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

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

16 Plaintiffs,

17 v.

18 GROKSTER, LTD., et al.,

19 Defendants.

Case No. CV 01-08541 SVW (PJWx)

21 JERRY LEIBER, et al.,

22 Plaintiffs,

23 v.

24 GROKSTER, LTD., et al.,

25 Defendants.

Case No. 01-09923 SVW (PJWx)

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

Date: December 2, 2002  
 Time: 1:30 p.m.  
 Dept: 6

26 AND RELATED COUNTERCLAIMS  
 27

28

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## I. INTRODUCTION

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

11 Jennifer turns on her new Sony Vaio computer. Like millions of other users,  
12 Jennifer's family—having been besieged with ads encouraging them to "Mix. Rip.  
13 Burn."—purchased a computer with a built-in CD burner, modem, and audio and  
14 video recording and playback software. The computer first loads the Microsoft  
15 Windows operating system. Jennifer then connects to the internet, by launching AOL  
16 Version 7.0. Jennifer is an AOL subscriber, and AOL has recently automatically sent  
17 her an update to the current version. The AOL software, along with the Microsoft  
18 operating system, activates Jennifer's 3Com modem and connects her to AOL. Once  
19 connected to the AOL network, Jennifer uses AOL's instant messaging to ask a friend  
20 about music swapping software. The friend points Jennifer to an AOL "message  
21 board," where she reads users' comments concerning various software programs. The  
22 users' comments teach Jennifer that it is best to use a broadband connection, through  
23 network providers such as AT&T Broadband, Time Warner cable, or her local phone  
24 company, but those connections are more expensive, so she sticks with her AOL dialup  
25 account. The message boards also explain to Jennifer that she can find any song she  
26 wants simply by using any search engine (such as Yahoo or AltaVista) within her  
27 Microsoft or AOL browser. She can also share files via her AOL Instant Messenger.  
28 But she also learns that file-sharing software such as Morpheus, Grokster, or Kazaa is  
easier to use.

Jennifer uses her browser to download a copy of Grokster, which is then stored  
on her computer's hard drive. She then starts her copy of Grokster, and she enters  
search terms for the songs she wants. Without any involvement of any computer or  
server operated by Grokster, her software searches the computers of other Grokster,  
Kazaa, and iMesh 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. In the process, she notices an ad on the Grokster site for a new band,  
MaddWest. She clicks on the ad to download a copy of their new song. When she goes  
to play it, she notices that it is digitally protected by Microsoft's digital rights  
management software, but that she has been given a 30-day free license to play the  
song. After 30 days, if she likes the song, she will need to buy a license. She 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 one of the  
most popular MP3 "players," 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

1 *hardware. She also decides to make a CD of her selections. Using MusicMatch*  
2 *software that came free with her Sony computer (software that also would have*  
3 *allowed her to “rip” the songs from her CDs in the first place and share them with*  
4 *others), she inserts a Memorex writable CD into her computer’s drive, and creates a*  
5 *new CD with dozens of her favorite songs, in the order she has chosen.*

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

11 So who can the record companies sue? Why not sue anyone who sold or gave Jennifer  
12 any of the tools she used? After all, Jennifer could not have committed her crimes without the  
13 aid of a host of co-conspirators, each of whom must be aware that there are millions of Jennifers  
14 involved in this massive international crime spree. Sony, AOL-Time Warner, Microsoft, AT&T  
15 Broadcom, Memorex, MusicMatch, WinAmp, Yahoo, 3Com, the chip makers, the drive  
16 manufacturers--and Grokster--all provide tools that enable Jennifer to commit her crimes, all  
17 profit (or hope to someday) from providing those tools, and all know that a major use of their  
18 products is the massive piracy alleged in this lawsuit. By the logic of Plaintiffs’ suit, all of these  
19 co-conspirators are equally culpable.

20 This motion—and this case—presents two key issues for decision by this Court: First,  
21 under the controlling authority of Sony v. Universal City Studios, 464 U.S. 417 (1984), does the  
22 distribution to the general public of a tool—a piece of hardware or software--expose the  
23 distributor of that tool to contributory liability when the end user of that tool uses it to infringe  
24 the copyrights of others? So long as that tool is capable of noninfringing uses, the answer is  
25 plainly “no.” Second, under the controlling authority of A&M Records, Inc. v. Napster, 239  
26 F.3d 1004 (2001) and Fonovisa, Inc. v. Cherry Auction, Inc. 76 F.3d 254 (9<sup>th</sup> Cir. 1996), can the  
27 supplier of a piece of software be held vicariously liable for alleged copyright infringements  
28 committed by users of that software? When the supplier does not have the ability to control that  
conduct, the answer is again plainly “no.”

## II. FACTUAL BACKGROUND

1  
2 Grokster Ltd. is a small, family-run business: its sole personnel are Daniel Rung, his son  
3 Matthew, and his brother Michael. Declaration of Daniel B. Rung (“Rung Decl.”)<sup>1</sup> They  
4 distribute the Grokster software product under license from Consumer Empowerment BV (now  
5 known as Kazaa BV). The Grokster software is functionally identical to the Kazaa Media  
6 Desktop, which is distributed by Sharman Networks: both products, and others, enable users to  
7 exchange files of any sort with other users via the FastTrack protocol. Grokster has no role in  
8 the design of the Grokster product itself, has no access to the source code for the product, and  
9 has no more understanding of the inner workings of the product than any other outside observer.  
10 Grokster’s sole “control” over the operation of its version of the FastTrack software consists of  
11 the ability to design its own “Start Page,” the web page that is sent to Grokster users when they  
12 launch their copy of the software, and the ability to designate the identity of advertising servers  
13 from which the Grokster software requests advertising content. By way of analogy to the Sony  
14 case, if Consumer Empowerment is the manufacturer of the VCR, Grokster is Circuit City: we  
15 get to put our brand name on the box and bundle our own advertising with it, but we can’t  
16 change the way it works inside.

17 As a result, Grokster has absolutely no ability to control the uses to which its product is  
18 put. When users search for files, the search requests and results are invisible to Grokster: they  
19 are transmitted between users without any contact with Grokster, just as electronic  
20 communications among users of Microsoft’s Outlook or Explorer products are invisible to  
21 Microsoft. Grokster has no way of knowing what files are being exchanged, or by whom. The  
22 only communications Grokster receives from its users’ computers are (1) requests for the content  
23 of Grokster’s “start page,” a typical HTML web page, and (2) automatic periodic requests to “ad  
24 servers,” which in turn return advertising content to the users. Those requests, and the resulting  
25 content and ads, are unrelated to the filesharing activities of the users: the Grokster application  
26 requests and displays ads regardless whether the user is sharing infringing files, noninfringing

27  
28 <sup>1</sup> Unless otherwise indicated, the facts set forth in this section are based upon the declaration of Daniel B. Rung, Grokster’s founder.

1 files, or no files whatsoever.

2       Neither does Grokster know, with any degree of certainty, the identities of its users. With  
3 earlier versions of the FastTrack software, when a user first installed the software he or she was  
4 prompted to register a user name, which along with the user's email address was transmitted to  
5 Grokster's registration server. Each subsequent time the application was launched, the user  
6 name would be checked against the central registration server.<sup>2</sup> Subsequent versions of  
7 FastTrack, however, dispensed with user registration, apparently because technological advances  
8 enabled the FastTrack software to distinguish between redundant user names without requiring a  
9 central registration database.<sup>3</sup>

10       After the authors of the FastTrack software dispensed with the mandatory registration  
11 feature, Grokster was left with no way to reach its new users directly, other than posting notices  
12 on its "start page" or its website. Grokster, however, regularly publishes a newsletter, designed  
13 primarily to inform users of independent musicians and artists who have authorized the  
14 distribution of their work via peer-to-peer networks. Accordingly, Grokster continues to  
15 encourage its users to register their user names and email addresses with Grokster, and to sign up  
16 for the Grokster newsletter. A minority of users do so. As a result, Grokster has the ability to  
17 communicate with some, but not all, of its users.

18       Since the inception of this lawsuit, the Plaintiffs have from time to time provided  
19 Grokster with notifications of alleged infringements of their copyrighted works. Grokster has at  
20 all times cooperated with plaintiffs in responding to those notices, by doing all that is within its  
21 power to contact the users in question and convey the Plaintiffs' demands that they cease  
22 infringing activities. For example, several of the Plaintiffs retained a company named  
23

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24 <sup>2</sup> Grokster believes that the primary function of the former registration process was to insure that  
25 usernames were unique (i.e., that there was only one [johndoe@grokster.com](mailto:johndoe@grokster.com)); absent unique user  
26 names, functions like instant messaging will not work. In the event the user name did not match  
27 an entry in the user database (or if the Grokster database server was not functioning), the  
28 filesharing portion of the software would continue to operate, but functions such as instant  
messaging would not.

<sup>3</sup> We say "apparently" because Grokster is not privy to the technical details or source code for  
any version of FastTrack. By observation, however, we know (1) that there is no longer a  
registration server, but nonetheless (2) instant messaging still works.



1 MediaForce to search for infringing content. MediaForce then began sending literally thousands  
2 of individual emails to Grokster, each identifying a single alleged infringer. Grokster voluntarily  
3 created an automated program to process those emails, extract the user name, retrieve the  
4 corresponding email address from its user database, and send a notice to the user. That notice  
5 advised the user that, in the event a second such notice were received, his or her registration  
6 would be terminated. Rung Decl. Exh. B. Grokster also advised MediaForce how to continue to  
7 format its notices so that the automated process would function, and further instructed  
8 MediaForce that, in order to trigger Grokster's "repeat offender" policy, it need only include the  
9 words "REPEAT OFFENDER" in the subject line of a notification. Id. MediaForce responded  
10 that it would do so. Id.

11 Curiously, however, almost as soon as Grokster had set up this system, MediaForce  
12 simply stopped sending notifications. In deposition, MediaForce's president testified that the  
13 notifications were terminated at the instruction of the client, but that he had no idea why that  
14 instruction had been given. Declaration of Michael H. Page ("Page Decl."), Exh. A. More  
15 significantly, in the months in which MediaForce monitored Grokster traffic and sent thousands  
16 of "cease and desist" notices, MediaForce never notified Grokster of a single repeat offender.  
17 But despite the apparent efficacy of the notices, the Plaintiffs terminated the process. Grokster  
18 can only conclude that the abandoned notification process was part of a failed effort to build a  
19 litigation record of nonresponsiveness on Grokster's part, rather than a good faith effort to  
20 address and discourage alleged infringement.

21 That conclusion is bolstered by the actions of other Plaintiffs. For example, the Harry  
22 Fox Agency (which represents the class action Plaintiffs) recently forwarded a series of  
23 "summaries" of alleged infringements. In response, Grokster offered to set up an automated  
24 notification system similar to those used for notices from the RIAA, the MPAA, and  
25 MediaForce, and offered to coordinate the technological details with Harry Fox personnel.<sup>4</sup> Page  
26 Decl., Exh. C. Rather than accept that offer, however, Harry Fox responded that "your offer to

27 \_\_\_\_\_  
28 <sup>4</sup> In addition to the MediaForce notifications, Grokster periodically receives notifications from  
the RIAA and MPAA. As those notices are in suitable machine-readable formats, Grokster has

1 notify users of the Grokster system and service of their infringing activity is a meaningless  
2 gesture. Grokster users who copy and distribute copyrighted music without authorization need  
3 no notice that their conduct is unlawful.”<sup>5</sup> *Id.*, Exh. D. Notwithstanding Harry Fox’s refusal to  
4 cooperate, Grokster proceeded to send notices to the users identified by Harry Fox manually.

5 In each instance, Grokster has responded to notifications of alleged infringement in the  
6 same way: by doing everything within its power to dissuade and prevent such conduct,  
7 notwithstanding the Plaintiffs’ refusal to cooperate in such efforts. Grokster’s efforts, however,  
8 go further. Grokster, like many software companies, provides its users with free user forums,  
9 where users can share information concerning its products, such as bug reports, tips on using the  
10 software more effectively, and the like. Grokster also, like most software companies, provides  
11 an email address to which users may direct technical support questions. Notwithstanding that  
12 Grokster has only two active workers, it has undertaken the massive burden of actively  
13 monitoring those forums and responding to those questions, manually reviewing each of the  
14 thousands of messages before posting, deleting those with inappropriate content (in particular  
15 any reference to apparent copyright infringement), and sending appropriate responses.<sup>6</sup>

16 Grokster’s Terms of Service similarly discourage (and in fact forbid) any use of the  
17 Grokster software to infringe the copyrights of others. Page Decl., Exh. E. In contrast, Grokster  
18 actively promotes and encourages the use of its software for the sharing of authorized content.  
19 The Grokster “start page” consists primarily of reviews and promotional material designed to  
20 introduce the work of various independent artists who are not among the tiny minority blessed  
21 with major label or studio contracts, and are using the growing world of peer-to-peer file  
22 exchange software to distribute their work. Declaration of Scott Egbert (“Egbert Decl.”), Exh.

23 also automated the process of forwarding them to users.

24 <sup>5</sup> This language echoes the incessant mantra of the Plaintiffs in this matter: the Grokster “system  
25 and service . . . system and service . . . system and service . . .” repeated at every turn in hopes  
the Court will not notice that all Grokster does is distribute a product.

26 <sup>6</sup> As Grokster has only one person to do this work, the review is by necessity cursory, often  
27 based solely on the subject line of the message. Thus on occasion a message that by its subject  
line appears to seek technical advice will slip through despite reference to a copyrighted work  
28 somewhere in the body. The plaintiffs placed remarkable emphasis on these few examples in  
Mr. Rung’s deposition, while ignoring the hundreds of successfully blocked messages, and we

1 A. Grokster has entered into partnerships with several groups of independent artists, all of whom  
2 expressly authorize distribution of their works via peer-to-peer networks. Grokster partner  
3 GigAmerica represents approximately 7000 independent artists, virtually all of whom have  
4 authorized distribution of their music via Grokster. Each week, GigAmerica artists are featured  
5 on Grokster's start page. Featured GigAmerica artists routinely have their songs downloaded  
6 2000 times a week. Egbert Decl. ¶ 4-9. Grokster partner J!VE Media works with content  
7 providers to package digitally-protected free content and distribute it via Gnutella and FastTrack  
8 networks. Its clients include the Priority Records division of EMI (whose promotional video for  
9 recording artist Lil' Romeo was downloaded by 400,000 people, 60% of whom did so via peer-  
10 to-peer networks) and Koch International (the world's third-largest independent music label, for  
11 whom J!VE Media distributes music videos), among others. Declaration of Sean L. Mayers  
12 ("Mayers Decl."). Grokster partner ReelMind promotes its free distribution of independent films  
13 via Grokster. Each of Grokster's user newsletters highlights independent artists whose works are  
14 available for authorized distribution via peer-to-peer networks.

15 The authorized content created and distributed by Grokster's partners, however, is just  
16 the tip of the growing iceberg of authorized, noninfringing uses of peer-to-peer filesharing. The  
17 accompanying declaration of Aram Sinnreich provides a broad survey of the exciting potential  
18 and actual legitimate uses of distributed file sharing applications. Peer-to-peer filesharing  
19 provides dramatic and obvious advantages over traditional means of content distribution.  
20 Traditional means of music distribution require huge and inefficient capital-intensive means of  
21 production and distribution. Records and CDs must be produced in factories, packaged, and  
22 shipped throughout the world. At each stage in the chain, large organizations and facilities—  
23 warehouses, trucks, stores, and the like—must exist to support the system. And of course, each  
24 player in that capital-intensive chain must extract its costs and profit. As a result, traditional  
25 music distribution leaves little if any income for the artists: only those artists who achieve mass  
26 success make any money. Declaration of Janis Ian, ¶13.<sup>7</sup> And as corollary of the capital-

27  
28 expect them to do the same in opposition.

<sup>7</sup> Ms. Ian's declaration was submitted with Defendant Streamcast Networks' motions for

1 intensive nature of the industry, record companies are by nature conservative: when it takes  
2 millions of dollars of development and marketing to create a successful product, companies will  
3 by necessity stick to “safe” bets that can be depended on to sell to millions. The economics of the  
4 industry move inevitably to the lowest common denominator.

5 By contrast, peer-to-peer distribution is a near-perfect system: it reduces “transaction  
6 costs” (i.e., the costs of distribution unrelated to the creative process) essentially to nothing.  
7 Once a work is created and made available on the internet, the incremental cost of each copy is  
8 effectively zero. Not only is there no need for stores, trucks, and plastic boxes; there is not even  
9 a need for large banks of servers feeding copies to each user; the consumers become the  
10 distributors, propagating content among themselves at no cost to the artist. When combined with  
11 digital rights management systems already available, the result is a marketplace with no “middle  
12 men,” where the fruits of the artist’s labor fall to the artist, not the manufacturer and distributor.  
13 Great for artists, but not so good for middle men. Thus it is no surprise that it is the middle men,  
14 not the artists, who resist.

15 The experience of the band Wilco provides a dramatic example of the legitimate power  
16 and use of free internet distribution of content. Wilco was a moderately successful artist on AOL  
17 Time Warner’s Reprise Records. When Wilco delivered its new album, Yankee Hotel Foxtrot,  
18 Reprise declined to release it, feeling it had no commercial potential, and Wilco repurchased the  
19 work from Reprise for far less than it had cost to record. Wilco then decided to release the entire  
20 album for free downloading. In the first month alone, their website received 200,000 unique  
21 visitors, and all of the songs are now widely and legally available on the FastTrack network.  
22 This widespread interest prompted bids from various record labels, and Wilco was signed to a  
23 new contract by Nonesuch Records—another AOL Time Warner label. Nonesuch released the  
24 album, which debuted at #13 on the Billboard charts. The album has now sold in excess of  
25 300,000 units, and is Wilco’s best selling album ever. Thus a record rejected by one AOL Time  
26 Warner label as having no commercial potential became, as a result of free internet distribution,  
27 a hit record for another AOL Time Warner label. Sinnreich Decl., ¶¶ 9-13.

28  

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summary judgment, filed concurrently herewith.

1 Other record companies have also discovered—belatedly—the value of peer-to-peer  
2 distribution. For example, Lava/Atlantic Records—a division of Plaintiff Atlantic—is currently  
3 distributing, for free, songs from the current albums of a number of its artists (including a Simple  
4 Plan and Grade 8) via GigAmerica and Grokster. Egbert Decl., ¶10. and Exh. A. Other  
5 examples of noninfringing uses of peer-to-peer software abound. As set forth in greater detail in  
6 the accompanying declarations of Aram Sinnreich, Sean L. Mayers, Janis Ian, and Scott Egbert,  
7 noninfringing uses of peer-to-peer networks are widespread and growing. Thousands of musical  
8 groups authorize free distribution of their music. Independent filmmakers distribute their works  
9 via peer-to-peer. Video game manufacturers have distributed millions of copies of their games.  
10 Project Gutenberg has released thousands of public domain literary works for free sharing.  
11 Distributed networking initiatives, market research companies, advertisers, record companies  
12 distributing samples of albums, individuals sharing all manner of graphic and text files, software  
13 vendors giving away freeware and shareware programs, and established artists authorizing  
14 sharing of live recordings are but a few of the exciting uses to which peer-to-peer networks have  
15 already been put, even in the infancy of this new technology.

### 16 III. ARGUMENT

#### 17 A. The Supreme Court’s Sony Opinion Precludes Imposition of Contributory 18 Copyright Infringement Liability

##### 19 1. The Provider of a Product Capable of Substantial Noninfringing Uses 20 Cannot Be Contributorily Liable

21 This Court’s analysis of contributory copyright infringement is controlled by the  
22 Supreme Court’s landmark decision in Sony. In that case, various holders of copyrights in  
23 motion pictures and programs broadcast on commercial television filed suit against Sony,  
24 seeking to enjoin the manufacture and distribution of the Sony Betamax video cassette recorder  
25 (“VCR”) on the ground that a substantial use of those VCRs was the creation of infringing copies  
26 of the plaintiffs’ works. It was undisputed that such use occurred, and the trial court, in denying  
27 an injunction, “assumed that Sony had constructive knowledge of the probability that the  
28 Betamax machine would be used to record copyrighted programs.” Id. at 426. The Supreme  
Court, however, agreed that generalized constructive knowledge that customers were infringing

1 copyrights was not sufficient to make Sony a contributory infringer. Rather, the Supreme Court  
2 held that, in order to avoid liability for contributory infringement, the product in question “need  
3 merely be capable of substantial noninfringing uses.” Id. at 442.

4 In so holding, the Court expressly rejected the plaintiffs’ contention (a contention  
5 repeated in this case) that, where a substantial proportion of the alleged use is infringing,  
6 contributory liability should attach. In Sony, the respondents (both of whom are plaintiffs here  
7 as well) argued that non-infringing uses of the Betamax VCR were dwarfed by the allegedly  
8 infringing uses, and thus that the staple article of commerce doctrine should not apply. The  
9 dissent in Sony agreed, noting that the evidence of non-infringing use was at best only 7% of all  
10 use, and urged a decision based upon the proportions of infringing and non-infringing use. Sony,  
11 464 U.S. at 493-94. The majority, however, disagreed, and held that—in order to avoid  
12 contributory liability—a new technology “need merely be capable of substantial noninfringing  
13 uses.” Sony, 464 U.S. at 442.<sup>8</sup> The Ninth Circuit in Napster agreed, applying the Sony rule to  
14 filesharing software: “To enjoin simply because a computer network allows for infringing use  
15 would, in our opinion, violate Sony and potentially restrict activity unrelated to infringing use.”  
16 Napster at 1021.

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

25 \_\_\_\_\_  
26 <sup>8</sup> 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 its decision solely on the current state of the market, rather than looking to potential uses,  
2 Hollywood would have succeeded in banning a technology that today is its biggest market. This  
3 is hardly an isolated instance: indeed, virtually every new technology, from piano rolls to vinyl  
4 records to radio to cassette tapes to cable television to digital audio tapes to mp3 players, has  
5 initially been met with desperate predictions of doom and concerted efforts to ban those  
6 technologies in the courts and in Congress. And in each instance, at the time of those initial  
7 efforts, the legal and profitable ways to exploit the new technology were not apparent to the  
8 movie and recording industries. Only as the technologies matured (and only because the courts  
9 declined to ban them in their infancy) did the substantial noninfringing uses of those  
10 technologies develop and come to dominate.

11         These earlier examples differ from the current landscape in one way, however: the pace  
12 of technological and cultural development has quickened, so that even in its infancy, while  
13 litigation is still in the trial courts, peer-to-peer filesharing has already developed myriad  
14 noninfringing uses. Scores of artists, and their labels, make use of free distribution of content  
15 over the internet in numerous ways. Some artists release some songs for free, in order to  
16 stimulate sales of others via traditional channels. Others, ignored by major labels, release all of  
17 their current content for free in hopes that the resultant fan base will generate major label  
18 attention in the future. The Wilco experience, discussed above, is a classic example: a work  
19 rejected by Time Warner as having no commercial potential was later purchased a second time  
20 by another Time Warner label because of the popularity created by its widespread free  
21 distribution, and became the band's highest selling album ever. Other artists distribute works  
22 with digital rights management protection that expires after 30 days, in order to induce listeners  
23 to purchase a license at the end of the free period. Independent filmmakers, denied any outlet for  
24 their work in theaters or on the airwaves, distribute their works via peer-to-peer networks.  
25 Mayers Decl. Other artists expressly authorize distribution of live recordings of their works.  
26 Sinnreich Decl., ¶31. The Gutenberg Project makes freely available thousands of classic textual  
27 works from the public domain; anyone can in a matter of seconds find and download, for  
28 example, the complete works of William Shakespeare, for free. Similarly, thousands of public

1 domain images are available online: If you need a photo of a dog, or a horse, or the Golden Gate  
2 Bridge, someone is sharing one.<sup>9</sup> Id., ¶32. A considerable amount of computer software is  
3 similarly distributed as “freeware” or “shareware,” and is widely available on peer-to-peer  
4 networks. As but one example, Trymedia uses FastTrack and Gnutella to distribute demo  
5 versions of video games from major publishers; they have distributed more than 5 million copies  
6 to date. Id., ¶ 33. And the free version WinZip, the well-known file compression utility, is  
7 perennially among the most-downloaded files on the internet. Id., ¶34.

8 In short, although peer-to-peer filesharing is in its infancy, scores of substantial  
9 noninfringing uses have already appeared. Those examples go far beyond the requisite showing  
10 under Sony that the Grokster software be merely capable of noninfringing use. Under the clear  
11 and unambiguous dictates of Sony, Grokster cannot be held liable for contributory infringement.

12 Plaintiffs admit as much, although obliquely, when they argue that Defendants should be  
13 held liable because they did not create and distribute a different product, designed more to the  
14 liking of the major labels and film studios. But the mere speculation that a different product  
15 could be designed in a way more to the Plaintiffs’ liking does not render this technology illegal.  
16 If it were so, then Sony would have been liable for designing and selling VTRs, because Sony  
17 could have designed them to be incapable of making infringing copies. The Supreme Court in  
18 Sony, however, rejected precisely this argument, urged by the dissent, that “Sony may be able,  
19 for example, to build a VTR that enables broadcasters to scramble the signal of individual  
20 programs and ‘jam’ the unauthorized recording of them.” Sony, 464 U.S. at 494 (Blackmun, J.,  
21 dissenting). Similarly, there would be no cassette players in the world, because they could have  
22 been designed to inhibit rather than facilitate illegal copying. Photocopiers would likewise be  
23 taboo, as they were designed and sold with nary a thought to policing the actions of their users.  
24 Radios, once considered the death of copyright, would have been banned from the earth long  
25 before any artist received a penny of royalties. And of course, there would be no CD’s, and no

26 \_\_\_\_\_  
27 <sup>9</sup> As Plaintiffs are fond of pointing out when it suits them, some of the material available on the  
28 internet is pornographic. Although such material may be embarrassing or unsavory, much of it is  
freely distributed by its owners, and is thus both legal and noninfringing. It is also, we are  
informed, substantial.



1 digital audio at all, because no single innovation in the past fifty years has done more to enable  
2 the easy creation of multiple, good-as-the-original illegal copies than digital audio. But all of  
3 these key technological innovations are legal, notwithstanding the clear degree to which each has  
4 facilitated and encouraged massive copyright infringement, because they are each technologies  
5 that are also capable of noninfringing uses.

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

18 We depart from the reasoning of the district court that Napster failed to  
19 demonstrate that its system is capable of commercially significant noninfringing  
20 uses. The district court improperly confined the use analysis to current uses,  
21 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.

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

23 As the Sony court held, the Copyright Act does not confer upon copyright holders the  
24 power to ban threatening technology:

25 It seems extraordinary to suggest that the Copyright Act confers upon all

26 <sup>10</sup> Digital Rights Management, or “DRM”, allows content to be encrypted and then distributed.  
27 When a user downloads an encrypted file, she is then free to redistribute copies at will, creating a  
28 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  
publisher.

1 copyright owners collectively, much less the two respondents in this case, the  
2 exclusive right to distribute VTR's simply because they may be used to infringe  
3 copyrights. That, however, is the logical implication of their claim. The request  
4 for an injunction below indicates that respondents seek, in effect, to declare  
5 VTR's contraband. Their suggestion in this Court that a continuing royalty  
6 pursuant to a judicially created compulsory license would be an acceptable  
7 remedy merely indicates that respondents, for their part, would be willing to  
8 license their claimed monopoly interest in VTR's to Sony in return for a royalty.

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

## 10 2. Grokster Is Not a "System" or "Service"; It Is A Piece Of Software

11 In an effort to avoid the clear application of controlling precedent, the Plaintiffs herein  
12 heap adjective upon adjective, hyperbole upon hyperbole, in an attempt to portray Grokster's  
13 distribution of software as something entirely different from that of any of the other companies  
14 who profit from internet file sharing: a "system and service" engaged in a "continual and  
15 persistent" joint effort at "massive" copyright infringement via the operation of an "immense"  
16 and "infamous" "network" purportedly under its control. Clearly Plaintiffs hope that, if they just  
17 describe the Grokster's distribution of a piece of software as a "network" often enough, the Court  
18 will not look to the facts underlying that characterization. The "network" at issue here is the  
19 internet itself, and Grokster no more controls the actions of its customers than any of the  
20 thousands of other companies that provide the hardware and software used in connection with  
21 the internet. Each of these companies knows perfectly well that its products are instrumental in  
22 "massive" copyright infringement. Some of them are plaintiffs in this case, alleging precisely  
23 that. Moreover, each of them has "continual and persistent" relationships with their customers.  
24 Software vendors routinely require their users to register their software. They routinely provide  
25 frequent upgrades to their software. They routinely maintain websites providing all manner of  
26 technical support. Service providers such as AOL and Yahoo host chat rooms in which users  
27 routinely trade tips about illegal activity. Similarly, they make money from their infringing  
28 users, both directly and through advertising revenue. None of these entirely typical and ancillary  
functions, however, contributes in any legal sense to copyright infringement by their customers.  
Plaintiffs do not contend that Microsoft is contributorily liable simply because virtually every  
music pirate in the world uses Microsoft's software, or that AOL is contributorily liable simply

1 because millions of its users connect to the internet and steal music through AOL's network.<sup>11</sup>

2 But Grokster is no different. Just as any other vendor of hardware or software connected  
3 to the internet, it is of course aware as a general matter that some of its users are infringing  
4 copyrights. But just as any other software provider, Grokster has no way of knowing in advance  
5 what use a prospective customer will make of their product, and no way of controlling the use to  
6 which their software is put once the customer acquires it. Microsoft "knows" its users steal  
7 songs. AOL "knows" that its users infringe copyrights: Indeed, Plaintiffs' own enforcement  
8 agent MediaForce has identified AOL as the single largest infringement venue in the world.  
9 Page Decl., Exh. B. Sony, Dell, Compaq, and Apple all "know" that their customers are using  
10 their computers for nefarious purposes: that's why they sell them with modems, broadband  
11 capability, CD-Rom burners, and MP3 player software built in, and advertise them with slogans  
12 like "Rip. Mix. Burn." Broadband connection vendors "know" that music and video piracy is the  
13 "killer app" driving their services into millions of homes. Makers of blank CDs "know" that  
14 piracy is likely the single largest share of their market. But (with the possible exception of ISPs,  
15 who provide a service but have their own special protections under the DMCA) each of these  
16 companies, just like Grokster, sells products that are also capable of noninfringing uses. Absent  
17 some other basis for liability, under Sony the mere provision of software cannot form the basis of  
18 a contributory liability claim. Neither Microsoft, nor Sony, nor Dell, nor WinAmp, nor  
19 MusicMatch, nor Grokster is a network: the network is the internet itself, not any vendor of  
20 tools used to access it.

21 **B. Under Napster and Fonovisa, Grokster Cannot Be Liable for Vicarious Copyright**  
22 **Infringement Because Grokster Lacks the Ability to Control the Allegedly**  
23 **Infringing Conduct**

24 Plaintiffs' claims of vicarious infringement fare no better. Under the controlling  
25 authority of Fonovisa and Napster, a defendant may be liable for vicarious copyright

26 <sup>11</sup> 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 infringement only when it “has the right and ability to supervise the infringing activity and also  
2 has a direct financial interest in such activities.” Napster at 1022 (quoting Fonovisa at 262).  
3 Although Grokster has no direct financial interest in allegedly infringing conduct—its  
4 advertising revenues are the same whether the user exchanges infringing content, noninfringing  
5 content, or no content at all—we do not for purposes of this motion dispute this prong of the test.  
6 It is undisputed and indisputable, however, that Grokster has absolutely no ability to supervise or  
7 control the allegedly infringing conduct of users. As set forth above and in the declaration of  
8 Daniel Rung, the activities of users of the Grokster software are entirely independent of and  
9 invisible to Grokster. When a user searches for a file, that search request is communicated  
10 directly to other users over the internet, not to Grokster. When a user downloads a file, that  
11 download also goes directly from one user to another, not to Grokster. At no time does Grokster  
12 ever receive or possess any information concerning any of the file transfers, and Grokster has no  
13 means by which it can monitor, filter, block, or effect in any way the activities of individuals  
14 using its product. Indeed, were Grokster to vanish from the earth entirely, the filesharing  
15 functions of the Grokster software would continue to function precisely as they do today.<sup>12</sup>

16 From the opening phrases of Plaintiffs’ complaint, throughout every argument in this  
17 case, one mantra is repeated over and over: “This case is exactly the same as Napster.” But of  
18 course, repetition ad nauseum cannot make this true. Grokster (and Kazaa and Morpheus) are  
19 different from Napster because it lacks precisely the attributes that led the Ninth Circuit to enjoin  
20 Napster. Napster provided a service, directly helping its users find specific copyrighted songs.  
21 Grokster provides no such service. Grokster merely provides a computer program – and one it  
22 resells at that. Selling a product that can be used by others to infringe is simply not equivalent to  
23 providing a service designed to help others infringe. The Ninth Circuit drew this distinction in  
24 Napster itself when it explained why Napster could not benefit from the Supreme Court’s Sony  
25 problem on others.

26 <sup>12</sup> Other functions would cease, but they are unrelated to the copying of files. For example, the  
27 Grokster “start page,” which features independent music and video artists who support and  
28 depend on peer-to-peer software, would cease, as would the ability of Grokster to provide  
software updates, and users’ access to forums and instant messaging. In addition, some subset of  
the advertising displayed by the Grokster software would cease.

1 decision, which permits the sale of products capable of substantial noninfringing uses:

2 We are compelled to make a clear distinction between the architecture of the  
3 Napster system and Napster's conduct in relation to the operational capacity of the  
4 system. . . .

5 The Sony Court refused to hold the manufacturer and retailers of video tape  
6 recorders liable for contributory infringement despite evidence that such machines  
7 could be and were used to infringe plaintiffs' copyrighted television shows. Sony  
8 stated that if liability "is to be imposed on petitioners in this case, it must rest on  
9 the fact that they have sold equipment with constructive knowledge of the fact  
10 that their customers may use that equipment to make unauthorized copies of  
11 copyrighted material." Id. at 439, 104 S. Ct. 774 (emphasis added). The Sony  
12 Court declined to impute the requisite level of knowledge where the defendants  
13 made and sold equipment capable of both infringing and "substantial  
14 noninfringing uses."

15 We are bound to follow Sony, and will not impute the requisite level of  
16 knowledge to Napster merely because peer-to-peer file sharing technology may be  
17 used to infringe plaintiffs' copyrights. See 464 U.S. at 436, 104 S. Ct. 774  
18 (rejecting argument that merely supplying the " 'means' to accomplish an  
19 infringing activity" leads to imposition of liability).

20 Napster, 239 F.3d at 1020-21.

21 The distinction the court drew between a service and a product was a critical one, not  
22 only because it reconciles Napster with Sony, but because it erects a barrier against the  
23 imposition of unreasonable liability. Providers of a service that has both infringing and  
24 noninfringing uses are in an ongoing relationship with their clients, and may be charged with  
25 distinguishing the illegal uses from the socially valuable ones. Napster could, at least in theory,  
26 permit only legal copies of songs to be traded on its system. A software reseller has no such  
27 freedom. The product being provided is either legal or illegal. Where the product serves  
28 valuable social purposes – where it has or is capable of noninfringing uses – Sony draws the line  
in favor of legality. Drawing that line preserves the careful balance inherent in the Copyright  
Act: to reward creative effort only as a means to encourage the development of the “useful arts  
and sciences.” U.S. Const. Article 1, Section 8. Banning technologies that are capable of  
noninfringing uses disturbs that careful balance.

That balance is preserved by making liability for the actions of others coextensive with  
one's ability to control those actions. As the Napster court made clear, the obligation to police  
Napster's customers extended only as far as its ability to do so: one cannot be held liable for

1 failing to do the impossible: “[T]he boundaries of the premises that Napster ‘controls and  
2 patrols’ are limited. Put differently, Napster’s reserved ‘right and ability’ to police is cabined by  
3 the system’s current architecture.” Napster at 1023-24 (citations omitted). Accordingly, the  
4 court found that, as Napster did not have access to the contents of the exchanged files, but only  
5 their titles, authors, and related information, Napster’s duty to police was limited to what it could  
6 do with the information available to it. Grokster’s ability to police is much more severely  
7 limited than Napster’s was: the architecture of the Grokster software is such that Grokster has  
8 literally no ability to supervise its users’ activities at all. A fortiori, having no ability to control  
9 the alleged infringing activity, Grokster as a matter of undisputed fact and law cannot be held  
10 liable for failing to exercise that nonexistent control.

11       Moreover, to the extent Grokster has any indirect influence over the conduct of its users,  
12 it has exercised that influence fully. Grokster’s Terms of Use prominently forbid the use of its  
13 software for infringing purposes. Grokster has sought out and maintained a database of its users’  
14 email addresses. When Consumer Empowerment changed the architecture of the FastTrack  
15 software to eliminate any need for a registration server, Grokster nonetheless encouraged its  
16 users to register. When the plaintiffs in this action submitted alleged infringement notices to  
17 Grokster, Grokster contacted each user for which it had address information, and set up  
18 automated systems to facilitate the prompt transmission of cease-and-desist notices. Despite  
19 being a two-man operation, Grokster voluntarily undertook the onerous task of monitoring its  
20 user forums, blocking postings that encouraged or concerned copyright violations. And Grokster  
21 actively promotes and proselytizes the use of its software for noninfringing use, prominently  
22 featuring emerging artists (including in some instances the plaintiffs’ own artists).

23       Indeed, it is entirely unclear what more Plaintiffs are asking Grokster to do to enforce  
24 their copyrights for them. Plaintiffs decline to say, for good reason: what Plaintiffs want is for  
25 Grokster to cease distributing its product entirely. But Plaintiffs are understandably loath to say  
26 so, because to say so would be to make crystal clear the true goals of this lawsuit. This case will  
27 determine whether a collection of purported holders of copyrights can unilaterally bar an  
28 emerging technology. Under Napster, however, Grokster cannot be required to exercise

1 “control” it does not have: if that were the law, every single provider of any of the myriad pieces  
2 of hardware and software used by anyone sharing copyrighted content on the internet would be  
3 equally liable as vicarious infringers. For when Plaintiffs argue that Grokster has the ability to  
4 “supervise” or “control” its users’ actions, they don’t mean the ability to filter or limit the use of  
5 the software. Rather, they mean the assumed ability to have designed a different product in the  
6 first instance, or to have refrained from designing a product at all. As a factual matter, Grokster  
7 does not even have this trivial notion of control, as it has no control over the design of a product  
8 it merely repackages and distributes. But more fundamentally, if this were “control” for  
9 vicarious liability purposes, the Sony doctrine would be a nullity, as any manufacturer has the  
10 “control” implicit in its ability to refrain from making its product at all. To equate this with the  
11 “control” necessary to incur liability as a vicarious infringer is akin to saying that one has the  
12 ability to control the editorial content of a television station by dint of one’s ability to blow up  
13 the transmitter.

14 **C. Allowing Individual Industries to Control Technologies With General Application Is**  
15 **Bad Public Policy**

16 There is a second important difference between Napster and Grokster: unlike Napster,  
17 Grokster is a general-purpose tool. Napster was a service limited to the online sharing of music  
18 files; the evidence before the court suggested that not only were the overwhelming majority of  
19 the files infringing, but also that the plaintiffs before the court held the copyrights to a majority  
20 of that content. By contrast, the Grokster software permits its users to share files of any type  
21 whatsoever. While plaintiffs may control the copyrights for a large number of popular songs and  
22 movies, they certainly do not control even 10% of all digital content. People can and do use the  
23 Grokster software to share and collaborate on documents, debug computer programs they have  
24 written, show grandparents photographs of their grandchildren, distribute original works of  
25 visual art, and countless other uses, limited only by the human imagination.

26 The fact that the Grokster software facilitates the sharing of any sort of file points up the  
27 critical importance of the Sony rule. Enjoining Napster affected only the market for the  
28 distribution of music; since the plaintiffs controlled most of that market, it might have made

1 policy sense to weigh the harm to them more greatly than the benefits Napster provided to  
2 independent artists. But in this case the plaintiffs wish to declare illegal an efficient means of  
3 distributing content of all kinds, merely because some of the content shared by users of Grokster  
4 infringes their copyrights. Granting such an injunction would be extremely dangerous to  
5 innovation. To give one industry, no matter how large and well-funded, the power to control  
6 innovation that affects countless other industries, would undermine the free flow of commerce  
7 that has brought the U.S. all of the fruits of technological innovation.

8 Nor is this a hypothetical risk. The content industries have repeatedly tried in the past to  
9 squelch new technologies because they feared those technologies. Piano rolls, radios, cassette  
10 recorders, VCRs, Digital Audio Tape, MP3 players, cable television, in-room video, and Replay  
11 TV were each met with protestations of doom and attempts to ban them. Fortunately, no court  
12 has granted copyright owners the power to stop technological innovation in order to facilitate  
13 greater control over their copyrights. And in each case, history proved the courts right. The  
14 technologies that copyright owners wanted to stop – jukeboxes, record players, radio stations,  
15 VCRs, digital audio recording devices – have not only made the world a better place, but have  
16 made copyright owners richer too. There is no more cause to suppress peer-to-peer technology  
17 in the name of preventing piracy than there was to stop radio or the VCR.

18 This case is but one part of a much larger modern campaign to shut down innovation of  
19 all sorts that copyright owners cannot control. In recent years copyright owners have sued the  
20 makers of software (Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001); DVD Copy  
21 Control Ass'n v. Bunner, 113 Cal. Rptr. 2d 338 (Ct. App. 2001), rev. granted, 117 Cal. Rptr. 2d  
22 167 (2002)), makers of devices that play music (RIAA v. Diamond Multimedia Systems, 180  
23 F.3d 1072 (9th Cir. 1999)), Internet service providers (Religious Technology Center v. Netcom,  
24 907 F. Supp. 1361 (N.D. Cal. 1995); ALS Scan v. Remarq Communities, 239 F.3d 619 (4th Cir.  
25 2001); Ellison v. Robertson, 189 F. Supp. 2d 1051 (C.D. Cal. 2002)), Internet search engines  
26 (Kelly v. ArribaSoft, 280 F.3d 934 (9th Cir.2002)), the owners of the wires through which the  
27 Internet flows (Arista Records, et al. v. AT&T Broadband et al. (S.D.N.Y. 2002) (suing various  
28 ISP's for failing to disable Chinese website)), venture capitalists who fund Internet companies



1 (Katz v. Napster et al., 284 F.3d 1091 ((9th Cir. 2001) (naming as defendants, in addition to  
2 Napster, venture firm and individuals who invested in Napster)) and even the lawyers who  
3 represent those companies (mp3.com v. Cooley, Godward, Santa Clara County Superior Court,  
4 Case No. CV 806837 (Universal, after successfully suing mp3.com, acquired mp3.com and then  
5 sued mp3.com's counsel in underlying action)). Their goal is quite simple: to prevent the  
6 development of any technology – including the Internet – that is not designed and organized to  
7 control piracy. One can readily understand why the plaintiffs might want such a world, though  
8 even for them history has shown the suppression of technology to be shortsighted. But it is  
9 important to understand that the plaintiffs do not represent the public interest. They want to  
10 change the law to maximize their profits at the expense of everyone else. The court should not  
11 give them what they want.

12 **D. Principles of Comity Preclude Imposition of Liability for Distribution of the**  
13 **Grokster Application**

14 *'Comity' in the legal sense, is neither a matter of absolute obligation on the one*  
15 *hand, nor of mere courtesy and good will upon the other. But it is the recognition*  
16 *which one nation allows within its territory to the legislative, executive or judicial*  
17 *acts of another nation, having due regard both to international duty and*  
18 *convenience, and to the rights of its own citizens or of other persons who are*  
19 *under the protection of its laws.*<sup>13</sup>

20 The plaintiffs in this lawsuit have very long arms. Their arms are so long, in fact, that  
21 this lawsuit constitutes only one part of a coordinated international attack on peer-to-peer  
22 networks. Indeed, in the Netherlands, two organizations (called Vereniging Burma and Stichting  
23 Sterma) representing many of the same parties who are plaintiffs in this case, are presently  
24 appealing a decision by the Dutch court of appeals holding that defendant Kazaa has not violated  
25 anyone's copyright by distributing the software at issue here. Page Decl., Exh. F. In reaching  
26 this decision, the Amsterdam Court of Appeal specifically relied on the reasoning used in  
27 Sony— holding that “[p]roviding the means for publication or reproduction of copyrighted  
28 works is not an act of publication or reproduction in its own right. Also, it is not true ... that the  
Kazaa computer program is exclusively used for downloading copyrighted works.” Id.

1 The fact that the plaintiffs are pursuing their litigation in two different forums, and the  
2 fact that the Dutch court has already ruled that the very software at issue in this litigation does  
3 *not* infringe on the plaintiffs' copyrights, should impact the Court's analysis here. Under long-  
4 standing principles of international comity, "United States courts ordinarily refuse to review  
5 acts of foreign governments and defer to proceedings taking place in foreign countries, ... so  
6 long as 'the foreign court had proper jurisdiction and enforcement does not prejudice the rights  
7 of United States citizens or violate domestic public policy.'" Finanz AG Zurich v. Banco  
8 Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999) (emphasis added, internal citations omitted);  
9 Gordon and Breach Science Publishers, S.A. v. American Institute of Physics, 905 F. Supp. 169,  
10 178 (SDNY 1995) ("it is primarily principles of fairness and reasonableness that should guide  
11 domestic courts in their preclusion determinations.").<sup>14</sup>

12 One of the principal questions any court must ask in deciding what kind of preclusive  
13 effect it should, in fairness, give to the judgment of a foreign court comes down to reciprocity—  
14 *i.e.*, what would the foreign court do if the situations were reversed? See Hilton v. Guyot, 159  
15 U.S. 113, 163-64 (1895). On this ground, the Netherlands passes with flying colors. See Bata v.  
16 Bata, 163 A.2d 493, 507 (Del. 1960) ("Questions involving claims of res judicata in the  
17 Netherlands courts appear to be governed primarily by the Code Section 1954 provides: 'The  
18 authority of res judicata does not extend beyond the subject matter of the judgment. To be able to  
19 invoke such authority, it is required that the thing claimed is the same, that the claim is based on  
20 the same cause and be made by and against the same parties in the same quality'.  
21 Notwithstanding the limited scope of the Code, the Supreme Court of the Netherlands has  
22 construed it to cover cases in which the controlling question decided is the same in both suits,  
23 although the cause of action is different."). Because the controlling question at issue in both  
24

25 <sup>13</sup> Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

26 <sup>14</sup> While the action in the Netherlands is not yet final (only because the plaintiffs are pursuing a  
27 last-ditch, low-probability appeal to the Supreme Court of the Netherlands) that fact should make  
28 little difference in the Court's analysis—because it has no impact on the overall fairness of  
deferring to the Dutch court. See Alesayi Bev. Corp. v. Canada Dry Corp., 947 F. Supp. 658,  
663 n.8 (SDNY 1996) ("Generally, the principles of comity are applied in two contexts: to  
enforce foreign judgments in the United States and to recognize foreign court proceedings.").

1 suits (i.e. does the Fast Track software infringement plaintiffs copyright) is identical the Dutch  
2 court would apply res judicata principles to a holding of this Court—in fairness, this Court  
3 should do the same.

4 A second question the Court should ask is whether the foreign court provided a full and  
5 fair forum for the dispute under a proper grant of jurisdiction. See Alesayi Bev. Corp. v. Canada  
6 Dry Corp., 947 F. Supp. 658, 663 (SDNY 1996) (“if the foreign forum provides a full and fair  
7 trial before a court of competent jurisdiction, under a system of procedural fairness akin to the  
8 principles governing United States courts, and there is nothing to show either prejudice or fraud  
9 in the foreign forum, then ‘the merits of the case should not, in an action brought in this country  
10 upon the judgment, be tried afresh . . . upon the mere assertion of [a] party that the judgment was  
11 erroneous in law or in fact.’). Once again, the Netherlands passes with flying colors. Indeed,  
12 having chosen to sue Kazaa in the Netherlands before bringing the current suit the plaintiffs  
13 cannot seriously complain that the Dutch courts either lacked jurisdiction to hear the case or  
14 provided a procedurally inadequate hearing.

15 The third principle indicia of fairness is whether the laws of the foreign jurisdiction  
16 “prejudice the rights of United States citizens or violate domestic public policy.” Finanz AG  
17 Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999) (internal citations omitted).  
18 Once again, the Netherlands is unimpeachable. Indeed, the Netherlands is a signatory to the  
19 Bern convention on copyright—under which the Netherlands explicitly recognizes the copyright  
20 interest of “authors who are not nationals of one of the countries of the Union, for their works  
21 first published in one of those countries, or simultaneously in a country outside the Union and in  
22 a country of the Union.” Berne Convention<sup>15</sup> Article 3(1)(b) (Paris Text 1971). As even a brief  
23 perusal through the Convention shows, the Netherlands recognizes all of the major rights  
24 recognized by American copyright law, including the Right of Translation (Article 8), the Right  
25 of Reproduction (Article 9), the Right of Performance (Article 11), the Rights of Broadcast and  
26 Public Recitation (Article 11bis and 11ter), the Right of Adaptation (Article 12) and the Right of

27  
28 <sup>15</sup> The Berne Convention For The Protection Of Literary And Artistic Works is cited herein as  
“Berne Convention.”

1 Fair Use (Article 10). Given the harmony between the two legal regimes, there is no domestic  
2 public policy that would be violated by deferring to the decision of the Dutch courts, and no  
3 undue prejudice to the plaintiffs to bind them here according to the terms of the result they  
4 obtained over there.

5 Finally, the comity considerations should highlight for the Court the degree to which the  
6 issues in this case are really global issues. Were the Court to allow the music industry to shut  
7 down this technology, it would kill the technology all over the world. When the tables are  
8 turned, and a foreign court seeks to outlaw American-based technology that is legal here but  
9 reaches globally, American courts do not hesitate to reject such efforts. See, e.g., Yahoo!, Inc. v.  
10 La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001)  
11 (rejecting French court's attempt to ban sale of Nazi memorabilia on U.S. auction site based on  
12 French law). Given the fact that foreign courts have ruled that this technology not only has the  
13 potential for significant noninfringing uses, but is *actually* so used right now, this Court should  
14 be very reluctant to negate the decisions of a respected foreign jurisdiction by blazing its own  
15 path here. If the recording industry, having first chosen to test the legality of the FastTrack  
16 technology in its home courts, can simply move on to another nation when it fails, there is no  
17 logical end to the process; if they fail here, there are hundreds more jurisdictions in the world,  
18 and hundreds more bites of the apple.<sup>16</sup>

#### 19 IV. CONCLUSION

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

26 \_\_\_\_\_  
27 <sup>16</sup> Note also that, as a result of the Dutch court's ruling, distribution of the FastTrack software  
28 legal and authorized conduct in the only jurisdiction to have reached the question, and thus the  
distribution of the Kazaa and Grokster software to the Netherlands via peer-to-peer networks is  
itself another substantial noninfringing use.

1 Court to grant summary judgment and find that distribution of the Grokster software to the  
2 general public does not give rise to liability for contributory or vicarious copyright infringement.

3 Dated: September 9, 2002

KEKER & VAN NEST, LLP

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6 By: 

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