

Appeal No. 03-55894

**In The United States Court of Appeals
For The Ninth Circuit**

METRO-GOLDWYN MAYER STUDIOS INC, et al.;

Plaintiffs - Appellants,

v.

GROKSTER LTD, et al.,

Defendants - Appellees.

JERRY LEIBER, individually d.b.a Jerry Leiber Music, et al.,

Plaintiffs – Appellants,

v.

CONSUMER EMPOWERMENT BV, aka FastTrack

Defendant,

and

GROKSTER LTD, et al.,

Defendants – Appellees.

**On Appeal from the United States District Court
For the Central District of California
Case Nos. 01-08541-SVW and 01-09923-SVW
The Honorable Stephen V. Wilson**

Brief of Amici Curiae American Film Marketing Association; American Federation of Musicians; American Federation of Television and Radio Artists; American Society of Composers, Authors & Publishers; American Society of Media Photographers; Association of American Publishers; Association of American University Presses; Association for Independent Music; Association of Independent Music Publishers; The Authors Guild; Broadcast Music, Inc.; Church Music Publishers Association; Directors Guild of America, Inc.; Entertainment Software Association; Graphic Artists Guild; Imageline, Inc.; Interactive Entertainment Merchants Association; Office of the Commissioner of Baseball; Music Performance Trust Funds; National Academy of Recording Arts & Sciences, Inc.; National Association of Recording Merchandisers, Inc.; Producers Guild of America; Professional Photographers of America; Recording Artists Coalition; Rhythm & Blues Foundation; SESAC, Inc.; Screen Actors Guild; Songwriters Guild of America; and Video Software Dealers Association Urging Reversal.

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CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1, *amici* state that none of the organizations participating as *amici* has any parent companies. While Broadcast Music, Inc. has no parent corporation, 10% or more of its stock is held by Gannett Co., Inc., through an indirect, wholly owned subsidiary.

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INTEREST OF AMICI

Amici are 29 diverse organizations that represent the authors, composers, creators, producers, distributors, retailers, and copyright owners of copyrighted works, including computer software, interactive video games, music, film, television, literature and photographic art.

Amici are united by a single concern: piracy through unauthorized copying and distribution of their intellectual property over the Internet. Internet piracy – though it first affected the music industry – now plagues professional sports, software retailers and distributors, professional photographers, authors and publishers, motion picture and television actors, producers, directors and distributors and multiple guilds and their members. All of the affected industries have experienced substantial losses in sales and revenue because of Internet piracy, which has robbed creators and others of the rewards to which they are entitled as a result of their efforts.

If these industries are denied the effective protection of copyright laws, they will stop investing in the creation of works, which would not only result in a loss of tens of thousands of skilled

jobs, but also the loss to current and future generations of the experience and enjoyment that creative works provide.

Amicus AFMA (formerly the American Film Marketing Association) is a trade association representing more than 150 independent producers and distributors of motion pictures and television programming.

Amicus American Federation of Television and Radio Artists is a national labor union representing approximately 80,000 performers and newsmen.

Amici American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; and SESAC, Inc. are membership associations that between them represent hundreds of thousands of composers, lyricists, and music publishers.

Amici Professional Photographers of America and American Society of Media Photographers, Inc. represent photographers and photographic artists from dozens of specialty areas.

Amici Association of American Publishers and Association of American University Presses are national trade associations representing publishers.

Amicus The Authors Guild is the nation's oldest and largest professional society of published authors, representing more than 8,000 writers.

Amici the Association of Independent Music Publishers and the Church Music Publishers Association are associations that work on behalf of the interests of music publishers.

Amici Directors Guild of America, Inc.; Producers Guild of America; and Screen Actors Guild, Inc. are labor organizations that collectively represent tens of thousands of individuals who earn a living in entertainment and the arts.

Amicus Entertainment Software Association is a trade association dedicated to serving the business and public affairs needs of companies that publish video games.

Amicus Graphic Artists Guild, Inc. is a national union that serves illustrators, designers, web creators, production artists, surface designers, and other visual creatives.

Amicus Imageline, Inc. is a developer of electronic graphic arts content that has experienced wide-scale piracy of its electronic images by internet file sharing.

Amici the Interactive Entertainment Merchants

Association; the National Association of Recording Merchandisers, Inc.; and Video Software Dealers Association are trade associations that represent retailers entertainment products.

Amicus Music Performance Trust Funds annually co-sponsors approximately 15,000 individual programs that reach audiences of several million people.

Amicus the National Academy of Recording Arts & Sciences, Inc. is an organization of more than 15,000 musicians, producers, and other recording professionals, which annually bestows the GRAMMY Awards.

Amicus Office of the Commissioner of Baseball represents the thirty clubs engaged in the professional sport of Major League Baseball.

Amicus Recording Artists Coalition is a nonprofit, non-partisan coalition comprised of the most well known recording artists in the world.

Amicus Rhythm and Blues Foundation is the only independent nonprofit service organization solely dedicated to the historical and cultural preservation of Rhythm & Blues music.

Amicus The Songwriters Guild of America is an unincorporated voluntary association of approximately 5,000 songwriters.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises from the lower court's radical reformulation of traditional copyright law principles in a case involving the Grokster and related Streamcast peer-to-peer Internet networks. The Grokster defendants are among several peer-to-peer Internet "file sharing" services with analogous business models and similar sounding names (*Napster*, *Aimster*, *Grokster*) whose revenue models depend on providing users with free access to infringing content, including in this case copyrighted motion pictures, television programs and sound recordings.

In contrast to Ninth Circuit and Seventh Circuit opinions involving Napster and Aimster, the lower court in this case deviated dramatically from case law governing contributory and vicarious infringement. It articulated new, narrow standards that are unsupportable under controlling precedent and constitute terrible public policy. As detailed in this brief, the district court's misapplication of law, if permitted to stand, will create loopholes in the law of contributory and vicarious copyright infringement that will frustrate efforts to limit online piracy and serve to encourage and embolden potential infringers of creative works.

I. COPYRIGHT OWNERS, ARTISTS, CREATORS, AND RETAILERS REQUIRE PREDICTABLE, CONSISTENT INTERPRETATIONS OF CONTRIBUTORY AND VICARIOUS COPYRIGHT LIABILITY TO COMBAT MASSIVE ONLINE PIRACY □□□ □

This appeal involves Internet piracy, but has ramifications that go well beyond the particular facts of the present lawsuit. Piracy – or the practice of third parties profiting through the theft of copyrighted works – affects all rights owners, as well as businesses that sell works to consumers. Among other things, piracy reduces sales of original works and prevents the emergence of legitimate on-line markets. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 913 (C.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

The music industry in particular has been badly injured by the easy accessibility of compressed music files that transfer relatively quickly and easily over the Internet. *See, e.g., Lev Grossman, It's All Free!*, Time Magazine, May 5, 2003, at 60 (noting, among other things, that CD album sales dropped from 712 million units in 2001 to 680 million units in 2002 and was off by another 15 million units just in the first quarter of 2003).

Increased bandwidth, better compression technologies and more powerful computers improve the ability of pirates to quickly and efficiently deliver infringing content. These changes increasingly threaten the motion picture and television industries, whose works previously were viewed as too large to be the subject of wide-scale Internet piracy. Thus, unlike Napster, the Grokster defendants offer television shows and movies in addition to music. An estimated 400,000 and 600,000 movies are copied and distributed each day from these services (*It's All Free, supra*), with infringing copies of protected films such as *Lord of the Rings* and *Harry Potter* often available on defendants' websites at the same time they are in theatrical release (Cole Decl. ¶ 4).

The prevalence of services that foster infringement (such as defendants) has also had an adverse affect on attitudes about online piracy. For example, as of July 2003 “a striking 67% of Internet users who download music say they do not care about whether the music they have downloaded is copyrighted.” *Music Downloading, File-sharing and Copyright: A Pew Institute Internet Project Data Memo*, July 2003. This study is borne out by evidence that while up to 89 million Americans have downloaded music files, only a tiny

fraction (less than 1%) claimed to use legitimate (as opposed to pirate) services. *See The National Record Buyers Study*, Edison Media Research, July 16, 2003.

The doctrines of contributory and vicarious liability are the most viable means to combat Internet piracy. These doctrines permit copyright owners to stem infringement at its source – the pirates who induce, cause or materially contribute to infringement or who have the right and ability to control it and have a direct financial interest in its continuation. Moreover, they are especially valuable in cyberspace, where direct infringers act anonymously or pseudonymously – often at the encouragement of persons such as the defendants – and thereby increase the costs and complexity of individual enforcement.

Although education and suits against direct infringers may be used to combat piracy, copyright owners must ultimately rely on the doctrines of contributory and vicarious liability. Many of these Internet pirate services do not actually make infringing copies themselves and therefore potentially could not be held directly liable for copyright infringement. Instead, they provide the tools and

instructions on how to make “free” copies, or “file share” protected works, as an inducement to generate traffic or advertising revenue.

The lower court’s radical recharacterization of the traditional tests for contributory and vicarious liability would deny them this protection and not only affect the rights owners who filed suit, but also the hundreds of thousands of musicians, artists, singers, producers, directors, songwriters, performers, photographers, publishers, software vendors, videogame distributors, and retailers whose ability to earn a living depends on the continuity of well established legal standards for copyright infringement.

II. THE LOWER COURT DEPARTED FROM CONTROLLING PRECEDENT IN HOLDING THAT LIABILITY FOR CONTRIBUTORY INFRINGEMENT MAY NOT BE IMPOSED BASED ON CONSTRUCTIVE OR IMPUTED KNOWLEDGE AND BY IMPOSING A TEMPORAL REQUIREMENT ON WHEN ACTUAL KNOWLEDGE MAY LEAD TO LIABILITY

The lower court committed reversible error in holding – contrary to all governing authority – that contributory copyright infringement may be imposed only where a defendant has actual, as opposed to *constructive* or imputed knowledge of infringement. Because the lower court declined to consider whether liability could be imposed on this latter basis, its opinion should be reversed.

Further, with respect to *actual* knowledge, the lower court announced a test that, as applied by it, reflects an unprecedented narrowing of traditional copyright law principles. The lower court inappropriately required that knowledge of infringement exist at the specific moment in time when an infringing copy is made. On this basis, as well, the district court’s opinion should be reversed.

A. Unduly Narrow Reformulation of the Test for Contributory Infringement to Eliminate Constructive Knowledge

Contributory copyright infringement is a judicial doctrine that has been recognized by the U.S. Supreme Court in *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 434-35 (1984). As explained by the Court, the basis for applying the doctrine, as under patent law, is “*constructive knowledge* of the fact that [a defendant’s] customers may use [its] equipment to make unauthorized copies of copyright[ed] material.” *Id.* at 439 (emphasis added).

Likewise, in the first *Napster* decision¹ – *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (“*Napster I*”) – the Ninth Circuit, relying on decades of well established precedent, held

¹ A second decision by the Ninth Circuit – *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002) (“*Napster II*”) – affirmed the district court’s shut down order requiring Napster to cease

that “[c]ontributory liability requires that the secondary infringer ‘know or have reason to know’ of direct infringement.” *Id.* at 1020, citing *Cable/Home Communication Corp. Network Prods., Inc.*, 902 F.2d 829, 845 & 846 n.29 (11th Cir. 1990); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1373-74 (N.D. Cal. 1995); see also *Adobe Systems Inc. v. Canus Productions, Inc.*, 173 F. Supp. 2d 1044, 1048 (C.D. Cal. 2001) (“Contributory infringement requires that the secondary infringer ‘[k]now, or have reason to know’ of direct infringement.”); *Los Angeles News Service v. Reuters Television Intern., Ltd.*, 942 F. Supp. 1265, 1270 (C.D. Cal. 1996) (“A defendant is contributorily liable for infringement when it has actual or constructive knowledge of the infringement and it materially contributes to the infringing activity.”).

Applying this standard to evidence before it in the *Napster I* case, the Ninth Circuit found that it was “apparent from the record that Napster ha[d] knowledge, *both actual and constructive*, of direct infringement.” 239 F.3d at 1020 (emphasis added). Judges Beezer, Schroeder, and Paez found constructive knowledge based on the fact that Napster executives had (a) recording industry experience; _____ operations because it had failed to do everything in its power to prevent users of its service from engaging in copyright infringement.

(b) enforced intellectual property rights in other instances; (c) downloaded copyrighted songs from Napster; and (d) promoted the site with “screen shots listing infringing files.” *Id.* at 1020 n.5.

By contrast, the district court in this case ruled that “[e]vidence of actual knowledge of specific acts of infringement is required for contributory liability” (*MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003); emphasis in original) and that “liability for contributory infringement accrues where the defendant has actual – not merely constructive – knowledge of the infringement at a time during which the defendant materially contributes to the infringement.” *Id.* at 1036, *citing Napster I*, 239 F.3d at 1020-22. Though the district court cited to *Napster I*, it recast the test for contributory infringement in even narrower terms: “defendants are liable for contributory infringement *only* if they (1) have specific knowledge of infringement at a time when they contribute to the infringement, and (2) fail to act upon that information.” 259 F. Supp. 2d at 1036 (emphasis added).

Under this re-formulation of the test, however, liability could not have been established in *Napster I* itself, except based on actual knowledge, notwithstanding the Ninth Circuit’s express finding

that liability in that case was justified based on the defendant's constructive knowledge of the use of its system by third parties to engage in direct infringement.²

Unlike the district court's unprecedented narrowing of well established standards for imposing contributory infringement, the Seventh Circuit, in *In re Aimster Copyright Litig.*, 334 F.3d 643, No. 02-4125, 2003 U.S. App. LEXIS 13229 (7th Cir. June 30, 2003) ("*Aimster*"), a more recent decision, reaffirmed that liability for contributory infringement may be based on *either actual or constructive knowledge*. *Id.* at *16-17. Indeed, the Seventh Circuit expressly rejected the same arguments advanced by the defendants in this case. *Id.* ("We . . . reject Aimster's argument that because the Court said in Sony that mere 'constructive knowledge' of infringing uses [without more] is not enough for contributory infringement . . . and the encryption feature of Aimster's service prevented Deep from

² In support of this cramped interpretation, the district court cited *Napster I* for the proposition that "if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement." *Grokster*, 259 F. Supp. 2d 1036, citing *Napster I*, 239 F.3d at 1021. While this is correct, it does not represent a comprehensive statement of the grounds on which liability may be imposed. As noted above, the Ninth Circuit also found that Napster could be held contributorily liable for knowledge that was imputed to Napster's executives based on their previous experiences.

knowing what songs were being copied by the users of his system, he lacked the knowledge of infringing uses that liability for contributory infringement requires. Willful blindness is knowledge, in copyright law . . . as it is in the law generally.”).

Constructive knowledge was shown by evidence that the tutorial Aimster’s software provided on the sharing and copying of files included as its only example copyrighted materials that the recording industry had informed Aimster were being infringed; and the fact that Aimster’s revenues depended upon a subscription service which, in practice, resulted in infringement of copyrights on top-40 music selections. *Id.* at *22-23.

In this case, however, the district court did not consider whether constructive knowledge afforded a basis for contributory liability, in spite of persuasive evidence on this point.³ Instead, it departed from *Napster I*, *Napster II* and *Aimster* – where liability was imposed on peer-to-peer “file sharing” services based on similar facts

³ The district court acknowledged that defendants operated “a peer-to-peer *network*” (259 F. Supp. 2d 1032; emphasis added) and that “it is undisputed that Defendants are generally aware that many of their users employ Defendants’ software to infringe copyrighted works” *Id.* at 1038. Indeed, in this case, there was uncontroverted evidence that over 90% of the files on defendants’ FastTrack network were infringing (75% of which were owned by plaintiffs). Olkin Declaration ¶ 16; Creighton Opposition Declaration ¶¶ 5-6.

– because the file indices generated by defendants’ services appear on users’ computers, rather than on a central server owned by defendants (as in the *Napster* cases), and because “[i]f either Defendant closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption” (*id.* at 1041) whereas “[i]f Napster deactivated its computers, users would no longer be able to share files through the Napster network.” *Id.*

These ostensible distinctions, however, are not material to determining whether defendants had knowledge that their service was being used to make infringing copies. As a matter of law, whether individual users could continue engaging in direct infringement if a network is ordered shut down is irrelevant. Direct infringers presumably were still able to meet directly to exchange bootlegged tapes, even after liability was imposed on the flea market in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996). The fact that users could continue direct infringement outside defendants' direct control has no bearing on whether defendants *knew or should have known* about infringement.

Moreover, as a factual matter, the district court's assumption that defendants' networks could not be shut down, but that Napster, with a central server, could be deactivated is contradicted by evidence. First, one of the defendant networks was, in fact, disabled during the pendency of this case. (SUF 6(m)). Second, there was uncontroverted evidence that when the Ninth Circuit affirmed the shut-down order in *Napster I*, users continued to “share” infringing media files using Napster software. (SUF 3(c)).

The ostensible “technological distinction” drawn by the district court thus does not justify or explain its misapplication of law. Nor may the lower court’s departure from precedent be justified based on the medium at issue.⁴ Accordingly, the district court’s ruling should be reversed.

B. Knowledge May be Imputed Based on Willful Misconduct or “Turning a Blind Eye”

The lower court also erred in refusing to impute to defendants knowledge based on what the Seventh Circuit in *Aimster* characterized as “ostrich-like” conduct in operating a business that

⁴ As recognized by the U.S. Supreme Court, the Copyright Act is intended to be media-neutral. *See New York Times v. Tasini*, 533 U.S. 483, 502, 513 (2001).

used infringing copies of plaintiffs' works to generate revenue for itself. 2003 U.S. App. LEXIS 13229, at *32.

Contributory copyright infringement is “predicated upon ‘the common law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor’” *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (quoting an earlier case). In this case, the lower court acknowledged that it was “not blind to the possibility that Defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares.” *Grokster*, 259 F. Supp. at 1046. Indeed, there was evidence that the decentralized configuration of defendants' networks was intentionally set up to shield these third-generation Napster clones from the Ninth Circuit's *Napster* decisions. *See* Appellant's Brief; *see also* *MGM v. Grokster*, 243 F. Supp. 2d 1073 (C.D. Cal. 2003) (evaluating Kazaa BV's transfer of its website and domain name to a company organized under the laws of the island nation of Vanuatu to evade jurisdiction).

Nevertheless, contrary to binding precedent, the district court did not consider this evidence in evaluating whether, as in *Napster I*, *Napster II* and *Aimster*, the Grokster defendants should be held liable based on willful ignorance.

In rejecting the very same argument accepted by the district court in this case – that liability for contributory infringement may only be imposed where actual, as opposed to constructive knowledge is shown – Judge Posner in the *Aimster* case cogently explained that simply “because the Court said in *Sony* that mere ‘constructive knowledge’ of infringing uses [without more] is not enough for contributory infringement, . . .” does not mean that a defendant may avoid liability entirely for contributory infringement absent evidence of actual knowledge. *See* 2003 U.S. App. LEXIS 13229, at *16-17.

Relying on *Napster I*, Judge Posner wrote that “[w]illful blindness is knowledge in copyright law” *Id.* at *17, *citing Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987); *see also Napster I*, 239 F.3d at 1023 (writing, in connection with vicarious liability, that “[t]urning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability”). Judge Posner therefore

disregarded the defendant's suggestion that because files copied were encrypted "he lacked the knowledge of infringing uses that liability for contributory infringement requires." *Aimster*, 2003 U.S. App. LEXIS 13229, at *17.

Instead, reasoning by analogy to criminal law, Judge Posner explained that "[o]ne who, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings is held to have a criminal intent . . . because a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind." *Id.* at *17-18 (citations omitted). Elsewhere, Judge Posner wrote that *Aimster*, in establishing its system so that it could not in fact identify the content exchanged by its users, "must take responsibility for that self-inflicted wound." *Id.* at *29; *see also Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1058 (C.D. Cal. 2002) (ruling that even though defendant may not have received actual notice, it "should have known about the infringement" because it failed to receive the communication through "its own fault"; also noting that a contrary rule would encourage services "to remain

willfully ignorant in order to avoid contributory copyright infringement liability”).

Judge Posner’s analysis is consistent with the Ninth Circuit’s own alternative characterization of the test for contributory infringement – that liability may be imposed where a defendant “engages in ‘personal conduct that encourages or assists the infringement.’” *Napster I*, 239 F.3d at 1019, quoting *Mathew Bender & Co. v. West Publishing Co.*, 158 F.3d 693, 706 (2d Cir. 1998).

Although merely selling a “staple article of commerce” (such as a VCR recorder) “does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes . . . [or is] capable of substantial noninfringing uses” (*Sony*, 464 U.S. at 442), the evidence in this case plainly shows that the defendants operated services from which they earned advertising revenue, rather than selling a “staple article of commerce” such as application software,⁵ and that their services were put to overwhelmingly infringing uses.⁶ *Grokster*, 259 F. Supp. 2d at

⁵ A different standard should apply in a case involving a service, as opposed to a “staple article of commerce.” *Aimster*, 2003 U.S. App. LEXIS 13229, at *12.

⁶ In *Sony*, there was evidence that approximately 75% of the copies made with VCRs had been made for purposes of time shifting, which was deemed a fair use. 464 U.S. at 424 n.4. In this case, the numbers

1037 (“Plaintiffs point to a massive volume of similar evidence (comparable to the evidence in *Napster I*, *Napster II* and *Aimster*), including documents suggesting that both Defendants marketed themselves as ‘the next Napster,’ that various searches were performed by Defendants’ executives for copyrighted song titles or artists, that various internal documents reveal Defendants were aware that their users were infringing copyrights, and that Plaintiffs sent Defendants thousands of notices regarding alleged infringement.”).

The district court’s refusal to consider whether knowledge should have been imputed to defendants based on this “massive volume of similar evidence” was a legal error that requires reversal.

are reversed: more than 90% of the content on defendants’ service constitutes copies of copyrighted media files, 75% of which belong to the named plaintiffs. Olkin Declaration ¶ 16; Creighton Opposition Declaration ¶¶ 5-6. Thus, the *Grokster* defendants cannot avail themselves of the *Sony* defense that their services are widely used for legitimate, unobjectionable purposes or are capable of substantial noninfringing uses.

Although Judge Posner disagreed with the Ninth Circuit’s *Napster I* ruling with respect to the level of proof required to establish contributory infringement in cases where substantial noninfringing uses are shown (citing the 75% fair use finding in *Sony* as an example), this is plainly not such a case. Here, there was no quantification in the district court’s order of the amount of non-infringing use that allegedly occurred (the residual 10% of unidentified content, beyond the 90% that was copyrighted, may have also included protected works).

C. The Requirement that Actual Knowledge Exist At The Moment When An Act of Infringement Occurs Is Inconsistent With Controlling Precedent and An Unworkable Standard For Digital Media

The lower court’s re-formulated test for contributory infringement – that liability may attach to defendants “*only* if they (1) have specific knowledge of infringement at a time when they contribute to the infringement,⁷ and (2) fail to act upon that information” (259 F. Supp. 2d at 1036; emphasis added) – is also inconsistent with governing precedent by imposing a temporal requirement that knowledge and infringement occur at the exact same point in time (in this case at the very moment – or perhaps several moments, depending arbitrarily on the speed of a given users’ connection to the Internet – when a song or other media file transfers from the hard drive of one user of defendants’ services to another).

Implicit in this test is the notion – underscored by the court’s holding for the defendants in this case – that liability may *not* be imposed even where defendants have specific knowledge of infringement, so long as they can claim ignorance at the specific moment when an act of direct infringement occurs. This

⁷ As applied by the district court, the test would have required knowledge at the moment when a work was copied from one user’s computer to another.

unprecedented formulation – that cause and effect occur simultaneously – elevates form over substance, and merely encourages infringers to separate artificially their contribution to infringement (at which time they have “knowledge” under the district court’s test) from the point in time when a copy is actually made.

The requirement of specific knowledge at the specific time when defendants “contribute” to infringement (interpreted to mean at the very moment of direct infringement) represents a departure from prior case law. In *Napster I*, the Ninth Circuit held that the duty to remove infringing content or block access arose after the service provider had knowledge that infringing conduct was occurring, not specific knowledge of a given act of infringement at the moment it took place. 239 F.3d at 1022 (“The record supports the district court’s finding that Napster had actual knowledge that specific infringing material is available using its system, that it could block access to the system by its suppliers of the infringing material, and that it failed to remove the infringing material.”). Evidence of these exact same circumstances have been demonstrated here.

Similarly, in *Napster II*, the Ninth Circuit affirmed the district court’s shut down order where the plaintiffs had provided

notices of infringing material and the defendants had subsequently failed to do everything in their power to remove or block the infringing content. 284 F.3d at 1098.

In *Aimster*, liability likewise was premised broadly on knowledge (that defendants knew or should have known how their service was being used) – not narrowly on actual knowledge at the specific moment in time at the end of the process when encrypted files were transferred. Indeed, in that case, as in the present one, defendants argued that because of the way they had established their service, it was impossible to know precisely what files were being copied by their users. Under the district court’s strict temporal requirement, defendants would have escaped liability in *Aimster*. Instead, because the Seventh Circuit applied traditional contributory copyright standards, Judge Posner affirmed the preliminary injunction order against Aimster.

Liability for contributory infringement also has been imposed by various district courts in cases involving online infringement, where the defendant induced, caused or materially contributed to third party acts of infringement, albeit not necessarily at the exact moment in time when the infringing conduct occurred. *See*,

e.g., Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503 (N.D. Ohio 1997) (subscribers encouraged to upload adult photographs to defendants' BBS, inducing, causing or materially contributing to infringement of plaintiffs' 412 images, which accounted for approximately 0.003% of content accessible from the service); *Sega Enterprises, Ltd. v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996) (contributory infringement found where the defendant marketed a device that allowed users to convert software from Sega's proprietary format to a disk, thereby facilitating unauthorized copying and uploading to defendants' service; the act of contribution through sale of the device necessarily preceded the act of copying).

Indeed, liability for contributory infringement has been found on the basis of little more than links to third party websites that contained infringing material, where the links and related notices induced, caused or materially contributed to users going to third party sites where they *thereafter* made infringing copies of protected material. *See Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999) (links to third party sites where infringing copies of a literary work could be downloaded or copied, where defendants had previously made copies available

directly at their website); *Arista Records, Inc. v. MP3Board, Inc.*, Copy. L. Rep. (CCH) ¶ 28, 483 (S.D.N.Y. Aug. 22, 2002) (denying defendant's motion for summary judgment because its provision of an “automated system devoted to searching for, aggregating, and organizing links” to infringing works presented a triable issue of fact).

The lower court’s standard merely encourages infringers to artificially separate their contribution to infringement (at which time they have “knowledge,” under the district court’s test) from the actual point when a copy is made by a user (among other things, elevating form over substance). Ironically, in applying its new, unduly narrow legal test to find for defendants, the district court commented that it was “not blind to the possibility that Defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares.” 259 F. Supp. 2d at 1046. But the district court nonetheless chose to respect this false “segregation” of activity” even though it also found that the defendants were generating substantial advertising revenue from their networks.

The district court actually refused to consider evidence that the defendants had blocked pornographic and other content,

periodically provided users with software updates, and retained the ability to block infringing content, and that one defendant had even shut down its entire network at one point.

Ultimately, the district court's requirement that knowledge exist at the moment in time when a file is copied would effectively make it impossible to ever enjoin online piracy. Given that information may be disseminated in digital form – indeed in a matter of minutes a single media file may be replicated thousands or millions of times and downloaded or emailed around the world – it is next to impossible for a copyright owner to monitor and interrupt at the point of detection any and every attempt to make an illicit copy. The district court's temporal requirement would impose a burden on copyright holders (and others who depend on the lawful sale of copyrighted material) that is so substantial that it would preclude effective relief.

III. THE LOWER COURT DEPARTED FROM CONTROLLING PRECEDENT IN LOOKING TO OWNERSHIP OR DIRECT OPERATION OF A CENTRAL SERVER, RATHER THAN ABILITY TO CONTROL, AS THE STANDARD FOR IMPOSING VICARIOUS LIABILITY AND IN DECLINING TO HOLD DEFENDANTS ACCOUNTABLE FOR THE NETWORKS THEY PUT IN PLACE

The district court also erred in refusing to hold defendants vicariously liable for their own conduct, or to ascribe to them an ability to control the systems that they created and/or operated and from which they continue to earn revenue.

Vicarious liability may be imposed where a defendant (1) has the right and ability to supervise the infringing activity, and (2) has a direct financial interest in it. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996); *Napster I*, 239 F.3d at 1022.

In this case the district court found that defendants had a financial interest in their service because they earned advertising revenue in proportion to the popularity of their “file sharing” service. *Grokster*, 259 F. Supp. 2d at 1043. The district court, however, ruled that defendants did not ostensibly have the ability to control the services they created and/or operated and therefore could not be found vicariously liable. *Id.* at 1045.

As with its contributory infringement analysis, the district court reached this conclusion only by refusing to ascribe to defendants responsibility for their own conduct. In finding that defendants provided software that then ostensibly operated outside of their control (*id.*) the district court adopted a circular standard that allows defendants to escape responsibility for their own misconduct.

Though defendants plainly set in motion a series of harmful events – from which they continue to profit at the expense of copyright holders – they escape liability, under the lower court’s opinion, so long as they have significantly diminished (or, better yet, eliminated) their ability to avert any subsequent harms. In effect, the district court’s decision permits defendants to profit from technological time-bombs they have dispersed throughout the Internet, and can affect through software updates and blocking mechanisms, so long as they do not trigger the devices at the moment they explode.

A. The District Court Adopted An Unreasonably High Standard for Establishing Control 

Under *Napster I* – which is controlling precedent – control may be shown by evidence of “[t]he ability to block infringers’ access to a particular environment for any reason whatsoever” 239 F.3d at 1023. The lower court failed to apply

this standard, however, and instead looked to whether the infringing conduct occurred on a central server operated by the defendants, as in *Napster I*, and whether that network control afforded a basis for controlling infringing conduct.

Finding that this purported “requirement” from *Napster I* was not met, because defendants operated networks that were more decentralized than the earlier-generation Napster software service, the lower court excused defendants from any responsibility to make their software service less susceptible to infringing uses. 259 F. Supp. 2d at 1045.

Whether defendants retained ownership or control of specific computers used to index songs for copying, as the lower court required, is irrelevant. Defendants plainly retained *the ability* to block user access to particular content, which is all that *Napster I* requires. (SUF 6(m) and 6(i)).

Defendants further could control infringing conduct by means of existing filtering technology, which they could provide together with software updates. The lower court acknowledged that defendants had included filters that screened for pornography (259 F. Supp. 2d at 1045), but then refused to consider the ability of

defendants to provide updates (*id.* at 1042; “irrelevant”) or to employ filtering technologies to control infringing conduct (*id.* at 1045; “immaterial”).

The lower court’s insistence – that defendants own and operate the very networks on which the infringing conduct occurs – is an inaccurate reading of *Napster I* (and also factually incorrect – *see* Appellant’s Opening Brief at 45-48). The lower court’s requirement runs contrary to other decisions that have found vicarious liability based on infringing conduct on networks that a defendant did *not* own or operate.

In *Perfect10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002), for example, vicarious liability was imposed on the operator of a service that provided age verification for users who wanted to access third party adult websites. The defendant did not own or operate the third party websites where infringing copies of plaintiffs’ photographs had been posted. However, liability was imposed because the defendant had the ability to block access to websites that contained infringing content (much in the same way that defendants could in this case).

The *Perfect10* court rejected the defendant's argument that it was not engaged in infringement because its servers did not hold the infringing content:

[Cybernet's] argument attempts to distinguish the Adult Check system from Napster's system because the images used in the Adult Check system do not pass through [its] hardware. . . . Focusing on the ability to control the sites found in its system, the Court concludes that Perfect 10 has established a strong likelihood of success. As mentioned earlier, Cybernet has a monitoring program in place. . . . This ability to control other types of images belies any attempt to argue that Cybernet does not exercise sufficient control over its webmasters to monitor and influence their conduct or to deny copyright offenders the benefits of its service.

213 F. Supp. 2d at 1173 (citing other cases).

The court found Cybernet liable for vicarious copyright infringement, "like the swap meet in *Fonovisa*," "not only [because it] has the right to terminate webmasters at will" but also because "it controls consumer access, and promotes its services." 213 F. Supp. 2d at 1174. These activities, combined with policing of websites, were sufficient to establish a strong likelihood of success for "right and ability to control" even though Cybernet's servers did not hold the infringing content. *Id.*

Likewise, in *Arista Records, Inc. v. MP3Board, Inc.*, Copy. L. Rep. (CCH) ¶ 28, 483 (S.D.N.Y. August 22, 2002), the court

found defendant's vicarious liability to present a triable issue of fact where it ran an "automated system devoted to searching for, aggregating, and organizing links" to infringing works but did not own or operate the third party sites that actually hosted infringing content. The court found that there was evidence that the defendant maintained the "right and ability to control" because it could delete the links from its database, and thus prevent them from being displayed to users, it had a stated policy of not permitting links to pornography, hate or hacker sites, or infringing "warez" software, and it had in fact removed offending links from the site and banned repeat offenders.

Under the proper standard, as applied in *Napster I* and all other vicarious liability cases, defendants should have been held liable because they retained the ability, which they have exercised in the past, to control user conduct (by, among other things, excluding users from their network, issuing software updates, and incorporating filtering technologies in their software updates).

B. Liability Based in Willful Blindness

Liability for vicarious infringement also may be found where a defendant deliberately sets up a system to profit from

infringement in a way where it cannot specifically control the infringing conduct of users of its service.

In *Napster I*, the Ninth Circuit ruled that “[t]urning a blind eye to detectable acts of infringement for the sake of profit gives rise to [vicarious] liability.” 239 F.3d at 1023. Similarly, although the Seventh Circuit found it unnecessary to reach the issue of vicarious liability in *Aimster*, Judge Posner cited this standard approvingly, when taking account of the fact that Aimster’s encryption acted to conceal the identity of specific content, and in writing that “[w]illful blindness is knowledge in copyright law” *Aimster*, 2003 U.S. App. LEXIS 13229, at *17, citing *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987).

In *Playboy Enterprises, Inc. v. Webworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *aff’d mem.*, 168 F.3d 486 (5th Cir. 1999), vicarious liability was imposed on a defendant who wrote and programmed intelligent agent software that automatically culled visual images from the Usenet (a tiny percentage of which were infringing copies of plaintiffs’ works). The court rejected defendant’s objection that he did not have the ability to control the bots that automatically trolled the Internet for visual images because, as here, it

was the defendant himself who initially programmed the software and arguably could have changed the parameters to avoid infringement. The court cautioned that “[i]f a business cannot be operated within the bounds of the Copyright Act, then perhaps the question of its legitimate existences needs to be addressed.” 968 F. Supp. at 1175.

The lower court’s decision should be reversed because it failed to properly evaluate evidence of defendants’ ongoing participation (and profit) from, and ability to control, infringing conduct and failed to hold accountable defendants who knowingly created and/or operate their services to profit from third party acts of copyright infringement. If allowed to stand, it would permit companies such as those operated by defendants to misappropriate the royalties meant for copyright holders (and those who depend on the lawful sale of copyright material) to an extent that would be limited only by their technological imagination.

CONCLUSION

The lower court acknowledged that it was “not blind to the possibility that Defendants have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares” but

stated that it felt constrained not to act in the absence of further legislative guidance. 259 F. Supp. 2d at 1046.

The standards for contributory and vicarious liability are based on case law principles, however (as underscored by the U.S. Supreme Court in *Sony*), not specific language in the Copyright Act that courts are duty bound to apply, particularly where doing so would lead to troubling outcomes. The district court's rigidity, in literally applying language from *Napster I* taken out of context, therefore is wholly inappropriate.

More significantly, however, the lower court failed to apply governing precedent on constructive or imputed knowledge, enunciated new and unprecedented narrow tests for contributory and vicarious liability and reached a counter-intuitive result that is inconsistent with *Napster I*, *Napster II* and *Aimster* (and decades of case law on the traditional standards for contributory infringement and vicarious liability). Unless reversed, the district court's radical reformulation of the standards for third party copyright liability will serve to embolden and empower potential infringers and dramatically increase the costs of infringement to Amici and to the American economy.

Respectfully submitted,

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I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, had a typeface of 14 points, and contains 6,960 according to the word count of the word-processing system used to prepare this brief.

Dated: August 25, 2003

Ian C. Ballon

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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.

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Candi Saul