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Re **MGM Studios, Inc., et al. v. Grokster Ltd., et al.**

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11
 12 UNITED STATES DISTRICT COURT
 13 CENTRAL DISTRICT OF CALIFORNIA
 14 WESTERN DIVISION

15
 16 METRO-GOLDWYN-MAYER STUDIOS,
 INC., et al.,

17 Plaintiffs,

18 v.

19 GROKSTER, LTD., et al.,

20 Defendant.

Case No. CV 01-08541 SVW (PJWx)

**DEFENDANT GROKSTER'S REPLY
 MEMORANDUM IN SUPPORT OF
 MOTION FOR PARTIAL SUMMARY
 JUDGMENT**

Date: March 4, 2002

Time: 1:30 p.m.

Dept: 6

I. INTRODUCTION¹

1 Jennifer sits down at her computer. She is a sixteen-year-old music fan. Half
2 of her allowance goes to buying CDs of Britney Spears, 'N Sync, Christine Aguilera,
3 and the Backstreet Boys. She has just purchased a Sony MP3 player: a tiny device
4 that allows her to carry around dozens of her favorite songs on a tiny microchip. But
5 first she needs to load those songs into the device, in the popular MP3 compressed
6 audio format. She could "rip" them from the CDs she already owns (a process of
7 translating the digital files on her CDs into the ten-times more compact MP3 format),
8 but that process is complicated and confusing. Instead, she decides to download MP3
9 versions of those songs.

10 Jennifer turns on her Sony Vaio computer. The computer first loads the
11 Microsoft Windows operating system. Jennifer then connects to the internet, by
12 launching AOL Version 7.0. Jennifer is an AOL subscriber, and AOL has recently
13 automatically sent her an update to the current version. The AOL software, along with
14 the Microsoft operating system, activates Jennifer's 3Com modem and connects her to
15 AOL. Once connected to the AOL network, Jennifer uses AOL's instant messaging to
16 ask a friend about music swapping software. The friend points Jennifer to an AOL
17 "message board," where she reads users' comments concerning various software
18 programs. The users' comments teach Jennifer that it is best to use a broadband
19 connection, through network providers such as ATT Broadband, Time Warner cable,
20 or her local phone company, but those connections are more expensive, so she sticks
21 with her AOL dialup account. The message boards also explain to Jennifer that she
22 can find any song she wants simply by using any search engine (such as Yahoo or
23 AltaVista) within her Microsoft or AOL browser. But she also learns that file-sharing
24 software such as Morpheus, Grokster, or Kazaa is easier to use.

25 Jennifer uses her browser to download a copy of Grokster, which is stored on
26 her computer's hard drive. She then starts her copy of Grokster. After registering her
27 copy, she enters search terms for the songs she wants. Without any involvement of any
28 computer or server operated by Grokster, her software searches the computers of
other Grokster, Morpheus, and Kazaa users and finds copies of the songs she wants.
She downloads those songs from other users, routed to her through various
commercial internet service providers, and then shuts down her copy of Grokster.

Next, she wants to organize those songs into a playlist, and listen to them on
her computer. Again using her AOL or Microsoft browser, she downloads the most
popular MP3 "player," WinAmp, from its AOL-owned author and distributor. Using
WinAmp, she listens to her favorites songs, and decides on a sequence. She then
copies those songs into her Sony MP3 player, using Microsoft and Sony software and
hardware. She also decides to make a CD of her selections. Using MusicMatch
software that came free with her Sony computer (software that also would have
allowed her to "rip" the songs from her CDs in the first place and share them with
others), she inserts a Memorex writable CD into her computer's drive, and creates a
new CD with dozens of her favorite songs, in the order she has chosen.

¹ Grokster submits this Reply in support of the pending motions in both the MGM and Leiber actions. As the matters are not consolidated, identical briefs are being filed under both captions.

1 The plaintiffs in this case contend that what Jennifer has done is illegal, even if she has
2 already bought copies of the songs she has downloaded. The record companies who claim to
3 hold the copyrights in those songs could—if they chose—sue her for infringement. But suing
4 one's own sixteen-year-old customer, for using the products one's corporate parent has sold to
5 her, is hardly an inspired business plan.

6 So who can the record companies sue? Why not sue anyone who sold or gave Jennifer
7 any of the tools she used? After all, Jennifer could not have committed her crimes without the
8 aid of a host of co-conspirators, each of whom has derived profits from that crime, and each of
9 whom must be aware that there are millions of Jennifers involved in this massive international
10 crime spree. Sony, AOL-Time Warner, Microsoft, ATT Broadcom, Memorex, MusicMatch,
11 WinAmp, Yahoo, 3Com, the chip makers, the drive manufacturers, and Grokster all provide
12 tools that enable Jennifer to commit her crimes, all profit (or hope to someday) from providing
13 those tools, and all know that a major use of their products is the massive piracy alleged in this
14 lawsuit.

15 II. ARGUMENT

16 This motion—and this case—presents a key issue for decision by this Court: under the
17 controlling authority of Sony v. Universal City Studios, 464 U.S. 417 (1984), does the
18 distribution to the general public of a tool—a piece of hardware or software—expose the
19 distributor of that tool to contributory liability when the end user of that tool uses it to infringe
20 the copyrights of others? So long as that tool is capable of non-infringing uses, the answer is
21 plainly “no.”

22 A. The Grokster, Morpheus, and Kazaa Products are Articles of Commerce, Not 23 “Networks” or “Services.”

24 In an effort to avoid the clear application of controlling precedent, the Plaintiffs herein
25 heap adjective upon adjective, hyperbole upon hyperbole, in an attempt to portray the
26 Defendants' distribution of software as something entirely different from that of any of the other
27 companies who profit from internet file sharing: a “continual and persistent” joint effort at
28 “massive” copyright infringement via the operation of an “immense” and “infamous” “network”

1 purportedly under their control. Clearly Plaintiffs hope that, if they just describe the Defendants'
2 distribution of a piece of software as a "network" often enough, the Court will not look to the
3 facts underlying that characterization. The "network" at issue here is the internet itself, and the
4 Defendants no more control the actions of its users than any of the thousands of other companies
5 that provide the hardware and software used in connection with the internet. Each of these
6 companies knows perfectly well that its products are instrumental in "massive" copyright
7 infringement. Some of them are plaintiffs in this case, alleging precisely that. Moreover, each of
8 them has "continual and persistent" relationships with their customers. Software vendors
9 routinely require their users to register their software. They routinely provide frequent upgrades
10 to their software. They routinely maintain websites providing all manner of technical support.
11 Service providers such as AOL and Yahoo host chat rooms in which users routinely trade tips
12 about illegal activity. Similarly, they make money from their infringing users, both directly and
13 through advertising revenue. None of these entirely typical and ancillary functions, however,
14 contributes in any legal sense to copyright infringement by their customers. And Plaintiffs do
15 not contend that Microsoft is contributorily liable simply because virtually every music pirate in
16 the world uses Microsoft's software, or that AOL is contributorily liable simply because millions
17 of its users connect to the internet and steal music through AOL's network.²

18 But Morpheus, and Grokster, and Kazaa are no different. Just as any other vendor of
19 hardware or software connected to the internet, they are of course aware as a general matter that
20 many of their users are infringing copyrights. But just as any other software provider, they have
21 no way of knowing in advance what use a prospective customer will make of their product, and
22 no way of controlling the use to which their software is put once the customer acquires it.
23 Absent some other basis for liability, under Sony the mere provision of software cannot form the
24 basis of a contributory liability claim.

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26 ² Indeed, it is curious that Plaintiffs chose to file suit against the current Defendants, insisting
27 that they do something (although they cannot say what) about alleged infringements. One would
28 expect that—having identified thousands of alleged infringements by AOL's own customers—
they would at a minimum ask their own co-Plaintiff AOL-Time Warner to terminate the accounts
of its own infringing customers. But of course, that would threaten their own income stream (a
stream based in significant part on the very infringements alleged here), rather than blaming the

1 Plaintiffs argue, in conclusory fashion, that Defendants do “much more” than simply
 2 provide a product. But it is important to look behind that rhetoric and examine what—
 3 precisely—Plaintiffs submit as that “much more.” Primarily, that “evidence” consists of isolated
 4 postings of comments in chat rooms on the Morpheus website concerning swapping of
 5 copyrighted files. But putting aside the paucity of that evidence as regards Morpheus, Plaintiffs
 6 have adduced no such evidence regarding Grokster. Nor can that complete failure of evidence be
 7 blamed on a lack of discovery: the contents of the Grokster chat rooms is public, and freely
 8 available to the Plaintiffs. As their opposition notes, Plaintiffs have downloaded and preserved
 9 the entire contents of the Morpheus website for analysis (Creighton Decl., ¶ 39), and have
 10 presumably done so for the Grokster site as well. Nonetheless, they submit no evidence of any
 11 such allegedly incriminating postings on the Grokster site, or any action by Grokster beyond the
 12 initial distribution of the software itself.

13 **B. Grokster, MusicCity, and Kazaa Cannot Monitor or Control the Activities of Their**
 14 **Users**

15 Plaintiffs also submit no evidence to establish or suggest that Grokster (or Morpheus or
 16 Kazaa) has any ability to control the actions of their users. They do not dispute Morpheus’
 17 evidence that, if Morpheus and Grokster and Kazaa ceased operation entirely, the file sharing
 18 portions of their software would continue to function.³ Rather, they suggest that, were all three
 19 Defendants to cease operations entirely, they would nonetheless continue to be liable for future
 20 infringements by users beyond their control. In support of this proposition, they argue (at page
 21 18, footnote 10, emphasis added) that

22 “If the swap meet operator in Fonovisa prevented sales of counterfeit records, the
 23 infringing vendors might very well meet across the street the next weekend, and
 24 the defendant could not stop them. But there is no suggestion that that could in
 25 any way absolve the defendant of liability.”

26 problem on others.

27 ³ Other functions would cease, but they are unrelated to the copying of files. For example, the
 28 Grokster “start page,” which features independent music and video artists who support and
 depend on peer-to-peer software, would cease, as would the ability of Grokster to provide
 software updates, and users’ access to chat rooms and instant messaging.

1 This is a remarkable proposition: if the swap meet owner in Fonovisa had exercised
2 control to the full extent available to him, and had barred all infringers from his property, he
3 would in the Plaintiffs' view still be liable when the counterfeiters set up shop the next week on
4 someone else's property! Apparently, once the record companies name a defendant, that
5 defendant has been deputized, and is charged with tracking down and eradicating infringement
6 wherever it may be found, regardless whether the activity takes place on its property, or with its
7 assistance, or within its control.

8 This, of course, is not the law. As the Ninth Circuit made clear in A&M Records v.
9 Napster, 239 F.3d 1004 (2001), the obligation to police the actions of one's customers is
10 coextensive with one's ability to do so: one cannot be held liable for failing to do the
11 impossible.⁴ But Plaintiffs, for all their rhetoric, never suggest to either the Defendants or the
12 Court what, precisely, they are asking Defendants to do to enforce their copyrights for them.
13 There is a good reason for that omission: what Plaintiffs want is for Morpheus, Kazaa, and
14 Grokster to cease distributing their products entirely. But Plaintiffs are understandably loath to
15 say so in this motion, because to say so would be to make crystal clear that the instant partial
16 summary judgment motion—which Plaintiffs portray as relevant to “only one piece of evidence
17 with respect to Defendants' unlawful scheme” (Leiber Opp. at 6)—goes to the heart of this case.
18 This case is not about isolated snippets of user comments in a chat room. It is about whether a
19 collection of purported holders of copyrights can unilaterally bar an emerging technology.

20 Plaintiffs admit as much, although obliquely, when they argue that Defendants should be
21 held liable because they did not create and distribute a different product, designed more to the
22 liking of the major labels and film studios (MGM Opp. at 20). But the mere speculation that a
23 different product could be designed in a way more to the Plaintiffs' liking does not render this
24 technology illegal. If it were so, then Sony would have been liable for designing and selling

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26 ⁴ As a formal matter, the issue of control is actually irrelevant to claims of contributory liability:
27 it is an element only of vicarious liability. Plaintiffs, however, attempt to conflate the two,
28 apparently arguing that the Defendants' ability to “control” their users lies not in any ability to
filter or limit the use of their software, but rather in their assumed ability to have designed a
different product in the first instance, or to refrain from designing a product at all. But if this
were “control” for vicarious liability purposes, the Sony doctrine would be a nullity, as any

1 VTRs, because Sony could have designed them to be incapable of making infringing copies.
2 The Supreme Court in Sony, however, rejected precisely this argument, urged by the dissent, that
3 “Sony may be able, for example, to build a VTR that enables broadcasters to scramble the signal
4 of individual programs and ‘jam’ the unauthorized recording of them.” Sony, 464 U.S. at 494
5 (Blackmun, J., dissenting). Similarly, there would be no cassette players in the world, because
6 they could have been designed to inhibit rather than facilitate illegal copying. Photocopiers
7 would likewise be taboo, as they were designed and sold with nary a thought to policing the
8 actions of their users. Radios, once considered the death of copyright, would have been banned
9 from the earth long before any artist received a penny of royalties. And of course, there would
10 be no CD’s, and no digital audio at all, because no single innovation in the past fifty years has
11 done more to enable the easy creation of multiple, good-as-the-original illegal copies than digital
12 audio.

13 But of course, all of these key technological innovations are legal, notwithstanding the
14 clear degree to which each has facilitated and encouraged massive copyright infringement,
15 because they are each technologies that are also capable of non-infringing uses. So too is peer-
16 to-peer filesharing, and thus under the clear dictates of Sony, this emerging technology cannot be
17 banned. As the Sony court held, the Copyright Act does not confer upon copyright holders the
18 power to ban threatening technology:

19 It seems extraordinary to suggest that the Copyright Act confers upon all
20 copyright owners collectively, much less the two respondents in this case, the
21 exclusive right to distribute VTR’s simply because they may be used to infringe
22 copyrights. That, however, is the logical implication of their claim. The request
23 for an injunction below indicates that respondents seek, in effect, to declare
24 VTR’s contraband. Their suggestion in this Court that a continuing royalty
25 pursuant to a judicially created compulsory license would be an acceptable
26 remedy merely indicates that respondents, for their part, would be willing to
27 license their claimed monopoly interest in VTR’s to Sony in return for a royalty.

24 Sony, 464 U.S. at 441 n. 21.

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28 manufacturer has the “control” implicit in its ability to refrain from making its product at all.

1 **C. Capability for Non-Infringing Use Cannot Be Based on Proportionate Shares, and**
2 **Must Consider Future As Well As Present Use**

3 In an attempt to avoid the inevitable dictates of Sony, Plaintiffs ask this Court to
4 disregard the indisputable evidence that Grokster, Morpheus, and Kazaa have non-infringing
5 uses, on the ground that those uses are currently in the minority relative to infringing uses. There
6 are, however, two essential flaws with that argument. First, the “proportional use” approach was
7 expressly rejected by the Supreme Court in Sony. In that case, the plaintiffs (both of whom are
8 plaintiffs here as well) argued that non-infringing uses of the Betamax VCR were dwarfed by the
9 allegedly infringing uses, and thus that the staple article of commerce doctrine should not apply.
10 The minority in Sony agreed, noting that the evidence of non-infringing use was at best only 7%
11 of all use, and urged a decision based upon the proportions of infringing and non-infringing use.
12 Sony, 464 U.S. at 493-94. The majority, however, disagreed, and held that—in order to avoid
13 contributory liability—a new technology “need merely be capable of substantial noninfringing
14 uses.” Sony, 464 U.S. at 442.⁵

15 In so holding, the Sony court recognized the second flaw in Plaintiffs’ argument here:
16 the courts cannot decide the fate of a new and useful technology based upon the usage of that
17 technology in its infancy. Rather, courts must look to the capability of future non-infringing use
18 as well as the initial uses to which the technology is put. At the time the Sony case was decided,
19 Hollywood was decrying the advent of video tape recorders as the end of civilization as we know
20 it. The predominant use of video tape recorders was for home copying of copyrighted works,
21 and Hollywood had not yet understood the vast potential market for pre-recorded tapes—a
22 market that today dwarfs the studios’ income from first-run theaters. Had the Sony court based
23 its decision solely on the current state of the market, rather than looking to potential uses,
24 Hollywood would have succeeded in banning a technology that today is its biggest market. This

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26 ⁵ In so holding, the Sony court recognized that—just as here—not all copyright holders might
27 choose to deny authorization for copying of their works: “It is not the role of the courts to tell
28 copyright holders the best way for them to exploit their copyrights: even if respondent’s
competitors were ill-advised in authorizing home videotaping, that would not change the fact that
they have created a substantial market for a paradigmatic noninfringing use of Sony’s product.”
Sony, 464 U.S. at 447.

1 is hardly an isolated instance: indeed, virtually every new technology, from piano rolls to vinyl
2 records to radio to cassette tapes to cable television to digital audio tapes to mp3 players, has
3 initially been met with desperate predictions of doom and concerted efforts to ban those
4 technologies in the courts and in Congress. And in each instance, at the time of those initial
5 efforts, the legal and profitable ways to exploit the new technology were not apparent to the
6 movie and recording industries. Only as the technologies matured (and only because the courts
7 declined to ban them in their infancy) did the substantial non-infringing uses of those
8 technologies develop and come to dominate.

9 Peer-to-peer filesharing is only the latest in this endlessly repeating cycle. It is no
10 surprise that—just as the studios initially resisted video tape rather than releasing prerecorded
11 tapes—the established record and movie companies have resisted opportunities to exploit peer-
12 to-peer technology. When one entirely dominates the existing means of distribution, one tends to
13 resist change. But already some copyright holders have understood and embraced the promise of
14 peer-to-peer technology as an incredibly efficient and entirely cost-free means of distribution.
15 As shown by the J!VE Player example, currently available digital rights management techniques⁶
16 allow copyright holders to exploit and profit from the enormous potential of peer-to-peer
17 technology. Those noninfringing uses already exist, and will grow in the future. And those uses
18 are sufficient to defeat a finding of contributory infringement. As the Napster court held, it is
19 thus inappropriate to base decisions concerning noninfringing use solely on the present uses of
20 an emerging technology:

21 We depart from the reasoning of the district court that Napster failed to
22 demonstrate that its system is capable of commercially significant noninfringing
23 uses. The district court improperly confined the use analysis to current uses,
24 ignoring the system's capabilities. Consequently, the district court placed undue
weight on the proportion of current infringing use as compared to current and
future noninfringing use.

25 Napster, 239 F.3d at 1021 (emphasis added; citations omitted).

26
27 ⁶ Digital Rights Management, or “DRM”, allows content to be encrypted and then distributed.
28 When a user downloads an encrypted file, she is then free to redistribute copies at will, creating a
vast network of “superdistribution” which costs the original publisher nothing. When a recipient
goes to play the encrypted file, he or she is first required to transfer electronic payment to the

1 **D. Plaintiffs' Procedural Arguments Are Meritless**

2 Finally, Plaintiffs urge the Court to reject out of hand Grokster's (and Kazaa's) joinders
3 in MusicCity's motion on technical grounds, arguing that Grokster should have submitted its
4 own separate statement of undisputed facts. This is nonsense: nothing in Local Rule 56-1
5 requires that each party joining in a noticed motion must resubmit duplicate statements of the
6 same undisputed facts. Rather, Rule 56-1 requires such a statement to accompany only "each
7 notice of motion for summary judgment." The instant motion was noticed by MusicCity, and a
8 statement of undisputed facts accompanied that notice. Grokster joined in that motion.

9 More importantly, Grokster's joinder is based solely on the undisputed facts set forth in
10 MusicCity's statement, combined with binding party admissions contained in the Plaintiffs' own
11 complaints. MusicCity's motion establishes the two relevant facts here: that the Morpheus
12 software is capable of noninfringing uses, and that MusicCity cannot control the uses to which
13 that software is put. The only additional fact needed to extend the Court's holding to Grokster's
14 software as well—that the Grokster software is functionally identical to the Morpheus
15 software—is established by the Plaintiffs' own complaint, and as a party admission cannot be
16 disputed. Accordingly, no rational purpose could be served by requiring redundant statements of
17 the same uncontested facts in the same motion.

18 **III. CONCLUSION**

19 Although this case is about new technology, the themes are anything but new: just as at
20 each step in the past century's advances in technology, the major studios and record companies,
21 wedded to the previous means of distribution, ask the courts to ban the next generation of
22 technology. And each time, the courts correctly find that holding a copyright—or even a very
23 big pile of copyrights—does not entitle the holder to extend that limited monopoly to ban an
24 entire technology. The result here should be no different. Grokster thus respectfully asks this
25 Court to grant partial summary judgment and find that distribution of the

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28 publisher.

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Kazaa/Morpheus/Grokster software to the general public does not give rise to liability for contributory copyright infringement.

Dated: February 21, 2002

KEKER & VAN NEST, LLP

By: _____

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Attorneys for Defendant
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PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Kecker & Van Nest, LLP, 710 Sansome Street, San Francisco, California 94111.

On February 25, 2002, I served the following document(s):

DEFENDANT GROKSTER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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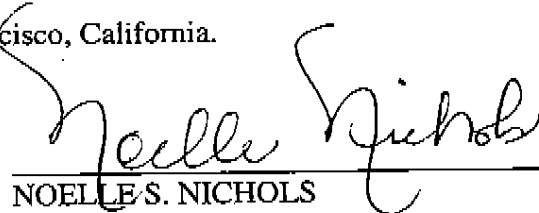
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 25, 2002, at San Francisco, California.


NOELLE S. NICHOLS