician conducting infringing music. He didn't have power to determine that. But he did have some supervisory authority over the premises.

I think here it's important to look again to Napster. And there are a number of ways that defendants do in fact have the ability to police their network. And I think -- you asked the question in terms of summary judgment.

What I'm going to try to do is point you back to pages of their statement of undisputed fact, or they call it a statement of disputed fact, where they make various concessions that I think in fact is going to make the Court's job easier.

Now, Napster said, of course, the court in Napster, that the ability to block infringers' access is evidence of control. First of all, here, we have the terms of service of both Grokster and Music City which assert the right to control, eliminate the access of individual users.
If you look at their statement of disputed facts pages 56, 57, you find that they concede that.

These another way that individual users can be blocked from the network and that is -- there was mentioned before the break of the KAZAA server software which runs on the server that's centrally controlled by the defendants.

And again, Music City admits on page 74 that it could use the so-called ban user function. Now, that's not an absolute ability to forever ban the user but you can certainly knock him out with that particular IP address and user name. That's the first kind of control; the ability to keep out individual users.

The second kind of control that they've exercised and have the ability belt to exercise is control over the network itself. The Fast Track network which Grokster is still on and Music City was on until February of this year, is a proprietary closed source network. It's protected by encryption.

And the defendants have used -- and this is not KAZAA BV but it's these two defendants, also -- have used encryption changes when hackers were trying the get into the network. Most notably, with the so-called gift project. So they have the ability to keep people out of their network.

They invoke that ability interestingly enough, and we document this in the papers, to keep out copyright investigators, media enforcer, Net P.D, even the law firm of Mitchell Silberberg. They've used their encryption power to

block access there.

Now, they have the ability in their license agreement with Fast Track to disable the network and to demand a network split. So they have those potentials to control the network.

They have used filtering. Now, this is very interesting, your Honor. They have used filtering to keep out adult content, keep out viruses. And KAZAA BV -- excuse me -- Sharman Network is now experimenting with a so-called bogus file filter.

When it's in their interest to do, they can keep certain material out of the network. So that is the third kind of control or supervision.

There's been mention of the root supernode and the seed servers. And we're getting into some technical jargon here. But it's important to understand that those server functions, which again were centrally controlled, were used by these defendants to get people on the network. They were so-called bootstrapping functions.

You see -- and Music City again admits this at page 32 and page 43 of its statements of disputed facts.

There are upgrades that they make available. That again is a way to exercise supervision over the network. I think that the user support, I won't go into that again, but is away to control, police, supervise, what people

are doing.

Again, you can't supervise their precise activity, but that's never been required in vicarious liability cases because, as I say, usually, the person held for vicarious liability wasn't even on the premises when the act was occurring.

Now, there are other control ways. There are other kinds of supervision that Music City has over its Morpheus client. Mr. Frackman mentioned that they could adjust the controls on the central service. This is the so-called Auto dot XML function.

And Music City can -- there is not a disagreement here. If you look at pages 34, 65, 95 to 96, and 96 of Music City's statement of disputed facts, you see that they concede most of what we're saying about their controls through this central server.

Likewise, and again if I could just cite their own declarations, Dr. Gribble, his September 9 declaration at paragraph 13, note three and paragraph 38; Darryl Smith's declaration submitted October 21, Music City's CTO, at paragraph 94, and Dr. Gribble's declaration of that same day, October 21 at paragraph 12, note two and paragraph 46.

There's really agreement. When the technologists get together, there's agreement that they can do many things through this central function to control the flow of

searches, to control the nature of the search results themselves, to put out advice of updates and, again, actually mandatorily upgrade the software.

Now, there's something else that Morpheus 2.0 did and Mr. Frackman averted to that. They controlled the actual sharing of filings. Because like a vacuum cleaner, unbeknownst to you, when you hook up 2.0, it simply takes over files from these other file sharing services. And it does that even if you have set your do not share function.

There again, I just -- again, there's agreement on this. If you look at Dr. Gribble's declaration filed on October 21, paragraph 20, note four, he acknowledges this.

A third kind of control or supervision that Music City exercises over the 2.0 software are the filters. They have filters for viruses and they have another kind of adult filter in which you fill in the words.

There are, finally, upgrades that they provide. And there are their constant communication with the users which in all versions, Fast Track and 2.0 they've had, and that is an ability to supervise users' conduct.

So for all those reasons, your Honor, I think there are an abundance of ways in which they can police their network even though their chin is not on the shoulder of the user when he or she opts to copy a file illegally.

MR. FRACKMAN: Your Honor, I just have a brief

comment, if I may.

THE COURT: All right.

MR. FRACKMAN: I would like to suggest to the Court in all due respect that our argument is not really, or at least doesn't have to be that, they can police. What our argument is, is that they have supervision or control.

And once the Court finds that, they have a duty to police under Napster to the fullest extent that they can police. But you don't have to find from the beginning, although, we think it's here, that they have the ability or the absolute ability to police.

And once you get to that point, your Honor, you turn again -- because Napster argued the same thing; we don't have the ability to police. We don't have a filtering mechanism that's in place. Under the system the way it's now set up, we can't police.

And what the Ninth Circuit said in Napster is, the ability to block infringers' access to a particular environment for any reason, whatsoever, is evidence of the right and the ability to police.

And the court in Napster pointed to two situations that are actually identical to what we have here. The first one the Court referred to plaintiffs have demonstrated that Napster retains the right to control access to its system. Napster has an express reservation of rights policy stating

on its website that it expressly reserves the right to refuse service, et cetera.

Exactly analogous to the terms of service. Although, Music City has now done away with their terms of service voluntarily. But analogous to that reserved right in this case. That's the legal right to control access.

There is, also, your Honor, the practical right to control access and Mr. Kendall alluded to that and I won't belabor the Court with it other than to cite from one of my favorite documents in the case which is I.D. 544361. It's from Darryl Smith, who is the CTO of Music City, and the subject is Mitchell Silberberg and Knupp, my law firm.

And the original e-mail message says this is another one for the ban list, referring to Mitchell Silberberg and Knupp. And then a response: Done. Their IP is -- and it gives our IP number -- just ban it. I only see one C-class so hopefully they're using a proxy from one IP for all their users.

And then it goes on to say, Darryl Smith says, just found another one and he refers to Net P.D, which is a system that we've used to determine what infringing conduct is taking place.

And then you go on to the next e-mail, which is 54361, and they talk about Media Enforcer. And the e-mail to Darryl Smith from the fellow who came up with or devised

the Fast Track, Mr. -- and the last name I can't pronounce -- he says, talking about Media Enforcer, I've already cracked the program. They were using KAZAA dot com website to do searches and I've blocked it now.

And the response from Mr. Smith is, that's good. No more Media Enforcer. Good job with Media Enforcer.

And there are other documents, your Honor, where they say they have ability to ban and block users. So -- and to do so either by user name or by IP address.

THE COURT: All right.

MR. FRACKMAN: If you look --

THE COURT: I have.

MR. FRACKMAN: If you look at the Napster opinion, that's the sum and substance. And there's lot more here, your Honor, and I think it's all in the record.

THE COURT: Do you want to respond?

MR. BAKER: Yes, your Honor.

Your Honor, I think the initial question you asked in the summary judgment context, what are the facts here dealing with control. And going back to that context, what I'd like to point out is a couple things again about Fast Track --

THE COURT: What I seem to hear was that it doesn't involve the ability to modify the software --

MR. BAKER: I'm sorry, in what context?

THE COURT: In other words, you were arguing, I thought, that the ability to modify the software isn't the only question.

MR. FRACKMAN: It's not only question, your Honor. If I would have continued, I would have said they have the ability to modify the software and to filter, as well.

MR. BAKER: And your Honor, I think -- I think the crux here, the crux question is to ask not necessarily do we have that ability, but should we be required to change our software to make them happy. And that's the critical question I believe that's before the Court.

THE COURT: Not to make in them happy but to avoid infringement.

MR. BAKER: Yes, your Honor.

Because I believe -- especially if you go back and look at our motion, our motion on vicarious which was focused only on the Gnutella version, what we did was show the Court that we don't have the ability to stop the infringing activity. And I think we've even shown that in the Fast Track. At least, there's a disputed issue.

And that's the critical question that the Court needs to look at: Can we stop like Napster was able to stop through its architecture the infringing activity. We can not. We do not have that capability today to do so.

THE COURT: At least you maintain that that's an

issue of fact.

MR. BAKER: Yes, your Honor, we do.

They claim that we have the capability to change the system. And yes, there have been -- experts have said yes. In the world of software, you can make all kinds of software out there. But under the current architecture today which is what the Napster court looked at, you've got to look at what cabined by the architecture.

THE COURT: The architecture may not be this specific software. It may encompass more than that.

MR. BAKER: Well, yes, your Honor. It's also the software and the overall -- how the overall system operates, I agree.

THE COURT: Yes.

MR. BAKER: For example, in Napster it was the servers, the centralized servers, which was part of this system, which is where the ability to block or to stop the infringing activity occurred.

But other courts, more recent courts, in particular, the Adobe (ph.) court --

THE COURT: That was in this district.

MR. BAKER: Yes, your Honor.

This just very briefly, that case --

THE COURT: I have that case in mind.

MR. BAKER: Okay. In that situation -- the only

thing I want to point out is that the court was faced with the issue, did the trade show vendor have the obligation to go out and hire these additional security people that knew when infringing was going to occur by the Adobe software. And the court said, no, you're not required to go out and do that.

And there's never been a court that said you're required to go out and make these changes to prevent copyright infringement.

THE COURT: Thank you.

I'm going to conclude the argument, at this point, because I'm not going to rule at this juncture.

Do you have something that was so important that you feel you have to comment?

MR. PAGE: I did --

THE COURT: All right.

MR. PAGE: -- want to respond on the behalf of my client.

THE COURT: Grokster?

MR. BAKER: Yes.

THE COURT: I understand the Grokster argument. You don't structurally have the ability to change the software. You just distribute it.

MR. PAGE: That is part of it. I also wanted to pointed out, the plaintiffs' comments in the Aimster case

about whether filtering works. I referred to it in my briefs.

THE COURT: All right.

MR. BAKER: Thank you.

THE COURT: Here's what I'm thinking of doing, the arguments, actually, unlike lot of these motions, was helpful. Most of the time, it's just, you know, an opportunity to demonstrate to the Bar how patient I am. I'm not known for my patience.

So I was interested in what you had to say and some of the things you said were provocative so I have to go back and rethink some of my impressions before I took the Bench today.

What I may very well do, and I don't promise I'll do it in this precise fashion, is possibly issue what I call a Speaking Order. Sometimes in a complex case, it's hard to get your arms around every aspect of the litigation.

And it may be helpful for me to in this Speaking Order indicate what the Court's views are and invite some specific response; where I'm inclined or not inclined; and where my thinking is and so forth. And that would give me the certainty that I haven't missed something if I am moving in a direction. So that may very well what I will do, at least on some of the issues.

Some of the issues, I haven't broken them down, but

some of them are more decidable than others.

Before we leave, I have one important thing to say. It just occurred to me that the name of that newspaper was the Abilene Bugle. There is a paper called the Abilene Bugle. And it was an antitrust. And that's what they said, If you keep citing the New York Times, who knows when we we'll start citing the Abilene Bugle.

So if we take nothing else from this argument...

All right. Thank you.

MR. KENDALL: Thank you, your Honor.

MR. FRACKMAN: Thank your, your Honor.

MR. RAMOS: Thank you, your Honor.

MR. BAKER: Thank you, your Honor.

MR. PAGE: Thank you, your Honor.

(END OF PROCEEDINGS.)

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CERTIFICATE OF REPORTER

COUNTY OF LOS ANGELES)
)SS.
STATE OF CALIFORNIA)

I, LENA VILLEGAS, OFFICIAL COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT, FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT I REPORTED STENOGRAPHICALLY THE FOREGOING PROCEEDINGS AT THE TIME AND PLACE HEREINBEFORE SET FORTH; THAT THE SAME WAS THEREAFTER REDUCED TO TYPEWRITTEN FORM BY MEANS OF COMPUTER-AIDED TRANSCRIPTION; AND I DO FURTHER CERTIFY THAT THIS IS A AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES SO TAKEN.

Lena Villegas

DATED: December 13, 2002

LENA VILLEGAS
FEDERAL OFFICIAL COURT REPORTER