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Briefing Paper  
Peer-to-Peer File Sharing: *Grokster* and *Aimster*  
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## INTRODUCTION

The two cases under consideration, *Metro-Goldwyn-Mayer v. Grokster, Ltd.* (“Grokster”)<sup>1</sup> and *In re Aimster Copyright Litigation* (“Aimster”)<sup>2</sup> present two different outcomes regarding the legality of peer-to-peer file sharing—specifically, music file sharing—that may represent a split between the Ninth and Seventh Circuits, distinguishable fact patterns, or some combination therein. Both cases fall into the line of decisions regarding the legality of technology that may be used to infringe copyright begun by *Sony Corp. of America, Inc. v. Universal City Studios, Inc.* (“Sony”)<sup>3</sup> and applied to the music file sharing question by the Ninth Circuit in *A&M Records, Inc. v. Napster, Inc.* (“Napster”).<sup>4</sup> With *Grokster* a district court case decided in April and *Aimster* a June circuit court decision, the cases offer differing interpretations, limitations, and expansions of the *Sony* and *Napster* doctrines that may call for Supreme Court review of the peer-to-peer issue.

## QUESTIONS PRESENTED

The issues presented by the instant and pending litigation include: May technology distributors be held liable for contributory and/or vicarious copyright

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<sup>1</sup> 259 F. Supp. 2d 1029 (9<sup>th</sup> Cir. 2003).

<sup>2</sup> 334 F.3d 643 (7<sup>th</sup> Cir. 2003).

<sup>3</sup> 464 U.S. 417 (1984).

<sup>4</sup> 239 F.3d 1004 (9<sup>th</sup> Cir. 2001).

infringement where the technology is capable of substantial non-infringing uses, present or absent the following factors?

The technology distributor may have constructive knowledge but has no actual knowledge of infringing conduct by end users.

The technology distributor has willfully blinded itself to actual or constructive knowledge of infringing conduct by end users.

The technology distributor does not facilitate infringement via a file-sharing index or network.

The technology distributor does not have the right or ability to supervise infringing conduct.

The technology distributor offers not just a product but also a service that facilitates copyright infringement.

Additional issues posed by *Aimster* include whether where a technology has substantial non-infringing uses,

Using technology to edit a copyrighted work creates an infringing derivative work.

Space-shifting may constitute a fair use of copyrighted materials.

The technology producer has a legal duty to take measures to prevent or substantially reduce infringing use of its product subject to a cost-benefit balancing test.

### **PROCEDURAL POSTURE**

In *Grokster*, numerous plaintiffs from the recording industry sued peer-to-peer software distributors Grokster, Streamcast Networks (also known as Morpheus), and Kazaa (since purchased by the Australian company Sharman Networks and removed from the case by a default judgment) for contributory and vicarious copyright infringement based on defendants' distribution of such software. The district court

granted the defendants' motions for partial summary judgment thus denying the plaintiffs' prayer for injunctive relief. The matter is currently on appeal.

In *Aimster*, the Seventh Circuit heard an appeal of an injunction the district court granted the recording industry upon finding that Aimster's peer-to-peer file-sharing network was likely to be found liable for contributory and vicarious copyright infringement. Writing for the Seventh Circuit, Judge Posner affirmed the contributory infringement charge and the district court's injunction.

### DISCUSSION

The *Grokster* court, noting that *Napster* established that downloading and uploading copyrighted music files constitutes copyright infringement and that the defendants had ceded that users did so with their software, assessed the charges in light of such undisputed infringing conduct by the software's end users.

In ruling on contributory infringement, the Ninth Circuit cited *Sony* to assert that where a technology is capable of substantial non-infringing uses, no contributory liability accrues even where the technology's distributor may have constructive knowledge of infringing conduct; actual knowledge is required. Furthermore, the court said, the holding in *Napster* required active facilitation of infringement and subsequent failure to prevent infringing conduct in order to show contributory liability. The decision distinguished the defendants' products and services from Napster's in that they provided no centralized file-sharing index or network, and thus did not facilitate infringement.

As to vicarious infringement, the court found that though the defendants did benefit financially from distribution of their products, they did not have the requisite right

and ability to supervise infringing conduct. Comparing peer-to-peer technology with the counterfeit swap meet at issue in *Fonovisa*, the court found that the defendants did not control access to or patrol the space its product created—an apt description of the end-to-end Internet—and thus could not be held vicariously liable for copyright infringement that took place there.

The *Grokster* court concluded with a call for legislative guidance on whether and how the state should regulate the design of software susceptible to unlawful use, but specifically declined to “expand existing copyright law beyond its well-drawn boundaries,” treading the line drawn by *Sony*.

The *Aimster* decision destabilized a good deal more of existing *Sony* and *Napster* doctrine than did *Grokster*. Noting that Aimster offered not just a product but an ongoing service, Judge Posner held that Aimster (1) proffered an “invitation to infringement” through a tutorial that used only copyrighted music files as examples, and “Club Aimster,” which charged a monthly fee for expedited access to the most popular downloads, and 2) willfully blinded itself to infringing activity—conduct that the company could have observed and controlled but for an encryption process apparently designed primarily to exculpate the proprietor from the knowledge requirement. Given contributory liability, Judge Posner deemed the question of vicarious liability “academic” and affirmed the district court without specifically addressing the latter charge in detail.

In the course of his opinion, Judge Posner raised a number of novel propositions regarding copyright law. Among them was that under *Sony*, using a VCR to skip commercials creates an infringing derivative work (*compare with* the current *Clearplay* case), while despite the holding in *MP3.com*, space-shifting may constitute a fair use of

digital music files. Judge Posner also proposed that *Sony* suggests that where a technology has potentially substantial infringing uses, the court should apply a cost-benefit balancing test that would require the technology producer to take all measures that are not “disproportionately costly” to prevent or substantially reduce such infringing use. Finally, despite language in *Sony* that looks to not just present but potential non-infringing uses of a technology, the court found that Aimster’s failure to offer evidence of any current non-infringing uses fatally weakened its non-infringing capability argument.

### **RESULTING AND RELATED LEGAL ISSUES**

With *Grokster* under expedited appeal, the questions raised by *Aimster* open, and Supreme Court review of either case possible, the state of the law regarding peer-to-peer file sharing is markedly unsettled. Nonetheless, factual distinctions between the cases regarding the technologists’ degree of control and knowledge of infringing conduct suggest that courts can draw somewhat rational lines regarding contributory and vicarious infringement under current copyright doctrine.

In the wake of the *Grokster* district court loss, the RIAA’s campaign to subpoena peer-to-peer user names from ISPs sue those it accuses of uploading copyrighted music files raises a number of additional legal issues: the extent of the DMCA’s safe harbor provision for ISP providers; due process, privacy and the “new spam”; and initiatives to reform copyright law to make file sharing legal via alternative compensation schemes to copyright holders. Many in the field also expect a new round of peer-to-peer technology that masks users’ identity, raising additional enforcement issues for any outcome of these cases.

## CONCLUSION

The outcome of the *Grokster* appeal and adjudication following the *Aimster* decision will have significant effects on the legal landscape regarding contributory and vicarious liability for copyright infringement, the safe harbor provisions under the DMCA, and construction of the Copyright Act's fair use provisions for technology products. The result of the *Grokster* appeal may deepen or lessen the divide. In either case, the federal courts' call for guidance from the Supreme Court of Congress seems clear.