

槍械與扣動扳機者孰負侵權之責？

— 論著作權之間接侵權行為責任

孫遠釗*

摘 要

從近代著作權保護體系的發展過程當中常可看到「科技」與「內容」開發者之間經常存在的潛在衝突，而且前者還往往被視為社會中對智慧創作的掠取和破壞者。無論從過去的攝影機、影印機、電視機、錄影機、電腦軟體、光碟技術等等到現今的電子商務，每當有重大的科技產生時，就總會看到各種著作權與其他智慧財產權的問題浮上檯面，成為「科技」與「內容」提供者彼此間的爭端焦點。而頗具反諷的是，往往當初對這些科技發展最為顧忌的一方（「內容」提供者）卻最終成為這些科技的最大受患者，而整個智慧財產領域的保護規則也在這些訴訟的洗禮後而更加明確。在當前的智慧財產保護走向全球化與國際整合之際，加上網際網路的使用在先天上便是跨國性的，一國或地區的相關發展也自然更容易對其他的國家和地區帶來更為強烈的衝擊。

本文便擬在此一氛圍下探討當前點對點式網路資源分享，尤其是非法上、下載影音著作物所產生的間接著作侵權責任問題，並冀圖從近來的發展中擷取教訓，以因應未來的、更新的挑戰。鑒於美國、歐盟、日本、韓國、澳洲以及大中華地區等地的法院在近一、兩年中均面臨到了相當困難的挑戰，並已先後做成了判決，本文除進行比較研究外，亦亟求突顯不同的法院如何來看待和處理這其中

* 孫遠釗，國立政治大學智慧財產研究所副教授

的問題，即如同在關於槍枝管制問題的論證中，究竟是槍還是那扣動扳機的人應負侵權行為責任？本文最終則主張在此一領域內對著作權的保護政策不但不會扼殺科技發展的創意，恐怕反而更會激發創新。本文亦主張各國必須慎重考量採行對智慧財產權益的間接侵權行為與損害賠償責任，從而方可將此一領域中的諸多問題納入正軌，尤其強調「科技中立」的原則，法院所需注意的焦點仍是當事人的「行為」，而不應被其中所使用的科技所誤導。本文最後則主張，「科技」與「內容」的發展未必始終是站在對立的面向；經驗顯示，誰能有效的將兩者結合才可能成為真正的贏者，整個社會也從而跟著獲利。而且無論法律面向的發展如何，人類的未來最終還是取決於市場，而非法院或政府。

關鍵字： 比特洪流、輔助侵權責任、代理侵權責任、網際網路、點對點式檔案分享、意圖引誘、著作權間接侵權責任、具商業規模之相當非侵權使用、Grokster 案、Napster 案、新力錄影機案之抗辯或例外、必需用品

IS IT THE GUN OR THE MAN WHO PULL THE TRIGGER THAT IS LIABLE? —ON SECONDARY LIABILITIES OF COPYRIGHT INFRINGEMENT *

Andy Y. Sun**

ABSTRACT

The development of modern copyright protection regime often witnesses a potential confrontation between “technology” and “content” developers, with the former being perceived as “spoiler” that reap the benefit of and undercut the creative genius in a given society. Ironically, the content providers often turn out to be the beneficiaries of technologies once they learn how to embrace them, be it photography, lexicography, photocopying, video recording, laser discs, or the latest online file-share. In the interim, however, content providers such as the music and film industries have waged numerous battles against technology developers, thereby shaping the entire landscape of copyright protection regime. As copyright now enters into an era of international harmonization, together with the global widespread usage of the Internet, which by definition is multinational, the laws and developments in one nation or region necessarily have even far stronger impact on other nations than ever before.

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** M.C.L., the George Washington University Law School, J.D., University of Maryland School of Law. The author is an Associate Professor at the Graduate Institute of Intellectual Property and the Graduate Institute of Interdisciplinary Laws, National Chengchi University, Taipei, Taiwan. He is also the Executive Director of the Asia Pacific Legal Institute, a non-profit organization chartered in Washington, D.C. and dedicated to the legal cooperation and exchange between the U.S. and East Asia.

This article intends to depict the on-going conflicts and dissect the lessons we may learn to tackle future challenges of these sorts. While focusing on the legal aspects of peer-to-peer file-share technology to that of copyright protection, particularly the so-called secondary copyright infringement liability, this article emphasizes how different courts, in many ways a true reflection of our entire society, manage to approach the various arguments and issues presented. In conclusion, this article proposes that it is time for nations to seriously consider the adoption of indirect or secondary infringement liability; mindfully, however, that regardless of what is happening on the legal front, and given that technology and content development may not necessarily on a collision course, it is the market, not the courts or governments, which will ultimately decide what will be for our future.

KEY WORDS : Bittorrent, Contributory Liability, Capability of

Commercially Substantial Non-infringing use, Grokster, Intentional Inducement, Internet, Napster, Peer-to-peer File-share, Secondary Infringement Copyright Liability, Sony Betamax Exception, Stable Article of Commerce, Vicarious Liability

I. INTRODUCTION

The advancement of technologies and the law are not always in harmony. On the contrary, they have often found themselves going their own ways, sometimes in completely opposite directions, with one being perceived as an obstacle (if not a major one) to the other. This perception and tension is not completely without merit. For example, we witnessed how computer software has been legally treated in the past 30 years – at least in the patent area, advancing from outlaw to celebrity status, and therefore, as some would argue, overly protected today.

Contrary to the general perception that the intellectual property system is designed primarily for the protection of industry interests, industries do not always prevail in getting what they consider “proper” intellectual property rights protection over the technologies they have developed and marketed. Courts tend to take a more “conservative” (or “prudent,” depending on the beholder’s point of view) approach in treating issues concerning new technologies the potential of which has not yet been fully ascertained. Indeed, we may view the process of delineating the scope of legal protection over the advancement of technologies as an act of walking on a tight rope, always seeking balance between the private interests and the public good. To compound the difficulties and complexities, the rope is not still, but is expanding towards unknown directions – along with the progress of time. As long as there are innovations, as technologies keep rolling out and marching on, there will always be the call for more flexibility of the laws that govern them.

As a result, technological innovations, while providing more convenience to our daily lives, ironically also pose new and difficult challenges to the existing legal system, forcing lawyers to take various innovative approaches as well to confront them. A lesson quickly learned is that any solution must involve at least legal, technological, managerial and market considerations. No one single discipline is sufficient to tackle the complex issues of today and tomorrow.

Dr. Alan Greenspan, former Chairman of the U.S. Federal Reserve, observed: “Only in recent decades, as the economic product of the United States has become so predominantly conceptual, have issues related to the protection of intellectual property rights come to be seen as significant sources of legal and business uncertainty. Intellectual property is clearly more difficult to define and ... to protect.”¹

¹ See Alan Greenspan, *Market Economies and Rule of Law*, Keynote speech delivered at the Financial Markets Conference of the Federal Reserve Bank of Atlanta, Sea Island, Georgia, 4 April, 2003.

A growing problem highlighting this point is the massive end-user copyright piracy over the Internet.² When audio and video industries finally felt enough is enough and began to take strong legal actions against end users in the United States and Europe, they quickly found themselves in a public relations disaster. Similar situations occurred in Asia.³ The image of a twelve-year old honor-roll student being subpoenaed to court for downloading unauthorized, copyrighted music files online does not sit well with the music industries or the general public.⁴ Arguably there is no real winner coming out of this legal hot pursuit. Thus, a natural response to the dilemma: Is there a better alternative? In addition to end users, who should be the real culprits to be blamed, the ones who created the technologies or the ones who act on them, or both?

II. SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENT

Courts in the United States have long established, under the realm of torts, a rule that those who assist and facilitate infringement are liable just as those who commit actual infringement.⁵ This so-called “secondary liability” or third-party liability has a practical

² Based on the survey statistics of BigChampagne, there are on average 8.5 million individuals engaging in peer-to-peer file share globally at any time (presumably most of which are music files, or MP3). The number has grown from 5.5 million in 2003 to 8.5 million through the first five-and-a-half months of 2005. Two dips occurred. One was when the first wave of publicity hit about the Recording Industry Association of America’s intent to sue individual US residents it believed were violating copyrights. The other was when it actually started filing the suits. *See 8.5m P2P File Sharers on Average at Any Time*, ONLINE REPORTER (USA), Issue 450, 21 June, 2005.

³ Similar incidents occurred in both Mainland China and Taiwan. In 1999, Microsoft (China) sued Beijing Yadu Corporation. Dubbed the very first end-user software infringement case China, the court tossed the case out of the window on the grounds that the defendant lacked proper standing to be sued. This allowed the court to dodge the bullet despite the fact that Microsoft thought it has gotten an iron-proof case. In 2002, Taiwan witnessed its very first end-user copyright infringement incident. Fourteen students from a local, prestigious university were about to be criminally prosecuted after their computers were found to contain hundreds, if not thousands of music files, before a major public outcry broke out against the industry on the island. The incident was eventually settled, but not before both sides would have to deal with their respective image problems. For detailed illustrations, *see* Andy Y. Sun, *Reforming the Protection of Intellectual Property: The Case of China and Taiwan in Light of WTO Accession*, MARYLAND SERIES IN CONTEMPORARY ASIAN STUDIES, University of Maryland School of Law, No. 4 – 2001 (165)(2002).

⁴ *See Courting Disaster*; The RIAA Hurts Its Cause Immeasurably by Targeting A 12-year-old, KANSAS CITY PITCH WEEKLY, vol. 22, Issue 62 (18 September 2003).

⁵ The root of secondary liability can be traced as far back to a 1911 case of the U.S. Supreme Court. *See Kalem v. Harper Brothers*, 222 U.S. 55 (1911)(the “Ben Hur” Case). Note that the Copyright Act of 1909 did not expressly address secondary liability. Thus the Court based its decision on logical inference: “In some cases where an ordinary article of commerce is sold, nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer ... If the defendant did not contribute to the infringement, it is impossible to do so except by taking part in the final act. It is liable on principles recognized in every part of the law.” *Id.*, at 63.

purpose as well: To ensure real, effective enforcement against those *truly* responsible in both legal and financial terms.⁶ In other words, it grew out of a need for fundamental fairness in infringement cases.⁷

American courts have traditionally distinguished secondary liabilities into two categories, *i.e.*, vicarious and contributory liability. Vicarious liability is imposed “[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials... the purpose of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.”⁸ On the other hand, contributory liability is for one “who, with the knowledge of infringing activity, induces, causes, or materially contributes to the infringing conduct of another.”⁹

Therefore, to qualify for any of the secondary liability, there must first be direct infringement by a primary party. Then, for vicarious liability, the defendant (or third party) must have the right and ability to supervise or control the infringing activity, and must have acquired direct financial benefit from such infringing activity.¹⁰ As for contributory liability, the defendant must have knowledge of the infringement, and has made material contribution to the infringing activity.¹¹

III. STATUTORY ENACTMENT/CODIFICATION

Secondary liability for copyright infringement was formally codified when Congress enacted the Copyright Act of 1976.¹² Section 106 provides, among other things, “[t]he owner of copyright under this title has the exclusive rights to do *and to authorize* any of the [reproduction, adaptation, publication, performance, and display rights] ...”

⁶ The term can be somewhat misleading, as the damage awards against those “indirect” infringers normally far exceed the “direct” infringers. This shift of burden can also be viewed as a reflection of the “deep pocket” approach or theory.

⁷ See John T. Soma and Natalie A. Norman, *International Take-down Policy: A Proposal for the WTO and WIPO to Establish International Copyright Procedural Guidelines for Internet Service Providers*, 22 HASTINGS COMM. & ENT. L.J. 391, 398 (2000).

⁸ See *Shiparo, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 354 (7th Cir. 1929).

⁹ See *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2^d Cir. 1971). Note that “knowledge” can be either actual or constructive. See *infra* note 17.

¹⁰ See *supra* note 8. This doctrine thus closely resembles the torts doctrine of *respondeat superior* or enterprise liability.

¹¹ See *supra* note 9.

¹² Pub. L. No. 94-553, Title I, 90 Stat. 2541 (1976), as codified in 17 U.S.C. §§ 101 *et seq.* These are the so-called “bundle of rights.”

[emphasis added.] Congress tried to make it clear that “[t]he use of the phrase ‘to authorize’ is intended to avoid any questions as to the liability of contributory infringers.”¹³ Congress “recognize[s] the impracticability or futility of a copyright owner’s suing a multitude of individual infringers... [Thus] the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aider and abettor.”¹⁴ In other words, courts have first borrowed from the concept of criminal aiding and abetting to impose civil liabilities on copyright infringement. Yet it took another 67 years before Congress eventually codified the same idea.

Recognizing that these rules were created out of equitable considerations and necessity, a built-in controversy was nevertheless created. Drawing upon the analogy of gun control, was it the gun that did the crime or the man who actually pulled the trigger? Where should the blame or fault be placed? If the law were to punish those who designed or manufactured a device, gadget, or software which made illegal copying or distribution of copyrighted works possible or easier, what should the standards be?

To tackle this built-in problem and to maintain a certain flexibility in light of constant technological innovation, while the statute allowed direct enforcement against the “middlemen” who encourage, facilitate and benefit from infringement, especially when it involves large dissemination of the copyrighted works, it left the details open and courts are to fill the gaps, especially seeking the proper balance between infringement and fair use, also a judicial development eventually codified by the same act in 1976.¹⁵

IV. THE SONY BETAMAX CASE

The first landmark case dealing with these issues was the so-called *Sony Betamax* case.¹⁶ There the U.S. Supreme Court must decide whether the manufacturer of videocassette recorders (or VCRs) may be liable for the infringing actions of its customers.

The court was facing a dilemma: By the time this case reached the Supreme Court, VCRs have already gained tremendous popularity that any decision rendered by the court

¹³ See H.R. Rep. 94-1476, p. 61. In the report, Congress further illustrated: “For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.”

¹⁴ See *In re Aimster*, 334 F.3d 643, 646 (7th Cir. 2003).

¹⁵ 17 U.S.C. §§107-122 (2000, Supp. II).

¹⁶ *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

could have a very significant impact on the entertainment and other related industries. Recognizing the complexity involved, the court made it clear that the imposition of contributory liability must “rest on the fact that [the defendant] has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material.”¹⁷ The court held that the VCR manufacturer did have constructive, but not actual knowledge, of the infringing activity for which customers used the device.

The court, however, also recognized that it must strike a balance between a copyright holder’s legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Hence, the mere sale of copying equipment did not constitute contributory infringement if it was *widely used* for legitimate, unobjectionable purposes.

To lay out the standard for or exception to contributory infringement liability, the court could not find any guidance from the Copyright Act of 1976. So it looked to the patent law instead and borrowed the “staple article of commerce” doctrine into the copyright arena, holding that the exception to patent infringement also applied in copyright, *i.e.*, the sale of a “staple article or commodity of commerce suitable for substantial non-infringing use” does not constitute contributory infringement.¹⁸ Thus, to avoid contributory liability, the key issue is whether a staple article of commerce needs to “be capable of substantial non-infringing uses” and such uses are indeed “commercially significant.”¹⁹

Here, the Supreme Court reaffirmed the district court’s finding that a significant amount of VCR purchasers used the equipment for “time-shifting” purpose, *i.e.*, the recording of a television program to be viewed at a later, more convenient time, and then erased it, which clearly constituted fair use, and concluded that since there was no actual

¹⁷ *Id.*, at 439. Courts do not require actual knowledge; rather, a defendant incurs contributory copyright liability if it has reason to know of the third party’s direct infringement (constructive knowledge). See *Cable/Home Communication Corporation v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990); *Sega Enterprises, Ltd. v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996).

¹⁸ 35 U.S.C. §271(c)(2000, Supp. II) states, “[w]hoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and *not a staple article or commodity of commerce suitable for substantial noninfringing use*, shall be liable as a contributory infringer.” [Emphasis added.]

¹⁹ See *supra* note 16, at 442.

knowledge of infringement, and since VCRs were *capable of commercially substantial noninfringing uses*, meaning there was no material contribution to the infringing activity, no contributory infringement liability existed on the part of the manufacturer (*i.e.*, Sony Corporation).

V. THE NAPSTER CASE – THE FIRST PEER-TO-PEER CHALLENGE

The widespread use of the internet spelled the arrival of electronic commerce. Two of the most significant developments that sparked such popular usage have to be the so-called MP3 standard and the subsequent peer-to-peer file-sharing technology.²⁰ The convergence of the two inevitably put the development of technology and content on a confrontation path, if not an outright collision course.

In 2001, the U.S. Court of Appeals for the Ninth Circuit got the first taste of this challenge in *A&M Records v. Napster*, the first known peer-to-peer file-sharing case.²¹ Here, the court was asked to reverse the lower court's granting of a preliminary injunction, which, if sustained, would effectively shut down the entire operation of a highly popular, albeit mostly illegal web file-swapping service. Note that the alleged infringing acts in this case (*i.e.*, the actual file-sharing or file transfer, which involves both unauthorized duplication and distribution of copyrighted materials) were done by the end-users themselves, not Napster. Napster, however, did maintain a centralized server to work as a

²⁰ MP3 originates from a 1987 research and development project on high quality and low bit-rate audio coding technology code named "EUREKA Project EU 147, Digital Audio Broadcasting (or DAB)" at the Fraunhofer Institut für Integrierte Schaltungen (or Fraunhofer IIS-A, which is part of the prestigious Fraunhofer Gesellschaft) of Germany. Through collaborations between Dr. Karlheinz Brandenburg (who is now often referred to as the father of MP3) of Fraunhofer IIS-A and Professor Dieter Seitzer of the University of Erlangen near Nuremberg, Germany, with subsequent contribution from Professor Heinz Gerhäuser, their team eventually developed a successful compression/decompression algorithm that enable fast transmission of audio files over a computer network while preserving the original sound quality, all within the environment or confine of limited bandwidth and storage space. In 1989 Fraunhofer received a German patent over this technology and in 1991 it submitted the invention for standard certification. The case was taken up and reviewed by the Moving Pictures Expert Group (MPEG, established in 1988 as a subcommittee of the International Standards Organization /International Electrotechnical Commission, ISO/IEC). In 1992, it was first integrated into the MPEG-1 video compression standard (for low bandwidth), with the audio portion being recognized as ISO-MPEG Audio Layer-3, hence the abbreviation "MP3." On 26 November 1999, the U.S. Patent and Trademark Office issued U.S. Patent No. 5,579,430 to MP3 (entitled "Digital Encoding Process"), which listed Bernhard Grill, Karlheinz Brandenburg, Thomas Sporer, Bernd Kurten, and Ernst Eberlein as its co-inventors. In September 1998, Fraunhofer started to enforce its patent rights. All developers of MP3 encoders or rippers and decoders/players now have to pay a licensing fee to Fraunhofer.

²¹ 239 F.3d 1004 (9th Cir. 2001). The Ninth Circuit affirmed in part, reversed in part the original injunctive relief and remanded the case to the district court on certain procedural/technical matters.

master index so that different users may be able to identify what files are available and whom they can exchange files with. As a result, the court only needs to deal with the issues of secondary infringement and liability and it eventually affirmed the district court's injunction.²²

On contributory liability, Napster is found to have actual knowledge of infringing activities; its software and services constitute material contribution to the infringement. The court specifically states that “if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement.”²³ The Ninth Circuit goes on to conclude that “Napster has *actual* knowledge that *specific* infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material.”²⁴

On vicarious liability, Napster is found to have enjoyed financial benefit from the infringement and has the right and ability to police its system, or, to put it differently, to supervise the infringing conduct by blocking end users' access to the Napster service. The Ninth Circuit interprets *Sony Betamax* to be a defense applicable *only* when the device or software manufacturer has no actual, specific knowledge of infringement in the first place.

Facing the “staple article of commerce” defense laid out in *Sony Betamax*, the court here is “compelled” to distinguish between the architecture of the system itself and Napster's conduct in relation to the operational capacity of that system. This, as it turns out, eventually affects the U.S. Supreme Court's later decision when that court is confronted with an even more difficult technological challenge.

Incidentally, as a tactical maneuvering not to be “cornered,” Napster has indeed raised the affirmative defense of “fair use,” claiming that it is indeed the case at least under the following circumstances: sampling, where users make temporary copies of a work before purchasing; “space-shifting,” where users access a sound recording through the Napster system that they already own in audio CD format; and permissive distribution of recordings by both new and established artists. The Ninth Circuit, however, discounted each of Napster's arguments. On the question that the music industry has not

²² 284 F.3d 1091 (9th Cir. 2002).

²³ See *supra* note 21, at 1021.

²⁴ *Id.*, at 1022.

shown a significant loss to its existing sale (at that time), the court specifically declares that the “lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works.”²⁵ Facing insurmountable legal hurdles as well as mounting legal bills and other suits, Napster eventually shut down its entire operations, and went into bankruptcy, with its name first being bought by a former rival, the German media conglomerate Bertelsmann AG, then being repurchased, reformed, transformed and its doors reopened as a business for legitimate online music exchange.²⁶

VI. THE *AIMSTER* CASE – A TWIST BUT NO CIGAR

While the Ninth Circuit was wrangling with the challenges brought on by the Napster phenomenon, a somewhat different kind of peer-to-peer file-sharing software emerged elsewhere. In less than two years, the U.S. Court of Appeals for the Seventh Circuit in Chicago, Illinois needs to decide on *In re Aimster*, a case that involves end users using software provider’s instant messaging (IM) service to transmit encrypted copyright-infringing attachments.²⁷ The court only addressed the contributory liability issue here and affirmed the lower court’s preliminary injunction. The Seventh Circuit rejected Aimster’s argument that the encrypted attachment prevented it from having knowledge of the infringing activity, and concluded, instead, that it is merely an attempt to avoid liability by remaining purposely ignorant of the infringement. “[W]illful blindness is knowledge, in copyright law ... as it is in the law generally.”²⁸ So declares the court. The court tries to make it clear that this decision is not against the use of encryption *per se* (“Encryption fosters privacy, and privacy is a social benefit, though also a source of social costs.”).²⁹ Rather, “a service provider that would otherwise be a

²⁵ *Id.*, at 1017.

²⁶ Napster is now a paid-subscription online music provider publicly traded on the NASDAQ. Since 19 May 2003, it has been under the management of Roxio Corporation, which bought the name brand and virtually all interests of Napster at a bankruptcy auction from *Pressplay*, a joint venture between Universal Music Group (UMG) and Sony Music Entertainment, restructured as Sony BMG Music Entertainment (SBME) since 5 August 2004 after its merger with BMG. SBME remains wholly owned by Bertelsmann AG. Note that the record label EMI initially joined with UMG to sue Bertelsmann AG and Hummer Winblad Venture Partners (the venture capital firm which once funded Napster) in February 2003 in the federal district court in New York, claiming that by investing US\$60 million in Napster, Bertelsmann AG is, in effect, promoting piracy and infringing on the copyright of their music. This case was eventually settled with the formation of the *Pressplay* joint venture. See Jeff Leeds, *Music Industry Turns to Napster Creator for Help*, NEW YORK TIMES, December 3, 2004, at C1.

²⁷ 334 F.3d 643 (7th Cir. 2003).

²⁸ *Id.*, at 650.

²⁹ *Id.*

contributory infringer does not obtain immunity by using encryption to shield itself from actual knowledge of the unlawful purposes for which the service is being used.”³⁰ Thus, based on the software’s tutorial showing how it is to be used that only included copyrighted music files, and the fact that Aimster did provide a paid service to enable subscribers to download copyrighted materials, Aimster is found to have sufficient knowledge.

What makes this case interesting is that the court (*i.e.*, Judge Richard A. Posner in particular) took a swipe at the Ninth Circuit approach, and hence, the Supreme Court’s rationale in the *Sony Betamax* case. Coming from the legal-economic point of view, the court held that it is not enough for a defendant to show that a product or service is physically capable of a noninfringing use. Even if such substantial noninfringing uses can be shown, Aimster would still have to show that it would have been disproportionately costly for it to eliminate or at least reduce substantially the noninfringing uses. Therefore, to raise a successful defense, Aimster must show that its software “is widely used for legitimate, unobjectionable purposes,” and the court need not give precise content to the question of how much use is commercially significant.³¹ Here, the court found that Aimster failed to present evidence that the added encryption capability was *effective against the service provider itself*, added important value to the service or saved significant costs. Thus, encryption serves no cover for Aimster to hide behind the *Sony-Betamax* defense.

Here, the Seventh Circuit clearly departed from the Ninth Circuit’s interpretation of the *Sony Betamax* defense. Evidence of cost-effectiveness or probability, *i.e.*, how “probable” the noninfringing uses of a product are, must be introduced even in light of commercially significant noninfringing use and the lack of actual or specific knowledge of infringing activity. These diverse points of view, in fact, set the stage for the U.S. Supreme Court to revisit its *Sony Betamax* ruling after two decades.

VII. *MGM V. GROKSTER* – DECENTRALIZED FILE-SHARING AND INDUCEMENT

As if in a cat and mouse game, some software developers, not surprisingly, quickly devised ways to avoid legal troubles as soon as previous versions were stricken down by

³⁰ *Id.*, at 650-651.

³¹ *Id.*, at 648, 653.

courts for being illegal. Indeed, while Napster was still engaged in full-scale legal battles with the music labels, and thanks in part to the prevalence of the broad bandwidth of internet capacity and burgeoning usage, newer and faster peer-to-peer software was already emerging, ready to seize the advantage from Napster's downfall.³² Two of the most popular of such software names are Grokster and Morpheus. Although the software can be used for any kind of electronic or digital file exchange, it appears that most of their users use the software to swap copyrighted audio and/or video files without authorization. Thus, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, the American federal courts are once again confronted with the legality of these latest technological developments.³³ From the technological point of view, the most significant difference between these newer software packages and Napster or Aimster is that the newer versions do not require a centralized server to police file exchanges; hence it both increases the speed and reduces the risk of service disruption should a server go down.³⁴

As expected, the defendants used the *Sony Betamax* arguments as their primary defense, arguing that distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. The district court agreed with this assessment.³⁵ Apparently impressed by the decentralized architecture software design, the Ninth Circuit also accepted the defendants' argument and affirmed the district court's ruling, holding that

³² Tom Spring, *Napster Fans Find Lively Alternative – For Now As FastTrack's Popularity Grows, Napster's Old Foes Gear Up For A New Fight*, PC WORLD, 12 July 2001, available at <http://www.pcworld.com/news/article/0,aid,55006,00.asp>.

³³ 545 U.S. ___; 125 S.Ct. 2764, 162 L.Ed.2d 781 (2005).

³⁴ Grokster uses the so-called FastTrack technology. On its network, the user's request goes to a computer given an indexing capacity by the software and designated a "supernode," or to some other computer with comparable power and capacity to collect temporary indexes of the files available on the computers of users connected to it. The supernode (or indexing computer) searches its own index and may communicate the search request to other supernodes. If the file is found, the supernode discloses its location to the computer requesting it, and the requesting user can download the file directly from the computer located. The copied file is placed in a designated sharing folder on the requesting user's computer, where it is available for other users to download in turn, along with any other file in that folder. On the other hand, Morpheus, developed by another defendant, StreamCast, uses the Gnutella technology, similar in terms of function and structure to FastTrack but with no "supernodes" being used in some versions. In these versions, peer computers using the software protocol communicate directly with each other. When a user enters a search request into the Morpheus software, it sends the request to computers connected with it, which in turn pass the request along to other connected peers. The search results are communicated to the requesting computer, and the user can download desired files directly from peers' computers. See *Id.*, at 125 S.Ct. 2771.

³⁵ 259 F.Supp.2d 1029 (C.D.Cal. 2003).

they had no actual or constructive knowledge and did not materially contribute to the infringement. On vicarious liability, the Ninth Circuit held that there was no evidence on defendants' right and ability to supervise their users. In fact, the defendants neither designed nor operated an "integrated service," which they monitor and control. Given the lack of a registration and log-in process, the Ninth Circuit held that the defendants had no ability to block or actually terminate access to file sharing functions.³⁶

Thinking the Ninth Circuit read too broadly into the *Sony Betamax* defenses, the U.S. Supreme Court, however, unanimously vacated the Ninth Circuit's decision and remanded the case back to the district court. To clarify, the Supreme Court held that *Sony Betamax* barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows it is in fact used for infringement. It does not mean that whenever a product is capable of substantial lawful use, the producer can never be held contributorily liable for third parties' infringing use of it.³⁷ "Nothing in *Sony* requires courts to ignore evidence of intent if there is such a evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law."³⁸ Thus, the Supreme Court simply chooses not to further elaborate on *Sony Betamax*, especially the "staple articles of commerce" exceptions to contributory and vicarious liability, but focuses instead on "intentional inducement" as a separate category of secondary liability, *i.e.*, when one induces commission of infringement by another, or entices or persuades another to infringe.³⁹ Here the Supreme Court formally adopts the "intentional inducement" doctrine in this case by declaring that "one who distributes a device with the

³⁶ 380 F.3d 1154 (9th Cir. 2004). The Ninth Circuit made a distinction between centralized and decentralized architecture of defendants' software design, and did not apply its own ruling in the *Napster* case. Nor did it accept the holding from the Seventh Circuit in *Aimster*. As a result, this diversity of opinions provides the opportunity and paves the way for the U.S. Supreme Court to review its *Sony Betamax* decision.

³⁷ See *supra* note 33, at 2778.

³⁸ *Id.*, at 2779.

³⁹ Here the U.S. Supreme Court attempts to make a clear distinction between *Sony Betamax* and *Grokster*: "*Sony* dealt with a claim of liability based *solely* on distributing a product with alternative lawful and unlawful uses, with knowledge that some users would follow the unlawful course. The case struck a balance between the interests of protection and innovation by holding that the product's capability of substantial lawful employment should bar the imputation of fault and consequent secondary liability for the unlawful acts of others ... Here, evidence of the distributors' words and deeds going beyond distribution as such shows *a purpose to cause and profit from third-party acts of copyright infringement*. If liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was." [Emphasis added.] *Id.*, at 2782.

object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”⁴⁰

The Supreme Court is mindful of the need to keep its ruling from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, the court gingerly points out: “[M]ere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on *purposeful, culpable expression and conduct*, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”⁴¹ [Emphasis added.]

Based on this rule, the court framed the key question as whether plaintiffs have sufficiently proved that the defendants communicated an inducing message to their software users. The court believed they had. First, each defendant showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users. Second, the evidence of unlawful objective is given added significance by plaintiffs’ showing that neither defendant attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. Third, there is a further complement, *i.e.*, profit motive, to the direct evidence of unlawful objective. Since the extent of the software’s usage determines the gain to both software distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing.

VIII. THE AFTERMATH OF *GROKSTER* – THE “INDUCE ACT” NOW ON HOLD

In *Grokster*, the U.S. Supreme Court clearly backs away from what a machine or device is capable of and turns its attention, instead, to the act of the developer or distributor of that machine or device. While backing away from *Sony Betamax*, the Supreme Court did not accept the invitation to adopt a more economic or cost-effect probability analysis from the Seventh Circuit, either. It seems that the rationale in *Sony*

⁴⁰ *Id.*, at 2771, 2780.

⁴¹ *Id.*

Betamax and *Aimster* will be secondary in similar types of cases in the future. This means defendants in future civil infringement suits cannot just turn a deaf ear to what is going on around their designed or developed technologies and still draw on the *Sony Betamax* line of defense. In other words, there is now a new “intentional inducement” category independent of and separate from the traditional contributory and various liabilities as far as secondary infringement is concerned, and courts are required to first look at whether inducement is present before turning to other issues.

Grokster also trumps what Congress intended to do, at least for now. On June 22, 2004, several influential senators jointly sponsored and introduced a bill entitled “Inducing infringement of Copyrights Act of 2004.”⁴² The bill seeks to create a new type of secondary copyright infringement, *i.e.*, whoever intentionally induces any violation of a copyright owner’s enumerated exclusive rights is an infringer and shall be liable accordingly. The bill defines “intentional inducement” as intentionally aiding, abetting, inducing, or procuring. “Intent” may be shown by acts from which a reasonable person would find intent to induce infringement based on *all* relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability.⁴³ Meanwhile, the bill also expressly indicated that the doctrines of contributory and vicarious liability remain the same, *i.e.*, they will *not* be enlarged or diminished. While this bill is supposed to focus only on a defendant’s intention and behavior and remain technology neutral, it is obviously designed to deal with Internet-related types of copyright infringement.

The bill, as expected, was controversial and indeed generated quite a bit of discussion

⁴² S. 2560, 108th Cong., 2^d Sess. (2004). This bill has been commonly referred to as the “Induce Act.” The six original co-sponsors of the bill are: Senators William (Bill) H. Frist (R-Tennessee), Senate Majority Leader; Thomas A. Daschle (D-South Dakota), Senate Minority Leader; Orrin G. Hatch (R-Utah), Chairman of the Judiciary Committee; Patrick Leahy (D-Vermont), Ranking Member of the Judiciary Committee; Lindsey O. Graham (R-South Carolina) and Barbara Boxer (D-California); subsequently Senators Lamar Alexander (R-Tennessee), Hillary Rodham Clinton (D-New York), Paul S. Sarbanes (D-Maryland), Robert (Bob) Graham (D-Florida) and Debbie Stabenow (D-Missouri) also signed on as co-sponsors, all heavyweight members of the 108th U.S. Senate. It was to demonstrate bi-partisan support of the bill despite the controversies between technology and content providers.

⁴³ Senator Leahy, in fact, tried to assure those who merely provide copying technology that they would not be liable under the bill because they lack indicators of “intentional inducement,” *e.g.*, reliance on infringement for commercial viability, and encouragement of distribution for copyrighted works, among other things. Thus, the mere manufacturing or selling of a portable MP3 player would not be reason to be held liable.

within the copyright circle immediately after its introduction.⁴⁴ It nevertheless quickly gained the endorsement from the Register of Copyrights and the copyright industries in general, but the Institute of Electrical and Electronic Engineers (IEEE) – USA raised concerns over its balance with fair use as well as research and development incentives.⁴⁵ The IEEE-USA proposed, instead, the outright adoption of patent law’s *active inducement* standard, requiring the active inducement conduct instead of mere control, *i.e.*, an affirmative undertaking to induce conduct known to be an infringement.⁴⁶ Due to its controversial nature, the 2004 mid-term election, the budgetary process and some other political maneuvering, the bill never got out of the Senate Judiciary Committee, but the U.S. Supreme Court apparently adopts, in whole or in part, the concept. While still using the term “intentional inducement,” the fact that the court squarely imposes “liability on *purposeful, culpable expression and conduct*” suggests that the rule is now more in line with the patent law “active inducement” principle. It is unclear, however, what exactly constitutes “purposeful, culpable expression and conduct,” and this vacuum clearly needs to be filled by later court decisions. Rest assured that in the meantime, there will be uncertainties. Recognizing this, the court tries, as did the Congress, to calm the technology industry’s concerns by declaring that the inducement rule “does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.” It remains to be seen whether this new ruling indeed has a “chilling effect,” as claimed by some, on future technological developments.⁴⁷

⁴⁴ See, for example, Declan McCullagh, *Senator Wants to Ban P2P Networks*, CNET NEWS, July 22, 2004.

⁴⁵ The Register of Copyrights, having consulted with various interested parties, eventually proposed amending the language of the original bill on 9 September 2004: “Whoever manufactures, offers to the public, provides, or otherwise traffics in any product or service, such as a computer program, technology, device or component, that is a cause of individuals engaging in infringing public dissemination of copyrighted works shall be liable as an infringer where such activity: (A) relies on infringing public dissemination for its commercial viability; (B) derives a predominant portion of its revenues from infringing public dissemination; or (C) principally relies on infringing public dissemination to attract individuals to the product or service.” See Register of Copyrights, *Recommendations on Amendments to S. 2560*, available at <http://www.copyright.gov/docs/S2560.pdf>.

⁴⁶ See 35 U.S.C. § 271(b)(2000, Supp. II); see also *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 909 F.2d 1461 (Fed. Cir. 1990).

⁴⁷ As a result of the Supreme Court ruling and the eventual settlement with music record industry, Grokster ceased its online file-swapping operations on 7 November 2005. Based on its settlement agreement with RIAA, Grokster’s owners will be responsible for paying a total of \$50 million in damages. Any remaining assets of Grokster will be acquired by Mashboxx, a legal peer-to-peer network founded by Grokster’s former president Wayne Rosso and backed by the industry. Like Napster, there is a distinctive possibility that the name brand Grokster may be kept, re-launched as a legal online business in the future. On the other hand, Grokster’s co-defendant, StreamCast Networks,

IX. THE CHALLENGE – BITTORRENT AND OTHERS

As if a rerun from Napster to Grokster, even before the Supreme Court had the opportunity to get its handle on *Grokster*, another wave of peer-to-peer type of technologies was already emerging and quickly gaining popularity. A representative of this new wave of technologies is BitTorrent.⁴⁸ A significant difference between this latest software and the previous ones is that shared files are divided among many end-user computers rather than having one integral such file located on a single server or one other computer. In actual operation, the downloading process involves information being divided into numerous bits while the same information is actually being uploaded to other computers at the same time. As a result, so long as there is a large enough shared computer network existing, this total resource sharing can in theory greatly accelerate the speed of file-sharing. In other words, the files passed on by the largest number of users also become the fastest to download: the faster a user uploads, the faster that user is allowed to download. The appearance of this software greatly increased the usage of online video file-sharing, the piracy of which had not been considered as a serious threat until recently due to the much larger sizes of the files and the time needed to swap.

As of 15 December 2004, just a few days after the Supreme Court decided to accept its appeal petition in *Grokster*, the Motion Pictures Association of America (MPAA) began suing several BitTorrent website owners, although the original creator of BitTorrent has not been targeted.⁴⁹ Clearly recognizing that there are websites conducting legitimate file-sharing businesses (for either licensed files or those in the public domain), the MPAA needs to be selective in targeting the specific business owners in its copyright infringement actions. With the *Grokster* ruling, it is safe to say that future plaintiffs will probably be even more selective in picking the potential defendants. Therefore, this may

decided to stay in the business and fight on. See John Borland, *Last Waltz for Grokster*, CNET NEWS.COM, available at http://news.com.com/Last+waltz+for+Grokster/2100-1027_3-5937832.html.

⁴⁸ First developed by Bram Cohen in 2001, BitTorrent is clearly gaining significant usage since late 2003, particularly since Kazaa, another highly popular peer-to-peer software, was confirmed to have spyware and perhaps too many unwanted advertisements. See Ruben Farzad, *File Swappers Get Creative as Wheels of Justice Turn*, NEW YORK TIMES, June 18, 2005, at C13. In addition to BitTorrent, eDonkey is another example of latest software gaining tremendous popularity.

⁴⁹ As of May 2005, the MPAA had sued more than 100 BitTorrent websites. The movie association has yet to disclose how many individuals have been targeted thus far, but BitTorrent's original creator, Bram Cohen, is not on the list. "The target of our actions is not technology," MPAA spokesperson John Malcolm said. "There are many legal Torrent sites ... that are dedicated to the distribution of public domain work and we are taking no action against them whatsoever." See Associate Press, *Hollywood Sues File-sharing Servers: Action Aimed at Popular BitTorrent Site*, 14 December 2004.

be a factor countering the potential chilling effect on technological developments.

The real difficulties, however, may still lie in the very technology which BitTorrent or other similar software employs. By definition, the technology is content neutral. It is designed to facilitate the transmission of zeros and ones over the network. Therefore, assuming that there are no indexing or tracking devices involved, an owner of a website engaging in transactions using BitTorrent as the underlying technology may indeed be facing uncertainties. Does *Grokster* mean that as long as the website owner(s) does not expressly engage in piracy-encouraging activities or at least is discreet about its operations, *Sony Betamax* defenses may once again be available, especially given that BitTorrent arguably involves both “time” and “space” shifting? Furthermore, whether or not a website owner may qualify as an Internet Service Provider (ISP), take shelter under the “safe harbor” rule and be exempt from any infringement liability, direct or secondary, is also questionable.⁵⁰

In sum, while the introduction of “intentional inducement” helps the legal enforcement in tackling network-related piracy, it certainly does not resolve all the issues. While courts will continue to seek a careful balance between the right of content owners and the development of technologies, technology developers should be mindful that their acts to promote a new technology may well be the determinative factor regardless of what the technology itself is truly capable or not capable of. In addition, there are always other alternatives to reconcile or even resolve the perceived conflict between content and access providers. For example, the Hollywood movie studios have entered an agreement with the creator of BitTorrent, Bram Cohen, who promises not to upload copyrighted movies onto his website.⁵¹ Just how this move may impact on the illegal online swapping of movie and other media files remains to be seen. It is nevertheless a sign of creativity of future business models and a clear demonstration that content providers have indeed learned to embrace new technologies to their advantage. After all, litigation is a zero-sum game that should always be the last resort rather than the final objective in and of itself.

⁵⁰ 17 U.S.C. § 512 (a), (b)(2)(B)(2000, Supp. II).

⁵¹ Sharon Waxman, *Web Site Agrees to Curb Access to Movie*, NEW YORK TIMES, 23 November 2005, at C5 (it appears that Mr. Cohen has been engaged in other negotiations with movie studios to use his technology in future legitimate movie uploads and downloads); see also Charles Solomon, *File Share and Share Alike*, NEW YORK TIMES, 21 August 2005, Section 2, at 4.

X. INTERNATIONAL DEVELOPMENTS

From the international perspective, on the surface there is not a consensus yet concerning secondary liability of copyright infringement: None of the major international conventions or treaties, such as the TRIPS Agreement,⁵² the Berne Convention,⁵³ the Rome Convention⁵⁴ or the so called “WIPO Internet Treaties” (WCT and WPPT),⁵⁵ provides any provision on this issue. However, a closer and more in-depth look reveals a very different picture: Secondary liability for copyright infringement has become not only a common, but indeed one of the most critical issues that every nation must grapple with, regardless of the legal tradition of a given nation, be it continental (civil) or common law. There is clearly an international trend emerging, treating secondary liability just as serious as, if not more than, direct infringement liabilities.

For instance, in Japan, the Supreme Court has recognized indirect infringement liability since 1988.⁵⁶ On peer-to-peer issue, the Tokyo High Court on 31 March 2005 affirmed the Tokyo District Court’s decision in *Nippon Columbia, Co., Ltd., et al. v. Yugen Kaishia Nippon MMO*, holding that both the defendant company (which provided the so called “file rogue” peer-to-peer services) and its president Michihito Matsuda are liable for secondary copyright infringement and that the Limited Liability Law of Internet

⁵² Agreement on Trade-Related Aspects of Intellectual Property Rights, as Annex 1C of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, 15 April 1994)(*Final Act*), MTN/FA-A1C, 1869 U.N.T.S. 299, 33 I.L.M. 1125 (1994).

⁵³ Berne Convention for the Protection of Literary and Artistic Works (1971 Paris Text), 828 U.N.T.S. 223 (1972), as amended on Sept. 28, 1979, WIPO Document AB/X/32 (1979).

⁵⁴ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961, entered into force on May 18, 1964, 496 U.N.T.S. 43 (1964).

⁵⁵ World Intellectual Property Organization (WIPO) Copyright Treaty (WCT), adopted in Geneva on December 20, 1996, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on 20 December 1996, 36 I.L.M. 76 (1997). Note that WCT entered into force on 6 March 2002, see WIPO Copyright Treaty Notification No. 32 (6 December 2001); whereas WPPT entered into force on 20 May 2002, see WIPO Performances and Phonograms Treaty Notification No. 32 (20 February 2002).

⁵⁶ Case 1984 (o (オ)) No. 1204 on the infringement of copyright by the singing at a karaoke outlet (Supreme Court judgment of 15 March 1988), *Minshu*, vol. 42, No. 3, at 199 (a/k/a the Club Cat’s Eye Case). The Supreme Court held that although the karaoke bar has paid a fee for the production of music tapes, it has nevertheless infringed the performing rights by allowing the hostesses and other employees and customers to sing, accompanied by the copyrighted karaoke music. This is known as the Japanese Dance Hall case. See also The Karaoke Equipment Leasing Case, Osaka District Court judgment of 17 May 1994, *Hanrei Jiho*, No. 1516, at 116; and “Sangokushi III” case, Tokyo District Court judgment of 14 July 1995, *Hanrei Jiho*, No. 1555, at 218.

Intermediary Services does not apply.⁵⁷ Using the concept of “expanded scope of users,” the High Court held that the defendants’ acts amounted to users-in-fact, and rendered the defendants “indirect joint tortfeasors” to the copyright infringement.

In the Republic of Korea, the Seoul High Court in *Asia Media, Inc. et al. v. Yang, et al.* (commonly referred to as the *Soribada* case) generally affirmed its Suwon District Court’s decision that the peer-to-peer service has indirectly infringed on the copyrights of members of the Recording Industry Association of Korea.⁵⁸ While holding that the user’s collective, direct downloading of unauthorized MP3 music files onto a computer hard drive constitutes infringement of the right holder’s reproduction rights, the individual conversion from the original CD music to MP3 format *and* for personal consumption may qualify as fair use under Section 27 of the Korean Copyright Law. The High Court sought to clarify that *Soribada* does not constitute a “joint tortfeasor” under Section 760, Paragraph 1 of the Civil Code, since the mere connection to its service as a necessary step to complete the music download is insufficient to suggest that *Soribada* has engaged in the “meeting of minds” with all of its users to accomplish the tort. On the other hand, the court indicated that the defendants knew that its users are engaged in illegal copying, nevertheless installed and improved the *Soribada* services to make the acts more easily but failed to take any actions other than merely posting a warning label on its website. The case has been appealed to the Supreme Court of Korea.⁵⁹

⁵⁷ Case 2004 (Ne (ネ)) No. 446 on Copyright Infringement and Damages (Tokyo High Court Judgment of 31 March 2005). The district court judgment can be found at 2002 (Wa (ワ)) Case No. 4249 (Tokyo District Court, 29th Civil Division, interlocutory judgment of 29 January 2003). See also Article 113 (2) of the Copyright Law of Japan: “An act of using on a computer, in the conduct of business, copies made by an act infringing copyright in a program work (including copies made by the owner of such copies in accordance with the provision of Article 47bis, paragraph (1) as well as copies of a program work imported as mentioned in item (i) of the preceding paragraph and copies made by the owner of such imported copies in accordance with the provision of Article 47bis, paragraph (1) shall be considered to constitute an infringement on that copyright, so far as a person using such copies is aware of such infringement at the time when he has acquired an authority to use these copies.”

⁵⁸ (2003) NA 21140 on opposition to injunction (4th Civil Division, Seoul High Court), affirming Case No. (2002) KAHAP77 (Suwon District Court, Seongnam Branch, First Civil Department, 9 July 2002). In a separate decision, the Seoul High Court held that the two founding members of the service, Yang Jung-hwan and Yang Il-hwan (brothers), were not criminally or personally liable for the infringement. See Case No. 2003N04296 on copyright infringement (5th Criminal Division, Seoul Central District Court, 12 January 2005). These cases have been referred to as Korea’s Napster case (although technically the two are not quite similar) and received widespread attention in the copyright community of the Asian region and elsewhere. The Korean word 소리바다 (*soribada*) means “sea of sound.”

⁵⁹ Meanwhile, the Seoul Central District Court issued another injunction against one of defendant’s

In South Africa, Section 23 of its Copyright Act of 1978 specifically provides secondary infringement liabilities, although later judicial opinion holds that it is also necessary to demonstrate the knowledge of guilt on the part of the infringer.⁶⁰

In Australia, the Copyright Act clearly recognizes secondary infringement liability, and the federal courts have confirmed that as well.⁶¹ With regard to peer-to-peer services, the Federal Court in Australia in its very first such case, *Universal Music Australia Pty Ltd. v. Sharman License Holdings Ltd.*, which involves the popular peer-to-peer software known as KaZaA (or Kazaa), held that Kazaa's owners and distributors (altogether six of the ten defendants), led by defendant Sharman License Networks, Ltd., took no action to rein in illegal file-sharing despite posted warnings on their website urging Kazaa users not to swap copyrighted materials.⁶² The court found that each of the defendants was aware that a major use of the Kazaa system was the transmission of copyrighted material, and none of them had an interest in preventing or curtailing that predominant use; if anything, the contrary. Each of the respondents was at least acquiescent in the use of Kazaa for copyright-infringing activities. Similar to the U.S. approach, Section 101(1) of Australia's Copyright Amendment (Digital Agenda) of 2000 proscribes direct "authorization" of infringement. Here the court elaborated on this prohibition and developed a three-prong test on secondary liability:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;

servers, coded as "Soribada 3," that contain centralized indexing system. As a result, Soribada announced that it has shut down that service and dropped approximately 22 million of its subscribers effective 7 November 2005. See *Soribada Shuts Down P2P Site After Court Verdict*, CHOSUN ILBO (ENGLISH EDITION), 7 November 2005, available at <http://english.chosun.com/w21data/html/news/200511/200511070017.html>.

⁶⁰ Copyright Act No. 98 of 1978, as amended by the respective Copyright Amendments Acts, No. 56 of 1980, No. 66 of 1983, No. 52 of 1984, No. 39 of 1986, No. 13 of 1988, No. 61 of 1989 and No. 1125 of 1992, plus the Intellectual Property Laws Amendments Act of 1997. Section 23 provides, *inter alia*, "(1) Copyright shall be infringed by any person, not being the owner of the copyright, who, without the license of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorize." [Emphasis added.] See also *Frank and Hirsch (Propriety) Ltd. v. A. Roopanand Brothers (Propriety) Ltd.*, 1993 (4) SA 279 (A).

⁶¹ Copyright Act of 1968, Act No. 63 (27 June 1968), as amended by the Copyright Amendment (Digital Agenda) Act of 2000, §§100, 101(1)(A), and 112(E). For the most recent decision on peer-to-peer problems, see also *Universal Music v. Cooper*, [2005] FCA 972 (14 July 2005). Here the Federal court held that the proprietor of the website (Cooper) was held liable for authorizing infringement by knowingly allowing others to place on his website hyperlinks to infringing material and encouraging website users to access infringing files via the links.

⁶² [2005] FCA 1242 (5 September 2005).

- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.⁶³

The court further added, in addition to the above indicated statutory requirements, that “[k]nowledge, or lack of knowledge, is an important factor in determining whether a person has authorized an infringement.”⁶⁴ Interestingly, in addition to holding defendants’ action (or the lack thereof) constituted infringement, the court imposed an affirmative duty on their part (despite their claim that the backbone of Kazaa’s “FastTrack” technology carries no centralized server, hence they have no control over their users) to employ technical measures (such as a filtering mechanism) to ensure no copyrighted work is infringed.⁶⁵

In the People’s Republic of China (PRC), the Beijing First Intermediate People’s Court (BFIPC) got its first taste of online copyright infringement in *Wang Meng, et al. v. Beijing Cenpok Intercom Technology Co., Ltd.* (also known as the *Beijing Online* case) in 1999.⁶⁶ Here the court affirms the lower court’s ruling that the defendant’s unauthorized posting of plaintiffs’ works on the Internet constitutes copyright infringement and the damage rendered by the lower court is appropriate. This is the third known copyright infringement lawsuit in the PRC concerning the liability of an Internet service provider. Yet it has gained national prominence from the outset. The plaintiffs are all celebrity writers, the defendant is the leading Internet firm, and the outcome will no doubt have a profound impact on the future of e-commerce in the PRC.⁶⁷ Instead of simply applying

⁶³ *Id.*, at ¶ 359.

⁶⁴ *Id.*, at ¶ 370.

⁶⁵ While the appeal is pending (oral argument is scheduled for February 2006), on 17 November 2005, Judge Murray Wilcox further ordered the defendants to take active steps to screen out music files that contain key words within 48 hours since an updated list is provided by the plaintiffs. Unable to do so, Sharman closed down its services on 5 December 2005, the court-imposed deadline. See *Universal Music Australia Pty., Ltd. v. Sharman License Holdings, Ltd.* (with corrigendum), [2005] FCA 1587 (17 November 2005).

⁶⁶ [1999] First Intermediate Zhōng No. 185 Civil Judgment (17 December 1999). It needs to be pointed out that this case dealt only with direct infringement, albeit in the network environment.

⁶⁷ For example, the lead plaintiff, Mr. Wang Meng, was one of most well-known writers/novelists in the PRC. The case gained more attention by the official Chinese Central Television’s national live broadcast of the entire trial on September 18, 1999. The names of the other five plaintiffs are: Zhang Jie, Bi Shumin, Zhang Kangkang, Zhang Zhi and Liu Zhenyu.

Article 2(1) of the Berne Convention (of which PRC is a member and such application would automatically supersede the PRC's domestic law), the court took a more creative approach and literally stretched the meaning of the existing statute to its limits (or, arguably exceeding its limits) to encompass online publication within the scope of copyright protection.⁶⁸ Section 10, subsection (5) of the Copyright Law states that the right of exploitation is “the right of exploiting one's work by reproduction, live performance, broadcasting, exhibition, distribution, making cinematographic, television or video production, adaptation, translation, annotation, compilation *and the like*.”⁶⁹ In the Chinese language, “and the like” in connotation can be either exclusive (*i.e.*, after an exhaustive list) or inclusive. For instance, to describe that there are four factors that need to be considered in a given issue, it can be said that they are factors A, B, C, D and the like to be considered. However, it can also be said that there are elements A, B, ... and the like to be considered.⁷⁰ Sensing online publication was clearly not covered by the statute at the time, the court took on this language ambiguity by simply incorporating it into the scope of the statute. This issue was eventually addressed by the enactment of the Copyright Law of 2001.⁷¹

In light of the authorization granted by the 2001 Copyright Amendment, on 30 May 2005, the PRC began to implement the Regulations on Internet Copyright Administrative Protection, a new set of rules designed to clarify the liabilities of online service and/or content providers.⁷² Article 11 of this Regulation grants the governing administrative agencies, *i.e.*, the National Copyright Administration and the Ministry of Information

⁶⁸ Article 2(1) provides, “The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression” Therefore, online publication can easily fit into this category as long as it meets other criteria for being copyrightable. Note that in later domain name disputes, recognizing the insufficiency of existing Trademark statutes, the Beijing court did go ahead with the application of Articles 6^{bis} (concerning well-known marks) and 10^{bis} (concerning unfair competition) as well as the PRC's own Anti-Unfair Competition Law as primary authority in resolving the disputes. The court did not stretch any provision of the Trademark Law to cover domain names as a protectable subject matter.

⁶⁹ Emphasis added. The original Chinese language for the emphasized words is *deng* (等). This is based on the official translation. See DOCUMENT AND ARCHIVE CENTER, NATIONAL COPYRIGHT ADMINISTRATION OF CHINA, COPYRIGHT LAW OF THE PEOPLE'S REPUBLIC OF CHINA, at 54-55 (1993).

⁷⁰ An analogy to this is the usage of “consists of” as opposed to “comprises of” with the former being exclusive and the latter being inclusive.

⁷¹ A newly added Subsection 12, which clearly makes reference to WCT and WPPT, expressly provide the exclusive “right of communications to the public” to the copyright holders. Section 58 further authorizes the State Council to implement measures over the protection of this exclusive right.

⁷² Its original Chinese name is: 互聯網著作權行政保護辦法. See Order No. 5 jointly issued by the National Copyright Administration and Ministry of Information Industries of the People's Republic of China (30 April 2005). This set of regulations took effect on 30 May 2005.

Industry, the authority to impose administrative penalties on the service providers if and when they *knowingly* keep the copyright infringing materials on their services or, although without such knowledge, fail to take down such materials after being notified by the copyright holder, thereby causing damages to the public interest. In addition, Article 4 of the Supreme People's Court Interpretation on Certain Questions Concerning Copyright Disputes Related to Computer Network provides, *inter alia*, states that a network service provider shall be a joint tortfeasor if it aids or abets others to engage in copyright infringing activities.⁷³ These developments clearly indicate that both the courts and governing administrative agencies have now come to recognize both direct and secondary liabilities. While the Chinese Copyright Law has yet to formally address this issue, the overall trend nevertheless suggests that China may be inching toward recognizing secondary liability, particularly infringement in the online or network environment.

In Germany, while the German Copyright Act (*Urheberrechtsgesetz*, or UrhG) does not specifically touch on the issue, the Federal Supreme Court has repeatedly held that the organizer or promoter of a public performance of musical or literary works, or the proprietor or manager of a dance hall or a restaurant may be subject to copyright infringement liability for another party's direct infringement, even though they themselves did not engage in such infringing activities.⁷⁴ Both contributory and vicarious liabilities are principles well established by the German courts.⁷⁵

The court in the Netherlands, however, has held otherwise. In *Kazaa B.V. v. Buma-Stemra*, the Amsterdam Court of Appeals stated that it was not correct to assume that Kazaa had violated the relevant copyright laws simply by providing free and unlicensed software that can also be used for the illegal exchange of copyrighted works. Using photocopiers, tape recorders and CD-writers as analogy, the court held that Kazaa simply cannot be held liable for infringements committed by malicious or ignorant users of its virtual copying device.⁷⁶

⁷³ Its original Chinese name is: 最高人民法院關於審理涉及計算機網絡著作權糾紛案件適用法律若干問題的解釋。 See Supreme People's Court, *Fa Shi* [2000] No. 48 (19 December 2002).

⁷⁴ RGSt 12/34 and RGZ 78,84 and 86; BGHZ 42, 118, 127 – *Tonbandgerätehersteller*. For detailed analyses, see Alexander Liegl, Andreas Leupold and Peter Bräutigam, *Copyright Infringement in Germany*, contained in Dennis Campbell and Susan Cotter, ed., *COPYRIGHT INFRINGEMENT – COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS*, Special Issue 1997, at 162-164 (1997).

⁷⁵ See also the Federal Supreme Court's *Video Licensing Agreement Decision*, [1987] GRUR 37, 39.

⁷⁶ *Kazaa B.V. v. Buma-Stemra*, Court of Appeal Amsterdam, 28 March 2002, no. 1370/01skg.

In the European Union, Article 8(1) of the EU Copyright Directive requires *all* Member States to “provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.”⁷⁷ Article 13(1) of the EU Intellectual Property Rights Enforcement Directive further declares: “Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.”⁷⁸ In addition, Article 13(2) states that “[w]here the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.” That “knowledge” is used to differentiate between two types of infringing activities strongly suggests that the EU recognizes secondary liability for copyright infringement, at least with regard to contributory and vicarious types of indirect infringement.⁷⁹

On 12 July 2005, in the wake of the U.S. Supreme Court decision on *Grokster*, the European Commission issued a proposal for the European Council and Parliament to adopt yet another *Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights* and a *Council Framework Decision to Strengthen the Criminal Law Framework to Combat Intellectual Property Offenses*.⁸⁰ If both the EU Council and Parliament should agree with the current proposed text, the EU would have gone far beyond the United States by making *all* intentional infringements of an intellectual property right *on a commercial scale* (in conformity with Article 61 of TRIPS Agreement), and *attempting, aiding or abetting and inciting* such infringements as *criminal* offences. Furthermore, when such offenses are committed under the aegis of a criminal organization, the defendants may be punishable by a maximum sentence of at

⁷⁷ Council Directive 2001/29/EC, Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 (EC). This Directive is commonly known as the EU Copyright Directive (EUCD), and serves as EU’s compliance/harmonization effort with the two WIPO Internet Treaties.

⁷⁸ Council Directive 2004/48/EC, Enforcement of Intellectual Property Rights, 2004 O.J. (L 195) 16 (EC).

⁷⁹ For detailed analysis, see Rosa Julià-Barceló, *On-Line Intermediary Liability Issues: Comparing EU and U.S. Legal Frameworks*, ESPRIT PROJECT 27018 OF THE ELECTRONIC COMMERCE LEGAL ISSUES PLATFORM (December 1999), available at <http://europa.eu.int/ISPO/legal/en/lab/991216/liability.doc>.

⁸⁰ COM (2005) 276 final (12 July 2005).

least four years' imprisonment.⁸¹

Not surprisingly, this proposal immediately generated controversies across both sides of the Atlantic Ocean, with discussions mostly centered on the vague language of the proposed statute, such as what exactly constitutes "inciting" and what amounts to "a commercial scale," among other things.⁸² What is not being challenged, it seems, is the fundamental concept that there is a need to level the playing field for secondary liabilities among EU Member States. Obviously only time will tell whether there is indeed a consensus forged to put forth a directive as proposed.

On 30 June 2005, the Shih-lin District Court in Taiwan issued a judgment on the *ezPeer* case, holding that the co-defendants *ezPeer* and Yi-da Wu, its legal representative, are not *criminally* liable for copyright infringement under the existing Copyright Law.⁸³ Facing this very first peer-to-peer case in Taiwan, the court used the culpability analyses to determine whether the prosecutor's evidence is sufficient to show that the defendants either directly engage in the infringing act (unauthorized duplication or distribution of copyrighted materials) themselves or aided or abetted other parties (its members) to engage in such an act.⁸⁴ The court answered negatively in both instances, holding that the development of peer-to-peer software did not create the risk prohibited by law, either the Copyright Law or other statutes, that the software was not created specifically for the purpose of infringing others' copyright, and that there is sufficient ground for fair use. Furthermore, using an analogy similar to "capable of substantial non-infringing use," the court held that the *ezPeer* is just a new platform or tool of e-commerce making file-sharing more convenient. The case is now being appealed to the Taiwan High Court.

⁸¹ This approach is quite similar to the U.S. where the Anticounterfeiting Consumer Protection Act of 1996 made copyright counterfeiting a racketeering activity under the Racketeer Influenced and Corrupt Organizations Act (or *RICO*), 18 U.S.C. §§ 1961-1968 (2000, Supp. II), originally designed to crack down on Mafia-type of organized crimes. See Pub. L. No. 104-153, § 3, 110 Stat. 1386 (1996) (amending 18 U.S.C. § 1961(1)(B) to include criminal copyright infringement to the list of *RICO* predicate offenses). See also Phillip Stuller, Note, *How the RIAA Can Stop Worrying and Learn to Love the RICO Act: Exploiting Civil RICO to Battle Peer-to-Peer Copyright Infringement*, 24 LOY. L.A. ENT. L. REV. 521 (2004).

⁸² See Bruce Gain, *Europe Follows Grokster's Lead*, WIRED, 5 August 2005, available at <http://www.wired.com/news/politics/0,1283,68418,00.html>. See also Kevin J. O'Brien, *U.S. Ruling to Echo in Europe Despite Differences in National Laws, Case to Have Chilling Effect*, INT'L HERALD TRIBUNE, 28 June 2005, at 15.

⁸³ (2003) *Su No. 728 Criminal Judgment*, Shih-lin District Court, Taiwan (30 June 2005).

⁸⁴ Note, however, that *ezPeer* does charge a monthly subscription fee (equivalent to approximately US\$3) to allow its members engage in unlimited file-sharing (primarily downloading of music files). Records shows that none of the copyrighted music files on the defendants' website are licensed.

Separately, the Taipei District Court issued its judgment on the so-called *Kuro* case on 9 September 2005, another *criminal* peer-to-peer litigation in Taiwan.⁸⁵ Unlike *ezPeer*, the court in this case found all the defendants (the Kuro Corporation, three of its legal representatives and an end user) liable for copyright infringement and imposed various criminal penalties against each of them, with the highest penalty of four years imprisonment plus NT\$3 million dollars fines (equivalent to approximately US\$86,000).⁸⁶ The court held, among other things, that while there was no issue over the legality of the peer-to-peer technology itself, its provider, however, may be criminally liable at least as an “indirect culprit” if the provider, knowing that the technology could be used as a tool to commit criminal offenses, nevertheless draws on the particular illegitimate functions or features to promote and induce others to use the technology in order to receive financial gain. The defendants have appealed to the Taiwan High Court as well.

There seems to be at least three critical factors that have made the different outcome between *Kuro* and *ezPeer*: (1) unlike *ezPeer*, the *Kuro* court did not distinguish the technology that has a centralized server from the one that does not and treated them differently (in fact, the judgment seems to premise on the ground that Kuro *did* have a centralized system to check on the identity or membership of its users and what may be contained in each user’s computer files); (2) records showed that Kuro actually had its employees directly engaged in the uploading and downloading of copyrighted works to enlarge the content of its online music database; and (3) strategically, the prosecutor in *Kuro* jointly sued the peer-to-peer service provider and an end-user having downloaded more than 900 music files online, which pretty much secured a quite favorable outcome for the prosecution. As the end-user was virtually assured to be convicted, a ruling in favor of the peer-to-peer service provider at the same time would be quite absurd if the court should adopt the *ezPeer* line of rationale – how could an end-user paying a monthly fee was guilty yet the provider that profited from it was not? In all likelihood, the Taiwan High Court may well be the forum that has the final say.⁸⁷

On 24 October 2005, in what may be the first case concerning the end-user liability

⁸⁵ (2003) *Su* No. 2146 Criminal Judgment, Taipei District Court (9 September 2005), opinion issued on 14 September 2005.

⁸⁶ See Articles 90-93 of the Copyright Law (amended as of 24 August 2004).

⁸⁷ Article 376 (1) of Taiwan’s Criminal Procedure Law provides that no criminal cases having the base penalty of less than three years imprisonment may receive the second appeal. Since both *ezPeer* and *Kuro* were based on Article 91 of the Copyright Law, which expressly limits the base criminal penalty to no more than three years imprisonment for unauthorized duplication of copyrighted works, it follows that the two cases are not appealable to the Supreme Court.

of BitTorrent technology, the Hong Kong Magistrate's Court at Tuen Mun convicted a Chan Nai Min (also known as "Big Crook" on the Internet) on three counts under Section 118(1)(f) of its Copyright Ordinance, Cap 528, for distributing three films on the Internet using that technology.⁸⁸ Subsequently, on 7 November 2005, the defendant was sentenced to three-month imprisonment. Noting that the defendant intentionally activated and labeled the movie files with the *.torrent* extension to enable other users to identify and download, that the defendant kept his computer online and the BitTorrent software active to complete the file-share process, the court found no difficulty to consider these acts "an integral part of the enterprise of downloading the infringing copies to other computers," and thus fell squarely within the definition of "distribution" under Section 118(1)(f).⁸⁹ Acknowledging that this prosecution indeed is the first of its type, the court does not "see great differences in terms of harm to copyright owners between this sort of conduct and the distribution of infringing discs. Neither is there any distinction to be drawn from the fact that these were attempts rather than completed offences."⁹⁰

While many nations and regions are weighing their respective approach in dealing with secondary infringement issues, WIPO has also geared up its efforts on this and other related subjects, such as the intermediary liabilities of Internet access and/or service providers (IAPs/ISPs). While there seems to be a consensus among conference participants that something eventually must be done to harmonize the copyright liability issues, especially the standards concerning the IAPs/ISPs, at the present time, however, different opinions and approaches are simply too diverse to be digested into a single and simple format.⁹¹ Note that instead of treating secondary and intermediary liabilities

⁸⁸ Hong Kong Special Administrative Region v. Chan Nai Min, [2005] TMCC 1268/2005 (conviction). Specifically, the defendant was charged with attempting to distribute an infringing copy of a copyright work, other than for the purpose of or in the course of any trade or business, to such an extent as to affect prejudicially the rights of the copyright owner. In addition, three alternative charges of obtaining access to a computer with dishonest intent, contrary to section 161(1)(c) of the Crimes Ordinance, Cap 200, were also brought against the same defendant.

⁸⁹ This case was no doubt a speedy litigation the Hong Kong Custom Services determined to showcase to the world (in line with a famous Chinese proverb "to kill the chicken to scare the monkey," thus creating a chilling effect among all potential BitTorrent or other like technology end-users.) The initial raid of the defendant's home took place on 12 January 2005. Trial was conducted on 5 October and the sentencing was completed in about two weeks. Interviews with Vincent Poon, Senior Advisor, Motion Picture Association, Hong Kong, and former Deputy Commissioner, Hong Kong Customer Service (26 September 2005).

⁹⁰ Hong Kong Special Administrative Region v. Chan Nai Min, [2005] TMCC 1268/2005 (sentencing).

⁹¹ See conference materials on WIPO SEMINAR ON COPYRIGHT AND INTERNET INTERMEDIARIES, WIPO/IIS/05, Geneva, Switzerland, available at http://www.wipo.int/meetings/2005/wipo_iis/.

separately, conference participants tend to blend them into one single issue in their discussions, thus often complicating the discussions.⁹²

XI. CONCLUSION

The legal issues and challenges brought forth by the prevalent usage of the Internet seem to put the advancement of technology and the right of artistic and literary creation on a collision course. Yet history has demonstrated that this clearly is not the first time such a conflict has ensued between content and technology. In the United States, the coming of cameras, radios, telephones, photocopiers, video cassette recorders, compact discs, computer software, and cable television had each generated significant impact on the evolution of the copyright law, both in terms of legislature and judicial developments.⁹³ Ironically, experience suggests that the best solution may lie not in the competition between technology and content, but cooperation and harmonization of the two.⁹⁴ This requires at least the fusion of successful management, law enforcement, and an acceptable technological platform. For example, the video rental businesses quickly took off since the Supreme Court's *Sony Betamax* ruling. Instead of being obliterated by the video cassettes and their recording devices, the movie studios turned out to be the biggest beneficiary from this technology. While the record industry once again chose to confront or even deny the peer-to-peer technology and the perceived threat that comes with it, Apple Corporation's *iTunes* Music Store and the *iPod* product line choose to embrace both instead and have turned a crisis into great opportunities for the music industry.⁹⁵ In a very short period of time since the inception of iPods and iTunes, this

⁹² IAPs/ISPs can be either direct or secondary copyright infringers, or both. Thus before a nation or region even recognizes the existence of secondary infringement liability, the outright discussions over intermediary liabilities on Internet access providers tends to make them extremely nervous. A case on hand was the heated debates between various interest groups in the United States that eventually lead to the compromise over the issue (*i.e.*, the so-called "notice and take-down" rule) on 1 April 1998 that paved the way to the final congressional passage of DMCA. In countries where Internet access services are monopolized or oligopolized, especially with strong government subsidy involved, the situation, as can be imagined, can only get far more complicated.

⁹³ For a detailed illustration of copyright's evolution, see PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO CELESTIAL JUKEBOX* (1994); see also Jessica Litman, *Copyright Legislation and Technological Change*, 68 OREGON L. R. 275 (1989).

⁹⁴ "Competition is not only the life of trade, it is the trade of life ... we co-operate in our group – our family, community, club, church, party, "race," or nation – in order to strengthen our group in its competition with other groups. [Cooperation] is the ultimate form of competition." WILL AND ARIEL DURANT, *THE LESSONS OF HISTORY*, at 19 (1968). Thus, whoever can find ways to effectively bring what appears to be competition elements together in harmony is destined to be the winner.

⁹⁵ Apple first launched the iPod in October 2003 with the hope to capture the existing MP3 listening

combination has not only transformed the company from a computer maker to a music and entertainment powerhouse but also added a major new vehicle for dissemination of pop culture around the world. Even online music piracy has dropped significantly in the United States owing to the increased popularity of this product.⁹⁶

There are certainly other factors that contribute to the effective curtailment of unauthorized copying and distribution of copyrighted works online: more flexible and ingenious licensing (such as “open source” license as an alternative mechanism and collective license by many universities), effective digital rights management (such as built-in anti-circumvention devices or software), and public awareness (education programs). But it does show, time and time again, that a strategy encompassing both carrot and stick will probably carry the most significant weight and be the most effective. On the other hand, experiences suggest that by going after end-users with heavy-handed legal means, especially when not doing so at the early stage or when an industry is already created around a new technology, the plaintiffs run the high risk of turning the entire situation into a scorched-earth scenario and no one comes out winners. Therefore, the adoption of secondary liability of copyright infringement, at least as far as civil liability is concerned, makes economic, logical and practical sense to achieve adequate and effective protection of intellectual property rights of a nation.

In light of the U.S. Supreme Court’s formal recognition of a new “intentional inducement” category in addition to the contributory and vicarious liabilities in terms of secondary liability of copyright infringement, it is safe to say that when dealing with peer-to-peer type infringement cases, the U.S. federal courts will first examine the acts of

market. In light of the fact that most downloaded MP3 music files were probably not authorized, the initial version of iPod did not contain any digital rights management (DRM) device, so that its potential market share would not be jeopardized. See Leander Kahney, *Inside Look at Birth of the iPod*, WIRED, July 21, 2004, available at <http://www.wired.com/news/print/0,1294,64286,00.html>. See also Steven Levy, *iPod Nation – In Just Three Years, Apple’s Adorable Mini Music Player Has Gone from Gizmo to Life-changing Cultural Icon*, NEWSWEEK, July 26, 2005, available at <http://msnbc.msn.com/id/5457432/site/newsweek>. On April 28, 2003, Apple launched its iTunes Music Store after successfully persuading several major music content providers to license their songs to Apple, which in turn may sell each song for US 99 cents over the Internet. As of July 12, 2004, Apple has sold its 100 millionth song (Apple’s CEO, Steve Jobs, originally predicted that this goal could be achieved within a year). Apple is currently migrating iTunes to the MPEG-4 AAC (Advanced Audio Coding) standard and introduced DRM into its newer iPod, which has since generated some controversies over iTunes’ compatibility with traditional MP3 and other music portable players.

⁹⁶ See Mary Madden, *Artists, Musicians and the Internet*, PEW INTERNET & AMERICAN LIFE PROJECT, December 5, 2004; see also Mary Madden and Lee Rainie, *Music and Video Downloading Moves Beyond P2P*, PEW INTERNET & AMERICAN LIFE PROJECT DATA MEMO, 5 March 2005.

the defendant and determine whether there is any indication or evidence that “purposeful, culpable expression and conduct” is present, regardless of whether the defendant has knowledge or control over another party’s infringing act. Only when no inducement is present will the court revert back to the traditional contributory and vicarious type of analyses, which include the *Sony Betamax* “staple article of commerce” defenses, *i.e.*, whether the sale or distribution of a device is commercially capable of substantial non-infringing use.

In sum, while there are still many unanswered questions concerning the future of technological development in the wake of *Grokster*, at least it is clear now that courts in the United States will be paying attention to the act of the alleged infringer, rather than the device or technology being employed. To draw from the analogy of gun-related problems, is it the gun manufacturer or the man who pulls the trigger that is liable for the offense? The U.S. Supreme Court seems to suggest that as long as someone has indeed pulled the trigger, if that is under the guidance, encouragement or inducement from the manufacturer, regardless of whether the manufacturer has benefited from such act, it will nevertheless be held liable, in both civil and criminal terms. Obviously this case will not solve all the problems derived from peer-to-peer file-sharing. More cases are likely to be brought, challenging courts to fine-tune the Supreme Court’s rationale in *Sony Betamax* and *Grokster*. Courts in other countries are also taking hints from the *Grokster*’s rationale. While there is still no consensus on how exactly secondary liability issues should be treated internationally, particularly whether the doctrine of “intentional inducement” should be accepted or adopted, the majority of courts nevertheless seem to be more or less and gradually following the American approach. For countries having the civil law tradition, the secondary infringement liability may also be inferred from the “joint tortfeasors” concept found in the Civil Code and worth further exploration.

In the aftermath of a slew of judicial opinions around the world, one often hears the complaint that the decisions in favor of content providers tend to have a chilling effect that curtail technological innovation or human creativity.⁹⁷ Yet our own experiences seem to suggest otherwise. Now that courts have set new rules on the field, those who

⁹⁷ *MGM v. Grokster: Balancing the Protection of Copyright and Technological Innovation: Hearing before the U.S. Senate Comm. On Commerce, Science and Transportation*, 109th Cong., 1st Sess., ___ (28 July 2005)(Statement of Adam Eisgrau, Vice President, Flanagan Consulting; Executive Director, P2P United; also on behalf of Electronic Frontier Foundation), available at http://www.eff.org/IP/P2P/MGM_v_Grokster/p2punit_testimony.pdf.

have been dangling in the gray areas of existing legal boundaries may still want to try innovative ways to challenge these new rules. On the other hand, there may be more incentives for those who have thus far been reluctant to create and contribute, fearing their work will only be badly pirated online. Thus the irony is, as new ground rules or limits are imposed, they may actually promote more innovation and creativity. Further empirical studies may be necessary to ascertain the validity of various arguments from each side.⁹⁸

In the United States, organizations such as the Electronic Frontier Foundation (EFF) and P2P United are now urging Congress to further amend the Copyright Act in the wake of *Grokster* decision. Specifically, they would like to see that statutory damages (in the amount of US\$750 to US\$150,000 per infringing work)⁹⁹ be restricted to direct infringement only and that voluntary collective licensing for music downloading be given serious consideration.¹⁰⁰ The U.S. Register of Copyrights, Marybeth Peters, has also joined the call for copyright licensing reforms.¹⁰¹ Hilary B. Rosen, former president of RIAA (1998-2003) and the initiator of record label's tough line legal campaign against online copyright infringers, offered what may well be one of the most sobering yet enlightening observations:

“... knowing we were right legally really still isn't the same thing as being right in the real world. We had that euphoria with the first *Napster* decision. I hope my former colleagues remember that. The result was lots of back and forth and leverage hunting on both sides and continued litigation and then a great service shut down to make room for less great services. And more legal

⁹⁸ Initial surveys seem to suggest that the *Grokster* and other similar court decisions have not put a damper on global audio and video file-share activities. Based on a Nielsen Soundscan survey, in 2005 alone, a total of 333 million downloads took place from various music retail outlets, up from 134 million in 2004, or a whopping 148% increase. This does not even take into account the number of illegal downloads. See NEWSWEEK INTERNATIONAL, 16 January 2006, at 9.

⁹⁹ 17 U.S.C. § 504 (c)(2000, Supp. II).

¹⁰⁰ See *supra* note 97. This concept is similar to the “equitable remuneration” doctrine or *Vergütungspflicht* (copyright levy) found in Sections 54 to 54d of the German Copyright Law (UrhG), first codified in 1965. Many nations have since adopted the concept albeit it works somewhat differently. This principle in effect amounts to a form of compulsory license or tax and has not been fully adopted in the United States, with the exception of royalty payments for digital audio devices and media under the Audio Home Recording Act of 1992. See 17 U.S.C. § § 1003-1007 (2000, Supp. II).

¹⁰¹ *Music Licensing Reform: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, U.S. House of Representatives, 109th Cong., 1st Sess., ____ (21 June 2005)(Statement of Marybeth Peters, Register of Copyrights), available at www.copyright.gov/docs/regstat062105.html.

victories didn't bring more market control no matter how many times it was hoped it would. . . . The euphoria of this decision does not and should not change the need for the entertainment industry to push forward and embrace these new distribution systems. . . . For today, I hope all sides will take a deep breath and realize that this Supreme Court decision doesn't change one bit their responsibility to move forward together on behalf of their consumer.”¹⁰²

Thus, regardless of what is happening on the legal front, with technology and content development not necessarily on a collision course, it is important to note that one way or another, it is the market, not the courts or the legislature, which will ultimately decide what will be for our future.

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¹⁰² Hilary B. Rosen, *The Wisdom of the Court, Part II*, THE HUFFINGTON POST, 27 June 2005, available at: www.huffingtonpost.com/theblog/archive/hilary-rosen/the-wisdom-of-the-court-_3259.html.

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