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Comment

***646 HOW SONY SURVIVED: PEER-TO-PEER SOFTWARE, GROKSTER, AND CONTRIBUTORY
COPYRIGHT LIABILITY IN THE TWENTY-FIRST CENTURY**

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Introduction

Imagine, if you will, an enterprising graduate student in computer programming at a top tier university. One fateful night, this young man--who for simplicity's sake we will call Eric--grows tired of working on his master's thesis and is eager for some healthy procrastination. Inspired by the likes of Project Gutenberg, [\[FN1\]](#) this ambitious student decides to design a software program that will allow him and his fellow students to freely share electronic books (so-called eBooks) for leisure reading outside of the classroom. Rather than making the books available on a central server or Web site, Eric instead designs a file-sharing program, which he aptly names Bookster. Bookster relies on a "peer-to-peer" ("**P2P**") distribution network, [\[FN2\]](#) which means that the available books do not reside on a central server, but rather are shared over a network of autonomous computer users, who link up with each other using the Bookster software. Anyone who wants to join Eric's network of bibliophiles simply downloads Eric's Bookster program, installs it on a computer, ***647** and sets up a user name. Within minutes, the user is capable of scanning the network for available books and downloading them from other members' computers. These eBooks can be downloaded in a matter of seconds and then read on a computer screen, printed out, or transferred into a hand-held device.

Within a matter of days, most of Eric's friends have joined the Bookster network; within two weeks, the program's popularity has reached the undergraduates on campus, who join Bookster at a feverish rate. Within a month, there are over 500,000 people logged onto the Bookster network at any given moment in time--students and non-students alike. And because the available catalogue of eBooks depends on how many users--and which ones--are logged onto the Bookster network at a given time, the growth in members leads, indirectly, to a much richer selection of texts. Mark Twain's *The Adventures of Huckleberry Finn*--a public domain work no longer protected by United States copyright law--is the most popular book that is exchanged over the network; Stephen King's *IT*, however, which is a copyright-protected work, ranks a

close second.

Meanwhile, our graduate student, Eric, focuses the bulk of his energy on his voluminous master's thesis, maintaining minimal oversight over the Bookster network--as the Bookster network is wholly self-sufficient, little oversight is required in the first place. Nor does Eric derive any income from Bookster; in fact, his interest in designing the program stemmed, more than anything else, from his life-long love of books.

Unfortunately, Stephen King's publisher, Simon & Schuster, receives word of Mr. King's popularity on the Bookster network. Simon & Schuster recognizes that it would be unduly burdensome to track down every person who has downloaded a book from Bookster during the last few months (not to mention the fact that some of those downloads were, in fact, freely-exchangeable public domain works). Therefore, the publisher chooses instead to sue Eric, as the original designer of Bookster, in a federal district court, alleging contributory copyright infringement in violation of the United States Copyright Act. [FN3] The publisher demands monetary damages from Eric and asks that the court issue an injunction to cease the operation of the Bookster network. Should Eric be liable for contributory copyright infringement?

*648 On June 27, 2005, the United States Supreme Court--by issuing its decision in *MGM Studios Inc. v. Grokster, Ltd.* [FN4]--attempted to answer that question once and for all, and to settle the doctrinal confusion that had been escalating between the federal circuits over the issue of contributory copyright liability. This confusion, which had gradually percolated its way up to the Supreme Court over a twenty-year period, was based on fundamentally conflicting interpretations of the so-called Sony test for contributory copyright infringement. That test, originally articulated in 1984 in the case of *Sony Corp. of America v. Universal City Studios, Inc.*, [FN5] set forth what was intended to be a clear standard for contributory copyright infringement: the designer of an infringing product, such as a VCR, would be freed from liability if the product were "capable of substantial noninfringing uses." [FN6] While that standard appears to be a somewhat simple one, it has resulted in severe confusion when applied to new technologies, such as computer programs. Indeed, in recent years, the growth of the Internet, as well as the concomitant explosion of P2P software programs, appeared to be stretching the Sony doctrine to a breaking point. As the United States Court of Appeals for the Ninth Circuit observed as recently as 2004, the federal circuits found themselves faced with a "fundamental disagreement" over how Sony's contributory liability standard should be applied to P2P software. [FN7]

The United States Supreme Court's holding this past summer, in *Grokster*, sought to ameliorate some of the inter-circuit confusion over the Sony doctrine and give guidance to both copyright holders and inventors of new technologies. [FN8] The opinion stated that when an inventor distributes a technological device "with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement," the inventor *649 may be held liable as a contributory infringer. [FN9] The opinion, which sets forth a fresh theory of liability known as the "inducement rule," [FN10] seems to suggest that courts must now inquire into the "principal object" [FN11] or the "purpose" [FN12] of a given technological device in determining whether the device's inventor should be held contributorily liable under copyright law. With respect to our hypothetical Bookster program, for example, the *Grokster* case suggests that Eric--who wrote his program without any clear "object of promoting its use to infringe copyright"--would not be liable for the separate infringing acts of Bookster's users.

And yet the contours of the Court's new contributory liability standard are arguably much less pristine and clear than they could have been. Indeed, within days of the Court's opinion, copyright holders and technology companies alike were expressing frustration with the new inducement standard, arguing that it raised many more questions than it answered. [FN13] To make matters more complicated, the Court articulated its new inducement theory in *Grokster* without jettisoning the earlier Sony test; [FN14] rather, Sony's "capable of substantial noninfringing uses" test clearly survived the *Grokster*

opinion, [\[FN15\]](#) and still remains very much relevant to issues of contributory copyright liability. That aspect of the Grokster holding raises numerous problematic questions, such as whether the Sony test has now been supplemented by an inducement analysis, [\[FN16\]](#) or whether the inducement analysis alone should govern where there is explicit evidence of intent to infringe copyrights. For these reasons, the Court's opinion in Grokster warrants a much closer examination.

Nor does the Grokster holding raise an obscure issue that should only be of interest to legal scholars, copyright holders, and software *650 designers. Rather, the outcome of Grokster likely will have significant implications for all members of the entertainment-consuming public. The Court's decision will influence not only the future of **P2P** file sharing software, but also the means by which the public will be able to procure myriad forms of digital content in the twenty-first century. Thus, the Grokster opinion involves issues that will have far-reaching ramifications. [\[FN17\]](#) As the vice president of an Internet music company put it, the legal decisions that are made with respect to how and whether content should be distributed over the Internet will

directly shape the market for digital media and the manner in which digital media are distributed. This in turn will directly influence the options that are available to consumers, both in terms of the ease with which they will be able to access digital media and the equipment that they will require to do so. [\[FN18\]](#)

In addition, the Court's decision in Grokster is noteworthy because it underscores a classic, eternal dilemma of copyright law [\[FN19\]](#)--how to strike a reasonable balance between "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." [\[FN20\]](#) In other words, the Grokster opinion represents the Supreme Court's *651 best attempt to strike a balance between the traditional "monopoly interest" granted to artists via copyright law and the larger public interest. In that sense, the Grokster decision should be of interest to all members of the public--at stake in the Court's decision are not only the fundamental rights of writers, musicians, and filmmakers, but also the broader freedom of every citizen to access, obtain, and enjoy the myriad fruits of artists' labor via new technologies.

This Comment focuses specifically on the Grokster case and its likely impact on United States copyright law. Part I of this Comment traces the evolution of contributory copyright infringement as a theory of liability and then focuses on the landmark 1984 Supreme Court case, *Sony Corp. of America v. Universal City Studios, Inc.* Part II discusses how the emerging field of **P2P** software has severely tested the Sony doctrine in recent years. By focusing on three of the most significant **P2P** cases to reach the federal appellate level -- *A&M Records, Inc. v. Napster, Inc.*, [\[FN21\]](#) *MGM Studios Inc. v. Grokster*, [\[FN22\]](#) and *In re Aimster Copyright Litigation* [\[FN23\]](#)--Part II highlights the inter-circuit schism which the Supreme Court faced when it chose to grant certiorari to Grokster in late 2004. [\[FN24\]](#) Part III discusses how the Supreme Court dealt head-on with the issue of contributory copyright infringement by focusing on the recent Grokster opinion in depth. Part III posits that while the Grokster Court was wise to preserve the Sony doctrine, the Court erred by issuing a lengthy and open-ended opinion in Grokster --one that that will likely prove hopelessly difficult for the lower courts to implement. Finally, Part IV discusses the likely impact of the Grokster decision and addresses some statutory approaches that Congress could pursue in the wake of the opinion, should the public find it to be somewhat doctrinally inconclusive or unclear. Part IV then concludes with a discussion of one scholar's quite innovative statutory solution to the current **P2P** software impasse.

*652 I. The Origins of Contributory Copyright Liability: From Gershwin to Sony

The United States Copyright Act of 1976 [\[FN25\]](#) (the "Act" or the "Copyright Act") confers a number of exclusive rights on the holder of a copyright--among them the exclusive rights of reproduction, distribution, and public performance. [\[FN26\]](#) The Act makes clear that any party who violates any of these exclusive rights will be liable as an infringer. [\[FN27\]](#) Although

the Act imposes liability for violations of copyright rights by these so-called direct infringers, no statutory provision governs the liability of third parties who assist in, or contribute to, the infringement of copyright. [FN28] The doctrine of contributory copyright liability, [FN29] rather, is a judge-made doctrine, one derived from general common law principles. [FN30] The purpose of *653 contributory copyright liability is to "empower copyright owners to sue the root cause of numerous infringements," rather than having to sue a "multitude of individuals for direct infringements." [FN31]

The modern doctrine of contributory copyright liability was first articulated in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.* [FN32] In that case, the United States Court of Appeals for the Second Circuit examined whether a concert promoter should be liable when musicians performing at the promoter's concerts played copyright-protected works, thereby infringing on the copyright owners' exclusive rights of public performance. [FN33] The Second Circuit found that the promoter should be liable as a result of the direct infringements that occurred at the concert, under theories of both contributory and vicarious liability. With respect to contributory liability, the court held that such liability would be entirely appropriate where a defendant, "with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another." [FN34] The *Gershwin* court thereby established the two main prongs of the modern contributory copyright liability analysis: (1) knowledge of a direct infringement by a third party and (2) a material contribution to that infringement.

Thirteen years elapsed between the Second Circuit's holding in *Gershwin* and the seminal United States Supreme Court case construing contributory copyright liability, *Sony Corp. of America v. Universal City Studios, Inc.* In *Sony*, *Universal Studios* and *Walt Disney Productions*, the owners of a number of copyright-protected motion pictures, filed suit against *Sony*, the manufacturer of the newly-developed Betamax video tape recorder ("VTR"). [FN35] The plaintiffs first asserted that the VTR was being used to record copyright-protected works off of the television airwaves and that such actions infringed on the owners' exclusive rights under the Copyright Act. [FN36] Rather than suing each direct infringer for the unauthorized copying of the plaintiffs' films, the plaintiffs chose to sue *Sony*, *654 alleging that its manufacturing and marketing of the VTR should make it liable for contributory copyright infringement. [FN37]

The findings of fact at the district court level revealed that a large majority of VTR owners used the VTR for "time-shifting"--that is, recording a program in order to watch it at a later time--and that a majority of the films that were tape-recorded were undoubtedly copyright-protected works. [FN38] This common practice required the court to address both the thorny issue of whether home copying by private VTR owners directly infringed the copyright right of reproduction, as well as the separate question of whether the VTR manufacturer, *Sony*, should be liable on a contributory liability theory. [FN39]

The district court granted summary judgment in favor of defendant *Sony*. [FN40] First, the district court concluded that private home copying constituted a "fair use" under § 107 of the Copyright Act [FN41] and was, therefore, not an infringing act. [FN42] As an independent ground of decision, the court held that even if home copying were a direct infringement, *Sony* could not be liable as manufacturer on a contributory liability theory since it lacked the requisite knowledge that consumers were using the VTR to infringe plaintiffs' works. [FN43] Moreover, the court held that even if *Sony* had "constructive knowledge" of the infringements being committed by VTR users, it lacked the other essential element required for contributory liability: a material contribution to those infringements. [FN44]

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court. [FN45] First, the court held that VTR home copying was not a fair use, but was rather a direct infringement *655 of plaintiffs' copyright-protected works on a massive scale. [FN46] Moreover, the court held that *Sony* should be held liable for contributory copyright infringement. According to the court, *Sony* could be charged with knowledge of the VTR users' infringements because the

reproduction of copyrighted works was clearly "the most conspicuous use" of the VTR. [FN47] In addition, the Ninth Circuit evidently concluded that Sony had "materially contribute[d]" to the infringement of plaintiffs' works by manufacturing the VTR, since VTRs were sold "for the primary purpose of reproducing television programming." [FN48]

The evolution of the Supreme Court's opinion in Sony is a circuitous one to say the least. The Supreme Court first heard arguments in Sony in January 1983 and appeared ready to affirm the Ninth Circuit's holding by a vote of 5-4, with a majority opinion to be written by Justice Blackmun. [FN49] However, Justice Stevens, who at the time anticipated writing a dissenting opinion in the case, expressed clear ambivalence about a ruling announcing that private home videotaping constituted copyright infringement; he thought such private copying should perhaps be viewed as a fair use. [FN50] As Justice Stevens circulated memoranda to the other Justices about the home copying issue, some-- including Justice Powell--began to doubt the majority decision to affirm the Ninth Circuit. [FN51] Justice Stevens had shifted his view towards an approach to contributory liability that would exonerate Sony on the basis that private home recording did not constitute an infringing reproduction under the Act. [FN52] Justice Brennan, meanwhile, joined the debate by proposing a "third alternative" to Blackmun's and Stevens's approaches to liability. [FN53] Under Brennan's proposal, Sony would not be held liable as a contributory infringer since the VTR had a "substantial noninfringing use." [FN54] Stevens gradually incorporated Brennan's "third alternative" suggestions into his proposed opinion, bringing those proposals *656 together in what was beginning to look like a majority opinion rather than a dissent. [FN55] However, due to an inability of the Justices to reach a consensus, a ruling on the case was delayed, and the Court reheard oral arguments in October 1983. [FN56] Justice O'Connor eventually joined the Stevens/Brennan camp, providing the swing vote in favor of reversing the Ninth Circuit. [FN57] At that time, it became clear that Justice Stevens's anticipated dissent would indeed be the majority opinion, and Justice Blackmun's proposed majority opinion would become the dissent.

However, the issue of private copying and "fair use" remained a particularly difficult one among the five majority Justices. Justice White, therefore, suggested that the majority opinion elude the issue of private copying entirely, addressing solely the issue of Sony's liability as a contributory infringer. [FN58] As a result, the Sony majority opinion never directly addresses whether private home copying is a direct infringement; rather, the opinion presumes that it is, and focuses its attention solely on whether and when a manufacturer of an infringing item can be held liable on a contributory liability theory.

The Sony majority commenced its analysis by observing that the VTR can be used to record both copyrighted and non-copyrighted works alike--according to the Court, the invention had a "range of . . . potential use[s]." [FN59] Drawing an analogy to patent law, the majority noted that the Patent Act's [FN60] definition of patent infringement exempted from liability those "staple article[s] . . . of commerce" that are suitable for "substantial noninfringing uses." [FN61] The Court construed the "substantial noninfringing use" language in *657 the Patent Act as standing for the more general premise that where an invention is potentially used for patent infringement, but is also adapted for other lawful, noninfringing uses, those facts alone would not be sufficient to hold the inventor liable as a contributory infringer. [FN62]

Relying on this patent law analogy, the Court held that in a copyright context a party could not be liable as a contributory infringer solely on the grounds that he manufactured and sold an item of copying equipment (such as, in this case, a VTR). Rather, the Court held that if a copying item were capable of "substantial" or "commercially significant noninfringing uses," the manufacturer would not be liable for contributory copyright infringement. [FN63]

Using that definition as a departure point, the Sony majority then addressed whether the VTR was capable of "substantial" or "commercially significant" noninfringing uses. The Court stated:

In order to resolve that question, we need not explore all the different potential uses of the machine and determine

whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the District Court a significant number of them would be noninfringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home. [\[FN64\]](#)

In light of the district court's finding that "the primary use of the machine for most owners was time-shifting" [\[FN65\]](#)--i.e., recording a show for later viewing--and that a "significant quantity" of that time-shifting was expressly authorized by the likes of PBS, the National Football League, Major League Baseball, and the National Religious Broadcasters, [\[FN66\]](#) the Court concluded that the VTR was "capable of substantial noninfringing uses." [\[FN67\]](#)

***658** Justice Blackmun's dissent did not elide the issue of home copying as the majority did. Rather, he felt the Copyright Act made clear that "the making of even a single videotape recording at home" was an infringement of copyright. [\[FN68\]](#) Justice Blackmun also expressed doubts about the majority's finding that the VTR was capable of substantial noninfringing uses. While he agreed with the premise that contributory liability would be inappropriate if a significant portion of the product's use was clearly noninfringing, Justice Blackmun felt that the majority's analysis mistakenly focused on the proportion of television programming that was copyrighted-- contrasting plaintiffs' ten percent market share with those non-copyright protected shows on PBS--rather than on the "amount of VTR usage that [was] infringing." [\[FN69\]](#) Justice Blackmun also intimated that greater attention should be paid to the intent that lay behind an infringing product such as the VTR. As he put it, if a manufacturer of a product such as the VTR were "purposefully profiting" from an infringement, liability would be "appropriately imposed." [\[FN70\]](#) He concluded by arguing that the case should be remanded for an examination of "the proportion of VTR recording that [was] infringing." [\[FN71\]](#)

Although Sony has remained the cornerstone case construing contributory copyright liability, the opinion has been subject to withering criticism over the last two decades, from academics and industry moguls alike. Jack Valenti, President of the Motion Picture Association of America, once claimed that the opinion raises significant questions about whether "copyright is real or whether it is mush." [\[FN72\]](#) Others have alleged that Sony suffers from "clouded reasoning," [\[FN73\]](#) and that "good sense . . . is unhappily absent from much of the opinion[]." [\[FN74\]](#)

***659** Notwithstanding these criticisms, however, a final point should be made about the underlying copyright "values" that imbued the Sony opinion. The Sony majority commenced its analysis with a discussion of the underlying purposes of copyright: to grant authors a limited monopoly in their works and to allow the public access to those works after the limited period of control has expired. [\[FN75\]](#) After pointing out that it is Congress's role to grant and refine the scope of copyright protection, the Sony Court underscored the vital importance of striking a balance "between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce" on the other. [\[FN76\]](#) In other words, the Sony majority was keenly aware of the fundamental, eternal dilemma of copyright law: whether to expand protection so that authors and artists can capture a work's value in the market place or to withhold protection so that the public may freely enjoy copies of the work via a particular technological innovation. [\[FN77\]](#) The Court's articulation of the doctrine of contributory liability-- based on whether a product is capable of substantial noninfringing uses-- represented its attempt to strike a balance between copyright holders and the consuming public. Whether or not Sony properly struck that balance was the essential question facing the Supreme Court twenty-one years later in *Grokster*, when it was forced to revisit Sony in the context of **P2P** software.

II. Peer-to-Peer Software and the Inter-Circuit Schism over Sony

To be sure, the Sony opinion, with its "capable of substantial noninfringing uses" test for contributory copyright liability,

left many questions remaining. Most notably, the Sony Court made clear that it would not give "precise content to the question of how much use is commercially significant," [\[FN78\]](#) and its failure to give more guidance on that issue has led to some inconsistent results among the circuits. [\[FN79\]](#) *660 But where confusion over the Sony doctrine frequently arose, the growth of **P2P** technology in the last five years at times appeared to stretch the doctrine to its breaking point. [\[FN80\]](#)

P2P software [\[FN81\]](#) programs are mechanisms by which an independent network of computer users (so-called peers) is created. [\[FN82\]](#) Unlike a typical Internet network, the information accessed over a **P2P** network does not reside on a central server or host computer; rather, each computer makes the information available to every other computer in the network. [\[FN83\]](#) The software is necessary to connect users with other users of the software, thereby creating a network. The network, in other words, is built by connecting the hard drives of all of the users of the same or similar software, creating an available index of files (i.e., music files, photos, or documents) that can be freely exchanged among all users in the network. [\[FN84\]](#)

*661 The problems that **P2P** software programs pose to copyright holders are legion and well documented. Copyright law has historically relied upon a "gatekeeper" model of distribution, whereby the copyright holder, by virtue of § 106 of the Copyright Act, is granted exclusive rights of reproduction and distribution. [\[FN85\]](#) As a result, historically, anyone wishing to publicly distribute an artistic work--a book, film, or a compact disc--would have to negotiate with the rights-holding gatekeeper--the publishing company, the film studio, or the record company--for permission to do so. [\[FN86\]](#) As a corollary, these gatekeepers were able to prevent evasion of copyright law by blocking opportunities to buy an infringing product in the first place. [\[FN87\]](#)

The advent of **P2P** software programs has undermined this traditional model by completely eliminating the need for any gatekeeper/intermediary. [\[FN88\]](#) The goal of a **P2P** distribution system is, after all, to create "a network of perfect equals, each of which is both a consumer and a distributor." [\[FN89\]](#) In the late 1990s, copyright holders gradually became aware of the clear and present threat that **P2P** software posed to their exclusive rights of distribution. Supported by industry association groups such as the Recording Industry Association of America ("RIAA"), copyright holders decided to commence a series of contributory infringement lawsuits against the designers of these programs, starting with the most ubiquitous offender, Napster. [\[FN90\]](#) The copyright owners assumed at the time that it would be less costly--and more effective--to seek a judgment against a single secondary infringer rather than pursuing a multitude of direct infringers. [\[FN91\]](#)

*662 The results of these lawsuits, however, proved to be less than conclusive. While there was little dispute that the end-users of **P2P** file sharing systems were frequently infringing on copyright by downloading copyright-protected works, it was not at all clear that Sony's contributory liability test should support the imposition of liability on the designers of these programs--especially as many **P2P** programs arguably satisfied Sony's "capable of substantial noninfringing use" threshold. [\[FN92\]](#) Not only were many of these lawsuits unsuccessful--much to the chagrin of the RIAA--but they also underscored the severe schism between the Seventh and Ninth Circuits over how the Sony doctrine should be applied to **P2P** software. [\[FN93\]](#)

The first major case to construe the contributory liability of a **P2P** software designer was the Ninth Circuit's opinion *A&M Records, Inc. v. Napster, Inc.* [\[FN94\]](#) Napster was a **P2P** program, which operated by using an internal platform known as MusicShare. [\[FN95\]](#) The Napster program enabled users of the **P2P** network to freely exchange copyright-protected music files in an MP3 format. [\[FN96\]](#) Napster was a hugely successful program, boasting at one point as many as eighty million registered users on the network. [\[FN97\]](#) The plaintiffs, a large *663 number of copyright owners, sued Napster in federal district court in California, alleging theories of both contributory and vicarious copyright infringement. [\[FN98\]](#) The district court found a likelihood of success on the contributory infringement claim and granted an injunction to the plaintiffs, ordering Napster to refrain "from engaging in, or facilitating others in copying, downloading,

uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner." [\[FN99\]](#)

On appeal, the Ninth Circuit commenced its analysis of Napster's contributory liability by setting out the two familiar elements of contributory infringement: (1) knowledge of a direct infringement and (2) a material contribution to that infringement. [\[FN100\]](#) With respect to knowledge, the court found that defendant Napster had "actual, specific knowledge" of the infringements taking place on its network, that Napster had the potential to stop those infringements by blocking access, and that it failed to do so. [\[FN101\]](#) With respect to Napster's "material contribution," the court found that Napster provided the site and facilities for the infringing activities by maintaining indexing central servers and providing technical support to its users. [\[FN102\]](#)

The Ninth Circuit found the Sony doctrine to be unavailing to Napster. [\[FN103\]](#) The court of appeals agreed with the district court that Napster had plainly failed to demonstrate that it was "capable of substantial noninfringing uses." [\[FN104\]](#) The court briefly reprimanded the lower court, however, for its analysis of the substantial noninfringing use test. [\[FN105\]](#) According to the court, the district court had erroneously focused its attention on the "proportion" of current infringing uses to noninfringing uses. [\[FN106\]](#) Rather than focusing on the proportion of uses, the appellate court found that the proper focus of a Sony inquiry *664 should usually be the system's "capabilities," including current and future uses. [\[FN107\]](#)

The Ninth Circuit also took a moment to clarify the requirements of the Sony doctrine. Construing Sony as requiring a heightened knowledge threshold, the Ninth Circuit found that when a system is capable of substantial noninfringing uses, mere constructive knowledge of the infringement could not be imputed to a defendant. [\[FN108\]](#) Rather, according to the court's reading of Sony, where a product was capable of "substantial noninfringing uses," only the presence of "actual, specific knowledge" would justify the imposition of contributory liability. [\[FN109\]](#) Since the court found that Napster possessed such knowledge, however, the court held that liability was wholly appropriate--even had the program been deemed capable of noninfringing uses. [\[FN110\]](#)

The Ninth Circuit had occasion to revisit Sony as applied to **P2P** software in *MGM Studios Inc. v. Grokster, Ltd.* [\[FN111\]](#) Although the issues in *Grokster* were similar to those of *Napster*, the technology was quite different. Where *Napster* owned and operated a centralized server that was subject to its direct control, the **P2P** software involved in *Grokster* utilized decentralized (or quasi-decentralized "super node") networks which were much more difficult for their designers to control. [\[FN112\]](#) Indeed, the evidence suggested that the two defendants in *Grokster*--software distributors *Grokster* and *StreamCast*, which distributed the technology platforms *665 *FastTrack* and *Morpheus*, respectively--intentionally structured their **P2P** platforms to avoid the centralized control that doomed *Napster*. [\[FN113\]](#)

As in *Napster*, the plaintiffs in *Grokster* were a large number of copyright holders. [\[FN114\]](#) They sued defendants *Grokster* and *StreamCast* in federal district court in California, alleging that the distribution of their technology platforms constituted contributory and vicarious copyright infringement. [\[FN115\]](#) In contrast to *Napster*, however, the district court in *Grokster* refused to hold the defendants liable for contributory copyright infringement. First, the district court found that the software was capable of "substantial noninfringing uses," and therefore, under the Ninth Circuit's interpretation of the Sony doctrine in *Napster*, only "actual knowledge" of infringing acts would justify the imposition of contributory liability. [\[FN116\]](#) The district court found no such evidence that defendants had "specific knowledge" of infringing acts, especially in light of the highly decentralized nature of the **P2P** program being used. [\[FN117\]](#) In addition, the district court concluded that there was no material contribution by the defendants, since infringing files did not reside on the defendants' computers and they lacked the ability to suspend infringing users. [\[FN118\]](#)

On appeal, the Ninth Circuit confirmed its reading of Sony as first articulated in Napster--namely that if a product were capable of substantial noninfringing uses, constructive knowledge could not be imputed to the defendant and the plaintiff would have to show "knowledge of specific infringing files." [FN119] Based on that reading of Sony, the court analyzed whether the defendants' P2P platforms were capable of substantial noninfringing uses. In light of a number of public domain works which were exchanged over the Internet using defendants' technology--not to mention lesser-known artists such as Wilco that have consented to having their works liberally circulated on P2P systems--the court concluded that the defendants' technology *666 was clearly "capable of substantial noninfringing uses." [FN120] The court rejected the plaintiffs' argument that the vast majority of works being shared on the defendants' computers were infringing uses, stating that Sony merely requires that a product be capable of substantial noninfringing uses. [FN121]

Since the software at issue met the Sony threshold, the court held that the defendants would only be liable if there was evidence of specific knowledge of infringements. As the defendants did not operate a centralized indexing server (as Napster had), and since they lacked any ability to stop infringing files from being shared (once the program was installed on a user computer, the defendants no longer had any control over the network), the court found an insufficient showing of specific knowledge. [FN122] Nor did the court find evidence of a material contribution to the infringements. [FN123] The court pointed out that the defendants provided neither a file index nor a central server, and observed that the defendants wholly lacked the ability to suspend infringing user accounts. [FN124] The fact that the designers of the P2P software might have purposefully designed their products to pass the Sony test did not factor into the Grokster court's analysis at all. Rather, in the absence of either specific knowledge or a material contribution, the court declined to impose contributory liability on the defendants. [FN125]

While the Ninth Circuit was giving its own reading to the Sony test in cases such as Napster and Grokster, the Seventh Circuit stepped into the debate with its opinion in *In re Aimster Copyright Litigation*. [FN126] Aimster involved a popular file-sharing program developed by the defendant, a software designer named John Deep. [FN127] The program, which operated in part by "piggybacking" on America Online's Instant Messaging Service, allowed users to connect with one another and exchange both copyright-protected files (music and film) as well as non-copyright protected files (e-mails and personal *667 photos). [FN128] The plaintiffs, owners of a large number of copyright-protected works of music, sued Deep on theories of contributory and vicarious copyright liability. [FN129] The evidence before the district court suggested that the defendant exercised a moderate level of involvement and control over the program; Aimster maintained its own server, hosted a website, and provided "how to" tutorials for new users of the program. [FN130] As a result, the district court found the defendant liable for contributory and vicarious infringement and granted a broad injunction against the company. [FN131]

On appeal, Judge Richard Posner of the Seventh Circuit, writing for the court, immediately acknowledged that the Aimster program was clearly capable of both infringing and noninfringing uses. [FN132] As the court put it, the program could feasibly be used for the "expeditious exchange of confidential business data among employees," but it was also clear that copyright-protected works were also exchanged over the program. [FN133] As a result, Judge Posner reasoned that Sony should apply to the facts of the defendants' case and that the defendants would not be liable if the product were capable of "substantial noninfringing uses." [FN134]

From there, Judge Posner commenced a thorough review of the Sony case as applied to the facts of Aimster. [FN135] The Seventh Circuit first stated that when faced with a product involving both infringing and noninfringing uses, an estimate of the "respective magnitudes of the uses is necessary for a finding of contributory infringement." [FN136] Construing Sony this way, the court held that a defendant would not be able to escape liability for contributory infringement merely by showing that its product could be used in noninfringing ways. [FN137] According to Judge Posner, being capable in principle

of *668 noninfringing uses was insufficient for a defendant to escape liability, since nearly every product was at least capable of noninfringing uses. [\[FN138\]](#) Rather, a defendant would have to show that its product was used for substantial noninfringing uses. [\[FN139\]](#)

To illustrate this point, the court invoked the analogy of a massage parlor that was actually functioning as an illicit brothel. [\[FN140\]](#) As Judge Posner explained, an owner of the massage parlor might claim that the women he employs are "capable of giving massages," but if the owner in fact sells "only sex and never massages to [his] customers, [he] is an aider and abettor of prostitution." [\[FN141\]](#) In other words, the court made clear that Sony did not support the argument that the mere capability of noninfringement was enough to escape contributory liability; the court characterized such an argument as "an extreme result and one not envisaged by the Sony majority." [\[FN142\]](#) Construing Sony as requiring more than just the capability of noninfringement, then, the Aimster court held that the burden was on the defendant to show that its service had substantial noninfringing uses. [\[FN143\]](#) That burden was not met; on the contrary, the court found that the defendant had presented no evidence of any noninfringing uses. [\[FN144\]](#)

In addition to the lack of noninfringing uses, the court found a high level of facilitation by Aimster. [\[FN145\]](#) The court claimed that Aimster provided an open invitation for its users to infringe on copyrighted-protected material. [\[FN146\]](#) It rejected the defendant's argument that it lacked specific knowledge of infringements taking place on its networks, because it found that the defendant had been "ostrich-like" with respect to the infringements being committed by Aimster's users. [\[FN147\]](#) The court intimated that this willful blindness was sufficient in terms of the requisite knowledge threshold, providing as it did "merely another piece of evidence that [the defendant] was a contributory infringer." [\[FN148\]](#) As a result, the court affirmed the district *669 court's injunction shutting down the Aimster service on a contributory liability theory. [\[FN149\]](#)

In reviewing the Seventh Circuit's opinion in Aimster, a few points are noteworthy. First, the Seventh Circuit clearly construed Sony as requiring something beyond the possibility of noninfringing uses, and in that sense, it took an approach completely at odds with the Ninth Circuit's approach. The Seventh Circuit placed its emphasis on the "frequency" of noninfringing uses [\[FN150\]](#) rather than on the mere capability of such uses, and seemed to suggest that a significant quantity of noninfringing uses would be needed in order to qualify as "substantial" under Sony. [\[FN151\]](#) In some ways, this approach was redolent of Justice Blackmun's dissent in Sony; after all, it was Justice Blackmun who had emphasized the "proportion of VTR recording that is infringing." [\[FN152\]](#)

Second, although the Seventh Circuit did not expressly discuss the two-prong Gershwin test for contributory liability--i.e., knowledge and a material contribution--it made clear that the "knowledge" prong would be satisfied by a showing of willful blindness or "ostrich-like" behavior. [\[FN153\]](#) The defendant in Aimster was deemed to have the requisite knowledge for contributory liability, despite a paucity of evidence that it had been made aware of specific instances of infringements occurring on its system.

These **P2P** cases underscored a severe schism between the Ninth Circuit and the Seventh Circuit over how to properly interpret Sony. [\[FN154\]](#) In applying Sony to file-sharing software, the circuits reached two irreconcilable outcomes, [\[FN155\]](#) with each one emphasizing different aspects of the Sony doctrine. The Ninth Circuit characterized this schism as being "premised specifically on a fundamental disagreement" over the proper reading of Sony. [\[FN156\]](#)

*670 The inter-circuit confusion hinged on two main points. [\[FN157\]](#) First, the circuits suffered a notable division over the proper interpretation of Sony's "capable of substantial noninfringing use" test. [\[FN158\]](#) The Ninth Circuit clearly emphasized the capability of a product for noninfringing uses. In the Grokster case, for example, the Ninth Circuit declined to

impose liability on the defendants because the programs involved were at least capable of exchanging public domain works--this, despite a finding that the "vast majority of the files [on the networks were] exchanged illegally in violation of copyright law." [FN159] In addition, in *Napster*, the Ninth Circuit's Sony analysis focused primarily on the software's current and potential uses, [FN160] an approach that is congruent with an emphasis on a product's capabilities rather than its actual uses. [FN161] The Ninth Circuit's approach had obvious appeal to **P2P** software designers, who could arguably be exonerated from liability by showing only a few token noninfringing uses. [FN162] As a corollary, the Ninth Circuit's "capability emphasis" provoked the ire of copyright owners, who argued that the Ninth Circuit more or less ignored the word "substantial" in its analysis of whether a product is "capable of substantial noninfringing use." [FN163] With respect to the age-old tension between copyright protection and new technologies--those dueling interests that Sony had sought to balance--the Ninth Circuit's approach clearly shifted the scales in favor of the technology interests.

The Ninth Circuit's interpretation of Sony stood in stark contrast to the Seventh Circuit's approach in *Aimster*, which held that the mere capability of noninfringing uses was not enough to escape liability and that a high number of noninfringing uses would need to *671 be shown. [FN164] According to the Seventh Circuit, Sony demands "substantial" noninfringing uses, not just any noninfringing use. [FN165] The Seventh Circuit placed its emphasis on the respective magnitudes of noninfringing uses to infringing ones. [FN166] Unlike the Ninth Circuit, the Seventh Circuit appeared to shift the legal scales towards the entertainment industry and those interested in tighter copyright protection and away from the technology sector. According to the Seventh Circuit's holding, unless a given technology had a large number of noninfringing uses, the safe harbor of the Sony doctrine would be unavailing to the technology's inventors. [FN167] Since the vast majority of popular **P2P** file sharing programs were being used to infringe copyrights--with only a small fraction of the file-sharing taking place on their networks being noninfringing [FN168]--the Seventh Circuit's approach more or less ensured the success of the RIAA and the demise of the **P2P** programs that it had been seeking to stamp out.

As a second point, the circuits found themselves split over the requisite level of knowledge needed to impose contributory liability on a software designer. The Ninth Circuit construed Sony as requiring a heightened knowledge standard if a product is capable of both infringing and noninfringing uses; it expressly stated that under a Sony analysis a showing of "reasonable knowledge of specific infringing files" was required. [FN169] In contrast, the Seventh Circuit intimated in *Aimster* that "ostrich-like" behavior on the part of a **P2P** software provider was sufficient to meet the knowledge threshold of contributory liability. [FN170] The Seventh Circuit's willful blindness approach clearly carried more appeal to copyright holders, who were quick to point out that a requirement of actual knowledge would encourage **P2P** designers to "turn a willfully blind eye" to the infringements occurring with their programs. [FN171]

While the amici briefs were being filed in the *Grokster* case, and as the Supreme Court prepared to enter the fray and address the Sony doctrine in the context of **P2P** software, the severe schism *672 between the circuits began having far-reaching ramifications, stretching well beyond courts of law. Not only did the schism result in geographically anomalous results, but it also spurred the recording industry to temporarily abandon its strategy of enjoining **P2P** systems in favor of pursuing individual lawsuits against those who downloaded copyright-protected music. [FN172] Immediately following the Ninth Circuit's decision in *Grokster*, for example, the RIAA brought 750 lawsuits against individual users of *Grokster* and other **P2P** programs, seeking to impose direct, rather than contributory, copyright liability. [FN173] Such an approach proved to be not only expensive and time-consuming from the perspective of the RIAA, [FN174] but it also had the reverse effect of demonizing the RIAA and the *673 copyright holders they represented, rather than fomenting public sympathy for them. [FN175]

The individual lawsuit approach also proved to be an ineffective means of dealing with the proliferation of **P2P** software, or what one commentator called a "teaspoon solution to an ocean problem." [FN176] As the RIAA continued to launch

individual lawsuits against the users of **P2P** software, the technologies for file-sharing continued to advance to further protect and hide illegal use. [FN177] In other words, "the extremes of one side invited a more extreme response by the other." [FN178] Studies showed that users of **P2P** software evidently had no problem abandoning their current **P2P** application for newer, more elusive platforms. [FN179] In fact, **P2P** users began consistently migrating to the newest and most advanced programs, "whether [they] respected copyrights or not." [FN180] Meanwhile, in the absence of a uniform legal approach, the stalemate between **P2P** users and copyright holders worsened, with each side claiming that it was in the right. [FN181]

The United States Supreme Court's decision to inject itself into this debate, by granting certiorari in the Grokster case in late 2004, [FN182] created a prime opportunity for the Court to resolve the impasse between copyright owners and **P2P** software designers. Indeed, the severe inter-circuit schism seemed to militate dramatically for a re-visitation of the Sony doctrine as applied to file-sharing software. Many hoped that when the Court stepped into the legal debate, the **P2P** impasse, as well as the injustices it had produced for both *674 copyright owners and individual consumers, [FN183] would be resolved once and for all.

III. The Supreme Court Enters the Fray: Grokster

When the Supreme Court opted to enter the **P2P** debate in the Grokster case in 2004, it found itself faced with the same fundamental problem that had beset the Sony Court twenty years earlier: how to strike a proper balance "between the interests of authors and inventors in the control and exploitation of their writings and discoveries . . . and . . . the free flow of ideas, information, and commerce." [FN184] The stakes in Grokster were quite high; the Court ideally needed to find a way to limit widespread and rampant copyright infringement while at the same time permitting the public to enjoy the myriad benefits of **P2P** technologies. [FN185]

*675 The Grokster opinion, announced on the last day before the Court's 2005 summer recess, was a unanimous one. [FN186] From a procedural standpoint, the Court made clear its view that the district court had plainly erred in granting summary judgment to the defendants on the issue of contributory copyright liability and that the Ninth Circuit had erred in affirming that decision. [FN187] Beyond the procedural unanimity of the Grokster opinion, however, lurked some notable distinctions on such issues as the Sony doctrine, the particular facts of the case, and the ultimate basis for the imposition of infringement liability. Justice Souter wrote the Court's opinion in Grokster, but Justices Ginsburg and Breyer each wrote separate concurrences, which a total of six Justices joined.

Justice Souter's opinion commenced its analysis with a recognition of the benefits of **P2P** technology. [FN188] The opinion also noted the fundamental importance of achieving "a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringements." [FN189] Despite the need for a wise balance in crafting the scope of copyright liability, however, Justice Souter's opinion made clear that the conduct of the defendants Grokster and StreamCast in the case at hand militated strongly in favor of imposing liability. [FN190] Indeed, in light of evidence that the defendants' "principal object" [FN191] was to infringe on copyrights via their **P2P** platforms, as well as evidence that the infringement of copyright was central to the defendants' business model, the Court concluded that copyright liability was entirely appropriate. [FN192]

This conclusion prompted the Court to articulate its so-called inducement theory [FN193] of contributory copyright liability; as the Court explained: "one who distributes a [technological] device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is *676 liable for the resulting acts of infringement by third parties." [FN194] In light of evidence in the record that the defendants had advertised their product as being used to infringe copyrights, [FN195] the defendants had taken no steps to filter from their networks those

copyright-protected works, [\[FN196\]](#) and the defendants had repeatedly sought to be the "next Napster," [\[FN197\]](#) the Court found an express "objective" [\[FN198\]](#) to infringe and concluded that contributory liability was wholly appropriate. Justice Souter's opinion made clear that where there was "purposeful, culpable expression and conduct" on the part of a defendant programmer or distributor, or where there was extensive evidence of "advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations," [\[FN199\]](#) contributory copyright liability would lie.

Because *Grokster* was the first Supreme Court case to construe contributory copyright liability since *Sony*, the Court had little choice but to address the *Sony* doctrine and its continuing relevance to the field of copyright law. Turning to *Sony*, Justice Souter's opinion first stated that the "staple article of commerce doctrine" of patent law--on which the *Sony* test had been based--was actually a two-fold legal concept: while the inventor of a product with "substantial lawful as well as unlawful uses" could be exonerated from liability, the designer of a product "where the article is 'good for nothing else but infringement'" could and should be held liable. [\[FN200\]](#) Justice Souter then articulated the Court's view that the Ninth Circuit had misapplied *Sony* by giving the case far too broad a reading. [\[FN201\]](#) While Justice Souter's opinion intimated that *Sony* remains good law, the opinion suggested that the *Sony* doctrine should not be used to exonerate an inventor or distributor from liability where an infringing intent was manifest:

[T]his case is significantly different from *Sony* and reliance on that case to rule in favor of [the defendants] was error. *Sony* dealt with a claim of liability based solely on distributing a product with alternative lawful and unlawful uses, with *677 knowledge that some users would follow the unlawful course. . . . MGM's evidence in this case most obviously addresses a different basis of liability for distributing a product open to alternative uses. Here, evidence of the distributor's words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement. If liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was. [\[FN202\]](#)

In other words, the Court affirmed the overall validity of *Sony*, while stating that the *Grokster* case was distinguishable from *Sony* in light of evidence of "affirmative steps" [\[FN203\]](#) on the part of the defendants to infringe copyright. Justice Souter's *Grokster* opinion declined the parties' invitation to "revisit *Sony* further," [\[FN204\]](#) either to clarify it or to address exactly how the Ninth Circuit had misconstrued it. [\[FN205\]](#) Rather, Justice Souter summarily stated that it was *678 sufficient for purposes of the *Grokster* opinion "to note that the Ninth Circuit's judgment rested on an erroneous understanding of *Sony*." [\[FN206\]](#) The Court left "further consideration of the *Sony* rule" for another day. [\[FN207\]](#)

In analyzing Justice Souter's opinion in *Grokster*, a few points are noteworthy. First, the "inducement theory" Justice Souter articulated may have first been raised during oral arguments in the *Grokster* case. [\[FN208\]](#) but the theory arguably has its roots in Justice Blackmun's dissent in *Sony*. After all, it was Justice Blackmun who had argued in *Sony* that if a given manufacturer were "purposefully profiting" from a given infringement, "liability [would be] appropriately imposed." [\[FN209\]](#) By placing the emphasis on a software distributor's intent, it can be argued that the Court in *Grokster* was merely moving closer to the approach taken in Justice Blackmun's *Sony* dissent.

Second, despite its seeming legal clarity, the Court's "inducement theory" is not without flaws. Such an approach inevitably involves a factual inquiry into the intent or purpose of a software designer/distributor, which remains highly subjective. Nor is the intent of a particular software designer always easy to ascertain; many computer programmers might create a **P2P** program without any real "purpose" or "object," commercial or otherwise, beyond an interest *679 in seeing if the program will function properly. Would such programmers be liable on a contributory liability theory based on the ratio of infringements to noninfringements, or would the absence of any express "intent" exonerate them from third-party liability? The answer is far from clear.

To be sure, the Court's inducement theory arguably raises as many questions as it resolves. [\[FN210\]](#) For example, is such a theory intended to now supplement the already-familiar Sony doctrine, simply by incorporating into it considerations of intent and purpose? That certainly seems to be one possible reading that could be given to Justice Souter's opinion. [\[FN211\]](#) Alternatively, should a lower court now completely forgo the "capable of substantial noninfringing uses" analysis where the evidentiary record is replete with references to "affirmative steps" taken to infringe? [\[FN212\]](#) These legal questions will persist in the wake of the Court's opinion in *Grokster*, and will likely only be clarified as the lower courts begin implementing the opinion into their copyright liability cases in the years to come.

In addition to Justice Souter's opinion, Justices Ginsburg and Breyer each wrote separate concurrences in *Grokster*. Justice Ginsburg's concurrence first agreed that "the Ninth Circuit went astray" in its reading of Sony. [\[FN213\]](#) Her argument, however, for reversing the Ninth Circuit--and the lower court-- was much more of a procedural one. Essentially, Ginsburg argued that a "genuine issue of material fact" on the noninfringing activities of the defendants remained, and so summary judgment in favor of the defendants had been wholly inappropriate. [\[FN214\]](#) In reviewing the evidentiary record, Justice Ginsburg felt that the evidence submitted by the defendants *680 on the issue of their products' "noninfringing uses" was largely unsubstantiated and anecdotal. [\[FN215\]](#) She also argued that the evidence submitted by the defendants--a number of affidavits speaking to the legal, noninfringing uses of their product--were inconsistent and impossible to quantify. [\[FN216\]](#) Her opinion made clear that the plaintiffs had submitted overwhelming evidence of copyright infringements on the defendants' systems, and the piecemeal affidavits submitted by the defendants had plainly failed to rebut the plaintiffs' evidence. [\[FN217\]](#) In light of that fact, Justice Ginsburg made clear her view that, procedurally, the district court never should have granted summary judgment to the defendants in the first place.

Justice Ginsburg's concurrence prompted a separate opinion from Justice Breyer, who interpreted her opinion as endorsing a much higher evidentiary threshold than Sony required. According to Justice Breyer, Justice Ginsburg was incorrect to require overwhelming evidence of noninfringing uses; Justice Breyer felt that, given his more liberal reading of Sony, the defendants had clearly met the "capable of substantial . . . noninfringing uses" threshold. [\[FN218\]](#) He expressed concern that Ginsburg would require that a large number of noninfringing uses be shown before summary judgment could ever be granted in favor of a software designer/defendant. [\[FN219\]](#) As Justice Breyer read Sony, a showing of a mere ten percent noninfringing uses on a software system would meet the Sony threshold and would support a grant of summary judgment in favor of a defendant. [\[FN220\]](#) Justice Breyer's opinion subtly criticized the Seventh Circuit's more restrictive reading of Sony, and pointed out that the Sony opinion's use of the word "capable" imposed a liberal breadth on the Sony doctrine. [\[FN221\]](#) His statement that courts applying Sony should consider the "prospect of expanded legitimate uses over time" [\[FN222\]](#) placed his opinion much closer to the Ninth Circuit (which emphasized the word "capable" in the "noninfringing use" analysis) and much further from *681 the Seventh Circuit (which emphasized the word "substantial" in the "noninfringing use" analysis).

And yet, despite Justice Breyer's liberal approach--and despite his finding that Sony's "capable of noninfringing uses" standard had been plainly satisfied in the case of defendants *Grokster* and *StreamCast*--his opinion went on to agree with the general premise that it was appropriate to impose liability on the defendants. As Justice Breyer himself explained, despite the fact that the Sony test had been met, "a copyright holder may proceed against a technology provider where a provable specific intent to infringe . . . is present." [\[FN223\]](#) In other words, Justice Breyer's concurrence confirmed the view that liability may be imposed on a defendant, notwithstanding satisfaction of the Sony threshold, in the presence of a specific intent to infringe a copyright.

Justice Breyer's concurrence was rather notably joined by Justices Stevens and O'Connor, who had been the key votes in the Sony majority; it was Justice Stevens who wrote the Sony opinion, and Justice O'Connor who first proposed the "capable

of substantial noninfringing uses" test. [FN224] Not surprisingly, therefore, the concurring Justices engaged in a thorough review of the Sony doctrine, [FN225] only to conclude that the doctrine still provided the best possible balance between copyright owners' rights and technological innovation. [FN226] The concurrence concluded that the Sony test remained ideal for cases of contributory liability, and made clear that "a strong demonstrated need for modifying Sony (or for interpreting Sony's standard more strictly) has not yet been shown." [FN227]

While Justice Souter's opinion did not as wholeheartedly endorse Sony, neither did it seek to overturn it or amend it. As Justice Souter's opinion put it, the Court refused to "revisit Sony further." [FN228] Rather, the Court stated it would "leave further consideration of the Sony rule for a day when that may be required." [FN229] Justice Souter's holding made clear that the Sony test remains good law. In other *682 words, Sony survived Grokster. [FN230] Reports of the doctrine's death had, in fact, been greatly exaggerated.

IV. The Impact of Grokster and How Congress Could Respond

What will be the impact of Grokster? In the wake of the Court's opinion, media outlets described the holding as a "major victory" for entertainment companies and copyright holders. [FN231] It is certainly tempting to read Grokster as a ringing endorsement of liability for each and every P2P designed with the goal of accessing copyright-protected works. [FN232] And yet the Court's holding in Grokster may prove to be a Pyrrhic victory for the entertainment industry and the copyright holders that they represent. In fact, the entertainment industry will likely still face "a long, slow grind in influencing consumers to alter their habits." [FN233] Studies have shown that an *683 estimated ten million Americans use P2P file-sharing software [FN234]--with an estimated six million logged on to P2P networks at any one time. [FN235] As Fred Von Lohmann, the lawyer for the defendants in Grokster, explained on the eve of the Court's opinion, the Grokster case is not likely to destroy P2P software: "There's too much demand and too many smart startups . . . who can find ways to play within the system. If that fails, there are companies overseas to pick up the cause." [FN236] Accordingly, the Grokster opinion might prove to be less effective than the entertainment industry might have hoped.

In fact, those involved in software development and the technology sector might be encouraged by certain aspects of the Court's holding in Grokster. The opinion made clear that it would not serve to discourage those technology companies involved in "legitimate commerce" or "innovation having a lawful promise." [FN237] The opinion also rejected the notion that, "in the absence of other evidence of intent," a court could impose liability "based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial non-infringing uses." [FN238] Such a restrictive approach to copyright liability, the Court concluded, would "tread too close to the Sony safe harbor." [FN239]

It is not immediately clear whether the Grokster holding will have a detrimental effect on P2P technologies. At a minimum, the opinion will arguably permit P2Ps to continue to exist in certain technological contexts. While those P2Ps designed with the express purpose of encouraging the free exchange of copyrighted works [FN240] may now be shut down, it is possible that other P2Ps, such as collaborative learning programs [FN241] and noncommercial P2Ps like Project Gutenberg, will be permitted to thrive in the twenty-first *684 century. Some have also argued that the "inducement" approach of Grokster may create a healthy incentive for P2P designers to create noninfringing products, [FN242] since those P2Ps designed to profit solely from infringing uses will now be held liable.

And yet, despite the ongoing commentary over the Grokster decision and its likely impact on the field of technological innovation, it is quite possible that Congress, rather than the Court, will be the governmental body to step in and address the proper coexistence between copyright law and P2P technologies.

The notion that Congress should participate in shaping the scope of copyright liability is nothing new. It was, after all,

the Sony opinion in which the Supreme Court articulated the view that "[s]ound policy . . . supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology." [FN243] More recently, in upholding the constitutionality of the Sonny Bono Copyright Term Extension Act, [FN244] the Supreme Court made clear its view that it should always "defer substantially to Congress" with respect to copyright matters. [FN245] After all, as the Court is wont to point out, Article I, Section 8 of the U.S. Constitution states that "Congress shall have the power" to prescribe the scope of copyright law in order to secure "for limited Times . . . to authors' exclusive Right to their . . . Writings." [FN246]

The Grokster opinion also hinted at the involvement of Congress in the **P2P** debate. Justice Souter, for example, suggested that the struggle to find a proper balance "may well draw the public directly into the debate over copyright policy." [FN247]

Justice Breyer more explicitly stated that "the legislative option remains available. Courts are less well suited than Congress to the *685 task of 'accommodating fully the varied permutations of competing interests that are inevitably implicated by such new technology.'" [FN248] Thus, in the wake of the Grokster holding, many were predicting inevitable congressional involvement in the **P2P** debate. [FN249]

The "congressional involvement" approach has both strengths and weaknesses. One side of the argument is that, over and above the obvious constitutional mandate of Article I, Section 8, Congress tends to be more balanced when it comes to crafting copyright laws. Congress's laws are typically the result of compromises with various interest groups--software designers and copyright holders alike. Moreover, Congress has the ability to fine tune remedies so that the effects of infringement liability are not too burdensome on anyone. Judicial decisions, on the other hand, are much more likely to be "all or nothing." [FN250] It can also be argued that Congress is best poised to step into the fray when the market alone is incapable of solving an infringement problem--a market failure. [FN251] In such instances, when flaws within the market "preclude achievement of desirable consensual exchanges . . . Congress may correct for market distortions by imposing a regulatory solution." [FN252] In other words, proponents of congressional action argue that not only is Congress best poised to balance competing interests, but also that congressional action is most sorely needed when the market alone has been unable to address the failures between content owners and software developers.

On the other side of that argument, however, is the criticism that any copyright-**P2P** statute emanating from Congress will be the result of special interest lobbying and that any such statute will inevitably tilt in favor of copyright owners and against lesser-funded software developers. The intense private lobbying that preceded the passage of the Sonny Bono Copyright Term Extension Act in 1998 is illustrative of this problem:

Ten of the thirteen original sponsors of the act in the House received the maximum contribution from Disney's political *686 action committee; in the Senate, eight of the twelve sponsors received contributions. The RIAA and the MPAA are estimated to have spent over \$1.5 million lobbying in the 1998 election cycle. They paid out more than \$200,000 in campaign contributions. Disney is estimated to have contributed more than \$800,000 to reelection campaigns in the 1998 cycle. [FN253]

Critics of the congressional approach, such as Professor Lawrence Lessig, argue that a **P2P** statute will fail to achieve the proper balance between copyright law and new technologies--a balance that the majority in Sony sought to strike. [FN254] According to this argument, it is the judiciary, not Congress, which is in the best position to strike a balance between copyright protection and **P2P** software; after all, the judiciary is much more insulated from private lobbying and monetary contributions from interested parties.

Assuming that the **P2P** battle shifts to Congress, what types of legislative solutions might Congress propose? Unfortunately, those which have been suggested in recent years fail to strike a reasonable balance between copyright law and **P2P** users. Take, for example, the much-discussed Peer-to-Peer Piracy Prevention Act (H.R. 5211), which was proposed by Representative Howard Berman (D-Cal.) in late 2002. [FN255] Berman's bill includes a self-help provision that allows a copyright holder to use technology to deter or prevent the unauthorized distribution of copyrighted works over the Internet. The bill grants copyright holders the right to use any technology at their disposal to disable, interfere, or block the distribution of copyrighted works, and it limits liability for the impairment of personal computers, [FN256] as long as the economic loss suffered by the user is less than fifty dollars. [FN257] Representative Berman, whose constituency is Hollywood, has publicly defended the self-help *687 aspects of his bill, arguing that "the law has long allowed property owners to [take steps to] protect their property." [FN258]

The Berman bill would clearly have the effect of stifling **P2P** use, because if a **P2P** network dealt (intentionally or not) in the exchange of copyright-protected works, the user of that network would run the risk that his computer could be accessed and disabled by the copyright owners. Most **P2P** users would not want to take that risk--even if the destruction to their hard drive would be limited to fifty dollars in repairs--and would therefore cease from using **P2P** technology at all. To revert to our Bookster hypothetical, since Stephen King was exchanged over Eric's network, any user of Bookster would run up against the risk that his or her hard drive could be damaged by continuing to use the network. Most users would not want to take that risk, and the Bookster network would effectively be shut down, even though the exchanges of the works of Mark Twain pose no threat to copyright owners. Moreover, the above description of the Berman bill assumes that the copyright owners who benefit from the bill will adhere to the bill's provisions and limit hard drive damage to fifty dollars--an assumption that is not at all guaranteed. [FN259]

If Representative Berman's bill fails to strike the proper balance described by the Sony Court, another bill, like the one proposed by now-retired Senator Fritz Hollings (D-S.C.) fares little better. [FN260] Hollings's bill mandates copyright protection technologies in all digital media devices. Under the bill, the private sector would negotiate for the adoption of mandatory security system standards and encoding rules under the supervision of the Federal Communications Commission. [FN261] Once the standards were adopted, the bill would make it illegal to "sell, offer for sale in interstate commerce . . . digital media devices unless the device includes and utilizes standard security technologies that adhered to the security system standards" adopted under the bill. [FN262] Although Hollings's bill *688 envisions the security standards as emanating from a panel of content owners, technology companies, and consumer advocates, the bill's broad language--applying to any "digital media device"--could arguably bar many fair use applications of existing technologies, such as digital video recording ("DVR") or digital audio tape ("DAT") duplications. While the bill contains a vague reference to "fair use" in general, it does not make additional fair use allowances. [FN263] In addition, Hollings's bill fails to strike a balance in the sense that it places the entire cost of digital security implementation on the technology sector rather than on content owners. [FN264] While the makers of digital media technologies are required to implement security standards in order to avoid liability under the law, the copyright holders need not do anything at all. It could be argued that a bill should better balance competing interests by forcing copyright owners to find ways to compromise with the technology sector, in order to permit both industries to thrive. Hollings's bill, in contrast, places no such onus on copyright holders, who are allowed to exist within the status quo of copyright protection while the technology sector is forced to "get with the program" or suffer liability.

In short, the major **P2P** legislation proposed so far does not bode well for the future of **P2P** technologies. Nor do these pieces of legislation attain the fundamental "copyright vs. new technology" balance that the Sony Court sought to achieve. [FN265] Rather, much of the legislation to date tends to tilt in favor of copyright owners and would have the indirect effect of eviscerating much of the **P2P** technology now in existence, some of which is arguably legal. This is due in large part to the

fact that the recording and film industries yield an enormously powerful lobbying influence on Members of Congress, whereas individual users lack a similar entity to advocate for their interests. [\[FN266\]](#) If Congress opts to step into the **P2P** debate in the wake *689 of Grokster, it will clearly need to examine more progressive legislative solutions beyond those proposed to date. Failure to do so will result in an imbalanced solution to the **P2P** debate and will thereby weaken the fundamental goals of copyright law.

If the bills that have been proposed do not offer solutions, what other approaches could Congress take to address the **P2P** issue? The most practical solution to the impasse would arguably be some type of compulsory licensing scheme, which would set a rate at which copyrighted works would have to be licensed for distribution over the Internet. Such a system is already in place for mechanical--i.e., record and compact disc--reproductions of copyrighted works; [\[FN267\]](#) as the argument goes, Congress could act to extend this licensing scheme into the Internet realm, thereby allowing the distribution of content over the Internet while guaranteeing just compensation to the content owners. In fact, such a statutory licensing solution was originally proposed for the film company plaintiffs in Sony; prior to the Supreme Court's articulation of the Sony doctrine, the Ninth Circuit had suggested that "a continuing royalty pursuant to a . . . compulsory license may very well be an acceptable resolution" of the impasse between the VCR manufacturers and the film companies. [\[FN268\]](#) Of the *690 myriad options Congress has before it in addressing the **P2P** issue, this one is arguably best equipped to strike a balance between content owners and new technologies. It will force copyright owners to work together with online distributors, while ensuring that the copyright owners are compensated for the use of their work. "Being forced to deal with online distributors for a set fee may be an attractive solution for the copyright owner, if the alternative is to receive no compensation from [P2Ps] that profit from the unauthorized distribution of her intellectual property." [\[FN269\]](#)

In its simplest form, such a compensation scheme could be created by imposing a statutory levy on: (1) the digital equipment that enables digital reproductions of copyrighted works (such as compact disc burners); (2) the media used to store digital copies (such as blank compact discs); and (3) the **P2P** software systems themselves. [\[FN270\]](#) The funds raised by such levies would be placed in a fund--one administered by either the U.S. Copyright Office or a new administrative body--and the monies from the fund would be used to compensate copyright owners for the use of their works. [\[FN271\]](#) Stanford Law Professor William Fisher, who has recently undertaken extensive studies of such a statutory proposal, theorizes that an 11.8% levy on such digital media items would raise sufficient funds to compensate the copyright owners for the losses "they have suffered and will likely suffer in the future as a result of being unable to enforce their copyrights" in the **P2P** environment. [\[FN272\]](#) Moreover, this type of levy has been implemented by Congress before; in 1992, for example, Congress passed the Audio Home Recording Act ("AHRA") [\[FN273\]](#) to address the anticipated (though never realized) proliferation of DAT recorders in the United States. The AHRA imposed a statutory levy to be paid by the producers of blank DATs and DAT equipment--calculated as three percent of the price of blank DATs and two percent of the sales of such equipment-- which monies were then *691 deposited into a fund and distributed to the owners of both sound recordings and the underlying musical compositions. [\[FN274\]](#)

However, a congressionally-mandated levy on digital technology equipment will not solve the problem alone; after all, much of the difficulty with **P2P** technology is that it is nearly impossible to currently track exchanges of copyrighted works over **P2P** networks. Copyright owners have worried aloud that a levy on digital equipment would not adequately compensate them. [\[FN275\]](#) Consequently, Congress's compulsory licensing scheme would additionally need to mandate encoding requirements for all digital works--"fingerprints," so that the files can be identified and tracked--and would need to establish an administrative body (either the copyright office or a separate entity) to estimate the frequency with which each song or film was downloaded or viewed by consumers. [\[FN276\]](#) Each copyright registrant would then periodically be paid by the agency, from the levying fund, for the relative popularity of his work. [\[FN277\]](#) The agency would use a sampling system similar to Nielsen, either by randomly selecting a set of entertainment users who were willing to allow the agency to monitor

what they listened to and watched, or by statutorily mandating that all **P2P** software be designed with such monitoring capabilities built in. [\[FN278\]](#)

While a statutory licensing scheme would require significant changes to the current copyright regime--Professor Fisher's work speculates that it would require a congressional amendment to the Copyright Act as well as a modification of existing international copyright treaties [\[FN279\]](#)--such a scheme would provide compensation to copyright owners for the use of their works, while allowing **P2P** technologies (and the benefits that they convey on the public) to thrive without fear of running afoul of the copyright regime. In short, such a system would allow Congress to reconcile two goals that have long been in conflict: facilitating innovation and ensuring that artists are adequately compensated. [\[FN280\]](#) These "safety valves" of a statutory licensing solution [\[FN281\]](#) arguably achieve the public policy balance that the Sony court sought to attain with its original articulation of the contributory infringement standard, and is arguably the best way for *692 Congress to address the **P2P** issue in the wake of *Grokster*. Under such a rubric

[c]onsumers would pay less for more entertainment. Artists would be fairly compensated. The set of artists who made their creations available to the world at large--and consequently the range of entertainment products available to consumers--would increase Finally, society at large would benefit from a sharp reduction in litigation and other transaction costs. [\[FN282\]](#)

Unfortunately, a large number of events would have to occur for such a royalty scheme to emanate from Congress. Congress would need to be persuaded of the benefits of **P2P**; the RIAA would need to be convinced that such a compulsory royalty would better serve its long-term interests rather than attempting to stamp out **P2P** technologies via litigation; and the compensation system would have to be shown to adequately compensate copyright holders via an effective system of copyright registration and sampling. Despite the benefits of such a scheme, it seems highly unlikely that all of these events will occur in the immediate future, especially with the powerful lobbying influence that the RIAA currently wields over Congress. In other words, unless the RIAA decides to suddenly change its view of **P2P** software, perhaps spurred by a damaging outcome in the *Grokster* case, a statutory scheme such as the one proposed by Professor Fisher seems, regretfully, unlikely to materialize in the short term.

Conclusion

The Internet and its concomitant proliferation of **P2P** technologies in recent years pushed the doctrine of contributory copyright infringement to its breaking point. While Sony's contributory standard of "capable of noninfringing uses" appeared clear enough in the era of the VTR, it proved to be somewhat unwieldy when applied to new technologies like **P2P** software. The shortcomings of the Sony doctrine resulted in significant schisms between the federal circuits over the scope of contributory copyright liability; it was likely this inter-circuit split that motivated the Supreme Court to step into the fray in 2005, in *MGM Studios Inc. v. Grokster, Ltd.*

*693 In the wake of the Supreme Court's landmark decision in *Grokster*, serious questions remain unanswered. [\[FN283\]](#) While the Sony standard did indeed survive the *Grokster* holding, and will certainly continue to govern contributory copyright liability, the lower courts must now factor in additional considerations of an inventor's "intent" or "purpose" in distributing a new technological product. While it appears that this "inducement theory" is intended to supplement the Sony considerations without displacing them, it remains to be seen how the lower courts will incorporate new questions of "intent" into the Sony analysis. Regardless of how *Grokster* is construed by the courts in the years to come, questions over the proper balance between copyright protection and technological innovation will likely persist.

The challenge of striking this balance is nothing new. In fact, regardless of whether it is the lower courts of the judiciary or Congress that ultimately decides to construe the scope of copyright protection in the twenty-first century, they should be

guided by the underlying purpose of the Sony doctrine: striking "a balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries . . . and . . . the free flow of ideas, information, and commerce." [\[FN284\]](#) Failure to do so could have detrimental effects, not only on the future of **P2P** technology, but more importantly on the public's interest in the free flow of ideas and information.

[\[FN1\]](#). Project Gutenberg, founded by Michael Hart in 1971, is the first and largest collection of electronic books (eBooks) available on the Internet. The collection contains more than 13,000 literary works, most of which are older and are in the public domain in the United States. The works are available for downloading in a range of file formats. Project Gutenberg is a nonprofit organization. The entire collection is maintained by a team of volunteers. See generally <http://www.gutenberg.org> (last visited Nov. 29, 2005) (providing an overview of the Project Gutenberg website).

[\[FN2\]](#). While this Comment will elaborate on the nature of **P2P** distribution systems, for a helpful, general understanding of **P2P** software, see Jesse M. Feder, Is [Betamax Obsolete?: Sony Corp. of Am. v. Universal City Studios, Inc. in the Age of Napster](#), 37 *Creighton L. Rev.* 859, 863-68 (2003).

[\[FN3\]](#). United States Copyright Act of 1976, [17 U.S.C. §§101-1332 \(2000 & Supp. II 2002\)](#).

[\[FN4\]](#). [125 S. Ct. 2764 \(2005\)](#).

[\[FN5\]](#). [464 U.S. 417 \(1984\)](#).

[\[FN6\]](#). [Id. at 442](#). Subsequent courts relied upon Sony's "capable of substantial noninfringing uses" standard as the pivotal focus in cases of contributory copyright infringement. See, e.g., [Matthew Bender & Co. v. West Publ'g Co.](#), 158 F.3d 693, 706-07 (2d Cir. 1998) (invoking the Sony doctrine where West Publishing Company alleged contributory infringement by the manufacturers of CD-ROMs that utilized West's starred pagination system in its Supreme Court CD-ROMs); [Ga. Television Co. v. TV News Clips, Inc.](#), 718 F. Supp. 939, 948 (N.D. Ga. 1989) (finding the Sony doctrine to be unavailing to a corporate defendant who taped clips from a local newscast for commercial purposes, since such uses were "not noninfringing use[s] based on Sony").

[\[FN7\]](#). [MGM Studios Inc. v. Grokster, Ltd.](#), 380 F.3d 1154, 1162 n.9 (9th Cir. 2004), vacated, [125 S. Ct. 2764 \(2005\)](#).

[\[FN8\]](#). [Grokster](#), 125 S. Ct. at 2770.

[\[FN9\]](#). [Id. at 2780](#).

[\[FN10\]](#). [Id.](#)

[\[FN11\]](#). [Id. at 2774](#).

[\[FN12\]](#). [Id. at 2781](#).

[\[FN13\]](#). See Tom Zeller, Jr., Music Swapping Is Likely To Pause but Not Wither, *N.Y. Times*, June 28, 2005, at C1 (stating that Grokster provides "little guidance on just how one might determine whether a company was purposely inducing its users to violate the law").

[\[FN14\]](#). See [Grokster](#), 125 S. Ct. at 2778-79 (stating that the Court will "leave further consideration of the Sony rule for a day when that may be required").

[FN15]. Zeller, *supra* note 13 (quoting Jonathan Zittrain, co-director of the Berkman Center for Internet and Society at Harvard Law School, and his trenchant observation that "Sony emerges not in tatters").

[FN16]. See [Grokster, 125 S. Ct. at 2792-94](#) (Breyer, J., concurring) (emphasizing the importance of preserving the Sony test, while agreeing with the premise that, in cases of a "specific intent to infringe," contributory liability is appropriate).

[FN17]. See, e.g., Craig Joyce et al., *Copyright Law 2* (6th ed. 2003) ("In 2002, the core copyright industries (including pre-recorded music, TV programs, motion pictures, home videos, books, periodicals, newspapers and computer software) accounted for 5.24% of the U.S. Gross Domestic Product, or \$348.4 billion."); Jeffrey Rosen, Editorial, *Roberts v. The Future*, N.Y. Times, §6 (Magazine), Aug. 28, 2005, at 24, 44 (arguing that one of the most "important" issues facing then-Supreme Court nominee John G. Roberts, Jr., will be the future of digital copyright and "the ability of corporations and entrepreneurs, through the use of copyright ... to control a broad spectrum of intellectual property, from digital entertainment to genetic sequences").

[FN18]. WIPO One Year Later: Assessing Consumer Access to Digital Entertainment on the Internet and Other Media: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection, H. Comm. on Commerce, 106th Cong. 31 (1999) (statement of Peter Harter, Vice President, Global Public Policy and Standards, Emusic.com, Inc.).

[FN19]. Craig Joyce and his co-authors note:

The development of copyright law has been a continuing response to the challenge posed by new technologies for the reproduction and distribution of human expression Indeed, the first copyright statute was a reaction (albeit one delayed more than 200 years) to a new technology of the 15th Century: printing with moveable type.

Joyce et al., *supra* note 17, at 15.

[FN20]. [Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 \(1984\)](#).

[FN21]. [239 F.3d 1004 \(9th Cir. 2001\)](#).

[FN22]. [380 F.3d 1154 \(9th Cir. 2004\)](#), vacated, [125 S. Ct. 2764 \(2005\)](#).

[FN23]. [334 F.3d 643 \(7th Cir. 2003\)](#), cert. denied, [540 U.S. 1107 \(2004\)](#).

[FN24]. See Linda Greenhouse & Lorne Manly, *Justices Agree to Hear Case on File Sharing*, N.Y. Times, Dec. 11, 2004, at C1.

[FN25]. United States Copyright Act of 1976, 17 U.S.C. §§100-1332 (2000 & Supp. II 2002).

[FN26]. *Id.* §106.

[FN27]. *Id.* §501. The Act allows for a number of remedies against the infringer of a copyrighted work, including an injunction, the impoundment and destruction of all reproductions of the work that violate the owner's rights, a recovery of either statutory or actual damages, and attorneys' fees. See *id.* §§502-505.

[FN28]. The absence of any statutory provision governing contributory liability under the Act has arguably added to the confusion over the proper scope of the doctrine; courts are simply unable to refer to clear and concise statutory language when faced with a case of contributory copyright infringement. This might explain in part why opinions applying the doctrine of contributory copyright infringement are "startling in their inconsistency." Feder, *supra* note 2, at 860.

[FN29]. Copyright law has come to recognize two separate theories of liability when a copyright is infringed by a third party other than the defendant: contributory and vicarious liability. The lines between the two theories can sometimes blur. See [Sony Corp. of Am. v. Universal City Studios, Inc.](#), 464 U.S. 417, 435 n.17 (1984). However, there remain clear distinctions between the two. Vicarious liability derives from agency principles of respondeat superior, or "look to the higher up." See [Fonovisa, Inc. v. Cherry Auction, Inc.](#), 76 F.3d 259, 261-62 (9th Cir. 1996). Such liability is typically imposed in copyright law where a manager, the classic "dance hall operator," exercises both a high level of control over the infringement and is likely to benefit financially from the infringement. *Id.* Sony, and, more recently, Grokster, focused almost exclusively on the concept of contributory copyright liability, with nary a mention of vicarious copyright liability. See, e.g., [MGM Studios Inc. v. Grokster, Ltd.](#), 125 S. Ct. 2764, 2776 n.9 (2005) (declining to base its opinion on a vicarious infringement theory, and stating that "[b]ecause we resolve the case based on an inducement theory, there is no need to analyze separately MGM's vicarious liability theory"). For that reason, this Comment addresses vicarious copyright liability only where relevant.

[FN30]. It has also been suggested that contributory liability derives in large part from the implicit language of §106 of the Copyright Act, which grants to a copyright holder the right "to do and to authorize" the exclusive rights granted by that section. §106. The legislative history of the Copyright Act suggests that the use of the phrase "to authorize" was "intended to avoid any questions as to the liability of contributory infringers." Joyce et al., *supra* note 17, at 774. In any event, such liability has been recognized as implicit in copyright law, despite the fact that it is not expressly mandated in the statute. See [Fonovisa](#), 76 F.3d at 261 ("Although the Copyright Act does not expressly impose liability on anyone other than direct infringers, courts have long recognized that in certain circumstances ... contributory liability will be imposed.").

[FN31]. Brandon Francavillo, [Pretzel Logic: The Ninth Circuit's Approach to Contributory Copyright Infringement Mandates that the Supreme Court Revisit Sony](#), 53 Cath. U. L. Rev. 855, 861 (2004).

[FN32]. [443 F.2d 1159 \(2d Cir. 1971\)](#).

[FN33]. [Id.](#) at 1160.

[FN34]. [Id.](#) at 1162.

[FN35]. [Sony Corp. of Am. v. Universal City Studios, Inc.](#), 464 U.S. 417, 421-22 (1984).

[FN36]. [Id.](#) at 420.

[FN37]. [Id.](#)

[FN38]. [Id.](#) at 421.

[FN39]. See, e.g., Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* 130 (1994) (describing the issue of whether private copying as a direct infringement is a particularly problematic one, since "[p]rivate copies can also have commercial consequence").

[FN40]. [Universal City Studios, Inc. v. Sony Corp. of Am.](#), 480 F. Supp. 429, 469 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

[FN41]. United States Copyright Act of 1976, [17 U.S.C. §107 \(2000\)](#). The "fair use" provisions of the Copyright Act provide that the use of a copyrighted work in certain activities, such as, for example, "criticism, comment, news reporting, teaching, ... scholarship or research," will not be deemed to be an infringement of copyright. *Id.* The Act thereby provides a sort of

"safe harbor" for certain uses of copyrighted works.

[FN42]. [Universal City Studios, 480 F. Supp. at 454.](#)

[FN43]. [Id. at 460.](#)

[FN44]. [Id. at 461.](#)

[FN45]. [Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 \(9th Cir. 1981\), rev'd, 464 U.S. 417 \(1984\).](#)

[FN46]. [Id. at 971-72.](#)

[FN47]. [Id. at 975.](#)

[FN48]. [Id.](#)

[FN49]. See Jonathan Band & Andrew J. McLaughlin, The [Marshall Papers: A Peek Behind the Scenes at the Making of Sony v. Universal](#), 17 Colum.-VLA J.L. & Arts 427, 432-33 (1993).

[FN50]. [Id. at 432-33](#); see Goldstein, *supra* note 39, at 150.

[FN51]. Band & McLaughlin, *supra* note 49, at 433.

[FN52]. See Paul Goldstein, Copyright, Patent, Trademark, and Related State Doctrines: Cases and Materials on the Law of Intellectual Property 747-48 (5th ed. 2004); Band & McLaughlin, *supra* note 49, at 432-35.

[FN53]. Band & McLaughlin, *supra* note 49, at 437-38.

[FN54]. [Id. at 438.](#)

[FN55]. [Id. at 444-47.](#)

[FN56]. [Id. at 447.](#)

[FN57]. See *id.* (discussing a note from Justice O'Connor in which she states that she is "closer to Justice Stevens' opinion than to any 'other on the table'").

[FN58]. [Id. at 439-40](#) (citing a memo in which Justice White proposes "reversing on contributory infringement grounds without deciding the question of the homeowners").

[FN59]. [Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 437 \(1984\).](#)

[FN60]. United States Patent Act, [35 U.S.C. §271\(c\) \(2000\).](#)

[FN61]. [Sony, 464 U.S. at 440-41.](#) The Patent Act makes clear that patent protection must be narrowly limited to the invention described in the patent claim, and cannot extend to other "staple article[s] or commodit[ies] of commerce suitable for substantial noninfringing use." See [35 U.S.C. §271\(c\)](#). Prior to its codification in the Patent Act, the Supreme Court invoked the "staple article of commerce" doctrine in patent cases to prohibit patent holders' attempts to extend the scope of their patent protection. Thus, for example, the doctrine prevented the owner of a patent in film-projection equipment in his

attempt to block competitors from selling other types of film that could be used on its projectors. See [Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 517 \(1917\)](#). The Supreme Court cited to the Motion Picture case in discussing the intent of the "staple article" doctrine. [Sony, 464 U.S. at 442](#).

[FN62]. [Sony, 464 U.S. at 442](#).

[FN63]. Id.

[FN64]. Id.

[FN65]. Id. at 423.

[FN66]. Id. at 444-45.

[FN67]. Id. at 442. In support of its conclusion, the Sony majority observed that plaintiffs' combined market share of all available television programming was well below ten percent, and that allowing plaintiffs to enjoin all uses of the VTR would "have a significant impact on both the producers and the viewers of the remaining 90% of the programming in the Nation." Id. at 443. The Court claimed that the plaintiffs would have had a stronger case if they had been able to speak for "virtually all copyright holders with an interest in the outcome." Id. at 446.

[FN68]. See, e.g., id. at 463-64 (Blackmun, J., dissenting) ("[T]here can be no question that under the Act the making of even a single unauthorized copy is prohibited.").

[FN69]. Id. at 492. Justice Blackmun found it inappropriate that the Court's "substantial noninfringing use" analysis honed in on the fact that "substantial numbers of copyright holders who license their works for broadcast on free television would not object" to having their shows recorded. See id. at 456 (majority opinion). Justice Blackmun apparently felt that the emphasis on which television shows were being taped was misplaced and that the focus should have been on the copying instrument.

[FN70]. Id. at 491 (Blackmun, J., dissenting).

[FN71]. Id. at 492.

[FN72]. Richard Stengel, Decision: Tape It to the Max: The Supreme Court Says a VCR Switch in Time is Not a Crime, *Time*, Jan. 30, 1984, at 67.

[FN73]. See Francavillo, *supra* note 31, at 863.

[FN74]. Lloyd L. Weinreb, [Fair's Fair: A Comment on the Fair Use Doctrine](#), 103 *Harv. L. Rev.* 1137, 1153 (1990).

[FN75]. [Sony, 464 U.S. at 429](#).

[FN76]. Id.

[FN77]. Goldstein, *supra* note 39, at 37.

[FN78]. [Sony, 464 U.S. at 442](#).

[FN79]. Compare [Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255, 264- 67 \(5th Cir. 1997\)](#) (applying Sony and holding

that a software designer that created a program to "unlock" a protection on a computer program diskette-- thereby allowing computer users to make an "unlimited number" of copies of a program--was not liable in the presence of a single noninfringing use), with [Religious Tech. Center v. Netcom On-Line Commc'ns Servs., Inc., 907 F. Supp. 1361, 1373-75 \(N.D. Cal. 1995\)](#) (applying Sony and allowing for contributory liability of a computer bulletin board service operator for the posting of copyright-protected excerpts of books, despite the fact that the large majority of the message posts on the bulletin board were noninfringing).

[FN80]. Ryan Roemer, The Digital Evolution: Freenet and the Future of Copyright on the [Internet, 2002 UCLA J.L. & Tech. 1, 1-3](#).

[FN81]. A brief note about the phrase "peer-to-peer software." The phrase has been made famous by file-sharing software programs like Napster, Grokster, and the like--programs that are the focus of this Comment. But it should be pointed out that the phrase "peer-to-peer software" more generally refers to any program creating a network on which a number of independent computer users are able to "link up" with each other without the need for a centralized server or host. See Yochai Benkler, [Coase's Penguin, 112 Yale L.J. 369, 375-76 \(2002\)](#). P2P systems can be broadly categorized as falling under either "peer production" or "peer distribution." Id. In a program implementing a "peer production" system, users are allowed to connect and collaborate on the production of a large body of work, such as, for example, academic research. Id. at 381-82. One example of a peer production system is currently being used by NASA; this system, called the "clickworker" production system, allows a number of "NASA clickworkers" to independently review NASA's satellite photographs of a planet's moon via the Internet, analyze them closely, and work collaboratively to produce a detailed map of the moon. Id. at 384-85. In contrast, in a "peer distribution" system, such as Napster, a network of independent distributors is created with the software, at which point files can be distributed--i.e., freely exchanged--among all users in the network. Id. at 397. Although this Comment specifically uses the phrase "peer-to-peer software" in referring to Napster, Grokster, and the like, it should be noted that this Comment is more generally referring to file-sharing software programs that create "peer distribution" systems.

[FN82]. [MGM Studios Inc. v. Grokster, Ltd., 380 F.3d 1154, 1158 \(9th Cir. 2004\)](#), vacated, [125 S. Ct. 2764 \(2005\)](#).

[FN83]. Id.

[FN84]. Id. Over the years, the designers of P2P distribution systems have developed different methods of indexing the files that are shared among users. One method is to use a centralized indexing system, maintaining a list of all available files on a centralized server. Feder, supra note 2, at 862- 68. Another is to have a completely decentralized system, in which each computer maintains a list of files available on that computer only. Id. Somewhere between these two extremes--the centralized system and the decentralized system--is a "supernode" system, in which a select number of computers on the network are designated as the primary indexing servers. Id.

[FN85]. [17 U.S.C. §106 \(2000 & Supp. II 2002\)](#); Tim Wu, [When Code Isn't Law, 89 Va. L. Rev. 679, 712 \(2003\)](#).

[FN86]. Wu, supra note 85, at 715.

[FN87]. Id.

[FN88]. Id.

[FN89]. Id. at 717; see also Benkler, supra note 81, at 397 (describing software that is "intended to allow users to set up a peer-based distribution system that will be independent of the more commercially controlled distribution systems").

[FN90]. [MGM Studios Inc. v. Grokster, Ltd.](#), 259 F. Supp. 2d 1029 (C.D. Cal. 2003), aff'd, 380 F.3d 1054 (9th Cir. 2004), vacated, 125 S. Ct. 2764 (2005); [In re Aimster Copyright Litig.](#), 252 F. Supp. 2d 634 (N.D. Ill. 2002), aff'd, 334 F.3d 643 (7th Cir. 2003), cert. denied, 540 U.S. 1107 (2004); [A&M Records, Inc. v. Napster, Inc.](#), 114 F. Supp. 2d 896 (N.D. Cal. 2000), aff'd 239 F.3d 1004 (9th Cir. 2001).

[FN91]. Feder, supra note 2, at 872. As is discussed in the pages that follow, that traditional assumption was tested by the outcome of some of the **P2P** cases. In fact, once the RIAA realized that they might not be able to impose liability on a secondary infringer, they shifted strategies, and began pursuing lawsuits against individual downloaders. These strategies have been well-documented. See, e.g., Robyn Axberg, File-sharing Tools and Copyright Law: A Study of [In re Aimster Copyright Litigation and MGM Studios Inc. v. Grokster, Ltd.](#), 35 Loy. U. Chi. L.J. 389, 390 (2003) (stating that the new strategy of suing individuals directly followed the RIAA's unsuccessful lawsuit against Grokster's distributors).

[FN92]. See, e.g., Wu, supra note 85, at 726 (claiming that **P2P** designers are advantaged by "a specific legal doctrine--copyright's contributory liability doctrine").

[FN93]. Elizabeth Miles, Note, [In re Aimster & MGM Studios Inc. v. Grokster, Ltd.: Peer to Peer and the Sony Doctrine](#), 19 Berkeley Tech. L.J. 21, 34-35 (2004). Miles's Note, written before the Ninth Circuit's holding in Grokster and before the Supreme Court's decision to step into the **P2P** debate, highlights some of the problems that **P2P** software has wrought on the doctrines of contributory copyright infringement. After discussing some recent **P2P** cases, Miles engages in a thorough critique of Judge Posner's opinion in the Aimster case, see infra notes 132-53 and accompanying text, characterizing it as a departure "from previous case law in both procedure and substance," Miles, supra, at 42. Miles also highlights the arguments on both sides of the **P2P** issue that are currently being played out in the public sphere. [Id.](#) at 43-46. With respect to the doctrine of contributory liability, Miles concludes that the Sony test is plainly "inapplicable to present realities," and therefore needs to be jettisoned in the **P2P** context. [Id.](#) at 52.

[FN94]. [239 F.3d 1004 \(9th Cir. 2001\)](#).

[FN95]. [Id.](#) at 1011.

[FN96]. Created in 1987 by the Moving Picture Experts Group, an MP3 is a standard file format for the storage of audio recordings in a digital format. MP3s are compressed files, which allows for rapid transmission of digital audio files from one computer to another by electronic mail or any other file transfer protocol. [Id.](#)

[FN97]. Lawrence Lessig, Free Culture 67 (2004).

[FN98]. [A&M Records, Inc. v. Napster, Inc.](#), 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000), aff'd, 239 F.3d 3d 1004 (9th Cir. 2001).

[FN99]. [Id.](#) at 927.

[FN100]. [Napster](#), 239 F.3d at 1019 (citing [Gershwin Publ'g Corp. v. Columbia Artists Mgmt.](#), 443 F.2d 1159, 1162 (2d Cir. 1971)).

[FN101]. [Id.](#) at 1020.

[FN102]. [Id.](#) at 1022.

[\[FN103\]](#). Id.

[\[FN104\]](#). Id. at 1021.

[\[FN105\]](#). Id.

[\[FN106\]](#). Id.

[\[FN107\]](#). Id. (emphasis added). The Ninth Circuit emphasis on a product's "capabilities," albeit redolent of dicta, clearly set the stage for the Ninth Circuit's opinion in *Grokster*. Id. By placing the emphasis on a product's "capabilities" and downplaying the question of whether those capabilities were "substantial," the court created a model under which a number of **P2P** products would be at least capable of noninfringing uses. According to the Ninth Circuit's interpretation of *Sony*, for example, if 1,000 copies of a copyright-protected Eminem song were downloaded over a **P2P** system, but the system had the capability--present and future--of allowing users to download 100 of Beethoven's public domain works, then the system would be deemed "capable of noninfringing uses" and (without an actual analysis of the "substantiality" of those uses) the designer would be free from contributory liability. Although the court did not fully develop this view in the *Napster* opinion--deferring instead to the district court's finding that *Napster* knew its users' infringements of plaintiffs' copyrights and upholding liability on that basis, id. at 1021--the approach hinted at in *Napster* became the Ninth Circuit's official position in *Grokster*, where the product's "capabilities" exonerated the defendants from contributory liability.

[\[FN108\]](#). Id. at 1020.

[\[FN109\]](#). Id.; [Religious Tech. Center v. Netcom On-Line Commc'ns Servs., Inc.](#), 907 F. Supp. 1361, 1371 (N.D. Cal. 1995).

[\[FN110\]](#). [Napster](#), 239 F.3d at 1021.

[\[FN111\]](#). [380 F.3d 1154 \(9th Cir. 2004\)](#), vacated, [125 S. Ct. 2764 \(2005\)](#).

[\[FN112\]](#). Id. at 1159.

[\[FN113\]](#). See Wu, supra note 85, at 731-34 (citing "an intentional effort ... to avoid a lawsuit" by limiting the level of control exercised over such **P2P** programs as Gnutella, Kazaa, and *Grokster*); see also Miles, supra note 93, at 29 ("[I]n *Napster's* wake, peer-to-peer coders designed systems they hoped would satisfy the Ninth Circuit and like minded courts.").

[\[FN114\]](#). [259 F. Supp. 2d 1029, 1031 \(C.D. Cal. 2003\)](#), aff'd, [380 F.3d 1154 \(9th Cir. 2004\)](#), vacated, [125 S. Ct. 2764 \(2005\)](#).

[\[FN115\]](#). Id.

[\[FN116\]](#). Id. at 1031-36.

[\[FN117\]](#). Id. at 1036.

[\[FN118\]](#). Id. at 1041-43.

[\[FN119\]](#). [MGM Studios Inc. v. Grokster, Ltd.](#), 380 F.3d 1154, 1160-61 (9th Cir. 2004), vacated, [125 S. Ct. 2764 \(2005\)](#).

[\[FN120\]](#). Id. at 1161.

[FN121]. [Id. at 1162](#) (emphasis added). This focus on the capability of the software was exactly the approach defendants' had argued for in their motions to the court. See Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Partial Summary Judgment of Defendants StreamCast Networks, Inc. and MusicCity Networks Inc. at 3, *MGM Studios Inc. v. Grokster, Ltd.*, No. 01-08541 SVW (PJWx) (C.D. Cal. 2002).

[FN122]. [Grokster, 380 F.3d at 1163](#).

[FN123]. *Id.*

[FN124]. *Id.*

[FN125]. *Id.* at 1157.

[FN126]. [334 F.3d 643 \(7th Cir. 2003\)](#), cert. denied, [540 U.S. 1107 \(2004\)](#).

[FN127]. [Id. at 645](#).

[FN128]. [Id. at 646](#). "Piggybacking" carries connotations of "riding one's coattails." In other words, the defendant's software functioned by latching on to a prevalent and already-popular software program--in this case, the AOL Instant Messenger program. In addition, the evidence in the case suggests that Deep's program was attaching to a (supposedly legal) software program for the express purpose of obscuring its infringing acts.

[FN129]. [Id. at 645](#).

[FN130]. [Id. at 646-47](#).

[FN131]. [Id. at 645-46](#).

[FN132]. *Id.*

[FN133]. *Id.* at 647.

[FN134]. *Id.* at 647-48.

[FN135]. *Id.* at 647-55.

[FN136]. *Id.* at 649.

[FN137]. *Id.* at 651 ("We also do not buy Aimster's argument that ... all Aimster has to show in order to escape liability for contributory infringement is that its file-sharing system could be used in non-infringing ways, which arguably it could be.").

[FN138]. *Id.* at 651-53.

[FN139]. See *id.* at 648 (emphasizing the proportion of infringing uses to noninfringing uses).

[FN140]. *Id.* at 651.

[FN141]. *Id.*

[\[FN142\]](#). Id.

[\[FN143\]](#). Id. at 652.

[\[FN144\]](#). Id. at 653.

[\[FN145\]](#). Id. at 651.

[\[FN146\]](#). Id.

[\[FN147\]](#). Id. at 655.

[\[FN148\]](#). Id.

[\[FN149\]](#). Id. at 655-56.

[\[FN150\]](#). Id. at 653.

[\[FN151\]](#). Feder, supra note 2, at 898.

[\[FN152\]](#). [Sony Corp. of Am. v. Universal City Studios, Inc.](#), 464 U.S. 417, 492 (1984) (Blackmun, J., dissenting).

[\[FN153\]](#). [Aimster](#), 334 F.3d at 655.

[\[FN154\]](#). Miles, supra note 93, at 21.

[\[FN155\]](#). Id.

[\[FN156\]](#). [MGM Studios Inc. v. Grokster, Ltd.](#), 380 F.3d 1154, 1162 n.9 (9th Cir. 2004), vacated, [125 S. Ct. 2764 \(2005\)](#).

[\[FN157\]](#). See Axberg, supra note 91, at 435-36 (discussing a number of divisive points between the circuits, including the proper interpretation of Sony's "capable of substantial noninfringing use" test and the requisite level of knowledge needed to impose contributory liability on a software designer).

[\[FN158\]](#). Id.

[\[FN159\]](#). [Grokster](#), 380 F.3d at 1160.

[\[FN160\]](#). [A&M Records, Inc. v. Napster, Inc.](#), 239 F.3d 1004, 1029 (9th Cir. 2001).

[\[FN161\]](#). The Fifth Circuit took a similar view of Sony, placing the emphasis on whether a product is capable of noninfringement rather than whether those noninfringements are in fact "substantial." See, e.g., [Vault Corp. v. Quaid Software Ltd.](#), 847 F.2d 255, 264-67 (5th Cir. 1988) (applying Sony and holding that a software designer that created a program to unlock a protection on a computer program was not liable in the presence of a single noninfringing use).

[\[FN162\]](#). In the case of our hypothetical program, Bookster, for example, our software designer Eric would not be liable under the Ninth Circuit's reading of Sony, since the works of Mark Twain were exchanged on the network.

[\[FN163\]](#). Feder, supra note 2, at 895.

[FN164]. See Axberg, *supra* note 91, at 435.

[FN165]. Feder, *supra* note 2, at 895.

[FN166]. *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003), cert. denied, 540 U.S. 1107 (2004).

[FN167]. See *id.* 647-48.

[FN168]. *Id.* at 653.

[FN169]. *MGM Studios Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1160-61 (9th Cir. 2004), vacated, 125 S. Ct. 2764 (2005).

[FN170]. *Aimster*, 334 F.3d at 655.

[FN171]. Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Geo. L.J. 1833, 1875 (2000).

[FN172]. See Axberg, *supra* note 91, at 390 (stating that the new strategy of suing individuals followed the RIAA's unsuccessful lawsuit against Grokster).

[FN173]. See Bill Holland, RIAA Files 750 Infringement Suits, Billboard.com, Oct. 29, 2004, available at http://www.billboard.com/bb/daily/article.display.jsp?vnu_content_id=1000694363. In the wake of its defeat in Grokster at the appellate level, the RIAA undertook a vast range of legally creative tactics. For example, after the Grokster decision was announced by the Ninth Circuit, the RIAA sued Sharman Networks and other companies involved with the P2P program Kazaa in a court in Sydney, Australia, in the hope that Australia's courts might be more amenable to a finding of contributory copyright liability than the Ninth Circuit. See Susan Butler, Labels, Kazaa Battle in Australian Court, Billboard.com, Nov. 30, 2004, available at http://www.billboard.com/bb/daily/article.display.jsp?vnu_content_id=1000728021#loop. This litigation strategy wound up proving fruitful for the RIAA; in September 2005 the federal Australian court in Sydney ruled that Kazaa's software had clearly infringed a number of music copyrights. See Wayne Arnold, Australian Court Rules Kazaa Has Violated Copyrights, N.Y. Times, Sept. 6, 2005, at C3. In an opinion by Judge Murray R. Wilcox, the court ordered Kazaa to alter its software to completely prevent violations by its users. *Id.* At the same time, Judge Wilcox acknowledged that this would be more or less impossible for Kazaa to do. *Id.* The ruling appears to confirm the death of Kazaa as a viable P2P technology, at least in the context of Australian copyright law.

The RIAA also filed individual lawsuits against media companies who offer financial assistance to P2P software endeavors. See *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408, 412-13 (C.D. Cal. 2004). In that proceeding, the RIAA filed suit against Bertelsmann, the media conglomerate that purchased P2P program Napster as its bankruptcy was impending in 2001. The plaintiffs argued that by funding Napster as copyright infringements were continuing to occur on its system, Bertelsmann was liable for contributory copyright infringement. *Id.* at 410. The district court allowed the copyright infringement claims against Bertelsmann to proceed. However, the court showed ambivalence over issuing a blanket holding that anyone involved in the capitalization of a P2P software company could be liable for contributory liability; the court explained: "at this stage the court need not pass upon the question of whether mere financial support of a contributing and vicarious infringer such as Napster--without more direct involvement--would give rise to a claim for contributory or vicarious infringement against the party providing the funding." *Id.* at 414.

[FN174]. See, e.g., Glenn Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 Va. L. Rev. 813, 849 (2001) (stating that "even if [individual users can be identified] in some

cases, the costs of resolving the question of infringement through a judicial proceeding are prohibitive").

[FN175]. See, e.g., Tom Zeller, Jr., As Piracy Battle Nears Supreme Court, the Messages Grow Manic, N.Y. Times, Feb. 7, 2005, at C1 (describing recent efforts by the RIAA to educate the public about the harms of unauthorized downloading, but stating that the individual suits have "made it difficult for copyright holders to foster a positive public image--even though they see the lawsuits as critical to stamping out theft").

[FN176]. Randal Picker, Copyright as Entry Policy: The Case of Digital Distribution, 47 Antitrust Bull. 423, 442 (2002).

[FN177]. See, e.g., Wu, supra note 85, at 731 (describing how a number of P2Ps such as Gnutella, Kazaa, and Grokster attempted to modify their programs in "an intentional effort ... to avoid a lawsuit").

[FN178]. Lessig, supra note 97, at 200.

[FN179]. Roemer, supra note 80, at 8-9.

[FN180]. Id.

[FN181]. Both sides of the stalemate also sought to rally public opinion in anticipation of the Supreme Court's decision. See Zeller, supra note 175 (describing how each side pursued vigorous advertising and public awareness campaigns about the pros and cons of **P2P** software).

[FN182]. See Greenhouse & Manly, supra note 24.

[FN183]. The RIAA argued that CD sales fell by 8.9%, and revenues fell by 6.7%, as a result of **P2P** file sharing. Lessig, supra note 97, at 70. The validity of these figures has been hotly debated over the years, and the Grokster case unfortunately did precious little to resolve the issue. See [MGM Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2794 \(2005\)](#) (Breyer, J., concurring) (noting the debate over the impact of **P2P** on record sales). Regardless of their validity, however, on the other side of the industry's reduced revenues are a number of injustices that resulted from the RIAA's strategy of pursuing individual lawsuits for infringements rather than contributory ones. The RIAA's lawsuits included, among others, a suit against a twelve year-old girl living in public housing and a suit against a seventy year-old man "who had no idea what file sharing was." Lessig, supra note 97, at 200.

[FN184]. [Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 \(1984\)](#).

[FN185]. The potential benefits of **P2P** have been well documented. See, e.g., Benkler, supra note 81, at 381-82 (describing a **P2P** program by which a number of NASA "clickworkers" independently review NASA's satellite photographs and work to collaboratively produce a detailed map); Robert S. Boynton, The Tyranny of Copyright, N.Y. Times, Jan. 25, 2004, §6 (Magazine), at 44 (claiming that **P2P** offers the benefit of a "collaborative model for producing and sharing ideas"). In fact, StreamCast, one of the defendants in Grokster, made clear in the months leading up to the Grokster opinion that **P2P** had the potential to provide numerous benefits to the information-consuming public. In one interview, company CEO Michael Weiss posited that the "potential uses" for **P2P** were "staggering, assisting those who wish to trade anything from white papers and nursery rhymes to breaking news." See The NewsHour with Jim Lehrer (PBS television broadcast Mar. 7, 2005), available at http://www.pbs.org/newshour/bb/media/jan-june05/download_3-07.html. As Weiss put it: "There are 60 million users of peer-to-peer software in America alone, and 100 million worldwide. The amount of information storage that are on those computers of over 100 million users dwarfs anything that's available on the Web." Id. Legal scholars have also argued that a

severe approach to **P2P** by the courts could deprive the public of the substantial benefits that the technology offers. See, e.g., Lessig, *supra* note 97, at 74 (stating a "zero tolerance" approach to **P2P** "would mean that we as a society must lose the benefits of **P2P**, even for the totally legal and beneficial uses that they serve, simply to assure that there are zero copyright infringements that are caused by **P2P**").

[FN186]. Linda Greenhouse & Lorne Manly, *Justices Reinstate Suits on Internet File Sharing*, N.Y. Times, June 28, 2005, at C1.

[FN187]. [MGM Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2782 \(2005\)](#).

[FN188]. *Id.* at 2770 (citing the benefits of "security, cost, and efficiency" with **P2P** platforms).

[FN189]. *Id.* at 2775.

[FN190]. *Id.* at 2776.

[FN191]. *Id.* at 2774.

[FN192]. *Id.* at 2782.

[FN193]. *Id.* at 2776 n.9, 2780.

[FN194]. *Id.* at 2770, 2780.

[FN195]. *Id.* at 2780-81.

[FN196]. *Id.* at 2781.

[FN197]. *Id.* at 2773.

[FN198]. *Id.* at 2781.

[FN199]. *Id.* at 2780.

[FN200]. *Id.* at 2777-78 (citations omitted); see also [id. at 2779 n.10](#) (stating that the staple article doctrine provides no exemption for those who induce infringement).

[FN201]. *Id.* at 2778-79 (stating that the Ninth Circuit's reading of Sony was "erroneous").

[FN202]. *Id.* at 2782.

[FN203]. *Id.* at 2780.

[FN204]. *Id.* at 2778.

[FN205]. The Court did not address exactly how the Ninth Circuit had misconstrued Sony, nor did it address whether a court reviewing contributory liability should focus on the "substantiality" of a product's noninfringing uses rather than solely on its "capabilities." Of course, one can speculate that the Court disagreed with the Ninth Circuit's decision to ignore the word "substantial" in its analysis of whether a product is "capable of substantial noninfringing use," see Feder, *supra* note 2, at 895,

and that perhaps the Court found itself in agreement with the strict approach articulated by the Seventh Circuit in *Aimster*, which analyzed the proportion of infringing uses to noninfringing uses, [In re Aimster Copyright Litig.](#), 334 F.3d 643, 650 (7th Cir. 2003), cert. denied, 540 U.S. 1107 (2004).

In fact, some commentators have argued that the Court, by first denying certiorari to the Seventh Circuit in *Aimster* in 2004, implicitly suggested that it was endorsing that Circuit's legal reasoning. See, e.g., Francavillo, *supra* note 31, at 868 (characterizing the Seventh Circuit's approach as "a more practical reading of Sony"); Wu, *supra* note 85, at 739 (stating that "the ratio of infringing to non-infringing use" should be at "the forefront of the ultimate policy judgment in this area"). The temptation to read *Grokster* as an affirmation of the Seventh Circuit's approach is arguably bolstered by the *Grokster* Court's statement that the vast majority of the works exchanged on the defendants' networks were infringing works, [Grokster](#), 125 S. Ct. at 2770-71, as well as its observation that liability was clearly appropriate "given the number of infringing downloads that occur[ed] every day" using the defendants' products. [Id.](#) at 2776. The *Grokster* Court also seemed to adhere to the Seventh Circuit's emphasis on a defendant's behavior in assessing infringement liability. Compare [Aimster](#), 334 F.3d at 651 (imposing liability where there was a high level of facilitation of copyright infringement), with [Grokster](#), 125 S. Ct. at 2782 (basing defendants' liability on their "purpose to cause ... third-party acts of copyright infringement").

Despite these similarities, however, because the Court failed to explain exactly how the Ninth Circuit misconstrued Sony, the argument that the Seventh Circuit got it right in *Aimster* remains very much a speculative one. In fact, although Justice Souter made clear that the Court was reversing the Ninth Circuit, the *Grokster* majority never explicitly endorsed the Seventh Circuit's stricter approach.

[FN206]. [Grokster](#), 125 S. Ct. at 2778-79.

[FN207]. *Id.*

[FN208]. See Transcript of Oral Argument at 31, [MGM Studios Inc. v. Grokster, Ltd.](#), 125 S. Ct. 2764 (2005) (No. 04-480), available at <http://p2p.weblogsinc.com/entry/1234000167039288>.

[FN209]. [Sony Corp. of Am. v. Universal City Studios, Inc.](#), 464 U.S. 417, 491 (1984) (Blackmun, J., dissenting) (emphasis added); cf. [Grokster](#), 125 S. Ct. at 2782 (basing the liability of defendants on their "purpose to cause and profit from third-party acts of copyright infringement"). Commentators had expressly endorsed an inducement approach to copyright liability in anticipation of the *Grokster* case. See, e.g., Lee Gomes, Editorial, Ethical Responsibility, At Issue With *Grokster*, Applies to Others, Too, *Wall St. J.*, June 27, 2005, at B1 ("Grokster ... was in reality specifically designed for an illegal activity. While some people may use it for legal purposes (though I have never met anyone who has), its overwhelming use is to commit a crime."). In fact, one copyright scholar, calling his variation of the inducement analysis the "commercial punch" test, endorsed something similar to the inducement theory years before the *Grokster* opinion. That commentator argued that "courts should examine the underlying business that supports the development and distribution of the software," and argued that if copyright infringements were fundamentally "necessary to sustain [a company's] business model, however, the software [would not be] capable of substantial noninfringing use as contemplated in Sony." See Feder, *supra* note 2, at 901.

[FN210]. See Zeller, *supra* note 13 (stating that *Grokster* provides "little guidance on just how one might determine whether a company was purposefully inducing its users to violate the law"); see also Stuart Taylor, Jr., Editorial, Remote Control, *Atlantic Monthly*, Sept. 2005, at 37, 37-38 (arguing that the Supreme Court has increasingly "lost touch with the real world ramifications of its decisions" and positing that "lower court judges often find the law difficult to ascertain today," despite knowing "what each justice thinks it ought to be").

[FN211]. See [Grokster](#), 125 S. Ct. at 2779 (stating that while Sony called for an examination of a product's uses, a court

should not "ignore evidence of intent [to infringe] if there is such evidence"); *id.* (stating that Sony "did not displace other theories of secondary liability"); see also *id.* at 2794 (Breyer, J., concurring) (emphasizing the importance of preserving the Sony analysis, while agreeing with the premise that in cases of a "specific intent to infringe" contributory liability is appropriate).

[FN212]. See, e.g., *id.* at 2779 (majority opinion) (stating that "where evidence goes beyond a product's characteristics ... and shows statements or actions directed to promoting infringement, Sony's staple-article rule will not preclude liability").

[FN213]. *Id.* at 2784 (Ginsburg, J., concurring).

[FN214]. *Id.* at 2784-86.

[FN215]. *Id.* at 2785.

[FN216]. *Id.* at 2785-86

[FN217]. *Id.* at 2785, 2786 n.3.

[FN218]. *Id.* at 2790 (Breyer, J., concurring); see also *id.* at 2788 (stating that "Grokster passes Sony's test").

[FN219]. *Id.* at 2790-91.

[FN220]. *Id.* at 2789 ("That leaves some number of files near 10% that apparently are noninfringing, a figure very similar to the 9% or so of authorized time-shifting uses of the VCR that the Court faced in Sony.").

[FN221]. *Id.* at 2790.

[FN222]. *Id.* at 2789.

[FN223]. *Id.* at 2794 (commenting on the opinion of the majority at page 2782); see also *id.* at 2778 (majority opinion) (stating that Sony does not "displace other theories of secondary liability").

[FN224]. See *supra* note 57 and accompanying text.

[FN225]. See [Grokster, 125 S. Ct. at 2791-96](#) (Breyer, J., concurring).

[FN226]. *Id.*

[FN227]. *Id.* at 2796.

[FN228]. *Id.* at 2778-79 (majority opinion).

[FN229]. *Id.*

[FN230]. See *supra* note 15 and accompanying text.

[FN231]. Greenhouse & Manly, *supra* note 186. The article quoted industry executives hailing the decision as "good news indeed." *Id.* But see Electric Frontier Foundation, Deep Links, Noteworthy News from Around the Internet, Grokster Reader's Guide, para. 2 (June 25, 2005), <http://www.eff.org/deeplinks/archives/003742.php> (posting of Fred von Lohmann,

Attorney for Defendants) [hereinafter Lohmann] ("No matter what, we've won. From the beginning of this lawsuit the entertainment industries pushed the lower courts to adopt extreme, outlandish interpretations of copyright law No matter what the Court will announce on Monday, it will not be adopting [an] extreme position. So remember what we've already won.").

[FN232]. See Timothy L. O'Brien, King Kong vs. The Pirates of the Multiplex, N.Y. Times, Aug. 28, 2005, §3, at 1. The article discusses the recent proliferation of pirated, big-budget films--via **P2P** software--and Hollywood's attempts to stamp out such piracy. *Id.* However, the article notes that the Grokster opinion clearly "affirmed legal protections for creative content distributed online," and indicates that "[t]he ruling will make it easier for Hollywood to litigate more aggressively, should it choose to do so." *Id.*

However, despite the bolstering language of the Grokster opinion, the entertainment industry apparently remains amenable to suing individual **P2P** users. Armed with the Grokster opinion as a form of additional ammunition, in September 2005 the RIAA filed another 757 lawsuits against individual users of **P2P** file-sharing programs, sixty-four of whom were college students. See Latest Round of Music Industry Lawsuits Targets Internet Theft at 17 College Campuses, Collegiate Presswire, Sept. 28, 2005, http://www.cpwire.com/artmon/publish/printer_1158.asp. This brought the total number of individual lawsuits filed by the RIAA to 14,800. *Id.*

[FN233]. Jeff Leeds, No Pot of Gold in Court Ruling for the Studios, N.Y. Times, June 28, 2005, at C1; Hilary Rosen, Editorial, The Supreme Wisdom of Not Relying on the Court, Huffington Post, June 26, 2005, http://www.huffingtonpost.com/hilary-rosen/the-supreme-wisdom-of-not_b_3221.html (stating, in an editorial by the former Chairman/CEO of the RIAA, that "while the victory of whoever wins may be important psychologically, it just won't really matter in the marketplace"); see also Roemer, *supra* note 80, at 9 (stating that **P2P** users will "migrate to the best **P2P** system, whether it respects copyrights or not").

[FN234]. Renee Graham, Some Doubt Ruling Will Stop Downloading, Boston Globe, June 28, 2005, at A4.

[FN235]. Leeds, *supra* note 233; see also David Pogue, Britney to Rent, Lease or Buy, N.Y. Times, Aug. 7, 2005, §2, at 1 (stating that the growth of legal 'pay-per-download' services such as iTunes has only "infinitesimally" affected the proliferation of free **P2P** file-sharing programs, and claiming that "despite all of Apple's success selling songs online ... nearly 10 times as much online music is swapped as is bought").

[FN236]. Sarah Lacy, Countdown to Grokster vs. MGM [sic], Bus. Week Online, June 23, 2005, <http://www.businessweek.com>.

[FN237]. [MGM Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2780 \(2005\).](#)

[FN238]. [Id. at 2781 n.12.](#)

[FN239]. *Id.*

[FN240]. See, e.g., Alec Klein, Going Napster One Better; Aimster Says Its File Sharing Software Skirts Legal Quagmire, Wash. Post, Feb. 25, 2001, at A1 (describing how the **P2P** Aimster software was designed to be the "next Napster" and how it had the express goal of allowing free downloads of copyrighted work without incurring legal liability).

[FN241]. Benkler, *supra* note 81, at 381-82.

[FN242]. Feder, *supra* note 2, at 905.

[FN243]. [Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 \(1984\)](#); see also [White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 18 \(1909\)](#) (stating that copyright protection considerations "properly address themselves to the legislative and not to the judicial branch of the Government"); [AT&T Corp. v. City of Portland, 216 F.3d 871, 876 \(9th Cir. 2000\)](#), overruled in part, [Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688 \(2005\)](#) ("Like Heraclitus at the river, we address the Internet aware that courts are ill-suited to fix its flow.").

[FN244]. [17 U.S.C. §302\(a\) \(2000\)](#).

[FN245]. [Eldred v. Ashcroft, 537 U.S. 186, 204 \(2003\)](#).

[FN246]. [U.S. Const., art. I, §8, cl. 8](#) (emphasis added).

[FN247]. [MGM Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2775 \(2005\)](#).

[FN248]. [Id. at 2796](#) (Breyer, J., concurring) (quoting [Sony, 464 U.S. at 431](#)).

[FN249]. See Lohmann, *supra* note 231 ("The Court's opinion will set the stage for the inevitable fight on Capitol Hill.").

[FN250]. See Goldstein, *supra* note 39, at 146. But see Feder, *supra* note 2, at 908 (arguing that congressional deference is wholly inappropriate and that it should be the sole duty of the judiciary to apply statutory principles to new technologies as they proliferate).

[FN251]. Wendy J. Gordon, [Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 Colum. L. Rev. 1600, 1615 \(1982\)](#).

[FN252]. [Id. at 1613](#).

[FN253]. Lessig, *supra* note 97, at 218; see also Lunney, *supra* note 174, at 897-98 (noting the danger of special interest laws because of the disproportionate influence of the RIAA and the MPAA in Washington, D.C.).

[FN254]. See Lessig, *supra* note 97, at 215-16, 221-25.

[FN255]. Peer-to-Peer Piracy Prevention Act of 2002, H.R. 5211, 107th Cong. (2002). The bill failed to move out of a House subcommittee during the 107th Congress. If the public looks to Congress to address the **P2P** issue in the wake of Grokster, Berman's bill will be a likely contender, as it is already drafted and ready for House consideration.

[FN256]. [Id. §514\(a\)](#).

[FN257]. [Id. §514\(b\)\(1\)\(c\)](#).

[FN258]. Jennifer Norman, [Staying Alive: Can the Recording Industry Survive Peer-to-Peer?, 26 Colum. J. L. & Arts 371, 399 \(2003\)](#) (citing Dawn C. Chmielewski, 'Self-Help' Anti-Piracy Bill Unveiled, San Jose Mercury News, July 26, 2002, at 1C).

[FN259]. Indeed, Berman's bill has no mechanism to ensure that self-helping copyright owners limit their hard drive damage to fifty dollars; Berman appears to trust that they will do so. See Norman, *supra* note 258, at 400 (claiming that under

Berman's bill there is "too great a potential for abuse").

[FN260]. Consumer Broadband and Digital Television Promotion Act, S. 2048, [107th](#) Cong. (2002).

[FN261]. *Id.* §3.

[FN262]. *Id.* §5(a).

[FN263]. Norman, *supra* note 258, at 398.

[FN264]. *Id.*

[FN265]. [Sony Corp. of Am. v. Universal City Studios, Inc.](#), 464 U.S. 417, 429 (1984).

[FN266]. This disproportionate influence at the congressional level may be changing, however. One grassroots organization, for example, Downhill Battle, has mobilized thousands of pro-**P2P** volunteers and is soliciting large numbers of monetary contributions in order to advocate for the pro-**P2P** camp; the group has already mobilized an effective public relations campaign, and assisted with a large number of amicus filings in the Grokster case. See generally <http://www.downhillbattle.org> (last visited Nov. 29, 2005) (mapping out strategies for promoting **P2P** technologies, and offering merchandise such as tee-shirts and bumper stickers, to financially support those advocating on behalf of **P2P** technologies). If the **P2P** debate shifts to Congress, it is likely that groups such as Downhill Battle will attempt as much as possible to equalize the powerful lobbying influence of the RIAA and the MPAA.

[FN267]. In 1909, Congress amended the Copyright Act to ensure that composers would be paid for "mechanical reproductions" (reproductions on phonorecords and compact discs, so-called cover recordings) of their music. See [17 U.S.C. §115 \(2000 & Supp. II 2002\)](#). "[R]ather than granting the composer complete control over the right to make mechanical reproductions, Congress [instead] gave recording artists a right to record the music, at a price set by Congress, once the composer allowed it to be recorded once." Lessig, *supra* note 97, at 56. In other words, "[o]nce a composer authorizes a recording of his song, others are free to record the same song, so long as they pay the original composer a fee set by the law." *Id.* at 57. In effect, this statutory licensing rate "subsidizes the recording industry through a kind of piracy." *Id.*

The proposed statutory licensing scheme mentioned in the pages that follow should not be confused with the range of prevalent, legal music websites such as Apple's iTunes service. While those sites are clearly legal, involving both consent and a concomitant, though undisclosed, compensation to the copyright owner (calculated as a percentage of the \$.99-per-song fee paid by the iTunes end-user), such sites are not mandatory, but are purely optional. In other words, copyright holders have a right to choose or not to choose to license their copyrighted works to companies such as iTunes (for example, the Beatles are notoriously absent from iTunes). Under the scheme discussed in the pages that follow, in contrast, the statutory royalty would be compulsory and would apply to all copyrights. Put another way, the copyright holder would not be allowed to decide whether or not a work would be licensed to a **P2P** distribution company, but Congress would ensure that the artist would get a royalty from each and every one of those uses, based on the statutory rate.

[FN268]. [Sony](#), 464 U.S. at 428. This royalty solution was revived more recently by the Ninth Circuit in Napster, where the court considered whether it should impose "a monetary penalty by way of a compulsory royalty in place of an injunction." [A&M Records, Inc. v. Napster, Inc.](#), 239 F.3d 1004, 1028 (9th Cir. 2001).

[FN269]. Norman, *supra* note 258, at 401.

[\[FN270\]](#). See William F. Fisher III, Promises To Keep 216-22 (2004) (discussing how taxation would be an alternative form of compensation for copyright owners).

[\[FN271\]](#). To revert to our opening hypothetical, for example, such a scheme would ensure that Eric's Bookster program would be permitted to thrive. While a statutorily-imposed monetary levy would need to be imposed on Eric's Bookster software and other digital devices such as eBook readers, Fisher's scheme would ensure that the Bookster program would continue to proliferate (without any fear of future liability). On the other hand, copyright holders in the literary works--such as Stephen King--would be fairly compensated from the levy fund, thereby permitting them to work with **P2P** designers like Eric rather than against them.

[\[FN272\]](#). Fisher, supra note 270, at 208, 221.

[\[FN273\]](#). Audio Home Recording Act, [17 U.S.C. §§1001-1010 \(2000\)](#).

[\[FN274\]](#). Goldstein, supra note 39, at 162-63.

[\[FN275\]](#). Lunney, supra note 174, at 855.

[\[FN276\]](#). Fisher, supra note 270, at 203.

[\[FN277\]](#). Id. at 202.

[\[FN278\]](#). Id. at 227-78.

[\[FN279\]](#). Id. at 248.

[\[FN280\]](#). Id. at 239.

[\[FN281\]](#). Goldstein, supra note 39, at 20.

[\[FN282\]](#). Fisher, supra note 270, at 203.

[\[FN283\]](#). See Zeller, supra note 13 (stating that Grokster provides "little guidance on just how one might determine whether a company was purposely inducing its users to violate the law"); see also Taylor, supra note 210, at 38 (arguing that the Supreme Court has increasingly "lost touch with the real world ramifications of its decisions" and positing that "lower-court judges often find the law difficult to ascertain today").

[\[FN284\]](#). [Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 \(1984\)](#).

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