

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Nos. 03-55894 & 03-56236 (Consolidated with No. 03-55901)

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

Plaintiffs-Appellants,

v.

GROKSTER, LTD., *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case Nos. CV-01-08541-SVW & CV-01-09923-SVW
Honorable Stephen V. Wilson, United States District Court Judge

MGM PLAINTIFFS-APPELLANTS' REPLY

[FILED UNDER SEAL – REDACTED VERSION]

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Defendants' briefs rely on fable and metaphor, rather than fact and law, in an attempt to lure the Court into disregarding well-established copyright principles to hold that businesses specifically designed to further and profit from copyright piracy are beyond the reach of the copyright laws. The Court should decline this invitation. Defendants' resort to storytelling is understandable: the truth hurts. Despite their protestations, they are not modern-day Galileos, but participants in the ancient art of thievery.

Defendants encourage millions to use their software for free as the first step in building and maintaining networks of users who engage overwhelmingly in the distribution and copying of copyrighted works. Not only do Defendants know about the infringement over their networks, they planned for and intended it from the outset of their businesses, setting out to replace the enjoined Napster network with their own. Without Defendants' contribution, those users could not engage in the massive infringement that predominates on Defendants' networks. Without Defendants' continuing involvement – furnishing advertising, software updates, and other services – Defendants could not profit from the ongoing infringement on their networks. No less than the swap meet in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), or the network in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), Defendants provide

the illicit market, the audience, and the facilities for the infringement that Defendants can, but refuse to, limit or prevent.

Defendants try to but cannot avoid the unrebutted statistical evidence that 90% of the works made available on the FastTrack network (currently used by Grokster and used by Streamcast from 2001 to 2002) are identifiable copyrighted materials being distributed without authorization. No court has sustained such massive exploitation of copyrighted works by persons who are neither creators, owners, nor licensees.

Defendants place their primary reliance on *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (“*Sony-Betamax*”), because of an unquantified (but small) amount of “noninfringing uses” of their networks. Just as in *Napster*, however, this affirmative defense does not shield Defendants, in light of (1) their specific knowledge of infringing activity, (2) their direct financial benefit from such ongoing activity, (3) over networks they created for the purpose of, and which are primarily used for, infringement, (4) which Defendants could limit or prevent. Unlike the record in *Sony-Betamax*, where the great majority of users of the Betamax utilized it for the fair use of time-shifting, the undisputed facts here are that “many if not most [of Defendants’ users] . . . use [Defendants’ networks] to infringe copyrights.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029, 1037 (C.D.Cal. 2003). In *Sony-Betamax*, a suit by a

minority of copyright holders would have had the effect of banning a product. In this case, a majority of copyright holders have sued to stop only the infringements taking place on services, not any legitimate uses of those services.

The District Court acknowledged that its “ruling clearly is susceptible to substantial differences of opinion.” JER(v.27)7705. Reflecting just such a “substantial” disagreement, the Register of Copyrights recently observed in Senate testimony that the District Court’s decision in this case “departed from long-established precedent” and:

would encourage the kind of sophistry we have seen from the proprietors of some peer-to-peer applications: a denial of knowledge of infringements by their customers in the face of clear and uncontested evidence that such infringement is occurring on a mind-boggling scale. . . . [Their] business plan is dependant upon massive copyright infringement and any application of the law that allows them to escape liability for lack of knowledge of those same infringements is inherently flawed.¹

Under settled principles that this Court should reaffirm, Defendants are liable for contributory and vicarious copyright infringement.

¹ Prepared Statement of the Hon. Marybeth Peters, Register of Copyrights, Senate Judiciary Comm. (Sept. 9, 2003)(108th Cong. 2d Sess.) (<http://www.judiciary.senate.gov/hearing.cfm?id=902>).

ARGUMENT

I. DEFENDANTS ARE LIABLE FOR CONTRIBUTORY INFRINGEMENT.

A. Sony-Betamax Does Not Immunize Defendants' Conduct.

Defendants grossly mischaracterize the Supreme Court's holding in *Sony-Betamax*,² claiming that "the mere capability of substantial noninfringing uses is all that is required to protect a new technology from an attack grounded on allegations of contributory copyright infringement." SCBr. 15; *accord* GBr. 27.³ If that were correct, it would be impossible to explain *Napster*, where this Court upheld a finding of likely contributory liability "[r]egardless of the number of *Napster's* infringing versus noninfringing uses." 239 F.3d at 1021. Defendants all but ignore this Court's application of *Sony-Betamax* – that the capability of a defendant's product for noninfringing uses is irrelevant if the defendant's knowledge of users' infringement derives from facts other than the mere technical

² Notwithstanding StreamCast's grandiose claim (echoed by several *amici*) that *Sony-Betamax* furnishes a protection "on which innovators of all stripes have come to depend," SCBr. 22, it can cite *only one* decision upholding a *Sony-Betamax* defense – *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988). There, the challenged use of the defendant's technology – making archival copies of computer programs – was noninfringing under the express statutory exemption of 17 U.S.C. § 117(2). 847 F.2d at 262.

³ "SCBr." and "GBr." refer to the StreamCast and Grokster briefs, respectively. "MGMBr." and "LBr." refer to the MGM and Leiber Plaintiffs-Appellants' opening briefs, respectively. Unless otherwise noted, emphasis in quotations is added.

capacity of the product to enable infringement. *Id.* at 1020-21. Here, the extensive record on Defendants' knowledge is at least as strong as in *Napster*. MGMBR. 27-32. Defendants not only *know* of the pervasive infringement on their networks, but purposefully designed their systems to enable that infringement and to profit from it. 259 F.Supp.2d at 1046; MGMBR. 28-30.

Sony-Betamax gives Defendants no shelter for other reasons as well. Unlike Sony in that case, Defendants' contact with users does not end with a one-time sale of goods. MGMBR. 40. Rather, Defendants have a continuous relationship with their users, and at all times can observe and supervise how they are using Defendants' networks. *Infra* at 11-16, 23-29. Defendants also cannot satisfy the threshold requirements of the *Sony-Betamax* defense – the product's noninfringing uses must be “substantial” and “commercially significant.” *Sony-Betamax*, 464 U.S. at 442.

In *Sony-Betamax*, the “primary” use of the Betamax was “time-shifting,” which the Supreme Court held to be noninfringing. Over 75% of Betamax owners used the device for that purpose, a proportion the Court found “substantial” under any definition. *Id.* at 424 n.4, 456. The record here could not be more different. The only quantitative evidence in the record is undisputed – the vast majority of the files made available on the FastTrack network are infringing,

JER(v.7)1910, 1913,⁴ and StreamCast offers no evidence (or reason to believe) that the proportion is any different among its current users, a great many of whom began using Morpheus in its FastTrack incarnation, *see infra* n.7. Defendants do not contest that the overwhelming use of their networks is to infringe copyrights, and they make no effort to quantify the proportion of current or likely future noninfringing uses. Evidence that some noninfringing files are or can be made available on their networks, SCBr. 17; GBr. 22, in a pool of tens of millions of predominantly infringing files, does not establish that noninfringing uses are substantial.

With respect to their networks' "capability," Defendants offer *no* evidence concerning the likely magnitude or proportion of future noninfringing use. Their argument reduces to this: they should have no liability simply because their networks have the technical capacity for noninfringing uses. But if bare

⁴ Dr. Ingram Olkin, a Stanford statistics professor, directed a sampling study that found that "almost 90% of the files distributed by FastTrack users are infringing or likely infringing copies of commercially released copyrighted works and at least 75% of the files infringe the copyrights of Plaintiffs in this action." JER(v.7)1910. Dr. Olkin's methodology was similar to the one he used for his study in *Napster*, which this Court and the trial court in that case relied upon. *See* 239 F.3d at 1013. Grokster quibbles with certain aspects of Dr. Olkin's methodology, GBr. 44 n.18, but Plaintiffs refuted those objections below, JER(v.26)7639-7651. The District Court did not exclude the Olkin study from evidence; it was part of the summary judgment record; and Defendants offered no evidence of their own concerning the proportion of infringing to noninfringing files on their networks.

technical capacity were the test, the Supreme Court in *Sony-Betamax* would not have examined in detail the extent of actual noninfringing uses there, and would not have explicitly reserved “the question of how much [noninfringing] use is commercially significant.” *Id.* at 442. *See also In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003)(if the mere potential for some noninfringing use were enough, “the seller of a product or service used *solely* to facilitate copyright infringement, though it was capable in principle of noninfringing uses, would be immune from liability for contributory infringement. That would be an extreme result, and one not envisaged by the *Sony* majority.”)(emphasis in original).

Defendants offer no evidence that noninfringing uses of their networks are or ever will be “commercially significant.” In *Sony-Betamax*, the Court required that noninfringing uses be commercially significant *to the defendant*. Although the home recording of television broadcasts was itself a non-commercial activity, the extent of noninfringing home recording meant that Sony could sustain a business selling the Betamax even if infringing uses were not possible or significant. *See* 464 U.S. at 446 n.28. Defendants make no pretense that they could build and maintain a business if the only files available on their networks were NASA photographs, SCBr. 16, songs by unsigned recording artists, GBr. 17, or other noninfringing works, many of which are available from any number of other online sources.

B. At All Times, Defendants Have Had Sufficient Knowledge of Users' Infringing Activity To Justify Contributory Liability.

1. Actual Knowledge of Specific Infringements by Specific Users Is Not Required.

The law traditionally has not required copyright owners to prove that a contributory infringer acted with specific knowledge of the infringements he aided. MGMBr. 31-32. Defendants maintain there is a different rule for defendants who are “technology” providers. SCBr. 30. But they cannot explain why a different rule should apply. *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”).

Neither *Sony-Betamax* nor *Napster* supports Defendants’ proposed special rule for “technology.” In *Sony-Betamax*, the copyright owners’ sole argument as to knowledge was that Sony was liable “merely” by virtue of its awareness that the Betamax *could* be used to infringe. 464 U.S. at 428. The Supreme Court rejected imputation of knowledge on that basis, but did not suggest that contributory liability requires actual knowledge of specific infringements by specific users.⁵ In *Napster*, this Court agreed with the trial court that Napster’s

⁵ Defendants argue that, because Sony executives knew as a general matter that the Betamax was or would be used to infringe, the Court’s holding implicitly rejected such general knowledge as a basis for contributory liability. SCBr. 28; GBr. 26. But the premise is wrong. The district court in the case found after trial

general awareness that users were engaged in widespread infringement supported a finding of culpable knowledge. 239 F.3d 1020-21 & n.5; MGMBr. 27. This Court stated that contributory liability requires a defendant to have “specific information which identifies infringing *activity*,” 239 F.3d at 1021, but it did not suggest that such information must be at the granular level of “user X is infringing work Y.”

Defendants ask the Court to read into the law of contributory infringement (at least for “technology” vendors) a standard of proof of “knowledge” far more stringent than in any other area of the law. For example, Grokster contends that if a defendant’s product has both legitimate and illegitimate uses, and the defendant “does not know that the person buying it intends the latter,” the defendant does not have actionable knowledge “even if [it] ‘knows’ as a statistical certainty that many or most of the purchasers will infringe.” GBr. 31. But even in a *criminal* case, a defendant is deemed to have acted with actual “knowledge” if he was aware of a “high probability” that the relevant fact existed; the government need not prove that the defendant knew the fact with certainty.

that defendants did *not* know of infringing uses. *Universal City Studios, Inc. v. Sony Corp.*, 480 F.Supp. 429, 460 (C.D. Cal. 1979), *rev’d*, 659 F.2d 963 (9th Cir. 1981), *rev’d*, 464 U.S. 417 (1984). Although Sony executives knew that the Betamax would be used for *unauthorized* copying, they did not know that such copying was *infringing*, and indeed, the Court ultimately held that the dominant form of unauthorized copying, time-shifting, was not infringing. In the present case, by contrast, it is undisputed that dominant use of Defendants’ systems is not only unauthorized but infringing – and Defendants know both facts.

United States v. Jewell, 532 F.2d 697, 701 (9th Cir. 1976)(*en banc*); accord *Aimster*, 334 F.3d at 650. There is no reason why plaintiffs seeking only a *civil* remedy for infringement should have to meet a more onerous standard of proof.

2. Defendants Possess the Specific Knowledge of Infringements That They Claim Is Required.

Defendants’ argument about the need for specific knowledge is ultimately beside the point, because they indisputably possess the most specific possible knowledge of infringement. Since February 2001, they have received from Plaintiffs numerous notices identifying thousands of specific users who are distributing – “uploading,” or making available for downloading by others – millions of specific infringing files, including files containing all the works that Plaintiffs selected to be the focus of the liability phase below. JER(v.3)716-18, 730-32, 740, 742, 744-46, 774-76, 777-79.⁶ Unlike the unauthorized downloading of a file – which takes place over a period of time ranging from seconds to hours, and is then complete – the unauthorized distribution of a file is not a fleeting act. It

⁶ Contrary to *Grokster*’s assertion, GBr. 14, Plaintiffs continued sending infringement notices right up to the time they sought summary judgment. JER(v.3)729-35, 744-46; JER(v.3B)752.024-104. Far from responding cooperatively to the notices, GBr. 12-17, *Grokster* conceded it had the ability to “terminate these [infringing] users[‘] accounts,” JER(v.1)222, but refused to exercise that ability unless Plaintiffs sent it notice of “repeat” infringements. JER(v.1)222-27. As this Court recognized in *Napster*, Plaintiffs were under no such burden. 239 F.3d at 1021.

continues so long as the work is available for others to download. *Napster*, 239 F.3d at 1014.

In addition, Defendants have at all times had the ability, like any other user of their networks, to use the search function of their software to see particular infringing works being distributed by users. On Defendants' networks, the identities of the files being distributed (and the usernames of the distributing users) are visible to anyone who cares to look. GBr. 34 n.14. Defendants could have observed specific infringing acts in this way, just as Plaintiffs did before sending their infringement notices. *Napster*, 239 F.3d at 1024. Thus, StreamCast's claim that it has no ability to monitor the materials its users "share," SCBr. 37, is false. Regardless of whether Defendants used the search function to monitor their networks (and they did, JER(v.8)2224-28; JER(v.13)3507, 3576), they are chargeable with the knowledge of pervasive infringement that they could have obtained by doing so. LBr. 9-19.

C. Defendants Have Knowingly Provided Material Contribution to Their Users' Infringing Activity.

The undisputed record shows that Defendants have *always* had legally sufficient knowledge of the infringing activity on their networks, from the first day they each began offering network access, intending and promoting its use for infringement, and targeting the enormous population of former Napster users. MGMBBr. 27-31. And, with that knowledge, Defendants have *continuously* given

material assistance to infringing activity. *Id.* at 9-23, 46-52. The District Court’s artificial truncation of the issues to focus solely on Defendants’ “current” systems cannot obscure that users’ infringements by means of those systems have been materially assisted by Defendants’ conduct both before and after the implementation of their current systems.

Defendants began by providing everything necessary to set up their networks: they provided free software to organize an ongoing network of users to distribute copyrighted works. To obtain a core base of users necessary for the networks to operate, they provided not only software, but servers and other support. *Id.* at 46-48.

Contrary to Defendants’ suggestion, their issuance of file copying and distribution software is not a one-time transaction. They have “migrated” their user base to succeeding versions.⁷ MGMBBr. 12, 19-20; JER(v.7)1895. At the same time, they have continued to organize, increase, and maintain their networks. To do so, they have continued to provide, and have repeatedly issued upgrades and

⁷ For example, upon issuing its Gnutella-based version of Morpheus, StreamCast told its users: “All of your shared files from the previous version of Morpheus are automatically transferred into the new Morpheus [Preview Edition] – you won’t lose any of your content!” JER(v.7)1895. StreamCast thus not only had every reason to expect that a large proportion of the infringing files made available by its users in the FastTrack era would continue to be made available by those same users in the Gnutella era – it guaranteed that it would happen.

modifications of, their software to both new and existing users of their networks.
JER(v.3)799-800, 804-05, 810; JER(v.10)2657-58, 2871-72.

Grokster began operating the “current version” of its FastTrack-based system in February 2002. JER(v.1)199; JER(v.18)5116-5119. StreamCast began operating its “current” system, the Gnutella-based version of Morpheus, in March 2002.⁸ JER(v.3)798. Before they did so, both Defendants had knowledge from a variety of sources that huge numbers of their users (including many thousands specifically identified in Plaintiffs’ infringement notices sent from February 2001 through February 2002) were engaged in massive copyright infringement.
JER(v.3)716, 740, 742, 744-45, 774-75, 777-78; MGMBr. 28-31.

Possessing that knowledge, Defendants have continued to: provide users with everything necessary to search for, locate, copy, and distribute copyrighted works, MGMBr. 16-21; promote and advertise their networks, attracting additional users and their infringing files, JER(v.7)1895; JER(v.16)4469-

⁸ StreamCast suggests that its current version of Morpheus is just a branded version of a public-domain Gnutella program. SCBr. 9. In fact, Morpheus is a proprietary technology significantly different from (although interoperable with) the public Gnutella platform, JER(v.3)798-800, and it establishes a distinct network of Morpheus users. Although Morpheus users connect to the larger network of all Gnutella users, they have constant communications with StreamCast’s computers that other Gnutella users do not have, including transmissions of advertising directly from StreamCast’s computers. JER(v.7)1938, 1942-43, 1952-56; JER(v.3)807.

71: JER(v.22)6233-34; and provide instruction and help to their infringing users. JER(v.3)807; JER(v.17)4980, 4982, 4994; JER(v.22)6268-95, 6298-6319.⁹

Defendants have also continued to monitor their networks to ensure that files can be distributed and downloaded efficiently and without interruption. StreamCast, for example, ensures reliable access points for users to log on to its network. JER(v.3)799; JER(v.7)1951, 1955. Its servers check in with user software on a periodic basis. JER(v.3)800; JER(v.7)1942, 1951-56. It can remotely improve the operation of its network from its own central servers. JER(v.7)1938, 1948-52. Among other things, it can improve how searches and search results are routed across the network. JER(v.7)1949-50; MGMBr. 16-23.

Similarly, Grokster's central servers remain in contact with users' computers at all times the users are connected to the network. MGMBr. 15-16. Grokster also employs the network-management services of its licensor, Kazaa, JER(v.3)802, 805; JER(v.9)2380, 2388-90; JER(v.18)5119-26, 5140 [REDACTED]

[REDACTED]

[REDACTED]

Grokster also continuously provides a distinct and critical form of material

⁹ It is not true, as Grokster suggests, GBr. 16, that on only two occasions have its personnel given email advice to users on how to infringe copyrights. Plaintiffs merely highlighted two examples for the District Court. The record contains many more such instances. *See, e.g.*, JER(v.10)2912-19; JER(v.17)4940, 4959, 4970,

contribution to its users' infringement. With knowledge of its users' infringing activity, Grokster has continued to pay license fees to Kazaa so its users can enjoy uninterrupted access to the closed FastTrack network. JER(v.10)2898-99; JER(v.18)5138.

Defendants cast themselves as mere purveyors of computer software, SCBr. 8-9; GBr. 10-11, which flies in the face of an undisputed record showing that they do much more than simply issue software. But their provision of both the past and "current" versions of their software to a population of known infringers is, *in itself*, a legally sufficient "material contribution" to users' infringing activity on the networks formed by the software. Contrary to StreamCast's assertion, SCBr. 33, courts have recognized, both before and after *Sony-Betamax*, that providing copying technology is a material contribution to infringement. MGMBr. 45. Defendants' software "bears a direct relationship" to the infringing activity on the networks it forms. *Napster*, 239 F.3d at 1019. It executes the entire process of connecting users and searching for, downloading, and uploading infringing files, in accordance with directions that Defendants or their designees encode into the software.

In short, Defendants provide the means and the audience for the distribution and copying of infringing works. Without Defendants' contributions,

their networks would not exist, and they could not profit from their users' infringing activities.

D. Defendants and the District Court Offer a Legally Untenable Reading of the "Material Contribution" Requirement.

Defendants echo the District Court's unprecedented and erroneous holding that they are not liable for contributory infringement unless they have "actual knowledge of infringement at a time when they can use that knowledge to stop the particular infringement." 259 F.Supp.2d at 1037; SCBr. 34-35; GBr. 32-33. As noted above, there is no legal basis for requiring either "actual knowledge" of infringement or knowledge of a "particular infringement," *supra* at 8-10, although Defendants unquestionably have both. There is also no basis for the view that an actor does not make a "material contribution" to infringement unless he has the "ability to stop" it. Defendants concede that the contributory infringer's provision of material assistance need not be contemporaneous with the primary infringer's unlawful conduct. SCBr. 34-35; GBr. 33. But they ignore that the law of contributory infringement, and of aiding and abetting generally, has never required as a prerequisite of liability that the defendant have the ability to dictate, control, or halt the actions of the primary wrongdoer. MGMBr. 32-34. Material assistance in any form – and at any time – is enough for contributory liability, even

if ending such assistance will not necessarily cause the infringement to end.¹⁰ A defendant's failure to stop ongoing infringement may be sufficient for liability, but it is not necessary. MGMBR. 36.

Thus, although the District Court attached dispositive significance to the fact that Defendants do not operate Napster-like central index servers on which the network depends, 259 F.Supp.2d at 1041-42, that fact is irrelevant. Hosting indices of infringing material on one's own servers is only one of many possible forms of material contribution to online infringement. *In re Aimster Copyright Litig.*, 252 F.Supp.2d 634, 641 n.6 (N.D. Ill. 2002), *aff'd*, 334 F.3d 643 (7th Cir. 2003). Also irrelevant is the asserted (but disputed) fact that users, having received material assistance from Defendants in the form of software and other aid, would thereafter be able to continue infringing even if Defendants went out of business.

¹⁰ Courts have upheld contributory infringement claims in many situations where the defendants, having completed their material assistance to the primary infringer, thereafter plainly had no ability to stop the infringement. *See, e.g., Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845-47 (11th Cir. 1990); *Metzke v. May Dep't Stores Co.*, 878 F.Supp. 756, 761 (W.D.Pa. 1995); *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F.Supp. 399, 404-05 (S.D.N.Y. 1966); *see also* 2 Wayne R. LaFave, *Substantive Criminal Law* §13.2(a)(2d ed. 2003)(mere encouragement suffices for criminal aiding and abetting liability, and the "encouragement may come long before the time the crime [is] committed").

SCBr. 39; GBr. 45.¹¹ Defendants' liability is fixed at the time they knowingly contribute to their users' infringement.

E. To Impose Contributory Liability in These Circumstances Does Not Threaten Legitimate Vendors.

Defendants issue dire warnings that any theory of contributory liability applicable to them would also ensnare many other providers of copying machinery or computer technology. But "this argument ignores the reality of defendants' service as compared to the [legitimate providers] to which they claim such similarity." *Aimster*, 252 F.Supp.2d at 652. There is no basis to believe that the vast majority of the usage of Microsoft's Internet Explorer or Xerox's photocopiers is for copyright infringement, or that those providers are aware of a high probability that any given user is an infringer. Unlike Defendants, those providers supply technologies that are overwhelmingly used for lawful purposes. Unlike Defendants, those providers have not deliberately set out to facilitate and profit from infringement. Legitimate sellers of goods and Internet service providers are

¹¹ That claim is disputed as to StreamCast, JER(v.7)1952, and demonstrably false as to Grokster. The record shows that, if Grokster stopped paying license fees to Kazaa, its users could lose access to the FastTrack network, just as StreamCast's users did. MGMBR. 50-51.

not threatened by an application of settled copyright principles that holds Defendants liable for the massive infringement that they knowingly facilitate.¹²

II. DEFENDANTS ARE LIABLE FOR VICARIOUS INFRINGEMENT.

A. Defendants Receive a Direct Financial Benefit from Copyright Infringement.

The District Court held that “because a substantial number of users download the software to acquire copyrighted material, a significant proportion of Defendants’ advertising revenue *depends* upon the infringement.” 259 F.Supp.2d at 1044. Evidence of Defendants’ direct financial benefit from infringement, *e.g.*, MGMBr. 9-12, 28-31 – including the enormous percentage of infringing files available on FastTrack, JER(v.7)1908-33, and StreamCast’s brazen promotion of infringement to users and advertisers, JER(v.16)4627; JER(v.11)3096; JER(v.12) 3509-10, 3517, 3522-23 – was so overwhelming that Defendants *chose not to contest it*.

¹² Contrary to the assertions of certain *amici*, it is Defendants, not Plaintiffs, who raise issues that are properly addressed only by new legislation. Congress *already has* amended the Copyright Act to balance the various interests involved in imposing secondary liability for the online reproduction and distribution of copyrighted works. In 1998, it enacted the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, which limits the remedies available against an online “service provider” for aiding users’ infringing activity if the provider complies with the statute’s provisions and takes certain steps to curb such activity. 17 U.S.C. § 512. Defendants do not and cannot contend that they are eligible for the protections of that statute. Instead they seek a new “safe harbor” – the radical reinterpretation of the law of contributory liability adopted by the District Court.

Defendants' revenues depend on users not only seeking free copyrighted content, but also *supplying* it. In providing the infringing files that "draw" the audience, users provide a service on which Defendants' businesses rely. Because Defendants depend on direct infringers as providers of content (not merely as consumers), the ongoing relationship between them extends far beyond the "vendor-customer relationship," Sharman *Amicus* Br. 10, of a vendor providing routine support to customers who have bought its product.

Defendants' reliance on and profit from infringement starkly distinguish them from the legitimate providers of goods and services with whom they would compare themselves. Liability follows where, as here, "the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials." *Shapiro, Bernstein & Co. v. H.L. Green, Co.*, 316 F.2d 304, 307 (2d Cir. 1963).¹³

¹³ StreamCast concedes that "*Napster* held that the teachings of *Sony-Betamax* have no application to vicarious liability" and that "this Court is bound by *Napster*." SCBr. 40 n.38. See also MGMBr. 53. Grokster's argument that *Sony-Betamax* absolves it of *vicarious* liability, GBr. 49-50, is foreclosed by controlling authority.

B. Defendants Have the Right and Ability To Supervise Infringing Activity.

1. Defendants Possessed, and then Abandoned, the Same Ability to Block Access Sufficient for Liability in *Napster.*

In 111 pages of briefing, Defendants cannot find enough space to address even *once Napster*'s basic vicarious-infringement holding: "The ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise." 239 F.3d at 1023. *Napster* identified three features of the Napster system that, in themselves, were enough to establish vicarious liability: First, Napster had "the ability to locate infringing material listed on its search indices"; second, it had "the right to terminate users' access to the system"; third, it had the ability to terminate users' access. *Id.* at 1023-24.

None of these three features depended on whether Napster's own servers hosted the file name indices. This Court stated explicitly that Napster could locate infringing files by using the same "search function" equally available to Napster's users, *id.* at 1024; Napster's policy reserved the right to terminate users, *id.* at 1023; and Napster sometimes terminated infringing users via its

registration server, by “block[ing] the infringer’s password,” *A&M Records, Inc. v. Napster, Inc.*, 54 U.S.P.Q.2d 1746, 1753 (N.D. Cal. 2000).¹⁴

When Plaintiffs commenced this action, Defendants possessed the same three features that sealed Napster’s liability: the ability to use the search function to locate infringing materials, JER(v.3)791; reservation of the right to terminate users, JER(v.23)6628-35; JER(v.4)1000-07; and the ability to change passwords to deny access to infringing users, JER(v.25)7124. Indeed, both Defendants initially (but only sparingly) used their “registration servers” to block access to infringing users. JER(v.25)7124 (StreamCast admission that “[d]eleting a username had the effect of causing a user whose username was deleted to be unable to connect to other users”); JER(v.11)3021, 3023 (same Grokster admission). *Compare Napster*, 239 F.3d at 1023 (noting district court’s finding that “Napster’s representations to the court regarding ‘its improved methods of blocking users about whom rights holders complain . . . is tantamount to an admission that defendant can, and sometimes does, police its service’”).¹⁵

¹⁴ Each time Defendants claim that *Napster*’s holding relied on the fact that the file name indices “resided on Napster’s computer servers,” SCBr. 42, they fail, tellingly, to quote the opinion. *E.g.*, GBr. 34.

¹⁵ Despite these admissions, the District Court mistakenly found that a user whose name or password was removed from the registration server could still access other users. 259 F.Supp.2d at 1040 n.7. But the evidence was to the contrary. JER(v.1)198(¶7); JER(v.3)809; JER(v.25)7124. (Only when Defendants’ servers were malfunctioning could blocked users connect to other users. JER(v.9)2415.)

Instead of using those features to exercise their right to police “to its fullest extent,” *Napster*, 239 F.3d at 1023, Defendants did the opposite. Four months into the litigation, they abandoned their registration servers. JER(v.3)808-09; JER(v.10) 2895-96; MGM Br. 13, 63. Defendants’ actions call to mind a burglar, chased by the police, throwing his tools and loot out the car window, in order to appear empty-handed once pulled over.¹⁶ Holding Defendants accountable for abandoning control features they already possess is hardly the imposition of “a general affirmative duty on the part of technology vendors to design technologies to protect the interests of copyright owners.” SCBr. 47; GBr. 50. Instead, it is an affirmation of the settled principle that “[t]urning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability.” *Napster*, 239 F.3d at 1023.

2. Defendants Already Can, and Do, Block Files from Their Systems Based on Content.

Defendants’ current ability to block the distribution of particular materials on their systems provides even more compelling evidence of their ability

¹⁶ StreamCast even jettisoned its Terms of Service, in which it reserved the right to terminate users. JER(v.23)6628-35; JER(v.7)1941. This was a useless gesture. *See Fonovisa*, 76 F.3d at 263 (liability appropriate even where defendant “lacked the formal, contractual ability to control the direct infringer”). And despite litigation assertions to the contrary, GBr. 12, JER(v.1)199(¶7), *Grokster* actively sought to discard its registration server. JER(v.18)5114 (“Per our contract, please forward to us the latest update that includes . . . *no requirement for a registration server* and any other improvements/upgrades that are currently available”).

to supervise and control the direct infringement of their users. *See Napster*, 239 F.3d at 1027 (liability supported by Napster’s ability to “preclude access to potentially infringing files”). The District Court did not consider Defendants’ ability to block copyrighted works, finding that Defendants have no “obligation” to do so unless they have “the ‘right and ability’ to supervise *the infringing conduct*.” 259 F.Supp.2d at 1045 (emphasis in original). But Defendants’ ability to prevent the unlawful copying and distribution of copyrighted works on their networks establishes their ability to supervise the infringing conduct. Defendants have far more ability to control and stop infringements than has ever been required for vicarious liability. MGMBr. 52-56.

The evidence showed that Defendants’ current systems can identify and control files in ways Napster never could. For example, although “the Napster system does not ‘read’ the content of indexed files, other than to check that they are in the proper MP3 format,” 239 F.3d at 1024, Defendants’ systems *are* able to read detailed “metadata” and compute “hash values” of files. MGMBr. 19. The systems use these values to reliably identify files from which copies may simultaneously be made (e.g., to recognize that 11 differently named files are actually all identical copies of the Beatles’ “Yesterday”), and could also use them to reliably identify Plaintiffs’ infringed works that should be blocked. *Id.* 60.

Unable to contest that Defendants *already* provide filters to block pornographic files and viruses, Grokster attempts to downplay the filters' effectiveness. GBr. 51 n.21. But they work well enough for Grokster's CEO to claim credit for setting the software to block pornographic works, explaining: "Grokster believes that this is the appropriate default setting, as we believe that content that may offend a considerable number of users should only be presented to those users if they affirmatively choose to see it." JER(v.26)7533. There is no reason Defendants cannot also block unauthorized copyrighted materials, well within their systems' current architecture. *See A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002)("Napster II").¹⁷

Defendants, quibbling about possible imperfections in some *other* filtering methods available to them, SCBr. 46 n.44, GBr. 51-53, fail to rebut that effective filtering of files can be accomplished on a peer-to-peer network. JER(v.3)816-22, 754-66, 720-28; JER(v.7)1958-59. Indeed, Kazaa's file-copying system, operating on the same peer-to-peer FastTrack network as Grokster,

¹⁷ At a minimum, any questions about the feasibility of using Defendants' filtering ability to prevent infringement raise disputed issues of fact requiring reversal of summary judgment. StreamCast even concedes that the feasibility of filtering "remains disputed." SCBr. 46 n.44. In this regard, Grokster's section titled "The District Court's *Finding of Fact*," GBr. 22-24 – a catalogue of erroneous findings on issues that at a minimum were factually disputed – further shows why summary judgment should be reversed.

employs a filter, regularly updated from a central source, which blocks the distribution of files containing viruses. JER(v.7)1958-59.¹⁸

Grokster does not dispute its right, pursuant to its agreement with licensor Kazaa, to require changes in the Grokster software to improve its system's file-blocking. JER(v.18)5139. And undisputed testimony by Plaintiffs' expert demonstrated that Grokster does not even need the FastTrack source code to do so on its own. JER(v.7)1872-81.¹⁹ Defendants are able to block files based on content and do so when it suits them.

Defendants' final argument against exercising their ability to block infringing files is that, even though able to do so, they have no obligation to modify their software to implement features to thwart infringement. SCBr. 46-47, GBr. 49. This argument is contrary to the law. In *Napster II*, this Court held it

¹⁸ Grokster miscites the brief of plaintiffs in *Aimster*, GBr. 52, which noted only that the simple file-name text filtering that Napster chose was ineffective. JER(v.28)8198-99. Similarly, Grokster's swipes at the filtering Napster ultimately implemented, GBr. 51-52, leave out that "Napster *was* able to prevent sharing of much of plaintiffs' noticed copyrighted works," *Napster II*, 284 F.3d at 1098. And Grokster simply ignores most of the *multiple* types of file filtering Plaintiffs demonstrated could effectively be used on a peer-to-peer network, alone or in combination. MGM Br. 60-61; JER(v.3)816-22.

¹⁹ Grokster falsely states that Plaintiffs' expert "admitted that he could not even determine whether it was possible for Grokster to implement a filtering system without access to the FastTrack source code." GBr. 48 n.20; *see also* GBr. 9n.1. At the cited page, however, JER(v.28)8211-12, Plaintiffs' expert testified the source code would be needed only to filter by modifying the software itself, testifying later in the same deposition about other ways Grokster could block files *without* source-code access. JER(v.7)1872-81.

was appropriate to require Napster to modify its software to implement effective filtering: “The new filtering mechanism does *not* involve a departure from Napster’s reserved ability to police its system. It still requires Napster to search files located on the index to locate infringing material.” 284 F.3d at 1096. *See also Religious Tech.. Ctr. v. Netcom On-Line Commun. Servs., Inc.*, 907 F.Supp. 1361, 1376 (N.D.Cal. 1995)(defendant’s summary judgment motion defeated by testimony “that with an easy *software modification* Netcom could identify postings that contain particular words or come from particular individuals”).

It also is contrary to common sense. Defendants update and issue networking software not as an end in itself but as one of the ways in which they maintain and operate their file-copying networks. Whenever necessary to protect or enhance the networks, Defendants modify their software. JER(v.3)800; JER(v.10)2870. Over a five-day period last year, StreamCast issued sixteen updates of its software, all to improve the network’s file-copying functioning. JER(v.6)1710-11. Neither Defendants nor their *amici* offer any legal basis, or policy reason, why a defendant that modifies its networking software sixteen times in less than a week to promote infringement cannot modify it a seventeenth time to thwart infringement.

3. **Defendants Otherwise Retain the Ability To Supervise Infringing Activity.**

In additional ways, Defendants retain the ability to supervise infringing activity, including by virtue of their “pervasive participation in the formation and direction of the direct infringers, including promoting them (i.e. creating an audience for them).” *Fonovisa*, 76 F.3d at 263 (quotation omitted). Having created their networks, drawn revenue from them, maintained constant communication with their users’ computers, and maintained the ability to change the software used to connect to the networks, Defendants have as much if not more ability to supervise infringement as the defendants in *Fonovisa* and *Master*.

No mere “software reseller.” GBr. 46. Grokster provides users ongoing network access – to find and copy files scattered across the FastTrack network – by regularly paying Kazaa a 60%-of-revenues licensing fee. JER(v.18)5138. Grokster retains the contractual right at any time to disconnect its owns users from the other users on FastTrack. JER(v.18)5142. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Grokster’s central servers remain in contact with users’ computers at all times users are on the system (currently Grokster uses that contact largely to send advertising but could use it to limit users’ ability to infringe). JER(v.3)796; JER(v.7)1864, 1881. And Grokster even retains the contractual right to require

licensor Kazaa to make modifications to its system's "features and functionality."

JER(v.18)5139.²⁰

No mere "software vendor," SCBr. 1, StreamCast, in the current Gnutella-based incarnation of Morpheus, provides a computer network centered around StreamCast servers that check in with users' software on an hourly (later, daily) basis to ensure that users have the most current software and are using the best method to route searches on the network. JER(v.6)1729-32. StreamCast ensures reliable access points for users to log on to the network. JER(v.7)1951. And, contrary to its claims that it "has no ability to remotely disable or upgrade the Morpheus software once it has been downloaded and installed by the user," *id.* 14, StreamCast maintains so *much* control over use of its current system that it can download and install on all its users' computers any software modification it

²⁰ Ignoring this evidence, MGMBr. 11-12, 18, Grokster continues to state falsely that it is an "outside observer" of "the Grokster product" and has no right to "change the way it works inside." GBr. 10-11.

Moreover, even if Grokster did *not* have such a right, it still could not avoid liability by hiding behind its licensor. A defendant that profits from infringement cannot avoid liability by contractually ceding supervision of its operations to another party. *See Shapiro, Bernstein*, 316 F.2d at 309 (vicarious-infringement doctrine prevents parties from "creating a buffer against liability while reaping the proceeds of infringement").

wants, *without* giving users notice or an opportunity to decline. JER(v.7)1947-48; JER(v.25)7241-46; JER(v.25)7289-90.²¹

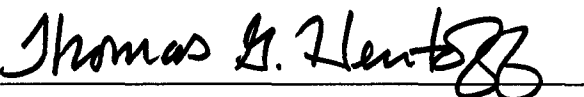
CONCLUSION

Defendants knowingly facilitate the massive infringement of Plaintiffs' copyrighted works, do so for profit, and refuse to take available measures to thwart the infringement. Employing an improperly cramped view of knowledge, contribution, and ability to supervise infringement, the District Court failed to stop what is in effect the biggest heist of intellectual property in history. Applying settled principles of copyright law, this Court should reverse and direct the entry of summary judgment for Plaintiffs.

Dated: October 1, 2003

Respectfully submitted,

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²¹ StreamCast concedes in a footnote that this is so, SCBr. 14 n.11, protesting only that "best practices" counsel notifying users first with an on-screen prompt, *id.* This simply means that StreamCast picks and chooses which "best practices" it will respect when exercising control over its users' activities.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing MGM Plaintiffs-Appellants' Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,893 words.

DATED: October 1, 2003

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PROOF OF SERVICE

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I am employed in the District of Columbia, in Washington. I am over the age of 18, and not a party to the within action; my business address is Williams & Connolly, LLP, 725 12th Street, N.W., Washington, D.C. 20005.

On October 1, 2003, I served the foregoing document described as **MGM PLAINTIFFS-APPELLANTS' REPLY BRIEF** on the parties in this action by placing **TWO copies** thereof enclosed in sealed envelopes addressed as follows, and taking the action described below:

SEE ATTACHED SERVICE LIST

*** BY THIRD-PARTY COMMERCIAL CARRIER:** I sealed and handed the envelope to a third-party commercial carrier for delivery to the addressees within three calendar days.

On October 1, 2003, I also filed the foregoing document described as **MGM PLAINTIFFS-APPELLANTS' REPLY BRIEF** with this Court by placing **THE ORIGINAL AND FOURTEEN COPIES** thereof enclosed in a sealed envelope addressed as follows, and taking the action described below:

Clerk, United States Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

*** BY THIRD-PARTY COMMERCIAL CARRIER:** I sealed and handed the envelope to a third-party commercial carrier for delivery to the addressee within three calendar days.

Executed on October 1, 2003, in Washington, D.C.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.



Gordon A. Shock

MGM STUDIOS, INC., et al. v. GROKSTER, LTD., et al.
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