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Case Summary
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Peer-to-Peer File Sharing

The two cases under consideration, *Metro-Goldwyn-Mayer v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (9th Cir. 2003)("Grokster") and *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003) ("Aimster") 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 follow 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.*, 464 U.S. 417 (1984) ("Sony") and applied to the music file sharing question by the Ninth Circuit in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) ("Napster"); *see* 17 *Berkeley Tech. L.J.* 71 (2002). 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.

Grokster

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. 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, the court 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*.

Aimster

The *Aimster* decision destabilized a good deal more of existing *Sony* and *Napster* doctrine than did *Grokster*. While the lawsuit had similar roots, here 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, holding that Aimster offered not just a product but an ongoing service that (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.

Outlook

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.