

# **METRO-GOLDWYN-MAYER STUDIOS INC. V. GROKSTER, LTD.: INDUCING INFRINGEMENT AND SECONDARY COPYRIGHT LIABILITY**

*By Galen Hancock*

*MGM Studios Inc. v. Grokster, Ltd.*<sup>1</sup> ends the latest battle in the entertainment industry's running war against online copyright infringement. The *Grokster* Court established a new theory of copyright liability, one based on inducement of infringement by end users. This new theory significantly alters the legal environment for technologists, who must now consider a new source of indirect copyright liability when designing software. At the same time, *Grokster* may frustrate copyright owners who will have to satisfy a new and ambiguous indirect infringement standard.

This Note considers the effect of the *Grokster* decision's inducement theory on designers of file-sharing networks and the decision's effects on the staple article of commerce doctrine. Part I describes the current state of the technology underlying file-sharing systems. Part II provides a legal primer on indirect copyright liability in the file-sharing context. Part III describes the Court's holding and rationale in *Grokster*, and Part IV interprets that decision and its impact on the future of file sharing.

## **I. TECHNICAL BACKGROUND**

Traditional systems for distributing files over the internet use a client-server model.<sup>2</sup> In this model, an entity with files to distribute (a website operator, for example) maintains a computer (called a "server") that stores a copy of those files and sends them to users' computers (called "clients") at their request.<sup>3</sup> Because the data is only available from one server (or a small group of them), servers offer a relatively inefficient means of transmitting information. Because they must serve the same data to each requesting user computer, servers frequently transmit very large amounts of data. This makes them expensive to operate, and the cost increases the

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1. 125 S. Ct. 2764 (2005).

2. See Client-server, FREE ONLINE DICTIONARY OF COMPUTING (Jan. 25, 1998), <http://foldoc.org/?client%2Fserver>; Client-server, WIKIPEDIA: THE FREE ENCYCLOPEDIA, <http://en.wikipedia.org/wiki/Client-server> (last visited Feb. 22, 2006).

3. Client-server, FREE ONLINE DICTIONARY OF COMPUTING (Jan. 25, 1998), <http://foldoc.org/?client%2Fserver>.

more popular the files are.<sup>4</sup> Additionally, if a server fails, the files it stores become inaccessible, rendering client-server systems quite vulnerable. Meanwhile, client computers work independently of each other, and tend to use only a small amount of their available resources.

Peer-to-peer (P2P) networks, in contrast, provide a more efficient and reliable means of transferring information. In a P2P system, copies of a desired file may reside on many computers ("peers"), any of which can supply the file to any other peer upon request it.<sup>5</sup> Because any end user computer that stores a file can potentially transfer it to another, costs can be spread out among users rather than centralized at the server operator.<sup>6</sup> P2P networks are also more reliable. Because they lack the centralization of client-server systems, the failure of a single computer will not typically limit availability of a file.<sup>7</sup> P2P networks, then, exhibit resistance to losing data, whether because of technical failures at the provider or a legal order to stop distributing a file.<sup>8</sup> P2P networks are therefore more effective systems for both legitimate<sup>9</sup> and infringing<sup>10</sup> copying and distribution of data.

While the P2P approach increases the efficiency of data transfer, the fact that the desired content may be stored on any number of computers can make finding the best source of a file difficult.<sup>11</sup> As a result, many successful P2P systems are not completely decentralized, and instead rely on central servers for some functions.<sup>12</sup> Napster, an early entrant, used a P2P mechanism for transferring files, but relied on a group of centralized servers that acted as a referral service for searching.<sup>13</sup> The Napster servers

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4. The cost of operating a web site, for example, includes the cost of the server and the network bandwidth it uses. The cost of bandwidth increases directly with how much data is sent, and as sites become more popular they also require larger and more expensive servers. *See, e.g.*, PEER-TO-PEER SYSTEMS AND APPLICATIONS 29 (Steinmetz & Wehrle eds., 2005).

5. *Grokster*, 125 S. Ct. at 2770.

6. *Id.*

7. *Id.*

8. *Id.*

9. Legal uses of P2P networks include software distribution and serving movie trailers. *E.g.*, BitTorrent, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/BitTorrent#Legal\\_uses\\_for\\_BitTorrent](http://en.wikipedia.org/wiki/BitTorrent#Legal_uses_for_BitTorrent) (last visited Dec. 20, 2005).

10. P2P networks do not generally distinguish between systems going down for technical reasons and systems going down because of legal action. Their reliability therefore works against copyright owners trying to eliminate infringement.

11. Compare how files are located on the Web: each URL embeds the name of the server with the data. P2P networks cannot use that method because it would force reliance on a particular server, undercutting part of the rationale for using P2P.

12. *See* PEER-TO-PEER SYSTEMS AND APPLICATIONS, *supra* note 4, at 37-38.

13. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011-12 (9th Cir. 2001).

maintained an index of files on the network and referred users to the peers with a copy of the desired file.<sup>14</sup>

Later designers improved on this system in various ways. Some tried to do away with central servers altogether, which reduced the costs of running the servers and also promised to reduce or avoid copyright liability.<sup>15</sup> Gnutella consisted solely of interconnected end user systems.<sup>16</sup> When a user searched for a file, the request was relayed from one system to each one directly connected to it, propagating that request throughout the network.<sup>17</sup> Peers storing the requested file sent replies back along the same path.<sup>18</sup> For technical reasons, Gnutella's performance became poorer as the number of users increased.<sup>19</sup> However, the *MGM v. Grokster* defendants overcame these problems and implemented a more successful decentralized P2P network.<sup>20</sup>

Other network designers attempted to protect their users, rather than themselves, from liability. In the wake of recording industry lawsuits against the individual infringing users of P2P software,<sup>21</sup> several P2P designers produced programs built around "small-world networks" in which users connect only to systems run by people they know and trust.<sup>22</sup> Since copyright holders rely on anonymous scans to find infringing files, this type of system increases the difficulty of locating potential defendants.<sup>23</sup> The Freenet project uses encryption and randomization to prevent users'

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14. *Id.*

15. Napster was liable for its service in part because it ran its own central search mechanism, which materially contributed acts of end user infringement. *See infra* Part II.

16. Clip2, The Gnutella Protocol Specification v0.4, [http://www9.limewire.com/developer/gnutella\\_protocol\\_0.4.pdf](http://www9.limewire.com/developer/gnutella_protocol_0.4.pdf) (last visited Dec. 20, 2005) (including a technical description of the protocol).

17. *Id.*

18. *Id.*

19. Jordan Ritter, Why Gnutella Can't Scale. No, Really., <http://www.darkridge.com/~jpr5/doc/gnutella.html> (last visited Feb. 7, 2006); PEER-TO-PEER SYSTEMS AND APPLICATIONS, *supra* note 4, at 46-49.

20. The FastTrack system, used by Grokster, improved on the Gnutella design by separating the network into two castes of systems. A group of "supernodes" connected to each other and to ordinary systems, and provided indexing and searching capabilities. Systems were selected as supernodes based on their data transfer capacity, which resulted in the overall network scaling much better than Gnutella. StreamCast's Morpheus worked similarly. *See MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2771 (2005).

21. *See generally* Kristina Groennings, *An Analysis of the Recording Industry's Litigation Strategy Against Direct Infringers*, 7 VAND. J. ENT. L. & PRAC. 389 (2005).

22. *See* Peter Biddle et al., Microsoft Corp., The Darknet and the Future of Content Distribution, <http://crypto.stanford.edu/DRM2002/darknet5.doc>, at 9 (last visited Dec. 20, 2005).

23. *Id.*

identities from being discovered while they transfer files in an attempt to protect users from legal attack.<sup>24</sup>

Although many of these innovations may have been driven by the desire to avoid copyright liability, other designers focused on different problems with early P2P systems. BitTorrent, for example, was created partly to solve the free-rider problem. In earlier systems, many users would download files without supplying anything in return, reducing network efficiency.<sup>25</sup> Bram Cohen, BitTorrent's creator, designed a protocol that encouraged reciprocity. Each peer prefers to send its data to systems that gave it data in return, thus providing an incentive to contribute bandwidth to the network.<sup>26</sup>

## II. LEGAL BACKGROUND

This Part reviews secondary copyright liability as applied to P2P systems. Section II.A reviews secondary copyright liability generally, and Section II.B describes an important defense for technologies with lawful uses. Section II.C discusses previous P2P cases.

### A. Contributory and Vicarious Copyright Liability

The Copyright Act explicitly prohibits only primary (or direct) copyright infringement.<sup>27</sup> Over time, the courts have developed two forms of secondary (or indirect) liability. Vicarious liability finds its roots in the doctrine of *respondeat superior*.<sup>28</sup> This theory requires that the defendant possess the right and ability to control the direct infringement as well as a direct financial interest in the infringing activity.<sup>29</sup> An owner of a public entertainment venue may be liable for infringement by an independent contractor hired to supply music, for instance, because the contractor is subject to the owner's control and the music makes the establishment more attractive.<sup>30</sup>

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24. J.D. LASICA, DARKNET: HOLLYWOOD'S WAR AGAINST THE DIGITAL GENERATION 226 (2005).

25. See Eytan Adar & Bernardo Huberman, *Free Riding on Gnutella*, 5 FIRST MONDAY 10 (2000), [http://www.firstmonday.org/issues/issue5\\_10/adar/index.html](http://www.firstmonday.org/issues/issue5_10/adar/index.html).

26. Bram Cohen, *Incentives Build Robustness in BitTorrent 3-4* (May 22, 2003), <http://www.bittorrent.com/bittorrentecon.pdf>.

27. 17 U.S.C. § 106 (2000); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04[A] (2005).

28. 3 NIMMER, *supra* note 22, § 12.04[A][2].

29. 3 NIMMER, *supra* note 22, § 12.04[A][1].

30. Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass'n, Inc., 554 F.2d 1213 (1977).

Contributory liability grew out of enterprise liability and requires knowledge of and material contribution to the direct infringement by the defendant.<sup>31</sup> In *Fonovisa, Inc. v. Cherry Auction, Inc.*, for example, the Ninth Circuit found that the operator of a swap meet at which a vendor sold infringing sound recordings could be contributorily liable if the operator knew of the infringement and supplied substantial services—space, utilities, parking, advertising, and customers—without which the infringement could not have occurred.<sup>32</sup>

P2P network designers face potential liability under both theories of indirect infringement.<sup>33</sup> Claims of secondary copyright liability for distributing or designing a product tend to rely on contributory infringement, however, since most product distributors lack any ability to control their customers' actions.

## B. The *Sony* Case

Although distributing a product that enables copyright infringement may be unlawful, products with lawful uses enjoy an exception to the general principles of secondary liability. In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>34</sup> the defendant was accused of contributory infringement for manufacturing and selling Betamax video cassette recorders (VCRs).<sup>35</sup> The plaintiffs owned copyrights for television programs and argued that VCRs were primarily used for unauthorized “time-shifting” and creating libraries of programs for later viewing.<sup>36</sup> The record, however, also showed that a number of copyright owners were willing to permit private home taping.<sup>37</sup>

The *Sony* Court noted the importance of not permitting copyright holders to extend their monopolies beyond the extent determined by Congress, and noted that a contributory infringement finding effectively extends a plaintiff's exclusive rights to the infringing article.<sup>38</sup> Furthermore, in this case the plaintiffs' businesses accounted for less than 10% of the

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31. 3 NIMMER, *supra* note 27, § 12.04[A][2].

32. 76 F.3d 259, 264 (9th Cir. 1996) (reversing dismissal for failure to state a claim).

33. *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (finding the defendant P2P vendor was probably liable for vicarious copyright infringement).

34. 464 U.S. 417 (1984).

35. *Id.*

36. *Id.* at 423.

37. *Id.* at 424 (particularly sports, religious, and educational producers).

38. *Id.* at 441-42.

market share for television programming.<sup>39</sup> If they succeeded in their suit, new technologies with potential to aid infringers could have been harshly restricted: not only could copyright owners as a group be able to block new technologies, but individual owners could prevent technologies that other owners wanted available.

The *Sony* Court adopted a rule that protected distributors of products capable of substantial noninfringing uses from secondary copyright liability.<sup>40</sup> Since the Copyright Act was silent on the issue of secondary infringement, the Court analogized to patent law which clearly delineates the scope of indirect liability. Section 271 of the Patent Act reads in part:

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.<sup>41</sup>

While copyright and patent are distinct bodies of law,<sup>42</sup> the Court borrowed the “staple article of commerce” doctrine from § 271(c) to create a parallel substantial noninfringing use rule for copyright law.<sup>43</sup>

Sony’s VCR could be and certainly was used to commit widespread copyright infringement. But the VCR could also be used to time-shift the programs of copyright holders who permitted such recording.<sup>44</sup> Moreover, the Court found that even unauthorized time shifting could qualify as fair use.<sup>45</sup> Accordingly, the Court held that, because its copying equipment enabled substantial noninfringing uses, Sony could not be held liable for distributing its product.<sup>46</sup>

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39. *Id.* at 443.

40. *Id.* at 442.

41. 35 U.S.C. § 271 (2000).

42. *Eldred v. Ashcroft*, 537 U.S. 186, 216-17 (2003).

43. 464 U.S. at 442.

44. *Id.* at 446.

45. *Id.* at 454-55.

46. *Id.* at 442.

### C. P2P Copyright Liability Cases

Although *Grokster* is the first P2P case to come before the Supreme Court, previous P2P litigation in Seventh and Ninth Circuit Courts of Appeal reached different interpretations of the *Sony* doctrine as applied to file-sharing systems.

Napster, the first widely adopted P2P program, used centralized servers to coordinate end user searching of the network.<sup>47</sup> Relying on the control over search results that this network architecture allowed, the Ninth Circuit—reviewing an appeal from a preliminary injunction against Napster—found that Napster was likely contributorily liable for copyright infringement committed by its users.<sup>48</sup> Because of the substantial noninfringing uses of P2P technology, the court held that design and functionality of the Napster network alone could not establish copyright liability.<sup>49</sup> Napster could still, however, be held liable for particular infringing works available on its system of which it had actual, specific knowledge.<sup>50</sup> This meant that Napster could be liable, at a minimum, for files on its network that it failed to remove from its centralized search indices after notice from the copyright holders.<sup>51</sup>

In *In re Aimster Copyright Litigation*,<sup>52</sup> the defendant produced a P2P system that, like Napster, relied on a centralized group of servers to facilitate file transfer.<sup>53</sup> The Seventh Circuit, on an appeal from a preliminary injunction, found the defendant was likely contributorily liable for the copyright infringement of its users.<sup>54</sup> Aimster used encryption that prevented its developer from knowing which files were transferred by users, but the court held actual knowledge of infringement was not required where the defendant turned a blind eye to unlawful activity.<sup>55</sup> Although the defendant argued noninfringing uses were possible, he failed to show any users actually used the software for such purposes.<sup>56</sup> Unlike the Ninth Circuit, the Seventh Circuit interpreted *Sony* to require actual, not merely

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47. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1012 (9th Cir. 2001); see *supra* Part I.

48. *Napster*, 239 F.3d at 1022.

49. *Id.* at 1020-21 (“We are bound to follow Sony, and will not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs’ copyrights.”).

50. *Id.* at 1020-22.

51. *Id.* at 1022 n.6.

52. 334 F.3d 643 (7th Cir. 2003).

53. *Id.* at 646.

54. See *id.* at 654-55.

55. *Id.* at 650-51.

56. *Id.* at 651.

potential, noninfringing uses.<sup>57</sup> Finally, the court found that the Aimster developer invited infringement in the software documentation:

In explaining how to use the Aimster software, the tutorial gives as its *only* examples of file sharing the sharing of copyrighted music, including copyrighted music that the recording industry had notified Aimster was being infringed by Aimster's users. The tutorial is the invitation to infringement that the Supreme Court found was missing in *Sony*.<sup>58</sup>

Finally, the court explained in dicta that even when a service demonstrates substantial noninfringing uses, the provider has a duty to eliminate or reduce infringing uses when it is not disproportionately costly to do so.<sup>59</sup> Given this analysis, the court affirmed the grant of a preliminary injunction against Aimster.<sup>60</sup>

### III. *METRO-GOLDWYN-MAYER STUDIOS INC. V. GROKSTER, LTD.*

*Grokster* started as a suit against two P2P software vendors who released free programs for sharing files over the Internet.<sup>61</sup> The District Court and the Ninth Circuit both focused on whether the *Sony* doctrine protected the defendants.<sup>62</sup> A unanimous Supreme Court sidestepped that question, and created a new theory of secondary copyright liability holding that those who intentionally induce copyright infringement can be liable for the results.<sup>63</sup> Two concurring opinions evaluated whether *Sony* should have applied in the case, however, reaching opposite conclusions.<sup>64</sup>

#### A. Background and Procedural History

Grokster and StreamCast designed and distributed P2P software programs used by millions of Americans for file sharing over the Internet.<sup>65</sup> These programs allowed users to access P2P networks that were entirely self-organizing, requiring no central servers run by the software vendors to

57. *Id.*

58. *Id.*

59. *Id.* at 653.

60. *Id.* at 656.

61. *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2770-71 (2005).

62. *Id.* at 2774-75; *MGM Studios Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035-36 (2003).

63. *See Grokster*, 125 S. Ct. at 2770, 2779.

64. *Id.* at 2783-2787 (Ginsburg, J. & Breyer, J., concurring).

65. *Id.* at 2770.

coordinate activity.<sup>66</sup> The vendors distributed their software for free and sold advertising that was delivered through the programs.<sup>67</sup> Both programs were used primarily to distribute copyrighted music.<sup>68</sup> Numerous members of the recording industry sued both companies in 2001, claiming contributory and vicarious copyright infringement.<sup>69</sup>

The District Court found for defendants on cross-motions for summary judgment, and the Ninth Circuit affirmed.<sup>70</sup> As to the contributory infringement claim, the Ninth Circuit held that the software was capable of substantial noninfringing uses. Therefore, under the *Sony* standard, knowledge of direct infringement could not be attributed to the defendants.<sup>71</sup> The court also held that the limited interaction between the defendants and the users—consisting informing users of each other’s IP addresses in the initial stages of network formation—was too limited to qualify as a material contribution.<sup>72</sup> On the question of vicarious infringement, the court held that because the design of the software left the defendants with no ability to remove content or restrict user activity, they lacked any right or ability to supervise. Vicarious liability, therefore, could not be established.<sup>73</sup>

The copyright holders sought review in the Supreme Court, which granted certiorari in 2004.<sup>74</sup>

## B. The Court’s Opinion

The Court considered “under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product.”<sup>75</sup> The Court, introducing a novel theory of secondary copyright liability, held that if Grokster and StreamCast intended to promote copyright infringement using their software, they could be held liable for direct infringement committed by their users.<sup>76</sup>

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66. *Id.* at 2771.

67. *Id.* at 2774.

68. *Id.* at 2772.

69. *Id.* at 2771.

70. *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

71. *Id.* at 1162.

72. *Id.* at 1163.

73. *Id.* at 1164-65.

74. *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 686 (2004).

75. *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2770 (2005).

76. *Id.*

The Court's analysis noted the need to strike a balance between supporting artistic pursuits and protecting technological innovators.<sup>77</sup> Although the Court acknowledged the importance of protecting innovation, it determined that this balance favored copyright holders because the number of infringing copies was very large and it was difficult to obtain relief against direct infringers.<sup>78</sup>

Turning to the *Sony* doctrine, the Court found that although *Sony* might preclude imputing knowledge of infringement to a product distributor merely because the product could be used in an infringing way, the substantial noninfringing use test did not prevent plaintiffs from establishing liability through other evidence of culpability.<sup>79</sup> In particular, they could show that the distributor intended to cause the infringement.<sup>80</sup> Much as *Sony* borrowed the staple article of commerce doctrine from the Patent Act, the Court claimed to draw the inducement doctrine from patent law as well.<sup>81</sup> The Court held 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."<sup>82</sup> This would not threaten legitimate commerce or innovation, the Court wrote, because evidence of "purposeful, culpable expression or conduct," and not ordinary product distribution, was necessary to establish liability.<sup>83</sup>

The Court considered a host of facts relevant to the inducement determination. Specifically, the Court focused on the defendants' attempts to market their software to music file traders, particularly former Napster users. After the collapse of the original Napster network,<sup>84</sup> both Grokster and Streamcast used a system called OpenNap that was intended to attract former Napster users.<sup>85</sup> StreamCast used this system to give away its Mor-

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77. *Id.* at 2775.

78. *Id.* at 2776.

79. *Id.* at 2778.

80. *Id.* at 2779-80.

81. *Id.* at 2780.

82. *Id.*

83. *Id.*

84. Napster was later reorganized as a legal, subscription service as part of a settlement of the case against it. *See, e.g.,* Brad King, *Napster Service: 2Legit 2Quit*, WIRED NEWS, June 5, 2001, <http://www.wired.com/news/mp3/0,1285,44322,00.html>.

85. *Id.* at 2772-73. Recall from Part I that Napster used a centralized group of servers to coordinate user systems. After Napster shut down, the user software was useless without Napster's servers. OpenNap was a free program that allowed former Napster users to set up their own servers. OpenNap: Open Source Napster Server, <http://opennap.sourceforge.net/> (last visited Dec. 20, 2005).

pheus software<sup>86</sup> and designed advertising aimed at Napster users. One advertisement read “When the lights went off at Napster . . . where did the users go?”<sup>87</sup> Grokster used metatags in its website to attract users querying search engines for the term “Napster.”<sup>88</sup> The Court also noted that the “Grokster” name was apparently derived from “Napster,” concluding that Grokster’s attempts to target former Napster users could establish liability under an inducement theory.<sup>89</sup>

According to the Court, the defendants’ business models also suggested that they intended to induce infringement.<sup>90</sup> They received revenue by selling in-program advertising; their profits, therefore, were directly tied to the number of users on their respective networks.<sup>91</sup> Since the large bulk of file transfers on these networks were infringing, the defendants profited from an increased number of available infringing songs.<sup>92</sup> In addition, the Court considered internal StreamCast communications that indicated its desire to maximize the number of copyrighted songs on its system.<sup>93</sup> The Court noted, however, that merely having a business model that profits from increased use would not establish liability without other evidence.<sup>94</sup>

The Court also noted that the defendants did not attempt to prevent infringement.<sup>95</sup> Their software contained no content filtering system, and Grokster actively tried to prevent copyright owners from monitoring infringement on its network.<sup>96</sup> Failure to take affirmative steps against infringement would not support liability on its own, but it was evidence of intent to induce infringement and could support liability given other such evidence.<sup>97</sup>

Finally, the Court noted that secondary copyright liability requires direct infringement, and that the facts in this case had shown large-scale in-

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86. *Grokster*, 125 S. Ct. at 2773.

87. *Id.* The record didn’t show whether this advertising campaign was actually used, but the Court found that they were good evidence of StreamCast’s intent regardless. *Id.* at 2773 n.7.

88. *Id.* at 2773.

89. *Id.*

90. *Id.* at 2774.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 2782.

95. *Id.* at 2774.

96. *Id.*

97. *Id.* at 2781.

fringement on the defendants' networks.<sup>98</sup> A study commissioned by MGM indicated that almost ninety percent of the files on Grokster's network were copyrighted, and the defendants conceded that most downloads were infringing.<sup>99</sup> The strength of the inducement case against the defendants led the Court to conclude that summary judgment in their favor was inappropriate.<sup>100</sup> Because the lower courts did not consider the evidence in light of the inducement theory, the Court remanded for reconsideration of MGM's summary judgment motion.<sup>101</sup> The tone and content of the Court's opinion, however, suggested that it expected MGM to prevail.<sup>102</sup>

### C. *Sony* and the Concurring Opinions

Many commentators expected the Court to decide *Grokster* by interpreting *Sony* in light of P2P technology, thus clarifying the legality of such programs.<sup>103</sup> Although the Court's holding did not reach the issue, two concurring opinions, each joined by three justices, reached different conclusions about the application of *Sony* to P2P technology. In her concurrence, Justice Ginsburg opined that anecdotal evidence of noninfringing uses was insufficient under *Sony* in light of the overwhelming volume of infringing activity. *Sony* required, according to Ginsburg, a more substantial amount of noninfringing use, which had to exist or be likely to develop.<sup>104</sup> Although she did not attempt to give a precise description of how much noninfringing use is sufficient to qualify under *Sony*, she wrote that the lawful uses of Grokster and Morpheus described in the record were

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98. *Id.* at 2782.

99. *Id.* at 2772.

100. *Id.*

101. *See id.* at 2782-83.

102. *See id.*

103. *E.g.*, Joshua S. Wattles, *Modernizing Sony Betamax for the Digital Age: The Ninth Circuit Enables P2P*, 34 SW. U. L. REV. 233, 243-45 (2005) (describing several directions the Supreme Court could take *Grokster* and suggesting the *Sony* doctrine would be narrowed); Andrew J. Lee, Note, *MGM Studios, Inc. v. Grokster, Ltd. & In re Aimster Litigation: A Study of Secondary Copyright Liability in the Peer-to-Peer Context*, 20 BERKELEY TECH. L.J. 485, 501-08 (2005) (describing the conflict between the Ninth Circuit opinion in *Grokster* and the Seventh Circuit's *Aimster* and suggesting lower courts would benefit from guidance from the Supreme Court regarding *Sony*); Richard M. Myrick, Note, *Peer-to-Peer and Substantial Noninfringing Use: Giving the Term "Substantial" Some Meaning*, 12 J. INTELL. PROP. L. 539 (2005) (arguing that the Supreme Court should adopt the Seventh Circuit's reading of *Sony*). Additionally, many of the amici curiae in the case focused their arguments on *Sony*. For a compilation of briefs filed before the Court, see U.S. Copyright Office, *MGM Studios v. Grokster*, <http://www.copyright.gov/docs/mgm/> (last visited Feb. 23, 2006).

104. *Grokster*, 125 S. Ct. at 2786 (Ginsburg, J., concurring).

anecdotal and that even if the noninfringing uses were large in absolute terms, they may be small in relation to the infringing uses.<sup>105</sup> This suggests that Ginsburg interprets *Sony* to require numerical evidence that the amount of noninfringing uses form a substantial percentage of total uses.

Justice Breyer's concurrence disagreed with the analysis of the substantial noninfringing use test offered by Justice Ginsburg. Justice Breyer relied on *Sony*'s holding that a device need only be capable of substantial noninfringing uses to qualify for the safe harbor.<sup>106</sup> Justice Breyer noted the documented—if anecdotal—evidence of noninfringing uses of P2P technology. Moreover, the Breyer concurrence pointed to the increasing rate of non-infringing uses of P2P technology and their potential future growth. Breyer contended that the lower courts correctly interpreted and applied *Sony*, and that its safe harbor should be preserved despite changing technological developments.<sup>107</sup>

#### IV. DISCUSSION

The implications of the *Grokster* decision for technology developers will prove significant and widespread. The Supreme Court created an inducement theory that serves as a completely independent road to contributory liability. Future product distributors, therefore, will face both inducement-based and contributory infringement claims. While this Note focuses on *Grokster*'s impact on file sharing, the impact of *Grokster* extends beyond P2P networks. Potentially every software developer or device manufacturer that creates a product that interacts with copyrighted content—such as personal video recorders (PVRs) and portable MP3 players<sup>108</sup>—could face inducement liability. Such liability could be particularly troubling since, once a product has been distributed, developers have little control over the end-user behavior.

This Part argues that the inducement doctrine is likely to eliminate only the most flagrant copyright offenders and will impose significant costs on technology developers. To avoid the specter of inducement-based liability, developers must reconsider their internal practices and business models in light of the ambiguous and untested bounds of the Court's intent to induce standard. Section IV.A describes some common characteristics

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105. *Id.* (Ginsburg, J., concurring).

106. *Id.* at 2789 (Breyer, J., concurring).

107. *Id.* at 2796 (Breyer, J., concurring).

108. Copyright owners have already sued both PVR and MP3 player manufacturers on other grounds. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1073 (9th Cir. 1999); *Paramount Pictures Corp. v. RePlayTV*, 298 F. Supp. 2d 921, 923 (C.D. Cal. 2004).

of modern file-sharing products. Section IV.B discusses how *Grokster*'s inducement theory should be interpreted and explains how product distributors will avoid inducement liability. Section IV.C discusses the probable future of the *Sony* doctrine in light of the *Grokster* majority and concurring opinions.

### A. Common Features of Current and Future File-Sharing Products

The evolution of P2P technology did not end after the *Grokster* decision. Several groups are actively working to improve the state of the art and enable end users to avoid detection or prosecution.<sup>109</sup> This Section provides an overview of the most common features of modern P2P systems.

The designs of modern P2P systems vary, but certain features are common. They are self-organizing, so that the designer distributes the program as an independent product, but operates no services.<sup>110</sup> The copying of copyrighted files remains their primary use.<sup>111</sup> They are capable of substantial noninfringing uses, in that some use them to transfer public domain or licensed works.<sup>112</sup> Their packaging and documentation do not promote infringement, and advertising, if it exists, is not suggestive of illegitimate uses.<sup>113</sup> Most of the new breed of P2P technologies lack features that specifically target infringers. If any features are particularly useful to infringers, they also serve more benign purposes, like promoting free speech in dictatorial regimes.<sup>114</sup> They do not employ content filtering for copyrighted works. The developers' business models typically do not rely on advertising revenue, or other means that benefit significantly from infringing users.<sup>115</sup>

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109. See *supra* Part I.

110. E.g., PEER-TO-PEER SYSTEMS AND APPLICATIONS, *supra* note 4, at 37.

111. E.g., Eric Hellweg, *Digital Music Forecast: BitTorrential Downpour*, TECH. REV., Oct. 19, 2004, [http://www.technologyreview.com/InfoTech/wtr\\_13824,300,p1.html](http://www.technologyreview.com/InfoTech/wtr_13824,300,p1.html).

112. See, e.g., Legal Torrents, <http://www.legaltorrents.com> (last visited Dec. 20, 2005) (search tool for authorized P2P files).

113. See, e.g., GUNet, GUNet Documentation: Using GUNet for File Sharing, [http://gnunet.org/user\\_afs.php3?xlang=English#gnunetdownload](http://gnunet.org/user_afs.php3?xlang=English#gnunetdownload) (last visited Dec. 20, 2005) (file sharing tool documentation giving as example a transfer of a file licensed for redistribution).

114. See, e.g., LASICA, *supra* note 24, at 225-27.

115. Not all systems will be like this, and some companies may try to replicate the *Grokster* business model. There are noncommercial, open source projects being devel-

The goals of these developers vary. BitTorrent, for example, is a business that aims to produce a platform for content distributors to use;<sup>116</sup> in the mean time, they are releasing their technology under an open source license.<sup>117</sup> Freenet and GUNet are noncommercial projects run by activists whose political and philosophical agendas—perhaps opposition in principle to copyright law, perhaps a desire to prevent censorship of the internet by totalitarian regimes, or both—support file-sharing networks that are difficult to shut down or control.<sup>118</sup> Future for-profit developers may attempt to design P2P systems that profit from infringement while navigating the *Sony* and *Grokster* decisions' interstitial ambiguities.

## B. Applying the *Grokster* Inducement Test to Future P2P Technology Developers

Under *Grokster*, “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.”<sup>119</sup> That is, defendants who “induce” infringement are not liable unless they intend to promote infringement. This requisite intent will likely be difficult to prove—and even more difficult to disprove—so both courts and litigants will face unresolved questions regarding what evidence is necessary to establish liability under the inducement standard.

In *Grokster*, the Court reviewed a wide variety of facts in its inducement analysis.<sup>120</sup> *Grokster* identified three factors as particularly significant: the defendants' efforts to satisfy a known market for copyright infringement, their failure to develop filtering mechanisms or other means for reducing infringement, and their choice of a business model that bene-

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oped now, however, and these will have an advantage among users because of their cost and lack of advertising. See, e.g., GUNet, <http://gnunet.org/> (last visited Mar. 14, 2006).

116. Daniel Roth, *Why Hollywood Loves BitTorrent*, CNN.COM, Oct. 19, 2005, <http://money.cnn.com/2005/10/19/technology/bittorrent/index.htm>.

117. BitTorrent, BitTorrent Open Source License, <http://www.bittorrent.com/license> (last visited Dec. 20, 2005).

118. Some of them may believe in the aphorism “Information wants to be free.” See generally Roger Clarke, “Information Wants to be Free. . .”, <http://www.anu.edu.au/people/Roger.Clarke/II/IWtbF.html> (last visited Dec. 20, 2005) (describing the history of the phrase).

119. *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2780 (2005).

120. Among these facts were the resemblance the defendant's name bore to Napster, the operation of OpenNap servers, internal documents and unused advertising campaigns, and the number of infringing downloads. *Id.* at 2773, 2776.

fited substantially from infringement.<sup>121</sup> Other indications of intent may arise in future cases, but were not discussed in *Grokster*, such as product features that are particularly useful for infringement and public statements by defendants. As courts resolve the questions left open in *Grokster*, developers are likely to simultaneously take steps to protect themselves from liability.

### 1. *Targeting Known Demand for Infringement*

The *Grokster* opinion emphasized evidence suggesting the defendants targeted infringers.<sup>122</sup> The Court focused on the defendants' internal and external communications, *Grokster's* choice of name, advertisements—even if the ads were never shared with the public—and the use of OpenNap servers.<sup>123</sup> While the Court did not hold that this factor alone was decisive, the Court's analysis emphasized marketing evidence and found that the other two factors were insufficient to support liability.<sup>124</sup>

#### a) Advertising to known infringers

Future developers will take great pains to avoid the problems that plagued *Grokster*. For example, they will not adopt names ending in “-ster,” or that resemble those of other services known to be popular among infringers. Likewise, product developers will avoid advertising that targets infringers. Open source programmers will use a purely noncommercial model and avoid advertisements altogether. Commercial developers will also avoid advertising that directly refers to known infringers or infringing services like the StreamCast advertisements, which asked “when the lights went off at Napster . . . where did the users go?”<sup>125</sup> Since *Grokster* considered even unused advertisements as evidence of intent,<sup>126</sup> developers will exercise caution when communicating without outside ad agencies.

This focus on targeting infringers could lead to perverse and anticompetitive results. For example, suppose two companies independently produce products that otherwise avoid liability under inducement and contributory infringement theories. If those services are primarily used to in-

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121. *Id.* at 2781.

122. *Id.* at 2780-81.

123. *Id.*

124. *Id.* at 2781-82.

125. *Id.* at 2773.

126. *Id.* at 2781.

fringe, each company may avoid targeting the other's customers in order to minimize exposure to future inducement claims.

Beyond this, courts' interpretations of what constitutes legitimate advertising will depend in part on the business context of a given dispute. For defendants who appear to be independent, anti-copyright activists, evidence of targeting infringers will likely be given great weight. Conversely, defendants whose business models depend primarily on legitimate uses will be able to claim they are not attempting to attract infringing activity, even if their advertising suggests copying<sup>127</sup> and targets customers of services known to have infringing uses.<sup>128</sup>

Other types of marketing evidence, like the operation of OpenNap servers, will probably be more difficult to apply in future cases. Running related services in the past could suggest an attempt to target infringers. This evidence will be of relatively minor concern to businesses with fundamentally legitimate business models,<sup>129</sup> but those that operate in a gray area will need to take care to avoid services favored by infringers and programmers who worked on them.

In general, any advertising or other effort to attract probable infringers will subject a defendant to scrutiny. Potential defendants who do engage in such advertising may avoid liability if they have an innocent business explanation for their actions, while liability is likely for those whose business models suggest an unlawful motive.<sup>130</sup> Developers who avoid advertising entirely, like open-source P2P programmers, will benefit the most from the Court's emphasis on this factor.

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127. Compare the advertising by Sony in the case against Betamax that was arguably suggestive of infringement. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (Blackmun, J., dissenting).

128. See *infra* Section IV.B.3. This will be of particular concern for non-P2P inducement defendants.

129. For example, HiveCache, a now-defunct business, was a backup vendor that previously operated a P2P service called MojoNation on which its backup software was based, and which was used for copyright violation. HiveCache, <http://web.archive.org/web/20040701105400/http://www.mojonation.net> (last visited Dec. 20, 2005) (archive of HiveCache's website). As long as HiveCache could demonstrate their backup business was genuine and that there was a strong rationale for running the file-sharing service (for example, to test the technology underlying its backup software), they probably would not have been at risk.

130. Other evidentiary factors will come into play, such as the other two major factors of the *Grokster* three. But without significant mitigating evidence (perhaps such as proactive efforts to filter copyrighted content), this factor may be decisive by itself.

## b) Internal communications

The Court inferred that the defendants intended to target old Napster users partly on the basis of internal communications.<sup>131</sup> This raises risks for technology companies, since any employee e-mail may qualify as discoverable evidence likely to increase the risk of liability. This risk is most substantial for high-ranking employees and presents greater risks when the company lacks a well-developed legitimate business plan.

Risks of this kind are not entirely new, and many potential defendants will already have tools in place that can help protect them, such as document retention policies.<sup>132</sup> Potential defendants who are particularly susceptible to inducement claims may choose to discuss business strategies in person or through other means that do not leave a paper or electronic trail. Executives and spokespersons probably will be trained to describe the company's goals in ways that cannot be distorted by an opposing attorney. This sort of risk management, however, will raise development costs.

## 2. *Lack of Content Filtering*

The Supreme Court considered the failure to develop filtering tools to reduce infringement as an indicator of unlawful purpose.<sup>133</sup> Lower courts will therefore be favorably disposed to defendants that proactively attempt to remove copyrighted material from their systems. The earlier Seventh Circuit *Aimster* decision went further and held outright that distributors have a duty to mitigate damage to copyright owners where such efforts are cost-effective.<sup>134</sup> While the *Grokster* Court disagreed with the weight such considerations were given in *Aimster*, it still considered the failure to filter as a key consideration in the inducement analysis.<sup>135</sup>

Many technologists would argue that judicial promotion of content filtering is premature since current filtering tools are easily circumvented.<sup>136</sup> For example, the content filtering that Napster implemented when it was ordered to by the Ninth Circuit performed poorly.<sup>137</sup> More sophisticated

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131. *Grokster*, 125 S. Ct. at 2773.

132. Document retention policies generally involve discarding unnecessary documents after a period of time.

133. *Grokster*, 125 S. Ct. at 2781.

134. *See supra* Section III.C.

135. *Grokster*, 125 S. Ct. at 2781.

136. *See, e.g.*, Brief Amici Curiae of Computer Science Professors Harold Abelson et al. Suggesting Affirmance of the Judgment, *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (No. 04-480).

137. *See* Brad King, *Napster Filter More Like a Sieve*, WIRED NEWS, Mar. 5, 2001, <http://www.wired.com/news/culture/0,1284,42196,00.html>.

forms of filtering scan audio files for copyrighted content, but these measures can be evaded by certain kinds of encryption.<sup>138</sup> Given the difficulty of developing content filtering, its limited effectiveness, and the constraints it imposes on network design, technologists are unlikely to build encryption into systems unless pressured to do so by either the content industry or the courts.<sup>139</sup> Content filtering could increase in popularity if lower courts weigh this factor more heavily in the inducement analysis. But footnote twelve of the *Grokster* opinion, holding that content filtering is not required to avoid liability, should foreclose the possibility that the judiciary will support mandatory content filtering schemes.<sup>140</sup>

### 3. *Business Model Evidence*

Grokster's business model relied almost entirely on the sale of advertisements, requiring it to focus on high volume uses of P2P, which were largely infringing.<sup>141</sup> While finding evidence related to the defendants' business models worthy on consideration, the Court held that, like content filtering, such evidence alone is insufficient to prove unlawful intent.<sup>142</sup> Business model evidence probably will prove more significant than failure to filter. Receiving revenue from infringing uses will likely color how the finder of facts weighs defendant testimony.

Different business models will lead to different degrees of credibility. Businesses that generate revenue from each user, through sales, subscriptions, or advertising, will face the most liability and appear the least credible when disclaiming an intent to induce infringing uses. Since most business models yield payments per product sold or user subscribed, applying *Grokster's* third factor will require some care to avoid imposing liability where the *Sony* rule should otherwise excuse it. For example, consider *Diamond Rio*, in which the recording industry sued one of the first portable MP3 player manufacturers.<sup>143</sup> At the time, legitimate digital music sources were relatively rare,<sup>144</sup> and so the Diamond Rio was probably fre-

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138. See Declan McCullagh, *SDMI CodeBreaker Speaks Freely*, WIRED NEWS, Aug. 16, 2001, <http://www.wired.com/news/politics/0,1283,46097,00.html>.

139. DRM's public image took a blow when it was discovered that DRM software used by Sony made computers vulnerable to viruses. John Borland, *Sony Recalls Risky "Rootkit" CDs*, CNET NEWS.COM, Nov. 15, 2005, [http://news.com.com/2100-7349\\_3-5954154.html](http://news.com.com/2100-7349_3-5954154.html).

140. *Grokster*, 125 S. Ct. at 2781 n.12.

141. *Id.* at 2781-82.

142. *Id.* at 2782.

143. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072 (9th Cir. 1999) (applying the Audio Home Recording Act of 1992).

144. See *id.* at 1074.

quently used to play illegally downloaded music. Although Diamond certainly profited from infringers who bought its product, the nature of its business was similar to that in *Sony*.<sup>145</sup> But if the *Grokster* business model considerations were applied literally, Diamond Rio's sale of MP3 players could have given rise to inducement-based liability.

Open source providers like GUNet and Freenet will be in a better position than for-profit file-sharing networks, since their claimed efforts to promote noninfringing uses, improve the state of the art, or fight censorship will not be tainted by monetary gain. But to the extent these claims are viewed as pretexts for an anti-copyright agenda, they will remain vulnerable to inducement liability.

Businesses that generate revenue solely from noninfringing users will be in a much better position since their financial interests suggests that any enablement of infringement is only accidental. Such businesses will include those that give away basic versions of their software but sell platforms for legal content sales<sup>146</sup> or other business services.<sup>147</sup> Where a business makes money through both noninfringing and infringing uses, but the noninfringing uses make up the bulk of the activity, it will be in a similar position.<sup>148</sup>

For non-P2P businesses that need to consider inducement liability, this factor may be troublesome. Inducement liability could potentially discourage many businesses from introducing new products, because almost any business model will produce more profit when usage is higher. If courts are not cautious in developing inducement liability, they may limit development of some technologies that would ultimately have substantial lawful value by imputing unlawful intent to developers of groundbreaking devices and services.

#### 4. *Technological Features Conducive to Infringement*

While the three factors discussed above were central to the *Grokster* decision,<sup>149</sup> future cases will look to other evidence that may contribute to a finding of an unlawful objective. For example, product features that are

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145. *Id.* at 1079.

146. For example, BitTorrent plans to operate a market for content providers to sell their work. See Roth, *supra* note 116.

147. For example, One (failed) company, HiveCache, started by giving away a file-sharing program called MojoNation and tried to switch to selling backup services. See *supra* note 129.

148. Most business models will probably benefit from increased use of their products, but not all will have the same direct financial gain as the *Grokster* defendants did.

149. *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2781-82 (2005).

particularly conducive to infringing uses could provide evidence of unlawful intent.

Programs currently under development offer features that may make it difficult for copyright holders to identify and target individual infringers. Freenet, for example, serves as a “darknet” in which user actions are obscured through encryption and relaying, minimizing the likelihood of detection by copyright enforcers.<sup>150</sup> While other darknets avoided detection by only connecting small groups of users, the Freenet project believes it can protect each user’s identity, but allow them to access files located through the entire network.<sup>151</sup> This feature could result in a global network offering all the functionality of traditional P2P clients, but with very little legal risk for users.

Anonymity on the internet is nothing new, and other tools already provide similar functionality.<sup>152</sup> Combining them with a file-sharing tool in a convenient package, however, suggests an intent to promote infringement. The developers of these darknets usually explain their design choices as protective of free speech, particularly for citizens of dictatorial regimes.<sup>153</sup> The effectiveness of such programs in subverting the control of totalitarian regimes, however, remains unproven. And since these programs can be easily adapted to copyright infringement, this rationale is weak. Designers of systems like these run a major risk of being found liable, particularly if other evidence suggests an intent to cause infringement.

### 5. *Public Statements*

While product designers are unlikely to explicitly support use of their software to infringe, some developers have made statements that could be interpreted as opposing the copyright system. For example, the Freenet project leader wrote that “copyright is economic censorship (i.e., restricting the free distribution of information for economic reasons), and thus

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150. The Free Network Project, <http://www.freenetproject.org/> (last visited Feb. 23, 2006).

151. LASICA, *supra* note 24, at 226, 228-29.

152. One, called the Mixmaster protocol, sends a message from one e-mail relay to another, eventually coming to the destination in a way that does not permit it to be traced. Mixmaster, <http://mixmaster.sourceforge.net/> (last visited Dec. 20, 2005). The method could be adapted to systems other than e-mail. Another protocol, called onion routing, is another technique involving the relay of messages through different systems to allow a user system to interact with Internet servers “pseudonymously”—that is, the servers would be able to tell they were dealing with a distinct end user, but not who that user was. Tor: An Anonymous Internet Communication System, <http://tor.eff.org> (last visited Dec. 20, 2005).

153. *See, e.g.*, LASICA, *supra* note 24, at 225-27.

Freenet will make it difficult or impossible to enforce copyright.”<sup>154</sup> These statements are certainly suggestive of an intent to cause infringement, and will support a finding of liability.<sup>155</sup>

#### 6. *Summary: Evidence Bearing on Designer's Intent*

Future cases in which inducement liability is alleged will require careful fact-specific weighing of the evidence to determine the existence of unlawful intent to cause infringement.

After *Grokster*, developers can take advantage of a variety of methods to avoid liability. In general, those that avoid demonstrating a financial interest in infringing uses of their products will likely not be liable under a reasonable interpretation of *Grokster*. In the P2P context, most product designers will be able to insulate themselves from liability. Those that add more advanced anti-censorship or anonymity features that are useful for preventing copyright enforcement may be liable in any event if their stated objectives are unpersuasive.

For non-file-sharing businesses, the inducement test will protect most companies that attempt to build legitimate customer bases if they exhibit reasonable care in their marketing efforts. The inducement standard is highly subjective, however, which will likely lead technological innovators to be cautious when designing their systems. Unless courts are cautious in developing inducement liability, the development of the next generation's VCRs and MP3 players may be stifled.

### C. **Liability Under *Sony* and the Future of the *Sony* Rule**

Potential infringers will likely continue to face claims under ordinary contributory liability. Under this theory of liability, the *Sony* safe harbor remains a relevant defense. Since *Grokster* presented an opportune time to revisit *Sony*,<sup>156</sup> the Court's reluctance to alter *Sony* suggests that it is unlikely to do so in the near future. However, with three justices favoring

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154. Posting of Roblimo to Slashdot, <http://slashdot.org/article.pl?sid=00/04/10/0755259&mode=thread> (Apr. 10, 2000, 11:00); see also LASICA, *supra* note 24, at 227 (quoting Clarke's statement that copyright has been expanded far beyond its appropriate role). The author of BitTorrent has also made comments that could suggest intent to cause infringement, though he later disclaimed them as a parody. Bram Cohen, A Technological Activist's Agenda, [http://bitconjuror.org/a\\_technological\\_activists\\_agenda.html](http://bitconjuror.org/a_technological_activists_agenda.html) (last visited Dec. 20, 2005).

155. Some of the designers make vaguer statements that may suggest bad intent but probably will not lead to liability. *E.g.*, BitTorrent, Introduction, <http://www.bittorrent.com/introduction.html> ("BitTorrent is a free speech tool.") (last visited Dec. 20, 2005).

156. See *supra* note 103 and accompanying text.

a limiting interpretation of *Sony* and three favoring a more lenient understanding, predicting the precise scope of the protection offered by *Sony* will prove difficult.

Footnote twelve of the *Grokster* opinion limits how restrictively lower courts can interpret *Sony*. The Court held that a product distributor need not include content filtering features to avoid liability, at least as long as there is no other evidence of an unlawful objective of causing infringement.<sup>157</sup> This footnote is a strong signal that the Court will not significantly alter the contours of the *Sony* safe harbor. Footnote twelve would be hard to reconcile with a change in the *Sony* doctrine that holds P2P designers liable for general-purpose file-sharing programs that avoid inducement liability. Even if the Court interprets *Sony* more narrowly, it would most likely do so by raising the standard of proof required for a showing of noninfringing uses. This would follow the reasoning of Justice Ginsburg's concurrence, which would have required a "reasonable prospect" for a market for noninfringing uses to develop.<sup>158</sup>

The boundaries of *Sony* thus are unlikely to change at the Supreme Court. If the *Sony* doctrine continues to evolve at the lower courts, it will be constrained by the language of footnote twelve. *Grokster* may limit the practical usefulness of *Sony*, however, because inducement claims will be more difficult to dispose of on summary judgment, making it harder for defendants to avoid litigation costs. Moreover, *Sony* may become less relevant to real cases if showing intent to induce infringement proves easier than establishing contributory liability on other grounds.

## V. CONCLUSION

*Grokster's* inducement standard provides copyright owners a new weapon in the war on P2P networks. Since *Grokster* did not give the content industry what they really wanted—a rule that *Sony* requires primarily noninfringing uses or demands content filtering to be built in to products when possible—the industry will increasingly turn to other methods of combating infringement.

In particular, the industry will continue to advance its legal alternatives to unauthorized services. The popularity of such licensed services will receive a substantial boost as the illegal services that cannot survive an inquiry into their business objectives close their doors or strike deals with

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157. *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2781 n.12 (2005).

158. *Id.* at 2786 (Ginsburg, J., concurring).

copyright owners.<sup>159</sup> Copyright owners will also continue to sue individual infringers. Although the volume of infringing users makes it difficult for suits to stem the tide of P2P infringement, they will generate negative publicity for non-licensed services and encourage the public to migrate to the authorized alternatives.

Meanwhile, *Grokster* will keep lower courts occupied with deciphering the details of inducement liability for some time. Although *Grokster* left copyright owners claiming victory and technology advocates disappointed,<sup>160</sup> it may in the end turn out to be a blessing in disguise for technologists. The subjective intent standard leaves room for technology developers to claim benign motivations for many activities, and most factors supporting inducement liability can be easily avoided by many technology companies. Avoiding liability under *Grokster*'s standard will have serious costs, however, as technologists alter the operation of their businesses to minimize their exposure. In the end, *Grokster* may slow innovation by technologists without significantly limiting the infringement the opinion was meant to ameliorate.

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159. John Borland, *Last Waltz for Grokster*, CNET NEWS.COM, Nov. 7, 2005, [http://news.com.com/2100-1027\\_3-5937832.html](http://news.com.com/2100-1027_3-5937832.html).

160. See Press Release, RIAA, RIAA Statement On MGM v. Grokster Supreme Court Ruling (June 27, 2005), <http://www.riaa.com/news/newsletter/062705.asp>; Press Release, Electronic Frontier Foundation, Supreme Court Ruling Will Chill Technology Innovation (June 27, 2005), [http://www.eff.org/news/archives/2005\\_06.php](http://www.eff.org/news/archives/2005_06.php).