

September 27, 2005

Week 5) Copyright 2: Music on the Net, peer-to-peer, and indirect liability

- *Sony Corporation of America v. Universal City Studios, Inc.*, 464 US 417 (1984)
- *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001)
- *Metro-Goldwyn-Mayer v. Grokster*, No. 04-480, (U.S. June 27, 2005),
- *skim* Complaint in *Capitol Records v. Does 1-250*, 04-CV-00472,
<http://www.eff.org/IP/P2P/RIAA_v_ThePeople/JohnDoe/20040121_capitol_complaint.pdf>
- *skim* EFF, *A Better Way Forward, Voluntary Collective Licensing of Music File Sharing*,
<http://www.eff.org/share/?f=collective_lic_wp.html>

For further reading (optional):

- Mark Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev (2004),
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=525662>
- William Fisher, *Promises to Keep* (2005)
- Peter Biddle, Paul England, Marcus Peinado, and Bryan Willman, *The Darknet and the Future of Content Distribution* (2002)
<<http://crypto.stanford.edu/DRM2002/darknet5.doc>>

From the time of the player piano, copyright holders have tried to control technologies through which their works can be experienced or infringed. The “Betamax” case, *Sony v. Universal*, sets the backdrop for our consideration of the entertainment industry response to Internet infringement. In 1984, the Supreme Court was asked to enjoin the Sony Betamax on the ground that its primary uses infringed movie studio copyrights. The Court refused, setting out principles of secondary copyright liability it then had to apply, two decades later, to the question of filesharing software.

As you read *A&M v. Napster* and *MGM v. Grokster*, watch for the tension between copyright and technology. Is Internet distribution different in relevant ways from videocassette recording? Does Congress need to change the law? Watch too how liability rules shape technology development. After the centralized directory service of Napster (1.0) was enjoined, programmers and entrepreneurs quickly developed new filesharing programs with decentralized architectures to serve the same users. Is this reaction to legal rulings nefarious “inducement” of infringement or sensible risk management?

The entertainment industries have pursued other intermediaries, too. In *Recording Industry Association of America v. Diamond Multimedia Systems*, 180 F.3d 1071 (9th Cir. 1999), the RIAA sued the makers of the early MP3 player, the Diamond Rio for failing to implement copy controls. Diamond escaped liability under the Audio Home Recording Act, 17 U.S.C. 1001 et seq., on the grounds that its device did not meet the technical definition of a “digital audio recording device.” In 2002, major labels sued to compel backbone ISPs to block access to a Chinese website, Listen4ever.com, that was offering access to unauthorized music downloads. That suit was dropped when Listen4ever went offline. Many colleges and universities have faced pressure to cooperate with entertainment companies’ enforcement efforts. Some have responded by limiting or blocking access to the ports most commonly used by peer-to-peer

software; some have instituted network monitoring to catch and punish students using filesharing software; some have bought group access to music download sites like the new Napster or Rhapsody; some have done nothing.

In 2003, the RIAA announced that its members had begun suing individuals for “illegally distributing substantial amounts (averaging more than 1,000 copyrighted music files each) of copyrighted music on peer- to-peer networks.” Since then, record companies have identified several thousand individuals, including many at colleges and universities, by putting clients onto the peer-to-peer networks to find IP addresses of those “sharing” major-label music. They then seek the identities of the users of those IP addresses through “Doe” lawsuits and subpoenas to ISPs. The *Capitol Records v. Does 1-250* complaint is one example of the essentially template complaint filed across the country. After identifying defendants, the record companies typically send each a letter directing them to a “settlement center” to discuss settlement options. Most of the Does have settled, with reported settlements around \$2,000 - \$4,000. Does this methodology raise due process concerns? Does it seem like an efficient or effective way to address copyright infringement?

Each side of the debate can point to studies, some showing that filesharing has adversely affected music sales, others showing that those who share files buy as much or more music. Compare S. Liebowitz, *Will MP3 Downloads Annihilate the Record Industry? The Evidence So Far*, (June 2003), <<http://www.utdallas.edu/~liebowit/intprop/records.pdf>> (file sharing has caused a decline in music sales), with F. Oberholzer & K. Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, (Mar. 2004), <http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf> (concluding that "file sharing has no statistically significant effect on purchases of the average album"). Likewise, some artists such as Janis Ian and Wilco say they've benefited from fans' sharing their files, while others such as Metallica have led the charge against filesharing.

EFF, which defended Streamcast Networks, the makers of the Morpheus software, all the way up to the Supreme Court, proposes shifting the frame of the debate. Instead of asking who is the best target for infringement lawsuits, they've asked industry to consider offering a voluntary collective license to filesharing users. Like the ASCAP or BMI blanket licenses offered for radio play, copyright owners could offer users a subscription-like payment to download and share their music. Please skim the whitepaper, *A Better Way Forward, Voluntary Collective Licensing of Music File Sharing*, <http://www.eff.org/share/?f=collective_lic_wp.html>. Does the proposal seem realistic? How effectively would it address problems of digital copyright?

At least two threads intertwine in the discussion of digital music, those of culture and technology. On the one hand, the copyright law is supposed to “promote the progress of science” by giving artists and authors incentive to create and publish new works; on the other, it is not supposed to give them veto power over new technology for experiencing those works. When the Court refused to let Universal Studios jam the Betamax in its infancy, it opened the way for a now-thriving video rental market – and ever-greater opportunities for the public to enjoy movies? Can we protect artists against online infringement of their copyrights without stifling technological innovation?

Sony Corp. v. Universal City Studios, Inc.
464 U.S. 417 (1984)

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the television programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

Respondents commenced this copyright infringement action against petitioners in the United States District Court for the Central District of California in 1976. Respondents alleged that some individuals had used Betamax video tape recorders (VTR's) to record some of respondents' copyrighted works which had been exhibited on commercially sponsored television and contended that these individuals had thereby infringed respondents' copyrights. Respondents further maintained that petitioners were liable for the copyright infringement allegedly committed by Betamax consumers because of petitioners' marketing of the Betamax VTR's. Respondents sought no relief against any Betamax consumer. Instead, they sought money damages and an equitable accounting of profits from petitioners, as well as an injunction against the manufacture and marketing of Betamax VTR's.

[The district court denied plaintiffs' claims after trial. The Ninth Circuit reversed, finding Sony liable for contributory copyright infringement] ...

As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult 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, our patent and copyright statutes have been amended repeatedly.

From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment - the printing press - that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. Thus, long before the enactment of the Copyright Act of 1909, 35 Stat. 1075, it was settled that the protection given to copyrights is wholly statutory. *Wheaton v. Peters*, 8 Pet. 591, 661-662 (1834). The remedies for infringement "are only those prescribed by Congress." *Thompson v. Hubbard*, [131 U.S. 123, 151](#) (1889). Sound policy, as well as history, 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.

...

The two respondents in this case do not seek relief against the Betamax users who have allegedly infringed their copyrights. Moreover, this is not a class action on behalf of all copyright owners who license their works for television broadcast, and respondents have no right to invoke whatever rights other copyright holders may have to bring infringement actions based on Betamax copying of their works. As was made clear by their own evidence, the copying of the respondents' programs represents a small portion of the total use of VTR's. It is, however, the taping of respondents' own copyrighted programs that provides them with standing to charge Sony with contributory infringement. To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement. ...

If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory. The closest analogy is provided by the patent law cases to which it is appropriate to refer because of the historic kinship between patent law and copyright law.

In the Patent Act both the concept of infringement and the concept of contributory infringement are expressly defined by statute. The prohibition against contributory infringement is confined to the knowing sale of a component especially made for use in connection with a particular patent. There is no suggestion in the statute that one patentee may object to the sale of a product that might be used in connection with other patents. Moreover, the Act expressly provides that the sale of a "staple article or commodity of commerce suitable for substantial noninfringing use" is not contributory infringement. 35 U.S.C. 271(c).

When a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, the public interest in access to that article of commerce is necessarily implicated. A finding of contributory infringement does not, of course, remove the article from the market altogether; it does, however, give the patentee effective control over the sale of that item. Indeed, a finding of contributory infringement is normally the functional equivalent of holding that the disputed article is within the monopoly granted to the patentee.

For that reason, in contributory infringement cases arising under the patent laws the Court has always recognized the critical importance of not allowing the patentee to extend his monopoly beyond the limits of his specific grant. These cases deny the patentee any right to control the distribution of unpatented articles unless they are "unsuited for any commercial noninfringing use." *Dawson Chemical Co. v. Rohm & Hass Co.*, [448 U.S. 176, 198](#) (1980). Unless a commodity "has no use except through practice of the patented method," *id.*, at 199, the patentee has no right to claim that its distribution constitutes contributory infringement. "To form the basis for contributory infringement the item must almost be uniquely suited as a component of the patented invention." P. Rosenberg, *Patent Law Fundamentals* 17.022. (2d ed. 1982). "[A] sale of an article which though adapted to an infringing use is also adapted to other and lawful

uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce." *Henry v. A. B. Dick Co.*, [224 U.S. 1, 48](#) (1912), overruled on other grounds, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, [243 U.S. 502, 517](#) (1917).

We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective - not merely symbolic - protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

The question is thus whether the Betamax is capable of commercially significant noninfringing uses. 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. It does so both (A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court's factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use.

A. Authorized Time-Shifting

Each of the respondents owns a large inventory of valuable copyrights, but in the total spectrum of television programming their combined market share is small. The exact percentage is not specified, but it is well below 10%. If they were to prevail, the outcome of this litigation would have a significant impact on both the producers and the viewers of the remaining 90% of the programming in the Nation. No doubt, many other producers share respondents' concern about the possible consequences of unrestricted copying. Nevertheless the findings of the District Court make it clear that time-shifting may enlarge the total viewing audience and that many producers are willing to allow private time-shifting to continue, at least for an experimental time period.

The District Court found:

"Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the

public of the ability to use the Betamax for this noninfringing off-the-air recording. "Defendants introduced considerable testimony at trial about the potential for such copying of sports, religious, educational and other programming. This included testimony from representatives of the Offices of the Commissioners of the National Football, Basketball, Baseball and Hockey Leagues and Associations, the Executive Director of National Religious Broadcasters and various educational communications agencies. Plaintiffs attack the weight of the testimony offered and also contend that an injunction is warranted because infringing uses outweigh noninfringing uses. "Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law." 480 F. Supp., at 468.

Although the District Court made these statements in the context of considering the propriety of injunctive relief, the statements constitute a finding that the evidence concerning "sports, religious, educational and other programming" was sufficient to establish a significant quantity of broadcasting whose copying is now authorized, and a significant potential for future authorized copying. That finding is amply supported by the record. In addition to the religious and sports officials identified explicitly by the District Court, two items in the record deserve specific mention.

First is the testimony of John Kenaston, the station manager of Channel 58, an educational station in Los Angeles affiliated with the Public Broadcasting Service. He explained and authenticated the station's published guide to its programs. For each program, the guide tells whether unlimited home taping is authorized, home taping is authorized subject to certain restrictions (such as erasure within seven days), or home taping is not authorized at all. The Spring 1978 edition of the guide described 107 programs. Sixty-two of those programs or 58% authorize some home taping. Twenty-one of them or almost 20% authorize unrestricted home taping.

Second is the testimony of Fred Rogers, president of the corporation that produces and owns the copyright on Mister Rogers' Neighborhood. The program is carried by more public television stations than any other program. Its audience numbers over 3,000,000 families a day. He testified that he had absolutely no objection to home taping for noncommercial use and expressed the opinion that it is a real service to families to be able to record children's programs and to show them at appropriate times.

If there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as Mister Rogers' Neighborhood, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works. The respondents do not represent a class composed of all copyright holders. Yet a finding of contributory infringement

would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting.

Of course, the fact that other copyright holders may welcome the practice of time-shifting does not mean that respondents should be deemed to have granted a license to copy their programs. Third-party conduct would be wholly irrelevant in an action for direct infringement of respondents' copyrights. But in an action for contributory infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome. In this case, the record makes it perfectly clear that there are many important producers of national and local television programs who find nothing objectionable about the enlargement in the size of the television audience that results from the practice of time-shifting for private home use. The seller of the equipment that expands those producers' audiences cannot be a contributory infringer if, as is true in this case, it has had no direct involvement with any infringing activity.

B. Unauthorized Time-Shifting

Even unauthorized uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute. *Twentieth Century Music Corp. v. Aiken*, [422 U.S., at 154 - 155](#). Moreover, the definition of exclusive rights in 106 of the present Act is prefaced by the words "subject to sections 107 through 118." Those sections describe a variety of uses of copyrighted material that "are not infringements of copyright" "notwithstanding the provisions of section 106." The most pertinent in this case is 107, the legislative endorsement of the doctrine of "fair use."

That section identifies various factors that enable a court to apply an "equitable rule of reason" analysis to particular claims of infringement. Although not conclusive, the first factor requires that "the commercial or nonprofit character of an activity" be weighed in any fair use decision. If the Betamax were used to make copies for a commercial or profitmaking purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. Moreover, when one considers the nature of a televised copyrighted audiovisual work, see 17 U.S.C. 107(2) (1982 ed.), and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced, see 107(3), does not have its ordinary effect of militating against a finding of fair use.

[[Footnote 33](#)] It has been suggested that "consumptive uses of copyrights by home VTR users are commercial even if the consumer does not sell the home-made tape because the consumer will not buy tapes separately sold by the copyright holder." Home Recording of Copyrighted Works: Hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., pt. 2, p. 1250 (1982)

(memorandum of Prof. Laurence H. Tribe). Furthermore, "[t]he error in excusing such theft as noncommercial," we are told, "can be seen by simple analogy: jewel theft is not converted into a noncommercial veniality if stolen jewels are simply worn rather than sold." Ibid. The premise and the analogy are indeed simple, but they add nothing to the argument. The use to which stolen jewelry is put is quite irrelevant in determining whether depriving its true owner of his present possessory interest in it is venial; because of the nature of the item and the true owner's interests in physical possession of it, the law finds the taking objectionable even if the thief does not use the item at all. Theft of a particular item of personal property of course may have commercial significance, for the thief deprives the owner of his right to sell that particular item to any individual. Time-shifting does not even remotely entail comparable consequences to the copyright owner. Moreover, the time-shifter no more steals the program by watching it once than does the live viewer, and the live viewer is no more likely to buy prerecorded videotapes than is the time-shifter. Indeed, no live viewer would buy a prerecorded videotape if he did not have access to a VTR.

This is not, however, the end of the inquiry because Congress has also directed us to consider "the effect of the use upon the potential market for or value of the copyrighted work." 107(4). The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.

Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

In this case, respondents failed to carry their burden with regard to home time-shifting. ...

The District Court's conclusions are buttressed by the fact that to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits. In *Community Television of Southern California v. Gottfried*, [459 U.S. 498, 508](#), n. 12 (1983), we acknowledged the public interest in making television broadcasting more available. Concededly, that interest is not unlimited. But it supports an interpretation of the concept of "fair use" that

requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law.

When these factors are all weighed in the "equitable rule of reason" balance, we must conclude that this record amply supports the District Court's conclusion that home time-shifting is fair use. In light of the findings of the District Court regarding the state of the empirical data, it is clear that the Court of Appeals erred in holding that the statute as presently written bars such conduct.

...

It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

...Two kinds of Betamax usage are at issue here. The first is "time-shifting," whereby the user records a program in order to watch it at a later time, and then records over it, and thereby erases the program, after a single viewing. The second is "library-building," in which the user records a program in order to keep it for repeated viewing over a longer term. Sony's advertisements, at various times, have suggested that Betamax users "record favorite shows" or "build a library." Sony's Betamax advertising has never contained warnings about copyright infringement, although a warning does appear in the Betamax operating instructions.

Fair Use

The doctrine of fair use has been called, with some justification, "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (CA2 1939);...

There are situations, nevertheless, in which strict enforcement of [the copyright] monopoly would inhibit the very "Progress of Science and useful Arts" that copyright is intended to promote. An obvious example is the researcher or scholar whose own work depends on the ability to refer to and to quote the work of prior scholars. Obviously, no author could create a new work if he were first required to repeat the research of every author who had gone before him. The scholar, like the ordinary user, of course could be left to bargain with each copyright owner for permission to quote from or refer to prior works. But there is a crucial difference between the scholar and the ordinary user. When the ordinary user decides that the owner's price is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits. In such a case, the fair use doctrine acts as a form of subsidy -

albeit at the first author's expense - to permit the second author to make limited use of the first author's work for the public good. See Latman Fair Use Study 31; Gordon, Fair Use as Market Failure: A Structural Analysis of the Betamax Case and its Predecessors, 82 Colum. L. Rev. 1600, 1630 (1982).

A similar subsidy may be appropriate in a range of areas other than pure scholarship. The situations in which fair use is most commonly recognized are listed in 107 itself; fair use may be found when a work is used "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research." The House and Senate Reports expand on this list somewhat, and other examples may be found in the case law. Each of these uses, however, reflects a common theme: each is a productive use, resulting in some added benefit to the public beyond that produced by the first author's work. The fair use doctrine, in other words, permits worksto be used for "socially laudable purposes." See Copyright Office, Briefing Papers on Current Issues, reprinted in 1975 House Hearings 2051, 2055. I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use. ...

The making of a videotape recording for home viewing is an ordinary rather than a productive use of the Studios' copyrighted works. The District Court found that "Betamax owners use the copy for the same purpose as the original. They add nothing of their own." 480 F. Supp., at 453. Although applying the fair use doctrine to home VTR recording, as Sony argues, may increase public access to material broadcast free over the public airwaves, I think Sony's argument misconceives the nature of copyright. Copyright gives the author a right to limit or even to cut off access to his work. *Fox Film Corp. v. Doyal*, [286 U.S., at 127](#). A VTR recording creates no public benefit sufficient to justify limiting this right. Nor is this right extinguished by the copyright owner's choice to make the work available over the airwaves. Section 106 of the 1976 Act grants the copyright owner the exclusive right to control the performance and the reproduction of his work, and the fact that he has licensed a single television performance is really irrelevant to the existence of his right to control its reproduction. Although a television broadcast may be free to the viewer, this fact is equally irrelevant; a book borrowed from the public library may not be copied any more freely than a book that is purchased.

It may be tempting, as, in my view, the Court today is tempted, to stretch the doctrine of fair use so as to permit unfettered use of this new technology in order to increase access [[464 U.S. 417, 481](#)]to television programming. But such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create. ...

A&M Records v. Napster,
239 F.3d 1004 (9th Cir. 2001)

BEEZER, Circuit Judge:

Plaintiffs are engaged in the commercial recording, distribution and sale of copyrighted musical compositions and sound recordings. The complaint alleges that Napster, Inc. (“Napster”) is a contributory and vicarious copyright infringer. On July 26, 2000, the district court granted plaintiffs’ motion for a preliminary injunction. The injunction was slightly modified by written opinion on August 10, 2000. The district court preliminarily enjoined Napster “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.” ...

We have examined the papers submitted in support of and in response to the injunction application and it appears that Napster has designed and operates a system which permits the transmission and retention of sound recordings employing digital technology. In 1987, the Moving Picture Experts Group set a standard file format for the storage of audio recordings in a digital format called MPEG-3, abbreviated as “MP3.” Digital MP3 files are created through a process colloquially called “ripping.” Ripping software allows a computer owner to copy an audio compact disk (“audio CD”) directly onto a computer’s hard drive by compressing the audio information on the CD into the MP3 format. The MP3’s compressed format allows for rapid transmission of digital audio files from one computer to another by electronic mail or any other file transfer protocol.

Napster facilitates the transmission of MP3 files between and among its users. Through a process commonly called “peer-to-peer” file sharing, Napster allows its users to: (1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users; (2) search for MP3 music files stored on other users’ computers; and (3) transfer exact copies of the contents of other users’ MP3 files from one computer to another via the Internet. These functions are made possible by Napster’s MusicShare software, available free of charge from Napster’s Internet site, and Napster’s network servers and server-side software. Napster provides technical support for the indexing and searching of MP3 files, as well as for its other functions, including a “chat room,” where users can meet to discuss music, and a directory where participating artists can provide information about their music.

...Software located on the Napster servers maintains a “search index” of Napster’s collective directory. To search the files available from Napster users currently connected to the network servers, the individual user accesses a form in the MusicShare software stored in his computer and enters either the name of a song or an artist as the object of the search. The form is then transmitted to a Napster server and automatically compared to the MP3 file names listed in the server’s search index. Napster’s server compiles a list of all MP3 file names pulled from the search index which include the same search terms entered on the search form and transmits the list to the searching user. The Napster server does not search the contents of any MP3 file; rather, the search is limited to “a text search of the file names indexed in a particular cluster. Those file

names may contain typographical errors or otherwise inaccurate descriptions of the content of the files since they are designated by other users.” *Napster*, 114 F. Supp. 2d at 906.

To use the “hotlist” function, the Napster user creates a list of other users’ names from whom he has obtained MP3 files in the past. When logged onto Napster’s servers, the system alerts the user if any user on his list (a “hotlisted user”) is also logged onto the system. If so, the user can access an index of all MP3 file names in a particular hotlisted user’s library and request a file in the library by selecting the file name. The contents of the hotlisted user’s MP3 file are not stored on the Napster system.

To transfer a copy of the contents of a requested MP3 file, the Napster server software obtains the Internet address of the requesting user and the Internet address of the “host user” (the user with the available files). The Napster servers then communicate the host user’s Internet address to the requesting user. The requesting user’s computer uses this information to establish a connection with the host user and downloads a copy of the contents of the MP3 file from one computer to the other over the Internet, “peer-to-peer.” A downloaded MP3 file can be played directly from the user’s hard drive using Napster’s MusicShare program or other software. The file may also be transferred back onto an audio CD if the user has access to equipment designed for that purpose. In both cases, the quality of the original sound recording is slightly diminished by transfer to the MP3 format.

This architecture is described in some detail to promote an understanding of transmission mechanics as opposed to the content of the transmissions. The content is the subject of our copyright infringement analysis.

Plaintiffs claim Napster users are engaged in the wholesale reproduction and distribution of copyrighted works, all constituting direct infringement. Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995) (“[T]here can be no contributory infringement by a defendant without direct infringement by another.”). It follows that Napster does not facilitate infringement of the copyright laws in the absence of direct infringement by its users. The district court agreed. We note that the district court’s conclusion that plaintiffs have presented a prima facie case of direct infringement by Napster users is not presently appealed by Napster. ...

Accordingly, we next address whether Napster is secondarily liable for the direct infringement under two doctrines of copyright law: contributory copyright infringement and vicarious copyright infringement.

We first address plaintiffs’ claim that Napster is liable for contributory copyright infringement. Traditionally, “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); see also *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). Put differently, liability exists if the defendant engages in “personal conduct that encourages or assists the

infringement.” *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 706 (2d Cir. 1998). The district court determined that plaintiffs in all likelihood would establish Napster’s liability as a contributory infringer. The district court did not err; Napster, by its conduct, knowingly encourages and assists the infringement of plaintiffs’ copyrights.

A. Knowledge

Contributory liability requires that the secondary infringer “know or have reason to know” of direct infringement. *Cable/Home Communication Corp. Network Prods., Inc.*, 902 F.2d 829, 845 & 846 n.29 (11th Cir. 1990); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1373-74 (N.D. Cal. 1995) (framing issue as “whether Netcom knew or should have known of” the infringing activities). The district court found that Napster had both actual and constructive knowledge that its users exchanged copyrighted music. The district court also concluded that the law does not require knowledge of “specific acts of infringement” and rejected Napster’s contention that because the company cannot distinguish infringing from noninfringing files, it does not “know” of the direct infringement. 114 F. Supp. 2d at 917.

It is apparent from the record that Napster has knowledge, both actual and constructive. The district court found actual knowledge because: (1) a document authored by Napster co-founder Sean Parker mentioned “the need to remain ignorant of users’ real names and IP addresses ‘since they are exchanging pirated music’”; and (2) the Recording Industry Association of America (“RIAA”) informed Napster of more than 12,000 infringing files, some of which are still available. 114 F. Supp. 2d at 918. The district court found constructive knowledge because: (a) Napster executives have recording industry experience; (b) they have enforced intellectual property rights in other instances; (c) Napster executives have downloaded copyrighted songs from the system; and (d) they have promoted the site with “screen shots listing infringing files.” *Id.* at 919. of direct infringement. Napster claims that it is nevertheless protected from contributory liability by the teaching of *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). We disagree. We observe that Napster’s actual, specific knowledge of direct infringement renders *Sony*’s holding of limited assistance to Napster. We are compelled to make a clear distinction between the architecture of the Napster system and Napster’s conduct in relation to the operational capacity of the system.

The *Sony* Court refused to hold the manufacturer and retailers of video tape recorders liable for contributory infringement despite evidence that such machines could be and were used to infringe plaintiffs’ copyrighted television shows. Sony stated that if liability “is to be imposed on petitioners in this case, it must rest on the fact that they have sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material.” *Id.* at 439 (emphasis added). The *Sony* Court declined to impute the requisite level of knowledge where the defendants made and sold equipment capable of both infringing and “substantial noninfringing uses.” *Id.* at 442 (adopting a modified “staple article of commerce” doctrine from patent law). See also *Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429, 459 (C.D. Cal. 1979) (“This court agrees with defendants that their knowledge was insufficient to make them contributory infringers.”), rev’d, 659 F.2d 963 (9th Cir. 1981), rev’d, 464 U.S. 417 (1984); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Geo. L.J. 1833, 1874 & 1893

n.210 (2000) (suggesting that, after Sony, most Internet service providers lack “the requisite level of knowledge” for the imposition of contributory liability).

... Regardless of the number of Napster’s infringing versus noninfringing uses, the evidentiary record here supported the district court’s finding that plaintiffs would likely prevail in establishing that Napster knew or had reason to know of its users’ infringement of plaintiffs’ copyrights.... [I]f a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement. See *Netcom*, 907 F. Supp. at 1374. Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. See *Sony*, 464 U.S. at 436, 442-43. To enjoin simply because a computer network allows for infringing use would, in our opinion, violate Sony and potentially restrict activity unrelated to infringing use.

We nevertheless conclude that sufficient knowledge exists to impose contributory liability when linked to demonstrated infringing use of the Napster system. See *Napster*, 114 F. Supp. 2d at 919 (“Religious Technology Center would not mandate a determination that Napster, Inc. lacks the knowledge requisite to contributory infringement.”). The record supports the district court’s finding that Napster has actual knowledge that specific infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material. See *Napster*, 114 F. Supp. 2d at 918, 920-21. As stated by the district court:

Plaintiff[s] . . . demonstrate that defendant had actual notice of direct infringement because the RIAA informed it of more than 12,000 infringing files. See *Creighton* 12/3/99 Dec., Exh. D. Although Napster, Inc. purportedly terminated the users offering these files, the songs are still available using the Napster service, as are the copyrighted works which the record company plaintiffs identified in Schedules A and B of their complaint. See *Creighton* Supp. Dec. PP 3-4.

114 F. Supp. 2d at 918.

B. Material Contribution

Under the facts as found by the district court, Napster materially contributes to the infringing activity. Relying on *Fonovisa*, the district court concluded that “[w]ithout the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts.” *Napster*, 114 F. Supp. 2d at 919-20 (“Napster is an integrated service designed to enable users to locate and download MP3 music files.”). We agree that Napster provides “the site and facilities” for direct infringement. See *Fonovisa*, 76 F.3d at 264; cf. *Netcom*, 907 F. Supp. at 1372 (“Netcom will be liable for contributory infringement since its failure to cancel [a user’s] infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation.”). The district court correctly applied the reasoning in *Fonovisa*, and properly found that Napster materially contributes to direct infringement.

We affirm the district court’s conclusion that plaintiffs have demonstrated a likelihood of success on the merits of the contributory copyright infringement claim. ...

We turn to the question whether Napster engages in vicarious copyright infringement. Vicarious copyright liability is an “outgrowth” of respondeat superior. *Fonovisa*, 76 F.3d at 262. In the context of copyright law, vicarious liability extends beyond an employer/employee relationship to cases in which a defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Id.* (quoting *Gershwin*, 443 F.2d at 1162); see also *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325-26 (D. Mass. 1994) (describing vicarious liability as a form of risk allocation).

Before moving into this discussion, we note that Sony’s “staple article of commerce” analysis has no application to Napster’s potential liability for vicarious copyright infringement. See *Sony*, 464 U.S. at 434-435; see generally Anne Haring, Copyright Infringement Issues on the Internet, 617 PLI/Pat 455, 528 (Sept. 2, 2000) (indicating that the “staple article of commerce” doctrine “provides a defense only to contributory infringement, not to vicarious infringement”). The issues of Sony’s liability under the “doctrines of ‘direct infringement’ and ‘vicarious liability’” were not before the Supreme Court, although the Court recognized that the “lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn.” *Id.* at 435 n.17. Consequently, when the Sony Court used the term “vicarious liability,” it did so broadly and outside of a technical analysis of the doctrine of vicarious copyright infringement. *Id.* at 435 (“[V]icarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.”); see also Black’s Law Dictionary 927 (7th ed. 1999) (defining “vicarious liability” in a manner similar to the definition used in *Sony*).

A. Financial Benefit

The district court determined that plaintiffs had demonstrated they would likely succeed in establishing that Napster has a direct financial interest in the infringing activity. *Napster*, 114 F. Supp. 2d at 921-22. We agree. Financial benefit exists where the availability of infringing material “acts as a ‘draw’ for customers.” *Fonovisa*, 76 F.3d at 263-64 (stating that financial benefit may be shown “where infringing performances enhance the attractiveness of a venue”). Ample evidence supports the district court’s finding that Napster’s future revenue is directly dependent upon “increases in userbase.” More users register with the Napster system as the “quality and quantity of available music increases.” 114 F. Supp. 2d at 902. We conclude that the district court did not err in determining that Napster financially benefits from the availability of protected works on its system.

B. Supervision

The district court determined that Napster has the right and ability to supervise its users’ conduct. *Napster*, 114 F. Supp. 2d at 920-21 (finding that Napster’s representations to the court regarding “its improved methods of blocking users about whom rights holders complain . . . is tantamount to an admission that defendant can, and sometimes does, police its service”). We agree in part.

The ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise. See *Fonovisa*, 76 F.3d at 262 ("Cherry Auction had the right to terminate vendors for any reason whatsoever and through that right had the ability to control the activities of vendors on the premises."); cf. *Netcom*, 907 F. Supp. at 1375-76 (indicating that plaintiff raised a genuine issue of fact regarding ability to supervise by presenting evidence that an electronic bulletin board service can suspend subscriber's accounts). Here, plaintiffs have demonstrated that Napster retains the right to control access to its system. Napster has an express reservation of rights policy, stating on its website that it expressly reserves the "right to refuse service and terminate accounts in [its] discretion, including, but not limited to, if Napster believes that user conduct violates applicable law . . . or for any reason in Napster's sole discretion, with or without cause."

To escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability. See, e.g., *Fonovisa*, 76 F.3d at 261 ("There is no dispute for the purposes of this appeal that Cherry Auction and its operators were aware that vendors in their swap meets were selling counterfeit recordings."); see also *Gershwin*, 443 F.2d at 1161-62 (citing *Shapiro, Bernstein & Co. v. H.L. Greene Co.*, 316 F.2d 304 (2d Cir. 1963), for the proposition that "failure to police the conduct of the primary infringer" leads to imposition of vicarious liability for copyright infringement).

The district court correctly determined that Napster had the right and ability to police its system and failed to exercise that right to prevent the exchange of copyrighted material. The district court, however, failed to recognize that the boundaries of the premises that Napster "controls and patrols" are limited. See, e.g., *Fonovisa*, 76 F.2d at 262-63 (in addition to having the right to exclude vendors, defendant "controlled and patrolled" the premises); see also *Polygram*, 855 F. Supp. at 1328-29 (in addition to having the contractual right to remove exhibitors, trade show operator reserved the right to police during the show and had its "employees walk the aisles to ensure 'rules compliance'"). Put differently, Napster's reserved "right and ability" to police is cabined by the system's current architecture. As shown by the record, the Napster system does not "read" the content of indexed files, other than to check that they are in the proper MP3 format.

Napster, however, has the ability to locate infringing material listed on its search indices, and the right to terminate users' access to the system. The file name indices, therefore, are within the "premises" that Napster has the ability to police. We recognize that the files are user-named and may not match copyrighted material exactly (for example, the artist or song could be spelled wrong). For Napster to function effectively, however, file names must reasonably or roughly correspond to the material contained in the files, otherwise no user could ever locate any desired music. As a practical matter, Napster, its users and the record company plaintiffs have equal access to infringing material by employing Napster's "search function."

Our review of the record requires us to accept the district court's conclusion that plaintiffs have demonstrated a likelihood of success on the merits of the vicarious copyright infringement claim. Napster's failure to police the system's "premises," combined with a showing that Napster

financially benefits from the continuing availability of infringing files on its system, leads to the imposition of vicarious liability....

The district court correctly recognized that a preliminary injunction against Napster's participation in copyright infringement is not only warranted but required. We believe, however, that the scope of the injunction needs modification in light of our opinion. Specifically, we reiterate that contributory liability may potentially be imposed only to the extent that Napster: (1) receives reasonable knowledge of specific infringing files with copyrighted musical compositions and sound recordings; (2) knows or should know that such files are available on the Napster system; and (3) fails to act to prevent viral distribution of the works. See *Netcom*, 907 F. Supp. at 1374-75. The mere existence of the Napster system, absent actual notice and Napster's demonstrated failure to remove the offending material, is insufficient to impose contributory liability. See *Sony*, 464 U.S. at 442-43.

Conversely, Napster may be vicariously liable when it fails to affirmatively use its ability to patrol its system and preclude access to potentially infringing files listed in its search index. Napster has both the ability to use its search function to identify infringing musical recordings and the right to bar participation of users who engage in the transmission of infringing files. The preliminary injunction which we stayed is overbroad because it places on Napster the entire burden of ensuring that no "copying, downloading, uploading, transmitting, or distributing" of plaintiffs' works occur on the system. As stated, we place the burden on plaintiffs to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content. Napster, however, also bears the burden of policing the system within the limits of the system. Here, we recognize that this is not an exact science in that the files are user named. In crafting the injunction on remand, the district court should recognize that Napster's system does not currently appear to allow Napster access to users' MP3 files. ...

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.

No. 04-480, Decided June 27, 2005

Justice Souter delivered the opinion of the Court.

...Respondents, Grokster, Ltd., and StreamCast Networks, Inc., defendants in the trial court, distribute free software products that allow computer users to share electronic files through peer-to-peer networks, so called because users' computers communicate directly with each other, not through central servers. The advantage of peer-to-peer networks over information networks of other types shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. Since copies of a file (particularly a popular one) are available on many users' computers, file requests and retrievals may be faster than on other types of networks, and since file exchanges do not travel through a server, communications can take place between any computers that remain connected to the network without risk that a glitch in the server will disable the network in its entirety. Given these benefits in security, cost, and efficiency, peer-to-peer networks are employed to store and distribute electronic files by universities, government agencies, corporations, and libraries, among others.

Other users of peer-to-peer networks include individual recipients of Grokster's and StreamCast's software, and although the networks that they enjoy through using the software can be used to share any type of digital file, they have prominently employed those networks in sharing copyrighted music and video files without authorization. A group of copyright holders (MGM for short, but including motion picture studios, recording companies, songwriters, and music publishers) sued Grokster and StreamCast for their users' copyright infringements, alleging that they knowingly and intentionally distributed their software to enable users to reproduce and distribute the copyrighted works in violation of the Copyright Act, 17 U. S. C. §101 *et seq.* (2000 ed. and Supp. II). MGM sought damages and an injunction.

Discovery during the litigation revealed the way the software worked, the business aims of each defendant company, and the predilections of the users....[With both defendants' software, users can search for files, the search results are communicated to the requesting computer, and the user can download desired files directly from peers' computers.] Grokster and StreamCast use no servers to intercept the content of the search requests or to mediate the file transfers conducted by users of the software, there being no central point through which the substance of the communications passes in either direction.

Although Grokster and StreamCast do not therefore know when particular files are copied, a few searches using their software would show what is available on the networks the software reaches. MGM commissioned a statistician to conduct a systematic search, and his study showed that nearly 90% of the files available for download on the FastTrack system were copyrighted works. Grokster and StreamCast dispute this figure, raising methodological problems and arguing that free copying even of copyrighted works may be authorized by the rightholders. They also argue that potential noninfringing uses of their software are significant in kind, even if infrequent in practice. Some musical performers, for example, have gained new audiences by distributing their

copyrighted works for free across peer-to-peer networks, and some distributors of unprotected content have used peer-to-peer networks to disseminate files, Shakespeare being an example. Indeed, StreamCast has given Morpheus users the opportunity to download the briefs in this very case, though their popularity has not been quantified.

Grokster and StreamCast are not, however, merely passive recipients of information about infringing use. The record is replete with evidence that from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.

After the notorious file-sharing service, Napster, was sued by copyright holders for facilitation of copyright infringement, *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (ND Cal. 2000), aff'd in part, rev'd in part, 239 F. 3d 1004 (CA9 2001), StreamCast gave away a software program of a kind known as OpenNap, designed as compatible with the Napster program and open to Napster users for downloading files from other Napster and OpenNap users' computers. Evidence indicates that "[i]t was always [StreamCast's] intent to use [its OpenNap network] to be able to capture email addresses of [its] initial target market so that [it] could promote [its] StreamCast Morpheus interface to them," App. 861; indeed, the OpenNap program was engineered "to leverage Napster's 50 million user base," *id.*, at 746. ...

The evidence that Grokster sought to capture the market of former Napster users is sparser but revealing, for Grokster launched its own OpenNap system called Swaptor and inserted digital codes into its Web site so that computer users using Web search engines to look for "Napster" or "[f]ree filesharing" would be directed to the Grokster Web site, where they could download the Grokster software. *Id.*, at 992-993. And Grokster's name is an apparent derivative of Napster.

In addition to this evidence of express promotion, marketing, and intent to promote further, the business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works. Grokster and StreamCast receive no revenue from users, who obtain the software itself for nothing. Instead, both companies generate income by selling advertising space, and they stream the advertising to Grokster and Morpheus users while they are employing the programs. As the number of users of each program increases, advertising opportunities become worth more. While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work. Users seeking Top 40 songs, for example, or the latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron, and Grokster and StreamCast translated that demand into dollars.

Finally, there is no evidence that either company made an effort to filter copyrighted material from users' downloads or otherwise impede the sharing of copyrighted files...

After discovery, the parties on each side of the case cross-moved for summary judgment.... The District Court held that those who used the Grokster and Morpheus software to download

copyrighted media files directly infringed MGM's copyrights, a conclusion not contested on appeal, but the court nonetheless granted summary judgment in favor of Grokster and StreamCast as to any liability arising from distribution of the then current versions of their software. Distributing that software gave rise to no liability in the court's view, because its use did not provide the distributors with actual knowledge of specific acts of infringement. ...

The Court of Appeals affirmed. ... the court read *Sony Corp. of America v. Universal City Studios, Inc.*, [464 U. S. 417](#) (1984), as holding that distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. The fact that the software was capable of substantial noninfringing uses in the Ninth Circuit's view meant that Grokster and StreamCast were not liable, because they had no such actual knowledge, owing to the decentralized architecture of their software. The court also held that Grokster and StreamCast did not materially contribute to their users' infringement because it was the users themselves who searched for, retrieved, and stored the infringing files, with no involvement by the defendants beyond providing the software in the first place.

The Ninth Circuit also considered whether Grokster and StreamCast could be liable under a theory of vicarious infringement. The court held against liability because the defendants did not monitor or control the use of the software, had no agreed-upon right or current ability to supervise its use, and had no independent duty to police infringement. We granted certiorari. 543 U. S. ____ (2004).

...The argument for imposing indirect liability in this case is... a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement. See *In re Aimster Copyright Litigation*, 334 F. 3d 643, 645-646 (CA7 2003).

One infringes contributorily by intentionally inducing or encouraging direct infringement, ... and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it,... Although "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another," *Sony Corp. v. Universal City Studios*, [464 U. S.](#), at 434, these doctrines of secondary liability emerged from common law principles and are well established in the law....

...We agree with MGM that the Court of Appeals misapplied *Sony*, which it read as limiting secondary liability quite beyond the circumstances to which the case applied. *Sony* barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement. The Ninth Circuit has read *Sony*'s limitation to mean that whenever a product is capable of substantial lawful use, the producer can never be held contributorily liable for third parties' infringing use of it... even when an actual purpose to cause infringing use is shown by evidence independent of design and distribution of the product....

This view of *Sony*, however, was error, converting the case from one about liability resting on imputed intent to one about liability on any theory. Because *Sony* did not displace other theories of secondary liability ... we do not revisit *Sony* further, as MGM requests, to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur. ...

Sony's rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. But nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law....

The classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, or "entic[es] or persuad[es] another" to infringe, Black's Law Dictionary 790 (8th ed. 2004), as by advertising. Thus at common law a copyright or patent defendant who "not only expected but invoked [infringing use] by advertisement" was liable for infringement ...

The rule on inducement of infringement as developed in the early cases is no different today. [A]dvertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use...

For the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a 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 liable for the resulting acts of infringement by third parties. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, just as *Sony* did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, [464 U. S., at 439](#), n. 19, mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.

The only apparent question about treating MGM's evidence as sufficient to withstand summary judgment under the theory of inducement goes to the need on MGM's part to adduce evidence that StreamCast and Grokster communicated an inducing message to their software users. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. MGM claims that such a message is shown here. It is undisputed that StreamCast beamed onto the computer screens of users of Napster-compatible programs ads urging the adoption of its OpenNap program.. Those who accepted StreamCast's OpenNap program were offered software to perform the same services, which a

factfinder could conclude would readily have been understood in the Napster market as the ability to download copyrighted music files. Grokster distributed an electronic newsletter containing links to articles promoting its software's ability to access popular copyrighted music. And anyone whose Napster or free file-sharing searches turned up a link to Grokster would have understood Grokster to be offering the same file-sharing ability as Napster, and to the same people who probably used Napster for infringing downloads; that would also have been the understanding of anyone offered Grokster's suggestively named Swaptor software, its version of OpenNap. And both companies communicated a clear message by responding affirmatively to requests for help in locating and playing copyrighted materials.

In StreamCast's case, of course, the evidence just described was supplemented by other unequivocal indications of unlawful purpose in the internal communications and advertising designs aimed at Napster users ("When the lights went off at Napster ... where did the users go?" App. 836 (ellipsis in original)). Whether the messages were communicated is not to the point on this record. The function of the message in the theory of inducement is to prove by a defendant's own statements that his unlawful purpose disqualifies him from claiming protection (and incidentally to point to actual violators likely to be found among those who hear or read the message). ...

Three features of this evidence of intent are particularly notable. First, each company showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users. StreamCast's internal documents made constant reference to Napster, Grokster's name is apparently derived from Napster...

Second, this evidence of unlawful objective is given added significance by MGM's showing that neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. While the Ninth Circuit treated the defendants' failure to develop such tools as irrelevant because they lacked an independent duty to monitor their users' activity, we think this evidence underscores Grokster's and StreamCast's intentional facilitation of their users' infringement.

Note 12: Of course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.

Third, there is a further complement to the direct evidence of unlawful objective. It is useful to recall that StreamCast and Grokster make money by selling advertising space, by directing ads to the screens of computers employing their software. As the record shows, the more the software is used, the more ads are sent out and the greater the advertising revenue becomes... the commercial sense of their enterprise turns on high-volume use, which the record shows is

infringing. This evidence alone would not justify an inference of unlawful intent, but viewed in the context of the entire record its import is clear.

The unlawful objective is unmistakable.

In addition to intent to bring about infringement and distribution of a device suitable for infringing use, the inducement theory of course requires evidence of actual infringement by recipients of the device, the software in this case. As the account of the facts indicates, there is evidence of infringement on a gigantic scale, and there is no serious issue of the adequacy of MGM's showing on this point in order to survive the companies' summary judgment requests... there is no question that the summary judgment evidence is at least adequate to entitle MGM to go forward with claims for damages and equitable relief.

In sum, this case is significantly different from *Sony* and reliance on that case to rule in favor of StreamCast and Grokster was error. *Sony* dealt with a claim of liability based solely on distributing a product with alternative lawful and unlawful uses, with knowledge that some users would follow the unlawful course. The case struck a balance between the interests of protection and innovation by holding that the product's capability of substantial lawful employment should bar the imputation of fault and consequent secondary liability for the unlawful acts of others.

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 distributors' 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. ...

Justice Ginsburg, with whom The Chief Justice and Justice Kennedy join, concurring

I concur in the Court's decision, which vacates in full the judgment of the Court of Appeals for the Ninth Circuit, *ante*, at 24, and write separately to clarify why I conclude that the Court of Appeals misperceived, and hence misapplied, our holding in *Sony Corp. of America v. Universal City Studios, Inc.*, [464 U. S. 417](#) (1984). There is here at least a "genuine issue as to [a] material fact," Fed. Rule Civ. Proc. 56(c), on the liability of Grokster or StreamCast, not only for actively inducing copyright infringement, but also or alternatively, based on the distribution of their software products, for contributory copyright infringement. ...

This case differs markedly from *Sony*. ... Here, there has been no finding of any fair use and little beyond anecdotal evidence of noninfringing uses. In finding the Grokster and StreamCast software products capable of substantial noninfringing uses, the District Court and the Court of Appeals appear to have relied largely on declarations submitted by the defendants. These

declarations include assertions (some of them hearsay) that a number of copyright owners authorize distribution of their works on the Internet and that some public domain material is available through peer-to-peer networks including those accessed through Grokster's and StreamCast's software. ...

...Review of these declarations reveals mostly anecdotal evidence, sometimes obtained second-hand, of authorized copyrighted works or public domain works available online and shared through peer-to-peer networks, and general statements about the benefits of peer-to-peer technology. ... These declarations do not support summary judgment in the face of evidence, proffered by MGM, of overwhelming use of Grokster's and StreamCast's software for infringement.

Even if the absolute number of noninfringing files copied using the Grokster and StreamCast software is large, it does not follow that the products are therefore put to substantial noninfringing uses and are thus immune from liability. The number of noninfringing copies may be reflective of, and dwarfed by, the huge total volume of files shared. Further, the District Court and the Court of Appeals did not sharply distinguish between uses of Grokster's and StreamCast's software products (which this case is about) and uses of peer-to-peer technology generally (which this case is not about).

In sum, when the record in this case was developed, there was evidence that Grokster's and StreamCast's products were, and had been for some time, overwhelmingly used to infringe... and that this infringement was the overwhelming source of revenue from the products.... Fairly appraised, the evidence was insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over time. On this record, the District Court should not have ruled dispositively on the contributory infringement charge by granting summary judgment to Grokster and StreamCast...

Justice Breyer, with whom Justice Stevens and Justice O'Connor join, concurring.

I agree with the Court that the distributor of a dual-use technology may be liable for the infringing activities of third parties where he or she actively seeks to advance the infringement. *Ante*, at 1. I further agree that, in light of our holding today, we need not now "revisit" *Sony* ... Other Members of the Court, however, take up the *Sony* question: whether Grokster's product is "capable of 'substantial' or 'commercially significant' noninfringing uses." *Ante*, at 1 (*Ginsburg, J.*, concurring) (quoting *Sony, supra*, at 442). And they answer that question by stating that the Court of Appeals was wrong when it granted summary judgment on the issue in Grokster's favor. *Ante*, at 4. I write to explain why I disagree with them on this matter.

... [The *Sony*] Court recognized the need for the law, in fixing *secondary* copyright liability, to "strike a balance between a copyright holder's legitimate demand for effective--not merely symbolic--protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." ... The Court wrote that the sale of copying equipment, "like the sale of other articles of commerce, does not constitute contributory

infringement if the product is widely used for legitimate, unobjectionable purposes. *Indeed, it need merely be capable of substantial noninfringing uses.*" *Sony*, 464 U. S., at 442 (emphasis added). ...

It then applied this standard. The Court had before it a survey (commissioned by the District Court and then prepared by the respondents) showing that roughly 9% of all VCR recordings were of the type--namely, religious, educational, and sports programming--owned by producers and distributors testifying on Sony's behalf who did not object to time-shifting. ...

The Court found that the magnitude of authorized programming was "significant," and it also noted the "significant potential for future authorized copying." [464 U. S., at 444](#). The Court supported this conclusion by referencing the trial testimony of professional sports league officials and a religious broadcasting representative. *Id.*, at 444, and n. 24. It also discussed (1) a Los Angeles educational station affiliated with the Public Broadcasting Service that made many of its programs available for home taping, and (2) Mr. Rogers' Neighborhood, a widely watched children's program. *Id.*, at 445. On the basis of this testimony and other similar evidence, the Court determined that producers of this kind had authorized duplication of their copyrighted programs "in significant enough numbers to create a *substantial* market for a noninfringing use of the" VCR. *Id.*, at 447, n. 28 (emphasis added).

The Court, in using the key word "substantial," indicated that these circumstances alone constituted a sufficient basis for rejecting the imposition of secondary liability....

As in *Sony*, witnesses here explained the nature of the noninfringing files on Grokster's network without detailed quantification. Those files include:

--Authorized copies of music by artists such as Wilco, Janis Ian, Pearl Jam, Dave Matthews, John Mayer, and others. ...

--Free electronic books and other works from various online publishers, including Project Gutenberg. ...

--Public domain and authorized software, such as WinZip 8.1...

--Licensed music videos and television and movie segments distributed via digital video packaging with the permission of the copyright holder....

The nature of these and other lawfully swapped files is such that it is reasonable to infer quantities of current lawful use roughly approximate to those at issue in *Sony*....

Importantly, *Sony* also used the word "capable," asking whether the product is "*capable of*" substantial noninfringing uses. Its language and analysis suggest that a figure like 10%, if fixed for all time, might well prove insufficient, but that such a figure serves as an adequate foundation where there is a reasonable prospect of expanded legitimate uses over time. ... And its language also indicates the appropriateness of looking to potential future uses of the product to determine its "capability."

Here the record reveals a significant future market for noninfringing uses of Grokster-type peer-to-peer software. Such software permits the exchange of *any* sort of digital file--whether that file does, or does not, contain copyrighted material. As more and more uncopyrighted information is stored in swappable form, it seems a likely inference that lawful peer-to-peer sharing will become increasingly prevalent. ...

And that is just what is happening. Such legitimate noninfringing uses are coming to include the swapping of: *research information* (the initial purpose of many peer-to-peer networks); *public domain films* (e.g., those owned by the Prelinger Archive); *historical recordings and digital educational materials* (e.g., those stored on the Internet Archive); *digital photos* (OurPictures, for example, is starting a P2P photo-swapping service); *"shareware" and "freeware"* (e.g., Linux and certain Windows software); *secure licensed music and movie files* (Intent MediaWorks, for example, protects licensed content sent across P2P networks); *news broadcasts past and present* (the BBC Creative Archive lets users "rip, mix and share the BBC"); *user-created audio and video files* (including "podcasts" that may be distributed through P2P software); *and all manner of free "open content" works collected by Creative Commons* (one can search for Creative Commons material on StreamCast)....

There may be other now-unforeseen noninfringing uses that develop for peer-to-peer software, just as the home-video rental industry (unmentioned in *Sony*) developed for the VCR. But the foreseeable development of such uses, when taken together with an estimated 10% noninfringing material, is sufficient to meet *Sony's* standard. And while *Sony* considered the record following a trial, there are no facts asserted by MGM in its summary judgment filings that lead me to believe the outcome after a trial here could be any different. The lower courts reached the same conclusion.

Of course, Grokster itself may not want to develop these other noninfringing uses. But *Sony's* standard seeks to protect not the Groksters of this world (which in any event may well be liable under today's holding), but the development of technology more generally. And Grokster's desires in this respect are beside the point.

The real question here, I believe, is not whether the record evidence satisfies *Sony*. ...

Instead, the real question is whether we should modify the *Sony* standard, as MGM requests, or interpret *Sony* more strictly, as I believe *Justice Ginsburg's* approach would do in practice. ...

As I have said, *Sony* itself sought to "strike a balance between a copyright holder's legitimate demand for effective--not merely symbolic--protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." *Id.*, at 442. Thus, to determine whether modification, or a strict interpretation, of *Sony* is needed, I would ask whether MGM has shown that *Sony* incorrectly balanced copyright and new-technology interests. In particular: (1) Has *Sony* (as I interpret it) worked to protect new technology? (2) If so, would modification or strict interpretation significantly weaken that protection? (3) If so, would new or necessary copyright-related benefits outweigh any such weakening?

The first question is the easiest to answer. *Sony's* rule, as I interpret it, has provided entrepreneurs with needed assurance that they will be shielded from copyright liability as they bring valuable new technologies to market.

Sony's rule is clear. That clarity allows those who develop new products that are capable of substantial noninfringing uses to know, *ex ante*, that distribution of their product will not yield massive monetary liability. At the same time, it helps deter them from distributing products that have no other real function than--or that are specifically intended for--copyright infringement, deterrence that the Court's holding today reinforces (by adding a weapon to the copyright holder's legal arsenal).

Sony's rule is strongly technology protecting. The rule deliberately makes it difficult for courts to find secondary liability where new technology is at issue. It establishes that the law will not impose copyright liability upon the distributors of dual-use technologies (who do not themselves engage in unauthorized copying) unless the product in question will be used *almost exclusively* to infringe copyrights (or unless they actively induce infringements as we today describe). *Sony* thereby recognizes that the copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently. Thus *Sony's* rule shelters VCRs, typewriters, tape recorders, photocopiers, computers, cassette players, compact disc burners, digital video recorders, MP3 players, Internet search engines, and peer-to-peer software. But *Sony's* rule does not shelter descramblers, even if one could *theoretically* use a descrambler in a noninfringing way. ...

Sony's rule is forward looking. It does not confine its scope to a static snapshot of a product's current uses (thereby threatening technologies that have undeveloped future markets). Rather, as the VCR example makes clear, a product's market can evolve dramatically over time. And *Sony*--by referring to a *capacity* for substantial noninfringing uses--recognizes that fact. *Sony's* word "capable" refers to a plausible, not simply a theoretical, likelihood that such uses will come to pass, and that fact anchors *Sony* in practical reality. Cf. *Aimster, supra*, at 651.

Sony's rule is mindful of the limitations facing judges where matters of technology are concerned. Judges have no specialized technical ability to answer questions about present or future technological feasibility or commercial viability where technology professionals, engineers, and venture capitalists themselves may radically disagree and where answers may differ depending upon whether one focuses upon the time of product development or the time of distribution. Consider, for example, the question whether devices can be added to Grokster's software that will filter out infringing files. MGM tells us this is easy enough to do, as do several *amici* that produce and sell the filtering technology. Grokster says it is not at all easy to do, and not an efficient solution in any event, and several apparently disinterested computer science professors agree. ...

The second, more difficult, question is whether a modified *Sony* rule (or a strict interpretation) would significantly weaken the law's ability to protect new technology. *Justice Ginsburg's* approach would require defendants to produce considerably more concrete evidence--more than was presented here--to earn *Sony's* shelter. That heavier evidentiary demand, and especially the

more dramatic (case-by-case balancing) modifications that MGM and the Government seek, would, I believe, undercut the protection that *Sony* now offers.

To require defendants to provide, for example, detailed evidence--say business plans, profitability estimates, projected technological modifications, and so forth--would doubtless make life easier for copyrightholder plaintiffs. But it would simultaneously increase the legal uncertainty that surrounds the creation or development of a new technology capable of being put to infringing uses. Inventors and entrepreneurs (in the garage, the dorm room, the corporate lab, or the boardroom) would have to fear (and in many cases endure) costly and extensive trials when they create, produce, or distribute the sort of information technology that can be used for copyright infringement. They would often be left guessing as to how a court, upon later review of the product and its uses, would decide when necessarily rough estimates amounted to sufficient evidence. They would have no way to predict how courts would weigh the respective values of infringing and noninfringing uses; determine the efficiency and advisability of technological changes; or assess a product's potential future markets. The price of a wrong guess--even if it involves a good-faith effort to assess technical and commercial viability--could be large statutory damages (not less than \$750 and up to \$30,000 *per infringed work*). 17 U. S. C. §504(c)(1). The additional risk and uncertainty would mean a consequent additional chill of technological development.

C

The third question--whether a positive copyright impact would outweigh any technology-related loss--I find the most difficult of the three. I do not doubt that a more intrusive *Sony* test would generally provide greater revenue security for copyright holders. But it is harder to conclude that the gains on the copyright swings would exceed the losses on the technology roundabouts.

For one thing, the law disfavors equating the two different kinds of gain and loss; rather, it leans in favor of protecting technology. ... Moreover, *Sony* has been the law for some time. And that fact imposes a serious burden upon copyright holders like MGM to show a need for change in the current rules of the game, including a more strict interpretation of the test....

Will an unmodified *Sony* lead to a significant diminution in the amount or quality of creative work produced? Since copyright's basic objective is creation and its revenue objectives but a means to that end, this is the underlying copyright question. See *Twentieth Century Music Corp. v. Aiken*, [422 U. S. 151, 156](#) (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts"). And its answer is far from clear.

Unauthorized copying likely diminishes industry revenue, though it is not clear by how much. ...

The extent to which related production has actually and resultingly declined remains uncertain, though there is good reason to believe that the decline, if any, is not substantial. See, *e.g.*, M. Madden, Pew Internet & American Life Project, Artists, Musicians, and the Internet, p. 21, http://www.pewinternet.org/pdfs/PIP_Artists.Musicians_Report.pdf (nearly 70% of musicians believe that file sharing is a minor threat or no threat at all to creative industries); Benkler,

Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production, 114 Yale L. J. 273, 351-352 (2004) ("Much of the actual flow of revenue to artists--from performances and other sources--is stable even assuming a complete displacement of the CD market by peer-to-peer distribution [I]t would be silly to think that music, a cultural form without which no human society has existed, will cease to be in our world [because of illegal file swapping]").

More importantly, copyright holders at least potentially have other tools available to reduce piracy and to abate whatever threat it poses to creative production. As today's opinion makes clear, a copyright holder may proceed against a technology provider where a provable specific intent to infringe (of the kind the Court describes) is present. *Ante*, at 24 (opinion of the Court). Services like Grokster may well be liable under an inducement theory.

In addition, a copyright holder has always had the legal authority to bring a traditional infringement suit against one who wrongfully copies. Indeed, since September 2003, the Recording Industry Association of America (RIAA) has filed "thousands of suits against people for sharing copyrighted material." ...

Further, copyright holders may develop new technological devices that will help curb unlawful infringement. ...

At the same time, advances in technology have discouraged unlawful copying by making *lawful* copying (*e.g.*, downloading music with the copyright holder's permission) cheaper and easier to achieve. ...