

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

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

JERRY LEIBER, 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 No. CV-01-09923-SVW (Consolidated with CV-01-8541-SVW)
Honorable Stephen V. Wilson, United States District Court Judge

**LEIBER PLAINTIFFS-APPELLANTS' OPENING BRIEF
[REDACTED PUBLIC VERSION]**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants Jerry Leiber, individually and d/b/a Jerry Leiber Music, Mike Stoller, individually and d/b/a Mike Stoller Music, Peer International Corporation, Songs of Peer, Limited, Peer Music, Limited, Criterion Music Corporation, Famous Music Corporation, Bruin Music Company, Ensign Music Corporation, and Let's Talk Shop, Inc. d/b/a Beau-Di-O-Do Music, on behalf of themselves and all others similarly situated, make the following disclosures:

Plaintiff-Appellant Bruin Music Company is a wholly-owned subsidiary of Plaintiff-Appellant Ensign Music Corporation ("Ensign").

Ensign is a wholly-owned subsidiary of Plaintiff-Appellant Famous Music Corporation ("Famous").

Famous is a wholly-owned subsidiary of French Street Management Inc. ("French Street"). French Street is a wholly-owned subsidiary of Viacom International, Inc., which is a wholly-owned subsidiary of Viacom, Inc., a publicly traded corporation.

Plaintiffs-Appellants Jerry Leiber Music, Mike Stoller Music, Peer International Corporation, Songs of Peer, Limited, Peer Music, Limited, Criterion Music Corporation, and Let's Talk Shop, Inc. d/b/a Beau-Di-O-Do Music have no parent corporations, and there are no publicly held companies that own 10% or more of the stock of any of these companies.

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I.

JURISDICTIONAL STATEMENT¹

The District Court exercised jurisdiction over this case under 28 U.S.C. §§ 331 and 1338(a) and (b). This Court has jurisdiction under 28 U.S.C. §§ 1291, 1292(a)(1), and 1292(b).² On May 23, 2003, the Leiber Appellants filed a Notice of Appeal from the District Court's April 25, 2003 Order and, on June 27, 2003, filed an Amended Notice of Appeal from the District Court's June 18, 2003 Order.

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1 May the operator of a commercial Internet service provide the means and facilities for the direct infringement of copyrighted works on a massive scale, and profit from that infringement, but avoid liability by outsourcing the indexing of works available for unlawful copying, refusing to take any steps to prevent the widespread use of the service to commit infringement, and professing ignorance of that infringement despite its admitted receipt of tens of thousands of written

¹ Plaintiffs-Appellants Jerry Leiber, individually and d/b/a Jerry Leiber Music, Mike Stoller, individually and d/b/a Mike Stoller Music, Peer International Corporation, Songs of Peer, Limited, Peer Music, Limited, Criterion Music Corporation, Famous Music Corporation, Bruin Music Company, Ensign Music Corporation, and Let's Talk Shop, Inc. d/b/a Beau-Di-O-Do Music, on behalf of themselves and all others similarly situated (the "Leiber Appellants"), hereby adopt and incorporate by reference the Opening Brief filed by Plaintiffs-Appellants in Metro-Goldwyn-Mayer Studios, Inc., et al. v. Grokster, Ltd., et al., Docket Nos. 03-55894 and 03-56236 (the "MGM Brief"). On June 5, 2003, this Court consolidated the Leiber and MGM appeals. In accordance with this Court's July 16, 2003 Order, the Leiber Appellants have attempted to avoid duplicating the arguments made in the MGM Brief, and instead, have filed a separate brief to supplement the MGM Brief and to make additional arguments unique to the Leiber Appellants, who represent a certified class of over 27,000 songwriters and music publishers.

² See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., Nos. 03-55894 & 03-55901 (9th Cir. July 16, 2003) (acknowledging District Court's entry of partial final judgment on June 23, 2003 and vacating this Court's June 5, 2003 Order directing Appellants to show cause why appeals should not be dismissed for lack of jurisdiction).

notices of infringement from the affected copyright owners and widespread publicity of the use of its service for infringement on a massive scale?

2. May the operator of such a commercial service avoid liability under the Sony-Betamax “substantial non-infringing use” doctrine where the uncontested evidence shows that 90 percent of the files on the service are infringing or likely infringing, and 75 percent of the files are owned by Appellants?

3. Are the songwriters and music publishers who own the copyrights in the vast majority of the musical works on such a service effectively deprived of their statutory copyrights (thus thwarting an express Congressional mandate that copyrights should be enforced and creators compensated for the use of their works) if the operator of the commercial service is held to be immune from liability and the only alternative – policing the conduct of tens of millions of individual consumers on the Internet who use that service – is impossible?

III.

STATEMENT OF THE CASE

The Leiber Appellants adopt and incorporate by reference the Statement of the Case in the MGM Brief.

IV.

STATEMENT OF FACTS³

The Leiber Appellants adopt and incorporate by reference the Statement of Facts in the MGM Brief.⁴ The Leiber Appellants supplement the MGM Brief’s Statement of Facts with the following undisputed facts:

³ Citations to the record are contained in the Leiber and MGM Appellants’ Joint Excerpts of Record (“JER”) Volume (“v.”).

⁴ The technology underlying Defendants-Appellees’ services is described in detail in the MGM Brief.

- The Leiber Appellants represent a certified class of over 27,000 songwriters and music publishers that own and/or control more than 2.5 million copyrighted musical works.⁵ These works are some of the most recognizable musical compositions recorded in the Twentieth Century, including “Jailhouse Rock” by Jerry Leiber and Mike Stoller, “These Boots Are Made For Walking” by Lee Hazlewood, and “Moon River” by Henry Mancini and Johnny Mercer.⁶
- The record shows that Defendants-Appellees StreamCast Networks, Inc. and MusicCity.com, Inc. (collectively “MusicCity”) and Grokster, Ltd. (“Grokster”) have been put on notice that their users are committing direct infringement of the copyrighted works of the Leiber and MGM Appellants (collectively, “Appellants”) identified in Appellants’ respective complaints, amended complaints, and Rule 26 Disclosures, and in the formal notices sent to Defendants-Appellees.⁷
- Appellants conducted a statistical study to determine what percentage of files available for downloading on Grokster’s service was copyrighted material. The results of that survey – essentially uncontested by MusicCity and Grokster below – showed that **90% of those files are infringing or likely infringing, and 75% of the files are owned by Appellants.**⁸

⁵ JER(v.4) at 937-938 (Sanders Decl. ¶ 6).

⁶ JER(v.4) at 930 (Stoller Decl. ¶ 17); JER(v.4) at 946 (Robinson Decl. ¶ 6(C)); JER(v.4) at 952 (Goldsen Decl. ¶ 4(B)).

⁷ JER(v.3) at 730-733 and JER(v.3A) at 735.03-735.29 (Charlesworth Decl. ¶¶ 4-10 and Exs. A-G thereto); JER (v.3) at 715-718 and JER(v.3A) at 719.21-719.23 (Breen Decl. ¶¶ 2-15 and Ex. A thereto).

⁸ JER(v.7) at 1910, 1913 (Olkin Decl. ¶¶ 6, 16).

- All of the declarants cited in the District Court's April 25, 2003 Order on the issue of "commercially significant noninfringing uses" for MusicCity's and Grokster's services either lacked personal knowledge of the services or recanted the statements made in their declarations when they were examined in depositions.
- Appellants introduced uncontroverted evidence showing that both MusicCity and Grokster have built highly profitable businesses off the backs of copyright holders. Specifically, the record demonstrates that:

MusicCity derived \$ [REDACTED] in revenues in 2001 from serving up advertising to its millions of infringing users;⁹

As of July 2002, MusicCity had \$ [REDACTED] in revenue and projected \$ [REDACTED] by the end of 2002;¹⁰

MusicCity received over \$ [REDACTED] in venture capital investment and a valuation of the company at \$ [REDACTED];¹¹

Grokster also derives substantial revenue from advertising;¹²

Both MusicCity and Grokster receive revenue from other software "bundled" with theirs.¹³

⁹ JER(v.8) at 2126-27 (citing, among other things, JER(v.8) at 2242-44, 2305, 2306-07 and 2311 (Griffin Depo. at 256:7-258:4, 454:14-455:7, 458:15-23 and 446:1-14)).

¹⁰ JER(v.8) at 2307 and 2308 (Griffin Depo. at 455:3-7 and 456:2-3).

¹¹ JER(v.8) at 2310-2311 (Griffin Depo. 464:3-465:22).

¹² JER(v.8) at 2126 (citing, among others, JER(v.10) 2859-2860, 2898-2899 and 2931 (D. Rung Depo. at 69:2-70:10, 140:21-141:1 and 205:5-24) and JER(v.18) at 5037).

¹³ JER(v.8) at 2242-44 and 2305 (Griffin Depo. at 256:7-258:4 and 446:1-14); JER(v.11) at 2942 (D. Rung Depo. at 226:12-16).

V.

SUMMARY OF ARGUMENT

MusicCity is “[t]he #1 Alternative to Napster ... When the lights went off at Napster ... where did the users go? MusicCity.com” MusicCity brochure.¹⁴

“We DO NOT want to ... [use] a technology that will allow Morpheus to see what our users are sharing ...” – MusicCity internal e-mail.¹⁵

“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?” – Grokster support e-mail to user.¹⁶

This lawsuit is about MusicCity’s and Grokster’s knowing operation of illicit commercial businesses that actively facilitate, materially contribute to, and encourage the wholesale infringement of Appellants’ copyrighted works. Like the now defunct and notorious Napster service,¹⁷ MusicCity and Grokster operate unlicensed, peer-to-peer Internet “file-sharing” services. Their business model depends upon their millions of end-users offering a veritable treasure trove of copyrighted music and motion pictures for downloading by others – all for free and without any compensation to the copyright owners.¹⁸

¹⁴ JER(v.12) at 3458.

¹⁵ JER(v.15) at 4368 (emphasis in original).

¹⁶ JER(v.17) at 4959.

¹⁷ See A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001) .

¹⁸ See JER(v.27) at 7679-80 (Order at 28-29).

As the District Court correctly found in its April 25, 2003 Order (the “Order”), MusicCity and Grokster earn millions of dollars in revenue from advertising targeted at their millions of users. It further found that these users are engaged in the unauthorized copying and distribution of millions of copyrighted works, all constituting direct copyright infringement,¹⁹ and that Appellants have sent repeated notices to MusicCity and Grokster identifying millions of copies of their copyrighted works being made available for unauthorized downloading on the services.²⁰ But despite these undisputed facts, the District Court concluded that MusicCity and Grokster were not liable as a matter of law.

On contributory infringement, the District Court held that MusicCity and Grokster could not be liable because, notwithstanding their general knowledge that millions of users are engaged in massive, rampant infringement,²¹ MusicCity and Grokster must have actual knowledge of each specific act of infringement at the precise moment in time when they have the ability to use that knowledge to stop that particular infringement.²² This holding is contrary to well-established law. On vicarious infringement, the District Court held that MusicCity and Grokster do not have the right and ability to supervise the infringing conduct because they purportedly only distribute software, and thus have nothing to do with providing the infrastructure – the site and facilities – for copyright infringement to take place,²³ despite extensive, undisputed evidence to the contrary.

¹⁹ JER(v.27) at 7660-61 and 7679 (Order at 9:5-10:5 and 28:18-19).

²⁰ JER(v.27) at 7664-65 (Order at 13-14).

²¹ JER(v.27) at 7665 and 7667 (Order at 14:8-10 and 16:6-8).

²² JER(v.27) at 7665 (Order at 14:11-14).

²³ JER(v.27) at 7683 (Order at 32:14-20).

Moreover, the District Court incredibly equated MusicCity and Grokster to Xerox, rather than the more analogous comparison to the illegitimate Napster service.²⁴ This conclusion is entirely unfounded even under the District Court's own findings:

→ Unlike Xerox,

MusicCity's and Grokster's business models are based on copyright infringement because a "significant proportion of [their] advertising revenue depends upon the infringement."²⁵

→ Unlike Xerox,

MusicCity and Grokster "clearly know that many if not most of [the] individuals who download their software subsequently use it to infringe copyrights."²⁶

→ Unlike Xerox,

MusicCity and Grokster may have "intentionally structured their businesses to avoid secondary liability for copyright infringement."²⁷

→ Unlike Xerox,

MusicCity and Grokster are "benefiting financially from the illicit draw of their wares."²⁸

²⁴ JER(v.27) at 7678 (Order at 27:4-16 (stating that MusicCity and Grokster are not "significantly different from companies that sell home video recorders or copy machines"))).

²⁵ JER(v.27) at 7680 (Order at 29:1-13).

²⁶ JER(v.27) at 7665 (Order at 14:8-10).

²⁷ JER(v.27) at 7684 (Order at 33:7-11).

²⁸ JER(v.27) at 7684 (Order at 33:9-11).

In short, comparing Xerox to MusicCity and Grokster is like comparing a farmer who sells chickens to a promoter and organizer of cockfights.

This Court should reverse the Order for at least the following four reasons:

First, as the record clearly establishes, MusicCity and Grokster have cloaked themselves in willful blindness to the infringements taking place on their services sufficient to impute to them actual knowledge of the infringing activity. (See Section VI.A below.)

Second, it is undisputed that MusicCity's and Grokster's services are overwhelmingly being used for the copying and distribution of copyrighted material, and thus, MusicCity and Grokster cannot avail themselves of any protections afforded by Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774 (1984) ("Sony-Betamax"). (See Section VI.B below.)

Third, because MusicCity and Grokster are profiting from illegal activity, imposing liability on them is consistent with the rationales behind secondary copyright liability. (See Section VI.C below.)

Fourth, the District Court's Order deprives songwriters and music publishers of their rights under the Copyright Act by placing their copyrights at the mercy of rampant infringement, thereby destroying the delicate balance created by Congress under the compulsory license provisions of the Copyright Act applicable to songwriters and music publishers. (See Section VI.D below.)

VI.
ARGUMENT

A. MusicCity And Grokster Are Guilty Of Willful Blindness Sufficient To Impute To Them Actual Knowledge Of Infringing Activity On Their Services.

The record indisputably demonstrates that MusicCity and Grokster have actual knowledge of infringing activity. As set forth in the MGM Brief, there is overwhelming undisputed evidence that MusicCity and Grokster have actual knowledge of the infringements taking place on their services. One would have to be a hermit to be ignorant of what is transpiring on MusicCity's and Grokster's services. The press knows it;²⁹ MusicCity's and Grokster's users know it;³⁰ Appellants know it;³¹ and, most importantly for this appeal, MusicCity and Grokster know it.³² As the District Court found, MusicCity and Grokster "clearly

²⁹ JER(v.8) at 2109 (citing, among other things, JER(v.3) 713.02-713.06 and 713.11-713.14 (Bodenstein Decl. ¶ 3(a)-(e) and Exs. 1-6 thereto); JER(v.8) 2294-2304 (Griffin Depo. at 433:22-443:6); and JER(v.21) at 6001-6023 and 6025-6039).

³⁰ JER(v.8) at 2103-05 (citing, among other things, JER(v.4) at 848-849, 888-900; JER(v.8) at 2252 (Griffin Depo. at 278:5-10); JER(v.10) at 2735-38 (Weiss Depo. at 327:18-329:12), JER(v.10) at 2855, 2858 and 2924-2930 (D. Rung Depo. at 64:8-25, 67:15-25 and 191:3-195:8); JER(v.11) at 3026-27, 3028-29 and 3035-38 (M. Rung Depo. at 160:15-167:24, 168:20-169:13, and 188:11-191:6); JER(v.14) at 4073, 4075, 4077, 4079, 4081, 4083, 4091, 4093, 4095 and 4097; and JER(v.23) at 6523-30, 6536, 6542-44 6547-56, 6580-82, 6585, 6588 and 6591).

³¹ JER(v.8) at 2099 (citing, among other things, JER(v.3) at 740, 742, and 744-746 (Creighton Decl. ¶¶ 9, 13 and 18-20); JER(v.3) at 730-735 (Charlesworth Decl. ¶¶ 4-19); JER(v.3) at 716-717 (Breen Decl. ¶¶ 5-10); and JER(v.3) at 774-779 (Jacobsen Decl. ¶¶ 7-18)).

³² JER(v.8) at 2099-2107, 2109 (citing, among other things, JER(v.3) 716-717 (Breen Decl. ¶¶ 5-10); JER(v.3) at 730-735 (Charlesworth Decl. ¶¶ 4-19); JER(v.3) at 740, 742, and 744-746 (Creighton Decl. ¶¶ 9, 13 and 18-20); JER(v.3) 774-779 (Jacobsen Decl. ¶¶ 7-18); JER(v.3) at 787-797 (Kleinrock Decl. ¶¶ 17-30); JER(v.4) at 848-849, 867-886, 888-900 and 902-904 (Shock Decl. ¶¶ 5, 6, 7 and Exs. 3, 4 and 5 thereto); JER(v.8) at 2210, 2224-28, 2252-57 and 2294-2304 (Griffin Depo. at 79:7-20, 158:12-162:14, 278:11-283:23 and 433:22-443:6); JER(v.8) at 2331-38 (Smith Depo. at 25:20-32:2); JER(v.10) at 2675-76 (Smith Depo. at 542:16-543:3); JER(v.10) at 2852-2853 (D. Rung Depo. at 36:24-37:5);

know that many if not most of those individuals who download their software subsequently use it to infringe copyrights.”³³

MusicCity and Grokster, however, claim that they do not “know” about infringements because their services encrypt the specific content downloaded by users and “outsource” the central indexing/directory function, enabling MusicCity and Grokster to claim a lack of awareness of what is being downloaded at any given time. MusicCity’s and Grokster’s profession of ignorance rings hollow, particularly where they have taken deliberate steps to shield themselves from information about the infringements taking place every day on their services. Because the record establishes that, at best, MusicCity and Grokster have “willfully blinded” themselves to these infringements, the law deems them to have “actual” knowledge of the infringements occurring on their services.

More than two decades ago, this Court set out guiding principles to prevent wrongdoers from escaping liability through feigned ignorance. As this Court held in United States v. Jewell, “if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.” 532 F.2d 697, 700 (9th Cir. 1976). This Court explained, “the person acts at his peril in this regard, and is treated as having ‘knowledge’ of the facts as they are ultimately discovered to be.” Id.; accord United States v. Mapelli, 971 F.2d 284, 286 (9th Cir. 1992) (defendant deemed to have actual knowledge “where a person suspects a fact, realizes its

JER(v.11) at 2968-2969 (M. Rung Depo. at 17:6-18:14); JER(v.11) at 2988-2989 (M. Rung Depo. at 73:1-74:17); JER(v.11) at 3220, 3224, 3226, 3230; JER(v.12) at 3430-31; JER(v.12) at 3509-24; JER(v.17) at 4953, 4957, 4966 and 4968; JER(v.21) at 6001-6023; JER(v.23) at 6648-65; and JER(v.23) at 6648-65).

³³ JER(v.27) at 7665 (Order at 14:8-10 (emphasis added)); JER(v.27) at 7667 (Order at 16:6-8 (MusicCity and Grokster “are generally aware that many of their users employ [their] software to infringe copyrighted works”)).

probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended”).

For example, in Jewell, the defendant denied knowing that marijuana was in the car he was driving even though a drug dealer had asked him to drive the car across the border, and the defendant knew that there was something in the “secret compartment” in the car. See 532 F.2d at 701. This Court rejected the defendant’s argument, holding that he possessed “knowledge” of the marijuana sufficient for a conviction because he was aware of facts indicating a high probability of illegality and deliberately failed to investigate so that he could remain ignorant. Id. Similarly, in United States v. Erickson, this Court affirmed the defendants’ fraud convictions, even though they “may have lacked actual knowledge that their billing practices were illegal,” because they “had reason to believe that their practices may have been illegal and deliberately failed to investigate proper billing practices.” 75 F.3d 470, 481 (9th Cir. 1996).

Courts have imported this criminal concept of willful blindness into the civil context, including cases involving contributory copyright infringement. As the Seventh Circuit succinctly stated, “[w]illful blindness is knowledge in copyright law.” In re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003) (Posner, J.); accord Fonovisa, Inc. v. Napster, No. 3:01-CV-02669, 2002 WL 398676, *9 (N.D. Cal. Jan. 28, 2002) (Napster could be liable for contributory infringement if plaintiffs showed that Napster “willfully blind[ed]” itself to the infringements on its service). See also Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 265 (9th Cir. 1996) (in trademark action, “contributory liability could be imposed if the swap meet was ‘willfully blind’ to the ongoing violations”); Rattray v. City of National City, 36 F.3d 1480, 1487 (9th Cir. 1994) (in defamation action, “actual knowledge” of falsity may be shown by “willful blindness to the truth”). Here,

even more than in Napster, there is undisputed evidence in the record of willful blindness by MusicCity and Grokster.

Indeed, MusicCity's and Grokster's attempt to avoid the consequences of their conduct epitomizes the concept of "willful blindness." The record indisputably shows that MusicCity and Grokster have created a virtual swap meet allowing users to download practically every extant piece of copyrighted music free of charge, in direct violation of the copyright laws. From their inception, MusicCity and Grokster modeled their services on the infringing Napster service.³⁴ When Napster was enjoined by the district court and began taking steps to block infringing content from its service, MusicCity and Grokster went into business to fill Napster's shoes. They first built and operated some of the largest infringing "openNap" services – essentially Napster clones that MusicCity and Grokster based on unauthorized versions of Napster software.³⁵

As MusicCity candidly acknowledged in an internal e-mail, "[w]e have put this network in place so that when Napster pulls the plug on their free service (or if the Court orders them shut down prior to that), we will be positioned to capture the

³⁴ JER(v.3) at 2099-2100 (citing, among other things, JER(v.8) at 2210 and 2214 (Griffin Depo. at 79:7-20 and 117:10-24); JER (v.8) at 2331-32 and 2132-38 (Smith Depo. at 25:20-26:27 and 27:19-32:2); JER(v.10) at 2812-2813, 2817, 2818-2820 and 2828 (Hardison Depo. at 50:17-51:9, 58:11-22, 69:18-70:20 and 147:20-24); JER (v.10) at 2851-52 (D. Rung Depo. at 36:24-37:5); JER(v.11) at 2968-69, 2970 (M. Rung Depo. at 17:6-18:19, 22:14-22); JER (v.12) at 3460-3505 and 3457-58; JER (v.13) 3534-37, 3539, 3544-46; JER(v.14) 3893-34-31 and 3936-79; and JER (v.16) 4492 and 4694).

³⁵ JER(v.3) at 2099-2100 (citing, among other things, JER(v.8) at 2210 and 2214 (Griffin Depo. at 79:7-20 and 117:10-24); JER (v.8) at 2331-32 and 2132-38 (Smith Depo. at 25:20-26:27 and 27:19-32:2); JER(v.10) at 2812-2813, 2817, 2818-2820 and 2828 (Hardison Depo. at 50:17-51:9, 58:11-22, 69:18-70:20 and 147:20-24); JER (v.10) at 2851-52 (D. Rung Depo. at 36:24-37:5); JER(v.11) at 2968-69, 2970 (M. Rung Depo. at 17:6-18:19, 22:14-22); JER (v.12) at 3460-3505 and 3457-58; JER (v.13) 3534-37, 3539, 3544-46; JER(v.14) 3893-34-31 and 3936-79; and JER (v.16) 4492 and 4694).

flood of their 32 million users that will be actively looking for an alternative.”³⁶ Promoting itself as “[t]he #1 Alternative to Napster,” MusicCity bragged in advertising material that “[w]hen the lights went off at Napster ... where did the users go? MusicCity.com.”³⁷

But after this Court held oral argument on the injunction against Napster, MusicCity and Grokster recognized the risk in operating blatantly infringing openNap services. MusicCity’s own lawyer “recommend[ed] taking the current service down now,” because, in his view, “the service, which has always been risky, is now unbelievably risky.”³⁸ Because they already had accumulated millions of users to their services, MusicCity and Grokster “migrated” their users to the even more efficiently infringing “FastTrack”-based service.³⁹ MusicCity urged its openNap users to switch to the FastTrack service, promising, among other things, that “[e]verything is FULLY ENCRYPTED to protect privacy.”⁴⁰ As described in more detail in the MGM Brief, the FastTrack-based service encrypts most of the communications between MusicCity and Grokster and their users. The FastTrack-based service also “outsources” the central indexing/directory function (which permits users to search for and locate infringing material between users).⁴¹

³⁶ JER(v.13) at 3537.

³⁷ JER(v.12) at 3458.

³⁸ JER(v.20) at 5657.

³⁹ JER(v.8) at 2101 (citing, among other things, JER(v.8), 2220-22 (Griffin Depo. at 148:18-149:1 and 152:3-8); JER(v.9) at 2341-2342, 2347-2348 and 2365 (Smith Depo. at 40:21-41:9, 49:23-50:7, and 80:2-6); JER(v.10) at 2701-2703 and 2705-2706 (Weiss Depo. at 89:23-91:6 and 98:8-99:4); JER (v.10) at 2814-2818, 2821, 2824 and 2835-2836 (Hardison Depo. at 55:6-59:20, 87:1-25, 122:8-21 and 170:17-171:3); JER(v.11) at 2939-40 (D. Rung Depo. at 221:5-222:24); and JER(v.11) at 2971 (M. Rung Depo. 31:10-17); JER (v.12) at 3271-77 and 3304 - 05; and JER (v.13) at 3598-3602).

⁴⁰ JER(v.13) at 3644.

In March 2002, after defendant Kazaa BV blocked MusicCity from

MusicCity's and Grokster's proclaimed ignorance defense assumes that the encryption and the outsourcing function materialized out of thin air to provide them with some kind of legal immunity. But the encryption and outsourcing functions occurred as a direct result of MusicCity's and Grokster's own decisions and conduct. MusicCity and Grokster consciously chose to alter their services to provide for the anonymity of their users and to encrypt many of the computer-to-computer communications that take place on their FastTrack services.⁴² In short, by switching from an openNap service to a FastTrack-based service, MusicCity and Grokster contrived a ready-made "excuse" for the copyright infringement lawsuits they knew were coming, so that they could nominally claim to have no idea what their users were doing.⁴³

accessing the FastTrack Network, MusicCity began distributing a version of its software based on the Gnutella Network. JER(v.27) at 7673 (Order at 22).

[REDACTED] JER(v.7) at 1895. Although communications on the Gnutella Network are unencrypted, MusicCity's Gnutella-based service retains many of the characteristics of its previous FastTrack-based service.

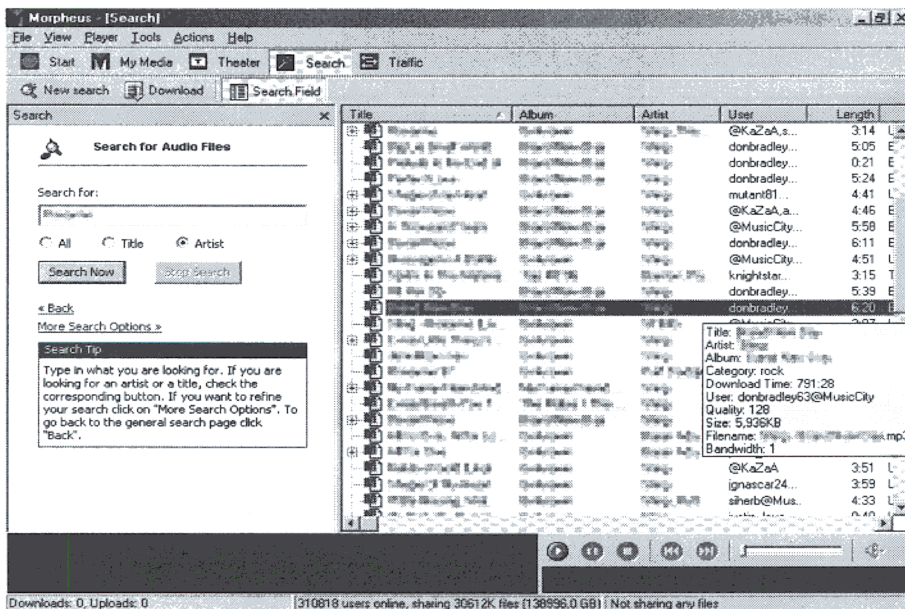
⁴² JER(v.8) at 2122-2123 (citing, among other things, JER(v.3) at 798, 803-804 and 810 (Kleinrock Decl. ¶¶ 41, 49(c) and 63); JER(v.9) at 2521-2523, 2534 and 2542 (Smith Depo. at 317:2-319:15, 336:8-19 and 350:5-24); JER(v.10) at 2833 (Hardison Depo. 167:13-168:1); JER(v.10) at 2810-2811, 2825-2827, 2839-2842 (Hardison Depo. at 47:19-48:4, 133:23-135:9 and 211:1-214:2); at 2897 (D. Rung Depo. at 138:7-22); JER (v.13) at 3644; JER(v.21) at 6053 (Answer of Music City Defendants to MGM Plaintiffs' First Amended Complaint, ¶ 49); and JER(v.21) at 6066 (Answer of Defendant Grokster, Ltd. to MGM Plaintiffs' First Amended Complaint, ¶ 49)).

⁴³ Contrary to the District Court's reasoning, MusicCity and Grokster cannot avoid liability merely by "outsourcing" the central index/directory function that was the focus of both the Napster service and this Court's opinion in Napster. Other than their physical location, the indices operate essentially the same way as did Napster's index. Thus, both MusicCity and Grokster, like Napster itself, provide continually updated, searchable indices of infringing files immediately available from users currently on their services. As this Court recognized in Napster, the entity that knowingly facilitates copyright infringement must obtain a license to copy or distribute musical works, or be subject to liability for copyright infringement. See 239 F.3d at 1013-14, 1019-22.

Moreover, after migrating users to the FastTrack-based service, MusicCity and Grokster took deliberate steps to cover up their knowledge of the infringements taking place on their services. For example, MusicCity developed promotional materials featuring obviously infringing content, including this sample “screen shot,” showing the results of a search for copyrighted songs by the singer and songwriter Sting:



In clear recognition of its culpability, MusicCity then attempted to cover its tracks by blurring the titles of those works, stating “[h]ere is an example of keeping the examples but covering our asses”:⁴⁴



⁴⁴ JER(v.12) at 3509-10, 3517 and 3522-23.

MusicCity also steadfastly refused to implement technologies that would have permitted it to identify specific infringing conduct on its service. In 2002, a leading file identification company sent MusicCity a proposal that would have allowed it to “see what our users are sharing.” In a remarkably frank e-mail, MusicCity employees admitted that this was something they did not want to do:

What this is, is a technology that will allow Morpheus to see what our users are sharing so that in turn we can ‘tie into a rights payment infrastructure.’ I know this is something we DO NOT want to do, but am not sure how to word that.⁴⁵

Further evincing a conscious effort to avoid the consequences of the infringements on their services, MusicCity and Grokster actually tried to block the efforts of companies retained by copyright owners to track or police infringements on MusicCity’s and Grokster’s services.⁴⁶ In a similar vein, in 2002, after the Napster-like service AudioGalaxy announced (in response to a lawsuit brought by copyright owners) that it would begin blocking infringing music from its service, Grokster offered a free “migration tool” to attract AudioGalaxy users to switch to the Grokster service where they could still freely infringe.⁴⁷ Grokster even acknowledged its awareness of copyright infringement – in this instance, a copyrighted computer game – directly to its users: “Everything that you get out of our network is free. You could always do the legal thing, and go buy the game

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As if these facts were not enough, MusicCity and Grokster also chose to ignore Appellants’ written notices of the infringing works offered on their services.

⁴⁵ JER(v.15) at 4368 (emphasis in original).

⁴⁶ JER(v.3) at 809-810 (Kleinrock Decl. ¶ 62); JER(v.6) at 3391; JER(v.7) at 1234-35, 3646; JER(v.15) at 4285, 4287-4290.

⁴⁷ JER(v.4) at 849, 902-904 (Shock Decl. ¶ 7 and Ex. 5 thereto).

⁴⁸ JER(v.17) at 4959.

On repeated occasions, from May 31, 2002 to August 9, 2002, the Leiber Appellants put both MusicCity and Grokster on formal notice that over 9,000 musical compositions owned and/or controlled by the certified class of songwriters and music publishers were available for downloading on MusicCity's and Grokster's services, including the 22 "Phase 1 Works" that were identified in the Leiber Appellants' summary judgment motion.⁴⁹ The notices demanded that MusicCity and Grokster take steps to stop or limit this infringement.⁵⁰ Instead of taking action, MusicCity and Grokster did nothing.⁵¹ Both MusicCity and Grokster continued to distribute, improve, promote, and update their services⁵² and to distribute the software that enables their users to engage in further infringements of the same copyrighted works – and continued to rake in millions of dollars in revenue, based on the huge numbers of users flocking to their services to download copyrighted material.

MusicCity's and Grokster's conduct is a textbook case of willful blindness. In Aimster, the Seventh Circuit concluded that the defendant (who also operated an unlicensed, peer-to-peer "file-sharing" network) had sufficient knowledge for contributory infringement. The same conclusion should be reached here. With

⁴⁹ JER(v.3) at 730-733 and JER(v.3A) at 735.03-735.29 (Charlesworth Decl. ¶¶ 4-10 and Exs. A-G thereto).

⁵⁰ JER(v.3) at 730-733 and JER(v.3A) at 735.03-735.29 (Charlesworth Decl. ¶¶ 4-10 and Exs. A-G thereto).

⁵¹ JER(v.3) at 715-716 and 718-719 (Breen Decl. ¶¶ 3, 16).

⁵² JER(v.8) at 2111-2116, 2118-2119, 2123-2126 (citing, among other things, JER(v.3) at 790-792, 794-804, 807-810 (Kleinrock Decl. ¶¶ 26, 27, 30, 37 (a)-(e), 39, 40, 42, 43, 46, 49, 50, 55, 62); JER(v.9) at 2362-63, 2382, 2384, 2388-89 and 2409-10 (Smith Depo. at 75:20-76:8, 104:4-16, 107:2-14, 112:14-113:25, and 146:11-147:2); JER(v.6) at 3391; JER(v.7) at 1234-35, 3646; JER(v.12) at 3373, 3375, 3411-13, 3433, 3398-3401, 3427, 3421-22; JER(v.13) at 3656, 3671; JER(v.14) at 4123; JER(v.15) at 4178, 4237-38, 4285, 4287-90, 4338; and JER(v.18) at 5128).

words strikingly applicable to this case, the court held that the defendant could not “escape liability ... by using encryption software to prevent himself from learning what surely he strongly suspects to be the case: that the users of his service – maybe all the users of his service – are copyright infringers.” Aimster, 334 F.3d at 650. Instead, “Aimster blinded itself in the hope that by doing so it might come within the rule of the Sony decision.” Id. at 653.

MusicCity’s and Grokster’s connivance is even more transparent than the conduct in Aimster. MusicCity and Grokster know of infringing activity on their services, and yet they continue to permit millions of users to upload and download copyrighted works, while making millions of dollars from advertisements targeted to these very same users. They have not taken action to stop the ongoing infringement; on the contrary, they have promoted, improved, and upgraded their services to increase performance and security for their users. And they continue to distribute the software that enables their users to engage in massive copyright infringement without making any effort whatsoever to stop or even limit its unlawful use. Far from being mere distributors of software, MusicCity and Grokster are acting in concert with their millions of users to profit off the illegal trafficking in the Leiber Appellants’ copyrighted musical works. Accordingly, this Court should conclude that MusicCity’s and Grokster’s willful blindness establishes, as matter of law, actual knowledge of infringing activity sufficient to find them liable for contributory infringement.⁵³

⁵³ At a minimum, as described in the MGM Brief, the record is replete with undisputed evidence demonstrating that MusicCity and Grokster have constructive knowledge of infringing activity occurring on their services. “Constructive knowledge” – where a defendant “should have known” of the direct infringement – is sufficient for a finding of contributory infringement. See Napster, 239 F.3d at 1020; Gershwin Publishing Corp. v. Columbia Artists Mgmt, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

B. The Undisputed Record Demonstrates That MusicCity's And Grokster's Services Overwhelmingly Are Used To Infringe Copyrighted Works.

The District Court ignored relevant evidence in holding that there were substantial non-infringing uses of MusicCity's and Grokster's services that are commercially significant. For the reasons stated in the MGM Brief, the Sony-Betamax decision is not a defense to MusicCity's and Grokster's conduct. However, assuming Sony-Betamax even applies to their conduct, MusicCity and Grokster must demonstrate that their services are capable of "commercially significant noninfringing uses." Sony-Betamax, 464 U.S. at 442; accord A&M Records, Inc. v. Napster, Inc., 239 F.3d at 1021.

The District Court found that "it is undisputed that there are substantial noninfringing uses for MusicCity's and Grokster's software – e.g., distributing movie trailers, free songs or other non-copyrighted works, using the software in countries where it is legal, or sharing the works of Shakespeare [citing eight declarations submitted by Defendants]." ⁵⁴ This erroneous conclusion is directly at odds with the record below.

First, Appellants pointed out to the District Court that the eight declarations submitted by MusicCity and Grokster plainly do not establish that their services are capable of substantial and commercially significant non-infringing uses. The declarations largely discuss the non-infringing uses of the Internet or peer-to-peer technology generally, not of MusicCity's and Grokster's services specifically. ⁵⁵ Many of the declarants ultimately conceded when they were questioned in depositions that they never had used MusicCity's and Grokster's services to

⁵⁴ JER(v.27) at 7662 (Order at 11:16-22).

⁵⁵ See, e.g., JER(v.1) at 173-185 (Sinnreich Decl. ¶¶ 4-44); JER(v.2) at 388-390 (Ian Decl. ¶¶ 7-14); at 405-406 (Newby Decl. ¶¶ 10-12); JER (v.2) at 508-511 (Kahle Decl. ¶¶ 8-20); JER (v.2) at 516-517 (Prelinger Decl. ¶¶ 17-18).

ascertain the availability of the non-infringing content described in their declarations.⁵⁶ Additionally, none of the declarants who referred to the non-infringing uses of the services addressed the magnitude or substantiality of such uses or their commercial significance, i.e., whether MusicCity and Grokster could sustain a commercial business built on those uses. In fact, they admitted that they either did not know how the services worked or had no idea how much non-infringing content, if any, was being traded on them.⁵⁷ Accordingly, all of the declarations are irrelevant to the Sony-Betamax inquiry, meaning that MusicCity and Grokster did not submit any admissible evidence on the extent of the alleged non-infringing uses of their services. Having utterly failed to meet their burden, MusicCity's and Grokster's resort to Sony-Betamax is futile. Cf. Aimster, 334 F.3d at 653 (rejecting defendant's Sony-Betamax defense due to its failure "to produce any evidence that its service has ever been used for a noninfringing use, let alone evidence concerning the frequency of such uses").

Second, Appellants argued below that MusicCity's and Grokster's services are being used to infringe Appellants' Phase 1 Works. MusicCity and Grokster have been on notice that copyrighted works were being copied and distributed on their services since at least the fall of 2001, when Appellants served and filed their respective complaints.⁵⁸ MusicCity and Grokster received additional notices of

⁵⁶ See JER(v.5) at 1301-02 (Ian Depo. at 15:9-16:8); JER(v.5) at 1308-31 (Kahle Depo. at 55:1-68:4); JER(v.5) at 1350 (Prelinger Depo. at 68:16-21); JER(v.5) 1353 (Sinnreich Depo. at 60:11-12).

⁵⁷ JER(v.5) at 1292-98 (Egbert Depo. at 53:1-4, 73:18-74:21, 75:8-78:10); JER(v.5) at 1303 (Ian Depo. at 62:6-18); JER(v.5) at 1311-22 (Kahle Depo. at 58:24-68:4); JER(v.5) at 1324-28 (Mayers Depo. at 25:7-21, 32:20-34:14, 37:11-24); JER(v.5) at 1333-35, 1339, 1341-42 (Newby Depo. at 29:15-31:9, 63:21-25, 73:19-74:13); JER(v.5) at 1345-49 (Prelinger Depo. at 31:4-32:6, 49:6-51:3); JER(v.5) at 1354-55, 1359-60, 1365-68 (Sinnreich Depo. at 61:16-62:6, 81:14-20, 192:6-193:6, 236:18-239:9).

⁵⁸ JER(v.3) at 716 (Breen Decl. ¶ 4).

infringement when Appellants provided their initial disclosures under Fed. R. Civ. P. 26(a)(1).⁵⁹ These disclosures have been updated throughout this litigation, resulting in the identification of discrete representative works upon which a liability ruling would be sought (the Phase 1 Works). MusicCity and Grokster received yet another notice of the copyrighted works being copied and distributed on their services when Appellants served and filed their respective amended complaints in the summer of 2002.⁶⁰ And if all of these notices were not enough, Appellants repeatedly have sent both MusicCity and Grokster thousands of notices identifying millions of specific files containing copyrighted music and motion pictures that are being unlawfully made available for downloading on their services.⁶¹

Third, Appellants also introduced uncontroverted evidence in the District Court demonstrating that the overwhelming and primary use of the services is infringement – 75% of the files on the Grokster service are owned by the Leiber and MGM Appellants, and **90% of the total are infringing or likely infringing.**⁶² These statistics are even **higher** than in the Napster case. See A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 911 (N.D. Cal. 2000) (more than 70% of files on Napster service owned by plaintiffs, 87% infringing), aff'd in part, vacated in part on other grounds, 239 F.3d 1004 (9th Cir. 2001). MusicCity and Grokster

⁵⁹ JER(v.3) at 716-717 (Breen Decl. ¶¶ 7, 9-10).

⁶⁰ JER(v.3) at 717 (Breen Decl. ¶ 8); see also JER(v.1) at 39-62 (MGM Plaintiffs' First Amended Complaint) and at 63-91 (Leiber Plaintiffs' First Amended Complaint).

⁶¹ JER(v.27) at 7664 (Order at 13:25-26); JER(v.8) at 2099 (citing, among other things, JER(v.3) at 740, 742, and 744-746 (Creighton Decl. ¶¶ 9, 13, 18-20); JER(v.3) at 730-735 (Charlesworth Decl. ¶¶ 4-19); at 716-717 (Breen Decl. ¶¶ 5-10); and at 774-779 (Jacobsen Decl. ¶¶ 7-18).

⁶² JER(v.7) at 1910 and 1913 (Olkin Decl. ¶¶ 6, 16).

never seriously contested these facts, nor presented a contrary study, as was their burden under Sony-Betamax. See id. at 912.⁶³

In sum, the record unequivocally establishes that MusicCity and Grokster did not discharge their burden of submitting evidence sufficient to create a triable issue of fact on the issue of non-infringing uses, let alone to have the matter resolved in their favor as a matter of law. On the contrary, the record demonstrates that their services are being used overwhelmingly for infringement.

C. Imposing Liability Here Is Consistent With The Rationales Behind Secondary Liability Because MusicCity And Grokster Profit From Illegal Activity.

The District Court found it “clear” that MusicCity and Grokster derive millions of dollars in advertising revenue, a “significant proportion” of which “depends upon the infringement” committed by their millions of users.⁶⁴ Indeed, the uncontroverted record demonstrates that the value of their illicit businesses is based primarily on the copyrighted content made available on their services – for which the creators receive no compensation.⁶⁵

⁶³ In light of this evidence, the District Court’s finding that Appellants had left “undisputed” the claim of substantial noninfringing uses is clear error.

⁶⁴ JER(v.27) at 7679 (Order at 28:15-16).

⁶⁵ JER(v.10) at 2831 and JER(v.20) at 5653 (Hardison Depo. 152:14-15 and Ex. 139 thereto (discussing [REDACTED])); JER(v.8) at 2233-2236, 2242-2244, 2307, 2308, and 2310-11 (Griffin Depo. at 192:10-195:8, 256:7-258:4, 455:3-7, 456:2-3 and 464:5-465:22); JER(v.9) at 2342-43 (Smith Depo. at 41:21-42:12); JER(v.10) at 2733 (Weiss Depo. at 313:8-22); JER(v.11) at 3121-25; JER(v.12) at 3383; JER(v.13) at 3598 (“Since data/content on a P2P network is solely dependent upon peers [users], you can have the best technology in the world, but it is of no value without peers and data.”), JER(v.16) at 4490-94 ([REDACTED]);

JER(v.17) at 4782-98 at 4785 ([REDACTED]);

[REDACTED]; JER(v.17) at 4800-01 ([REDACTED]);

[REDACTED]: JER(v.17) at 4947, 4953, and 4957

Notwithstanding this uncontroverted evidence, and the District Court's own assessment that MusicCity and Grokster know that their "user base in the tens of millions" commits millions of acts of direct infringement, and that they "may have intentionally structured their businesses to avoid secondary liability for copyright infringement," the District Court concluded that MusicCity and Grokster were not liable as a matter of law. That result perverts the very meaning and purpose of secondary liability for copyright infringement. MusicCity and Grokster cannot be permitted to operate commercial businesses that reap enormous financial profit from the illegal trafficking of copyrighted works, while, at the same time, purporting to claim ignorance by hiding their heads in the sand.⁶⁶ The District Court's Order effectively holds that a defendant may knowingly create a business that profits from widespread copyright infringement, refuse to make any effort to stop or limit the infringement, and escape any consequence for this deliberate conduct. This result makes a mockery of copyright law.

Secondary copyright infringement doctrines are intended to address the impracticability or futility of a copyright owner suing a multitude of individual infringers, especially those who may be judgment-proof.⁶⁷ Contributory liability developed from the concept of enterprise liability, which holds joint tortfeasors liable for the same underlying harm. See, e.g., Demetriades v. Kaufman, 690 F. Supp. 289, 292 (S.D.N.Y. 1988); Harper v. Shoppell, 28 F. 613, 615 (S.D.N.Y. 1886); accord Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d at 264 ("the common law doctrine that one who knowingly participates in or furthers a tortious act is

⁶⁶ See Aimster, 334 F.3d at 655 (Aimster's "ostrich-like refusal to discover the extent to which its system was being used to infringe copyright is merely another piece of evidence that it was a contributory infringer").

⁶⁷ See, e.g., Randal C. Picker, Copyright as Entry Policy: The Case of Digital Distribution, 47 Antitrust Bulletin 423, 442 (2002) ("chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem").

jointly and severally liable with the prime tortfeasor, is applicable under copyright law”) (citations and internal quotations omitted); Ted Browne Music Co. v. Fowler, 290 F. 751, 754 (2d Cir. 1923) (same). Enterprise liability “impose[s] joint liability on a group ... whose actions created an unreasonable risk of harm, even though perhaps only one of them may have been the direct cause of the injury.”⁶⁸ The principal justification for imposing contributory liability on third parties rests in equity.⁶⁹ Thus, liability for contributory infringement will turn on the defendant’s relationship to the direct infringement; that is, if the defendant is implicated in the acts constituting the direct infringement, courts will hold it liable for contributory infringement.⁷⁰

Similarly, the law of vicarious copyright infringement is predicated on the tort law principle that the operator of a commercial business that causes expected harm to another should be held responsible. As one court put it:

The law of vicarious liability treats the expected losses as simply another cost of doing business. The enterprise and the person profiting from it are better able than either the innocent injured plaintiff or the person whose act caused the loss to distribute the costs and to shift them to others who have profited from the enterprise. In addition, placing responsibility for the loss on the enterprise has the

⁶⁸ J.D. Lee & Barry A. Lindahl, Modern Tort Law, § 27.62, at p. 27-170 (2002); accord id. (noting that courts recognize that it is appropriate to place responsibility on the entity with “the most strategic point of foresight, precaution and risk distribution and the only feasible method of ascertaining risks, imposing safeguards and spreading costs was through joint liability”) (citation omitted). See also Aimster, 334 F.3d at 645-46 (“If a breach of contract (and a copyright license is just a type of contract) can be prevented most effectively by actions taken by a third party, it makes sense to have a legal mechanism for placing liability for the consequences of the breach on him as well as on the party that broke the contract.”).

⁶⁹ See, e.g., Sony, 464 U.S. at 435 (“the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another”).

⁷⁰ See Gershwin, 443 F.2d at 1162 & n.8; see also F. Harper, F. James, & O. Gray, The Law of Torts § 10.1 (2d ed. 1986).

added benefit of creating a greater incentive for the enterprise to police its operations carefully to avoid unnecessary losses.

Polygram Int'l Publishing, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1325 (D. Mass. 1994).⁷¹ Like the owner of a dance hall who hires bands that play copyrighted music without authorization, “it may be impossible as a practical matter for copyright holders to identify and obtain a legal remedy against the infringing bands yet quite feasible for the dance hall to prevent or at least limit infringing performances.” Aimster, 334 F.3d at 654. Thus, the dance hall or other proprietor that fails to make reasonable efforts to police the infringing activity is liable as a vicarious infringer. See, e.g., Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Ass'n, 554 F.2d 1213, 1214-15 (1st Cir. 1977); Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929).⁷²

In erroneously granting MusicCity and Grokster summary judgment, the District Court failed to appreciate the ongoing relationship between them and their users. This relationship is the foundation for MusicCity’s and Grokster’s entire business model. There can be no dispute that the “tens of millions” of MusicCity’s and Grokster’s users who infringe copyrights⁷³ are receiving a tangible benefit – they are obtaining free downloads of copyrighted works in exchange for uploading

⁷¹ Accord Alfred C. Yen, Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment, 88 Geo. L.J. 1833, 1856 (2000) (“Enterprises that create risk should bear the burden of that risk as a cost of doing business. Such cost internalization is more than just fair. It encourages risk creators to take precautions against loss, it provides compensation for victims, and it spreads the costs among all who benefit from the risk-creating activity.”) (internal footnotes omitted).

⁷² Congress has endorsed these secondary copyright infringement doctrines. For example, in the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, Congress expressly excluded secondary infringers from the safe harbors created for online material under certain circumstances. See, e.g., id. § 202(a), 112 Stat. 2860, 2880-81 (1998) (now codified at 17 U.S.C. §§ 512(c)(1) and 512(d)).

⁷³ JER(v.27) at 7660 and 7679 (Order at 9:5-10:5 and 28:18-19).

others. Cf. No Electronic Theft (NET) Act, Pub. L. No. 105-147 § 2(a) (1997) (codified at 17 U.S.C. § 101) (adding definition of “financial gain” in section 101 of the Copyright Act to include “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works”).

.....And there can be no dispute, as the District Court also found, that MusicCity and Grokster operate e-commerce businesses that derive substantial revenue from serving up advertising to their users – advertising that depends upon the number of “eyeballs” that are attracted to their services.⁷⁴ This is precisely how MusicCity and Grokster make money: they earn advertising revenue by attracting millions of users to their services with the lure of pirated music, movies, and other copyrighted media.⁷⁵

Thus, at minimum, MusicCity and Grokster are joint tortfeasors with their users, perpetrating a scheme of massive copyright infringement, while lining their pockets with the profits from the illicit trafficking. But Appellants would suggest that the relationship goes beyond that, that MusicCity and Grokster are more like the kingpins of a scheme to traffic in pirated goods who are careful never to actually come in contact with the illicit merchandise, relying instead on their minions to carry out their unlawful scheme.

As detailed in the MGM Brief, MusicCity and Grokster have provided their users with the means to engage in illicit activities and have the power to curtail those means and activities, but deliberately have chosen not to lift a finger to do so. While doing nothing to filter out pirated music and motion pictures, they have added features to their software to filter pornography and computer viruses.⁷⁶ The

⁷⁴ JER(v.27) at 7680 (Order at 29:8-12).

⁷⁵ JER(v.27) at 7680 (Order at 29:8-12).

⁷⁶ JER(v.8) at 2146-2147 (citing, among other things, JER(v.8) at 2146-2197; JER(v.8) at 2314-15 (Griffin Depo. at 494:14-495:24); JER(v.9) at 2411-12,

reason is obvious: reducing viruses and giving parents the ability to block pornography is in MusicCity's and Grokster's financial interest; stopping infringement on their services is not.

In essence, MusicCity and Grokster are in the business of selling the songs written by the certified class of songwriters and music publishers represented by the Leiber Appellants and sending the bill to their advertisers (and software-bundling companies).⁷⁷ This stands in stark contrast to legitimate online services such as the Apple iTunes Music Store and the Rhapsody™ Digital Music Service, who have obtained licenses for the music they sell, and who compensate the creators of that music.⁷⁸ MusicCity and Grokster don't wish to be bothered with such niceties – or to have to pay for the music they are shamelessly exploiting.

Under these circumstances, it would be unjust not to hold MusicCity and Grokster responsible for the rampant piracy taking place on their services. They have knowledge of, are complicit in, and profit directly from, that infringement. Requiring the thousands of individual songwriters and music publishers in the Leiber class to police millions of individuals pirating their works on the Internet would impose an unreasonable – indeed impossible – burden on the creators that the copyright laws were intended to encourage.⁷⁹ Holding MusicCity and Grokster

2491 and 2492 (Smith Depo. at 148:25-149:10, 274:17-22, and 276:4-12); JER(v.10) at 2661 (Smith Depo. at 928:5-18); JER(v.10) at 2837 (Hardison Depo. at 172:17-25); JER(v.10) at 2863 and 2869-70 (D. Rung Depo. at 78:6-18 and 93:13-94:15; JER(v.10) at 2999-3001 and 3012-13 (M. Rung Depo. at 96:7-98:2 and 131:23-133:21); JER(v.11) at 3234; JER(v.12) at 3409-10, 3442-46; JER(v.13) at 3569-70, 3606; JER(v.14) at 3862; JER(v.17) at 4880, 4942, 4947, and 4982; and JER(v.18) at 5128).

⁷⁷ JER(v.27) at 7679-80 (Order at 28-29).

⁷⁸ JER(v.4) at 942 (Sanders Decl. ¶ 19); see also <<http://www.apple.com/itunes/>> (Apples iTunes Music Store) and <<http://www.listen.com>> (Rhapsody™ Digital Music Service).

⁷⁹ JER(v.4) at 936-938 (Sanders Decl. ¶¶ 3, 6).

accountable, by contrast, imposes a reasonable cost on their business model and provides an incentive for them to police the infringing activity to the fullest extent required by the law.

The District Court's Order places no incentive on MusicCity and Grokster to do anything about the infringements. Instead, it gives them a free pass to continue making money from a service built around infringement and gives future "copycat" services the recipe to do the same. Permitting MusicCity and Grokster to "reap the benefits of countless violations by [their users], ... by merely claiming ignorance that any violation would take place" frustrates the very purpose of copyright law. Famous Music, 554 F.2d at 1215. It is fundamentally inequitable that MusicCity and Grokster can "profit[] from the infringing and unlawful activities of [their users] without shouldering any of the undesired burdens associated with protection of intellectual property rights." Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1191 (C.D. Cal. 2002).

D. The District Court's Order Effectively Deprives Songwriters And Music Publishers Of The Exclusive Rights That Congress Expressly Granted Them To Exploit Their Creations On The Internet, And Threatens To Undermine The Entire Statutory Scheme For Encouraging Songwriters To Create Musical Works And Make Them Widely Available To The Public.

For almost a century, Congress has maintained a delicate balance for songwriters and music publishers between making their musical works publicly available and ensuring that they are properly compensated for doing so. The Leiber Appellants and the certified class they represent compose and publish musical compositions. By owning and/or controlling the copyrights to the underlying music and lyrics of those compositions,⁸⁰ they have the exclusive rights

⁸⁰ JER(v.4) at 938-940 (Sanders Decl. ¶¶ 9-10, 12).

to make and distribute phonorecords containing sound recordings of their copyrighted musical works. See 17 U.S.C. §§ 106(1) and (3).

The Copyright Act subjects musical works to a statutory compulsory license for the making and distribution of phonorecords. See 17 U.S.C. § 115(a).⁸¹ This license was first introduced with the passage of the Copyright Act of 1909, when the recording industry was in its infancy and Congress became concerned that a single piano roll manufacturer – the Æolian Company – would secure a monopoly by buying up all the recording rights from popular songwriters.⁸² One of the main purposes of the compulsory license was to ensure that musical compositions were readily available to the general public by adequately compensating the creators.⁸³ Indeed, the obligation to pay the statutorily determined royalty rate (and the parallel obligation to account for them) has been described as the “essential quid

⁸¹ The compulsory license applicable to musical works is an exception to the general rule in copyright law. Literary works, motion pictures, sound recordings, and other copyrighted works are generally not subject to a compulsory license. See generally 17 U.S.C. § 101 et seq.

⁸² See, e.g., 2 Melville B. Nimmer and David Nimmer, Nimmer on Copyright (“Nimmer”) § 8.04[A], at 8-58.3 (2002); H.R. Rep. No. 2222, 60th Cong., 2d Sess., at 6 (1909); see also Arguments Before the Committee on Patents of the Senate and House of Representatives, Conjointly, on the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright, 59th Cong., 1st Sess., at 110-11, 114-15 (June 1906) (statement of John J. O’Connell, representing manufacturers of automatic piano players). Congress also specifically recognized the exclusive right of songwriters to make “mechanical” reproductions of copyrighted musical works in the Copyright Act of 1909. The term “mechanical” was used because, at the time, music was reproduced by using devices such as piano rolls – essentially long perforated sheets – that mechanically depressed a player piano’s keys to make recognizable sounds. See, e.g., Arguments Before the Committee on Patents of the Senate and House of Representatives, Conjointly, on the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright, 59th Cong., 1st Sess., at 234-35 (Dec 1906) (statement of J.F. Bowers, President of the Music Publishers’ Association).

⁸³ See, e.g., H.R. Rep. 2222, 60th Cong., 2d Sess., at 7 (1909) (“The main object [of the compulsory license] ... [is to] give to the composer an adequate return for the value of his composition[.]”).

pro quo” for imposing the compulsory license upon songwriters and music publishers.⁸⁴

In the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39 (“1995 Act”), Congress expressly amended the Copyright Act, confirming that the compulsory license provisions extend to the distribution of sound recordings by digital transmission (“digital phonorecord deliveries” or “DPDs”) on the Internet. See 17 U.S.C. § 115(c)(3)(A). By doing so, Congress recognized that the copyright laws should apply and operate no differently in the online world.⁸⁵ While songwriters and music publishers retained their right to receive the statutory royalty rate for digital transmissions of sound recordings of their works, those who wished to distribute copies of those works were assured of a compulsory license to do so (currently at a statutory rate of 8 cents per copy).⁸⁶ But Congress also anticipated that the ease of digital distribution on the Internet would also facilitate unauthorized uses. Accordingly, Congress expressly affirmed that the unauthorized making of a DPD containing a copyrighted work is an act of infringement under § 501 of the Copyright Act, subject to all of the remedies available under the Act. See id. § 115(c)(3)(H)(i).

Songwriters and music publishers rely on compliance with U.S. copyright laws to make their livings.⁸⁷ Due to the intangible nature of their works,

⁸⁴ Nimmer § 8.04[H][1], at 8-76; see also Peer Int’l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1337 (9th Cir. 1990).

⁸⁵ See, e.g., S. Rep. No. 104-128, 104th Cong., 1st Sess., at 37 (1995) (the amendments “maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CD’s ... [and] maintain mechanical royalty income and performance rights income for writers and music publishers”).

⁸⁶ See 37 C.F.R. § 255.3(k) (2002).

⁸⁷ JER(v.4) at 939-942 (Sanders Decl. ¶¶ 11, 13, 19). Notably, the compulsory license is extremely easy to obtain: the prospective licensee simply

songwriters and music publishers are particularly vulnerable to copyright infringement in the online world. Once a song has been recorded and released, the songwriter does not have the option of hiding it or locking it away. Nor can he decline to license users who wish to distribute recordings of his works and avail themselves of the compulsory license provisions in the Copyright Act. But in return for making licenses readily available, Congress made clear that those who seek to exploit copyrighted musical works without obtaining such licenses should be held fully accountable. By doing so, Congress sought to ensure that the delicate balance between encouraging creativity and enabling public access to creative works is maintained.⁸⁸

The District Court's Order upends that carefully calibrated balance, and thus thwarts Congress's express mandate. By acquitting the commercial services that exploit the rampant infringement on their services for profit, the court's decision effectively deprives songwriters and music publishers of the exclusive right that Congress expressly gave them to exploit their works on the Internet, leaving the thousands of songwriters and music publishers with no realistic recourse to protect their copyrights. The Order creates an unprecedented standard for secondary copyright liability that compels copyright owners to police the conduct of millions of individual users of MusicCity's and Grokster's Internet services and pursue individual enforcement actions against private individuals. That is simply impossible for songwriters and music publishers to do.

First, there are literally tens of thousands of songwriters and music publishers (more than 27,000 in the Leiber class alone). Many of them are

serves a notice of intention on the copyright owner and/or on the U.S. Copyright Office. See 17 U.S.C. § 115(b). The royalty rates are established in regulations promulgated by the U.S. Copyright Office. See id. § 702.

⁸⁸ See H.R. Rep. 2222, 60th Cong., 2d Sess., 7 (1909).

individuals or small businesses.⁸⁹ MusicCity's and Grokster's services have millions of users. It is simply not realistic to expect individual songwriters and music publishers to incur the expense of finding and filing suit against every individual infringer of their works.

Second, finding and litigating against individual infringers is likely to be an expensive exercise, and many, if not most of them, are likely to file for bankruptcy protection or raise other impediments to the satisfaction of a judgment or injunction against them.

This is simply not what Congress intended when it expressly affirmed the rights of songwriters and music publishers to distribute their copyrighted works on the Internet. This is likewise not what Congress intended when it expressly condemned the unauthorized distribution of those works by those who declined to avail themselves of the compulsory licenses that Congress also confirmed are available for digital distribution on the Internet. Left standing, the decision below thwarts Congress's express intent and threatens the very survival of the songwriting and music publishing communities, which rely on licensing royalties for their livelihoods.

The consequences of not correcting the serious error committed below should not be underestimated. Songwriters and music publishers are struggling to support the nascent legitimate Internet music services that comply with the law by taking licenses and paying royalties.⁹⁰ But those services cannot compete with commercial services like MusicCity's and Grokster's that make the same songs available for free. Not only does this thwart Congress's express grant of the exclusive rights to that market to Appellants (subject to a compulsory license that

⁸⁹ JER(v.4) at 936-938 (Sanders Decl. ¶¶ 3, 6).

⁹⁰ JER(v.4) at 942 (Sanders Decl. ¶ 19).

MusicCity and Grokster have chosen to ignore), but it sends a bleak message to young songwriters and prospective songwriters that they should not expect to pursue careers in songwriting like the Cole Porters, Irving Berlins, and Leiber and Stollers of the last century. Unlike their forbears, their works will be given away for free.⁹¹

The inevitable result will be a gross diminishment in the incentive to create musical works. The losers will not just be the songwriters and publishers, but also the general public, who will never get to hear those songs.⁹²

We appeal to this Court to see that does not happen.

⁹¹ JER(v.4) at 926-929 (Stoller Decl. ¶ 1-15).

⁹² See Eldred v. Ashcroft, 123 S. Ct. 769, 788 (2003) (“[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”) (quoting Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985)).

VII.
CONCLUSION

For the foregoing reasons, the judgment in favor of MusicCity and Grokster below should be reversed and summary judgment as to liability should be entered in favor of the Leiber Appellants on their contributory and vicarious copyright infringement claims. In the alternative, this Court should reverse and remand for further proceedings consistent with this Court's opinion.

DATED: August 18, 2003

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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 Leiber Appellants' Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 8,233 words.

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STATEMENT OF RELATED CASES

Pursuant to this Court's June 5, 2003 Order, this appeal has been consolidated with the appeal in Metro-Goldwyn-Mayer, Studios Inc., et al. v. Grokster, Ltd., et al., Docket No. 03-55894. Except for the MGM appeal, the Leiber Appellants know of no case currently pending that is related to this appeal.

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STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), the Leiber Appellants request that oral argument of this appeal be permitted. The Leiber Appellants submit that oral argument will assist this Court in deciding the appeal.

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