

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 03-55901 (Consolidated with Nos. 03-55894 and 03-56236)

JERRY LEIBER, et al.,

Plaintiffs-Appellants,

v.

GROKSTER, LTD., et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-01-09923-SVW (Consolidated with CV-01-8541-SVW)
Honorable Stephen V. Wilson, United States District Court Judge

LEIBER PLAINTIFFS-APPELLANTS' REVISED REPLY BRIEF

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I.

INTRODUCTION¹

MusicCity and Grokster compare themselves to many things – Google, Xerox, AOL, Memorex, manufacturers of CD burners or “megaphones,” and even Circuit City. Unlike MusicCity and Grokster, however, the business models of these companies are not based on copyright infringement.² A “significant proportion of [these companies’] advertising revenue [does not] depend[] upon infringement.”³ These companies do not “clearly know that many if not most of [the] individuals” who use their products “subsequently use it to infringe copyrights.”⁴ And these companies have not “intentionally structured their businesses to avoid secondary liability for copyright infringement.”⁵

By comparing themselves to these companies, MusicCity and Grokster attempt to divert attention from what they actually are and what they actually do. This case is not about whether Circuit City might be liable for selling VCRs that may be used to copy movies, or whether a manufacturer of “megaphones” might be liable for what users say on them. Based on the undisputed facts of this case, MusicCity and Grokster are actively distributing and continually “upgrading”

¹ Plaintiffs-Appellants Jerry Leiber, individually and d/b/a Jerry Leiber Music, Mike Stoller, individually and d/b/a Mike Stoller Music, Peer International Corporation, Songs of Peer, Ltd., Peermusic, Ltd., Criterion Music Corporation, Famous Music Corporation, Bruin Music Company, Ensign Music Corporation, and Let’s Talk Shop, Inc. d/b/a Beau-Di-O-Do Music, on behalf of themselves and all others similarly situated (the “Leiber Appellants”), hereby adopt and incorporate by reference the Reply Brief filed by Plaintiffs-Appellants in Metro-Goldwyn-Mayer, Studios, Inc., et al. v. Grokster, Ltd., et al., Docket Nos. 03-55894 and 03-56236 (the “MGM Reply Brief”).

² JER(v.27):7680.

³ Id.

⁴ JER(v.27):7665.

⁵ JER(v.27):7684.

services that they know exist – indeed, were created – to enable millions of people to commit millions of acts of copyright infringement, while they sit back and reap the financial benefits from the illegal activity they created and do nothing to stop. MusicCity and Grokster cannot hide behind platitudes about technological innovation, or shield themselves by invoking the image of 12-year-old girls who are attracted to their services with the offer of “free” music – a telling example of the predatory nature of their services. MusicCity and Grokster are not peripheral actors in the wholesale theft of copyrighted music – they are the pied pipers cynically enticing children – and adults – to engage in shoplifting of copyrighted music over the Internet – and deriving a profit therefrom.⁶ Their deliberate, knowing, and lucrative conduct makes each of them liable for contributory and vicarious copyright infringement.

II. ARGUMENT

A. **The Sony-Betamax Defense Does Not Apply Because MusicCity And Grokster Have Actual Knowledge of Infringing Activities.**

1. **MusicCity’s And Grokster’s Argument On Appeal Depends On The Applicability Of Sony-Betamax.**

MusicCity and Grokster stake their legal defense on an extreme interpretation of the Sony-Betamax case. Under their reading of Sony-Betamax, the existence of any non-infringing use of their services, whether current or potential, grants them complete immunity to conduct businesses for profit that they know are based on massive copyright infringement.⁷ This simply is not the law,

⁶ “Pied piper ... [a] person who offers others strong yet delusive enticements.” The American Heritage Dictionary of the English Language (4th ed. 2000).

⁷ See Appellee StreamCast Networks, Inc.’s Opening Brief (“MusicCity Br.”) at 15; Appellee Grokster, Ltd.’s Opening Brief (“Grokster Br.”) at 17-22, 26-29.

and if adopted by this Court, would eviscerate the doctrine of contributory liability, because all services and products conceivably could be used for some nominal non-infringing purpose.

What MusicCity and Grokster really seek is a free pass that will permit them to continue to distribute and “upgrade” their services, even though they indisputably have actual knowledge that millions of copies of Appellants’ copyrighted works are being unlawfully distributed on their services. But as this Court made clear in Napster, the Sony-Betamax defense does not apply if defendants have actual knowledge of the infringements taking place. Indeed, in the nineteen years since Sony-Betamax was decided, no court except the District Court below has applied that decision to exempt from liability an entity that materially contributes to infringement when it has actual knowledge of the infringing activity.

2. Sony-Betamax Does Not Provide A Defense Here Because The Record Demonstrates Undisputed Actual Knowledge Of Infringing Activities.

As this Court held in A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001), the Sony-Betamax defense does not apply when a defendant has actual knowledge of infringing activity: “We observe that Napster’s actual, specific knowledge of direct infringement renders Sony’s holding of limited assistance to Napster ... [r]egardless of the number of [the service’s] infringing versus noninfringing uses[.]” Id. at 1020, 1021 (emphasis added).

The groundwork for that holding came from Fonovisa v. Cherry Auction, 76 F.3d 259, 264 (9th Cir. 1996), where this Court held that a defendant may be liable for contributory copyright infringement if it knowingly provides the site and facilities for infringing activity. Fonovisa involved a swap meet, operated by the defendant. Vendors paid a daily fee to have booths at the swap meet, and shoppers paid an entrance fee. Additionally, the defendant “supplie[d] parking, conduct[ed]

advertising and retain[ed] the right to exclude any vendor for any reason, at any time.” Id. at 261. Some, but not all, of the vendors at the swap meet sold counterfeit copyrighted musical recordings, and the local sheriff’s office had put the defendant on notice of this fact. The defendant, however, refused to take action to curb the infringing vendors.

The plaintiff, whose copyrights had been infringed by the sale of counterfeit recordings at the swap meet, sued the defendant for contributory copyright infringement. The defendant filed a motion to dismiss, which the district court granted. Id. at 260. This Court reversed, holding that the defendant could be found liable for contributory copyright infringement under the facts alleged. In doing so, this Court noted that the defendant had actual knowledge of the infringing activity based on “the Sheriff sen[ding] a letter notifying Cherry Auction of the on-going sales of infringing materials[.]” 76 F.3d at 261, 264. Significantly, this Court did not hold that the defendant qualified for the Sony-Betamax defense, even though the swap meet was being used for some non-infringing uses.⁸

MusicCity and Grokster rely solely on the Fifth Circuit’s decision in Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988) to argue that Sony-Betamax applies even if the defendant has actual knowledge.⁹ But Vault did not involve a defendant that had actual knowledge of infringement. The defendant in Vault, which manufactured computer diskettes that allowed users to make copies of third-party computer programs sold in copy-protected form, admitted only that it had “actual knowledge that its product is used to make unauthorized copies of copyrighted material.” 847 F.2d at 262 (emphasis added). But in that setting,

⁸ This Court did cite Sony-Betamax twice in Fonovisa with respect to the law of contributory infringement generally, but never suggested that the Sony-Betamax defense might apply to the swap meet at issue there. See id. at 264.

⁹ MusicCity Br. at 22; Grokster Br. at 27.

“unauthorized” was not the same as “infringing” – a major use of the product was to make unauthorized, but nevertheless non-infringing, archival copies of programs.¹⁰ Thus, Vault is factually and legally unique. Furthermore, Vault has never been followed in its application of Sony-Betamax, and was not even mentioned by this Court in Napster .

Accordingly, under the reasoning of Fonovisa and Napster, a defendant with actual knowledge of infringing activities may not find shelter in Sony-Betamax. Plainly, there were non-infringing uses in Fonovisa (some of the vendors in the swap meet were selling legitimate goods) and Napster (some of the songs being distributed were non-infringing). Neither of these cases, however, held that such uses immunized the defendants from liability for contributory infringement. Similarly, this Court need not even reach the issue of non-infringing uses here, because the evidence demonstrates that MusicCity and Grokster have actual knowledge that millions of copies of Appellants’ specific copyrighted works are being illegally distributed on their services, and that MusicCity and Grokster are guilty of “willful blindness” to those infringements.

3. Appellants’ Voluminous Notices Of Infringement Sent To MusicCity And Grokster Demonstrate Actual Knowledge.

The record indisputably shows that MusicCity and Grokster have actual knowledge of widespread infringing activities on their services.¹¹ MusicCity, however, argues that it lacks sufficient knowledge for contributory liability because its software does not “phone home and report on the activities of its users,” and that it does not have “perfect knowledge” of what its users are doing at

¹⁰ The Copyright Act specifically permits users to make “archival” copies of a computer program without permission of the copyright owner. See 17 U.S.C. § 117(a)(2) (Supp. 1998).

¹¹ See Leiber Appellants’ Opening Brief (“Leiber Br.”) at 9 & nn.29-32.

any given time.¹² But this is not necessary, because MusicCity and Grokster already know about the illegal activities of its users from Appellants' infringement notices, among other things.¹³ This Court in Napster and Fonovisa did not require "perfect knowledge" for a finding of contributory liability. Instead, actual knowledge of the infringing activities was sufficient.¹⁴ In both Napster and Fonovisa, actual knowledge came from, among other things, notice letters informing each defendant of specific instances of infringement. See Napster, 239 F.3d at 1022 & n.6 (citing district court's finding that Napster had actual knowledge of direct infringements through notices of infringement); Fonovisa, 76 F.3d at 261, 264 (because "the Sheriff sent a letter notifying Cherry Auction of the on-going sales of infringing materials ..., [t]here is no question that plaintiff adequately alleged the element of knowledge in this case").

Here, as in Napster and Fonovisa, Appellants' notices provide actual knowledge to MusicCity and Grokster that millions of specific copies of Appellants' copyrighted works are being unlawfully distributed on their services. Indeed, Appellants' notice letters to MusicCity and Grokster are the same type that this Court held were sufficient to give Napster actual knowledge.¹⁵ If such notices were sufficient to trigger obligations by Napster in a preliminary injunction context, then they are clearly sufficient to establish actual knowledge here.

¹² MusicCity Br. at 37-38.

¹³ See Leiber Br. at 3 & n.7.

¹⁴ See MGM Appellants' Opening Brief "MGM Br." at 25-26, 31-32.

¹⁵ See 239 F.3d at 1022 & n.6; see also Leiber v. Napster, 2001 WL 789461 (N.D. Cal. 2001), aff'd, 284 F.3d 1091 (9th Cir. 2002); A&M Records v. Napster, 2001 WL 227083 (N.D. Cal. 2001), aff'd, 284 F.3d 1091 (9th Cir. 2002).

But there is still more. There was overwhelming evidence below that MusicCity and Grokster specifically set out to emulate Napster by intentionally creating computer networks to enable massive infringement of copyrighted material.¹⁶ MusicCity and Grokster do not deny this. Instead, they argue that this evidence is irrelevant because it relates to prior versions of their software and not the “current version” that the District Court ruled on. But this evidence is directly relevant to MusicCity’s and Grokster’s actual knowledge – which is dispositive of their Sony-Betamax defense – because it shows that they acted with intent to induce infringement. MusicCity’s and Grokster’s professed outrage about the use of this evidence speaks eloquently to its relevance – it exposes their Sony-Betamax defense as the Emperor’s new clothes.

4. MusicCity’s And Grokster’s Willful Blindness To The Infringing Activities On Their Services Also Constitutes Actual Knowledge.

MusicCity and Grokster do not dispute the black letter law that willful blindness constitutes actual knowledge of infringement.¹⁷ Nor do MusicCity or Grokster seriously contest the evidence cited in the Leiber opening brief demonstrating the voluntary, deliberate, and affirmative steps each has taken to avoid learning more about the massive infringements occurring on their services.¹⁸ That conduct falls squarely within the meaning of “willful blindness.”

As the evidence demonstrates, MusicCity and Grokster seek to benefit from the rampant infringement taking place on their services, but, at the same time, indisputably have taken steps so that they can disclaim knowing about such infringements in the hopes of avoiding liability. From operating blatantly

¹⁶ See Leiber Br. at 12-13; MGM Br. at 10-11; cases cited at footnote 20 below.

¹⁷ See Leiber Br. at 10-11.

¹⁸ See id. at 12-18.

infringing OpenNap services, to encouraging their users to switch to the more efficiently infringing FastTrack network, and from blurring the titles of infringing songs in marketing materials, to choosing to distribute and “upgrade” services that do not rely on a central indexing server but encrypt communications, their conduct epitomizes the meaning of willful blindness.¹⁹ Like the defendant in United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976), MusicCity and Grokster do not want to be caught looking into the “secret compartment” of their services, even though they know full well what is inside. Thus, because the record establishes that, at best, MusicCity and Grokster have willfully blinded themselves to these infringements, the law deems them to have actual knowledge of the infringements occurring on their services.²⁰

Confronted with this evidence of willful blindness and its legal implications, MusicCity maintains that its decision to distribute and “upgrade” Morpheus in this manner is no “different from any technology company that endeavors to make sure that its products do not violate copyright laws.”²¹ This is pure sophistry. There is an enormous difference between taking responsibility for complying with

¹⁹ See id. at 12-13, 15-17, and evidence cited therein. Moreover, while Grokster claims that it did not make the decision to encrypt the FastTrack network, see Grokster Br. at 34 n.14, it chose to distribute new versions of the software that do encrypt communications over the network, see id. at 14 n.42.

²⁰ In addition to showing willful blindness, this evidence demonstrates that their services were introduced specifically for the purpose of infringing activity. This is yet another reason why MusicCity and Grokster cannot take refuge in the Sony-Betamax defense. See, e.g., Cable/Home Communication Corp. v. Network Prods., 902 F.2d 829, 846 (11th Cir. 1990) (even though “other uses” existed, defendants were liable where they “utilized and advertised these devices primarily as infringement aids and not for legitimate, noninfringing uses”); A&M Records v. Abdallah, 948 F. Supp. 1449, 1456 (C.D. Cal. 1996) (Sony does not apply “to products specifically manufactured for counterfeiting activity, even if such products have substantial noninfringing uses”); see also Sony Corp. of Amer. v. Universal City Studio, 464 U.S. 417, 438 (1984) (approvingly citing district court’s finding that Sony had not “influenced or encouraged” the unlawful copies).

²¹ MusicCity Br. at 38 n.34.

copyright law, and engaging in conduct contrived simply to avoid such responsibility altogether. Deliberately taking steps to avoid learning more about the illegal activity on one's service is not the conduct of a responsible company trying to comply with copyright laws.

MusicCity also advances the specious argument that, if it avoids using a “central switching station” so that it is less able to “monitor what users are up to,” it is not willfully blind to the infringements taking place on its service.²² But the guiding principle behind “willful blindness” is precisely to prevent wrongdoers from escaping liability through feigned ignorance.²³ When MusicCity, for example, candidly acknowledges that it did “NOT want to ... [use] a technology that will allow Morpheus to see what our users are sharing[,]”²⁴ even though it “clearly know[s] that many if not most of those individuals who download [its] software subsequently use it to infringe copyrights,”²⁵ MusicCity engages in the textbook definition of willful blindness: “[I]f a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.” *Jewell*, 532 F.2d at 700.

Moreover, it is not simply MusicCity's failure to “design [its] product so as to monitor users”²⁶ that makes it willfully blind to the infringements. MusicCity and Grokster have engaged in deliberate efforts to make it more difficult for them – or anyone else – to curb such infringement.²⁷ MusicCity's own brief admits as

²² *Id.* at 38.

²³ *See* *Leiber Br.* at 10-11.

²⁴ *JER(v.15):4368* (emphasis in original).

²⁵ *JER(v.27):7665* (emphasis added); *JER(v.27):7667* (MusicCity and Grokster “are generally aware that many of their users employ [their] software to infringe copyrighted works”).

²⁶ *MusicCity Br.* at 38.

²⁷ As described in detail in the MGM Reply Brief, with each subsequent

much. It concedes that, “with respect to earlier versions of Morpheus, [they] blocked infringing users in response to Plaintiffs’ [infringement] notices.”²⁸ But MusicCity then claims that, with respect to its current version of Morpheus, they “lack[] any capacity to act in response to the notices received from Plaintiffs.”²⁹ What MusicCity neglects to mention is that they deliberately removed from subsequent versions of Morpheus the ability to block infringing users.³⁰ This action demonstrates incontrovertibly that, when confronted with “voluminous” notices that their users have been committing millions of acts of direct copyright infringement, MusicCity affirmatively took steps to make it more difficult for them to curtail such illegal activity.

MusicCity claims, however, that it hasn’t “buried its head[] in the sand” because it has no “central server.”³¹ This is circular reasoning and again misses the point of willful blindness. Both MusicCity and Grokster made changes to their services so that they could claim ignorance, but now say that their ignorance means that they are not willfully blind. Yet, that is precisely the meaning of willful blindness: strongly suspecting illegally activity, then taking steps to avoid confirming that suspicion.³² MusicCity concedes that the design changes to its

version of their software, MusicCity and Grokster have removed certain functions that permitted them to control such infringements. Nevertheless, even MusicCity’s and Grokster’s current incarnations of their services allow them to reduce or stop the infringements.

²⁸ MusicCity Br. at 39 n. 35.

²⁹ Id. at 39.

³⁰ JER(v.1):274, 292-293; JER(v.3):796-797, 808-809; JER(v.9):2511-13; JER(v.11):2943-44.

³¹ MusicCity Br. 38.

³² See Leiber Br. at 10-11.

service were done in an attempt to avoid its own liability, not to stop infringing conduct.³³ If that is not willful blindness, then nothing is.

In sum, MusicCity and Grokster cannot avoid liability by delegating to others the indexing of works available for unlawful copying, refusing to take any steps to prevent the widespread use of their services to commit infringement, and professing ignorance of that infringement despite their admitted receipt of tens of thousands of written notices of infringement from the affected copyright owners and widespread publicity of the use of their services for infringement on a massive scale. They are the operators of commercial Internet services that provide the means and facilities for the direct infringement of copyrighted works on such a scale, and then profit from that infringement. The law requires that they be held accountable for their duplicitous actions, and they cannot escape this result by clinging to Sony-Betamax.³⁴

³³ MusicCity Br. at 38 n.34.

³⁴ MusicCity's and Grokster's only other argument, that the concept of "willful blindness" was not raised below by Appellants, is unsupported. In all three of their briefs below, Appellants argued that "[t]urning a blind eye to detectable acts of infringement for the sake of profit gives rise to [] liability." JER(v.3):669 (lines 18-20); JER(v.25):7179 (lines 5-6); JER(v.4):1029 (lines 16-17). Appellants further argued below that "Defendants ... have deliberately chosen to turn a blind eye to the massive infringement their systems enable, facilitate, and encourage." JER(v.3):664 (lines 24-26); see also JER(v.3):678 (lines 22-27); JER(v.3):696 (lines 25-27) (Defendants "cannot sit on their hands, refusing to police their system – and even actively worked to impede the efforts of copyright owners – so that they can continue to profit from that rampant infringement"); JER(v.4):1029 (lines 14-16) ("defendants ... [cannot] structure their affairs so they can deny responsibility for infringements from which they profit"). Moreover, all of the evidence cited by the Leiber Appellants in their opening appeal brief on "willful blindness" was cited in Appellants' briefs below. Counsel for the Leiber Appellants also expressly argued that defendants were guilty of willful blindness at oral argument before the District Court on the summary judgment motions. See Hearing Tr. (Dec. 12, 2002) at 44:1-11. The District Court ignored these arguments in its decision below.

B. The Sony-Betamax Defense Does Not Apply Because MusicCity And Grokster Create, Maintain and Derive Continuing Profits From Their Infringing Networks.

The Sony-Betamax defense is limited to situations where a defendant manufactures a product or device – a “staple article” – and then ceases any contact with or supervision of its customers at the point of sale. See Sony-Betamax, 464 U.S. at 438 (“the only contact between Sony and the users of the Betamax that is disclosed by this record occurred at the moment of sale”). By contrast, imposing contributory liability in cases “involving an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred” is “manifestly just.” Id. at 437.

Contrary to their bald assertions, MusicCity and Grokster are not purveyors of staple articles that they ship into the stream of commerce, having no contact with their users thereafter.³⁵ Nor are they – notwithstanding Grokster’s strained analogies – the “Circuit City” of the online world.³⁶ Unlike Grokster, Circuit City arrests customers who shoplift copyrighted music and motion pictures from their stores. Rather, MusicCity and Grokster create and maintain computer networks that they know are used for rampant copyright infringement and derive continuing profit from that unlawful activity. Under these circumstances, Sony-Betamax has no applicability whatsoever.

MusicCity and Grokster portray themselves as mere purveyors of “software” – as if their “software” were some fungible article of commerce that anonymous third parties happen to be misusing. As explained in Appellants’ opening briefs, MusicCity’s and Grokster’s conduct extends well beyond the distribution of software.³⁷ Moreover, the software they have distributed – and continue to

³⁵ See MusicCity Br. at 8-9; Grokster Br. at 46.

³⁶ See Grokster Br. at 10.

³⁷ See MGM Br. at 8-23; Leiber Br. at 4, 12-17.

distribute – is not a staple article of commerce, but a very specific set of instructions to create a specialized network for piracy. As explained by the Federal Circuit:

Software is a set of instructions, known as code, that directs a computer to perform specified functions or operations [A]lthough a user must activate the functions programmed into a piece of software by selecting those options, the user is only activating means that are already present in the underlying software.

Fantasy Sports Props. v. Sportsline.com, 287 F.3d 1108, 1118 (Fed. Cir. 2002) (emphasis added).³⁸ MusicCity’s and Grokster’s software programs contain very specific instructions: a blueprint for creating a pirate network for infringement, which users activate by launching the programs on their computers.³⁹ Specifically, the software programs instruct individual users’ computers to link together to create an online “swap meet” where copyrighted material can be “traded” – just as the defendant in Fonovisa created a “swap meet” in the physical – or “offline” – world where copyrighted material could be “traded.”⁴⁰ The instructions embedded in Appellees’ software also accomplish other specific tasks, such as designating users’ computers to become supernodes that enable users to find and download Appellants’ copyrighted works.⁴¹

³⁸ Accord WMS Gaming v. Int’l Game Tech., 184 F.3d 1339, 1348 (Fed. Cir. 1999) (“A general purpose computer ... programmed to carry out an algorithm creates ‘a new machine, because a general purpose computer in effect becomes a special purpose computer once it is programmed to perform particular functions pursuant to instructions from program software.’”); Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1342 (9th Cir. 1984) (defining software as “a set of instructions that allows the system to accomplish a particular task”).

³⁹ See JER(v.27):7656.

⁴⁰ See, e.g., MusicCity Br. at 8-9.

⁴¹ JER(v.3):793; JER(v.9):2382, 2397-2400, 2536; JER(v.10):2865, 2889, 2892-93; JER(v.11):2985-86; JER(v.12)3370-71, 3403-06, 3421-22, 3439-40.

That these critical functions are achieved through coded instructions in computer programs, rather than written instructions to accomplices in a piracy ring, should make no difference – unless this Court is prepared to accept MusicCity’s and Grokster’s invitation to place the Internet or “software” or “peer-to-peer technology” in a special zone where laws of general application do not reach. That is a radical proposition that Appellees should address to Congress, not the courts.⁴²

In addition to creating specific “swap meet” networks where users engage in piracy, MusicCity’s and Grokster’s software programs afford them with an all-important direct connection to the users’ individual computers in order to serve up targeted advertisements and thereby derive substantial and continuing revenues from infringing activities.⁴³ Indeed, this tether between Appellees and their infringing users is an essential feature of their illicit business models because, without it, they could not “monetize server traffic”⁴⁴ and benefit financially from the infringing activity. This level of ongoing relationship between MusicCity and Grokster and their users – not, as Grokster suggests, the mere fact that there is any ongoing relationship at all⁴⁵ – renders the Sony-Betamax defense wholly inapplicable.

⁴² MusicCity and Grokster attempt to turn this principle on its head by arguing that copyright owners should lobby Congress to make clear that copyright law applies to the distribution of their works over the Internet. Congress has already done just that. See Leiber Br. at 31 (discussing Digital Performance Right in Sound Recordings Act of 1995).

⁴³ JER(v.3):796-797; JER(v.10):2935-36; JER(v.11):2981; JER(v.25):7218-24; JER(v.27):7680; JER(v.30):8718 and 8725.

⁴⁴ JER(v.10):2831.

⁴⁵ See Grokster Br. at 39.

C. MusicCity And Grokster Failed To Meet Their Burden Under Sony-Betamax To Demonstrate Substantial Non-Infringing Uses.

In the District Court, Appellants hotly disputed the issue of whether MusicCity's and Grokster's services were capable of substantial non-infringing uses. Among other things, Appellants demonstrated that MusicCity and Grokster had failed to submit any admissible evidence on the extent of the alleged non-infringing uses, as was their burden under Sony-Betamax.⁴⁶ Appellants also introduced uncontroverted evidence of the overwhelming and primary use of Grokster's service for infringement.⁴⁷

In stark contrast to the evidence presented by Appellants, Grokster never seriously contested, nor presented a contrary study disputing, that 75% of the files on the Grokster service are owned by the Leiber and MGM Appellants, and that 90% of the total are infringing or likely infringing.⁴⁸ MusicCity also offered no evidence in the District Court that the percentages would be any different among users of its Morpheus service. On appeal, it misplaces reliance on the declarations of Janis Ian, Sean Mayers, Richard Prelinger, and Brewster Kahle.⁴⁹ Three of the four declarants conceded when they were questioned in depositions that they had never used MusicCity's and Grokster's services to ascertain the availability of the non-infringing content described in their declarations. Additionally, and contrary to Grokster's feigned expression of surprise,⁵⁰ none of them addressed the magnitude or substantiality of such uses, let alone their commercial significance. In fact, all of the declarants admitted that they either did not know how the services

⁴⁶ See Leiber Br. at 20-21.

⁴⁷ See id. at 22-23.

⁴⁸ JER(v.7):1910 and 1913.

⁴⁹ See MusicCity Br. at 15-16.

⁵⁰ See Grokster Br. at 21 n.6

worked or had no idea how much non-infringing content, if any, was being traded on them:

Janis Ian⁵¹

Q: I take it you've never used KaZaA yourself?

A: No.

Q: Or Grokster?

A: No.

Q: Or Morpheus?

A: No. I'm on a modem; it's way too slow.

Q: Do you have any personal knowledge of the materials that are available for download on any of those services?

A: **I surfed a while ago to see where my stuff was but I didn't take much note of anything else.**

* * *

Q: You have no idea whether there are people who have obtained all of the Janis Ian music they want in the form of free downloads from StreamCast? ...

A: **I have no idea, no.**

Q: Or Grokster?

A: No.

Sean Mayers⁵²

Q: Do you have personal knowledge of whether any users are using the defendants' systems to download non-infringing content that is not JIVE Media content? ...

A: **... No, not really. I mean, you're asking me to speculate what other people are doing with this technology. I don't know.**

Richard Prelinger⁵³

Q: Do you know whether any user of Music City software has made available for downloading any Prelinger film?

A: No.

⁵¹ JER(v.5):1301-03.

⁵² JER(v.5):1327.

⁵³ JER(v.5):1348-1349.

Q: Do you know whether any user of Music City software has actually downloaded a Prelinger film?

A: No.

Brewster Kahle⁵⁴

Q: Do you have any knowledge regarding the portion of files that are available for downloading by Morpheus users that consists of public domain materials? ...

A: I don't know.

* * *

Q: Do you know whether any of the Prelinger films ever have been available to be downloaded by users of Grokster? ...

A: I do not know anybody that has ever used – I'm not familiar with anybody that has ever used Grokster.

MusicCity and Grokster also contend that they should not be found liable because their services technically have the capacity to support non-infringing uses.⁵⁵ To accept that contention effectively reads the word “substantial” out of the Sony-Betamax defense, rendering any non-infringing use sufficient to immunize their illegal conduct. Such a radical view simply cannot be reconciled with the plain language of Sony-Betamax. Nor can it be reconciled with this Court's decisions in Napster and Fonovisa, as both the Napster service and the Fonovisa swap meet could have been used for some non-infringing use. Indeed, in Abdallah, where there was no question that the “time-loaded” cassettes – an audiotape that runs for a certain predetermined time period – could be used for a non-infringing use, see 948 F. Supp. at 1456 n.5, the court nonetheless held that the seller was liable for contributory infringement, see id. at 1456 (“although time-loaded cassettes can be used for legitimate purposes, these purposes are insubstantial given the number of Mr. Abdallah's customers that were using them for counterfeiting purposes”).

⁵⁴ JER(v.5):1311-1314.

⁵⁵ See MusicCity Br. at 22-25; Grokster Br. at 26-29.

Accordingly, MusicCity and Grokster have failed to meet their burden under Sony-Betamax to demonstrate substantial non-infringing uses. Quite the contrary, the undisputed record shows that their services are used overwhelmingly to infringe copyrighted works.

D. MusicCity And Grokster Indisputably Have The Right And Ability to Supervise Infringing Activities.

MusicCity and Grokster concede that they profit from the infringing activities on their services. They contest only the element of vicarious liability that they have the right and ability to supervise those activities.⁵⁶ But that right and ability arises from their unique position in creating and maintaining their infringing networks. As discussed above, MusicCity and Grokster issue the instructions encoded in their software programs to create and “upgrade” their infringing networks. Indeed, as just one example, both MusicCity and Grokster can adjust the functioning of their services from a central location, and have done so. Users’ computers receive specific instructions from MusicCity’s and Grokster’s servers so that, even without the benefit of a central log-in server, they can cause update alerts to pop-up on their computers. By sending such instructions, MusicCity and Grokster have been able to fine-tune the performance of their services.⁵⁷

MusicCity’s and Grokster’s supervisory abilities are not diminished simply because they have engaged in self-serving conduct to “avoid liability.” On the contrary, their actions reveal the very rights and abilities they seek to conceal. For instance, MusicCity and Grokster once had the ability to add users to a “banned

⁵⁶ There can be no dispute that the Sony-Betamax defense is inapplicable to claims for vicarious copyright infringement. See Napster, 239 F.3d at 1022; see also MusicCity Br. at 40 n.38.

⁵⁷ JER(v.3):790-792, 794-804, 807-810 and 815-816; JER(v.9):2388-89, 2412-18; JER(v.10):2869, 2871, 2880-83; JER(v.12):3324, 3373, 3375, 3411, 3416, 3421-22, 3427, 3433.

list” by blocking the user’s Internet address.⁵⁸ MusicCity further admitted that it previously blocked the Internet addresses of entities that assisted copyright owners in enforcing their copyrights, but discontinued this practice.⁵⁹ Additionally, MusicCity and Grokster maintained the contractual right to ban users from their services, which MusicCity voluntarily abandoned in its recent Morpheus 2.0 software program.⁶⁰

Moreover, MusicCity and Grokster are able to change the protocol and encryption governing all communications on their services. They did so to block the efforts of a group of hackers⁶¹ and to terminate the ability of all MusicCity users to connect to the service.⁶² MusicCity also now admits that it “has the ability to instigate the download and installation of [a software] upgrade.”⁶³ And Grokster has or had the right under its licensing agreement with co-defendant Kazaa BV to request changes to the software program.⁶⁴ Thus, while Grokster may not have initially designed the software, its contention that it “has no control over the design” of the software⁶⁵ is belied by the undisputed record.

⁵⁸ JER(v.9):2511-13 and 2517-18; JER(v.11):2943-44 and 3021-23.

⁵⁹ JER(v.10):2665.

⁶⁰ JER(v.1):274, 292-293; JER(v.3):796-797; JER(v.22):6339; JER(v.23):6632.

⁶¹ JER(v.9):2522-23 and 2546-47; JER(v.3):803 and 810.

⁶² JER(v.9):2594-99; JER(v. 3):811.

⁶³ MusicCity Br. at 14 n.11.

⁶⁴ JER(v.18):5139 and 5142.

⁶⁵ See Grokster Br. at 47-48.

E. Secondary Liability Principles Are Wholly Consistent with Holding MusicCity and Grokster Liable.

MusicCity and Grokster are joint tortfeasors with their users, perpetrating a scheme of massive copyright infringement, while lining their pockets with the profits from the illicit trafficking on their services. It is fundamentally inequitable that MusicCity and Grokster can “profit[] from the infringing and unlawful activities of [their users] without shouldering any of the undesired burdens associated with protection of intellectual property rights.” Perfect 10 v. Cybernet Ventures, 213 F. Supp. 2d 1146, 1191 (C.D. Cal. 2002). Under these circumstances, imposing liability is wholly consistent with the rationales underlying secondary liability doctrines.⁶⁶

Grokster concedes this point by its silence. MusicCity complains that the Leiber Appellants seek to abandon secondary copyright liability and replace it with “an expansive form of enterprise liability.”⁶⁷ MusicCity further maintains that applying enterprise liability to copyright law would “create liability without limit,” painting a fantastical parade of horrors.⁶⁸

But MusicCity’s diatribe on general enterprise liability principles fails to appreciate that, far from abandoning secondary copyright liability, enterprise liability is wholly consistent with that doctrine. Secondary copyright liability originated almost 100 years ago from the very concept of enterprise liability, which holds joint tortfeasors liable for the same underlying harm.⁶⁹ As this Court has recognized, contributory infringement liability is but a species of enterprise

⁶⁶ See Leiber Br. at 23-29.

⁶⁷ MusicCity Br. at 49.

⁶⁸ See id. at 50-54.

⁶⁹ See Leiber Br. at 24-26; see also Kamel v. Harper Bros., 222 U.S. 55 (1911).

liability. See Fonovisa, 76 F. 3d at 264 (“Contributory infringement has been described as an outgrowth of enterprise liability”).

Under the principles of secondary liability, MusicCity’s and Grokster’s comparisons of themselves to various other Internet companies and device manufacturers are inapposite.⁷⁰ This case is not about the conduct or business models of Xerox, Memorex, AOL, QUALCOMM, or Microsoft. Those companies have not built businesses on the massive infringement of copyrighted works.

On the undisputed facts of this case, MusicCity and Grokster are secondarily liable. MusicCity and Grokster operate commercial businesses that depend upon their millions of end-users offering a veritable treasure trove of copyrighted music and motions pictures for downloading by others – all for free and without any compensation to the copyright owners. MusicCity and Grokster stake out the incredible proposition that they may release their software onto the Internet, harm countless thousands of copyright owners, and all the while never have to account for the consequences.⁷¹ Well-settled secondary liability principles are consistent with holding MusicCity and Grokster liable here because they have actual knowledge of, are complicit in, and profit directly from, infringing activities on their services.

F. MusicCity And Grokster Concede That The District Court’s Order Deprives Songwriters And Music Publishers Of Their Rights Under The Copyright Act.

The District Court’s Order upends the carefully calibrated balance between encouraging creativity and enabling public access to creative works, thereby depriving songwriters and music publishers of their rights under the Copyright Act.⁷² Neither MusicCity nor Grokster address the merits of this argument:

⁷⁰ See MusicCity Br. at 14; Grokster Br. at 5.

⁷¹ See Grokster Br. at 32-33.

⁷² See Leiber Br. at 29-34.

MusicCity only makes an immaterial comment in a footnote,⁷³ and Grokster is completely silent.

What remains undisputed is that the Copyright Act expressly confirms that the exclusive rights of songwriters and music publishers in their copyrighted musical compositions extend to the distribution and copying of their works over the Internet.⁷⁴ Furthermore, MusicCity and Grokster leave unrebutted the fact that songwriters and music publishers are especially vulnerable to copyright infringement in the online world, and that they rely upon compliance with U.S. copyright laws and upon licensing royalties for their livelihoods.⁷⁵ Congress made clear that those who seek to exploit copyrighted musical works without obtaining the necessary licenses should be held fully accountable,⁷⁶ regardless of the medium through which that exploitation occurs. Thus, contrary to the entreaties of MusicCity and Grokster, which the District Court embraced,⁷⁷ Congress has already taken action, and it is now for the courts to faithfully apply the law. Appellants are here because the District Court erred in carrying out that duty.

At bottom, MusicCity and Grokster concede that, by acquitting commercial services that exploit rampant copyright infringement for profit, the District Court's decision effectively deprives songwriters and music publishers of the exclusive rights granted by Congress to exploit their works on the Internet, leaving thousands of songwriters and music publishers – who cannot police the conduct of the millions of individual users of Appellees' services – with no realistic recourse to

⁷³ See MusicCity Br. at 54 n.47 (noting only its “puzzl[ement]” but not addressing the argument).

⁷⁴ See Leiber Br. at 31.

⁷⁵ See *id.* at 31-33.

⁷⁶ See *id.* at 32.

⁷⁷ See MusicCity Br. at 2-3, 53-54; Grokster Br. at 7; JER(v.27):7684.

protect their copyrights.⁷⁸ Left standing, the decision below thwarts Congress's express intent and threatens the livelihoods of songwriters and music publishers everywhere.

As legendary songwriter Mike Stoller solemnly noted, "Few people could afford to be professional artists if they are not paid for their work. That, without question, would mean a very different musical world. And we would all be poorer for it."⁷⁹

⁷⁸ See id.

⁷⁹ JER(v.4):929.

III.

CONCLUSION

For the foregoing reasons, this Court should grant the relief requested in the Leiber Appellants' Opening Brief.⁸⁰

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⁸⁰ See Leiber Br. at 35.