

Can the RIAA Survive “Substantial Non-Infringing Uses?”

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ABSTRACT

This Note discusses peer-to-peer (P2P) file sharing cases as they relate to rights in digital media. The recent problems involving P2P stem from the Supreme Court *Sony-Betamax* case of 1984. This piece takes issue with the scope of the *Sony* decision and several other notable cases in this context, and discusses the proper standard to be applied in cases involving charges of contributory copyright infringement. The Seventh Circuit gives *Sony* a plausible reading by balancing the intent of software distributors and the harms to rights holders—an approach mandated by the Court in *Sony*, and soon to be revisited in *Grokster*. Conversely, the Ninth Circuit glosses over the import of the *Sony* decision by ignoring intent and, more importantly, by disregarding the feasibility of balancing the parties’ respective interests with the potential harms to the parties. This Note suggests that courts faced with the defense of substantial non-infringing uses should employ a fact-intensive approach utilizing the balancing of interests mandate given by the Court in *Sony*, or in the alternative, that legislative action may be necessary. The discussion concludes with some final remarks about the direction of the doctrine, and offers some possible solutions for content owners to stave off unauthorized distribution of protected works.

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I. INTRODUCTION: NO LONGER A BLACK AND WHITE ISSUE

¶ 1 The *Grey Album* is a unique musical composition created by DJ Danger Mouse that combines the sounds of an a cappella version of Jay-Z’s 2003 release, the *Black Album*, with the 1968 release from the Beatles, the *White Album*.¹ On Tuesday, February 24, 2004, in what proponents called an act of civil disobedience,² approximately 170 Web sites hosted the *Grey Album* for download, resulting in over 100,000 downloads of the album.³ The a cappella version of Jay-Z’s album was promoted by Roc-A-Fella records⁴

1. Grey Tuesday, *Free the Grey Album* (Feb. 24, 2004) at <http://www.greytuesday.org> (last visited June 19, 2005).

2. There were, in a sense, two sorts of civil disobedience present. First, those promoting the *Grey Album* (ostensibly artists) were asserting their displeasure with the lack of a compulsory licensing scheme for recorded works. However, this first instance of disobedience was also encompassed by the larger discord between the general public and the recording industry. In both instances, the rift existed in part due to a public perception of greed within the recording industry.

3. Grey Tuesday, *supra* note 1.

4. Roc-A-Fella, *Roc-A-Fella Records*, <http://www.rocafella.com> (last visited June 19, 2005).

for the purpose of encouraging remixes such as the *Grey Album*.⁵ EMI,⁶ the holder of the rights to the Beatles' *White Album*,⁷ employs a different approach to licensing. Despite praise for the *Grey Album* from the industry and critics alike,⁸ EMI sent cease-and-desist letters to record stores demanding that they take the *Grey Album* off of their shelves, and also sent letters to Websites demanding that they remove any infringing material from their sites.⁹

¶2 This scenario presents one of the most serious problems facing the music industry, artists, and consumers. Some advocate a system of compulsory licensing to be imposed on file sharing, and paid pro rata to artists whose sound recordings are downloaded by individuals.¹⁰ If implemented, this would be similar to the compulsory licensing schemes developed by groups such as The American Society of Composers, Authors, and Publishers ("ASCAP")¹¹ and Broadcast Music Inc. ("BMI")¹² in response to the public broadcast and performance of protected sound recordings in the early twentieth century. Labels such as EMI, on the other hand, assert that the limited

5. Grey Tuesday, *supra* note 1.

6. EMI, *EMI Group*, <http://www.emigroup.com> (last visited June 19, 2005).

7. See generally American Society of Composers and Producers (ASCAP), <http://www.ascap.com/ace/> (Apr. 19, 2005).

8. Downhill Battle, *Press Release*, at http://www.downhillbattle.org/pressreleases/greytuesday_21904.html (Feb. 18, 2004) (noting that the *Grey Album* has attained praise in Rolling Stone (which called it "the ultimate remix record" and "an ingenious hip-hop record that sounds oddly ahead of its time"), The New Yorker, and The Boston Globe (which called it the "most creatively captivating" album of the year)).

9. Waxy.org, *Daily Log: Danger Mouse's The Grey Album MP3s*, at http://www.waxy.org/archive/2004/02/11/danger_m.shtml (Feb. 24, 2004) (posting the following letter from Jonathon Campbell, of EMI's Legal and Business Affairs team:

It has come to our attention that Andrew Baio is currently exploiting sound recordings that are owned and/or controlled by Capitol Records, Inc. ("Capitol"). In particular, it appears that Mr. Baio is using, without authorization, on his website, http://www.waxy.org/archive/2004/02/11/danger_m.shtml, (the "Website"), copies of sound recordings embodying performances of the Beatles, including but not limited to recordings of "Long, Long, Long," "While My Guitar Gently Weeps," "Glass Onion," "Savoy Truffle," "Mother Nature's Son," "Helter Skelter," "Julia," "Happiness is Warm Gun," "Piggies," "Dear Prudence," "Rocky Raccoon," "Revolution 1," "Revolution 9," "I'm So Tired," and "Cry Baby Cry" (the "Capitol Recordings"). . . .

We request that following your investigation of this matter you provide us full remedy under the DMCA Notice requirement, including but not limited to, expeditiously removing or disabling access to our copyrighted material. Unless we receive full and immediate compliance with this demand within a reasonable amount of time, we will be forced to consider pursuing our other remedies at law and in equity.)

10. Electronic Frontier Foundation, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing, "Let the Music Play" White Paper*, at http://www.eff.org/share/collective_lic_wp.php (last visited June 19, 2005) (positing that rights holders deserve some compensation for their efforts, that file sharing is here to stay, that the industry currently lacks sufficient catalog depth on digital delivery services to satisfy consumer needs, that voluntary collective licensing—where consumers pay a small monthly fee for unlimited access to label catalogs available for download, which is then distributed pro rata to rights holders, as is done by ASCAP and BMI—is an alternative to litigation and illegal activity, and that the model is supported by the overwhelmingly successful examples in broadcast radio).

11. The American Society of Composers, Authors, and Publishers, *ASCAP*, at <http://www.ascap.com/index.html> (last visited June 19, 2005).

12. BMI, <http://www.bmi.com> (last visited June 19, 2005).

monopoly granted to the copyright holder controls; hence, *they* decide whether mixes and other derivative works that build on the works they own should be created.¹³ As is often the situation with musical recordings, multiple rights holders may be involved,¹⁴ and absent a system of compulsory licensing any one of those rights holders may effectively lock others out from creating new, original adaptations of existing works.¹⁵ This practice is not only a poor business model, but is also contrary to the philosophical underpinnings of U.S. copyright law.¹⁶

¶3 And yet it appears that this is precisely what EMI and other record labels have been doing—stifling creativity by attempting to control the creation of derivative sound recordings. In response, users of peer-to-peer (“P2P”)¹⁷ technology, such as those promoting the *Grey Album*, continue to engage in a form of civil disobedience¹⁸ against

13. See Waxy.org, *supra* note 8.

14. Electronic Frontier Foundation, *Grey Tuesday: A Quick Overview of the Legal Terrain*, at http://www.eff.org/IP/grey_tuesday.php (last visited June 19, 2005) (noting that “there are at least 4, and maybe 5, ‘rights-holders’ potentially involved” including: 1. owners of the sound recording (“master”) for the *White Album*; 2. owners of the songs (“compositions”) on the *White Album*; 3. owners of the masters for the *Black Album*; 4. owners of the compositions that appear on the *Black Album*; and 5. (possibly) the owner of the *Grey Album*).

15. See Katie Dean, *Grey Album Fans Protest Clampdown*, Wired News, at http://wired.com/news/digiwood/0,1412,62372,00.html?tw=wn_tophead_2 (Feb 24, 2004) (quoting DJ Variable, a DJ and producer from Philadelphia:

If you want to be creative you have to be signed to one of the major labels. . . . They’re the only ones who will put up the money for sample clearance. It’s like a glass ceiling out there for music. . . . [i]f you start your own label and do your own thing, you can make a spark in the underground scene. If you get to be big, then the major labels are either going to sue you or sign you.)

16. U.S. CONST., art. I, § 8, cl. 8, (“The Congress shall have power to . . . promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”)

17. See generally David J. Colletti, Jr., *Technology Under Siege: Peer-To-Peer Technology Is The Victim Of The Entertainment Industry’s Misguided Attack*, 71 GEO. WASH. L. REV. 255 (2003) (explaining that, although there are three “generally accepted” classes of peer-to-peer technology (hybrid, plain, and law-defying), in reality all P2P networks may be classified as either centralized or decentralized. (The hybrid type may be considered centralized, while the plain and law-defying types may be classified as decentralized). Of course, both types of networks share many common features such as the ability of users to be both providers and borrowers of information, but there are important technological (and potentially legally significant) differences. In a centralized network (the most famous example being Napster) users send queries to a central service which scans for available downloads. In a decentralized network, on the other hand, there is no need for a central locator service. Because the ability to search among other users for desired files is inherent in the program itself, there is no need for further contact with the program provider once the software is installed on a user’s computer).

18. Although there may be merit to the claim of civil disobedience, in most instances it is not clear whether engaging in unauthorized file sharing is truly an act of civil disobedience, or whether it is simply a pretext for avoiding having to pay for CDs (whether or not they are overpriced). Is stealing the best way to get the message across? Civil disobedience is more synonymous with a principled cause, such as civil rights. It is not often associated with a desire to pay lower prices. If televisions are overpriced, does that make it an act of civil disobedience when a person goes to the store and steals one, or, better yet, if they intercept a shipment from the factory bound for the warehouse before the manufacturer can place the product into the stream of commerce? What about the person who goes to the store to steal a CD? Can that be called civil disobedience? Probably not, although, one might imagine circumstances (such as outright hoarding from consumers) that may justify such an act. Aside from the *Grey Album*, and general cries of “greed,” there has been no pointed target of file sharing civil disobedience. The goal is not to argue

the recording industry. Disenchanted with the rising costs of music, and surrounded by the explosion of CD-R drives, blank media, and the negligible costs of file sharing, consumers have decided to subvert traditional brick-and-mortar purchasing schemes in exchange for fast, inexpensive file sharing.¹⁹

¶4 Rather than embracing file sharing as a distribution method,²⁰ the industry as a whole initially sought to stop this practice by filing lawsuits, first against P2P network distributors such as Napster, Grokster, and Kazaa,²¹ and then against individuals engaged in file sharing.²² In the past, this approach has failed,²³ succeeded,²⁴ and excelled.²⁵

¶5 The most notable example of litigation brought in response to new technology comes from the now infamous 1984 U.S. Supreme Court case, *Sony v. Universal Studios*.²⁶ In *Sony*, the Motion Picture Industry sought to enjoin further manufacturing of the Betamax Video Tape Recorder ("VTR") based on claims of contributory copyright infringement.²⁷ The Court held that in order to defeat a claim for contributory infringement, a particular technology or device need only be capable of commercially significant "substantial non-infringing uses" (which remains the standard today).²⁸ In fact, the Court held that even *one* non-infringing use—time-shifting, in the case of programs taped off of television—was sufficient to save Sony from liability for contributory infringement because the benefit of end-user time-shifting outweighed the harm demonstrated by the plaintiffs.²⁹

over the merits of P2P as a means of engaging in civil disobedience, but rather to point out that crying "civil disobedience" cannot justify all instances of unauthorized file sharing.

19. See generally Doris E. Long, *E-Business Solutions to Internet Piracy: A Practical Guide*, 740 PLI/Pat 769, 780-81 (2003).

20. While the recording industry initially rejected file sharing as a distribution model, new services such as Apple iTunes, Napster, and even Wal-Mart (with its Music Downloads service) have begun to gain popularity with the industry and consumers alike, signifying a seeming change in attitude. The emergence of industry-authorized file sharing services does not, however, do away with the problem of unauthorized distribution via "unmonitored" P2P networks. Consequently, the legal battlefield remains largely unchanged.

21. In an ultimate turn of irony, KaZaA CEO Nikki Hemming (herself a former Virgin executive), stated that counsel for the group was preparing cease-and-desist letters to be sent to hackers who released a "Lite" version of KaZaA. The Lite version is the original *sans* advertising, and is, of course, an unauthorized appropriation of KaZaA's intellectual property. See John Borland, *Kazaa Steps out of the Shadows*, c|net News.com, at <http://news.com.com/2100-1023-890197.html> (Apr. 23, 2002).

22. See Associated Press, *Recording Industry Sues 532 Over Swapping*, available at <http://apnews.myway.com/article/20040323/D81G8B903.html> (last visited Apr. 4, 2004) (stating that, as of April 2004, the RIAA had brought suit against nearly 2,000 individuals, including almost 100 users of collegiate networks in at least thirteen states, and had settled around 400 of those suits).

23. See *infra* pt. III.C (discussing *Metro Goldwyn Mayer Studios Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *affirming* 259 F. Supp. 2d 1029 (C.D. Cal. 2003)).

24. See *infra* pt. II.E (discussing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)).

25. See *infra* pt. III.D (discussing *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003)).

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

27. The charge of contributory copyright infringement was predicated on unauthorized home recording by end users of the VTRs. See *infra* pt. II.A (discussing *Sony*, 464 U.S. 417).

28. See *infra* pt. II.A (discussing *Sony*, 464 U.S. at 442).

29. *Sony*, 464 U.S. at 442 (emphasis added). The idea of weighing the harms and interests involved seems to have been overlooked in the Ninth Circuit. See *infra* pt. III.E.2.

¶6 This “non-infringing use” defense to contributory copyright infringement sat relatively dormant until the late 1990s,³⁰ when the proliferation of P2P file sharing networks—such as the once defunct and now reborn Napster and its legacies Aimster, Grokster, and KaZaA—began to present similar problems for content owners, specifically the group known as the Recording Industry Association of America (“RIAA”).³¹ In tandem with the filing of numerous lawsuits against individual infringers, the RIAA made a preemptive strike to shut the tap off at its source by suing the corporations who created and marketed the networks which allowed the infringement to occur.³² In cases brought by the RIAA, P2P/file sharing network defendants have defended successfully³³ as well as unsuccessfully³⁴ by using the substantial non-infringing uses test elucidated in Sony. In fact, it has been noted that, in light of the Napster case,³⁵ newer versions of P2P networks have specifically built systems incorporating decentralized servers and encrypted file transfer protocols in order to avoid liability for contributory infringement, as well as to protect the anonymity of end users.³⁶

¶7 Additionally, there has been litigation by the RIAA against end users³⁷ resulting in both the alienation of consumers and a subsequent public backlash.³⁸ The litigation has also led to the rise of so-called “legitimate,” *i.e.* endorsed by the RIAA, digital download

30. Only three reported cases utilizing “substantial non-infringing uses” as a defense to contributory or vicarious copyright infringement can be found prior to its use in *Napster*. See *Time Warner Cable of New York City v. Cable Box Wholesalers, Inc.*, 920 F. Supp. 1048 (D. Ariz. 1996) (finding Sony inapplicable in suit for copyright infringement based on cable descramblers); *Sega Enters. v. Sabella, Copy. L. Rep.* (CCH) P27,648 (N.D. Cal. 1996) (finding liability for sale of copiers over bulletin board system which permitted copying of copyright-protected video games that did not have any substantial non-infringing uses); *Sega Enters. v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996) (same).

31. It is important to note that the problem of unauthorized file sharing is not solely the purview of the recording industry. Rights holders in protected television programs, movies, artwork, computer software, and all copyright protected material for that matter, have an (albeit unequal) interest in the outcome of P2P cases. It is the RIAA, however, that has spearheaded efforts to stop unauthorized distribution and copying of protected works in the P2P context.

32. See *In re Aimster*, 334 F.3d at 645-46 (7th Cir. 2003) (observing that it would be fruitless, or impractical at best, to sue all individuals illegally downloading copyrighted works. The opinion draws an analogy to the criminal act of aiding and abetting—which requires intent, an idea explored *infra* Part III.E.3—noting that tort theory permits right owners to sue facilitators for contributory copyright infringement).

33. See *infra* Part II.A (discussing *Grokster*, 380 F.3d 1154; 259 F. Supp. 2d 1029).

34. See *infra* Part III.D (discussing *In re Aimster*, 334 F.3d at 643).

35. *Napster*, 239 F.3d 1004.

36. *Grokster*, 259 F. Supp. 2d at 1046 (noting that the court was “not blind to the possibility that Defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares,” but reserving to the legislature the decision to require steps such as filtering). See also K-Lite, *Official Download Site*, at <http://www.k-lite.tk> (last visited June 19, 2005) (purporting to allow unlimited downloads using 100% legal software with technical support, while protecting user privacy. The software itself may be legal, and of course, as is the case with all other P2P networks, the end user license agreement (EULA) requires that end users not engage in copyright infringement, and specifies that they will indemnify K-Lite in the event that they do).

37. *In re Verizon Internet Servs., Inc.*, F. Supp. 2d 24 (D.D.C. 2003).

38. Cynthia L. Webb, *Kinder, Gentler RIAA*, WashingtonPost.com, at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A52749-2003Oct20> (Oct. 20, 2003).

services such as iTunes and the now legitimate Napster.³⁹ While the proliferation of legitimate digital delivery services has mitigated some of the harm accrued via illegal downloading,⁴⁰ a significant number of illegal transfers still occur, giving rise to the continued need for litigation by rights holders like the Software & Information Industry Association ("SIIA"), and the Motion Picture Association of America ("MPAA"). Another significant "change" in the relationship between the music industry and consumers is that digital delivery services attach a limited license to electronic track or album purchases,⁴¹ whereas physical media such as compact discs traditionally came with the technological ability (and the perceived right) to make an unlimited number of digital copies, for archival purposes as well as for sharing.⁴²

¶ 8 In light of the precedent established in *Sony*, the recent litigation regarding P2P networks, and the latest petition for certiorari before the Supreme Court,⁴³ the question arises whether "substantial non-infringing uses" is still a viable standard in the purported information age, specifically in the P2P context. In other words, can the goals of copyright law—to promote creativity while expanding the public domain, as endorsed in *Sony*—be reconciled with this new technology?

¶ 9 This Note argues that the *Sony* framework, including the balancing test adopted therein, continues to constitute a viable approach for reconciling the competing interests of copyright law. Part II explores several subsequent cases that have applied the substantial non-infringing use standard, as well as the overall phenomenon that led to the current discord in copyright jurisprudence between the rights of content owners and consumers. Part III explores cases on opposite sides of the vicarious or contributory copyright infringement liability spectrum, and suggests that courts faced with the defense of substantial non-infringing uses should employ a fact-intensive approach utilizing the balancing of interests mandate dictated by the Court in *Sony*. The current standard employed by the Ninth Circuit, which omits this balancing test, is over-inclusive and will harm copyright owners at the expense of promoting technology-based commerce—an unintended and undesirable result. Failure to strike a proper balance in such cases has the potential of taking the cliché, "information wants to be free," to a remarkable end, at the

39. Napster, at <http://www.napster.com> (last visited June 19, 2005).

40. *Music Piracy 'Does Hit CD Sales,'* BBC News, at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/entertainment/3995885.stm> (Nov. 11, 2004) (noting trends to the effect that one-fifth of an album sale is lost for every album downloaded from the Internet, and that while some users who illegally downloaded music went on to spend more on music, others actually cut back on or stopped purchasing music after sampling).

41. An interesting alternative to the current regime of licenses, which limits the number of devices and/or downloads allowed with respect to a purchased track or album, is Light Weight Digital Rights Management (LWDRM). See *Light Weight Digital Rights Management*, at <http://www.lwdrm.com/eng/> (last visited June 19, 2005) (offering a service that "allow[s] fair use and private copying if the consumer is willing to mark the content with his identity by applying his personal digital signature, thus accepting the responsibility not to use the content in a way that is considered infringing").

42. Likely factors in this shift include: the ability of consumers to make an unlimited number of flawless digital copies; a perceived feeling of inadequate compensation from license-based duties on mechanical recording devices such as recordable compact discs by the music industry; and defensive intellectual property economics.

43. Petition for Writ of Certiorari (No. 04-480), *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 686 (U.S. 2004).

expense of potentially stifling creativity. Part IV concludes with some final remarks about the direction of the doctrine, and offers some suggestions for how content owners can stave off unauthorized distribution of protected works.

II. BACKGROUND

A. Sony Betamax

¶ 10 The possibility that contributory copyright infringement liability⁴⁴ might arise based solely on the act of manufacturing products that facilitate copyright infringement first arose in the watershed 1984 case *Sony v. Universal Studios*.⁴⁵ In *Sony*, respondents Universal Studios and Walt Disney Productions brought suit against Sony, the manufacturer of Betamax VTRs, for contributory copyright infringement.⁴⁶ The District Court found the respondents' allegations of contributory copyright infringement lacking, based in large part on the fact-intensive nature of the case.⁴⁷ The infringement claims were based on unauthorized copying by consumers of works copyrighted or owned by respondents.⁴⁸ VTRs, the District Court explained, are capable of recording electromagnetic signals (which ultimately represent the works at issue) transmitted over public airwaves onto a magnetic tape, which can then be converted into a signal readable by a television set.⁴⁹

¶ 11 The VTR allowed the public to "time-shift" programs by recording publicly broadcast shows for viewing "once at a later time, *and thereafter erasing [them].*"⁵⁰ In fact, although the numbers differed, both parties offered surveys to the District Court evidencing that VTRs were used principally for time-shifting.⁵¹ Additionally, Sony offered evidence that at least seven percent of the programs recorded by Betamax VTRs were recorded without objection from the copyright owners.⁵² No mention was made,

44. To be held liable for contributory copyright infringement, as a preliminary matter, the plaintiff must allege and show that the end user (consumer of the manufacturer's product) engaged in direct copyright infringement. The plaintiff must then show that the secondary infringer (defendant) knew or should know of the direct infringement, and that the defendant materially contributed to or caused the infringement. *See Napster*, 239 F.3d at 1019-20.

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

46. *Id.* at 419-22.

47. *Id.* at 420.

48. *Id.*

49. *Id.* at 422.

50. *Id.* at 423 (emphasis added).

51. Time-shifting constituted approximately seventy-five percent of VTR use according to the plaintiff and ninety-six percent according to the defendant. *Id.* at 423, 424.

52. *Id.* at 424, 444-46. Among the content owners who made no objection to the recording of their materials for home use were representatives of professional sports organizations, public broadcasting, and Fred Rogers (of Mr. Rogers' Neighborhood). While these organizations and individuals undoubtedly authorized the recording of material of a legitimate public interest, there was little evidence offered that they were in any manner commercially significant. The lodestone of the Supreme Court's holding is commercial significance. Although not directly stated in the opinion, the commercial significance the Court speaks of must be the sale of VTRs—the article of commerce at issue.

however, of the transfer of tapes to other persons.⁵³ The court focused solely on the recording of copyright-protected material on an individual, private basis.⁵⁴ As such, the non-commercial recording of copyrighted programs was *presumptively* deemed by the District Court to be a fair use.⁵⁵ The court endorsed the view that the plaintiffs could not impede this right. Logically, then, Sony could not be held liable for contributory infringement if even one of the uses for the product was a fair one, irrespective of any potential for infringement.⁵⁶ Assuming even that Sony had constructive knowledge that its product would be used for some allegedly infringing uses, the District Court noted:

Selling a staple article of commerce e.g., a typewriter, a recorder, a camera, a photocopying machine[,] technically contributes to any infringing use subsequently made thereof, but this kind of 'contribution,' if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management. Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers whenever they 'constructively' knew that some purchasers on some occasions would use their product for a purpose which a court later deemed, as a matter of first impression, to be an infringement.⁵⁷

¶ 12 Under this line of reasoning, since the product in question was capable of non-infringing uses, the manufacturers were essentially sheltered from a claim of contributory infringement. To hold otherwise would hinder commerce, and more importantly, innovation—copyright's *raison d'être*. Moreover, the District Court reasoned that the respondents had not made a plausible demonstration of any present or future harm due to consumers' actions.⁵⁸ Nor could the relief requested adequately account for the public's right to record uncopyrighted material,⁵⁹ or the public's right to record programs to

53. *Id.* at 425. The technology for transfer of protected works (other than face-to-face, through the mail, etc.) simply did not exist, and if it did it was most certainly cost-prohibitive—keep in mind that it was only 1984. Today, on the other hand, the ability of individuals to transfer works, rather than the mere ability to record content from a publicly broadcast medium, forms the pinnacle of the debate over P2P. In *Sony*, the copying would be analogous to recording music off of the radio to an individual's home computer—where it would then stay (something the RIAA would presumably have substantially less objection to).

54. *Id.*

55. *Id.* The term "presumptively" is used because the burden has been allocated to the plaintiff to show that no non-infringing uses are possible—something which is virtually impossible with P2P, and wholly untenable without at least weighing the harms against the benefits.

56. *Id.* at 426.

57. *Id.* (emphasis added). One should keep in mind, however, that the copying enabled by a typewriter is too laborious to be effective as a copying tool. The photocopier, recorder, and camera, unlike P2P, produce degradation in subsequent copies such that after several generations of copies are made, the copied (infringing) material is no longer as desirable or useable as the original. Additionally, in the instances of photocopying and recording, the manufacturers of the respective technologies are subject to compulsory licensing schemes—something heretofore unused in the P2P context.

58. *Id.* The RIAA, on the other hand, has shown demonstrable harm. See Cecile Daurat, *Global Music Sales Fall for Four Years in a Row*, The Miami Herald.com (Apr. 8, 2004), available at <http://www.miami.com/mld/miamiherald/business/international/8380142.htm> (noting that worldwide music sales dropped approximately seven percent—to \$32 billion—in 2003, resulting in job and talent cutbacks at major record labels, and predicting the now-successful merger of Sony Music and Bertelsmann's BMG).

59. *Sony*, 464 U.S. at 427. P2P software can filter uncopyrighted content in the same way that it filters objectionable material such as pornography. Likewise, KaZaA allows users to filter content by

which the owners did not object.⁶⁰ Viewed in totality, the device's substantial non-infringing uses, coupled with the rights holders' lack of demonstrable financial harm, put VTR technology, in the eyes of the District Court, squarely in the realm of fair use.⁶¹

¶ 13 The Court of Appeals reversed, finding that "time-shifting" was not a fair use because it was not a "productive use."⁶² It also rejected the District Court's determination as to Sony's lack of constructive knowledge of infringing uses.⁶³ It instead held that the manufacturer's lack of scienter, *i.e.* good faith, should go to the issue of damages.⁶⁴ The Court of Appeals further posited that the District Court should consider a judicially imposed compulsory licensing scheme analogous to the photocopying market.⁶⁵

¶ 14 In reversing the Court of Appeals, the Supreme Court reiterated the rationale employed by the District Court. It stated that the public interest in emerging technologies was paramount, and that any private interest or benefit granted by Congress as a monopoly should necessarily bow to such a greater public purpose.⁶⁶ This is not to say that in all instances the monopoly enjoyed by the copyright owner should bow to the public interest—rather, such deference should occur only when it is logically and economically efficient.⁶⁷ At some time prior to the point when authors cease to create due to lack of any economically significant return on their creations, the public interest must bow to the monopoly—the author's right to lock up his creation. Otherwise, authors will have little incentive to create, aside from charging increasingly high costs for original works in order to offset unauthorized copying.⁶⁸ A precise factual delineation of

category—such as by music, movies, documents, etc. The problem is that the aforementioned filters are already in place, and new filters for copyrighted material would require end users to install newer versions of the relevant software—something most end users would be reluctant to do, or may completely refuse to do. And, as with most software, older non-filtered versions remain available. In short, there is no way to compel end users to download and use new versions that include copyright filters.

60. *Id.*

61. *Id.* at 425-27, 454.

62. *Id.* at 427.

63. *Id.* at 428.

64. *Id.*

65. *Id.*

66. At least to the extent that it furthered such a purpose. *Id.* at 429-32; *see also* Robyn Axberg, *File Sharing Tools and Copyright Law: A Study of In re Aimster Copyright Litigation and MGM Studios Inc. v. Grokster, Ltd.*, 35 LOY. U. CHI. L.J. 389, 438 (2003) (proposing that the *Grokster* district court decision "correctly recognized that industrial advancement and substantial consumer benefit balance favorably against some infringing activity, allowing some infringement to continue for the overall good of the general public").

67. *See* Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1337-38 (1987) (pointing out that, in the context of protecting computer programs, the correlation between the need for intellectual property protection and the goal of promoting the public good involves three factors: increasing the duration or strength of the limited monopoly, which increases the potential reward to authors; a resultant increase in creative output; and, lastly, an increase in ancillary technological output—all resulting in an overall increase in goods and reduction in cost, and necessitating legal protection for authors' return on their intellectual investments).

68. *See* Ramon E. Reyes, Jr., *Can the Common Law Adequately Justify a Home Taping Royalty Using Economic Efficiency Alone?*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 235, 239-40 (1996) (suggesting that while home taping royalties are appropriate, they are inefficient because they "unfairly restrict the rights of noninfringing consumers of blank audio tape and recording devices," and require justification

the point at which the right of the author in his monopoly theoretically gives way to the public interest is not necessary here.⁶⁹ What is important is that in the case of the Betamax machine, the Court opined that the public interest in the ability to engage in some⁷⁰ non-infringing uses outweighed the harm to the author. The authors in the Betamax case did, after all, enjoy essentially the same economic benefit they had enjoyed prior to the introduction of the Betamax—revenue from broadcast television.

¶ 15 The Court's balancing of the public interest in new creative works and technologies against the harm to copyright holders was rooted in patent law—the cousin of copyright.⁷¹ Indeed, the Court noted that, as in copyright, “[w]hen 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.”⁷² Noting that there are substantial differences between patent and copyright, the Court adopted the idea from patent law 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.”⁷³ The Court added that the pertinent question was whether the device was capable of *commercially significant* non-infringing uses.⁷⁴ The Court observed:

outside of common law economic efficiency grounds—such as the “moral” rights justification granted in civil law countries).

69. It has been said by at least one author, Ian MacKaye of the D.C.-based independent band Fugazi (and Dischord label founder), that “when people who are songwriters say, ‘That’s my property and if you give it away for free then I lose my incentive,’ then, well, good riddance.” Downhill Battle, *Ian MacKaye Interview*, at http://www.downhillbattle.org/interviews/ian_mackaye.php (Jan. 20, 2004).

70. *Sony*, 464 U.S. at 442, 456. Even the Court acknowledged that certainly not all, or even a majority, of the uses were non-infringing. Linguistically, the test actually employed and established as precedent was that a technology need only be capable of one use that in itself is substantially non-infringing. To recapitulate, the standard as properly understood should read something like this: “The sale of an article of commerce does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of a substantially noninfringing use.” This significantly changes the burden on the defending technology from establishing an actual non-infringing use to establishing a use that is substantially non-infringing—that use does not itself need to be non-infringing, only substantially so. By way of example, let’s assume that the VTR is capable of X number of uses. What is relevant is that only *one* of those X number of uses needs to be even substantially non-infringing; it does not even need to be *per se* non-infringing. Obviously, in 1984, this was a tenable standard (time-shifting). The problem today is that technology can easily be created with this standard in mind. Software programs, for example, can easily be written to include one non-infringing use—it could even be an afterthought, or a pretext—effectively negating any substantive value of the test, especially where no balancing of interests is incorporated into the standard.

71. *Id.* at 440-42. As cited by the Court, the language in the Patent Act that speaks to substantial non-infringing use, 17 U.S.C. § 271(c), states:

Whoever sells a component of a patented machine, . . . 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.

72. *Sony*, 464 U.S. at 440.

73. *Id.* at 442.

74. *Id.* (emphasis added).

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. . . . The question is thus whether the Betamax is capable of commercially significant noninfringing uses. . . . [W]e 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.*⁷⁵

¶ 16 Hence, this decision established the standard by which contributory copyright infringement claims against manufacturers whose products facilitate infringing behavior are to be judged. All that is required is that a device be capable of *one* non-infringing use. Given the facts of *Sony*⁷⁶ and the nature of the technology in question (namely, the degradation in quality from the original program to the recorded version and all subsequent copies made thereafter), both the test elucidated and its likely outcomes seemed reasonable. After all, the copies were of poor quality, and the Court presumably wanted to avoid impeding commerce in its reliance on patent law.⁷⁷

¶ 17 This standard would prove troublesome, however, in years to come, as a result of the proliferation of home computing, broadband Internet, and digital recording technology. File sharing technology has compounded the problem for copyright owners by effectively creating a two-layer *Sony* test; satisfaction at either stage will wholly absolve potential contributory infringers from liability.⁷⁸ P2P, like the VTR, facilitates copying, but it also introduces the additional threat of unauthorized distribution. Despite this threat, the technology which facilitates this two-sided attack is "protected" by the

75. *Id.* (emphasis added)

76. Of particular importance for the Court was the fact that the combined market share of each of the respondents in the total spectrum of television programming was less than ten percent. *Id.* at 443.

77. The staple article of commerce doctrine of patent law on which the Court relied governs "staple articles of commerce." The VTR was certainly novel, but could not seriously be considered indispensable, or a staple; perhaps the standard should be re-written as the "beneficial article of commerce doctrine" for copyright law.

78. This is because: (a) file sharing applications facilitate a "recording" of all sorts of copyrighted works—by copying the file in the host user's computer, creating an identical copy in the end user's computer, and leaving the same, identical copy on the host computer; and (b) file sharing applications allow the virtually identical, unauthorized copied files to be *distributed* freely to almost anyone in the world. This is unlike anything facing the plaintiffs when VTR technology emerged. Those plaintiffs were faced solely with the problem of unauthorized copying. Presently, content owners must not only fight against unauthorized *recording*, but also against simultaneous, unauthorized *distribution*. As mentioned above, if either is deemed non-infringing, then the technology as a whole will not create manufacturer liability.

same test as the one adopted in *Sony*—a factually specific case involving altogether different technology, and an altogether different threat.

B. Fair Use

¶ 18 In 1994, the Court decided *Campbell v. Acuff-Rose*,⁷⁹ solidifying the “right”⁸⁰ of fair use for otherwise unauthorized uses of a copyrighted work. In *Campbell*, the reluctance of Acuff-Rose (copyright assignee) to allow use of Roy Orbison and William Dees’ famous song “Oh, Pretty Woman” prompted a suit which solidified the right of musicians to use the work of others for comment, criticism, or parody.⁸¹ Luther Campbell, front-man for the once-popular musical group “2 Live Crew,” wrote a parody of Orbison’s “Oh, Pretty Woman” which “intended, ‘through comical lyrics, to satirize the original work.’”⁸² Campbell offered to give full credit to the authors and their assignees, and to pay royalties.⁸³ Acuff-Rose refused to grant permission, but 2 Live Crew nevertheless released an album in 1989 that contained the song.⁸⁴ When Acuff-Rose brought suit for copyright infringement, the District Court granted summary judgment for 2 Live Crew.⁸⁵ The court noted that 2 Live Crew’s version was a “play on words,” that it took no more lyrics than necessary for the purposes of parody, and, most notably, that it was “extremely unlikely that 2 Live Crew’s song could adversely affect the market for the original.”⁸⁶

¶ 19 The Court of Appeals for the Sixth Circuit reversed, but the Supreme Court sided with the District Court in holding the use to be a fair one protected by section 107 of the U.S. Copyright Code.⁸⁷ The Court found the Sixth Circuit’s reading of the statute

79. *Luther R. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

80. Much debate exists as to whether fair use is a right or simply a defense to a charge of copyright infringement. It is the opinion of the author that fair use is a right, based on an examination of the text of 17 U.S.C. § 107, which states in pertinent part that, “[n]otwithstanding the [exclusive rights granted to authors which are subject to sections 107 through 120], the fair use of a copyrighted work . . . is not an infringement of copyright.” 17 U.S.C. § 107 (2005). Regardless of whether fair use is a right or simply a defense to infringement, the factors delineated in the statute must be examined in their totality by a judge in order to determine whether fair use applies in a given case, effectively relegating the doctrine to that of an affirmative defense. See EFF.org, *EFF Fair Use Frequently Asked Questions, #5: Is Fair Use a Right or Merely a Defense?*, at http://www.eff.org/IP/eff_fair_use_faq.php (last modified Mar. 21, 2002) (noting that although traditionally used as a defense to a charge of copyright infringement, fair use may be viewed as an intended limitation on the exclusive rights granted to authors under the Copyright Act—for the benefit of the public). For information on fair use generally, see Copyright & Fair Use, *Stanford University Libraries, Stanford Copyright & Fair Use Center*, at <http://fairuse.stanford.edu> (last visited June 19, 2005).

81. *Campbell*, 510 U.S. 569.

82. *Id.* at 572.

83. *Id.*

84. *Id.* at 573.

85. *Id.*

86. *Id.* (quoting 754 F. Supp. 1150, 1154-55, 1157-58 (M.D. Tenn. 1991)).

87. *Id.* at 573, 576-77, 594. 17 U.S.C. § 107, “Limitations on exclusive rights: Fair use,” states: Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

overly- restrained. It posited that the presumption of infringement where a commercial use was made of the parodying work did not sufficiently account for the transformative nature of the work.⁸⁸ Indeed, the Court noted that:

[A]s Justice Story explained, “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”⁸⁹

¶ 20 Paramount in the Court’s decision was the reluctance to curtail the purpose behind copyright protection: “to promote the progress of science and the useful arts.”⁹⁰ The Court found that the commercial nature of the work was “only one element of the . . . [i]nquiry into its purpose and character,” and that, accordingly, it was not dispositive of infringement, but was to be viewed in light of the work’s parodic nature.⁹¹ In addition, the Court maintained that, although the District Court held that no more was taken than was necessary, the case should be remanded in light of the effect on the potential market for the original work (*i.e.* no evidence had been presented regarding whether a potential rap market for the original was harmed in any way).⁹² *Campbell* established that although fair use is not a license to copy the works of others—“[t]his is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free”—the Court would not permit exclusive rights granted to authors to stifle the creation of new, original works.⁹³

C. Commercial and Personal “Space-Shifting” As Fair Use

1. Personal Space-Shifting

¶ 21 Five years later, in *RIAA v. Diamond*,⁹⁴ space-shifting⁹⁵ for personal, home use was held to be fair use, much like time-shifting in *Sony*. The technology at issue in *Diamond*,

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- (1) the purpose and character of the use, including whether such use is of a cog the mmercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2005).

88. *Campbell*, 510 U.S. at 579-85.

89. *Id.* at 575. (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845)).

90. *Id.* at 575. (citing U.S. CONST., art. I, § 8, cl. 8).

91. *Id.* at 579-85.

92. *Id.* at 592-94.

93. *Id.* at 589; *See also id.* at 593-94.

94. *Recording Indus. Ass’n. of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999).

95. *See* Webopedia, *Online Computer Dictionary for Computer and Internet Terms and Definitions*, at http://www.webopedia.com/TERM/S/space_shifting.html (last modified Oct. 20, 2003) (defining space shifting as the copying of a digital file for use on a machine other than that originally intended—such as shifting from a compact disc to an MP3 player).

the Rio MP3⁹⁶ player, allowed for files which had been ripped⁹⁷ to the hard drive of a user's computer to be transferred to the Rio player—essentially a walkman capable of playing only MP3 files.⁹⁸ The RIAA brought suit against Diamond to enjoin manufacture of the Rio, alleging that the device did not meet the requirements under the Audio Home Recording Act (AHRA) that such devices employ a digital watermarking system.⁹⁹

¶ 22 The court found that the Rio did not meet the statutory definition of a “digital audio recording device,” and as such was not subject to the requirements of the AHRA.¹⁰⁰ This finding was based in part on the interpretation that songs on a computer hard drive were not digital musical recordings, but based more on the notion that under the AHRA, a home computer is not a digital audio recording device.¹⁰¹ Indeed, under the AHRA, the Rio is precisely the type of device for which the exemption is granted. The Court noted that the purpose of the Act “is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their *private, noncommercial use*.”¹⁰² The Rio, much like the VTR, simply allowed users to space-shift files already contained on their personal hard drives.¹⁰³ This personal, non-commercial use, even more so than the VTR-enabled time-shifting involved in *Sony*, is at the heart of fair use.

2. Commercial Space-Shifting

¶ 23 More directly concerning the decision in *Sony*, the court in *UMG Recordings v. MP3.com*¹⁰⁴ concluded that space-shifting for non-personal, unauthorized commercial gain, unlike time-shifting, was not a fair use.¹⁰⁵ In so holding, the court reasoned that the transfer of the music from a compact disc to MP3 format was not transformative.¹⁰⁶ The court posited that the actions of the defendants were in and of themselves evidence of a

96. “MP3,” which is short for Moving Picture Experts Group (“MPEG”) audio layer 3, refers to a file type that uses “perceptual audio coding and psychoacoustic compression” to eliminate parts of sounds imperceptible to the human ear and thereby shrink the file size required to capture a sound recording by a factor of twelve. Webopedia, *supra* note 95, at <http://www.webopedia.com/TERM/M/MP3.html> (last modified May 17, 2004).

97. “Ripping” allows a user to copy, *i.e.* rip, audio files from a compact disc onto a hard drive in MP3 format—which in turn allows for easier P2P file transfer. *Napster*, 239 F.3d at 1011.

98. *Diamond*, 180 F.3d at 1074-75.

99. *Id.* at 1075. The Audio Home Recording Act of 1992, 17 U.S.C. § 1001 et seq., provides that “[n]o person shall import, manufacture, or distribute any *digital audio recording device* . . . that does not conform to the Serial Copyright Management System [‘SCMS’] [or] a system that has the same functional characteristics” of sending, receiving, and acting upon copyright information for the file being played. *Id.* (alteration in original) (quoting 17 U.S.C. § 1002(a)).

100. *Id.* at 1076, 1081.

101. *Id.* at 1077-78. Where a machine is capable of making digital audio copies, if the “primary purpose” is other than to create digital audio copies, the machine is not a “digital audio recording device” under the AHRA. *Id.* at 1078 (citing S. REP. NO. 102-294, at 121 (1992), *reprinted at* 1992 WL 133198.) *See* 17 U.S.C. § 1001(3).

102. *Diamond*, 180 F.3d at 1079 (alteration in original) (quoting S. REP. NO. 102-294, at 86 (1992)).

103. *Id.* at 1079.

104. *UMG Recordings v. MP3.com*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

105. The space-shifting at issue consisted of uploading pre-purchased content onto a central server whereby users could access the content from anywhere. *Id.* at 350.

106. *Id.* at 351.

wholesale invasion of the plaintiffs' right to license works in which they owned copyrights.¹⁰⁷ In *MP3.com*, the defendant had purchased "tens of thousands of popular CDs in which plaintiffs held the copyrights, and . . . copied their recordings onto its computers' servers" so that subscribers could access the songs from anywhere in the world.¹⁰⁸ Subscribers of the defendant, however, were required to prove that they owned a copy of a given CD.¹⁰⁹ *MP3.com* saw this practice as simply storing CDs that subscribers had previously purchased; the court, however, saw it as unauthorized reproduction of protected works.¹¹⁰ Concerning fair use, the court found that the act of space-shifting (a) was not transformative, (b) copied wholesale the offended work, and (c) usurped the potential market as to the plaintiffs.¹¹¹ The court gave little credence to *MP3.com*'s argument that space-shifting actually enhanced the market because the plaintiffs remained free to license such activities.¹¹² In short, space-shifting in this instance was not fair use.

¶ 24 *MP3.com* argued that space-shifting was protected by several affirmative defenses. Fair use was thoroughly rejected, as was *MP3.com*'s contention that UMG was engaged in copyright misuse.¹¹³ The court responded:

While defendant contends, under the rubric of copyright misuse, that plaintiffs are misusing their 'dominant market position to selectively prosecute only certain online music technology companies,' the admissible evidence of record [] shows only that plaintiffs have reasonably exercised their right to determine which infringers to pursue, and in which order to pursue them.¹¹⁴

¶ 25 It should be noted, though, that despite the court's musings as to the unfounded nature of *MP3.com*'s affirmative defenses, the aggravation asserted by *MP3.com* against the recording industry exists not only with respect to others wishing to enter the market of MP3 distribution, but also is a common thread among file-swappers, some of whom are making fair uses of content they own.

D. Cyber-Anarchy

¶ 26 Acquisition, Active Ports, Aimster, Aqualime, Ares Galaxy, Audiogalaxy, audioGnome, BadBlue, BCDC++, BearShare, BitTorrent, Blubster, The Bridge, Carracho, The Circle, Dice, Diet Kaza, Direct Connect, DC++, eDonkey, eMule, ExoSee, Filetopia, FolderShare, Freenet, GLT Poliane, Gnucleus, Gnutella, Grokster, Gtk-Gnutella, iMesh, iMesh Light, IRC, iTunes, KaZaA, Kazaa k++, Kazaa Lite, Lan2P, LimeWire, MacFreenet, Madster, Mammoth, MediaSeek, MLDonkey, Morpheus, Mute, Napigator, Napster, Nova, Overnet, Parrot, Peerahna, PeerGuardian, Phex, Piolet,

107. *Id.* at 352.

108. *Id.* at 350.

109. *Id.*

110. *Id.*

111. *Id.* at 351-52.

112. *Id.* at 352.

113. *Id.* at 352-53.

114. *Id.* at 353 (internal citation omitted).

Poisoned, RockItNet, Shareaza, ShareMonkey, SoulSeek, Warez, Waste, WinMX, xMule, XoloX, Zultrax.¹¹⁵ While ultimately under-inclusive, this list represents a sampling of peer-to-peer sites. This is not to mention instant messaging¹¹⁶ and an early precursor to peer-to-peer, HyperTerminal.¹¹⁷

¶ 27 File sharing is not going away anytime soon. Indeed, in his recently released book, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY*,¹¹⁸ Lawrence Lessig posits:

The appeal of file sharing music was the crack cocaine of the Internet's growth. It drove demand for access to the Internet more powerfully than any other single application. It was the Internet's killer application ("app")—possibly in two senses of that word. It no doubt was the application that drove demand for bandwidth. It may well be the application that drives demand for regulations that in the end kill innovation on the network.¹¹⁹

¶ 28 Whether Lessig is right about P2P-driven regulation killing the network, one thing is clear: file sharing, unlike any other application to precede it, fostered growth and debate heretofore unseen on the Internet. For that we can thank Shawn Fanning, the creator of Napster.¹²⁰ In fact, on download.com, a popular site for shareware¹²¹ and freeware¹²² apps, KaZaA was the most downloaded application ever as of April 5, 2004, citing over 340,714,817 downloads as of that date.¹²³ Although many of these P2P apps¹²⁴ existed before the RIAA's efforts to quash unauthorized file sharing of

115. See Zeropaid.com, *Top Rated Programs*, at <http://www.zeropaid.com/php/filessharing.php> (last visited Apr. 4, 2004).

116. Instant messaging is probably the most popular form of ICQ, a sort of acronym for "I seek you."

117. HyperTerminal is a communications program which allows a user to dial a remote computer—another user—via a modem and transfer files directly. I am a wiz.com, *Internet Glossary*, at <http://www.iamawiz.com/web/glossary.htm#8> (last visited Apr. 6, 2004).

118. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004), available at <http://free-culture.org/freecontent/> (last visited June 19, 2005).

119. *Id.* at 296.

120. Darren Waters, *Napster's Legacy Lives On*, BBC News, available at <http://news.bbc.co.uk/2/hi/entertainment/3178004.stm> (last modified Oct. 9, 2003) ("Napster Timeline: January 1999 - Shawn Fanning drops out of university to write Napster.").

121. Shareware is a *method* of software distribution, not a *type* of software, which allows users to try software for a limited period—usually a short number of days, or for a limited number of uses of a product—before they must decide whether they wish to purchase the software permanently. Intermark.org Ireland, *Internet Marketing Glossary*, at <http://www.intermark.org/im-glossary.html#S> (last visited Feb. 9, 2005).

122. Freeware is software which is free of charge to the end user. Often freeware, like shareware, is a technologically limited version of a "for-purchase" software suite—*e.g.* some popular disc ripping and burning software may be distributed as freeware limited to a 4x read/write speed whereas the full version may allow users unlimited read/write speeds. *Id.*

123. c|net: download.com, *Reviews and free downloads at Download.com*, at http://www.download.com/3101-2001_4-0-1.html?tag=dir (last visited Apr. 5, 2004).

124. P2P always facilitated sharing between users; however, it was not known as P2P until the proliferation of Napster. In the early days of the Internet, Internet Relay Chat (IRC) was used primarily for chat, but could also be used to find software of all varieties.

copyrighted songs, one factor triggered the explosion of which Lessig speaks: Fanning's Napster.

E. Napster

¶ 29 The now-infamous case *A&M Records v. Napster*,¹²⁵ in which members of the recording industry sought to enjoin Napster from unauthorized distribution of protected works, stands as a scapegoat for content owners such as the RIAA, and as a learning tool for P2P distributors.¹²⁶ The defendant, Napster, facilitated copying of protected works via access to a centralized hub (purposefully absent in *Grokster*), which stored a directory of works stored on users' computers.¹²⁷ The record reflected that as much as eighty-seven percent of the works found on Napster were copyrighted, and more than seventy percent were owned by the plaintiffs.¹²⁸ The court held the defendants liable for both contributory and vicarious copyright infringement and issued an injunction, which effectively shut down Napster.¹²⁹

¶ 30 Napster argued several defenses unsuccessfully, most notably fair use. Napster contended that it could not be liable for contributory or vicarious infringement because its end users were not engaged in direct copyright infringement—they were protected by the affirmative defense of fair use.¹³⁰ Napster's argument that the downloading of plaintiffs' works was fair use and not infringing was grounded in two concepts: space-shifting and sampling.¹³¹ However, the predominant facets of the fair use inquiry detailed by the court—the purpose and character of the use, and the effect of the use on the market—weighed heavily against Napster.

¶ 31 The court gave little import to Napster's argument that it did not benefit financially. Rather, the court noted there need not be direct economic benefit to amount to a weighing against a defendant, especially when "commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies."¹³² Furthermore, whether some users eventually purchased music owned by plaintiffs was inapposite—even if sales were not reduced, the effect of the file sharing facilitated by Napster served as a barrier to plaintiffs' entry into P2P licensing.¹³³

¶ 32 Additionally, Napster's space-shifting arguments were given scant approval.

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

126. The lesson is this: the nature of code is such that in cases where a defendant's device is used to infringe on a plaintiff's rights to a protected work, the defendant can simply re-adjust the parameters of the program at issue in order to continually avoid liability as a contributory or vicarious infringer.

127. *Id.* at 1011, 1012.

128. *Id.* at 1014.

129. *See id.* at 1004.

130. Vicarious infringement, the court notes, is found where the defendant has the ability to supervise and control the infringing acts and enjoys a tangible financial benefit from the infringement. *Id.* at 1014, 1022.

131. *Id.* at 1018, 1019.

132. *Id.* at 1015.

133. *Id.* at 1016, 1018.

Napster attempted to analogize its users' copying to that of consumers in *Sony* and *Diamond*.¹³⁴ The court was quick to point out, though, that "[b]oth *Diamond* and *Sony* are inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user."¹³⁵ The court also noted that Napster could not escape contributory infringement because the district court record reflected both knowledge and contribution, partially as a result of the centralized nature of the server. Indeed, the court stated, "if a computer system [P2P] 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."¹³⁶ This is only possible where the distributor houses or monitors activity on the (centralized) network. Such knowledge of infringing files available through Napster's servers signified the fall of the once mighty Napster; it had enjoyed a life of nearly two years, but its reign was over. Napster has since re-emerged as a pay-for-download site to compete in the digital distribution market, but its commercial success remains to be seen.

F. Recent Developments

¶ 33 Breaking somewhat from the decision in *Napster*, Judge Posner of the Seventh Circuit in *In re Aimster Copyright Litigation* found the defendant, Aimster, guilty of contributory and vicarious copyright infringement.¹³⁷ This finding was based in large part on Aimster's claims and tutorials that demonstrated how to copy Top 40 songs, which the defendant knew were copyrighted.¹³⁸ Additionally, the defendant offered no rebuttal evidence of substantial non-infringing uses to which the technology at issue could be put.¹³⁹

¶ 34 Utilizing the same test as employed in *Aimster* (*Sony's* substantial non-infringing uses), but arriving at the opposite result, the Ninth Circuit in *MGM v. Grokster*¹⁴⁰ found the defendant, Grokster, not liable for contributory or vicarious copyright infringement.¹⁴¹ The court noted that the defendant's network was not a central storage system as in *Napster*.¹⁴² Nor did the defendants have knowledge of infringing activities until after they were completed by end users.¹⁴³ Following the rationale employed in *Sony*, the court in *Grokster* maintained that simply asserting that the technology *could have been* made differently to protect the rights of copyright holders by monitoring files transferred over the networks and blocking or filtering infringing content was not a

134. *Id.* at 1019.

135. *Id.*

136. *Id.* at 1021 (emphasis added). Specifically, the district court found that Napster had "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." *Id.*

137. *In re Aimster*, 334 F.3d 643.

138. *Id.* at 646.

139. *Id.* at 653.

140. *Grokster*, 380 F. 3d 1154.

141. *Id.* at 1157

142. *Id.* at 1163.

143. *Id.*

plausible ground of attack for contributory or vicarious copyright infringement.¹⁴⁴ In so holding, the court raised serious questions as to whether the RIAA's efforts, which began in *Napster* and had essentially been upheld to that point, would be frustrated. Moreover, the decision in *Grokster* raised the issue of whether filtering devices could be imposed on P2P services.

III. ANALYSIS

A. Substantial Non-Infringing Uses

¶ 35 As previously discussed, borrowing from patent law, the U.S. Supreme Court in *Sony* held that in order to defeat a claim for contributory copyright infringement, a particular technology or device need only be capable of one commercially significant substantial non-infringing use.¹⁴⁵ In light of this Supreme Court precedent and recent litigation concerning P2P networks, the question then arises: Is the "substantial non-infringing use(s)" defense still a viable standard given P2P? More specifically, can substantial non-infringing uses adequately protect copyright owners without unnecessarily inhibiting commerce?

¶ 36 The Seventh Circuit's illuminating reading of *Sony* in *In re Aimster* provides the framework for the proper standard in cases involving a defense of substantial non-infringing uses. Once a plaintiff has shown that copyrighted works have been infringed upon through use of a particular technology, the burden then shifts to the defendant charged with contributory or vicarious copyright infringement to show that the technology has commercially significant substantial non-infringing uses.¹⁴⁶ Additionally, to escape liability, defendants must allege and show that it would be *unreasonably burdensome* for them to reduce or remove the technology's ability to infringe on the plaintiff's works.¹⁴⁷

¶ 37 Factors to be taken into account, though not dispositive, should include: (a) fair or non-infringing uses to which the defendant's technology may be put, (b) willful subversion of discovery, (c) evidence of lost revenue by the plaintiff after the introduction of the defendant's device, (d) defendant's revenue gained from infringement on plaintiff's content, (e) defendant's intent, if any, to capitalize on the plaintiff's property rights, (f) plaintiff's willingness to enter the market the defendant presently usurps, (g) whether in the absence of sanctions, the plaintiff's economic incentive to create new works is decreased, (h) the proportionate burden on the defendant's technology, including the tendency of such sanctions to hinder new modes of commerce comparable to the defending technology,¹⁴⁸ and (i) *potential* non-infringing uses of a technology.¹⁴⁹

144. *Id.* at 1166-67 (emphasis added).

145. *Sony*, 464 U.S. at 442.

146. *See infra* pt. III.D (discussing *In re Aimster*, 334 F.3d 643).

147. *See id.* *See also supra* pt. II.A. (discussing *Sony*, 464 U.S. 417).

148. *See supra* pt. II.A. (discussing *Sony*, 464 U.S. 417).

149. There is no way to specifically categorize which of a technology's potential non-infringing uses may eventually harm either the plaintiff or the defendant. Given this indeterminacy, under the directive of

B. Spectrum of Liability for Contributory and Vicarious Copyright Infringement

¶ 38 Despite the language used in *Sony*, “substantial,” in the true sense of the word, was not the standard applied by the Court in that case,¹⁵⁰ and has not been the standard applied by subsequent courts relying on *Sony*.¹⁵¹ To be more precise, the standard employed by the Court in *Sony* and by subsequent courts citing the decision has been *any* non-infringing use.¹⁵² This establishes an intolerably high burden of proof when a copyright owner seeks to hold a manufacturer liable for contributory copyright infringement. All that is required is that a manufacturer be able to point to one commercially significant non-infringing use for which the technology may be used. Given the *Grokster* and *Sony* type of case, it seems then that no matter how many objectionable or infringing uses there are, such uses are simply irrelevant as long as one non-infringing use is demonstrated. This has resulted in misuse of the doctrine as espoused by the Court in *Sony*, and this interpretation was not the intended result of *Sony*. *Sony* was a case of a highly factual nature. At least one court, the Seventh Circuit, has been cognizant of this point, and consequently has shifted the burden to the defendant to show a commercially significant non-infringing use—at least where the plaintiff declares that the technology is used to infringe its property which is protected by copyright.¹⁵³ This shift compels a factually based weighing of interests, like the one performed by the Court in *Sony*.

C. Grokster

¶ 39 A recent example of the abuse of the substantial non-infringing uses test can be found in *MGM v. Grokster*. In that case, the defendant, Grokster, was indemnified from contributory and vicarious copyright infringement because in the eyes of the Ninth Circuit the P2P file sharing software was deemed capable of substantial non-infringing uses,¹⁵⁴ and Grokster did not exercise sufficient control¹⁵⁵ over the infringing acts of individual users, even though it received a tangible financial benefit from such use.¹⁵⁶

Sony, potential non-infringing uses, i.e. those uses which are in development or thought by the industry to be in development, should be viewed in a light most apt to promote commerce. To hold otherwise would be contrary to not only the idea set forth in *Sony*, but also to the underlying goal of copyright protection. If, for instance, the VTR had been enjoined from manufacture, the VCR and DVD may not have come into existence—a result that would be undesirable from the both the defendant’s and the rights holder’s perspective. Colorable potential non-infringing uses (in some stage of development) should be taken into consideration using the same weighing of interests test employed for those that are currently on the market. Those uses that are simply pretextual speculation should not be given consideration.

150. See *Sony*, 464 U.S. at 442 (stating that the defendant “need merely be capable of *substantial* non-infringing uses” (emphasis added)).

151. See discussion of *Grokster*, *infra* Part III.C.

152. See, e.g., *Grokster*, 380 F.3d 1154; *Aimster*, 334 F.3d 643.

153. See *Aimster*, 334 F.3d at 653.

154. *Grokster*, 380 F.3d at 1161-62.

155. *Id.* at 1165-66. This was disputed by the parties. While Grokster contended that there was no way for them to exercise control once users had downloaded the software, the plaintiffs argued that the defendants had implemented filters for pornographic material, as well as for file type (such as music only, movies only, etc.).

156. *Grokster*, 259 F. Supp. 2d at 1044.

¶40 *Grokster* arose out of several actions consolidated for discovery and pretrial purposes, whereby plaintiffs, a class of sound recording owners, brought suit against three providers of file sharing software.¹⁵⁷ Each defendant, at the time of filing, distributed essentially the same "FastTrack" P2P networking software, free of charge.¹⁵⁸ Although the defendants had in some cases modified the networks which they distributed to consumers,¹⁵⁹ the platforms operated in essentially the same manner, at least for purposes of this discussion.¹⁶⁰ The defendants' networks, like other P2P applications, allowed users to search for desired files (in this case copyrighted sound recordings) housed on other user's computers, independent of the P2P networks themselves.¹⁶¹

¶41 For purposes of litigation, both parties agreed that there were no disputed issues of fact.¹⁶² Furthermore, the parties stipulated that at least some of the end users of defendants' networks had engaged in direct copyright infringement, a requisite for a finding of contributory or vicarious liability.¹⁶³ As a result, the only issue presented to "the [district] [c]ourt (as to liability) [was] a legal one: whether Defendants' materially undisputed conduct gives rise to copyright liability."¹⁶⁴

¶42 Dealing first with the claim of contributory infringement, the district court noted that in order to be held liable, a contributory infringer must have knowledge of direct infringement.¹⁶⁵ Indeed, a defendant must have "actual knowledge of *specific acts* of infringement."¹⁶⁶ The district court added that, "[h]ere it is undisputed that there are substantial non-infringing uses for Defendants' software—*e.g.*, distributing movie trailers, free songs, or other non-copyrighted works."¹⁶⁷ This statement is not wholly correct, however. While there were non-infringing uses, they may not be economically substantial, as was pointed out in oral arguments.¹⁶⁸ Additionally, movie trailers are not

157. Defendants named in the suit included Grokster Ltd. (Grokster), StreamCast Networks, Inc. (StreamCast), and Kazaa BV (KaZaA). *Id.* at 1031.

158. *Id.* at 1032. The District Court cogently pointed out, however, that:

While those who use Defendants' software do not pay for the product, Defendants derive substantial revenue from advertising. For example, StreamCast had \$1.8 million in revenue in 2001 from advertising. And as of July of 2002, StreamCast had \$2 million in revenue and projects \$5.7 million by the end of the year. Grokster also derives substantial revenue from advertising[;] because a substantial number of users download the software to acquire copyrighted material, a significant proportion of Defendants' advertising revenue depends upon the infringement.

Id. at 1044 (internal citations omitted).

159. See, e.g., StreamCast Networks, Inc., *Welcome to Streamcast Networks*, at <http://www.streamcastnetworks.com> (last visited Apr. 4, 2004).

160. The district court noted that StreamCast now uses the open source Gnutella technology. *Grokster*, 259 F. Supp. 2d at 1032.

161. *Grokster*, 380 F.3d at 1163.

162. *Grokster*, 259 F. Supp. 2d at 1031.

163. 380 F.3d at 1162; 259 F. Supp. 2d at 1034.

164. *Grokster*, 259 F. Supp. 2d at 1031.

165. *Id.* at 1035.

166. *Id.* (citing *Napster*, 239 F.3d 1004) (emphasis added).

167. *Id.*

168. Oral Arg. Tr., *MGM Studios, Inc. v. Grokster, LTD.*, 380 F.3d 1154 (Feb. 3, 2004), available at <http://www.groklaw.net/article.php?story=20040823002045984>. (hereinafter *Grokster* Oral Arg. Tr.) (last visited June 19, 2005).

non-copyrighted works.¹⁶⁹

¶43 The defendants did not dispute that their networks are or may be used to infringe plaintiffs' works. The relevant inquiry, however, was whether the defendants possessed this knowledge at the crucial time, *i.e.*, when the infringement occurred. Indeed, the Ninth Circuit noted that "if the product at issue *is* capable of substantial or commercially significant noninfringing uses, then the copyright owner must demonstrate that the defendant had reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement."¹⁷⁰ In the words of the district court, "[t]he question . . . is whether actual knowledge of specific infringement accrues at a time when either Defendant materially contributes to the alleged infringement, and can therefore do something about it."¹⁷¹ As the district court found, the defendants did not actually facilitate file sharing via Grokster's or StreamCast's networks, but rather any acts of infringement were initiated solely by users.¹⁷² That court noted that, "[t]o be liable for contributory infringement, 'participation in the infringement must be substantial. The authorization of assistance must bear a direct relationship to the infringing acts, and the contributory infringer must have acted in concert with the direct infringer.'"¹⁷³ Employing this standard, it is a rare case when a P2P network would ever be held liable for contributory infringement.

¶44 The Ninth Circuit was, in a sense, giving P2P networks advice on how to insulate themselves from liability for contributory copyright infringement. The holding amounts

169. *Id.*

170. *Grokster*, 380 F.3d at 1161.

171. 259 F. Supp. 2d at 1038.

172. *Id.* at 1040-41 (internal citations omitted). The court noted that under Grokster's FastTrack network, locating and connecting to supernodes—user indexes—occurred independently of any involvement by Defendant Grokster:

Once a user is connected to the network, his/her search queries and results are relayed among supernodes, maximizing the breadth of the search pool and minimizing redundancy in search traffic. *This also reflects a critical distinction from Napster.* Napster utilized, in effect, a single "supernode" owned and operated by Napster. The company's central servers indexed files from, and passed search queries and results among, all Napster users. All Napster search traffic went through, and relied upon, Napster. When users search for and initiate transfers of files using the Grokster client, they do so without any information being transmitted to or through any computers owned or controlled by Grokster.

Id. at 1040 (emphasis added; internal citations omitted).

173. *Id.* at 1042 (quoting *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 255, 230 (S.D.N.Y. 2000)). The district court noted that file filtering *is* possible, yet can only occur post hoc, at a time too late to impose vicarious liability. *Id.* at 1045. The court further commented that:

Whether these safeguards [such as file filtering] are practicable is immaterial to this analysis, as the obligation to "police" arises only where a defendant has the "right and ability" to supervise the infringing conduct. Plaintiffs' argument—that Defendants could do more to limit the functionality of their software with respect to copyrighted works—forgets the critical distinction, broached above, between the Napster "system" and the software distributed by Defendants. The infringement in *Napster* took place across an "integrated service" designed and operated by Napster. . . . Such is not the case here. Defendants provide software that communicates across networks that are entirely outside Defendants['] control.

Id. (internal citations omitted).

to saying, "Simply build your networks so that once users have the software, further interaction with the you is unnecessary—in this case, you will be protected as there is no chance¹⁷⁴ of knowledge on your part when future infringements occur." Indeed, the Court of Appeals for the Ninth Circuit reiterated the words of the district court, stating that "even if the Software Distributors 'closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption.'"¹⁷⁵ This proclamation is dangerous for rights holders. Of course, Grokster, and others in the P2P business, require end users to agree to an End User License Agreement ("EULA") so that consumers will agree not to infringe the copyrighted works of others, and to indemnify Grokster in the event of a charge of direct infringement.¹⁷⁶

D. Aimster

¶ 45 In the Seventh Circuit, Judge Posner, speaking for the Court of Appeals, refused to indemnify the defendant, John Deep, for contributory or vicarious liability for copyright infringement due in large part to his "willful blindness," *i.e.* quasi unclean hands.¹⁷⁷ The defendant was charged, in several consolidated suits, with contributory and vicarious copyright infringement, for which the district court entered a preliminary injunction, effectively shutting down Aimster, Deep's AOL-Instant-Messenger-specific file sharing network.¹⁷⁸

¶ 46 The court began by pointing out that the system at issue, Aimster, was, by its very nature of being a P2P system, capable of use for "innocuous purposes such as the expeditious exchange of confidential business data among employees of a business firm."¹⁷⁹ These uses are clearly non-infringing. The Seventh Circuit also noted that *Sony* makes it clear that a manufacturer of a product that is capable of such non-infringing uses, and yet also capable of infringing ones is not necessarily a contributory infringer.¹⁸⁰ Whether *Sony* stands for the single non-infringing use standard employed by the Ninth Circuit, however, is in dispute. Judge Posner noted:

The copying involved in the second and third uses was unquestionably infringing to the extent that the programs copied were under copyright and the taping of them was not authorized by the copyright owners—but not all fell in either category. Subject to this qualification, building a library of taped programs was infringing because it was the equivalent of borrowing a copyrighted book from a public library, making a copy of it for one's personal library, then returning the original to the public library.¹⁸¹

174. That is, of course, short of being an actual aider and abettor under the analysis employed by the Seventh Circuit. See *infra* pt. III.D (discussing *In re Aimster*, 334 F.3d 643).

175. *Grokster*, 380 F.3d at 1163.

176. *Grokster, Ltd., Grokster End User License Agreement*, at <http://www.grokster.com/us/terms> (last visited Apr. 6, 2004).

177. *Aimster*, 334 F.3d at 650.

178. *Id.* at 645.

179. *Id.* at 647.

180. *Id.* (citing *Sony*, 464 U.S. 417).

181. *Id.* at 647.

¶47 And yet file sharing is much worse because it is like borrowing the book from the library, using a copying machine to make a nearly identical copy, indistinguishable for all practical purposes from the original, and then returning the original—resulting in two identical copies. The court continued: “[t]hus the video recorder was being used for a mixture of infringing and noninfringing uses and the Court thought that Sony could not demix them because once Sony sold the recorder it lost all control over its use.”¹⁸² The court went on to rehash the standard put forth in *Sony* that “one potential use of the Betamax plainly satisfies this standard[:] time-shifting.”¹⁸³ This did not, however, save Aimster. As Judge Posner commented, “[w]illful blindness is knowledge, in copyright law.”¹⁸⁴

¶48 Analogizing to criminal aiding and abetting, the court stated, “a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind.”¹⁸⁵ Posner noted that this does not presumptively demonstrate liability for contributory infringement, but rather that “a [P2P network] that would otherwise be a contributory infringer does not obtain immunity by using encryption to shield itself from actual knowledge of the unlawful purposes for which the service is being used.”¹⁸⁶

¶49 This is not to say that the RIAA is going to have a field day with P2P in the Seventh Circuit. In fact, the court noted that “[t]o the recording industry, a single known infringing use brands the facilitator as a contributory infringer. To the Aimsters of this world, a single noninfringing use provides complete immunity from liability. Neither is correct.”¹⁸⁷ The evidence presented did not elicit any indication whatsoever of substantial, let alone any, non-infringing uses to which the software may be put, but “the evidence [was] sufficient, especially in a preliminary-injunction proceeding, which is summary in character, to shift the burden of production to Aimster to demonstrate that its service [had] substantial noninfringing uses.”¹⁸⁸ That it had not done. The question remains, however, whether the Supreme Court, currently deciding the fate of Grokster, will, as it should, employ this burden-shifting reading of *Sony*.¹⁸⁹

182. *Id.*

183. *Id.* at 648 (citing *Sony*, 464 U.S. at 442).

184. *Id.* at 650.

185. *Id.*

186. *Id.* at 650-51.

187. *Id.* at 651.

188. *Id.* at 652.

189. The DMCA also provides guidance: the legislative history, which is generally speculative and vague, is nonetheless clear that the purpose of statutory exemptions for ISPs was not to provide indemnity for ISPs, but rather to protect the incentive of copyright holders to promote digital works over the Internet while protecting the right of fair use, and decryption for interoperability for end users. Unbridled use of P2P is undoubtedly incompatible with this. See CONG. REC. H7092-H7103 (daily ed. Aug. 4, 1998) (statements of Mr. Frank, Mr. Bliley, Mr. Markey, and Ms. Slaughter), WL Cong Rec H7074-03p*H7092-*H7103.

E. Light at the End of the Tunnel?

1. Posner Rejuvenates Sony's Balancing Directive

¶ 50 In *Aimster*, Judge Posner, speaking for the Seventh Circuit, provided an informative reading of *Sony*, which seems to return to the need for a balancing of interests espoused by the Court in *Sony*. Mere allegations of non-infringing uses should not suffice to save a P2P defendant from liability for contributory copyright infringement. Evidence of several works of Shakespeare traded over a given network, in like manner, should not suffice. As Posner noted, "when there are noninfringing uses of an Internet file sharing service, moreover, if the infringing uses are substantial, then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses."¹⁹⁰ The court continued: "Aimster hampered its search for evidence by providing encryption. It must take responsibility for that self-inflicted wound."¹⁹¹

¶ 51 The crucial element of this proclamation is that under the Seventh Circuit's reading of *Sony*, the burden is on P2P defendants to show that it would be burdensome for them to limit infringement. In fact it would not. P2P distributors have several options. They could reprogram the underlying code, the backbone of the P2P network itself, to include writing filters that block out copyright protected songs according to protocols described by the content owner. The P2P networks at issue already have filters based on file type and to filter out objectionable material, e.g. pornography.¹⁹² There are however, several problems with this solution. First, when end users wish to illegally swap files that they know may be monitored or subject to filtering, misspellings¹⁹³ and number/symbol inversion¹⁹⁴ are often used to fool filters. Second, filters can only be placed on new versions of the software, which means that older versions pre-dating filters cannot be retroactively changed by the defendants. P2P software is voluntarily downloaded by end users, so end users can simply choose not to download the newer versions of software that include the newer filters. KaZaA, for example, is currently distributing version 3.0.¹⁹⁵ The release of new versions can be a reaction to legal claims, a fact that is based on the nature of computer programs: the code can simply be changed to work within the bounds of a decision (hence the change to a decentralized P2P network). As noted by the Ninth Circuit Court of Appeals in *Grokster*, "[p]eer-to-peer file-sharing software upgrades can be coded in a way that prevents those who do not accept the upgrade from communicating with those who do, but those users who do not accept an upgrade may

190. *Aimster*, 334 F.3d at 653.

191. *Id.* at 654.

192. Petitioners' Petition for a Writ of Certiorari at 7, 11, *Grokster*, 380 F.3d 1154 (No. 04-480), available at 2004 WL 2289200.

193. E.g. Jay-z's *Black* album would be traded as Jz Blak Albm.

194. E.g. Jay-z's *Black* album would be traded as J@y-z B!ack Album.

195. KaZaA, *Kazaa v.3.0*, at <http://www.kazaa.com/us/index.htm> (last visited Dec. 28, 2004). It should be noted though, that version 3.0 is not simply the third version of KaZaA. Typically, software is given intermediary numerical updates such as 1.1, 1.12, 1.15, 2.0, in addition to so called "plus," and "lite" versions, etc., such that version 3.0 could be, for example, the tenth upgrade to the software. The important point is that the defendants had ample opportunities to update the software with filters, and that they simply chose not to do so.

still be able to communicate with each other.”¹⁹⁶ In sum, those who wish to engage in illegal transfer and copying of songs will simply retain older versions of the networks without the filters.¹⁹⁷

¶ 52 One company, Audible Magic,¹⁹⁸ has a different solution, and it is likely that more are in development. Audible Magic’s solution is external monitoring of files transferred over the P2P networks. By “listening” to the files as they are transferred over the networks, past problems such as misspellings and number/symbol replacement are avoided.¹⁹⁹ Either option—re-coding the P2P networks themselves and implementing filters, or employing audio-recognition software—involves minimal cost to defendants, especially in light of the millions of dollars in advertising revenue generated each year.²⁰⁰ In any case, the cost involved in making an effort to limit infringing uses is certainly not disproportionate or even burdensome. If this is true, then under the reading of *Sony* as adopted by the Seventh Circuit, absent any effort to reduce or eliminate infringement, P2P defendants should not be able to avoid liability for contributory infringement. Forcing defendants in this situation to implement filters or acoustic listening devices, in some sense, begins to amount to compulsory licensing.²⁰¹ The choice should be obvious: filter – *i.e.* make some effort to reduce infringement – or do not participate in this realm of commerce.

¶ 53 Similarly, Grokster, ISPs,²⁰² AnonX,²⁰³ Kazaa Lite,²⁰⁴ and similar services, should not be able to avoid liability wholesale simply because the IP addresses of users are encrypted. Anonymity is paramount; it is protected and considered of primary import by U.S. courts under the Constitution.²⁰⁵ However, when infringers and contributory infringers hide behind its shield, the closing remarks of the Seventh Circuit should be

196. *Grokster*, 380 F.3d 1160.

197. See Oldversion.com, *Oldversion.com: Because Newer is not Always Better*, at <http://www.oldversion.com> (last visited Dec. 28, 2004).

198. Audible Magic Corp., *Audible Magic*, at <http://www.audiblemagic.com/index.html> (last visited Apr. 17, 2004).

199. There is, of course, an interesting conundrum in that inevitably, someone will re-code the file so that as it is being transferred, it will be encrypted. Someone will in turn find a way to monitor this process. This cat-and-mouse game might slow down, however, if courts return to a proper reading of *Sony*.

200. Slyck, *P2P Millionaires on the Increase*, at <http://www.slyck.com/news.php?story=298> (last visited December 17, 2004). See also Motion by Plaintiffs for Summary Judgment at 31, *Grokster*, 259 F. Supp. 2d 1049 (No. CV 01 08541 SVW), available at 2002 WL 32387947; Petitioners’ Petition for a Writ of Certiorari, *supra* note 192, at 4 (citing millions of dollars in annual revenue from advertising on P2P networks).

201. See discussion *infra* pt. I ¶2 and accompanying footnotes.

202. See Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 406 (2003) (discussing ISP safe-harbors).

203. AnonX, *Anonymous Proxy Service—Web Privacy*, at <http://www.anonx.com/about.htm> (last visited Apr. 6, 2004):

We are focused on protecting the privacy of our end users by providing multiple secure proxy gateways located around the globe. We use several layers of encryption and masking to protect your privacy on the web. Our services provides a secure gateway by which the subscriber can browse the web, chat, send files and even use peer to peer file sharing applications and yet still remain anonymous.

204. Kazaa Lite, *Kazaa Music & Kazaa MP3*, at <http://www.k-lite.tk> (last visited Apr. 4, 2004).

205. See, e.g., *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002).

borne in mind: "the First Amendment 'bears less heavily when speakers assert the right to make other people's speeches.' Or, we add, to copy, or enable the copying of, other people's music."²⁰⁶

¶ 54 Confronted with a somewhat analogous situation regarding the refusal to disclose trade secrets, the court in *Coca-Cola Bottling Co. v. Coca-Cola Co.*, found the defendants liable for sanctions under Federal Rule of Civil Procedure 37(b)(2)(A).²⁰⁷ More important, the court held that "[b]ecause [the] defendant refuses to supply [the necessary] information, in the face of this Court's disclosure order, plaintiffs are entitled to the advantage of every possible inference that fairly could be drawn from the [pertinent] evidence sought."²⁰⁸ In file trading cases, this would amount to the plaintiffs being entitled to the inference that the files being traded are infringing works if the transfer is encrypted.²⁰⁹ Although encryption was not at issue in *Grokster*, this type of presumption may be looming on the horizon as file sharing networks resort to guerilla programming to insulate themselves from liability once the rationales for litigation are unpacked.

2. Necessity for a Factual Inquiry

¶ 55 A key element of the balancing of interests standard, heretofore unused in the Ninth Circuit, is the mandate from *Sony* that courts thoroughly examine the distinct facts relating to a given charge of contributory infringement. For example, in *Sony* the Supreme Court refused to let plaintiffs who controlled less than ten percent of the market share hinder developments in commerce.²¹⁰ The situation before the court in *Grokster* is more than merely different in this respect; it is virtually the opposite. The RIAA represents a large majority of the market share.²¹¹ During oral arguments, counsel for *Grokster* suggested that of the uncopyrighted ten percent, the rest is un-quantified, and may even be less—a point not conceded by opposing counsel.²¹² This may change in the future, but a cogent reading of *Sony* dictates that these facts should be taken into account. There is, quite simply, no excuse for not doing so. Not only should they be taken into account, but as Judge Posner notes, such glaring facts should shift the burden to the defendants to show the non-infringing uses of P2P. Then, the court must decide which interest is greater—the public's right to trade in copyrighted and non-copyrighted files, with or without the implementation of filters, or the music industry's right to enjoy stronger copyright protection.

¶ 56 *Grokster* and its co-defendants will have no problem showing a non-infringing use.²¹³ In oral arguments before the Ninth Circuit, counsel for *Grokster* noted that books

206. *Aimster*, 334 F.3d at 656 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 191 (2003)).

207. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 110 F.R.D. 363, 373 (D. Del. 1986).

208. *Id.* at 369.

209. See *Aimster*, 334 F.3d at 650.

210. *Sony*, 464 U.S. at 443.

211. *Grokster*, 380 F.3d at 1158 ("The Copyright Owners allege that over 90% of the files exchanged through use of the 'peer-to-peer' file sharing software offered by the Software Distributors involves copyrighted material, 70% of which is owned by the Copyright Owners.").

212. *Grokster* Oral Argument Tr. (Feb. 3, 2004), available at <http://www.groklaw.net/article.php?story=20040823002045984> (last visited Feb. 19, 2004).

213. *Grokster*, 380 F.3d at 1161 (citing 259 F. Supp. 2d at 1035). The district court noted:

of the Bible, works of Shakespeare, other works that have fallen into the public domain, and works by artists that do not object to file sharing (Grokster points to bands such as The Dave Matthews Band and Phish)²¹⁴ were traded on P2P networks.²¹⁵ However, as noted in the Petitioners' Petition for Certiorari, infringing file trading on these networks constituted up to ninety percent of overall user activity.²¹⁶ Under *Sony*, these facts direct the court to weigh the interests at stake. On the one hand, there are the public domain interests, including the propriety of P2P and the ability to trade in files that may or may not be infringing. On the other hand, there are the interests that the RIAA represents.

¶57 Assuming, arguendo, that all the rhetoric about the greed of the RIAA is true, giving the public free license²¹⁷ to steal is still not justified. P2P is not a virtual Robin Hood. Perhaps the RIAA would be better served by retracting all of the "piracy" nonsense and calling it what it is—theft—as Judge Noonan suggested during oral arguments.²¹⁸ Ironically, Mickey Mouse, the force behind the Copyright Term Extension Act,²¹⁹ was created in his earliest form by borrowing from a work in the public domain: Steamboat Bill, Jr.²²⁰ Indeed, the copyright monopoly was granted by Congress for

Here, it is undisputed that there are substantial noninfringing uses for Defendants' software. . . . For instance, StreamCast has adduced evidence that the Morpheus program is regularly used to facilitate and search for public domain materials, government documents, media content for which distribution is authorized, media content as to which the rights owners do not object to distribution, and computer software for which distribution is permitted.

259 F. Supp. 2d at 1035 (internal citations omitted). Cf. Joe Stewart, *BitTorrent and the Legitimate Use of P2P*, Panel Discussion of P2P technologies held by the Forum on Technology & Innovation (February 26, 2004) (transcript available at <http://www.joestewart.org/p2p.html>).

214. While Grokster is quick to point out that certain artists do not object to P2P, it is important to note that the files they have in mind are recordings (of decent, but not perfect sound quality) of live performances. The artist has already been paid for the live performance in that instance. However, this practice of sharing "bootleg" recordings of shows remains, whether accomplished over P2P or not. Many of the same artists identified by Grokster have built a fan base through their live performances and may benefit from the subsequent trading of such bootlegged recordings. It should also be noted that by and large, bands that make little or no objection to the trading of their works have enjoyed immense financial success (the Dave Matthews Band and Phish are two of the largest revenue draws around), further justification for releasing recordings of live performances on P2P. It was not alleged by Grokster, however, that these same artists would make no objection to the unauthorized trading of studio albums. The *Grokster* Court noted the example of the band Wilco, which, when it was denied distribution of one of its albums by its record label, purchased the rights back from the record label and distributed its recordings via P2P, which in turn sparked interest and led to a new recording contract. 380 F.3d at 1161. This success is not incompatible with filtering of files and balancing of interests.

215. *Grokster* Oral Argument Tr. (Feb. 3, 2004).

216. Petitioners' Petition for a Writ of Certiorari, *Grokster*, 380 F.3d 1154 (No. 04-480), available at 2004 WL 2289200.

217. See generally LAWRENCE LESSIG, *supra* note 119 (stating that the mantra of the Internet age, "information wants to be free," does not mean, as some might argue, that intellectual property should be free from cost, but rather that it should be free from restraint).

218. See LESSIG, *supra* note 118.

219. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of Title 17 of the U.S. Code). The constitutionality of the Copyright Term Extension Act was unsuccessfully challenged in *Eldred v. Ashcroft*, 537 U.S. 186 (2002).

220. Nadine Farid, *Not in my Library: Eldred v. Ashcroft and the Demise of the Public Domain*, 5 TUL. J. TECH. & INTELL. PROP. 1, 16 (2003) (noting that when Disney faced the expiration into the public domain of several of its copyrights—Mickey Mouse in 2003, Pluto in 2005, Goofy in 2007, and Donald

promotion of the greater educational good, and by its nature incorporates the idea that a work must be released to the public; either wholesale, as when the copyright runs out, or in limited amounts as under fair use. Under U.S. copyright law, the concepts of protection and piggybacking are mutually dependant. As a result, courts are instructed under the directive of *Sony* to balance these interests and at least ask the defendant to show commercially significant substantially non-infringing uses. *Sony* did not stand for the proposition that showing one non-infringing use should absolve a defendant from liability for contributory copyright infringement. Rather, that is a factor to be taken into account when weighing the harm to a particular technology if its manufacture were enjoined or subjected to technical (such as filtering) or monetary (such as compulsory licensing) restraints. These factors point to the conclusion that although infringing uses of P2P technologies occur, the technology itself should not be stifled because non-infringing and fair uses also occur. Blocking some of the content exchanged with P2P technologies can rectify the problem of infringing uses. Further, considering the lost revenue shown by the RIAA, the substantial revenue gained by defendants, and the recent indication of a willingness of the RIAA to enter the P2P distribution market, legislatively compelled licensing seems a plausible alternative to the extreme options of either shutting down P2P or allowing it to continue uncontrolled.

3. A Brief Note on Intent—Should Structure Matter?

¶ 58 It is clear from the case law, and from the decision to grant certiorari in the *Grokster* case, that “[i]n the context of this case, the software design is of great import.”²²¹ The key is whether file trading is facilitated through a centralized network or a decentralized network. In *Napster*, as in *Grokster*, this was the hook on which the Ninth Circuit hung its hat. The *Napster* decision was clear: the defendants undeniably exercised control over the infringing files because they served as a central repository for those files.²²² Taking a lesson from *Napster*, defendants *Grokster et al.* built a decentralized network so that they could truthfully assert that they had no “control” over the residence of the infringing files, as they did not provide the “site and facilities”²²³ required for infringement to occur. At first blush, this break in the connection required for material contribution to copyright infringement appears logical. However, the *Grokster* court’s reliance on the relinquishing of control over the site and facilities is misguided, and ignores the reality of file sharing as well as the intent of the defendants. In fact, the court completely glossed over the notion of intent.²²⁴

¶ 59 The court addressed the fact that *Grokster* built a decentralized network by stating that the decentralized network was not built simply to get around the liability

Duck in 2009—it lobbied for extension of the copyright term, largely via then-Congressman Sonny Bono. It did so despite the fact that Steamboat Willie, the precursor to Mickey Mouse, was borrowed from the public domain as a parody of Buster Keaton's Steamboat Bill, Jr.).

221. *Grokster*, 380 F.3d at 1163.

222. *Napster*, 239 F.3d 1004. See also Lichtman & Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 403 (2003).

223. *Grokster*, 380 F.3d at 1163.

224. See *id.* at §§ II.A.I, II.B.I (discussing the role of knowledge and intent, and the point at which they become critical).

imposed in *Napster*, but rather because the technology had several significant uses.²²⁵ Such uses included reducing the costs associated with file sharing and “reducing the centralized control of that distribution.”²²⁶ No doubt there are benefits to decentralized distribution of knowledge. The court seemed to congratulate the defendants for their efforts, and then based its decision on the decentralization. Noting that material contribution is essential to a finding of contributory infringement, the court posited that this newly decentralized network eliminated the site and facilities for infringement.²²⁷

¶ 60 Making liability turn on the fact that the defendants provided the site and facilities for infringement in *Napster* but not in *Grokster* is illogical. Both services provided a site, and both provided the facilities for infringement. The only difference is that in the case of *Napster*, users could search the underlying network and retrieve files through it, while users of *Grokster* retrieved files directly from each other. The defendants in *Grokster* were being rewarded for their interpretation of, and reliance on, *Napster*—for eliminating the index of files.

¶ 61 Part of the rationale of the *Grokster* court was that, similar to the defendant in *Sony*, there was no ongoing relationship between the manufacturer and end user. Indeed, the *Grokster* court noted, “even if the Software Distributors ‘closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption.’”²²⁸ This is true, but it completely ignores the intent of the defendants. The decision to relinquish centralized control was based at least in part on efforts to avoid the legal traps involved in distribution of file sharing software. Intent seems to have been irrelevant to the *Grokster* court, despite the finding that *Grokster* entered the word “*Napster*” in its metatags—words exploited by search engines to find web pages—to drive traffic to its site from potential *Napster* users.²²⁹ *Grokster* designed its system to take advantage of the holding of *Napster*, and should be held accountable for that decision—something the Seventh Circuit, but not the Ninth Circuit, was willing to analyze.

4. Compulsory “Demixing”

¶ 62 *Sony* states that to indemnify a manufacturer, all that is required is that a device be capable of *one* non-infringing use.²³⁰ Complete deference to substantial non-infringing uses flies in the face of reality. The doctrine, as applied, does not require that potential contributory infringers consider the imposition of filters, and consciously ignores the harm to rights holders in the name of promoting commerce. However, the Seventh Circuit did not share this blindness to the economic harm to copyright holders, as evidenced by its suggestion that P2P networks at the very least be required to

225. *Id.* at 1164.

226. *Id.*

227. *Id.*

228. *Id.* at 1163 (citing 259 F. Supp. 2d at 1041).

229. Petitioners’ Petition for a Writ of Certiorari, at 6, *Grokster*, 380 F.3d 1154 (No. 04-480), available at 2004 WL 2289200.

230. See *infra* pts. II.A, III.A.

demonstrate that they would be harmed by filtering.²³¹ On a similar note, Australian Federal Justice Murray Wilcox has requested that parties to a file sharing lawsuit address the issue of whether filters may effectively be implemented, despite the defendant's claims that the technology was not sophisticated enough to discriminate between licensed and unlicensed music, and that the filters were over-inclusive, *i.e.*, they blocked legal content as well.²³² The use of filters was not technologically feasible in *Sony*, but it is nearly effortless in the case of modern P2P networks.²³³

¶ 63 If other Circuit Courts adopt this balancing of interests model, the tide may turn in favor of rights holders. Or maybe not. After a careful balancing, the harm done to society if filters are implemented may outweigh that done to the recording industry and other rights holders. In either case, equity demands that the interests be weighed, and not simply that technology proceed at warp speed under the rubric of a single non-infringing use. P2P networks such as Grokster were developed in the wake of *Napster* for the specific purpose of continuing to transfer songs protected by copyright without regard for the rights of the copyright owners. Grokster shifted from a centralized network to a decentralized network to "eliminate" the element of knowledge for indirect liability purposes. In fact, specific steps have been taken to shield user-identifying information from being disclosed.²³⁴ New business models have even developed in response to file sharing lawsuits initiated by the RIAA and the music industry.²³⁵ This will not spell the end of the recording industry, but a shift in creative output and distribution of content may be welcome.

¶ 64 Compulsory demixing and filtering may be the most plausible alternatives to the challenge that P2P poses to rights holders. Whether imposed judicially or legislatively, compulsory licensing provides the most tenable solution to the current round of P2P litigation. Not only is it infinitely faster than litigation, but it adequately provides economic incentives for plaintiffs and defendants. The RIAA may argue that it is losing revenue from lost CD sales, and this may very well be true. However, the RIAA seems to fail to realize that by advocating a system of compulsory licensing, or by embracing digital distribution, it would enjoy revenue heretofore unseen. The lost revenue argument presented by the RIAA seems to assume that files traded over P2P networks would otherwise be purchased. This could not be further from the truth. The reality is that many a P2P user would be willing to download a classic song, or a show tune, but those same individuals—persons engaged in unauthorized distribution and copying of copyrighted works—would not otherwise purchase the music.

¶ 65 By securing revenue from P2P transfers of music using a licensing regime, owners

231. *In re Aimster*, 334 F.3d at 653.

232. Kristyn Maslog-Levis, *Sparring Begins in Kazaa Trial*, c|net News.com, at http://news.com.com/Sparring+begins+in+Kazaa+trial/2100-1027_3-5471120.html (November 30, 2004).

233. Petitioners' Petition for a Writ of Certiorari, at n.4, *Grokster*, 380 F.3d 1154 (No. 04-480), available at 2004 WL 2289200.

234. See KaZaA, *End User License Agreement*, at <http://guide.kazaa.com/eula.htm> (last visited December 17, 2004) (stating that users shall not "[c]ollect or store personal data or other information about other users").

235. See, e.g., AnonX, *Anonymous Proxy Service—Web Privacy*, at <http://www.anonx.com> (last visited Feb. 12, 2004).

may actually profit. Needless to say, there are some individuals who have the means and ability to purchase first sale CDs, but simply choose not to. However, it should be evident that by enjoying the limited monopoly granted by Congress, rights holders accept a certain level of theft and misappropriation of their works. By collecting a royalty on *all* copyrighted songs transferred over P2P, the music industry would not only gain revenue, but may even be able to change the negative public image they have spawned in the wake of myriad lawsuits against individual file-swappers.

¶ 66 Additionally, compulsory licensing allows the technology to survive, a concern of which the *Sony* Court was very mindful. If the transferring of songs in large volumes is allowed under a system of compulsory licensing, rights holders will enjoy increased revenue and lower legal costs, and the P2P networks would simultaneously be benefited. By submitting to compulsory licensing, P2P services will be permitted to advertise their networks as allowing the transfer of copyrighted songs that would otherwise subject the end user to potential liability as a direct infringer. This is no longer “a matter of first impression” where the defendant has merely “constructive knowledge” of the infringement that may occur through the use of its device.²³⁶ As such, courts need not tread so lightly when weighing the interests of the public to engage in P2P against the interests of rights holders. Compulsory licensing is possibly the best way to achieve this.

IV. CONCLUSION

¶ 67 The goal of U.S. copyright law is to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”²³⁷ A strong argument can be made that the public right to information should supercede the right of owners to lock up their works using copyright law. This requires a balancing act. Neither right is absolute, and each must give some in order to enjoy the benefits of the monopoly granted by Congress. However, this does not negate the fact that under the *Sony* test as it has been applied to P2P thus far, rights holders are forced to bear the brunt of the harm. In some instances, this harm may curtail incentives for creating new works. This is undesirable and directly at odds with the goals of copyright law.

¶ 68 Previous attempts at total control of copyrighted material have done little except backfire for the RIAA and content owners. This can readily be seen by the protest on “Grey Tuesday,” the proliferation of file sharing applications, and the decline in record sales in recent years. Despite arguments that the recording industry is greedy and controlling, absent capital to finance new musical compositions, everyone is harmed—not just the copyright holders. This is not to suggest that the RIAA, or content owners in general, are not self-interested in their efforts to create new works. They are groups whose members have significant financial expectations. Perhaps our copyright scheme would be better off—or at least more diverse—with more grassroots musicians promoting their own works over P2P networks. Artists may create less if the economic

236. *Sony*, 464 U.S. at 426-27.

237. U.S. CONST., art. I, § 8, cl. 8.

incentives they once enjoyed are eliminated because the recording industry will no longer support any but the most successful, formulaic artists. Then again, with the advent of digital distribution, artists may no longer need to rely on major labels for discovery and distribution.

¶ 69 In light of the foregoing, the balancing espoused by the Supreme Court in *Sony* must be utilized by courts to protect incentives for authors to create, while promoting the growth of the wealth that is the public domain. Once a plaintiff has shown that copyrighted works are infringed upon through use of a particular technology, the burden should then shift to the defendant charged with contributory (or vicarious) copyright infringement to show that there are, in fact, commercially significant and substantial non-infringing uses of the technology.

¶ 70 Additionally, to escape liability, defendants must show that it would be unreasonably burdensome for them to reduce or remove the ability to infringe plaintiff's rights. As a result of this balancing, manufacturers charged with contributory copyright infringement could be compelled to implement filters and demixers,²³⁸ which can be employed to restrict access to infringing works while still allowing transfers of non-infringing works. However, enforcement is a problem inherent in this proposal. Legislation (perhaps in the form of compulsory licensing) is always an alternative, but in the case of P2P, it would likely disappoint for its complete lack of expediency.

238. *Aimster*, 334 F.3d at 648.