
I Want my MP3: Secondary Copyright Liability in a Hidden Peer-to-Peer Network

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“[Y]ou can run but you can’t hide.”
— Cary Sherman, President RIAA²

I. INTRODUCTION

A worldwide technology arms race is underway between artists and their fans.³ The fight is over copyrights, and the arms are the technologies that control, or destroy control, over the copyrighted works.⁴ The artists have developed “Digital Rights Management” (DRM) technology to lock down their works, while their fans are using anonymity-protecting Peer-to-Peer networks to hide from copyright enforcement.⁵ This Note focuses on the copyright liability

1. Suffolk University Law School, J.D., 2005.

2. All Things Considered: *Cyberguerrilla warfare heats up as recording industry pursues music file swappers*, (NPR radio broadcast, July 8, 2003) 2003 WL 5580247 (responding to discussion of anonymity feature on Peer-to-Peer network).

3. *Id.*; Mike Corder, *Music Industry Raids Offices of Kazaa*, Associated Press, Feb. 6, 2004, available at http://www.usatoday.com/tech/news/techpolicy/2004-02-06-kazaa-raid_x.htm (last visited Mar. 3, 2005).

4. See generally John Alan Farmer, Note, *The Specter of Crypto-Anarchy: Regulating Anonymity-Protecting Peer-to-Peer Networks*, 72 *FORDHAM L. REV.* 725 (2003) [hereinafter *The Specter of Crypto-Anarchy*].

5. Megan E. Gray, *The Legal Fallout From Digital Rights Management Technology*, 4 *Computer and Internet Lawyer* 20, (April, 2003) (discussing DRM technology); and Farmer, *The Specter of Crypto-Anarchy*, *supra* note 4 (discussing

for the developers and users of Freenet, an anonymity-protecting Peer-to-Peer network.⁶

This Note first gives an overview of secondary copyright liability, discussing contributory and vicarious infringement.⁷ Peer-to-Peer (P2P) technology is then discussed, along with cases addressing this technology.⁸ Freenet is finally discussed, with the legal implications for those who develop and those who use Freenet.⁹ This Note proposes that users of Freenet, but not the developers, may be liable for secondary copyright infringement.¹⁰

II. SECONDARY COPYRIGHT LIABILITY

Title 17 of the United States Code gives the owner of a copyright the exclusive control of the reproduction, distribution, display, performance, and derivative works of their copyrighted work.¹¹ Under the statute, the owner of the copyright has standing to sue those who violate any of these rights directly.¹² Under the judicially-created doctrines of contributory and vicarious liability, copyright holders may sue those who are liable for the infringement of a third party.¹³

A. Contributory Copyright Infringement

“[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”¹⁴ A court will find contributory infringement if the copyright owner has established first, direct infringement of the copyright, second, knowledge of the infringement, and third, material contribution to the infringement.¹⁵

software programs: Free Haven, Publis, and Freenet, which protect identity on Internet while publishing).

6. Farmer, *The Specter of Crypto-Anarchy*, *supra* note 4 at 745-46 (discussing different types of anonymous communication on the Internet).

7. *See infra*, note 11 and accompanying text.

8. *See infra* note 63 and accompanying text.

9. *See infra* note 143 and accompanying text.

10. *See infra* Section IV (drawing conclusions based on current law).

11. 17 U.S.C. § 106 (2000).

12. 17 U.S.C. §§ 502-505 (2000) (providing remedies of injunctions, impounding and destruction of infringing materials, damages, and attorney’s fees).

13. *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1019 (9th Cir. 2001); *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.* 443 F.2d 1159, 1162 (2nd Cir. 1971); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1971).

14. *Napster*, 239 F.3d at 1019-20.

15. *Napster*, 239 F.3d at 1019-20; *Matthew Bender & Co. v. West Publ’g Co.*,

1. Occurrence of Direct Infringement

The copyright holder is given an exclusive right for a limited time to control the copying of the copyrighted work.¹⁶ When the work is copied, the person who illegally copies the work is a direct infringer of the copyright.¹⁷ In the context of Peer-to-Peer (P2P) networks, this usually means violating the right of control over reproduction and distribution when a copyrighted music CD is copied into MP3 format and distributed over the P2P networks.¹⁸ To establish copyright infringement the copyright owner must establish both ownership of the copyright and the occurrence of an infringing act.¹⁹ The alleged infringer may then rebut the charge of infringement.²⁰

The judicial doctrine of fair use in copyright law is codified; the governing statute provides that some copying, which would ordinarily constitute infringement, is not infringement.²¹ If no direct infringement occurred, then there can be no secondary copyright liability.²² In *Sony Corp. of America v. Universal Studios, Inc.*,²³ the issue presented on appeal to the Supreme Court was whether Sony was liable for contributory infringement, but the Court resolved the issue on the basis of whether or not Sony's customers were actually

158 F.3d 693, 706 (2d Cir.1998); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir.1996); *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir.1971).

16. 17 U.S.C. § 501(a) (2000) ("Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 121 or of the author as provided in Section 106A(a) . . . is an infringer of the copyright or right of the author, as the case may be.").

17. 17 U.S.C. § 501(a) (2000).

18. *See In Re Aimster Copyright Litigation*, 252 F. Supp. 2d 634, 644 (N.D. Ill. 2002), *aff'd*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, *Deep v. Recording Industry Ass'n of America, Inc.*, 124 S. Ct. 1069 (2004).

19. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001); "Plaintiffs must satisfy two requirements to present a prima facie case of direct infringement: (1) they must show ownership of the allegedly infringed material and (2) they must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106." *Id.*

20. 17 U.S.C. § 107 (2000). One affirmative defense is the doctrine of fair use. 17 U.S.C. § 107. Under this doctrine a court must consider four factors and determine if the act of infringement complained of should be allowed. 17 U.S.C. 107 (2000). One example of fair use is using a VCR to record a copyrighted television broadcast. *Sony Corp. of Am. v. Universal Studios, Inc.* 464 U.S. 417, 442-43 (1984). The copying is only fair use however, if it is for the purpose of viewing the broadcast at a different time, called time-shifting, but not for the purpose of building a library of recorded programs. *Id.* at 451.

21. 17 U.S.C. § 107, Notes of Committee on the Judiciary, House Report No. 94-1476.

22. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal.1995).

23. 464 U.S. 417 (1984).

infringing the copyrights.²⁴ The Supreme Court concluded that the majority of Sony's customers were only copying the material so that they could view it at a different time, and that this practice, called time-shifting, falls within the fair use provision of the copyright act, and is therefore not infringement.²⁵ Sony could not be held liable for contributory copyright infringement where the act of direct infringement did not occur.²⁶

Sony was selling a recording device called the Betamax, which was capable of recording copyrighted television broadcasts.²⁷ The Court borrowed a standard for contributory infringement from patent law, requiring more participation in the copyright infringement than just selling a "staple article of commerce" for material contribution.²⁸ In patent law, when an item is sold in parts and then assembled, the person selling the parts may be liable for contributory infringement of the patent.²⁹ This does not apply, however, if the part sold is a staple article which is commonly sold for many different purposes, or is capable of substantial non-infringing applications.³⁰ The Supreme Court in Sony held that the Betamax was a staple article of commerce under the copyright fair use laws because it was commonly used in a non-infringing manner.³¹ Under this staple article of commerce theory, the analysis for determining infringement focuses on the non-infringing uses of third parties instead of the direct infringement of third parties.³²

2. Knowledge of Copyright Infringement

When a person either knows or should know of copyright infringement, the element of knowledge required to show contributory copyright infringement is satisfied.³³ Actual knowledge

24. *Sony*, 464 U.S. at 421. The only issue on appeal to the Supreme Court was contributory infringement, but reasoning from vicarious infringement as well as contributory infringement was used. *Id.* at 435 FN 17; *Id.* at 456.

25. *Id.*

26. *Id.* at 446.

27. *Sony*, 464 U.S. at 426. Sony produced the Betamax, a precursor to the VCR, which was capable of recording copyrighted works from television broadcasts. *Id.*

28. *Sony*, 464 U.S. at 426 (giving examples of "a typewriter, a recorder, a camera, a photocopying machine" as staple articles of commerce).

29. 35 U.S.C. § 271(b) - (c)

30. *See, e.g., Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 n.4 (Fed. Cir. 1990).

31. *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 442 (1984) ("[The product] need merely be capable of substantial noninfringing uses.")

32. *Id.*

33. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019-20 (9th Cir.

can come from notice of infringement by the copyright holder.³⁴ In *Sony*, the Court concluded that Sony did not have actual knowledge of the copyright infringement of its customers because the contact with the customers did not give them actual knowledge, and they were not informed of specific infringing acts in some other way.³⁵ Constructive knowledge can also satisfy the knowledge requirement.³⁶ When a person has reason to know of copyright infringement, the court may hold the person to have knowledge of the infringement.³⁷

3. Material Contribution

The element of material contribution is satisfied when the accused provides the means for copyright infringement, or in any way knowingly furthers a third party's copyright infringement.³⁸ One example of material contribution is where the owner of a swap meet provides the site and facilities for copyright infringement.³⁹ Another example is where the operator of an Internet bulletin board fails to remove infringing material when the operator has actual knowledge of the copyright infringement.⁴⁰

B. Vicarious Copyright Infringement

Vicarious infringement in copyright law is based on the doctrine of *respondeat superior*.⁴¹ The elements for vicarious copyright infringement are less strict than the usual agency relationship of employer and employee.⁴² In agency law, the reasoning behind

2001).

34. *Id.*

35. *Sony*, 464 U.S. at 439; *see also Napster*, 239 F.3d at 1020-21.

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

37. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir.1971).

38. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). *Fonovisa* involved a swap meet where copyrighted materials were being sold illegally, and the court found the swap meet owners liable for contributory infringement because they provided the site for the infringing activity of distribution. *Id.*

39. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) The *Fonovisa* Court declared: "Cherry Auction actively strives to provide the environment and the market for counterfeit recording sales to thrive." *Id.*

40. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995).

41. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). *Respondeat superior* is a doctrine of agency law, where the master or employer is liable for the torts of the servant or employee. *Id.*

42. *Shapiro, Bernstein and Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir.1963).

respondeat superior is that the employer is reaping the financial benefit from the good work of the employee, and should also bear the risk for the torts committed by the employee within the scope of the business.⁴³ *Respondeat superior* is also based on the theory that the employer has control over the employee and is in the best position to prevent the harmful conduct. In this way the incentive to prevent the harmful conduct is given to the employer who is in a position to pay if the harm occurs.⁴⁴

The judicially-created copyright doctrine requires some ability to control the infringing activity, and some direct financial benefit from the infringing activity.⁴⁵ As with contributory copyright infringement, vicarious copyright infringement requires a finding of direct infringement by a third party.⁴⁶ Unlike the doctrine of contributory copyright infringement, however, the doctrine of vicarious copyright infringement does not require any knowledge of the infringing activity.⁴⁷ The liability is instead based on the relationship between the infringing party and the vicarious infringer.⁴⁸

1. Control of Infringement

The element of control can be understood by contrasting the relationship of an employer who must answer for the torts of the employee, with that of a landlord who is not responsible for the torts of the tenant.⁴⁹ The courts have drawn a distinction between an employer/employee relationship and a landlord/tenant relationship.⁵⁰ The key difference is the right and ability that an employer has to control and supervise the conduct of the employee.⁵¹ No such right is traditionally given to a landlord.⁵² When courts have determined that a case is closer to the employer model, then vicarious liability is

43. *N. X. v. Cabrini Med. Center*, 719 N.Y.S.2d 60, 75 (N.Y. App. Div. 2001).

44. *Ray v. Value Behavioral Health, Inc.*, 967 F. Supp. 417 (D. Nev. 1997).

45. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). *Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc.* 855 F. Supp. 1314, 1325-26 (D. Mass. 1994).

46. *Supra* text accompanying notes 16 - 82.

47. *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307(2 Cir. 1963).

48. *Id.* at 308.

49. *Id.*

50. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2 Cir. 1963).

51. *Id.* at 307.

52. Irma W. Merrill, *Landlord Liability for Crimes Committed by Third Parties Against Tenants*, 38 VAND. L. REV. 431, 435-37 (1985) (discussing the history of landlord liability).

imposed for the copyright infringement.⁵³ Some courts have ruled that in order to escape liability the relationship must be a strict landlord tenant relationship, without any right by the landlord to control or supervise the activities of the tenant.⁵⁴

When considering the issue of vicarious copyright infringement for the creators of technology, control has been at the center of the courts' analysis.⁵⁵ If the supplier of the technology retains the possibility of control over copyright infringement, then the courts may find the supplier liable for the copyright infringement of its customers.⁵⁶ For example, in *Sony* where the relationship ended at the sale of the Betamax recording device, there was not sufficient control to impose vicarious copyright liability for the customer's infringement using a Betamax (or VCR) recorder.⁵⁷

2. Financial Interest

The courts have taken a broad view of the financial interest

53. *Id.*

54. *E.g.*, *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). In the *Fonovisa* case where the court held that the landlord had the ability to control the infringing activity by supervising and policing the swap meet, the landlord was a swapmeet owner and the tenant was a vendor renting space. *Id.* There is also a group of cases known as the "dance hall cases" where the court held the owners of dance halls liable for the infringing performances held in the dance halls. *Sony*, 464 U.S. at 438 (foot note 18); *see also* *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass'n*, 554 F.2d 1213 (1st Cir. 1977) (affirming secondary liability where racetrack retained infringer to supply music to paying customers); *KECA MUSIC, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72 (W.D. Mo.1977) (finding secondary liability where cocktail lounge hired musicians to supply music to paying customers); *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929) (upholding liability where dance hall hired orchestra to supply music to paying customers).

55. *Compare* *Metro-Goldwyn-Maver Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1164 (9th Cir. Aug. 19, 2004), *cert. granted*, 125 S. Ct. 686, (U.S. Dec 10, 2004) (No. 04-480); *with* *Napster*, 239 F.3d at 1020-21. In *Napster*, the technology was seen by the courts as a service, where Napster retained control over the use of the technology, but in *Grokster*, very similar technology was viewed as a sale, where the consumer retained control. *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993, 998 (E.D. Cal. 2004) (comparing *Grokster* technology to Betamax (VCR) technology which did not create vicarious copyright liability). *Grokster*, 380 F.3d at 1164; *Napster*, 239 F.3d at 1022. The courts concluded that *Napster* was vicariously liable, while *Grokster* was not. *Grokster*, 380 F.3d at 1166.

56. *See* *Napster*, 239 F.3d at 1022-24.

57. *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 437-38 (1984). The Court suggests that if *Sony* had advertised infringing uses for the Betamax, or discussed infringing uses in its users manual, then the relationship between *Sony* and their customers would have enough control for vicarious liability. *Id.* *See also* *In re Aimster*, 334 F.3d 643, 654 (7th Cir. 2003) (noting Court in *Sony* could have found vicarious liability because of control over features which enabled copyright infringement).

element under a vicarious liability analysis.⁵⁸ A clear example of financial interest is presented when a person receives a percentage of sales from infringing activities.⁵⁹ The courts, however, have accepted more tenuous connections between the infringing activities and financial benefit, such as attracting customers.⁶⁰ Another example where a court found a direct financial interest was when a band was commissioned which did not pay for a license to perform copyrighted music and therefore can charge less for performing copyrighted music.⁶¹ In a landlord and tenant situation where the tenant is infringing copyrights, the rent paid by the tenant does not constitute a direct financial interest in copyright infringement unless the landlord knew of the tenant's intentions before signing the lease, and received a direct benefit from the tenant's infringing activities.⁶²

III. PEER-TO-PEER TECHNOLOGY

Before Peer-to-Peer technology, searching for specific files on the Internet was difficult because a search would require looking through a lot of different web sites for the desired files.⁶³ To solve this problem Shawn Fanning created a program called Napster, which catalogued files on many different computers to make them searchable as though the files were on one central server.⁶⁴ Through the central server, one computer can find another computer with a desired file and connect directly to transfer the file.⁶⁵ Napster used this configuration of a Peer-to-Peer network.⁶⁶ A Peer-to-Peer

58. *Fonovisa*, 76 F.3d at 263-64 (finding availability of infringing materials at a swap meet was a draw for customers which was a financial interest of the swap meet). Also see the "dance hall cases" *supra* note 54.

59. *See, e.g.*, *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 306-07 (2d Cir. 1963). The owner of a department store chain received a percentage of sales from the vendor who sold copyrighted music illegally in his stores. *Id.*

60. *See, e.g.*, *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass'n*, 554 F.2d 1213 (1st Cir. 1977); *KECA MUSIC, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72 (W.D.Mo.1977); *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929).

61. *See Big Tree Enters., Ltd. v. Hooker*, 1992 WL 179120, at *1 (N.D. Ohio 1992) (holding restaurant owner liable for copyright infringement of hired band).

62. *Deutsch v. Arnold*, 98 F.2d 686, 688 (2d Cir. 1938).

63. TYSON, JEFF, *How the Old Napster Worked*, at <http://computer.howstuffworks.com/napster.htm> (last visited Mar. 3, 2005). Napster has changed the structure of how it operates from a free service for searching MP3s to a pay-per-download service. *Id.*

64. *Id.*

65. *Id.* (explaining that a computer which is not a server is a peer, and files are actually transferred directly from one peer to another peer).

66. *Id.* The current version of Napster is no longer a peer-to-peer network. Instead it is a subscription service which provides music file downloads from its

network (P2P) is a network where the files are not stored on a central computer called a server, but are stored on individual computers which are connected together.⁶⁷ Napster and similar programs which have followed Napster can be categorized into two categories: centralized and de-centralized Peer-to-Peer networks.⁶⁸

A. Centralized Peer-to-Peer Networks

In a centralized P2P network, when one computer wants to find a file, the search is through a centralized server.⁶⁹ Each user tells the central server what files are available, and the central computer has an index of all the file names, but not the files themselves.⁷⁰ When a file is requested, the central computer instructs the two users to connect directly, not through the central computer, to transfer the file.⁷¹ The first Peer-to-Peer (P2P) file sharing network was Napster.⁷² Napster was a centralized network, where all the Napster users connected to the network could search for files from all other users connected to the network.⁷³

Napster was held liable for contributory infringement because it was operating the equivalent of an illegal online swap meet.⁷⁴ Napster had knowledge of copyright infringement on its system and had the ability to remove users or block infringing files.⁷⁵ In a P2P network like Napster, the files are not stored on a central computer,

servers for a fee. http://www.napster.com/why_napster.html (last visited Mar. 3, 2005).

67. BRAIN, MARSHALL, How File Sharing Works, at <http://computer.howstuffworks.com/file-sharing1.htm> (last visited Mar. 3, 2005).

68. BRAIN, MARSHALL, How File Sharing Works, at <http://computer.howstuffworks.com/file-sharing3.htm> (last visited Mar. 3, 2005). Examples from this article are Napster, as a centralized network, and Gnutella, as a decentralized network. *Id.*

69. See, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011-12 (9th Cir. 2001).

70. *Id.*

71. BRAIN, MARSHALL, How File Sharing Works, at <http://computer.howstuffworks.com/file-sharing3.htm> (last visited Mar. 3, 2005). Examples from this article are Napster, as a centralized network, and Gnutella, as a decentralized network. *Id.*

72. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011-12, (9th Cir. 2001) (describing the Napster service in detail).

73. *Id.*

74. See *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993, 999 (E.D. Cal. 2004).

75. *Napster*, 239 F.3d at 1023 (9th Cir. 2001). Napster did not have the ability to block infringing songs when the lawsuit was brought because it had not written any software to do so, but the court found that it would not be difficult for Napster to write the software, and therefore it had the ability to block infringing files. *Id.*

but on individual computers on the network.⁷⁶

In *Napster*, the court found the operators of the network had actual and constructive knowledge of copyright infringement.⁷⁷ Actual knowledge was established through documents sent to Napster informing them of copyright infringement, and by an internal Napster document written by a Napster executive referring to customers' acts as "exchanging pirated music."⁷⁸ Constructive knowledge was established through Napster executives' prior knowledge of copyright law, and their promotion of copyright infringement in their tutorials.⁷⁹ The Seventh Circuit has based contributory copyright infringement on constructive knowledge without actual knowledge.⁸⁰

The Ninth Circuit in *Napster* first examined whether there were any defenses to the charge of direct infringement before it proceeded to contributory and vicarious infringement.⁸¹ After determining Napster's customers were using Napster's service for direct copyright infringement, the court then determined Napster was liable for the infringement of its customers.⁸² Napster did not appeal the district court's finding that A&M Records established direct infringement by the users of Napster, but instead unsuccessfully argued on appeal that the uses of the network were fair uses under copyright law.⁸³ For the purposes of this Note, the court's determination of direct infringement by the users of P2P networks is presumed to be correct.⁸⁴

Napster's creators believed the operators of the network could avoid liability for copyright infringement because Napster's computers did not actually store or transfer any of the files.⁸⁵ The

76. BRAIN, MARSHALL, How File Sharing Works, at <http://computer.howstuffworks.com/file-sharing1.htm>

77. *Napster*, 239 F.3d at 1020 n.5.

78. *Id.*

79. *Id.* The conclusion of liability based on constructive knowledge in this case is dicta because the court relied on the actual knowledge not constructive knowledge to establish contributory copyright liability. *Napster*, 239 F.3d at 1021-22.

80. *In re Aimster* 334 F.3d 643 (7th Cir. 2003).

81. *Id.* at 1013-19

82. *Id.*

83. *Id.*

84. This Note focuses on secondary liability, which requires there to be direct infringement, however the question of copyright fair use on the Internet is not a settled one. See Electronic Frontier Foundation, EFF Secures Protection for ReplayTV Clients: Hollywood Promises Not to Sue Consumer Plaintiffs, January 9, 2004, http://www.eff.org/IP/Video/Newmark_v_Turner/20040109_end_case_pr.php (last visited Mar. 3, 2005).

85. Hisanari Harry Tanaka, *Post-Napster: Peer-to-Peer File Sharing Systems*

Ninth Circuit Court disagreed and held on a preliminary injunction appeal that Napster was likely liable under contributory and vicarious infringement claims.⁸⁶ The court concluded that Napster had knowledge of the copyright infringement occurring using Napster's network, and Napster materially contributed to the infringement by failing to remove access to copyrighted material on the network.⁸⁷

In *Aimster*, a case similar to *Napster*, where the operators of the P2P network were shielded from knowledge by encryption, the court stated that willful blindness will establish the element of knowledge.⁸⁸ *Aimster* was a centralized Peer-to-Peer network which tried to avoid the legal troubles of *Napster*⁸⁹ and failed.⁹⁰ *Aimster* designed a P2P network much like *Napster*, but where the users employed encryption technology.⁹¹ The idea of this design change was to shield the *Aimster* network operators from actual knowledge of the copyright infringement.⁹² If the element of knowledge could not be established, then a contributory infringement claim would fail.⁹³ The court did not find this argument persuasive, and concluded *Aimster's* lack of knowledge was a result of willful blindness, and that "willful blindness is knowledge, in copyright law."⁹⁴

Aimster also believed that without the knowledge of copyright infringement, they would not be liable for vicarious liability because they did not have the ability to supervise and control copyright infringement.⁹⁵ The court decided it was unnecessary to draw a definite conclusion on this issue, but indicated that the case for vicarious liability was less likely to succeed than the case for contributory infringement.⁹⁶ The court suggested that *Aimster* may

Current and Future Issues on Secondary Liability Under Copyright Laws in the United States and Japan, 22 LOY. L.A. ENT. L. REV. 37, 41-42 (2001).

86. *Napster*, 239 F.3d at 1027.

87. *Id.*

88. *In re Aimster* 334 F.3d 643, 650 (7th Cir. 2003); see also *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966).

89. Alec Klein, *Going Napster One Better; Aimster Says Its File-Sharing Software Skirts Legal*

Quagmire, Washington Post, Feb. 25, 2001, at A1

90. See *In re Aimster*, 334 F.3d 643, 645 (7th Cir. 2003). *Aimster*, like *Napster* appealed from a preliminary injunction, and like *Napster* the court held *Aimster* was likely a contributory and vicarious infringer. *Id.*

91. *Id.*

92. *Id.*

93. *In re Aimster*, 334 F.3d at 650 (rejecting *Aimster's* argument that it could not obtain knowledge because of encryption).

94. *Id.*

95. *Id.*

96. *In re Aimster*, 334 F.3d at 654-55.

have the necessary control because it could change the design of its software eliminating the encryption feature.⁹⁷

The main difference between Napster and Aimster was that Aimster used encryption.⁹⁸ When a request for a file was sent, the request was encrypted by the user's computer, and Aimster would not have knowledge of what file was requested.⁹⁹ Another user's computer would decrypt the information, then the two individual computers connected directly, but not through Aimster's computer.¹⁰⁰ The server still worked like the Napster service, matching requests for files with the users who listed those files as available on their computer.¹⁰¹

The court found that Aimster was contributing to copyright infringement because the tutorials which described how to use the service gave examples of using the service for copyright infringement.¹⁰² In addition, Aimster provided a service at \$4.95 per month, where the top downloads each month would be available by clicking on one button.¹⁰³ The top downloads each month were copyrighted, and this service contributed to the direct infringement.¹⁰⁴ These contributions were found necessary to distinguish the case from the Sony case, where contributory infringement was not found, because Sony did not invite the customers to infringe copyrights.¹⁰⁵

The use of encryption may only reduce the defenses available to the accused contributory infringer.¹⁰⁶ The Seventh Circuit Court, in Aimster, said you cannot hide from actual knowledge by using encryption.¹⁰⁷ The use of encryption alone, however, does not impute knowledge.¹⁰⁸ The essential ingredient is the intent of the person using the encryption.¹⁰⁹ When evidence establishes that the

97. *Id.*

98. *Id.*

99. *In re Aimster*, 334 F.3d at 650; Alec Klein, *Going Napster One Better; Aimster Says Its File-Sharing Software Skirts Legal Quagmire*, The Washington Post, February 25, 2001, at A1.

100. *In re Aimster*, 334 F.3d at 646.

101. Alec Klein, *Going Napster One Better; Aimster Says Its File-Sharing Software Skirts Legal Quagmire*, The Washington Post, February 25, 2001, at A1.

102. *In re Aimster*, 334 F.3d at 651-52.

103. *Id.*

104. *Id.*

105. *Id.*; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

106. *In re Aimster*, 334 F.3d at 650 (analogizing to criminal law where willful blindness establishes criminal intent).

107. *Id.*

108. *Id.*

109. *In re Aimster*, 334 F.3d at 650 (citing *United States v. Giovannette* 919 F.2d 1223, 1228 (7th Cir. 1990)).

person using encryption should have known there was copyright infringement, the use of encryption will only further establish knowledge.¹¹⁰ The court in *Aimster* concluded that the use of encryption was willful blindness because *Aimster* should have known the network was used for copyright infringement even though it could deny actual knowledge.¹¹¹ The court then said “[w]illful blindness is knowledge, in copyright law... as it is in the law generally.”¹¹²

The use of encryption impaired *Aimster*’s defense in several ways.¹¹³ The encryption prevented *Aimster* from acquiring knowledge of the non-infringing uses and thereby prevented a successful *Betamax* defense.¹¹⁴ The encryption was also, in part, the material contribution which was necessary to complete a finding of contributory infringement.¹¹⁵ Finally, the court viewed the use of encryption as willful blindness, and thus inferred that *Aimster* had a “criminal intent.”¹¹⁶

The centralized P2P networks had many disadvantages which lead to their downfall.¹¹⁷ The central nature of the service gave the networks knowledge of and control over the infringing material.¹¹⁸ The fact that the networks were conducted as an ongoing service, and not as a tangible item of commerce, distinguished the cases from *Sony* where the relationship and corresponding control terminated with the sale of the item.¹¹⁹ Finally, the networks were easily shut down because they were centralized and thus required only one injunction to prevent millions of people from using the network to infringe copyrights.¹²⁰ These problems have been addressed by a

110. *Id.* at 650-51.

111. *In re Aimster* 334 F.3d at 650 (citing *United States v. Giovannette* 919 F.2d 1223, 1228 (7th Cir. 1990))

112. *Id.*

113. *Id.*

114. *Id.* at 654 (describing the inability of *Aimster* to prove non-infringing uses as a “self inflicted wound”). The court did not expressly mention the *Betamax* defense, but discussed the fact that no evidence of non-infringing uses was brought forward. *Id.* The *Betamax* defense refers to the *Sony* case where the court determined the *Betamax* (forerunner to the VCR) was similar enough to a “staple article of commerce” to prevent contributory and vicarious copyright liability. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

115. See generally *In re Aimster* 334 F.3d 643 (7th Cir 2003). From the facts of *Aimster*, the inference is drawn that encryption was the draw for at least some of the 2-3 million people using the *Aimster* software. *Id.*

116. *In re Aimster*, 334 F.3d at 650.

117. See Fred Von Lohmann, IAAL: *What Peer-to-Peer Developers Need to Know About Copyright Law*, Electronic Frontier Foundation, Dec. 2003 at http://www.eff.org/IP/P2P/p2p_copyright_wp.pdf (last visited Mar. 3, 2005).

118. *Supra* note 117.

119. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001).

120. Lisa J. Beyer Sims, Note, *Mutiny on the Net: Ridding P2P Pirates of their*

new design of P2P networks, resulting in decentralized P2P networks.¹²¹

B. Decentralized Peer-to-Peer Networks

A number of decentralized P2P networks have been developed with varying features. One P2P network, Gnutella, is very widely used and provides a good example of how decentralized networks operate.¹²² Through the Gnutella network, the searching computer contacts only a few other computers in the network that in turn contact other computers, and so on.¹²³ When a computer with the desired file is found, the information regarding the file's location is sent back to the searching computer.¹²⁴ Once the requesting computer has the location of the file, the computer with the file is contacted directly.¹²⁵

During the time when Napster was facing legal battles, a group of engineers secretly developed Gnutella.¹²⁶ This code was released on America on Line's (AOL) network and then taken down by AOL within hours of its release.¹²⁷ The program was copied and widely distributed as a number of programs continued to develop the code, creating applications to run on the Gnutella network.¹²⁸ The major difference between Napster and Gnutella is the way file searches are carried out.¹²⁹ When a user requests a file on a decentralized network, the request is routed through other users, instead of a central

Booty 52 EMORY L.J. 1907, 1927-28 (2003).

121. *Post-Napster: Peer-to-Peer File Sharing Systems: Current and Future Issues on Secondary Liability Under Copyright Laws in the United States and Japan*, 22 Loy. L.A. Ent. L. Rev. 37, 56-57 (2001).

122. ORAM, *supra* note 143; Brain, Marshall, *How File Sharing Works*, at <http://computer.howstuffworks.com/file-sharing2.htm> (last visited Mar. 3, 2005). For the purposes of this paper, Gnutella, Kazaa and the many different Gnutella clients will all be referred to as decentralized networks.

123. BRAIN, *supra* note 71.

124. *Id.*

125. BRAIN, MARSHALL, *How File Sharing Works*, at <http://computer.howstuffworks.com/file-sharing4.htm> (last visited Mar. 3 2005). Note that in both the centralized and de-centralized networks discussed the request for a file only returns the location of the file, and then the two computers connect directly in order to transfer the file. *Id.*

126. Janelle Brown, *Did AOL eat Gnutella for lunch?* Salon.com March 15, 2000, available at <http://dir.salon.com/tech/log/2000/03/15/gnutella/index.html> (last visited Mar. 3, 2005).

127. Brown, *supra* note 126.

128. Brain, *supra* note 71. Some of the client programs are Kazaa, Grokster, BearShare, Gnucleus, LimeWire, Morpheus, WinMX, XoloX. *Id.*

129. Brain, *supra* note 67.

server.¹³⁰ One result of this architecture is that shutting down one server will not disable the network; instead all users must be shut down to disable a decentralized network.¹³¹

Although the Record Industry Association of America (“RIAA”) could not shut down the decentralized networks, it brought a complaint representing copyright holders and sought an injunction to stop the developing and distributing of P2P applications.¹³² RIAA claimed the decentralized networks were liable for contributory infringement of copyrights and vicarious liability for infringement.¹³³ In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, a case involving several decentralized P2P networks, the Ninth Circuit Court held the developers of the network were not liable for contributory infringement or vicarious liability because the companies did not control the uses of the file sharing software once it was in the hands of the users.¹³⁴ The court further explained that only one of the two necessary elements was present for vicarious liability.¹³⁵ The first element of financial benefit was satisfied because the infringing uses of the software attracted customers, which increased advertising revenue.¹³⁶ The second element of control, however, was not satisfied because the software developers did not encourage or in any way participate in or control the infringing activities.¹³⁷

After efforts to enjoin the operators of decentralized networks failed,¹³⁸ the RIAA next targeted the individuals using the networks

130. Brain, *supra* note 67.

131. Brain, *supra* note 71; *Metro-Goldwyn-Maver Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1163 (9th Cir. Aug. 19, 2004), *cert. granted*, 125 S. Ct. 686, (U.S. Dec 10, 2004) (No. 04-480) (stating if defendant software developers closed their business, networks would see little or no disruption in file copying).

132. *Metro-Goldwyn-Maver Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. Aug. 19, 2004), *cert. granted*, 125 S. Ct. 686, (U.S. Dec 10, 2004) (No. 04-480).

133. *Metro-Goldwyn-Maver Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1160 (9th Cir. Aug. 19, 2004), *cert. granted*, 125 S. Ct. 686, (U.S. Dec 10, 2004) (No. 04-480).

134. *Id.* at 1163-64 (analogizing to landlord tenant relationships where landlord does not control tenant after lease is signed, and does not contribute to illegal activity unless landlord knew of intent before lease was signed).

135. *Id.* at 1164.

136. *Id.* at 1164.

137. *Id.* at 1165.

138. *Metro-Goldwyn-Maver Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. Apr. 25, 2003), *aff'd*, 380 F.3d 1154, 1164 (9th Cir. Aug. 19, 2004), *cert. granted*, 125 S. Ct. 686, (U.S. Dec 10, 2004) (No. 04-480). RIAA failed to get a preliminary injunction in federal district court against Grokster and other P2P networks. *Id.* The decision was upheld on appeal to the Ninth Circuit. *Id.* The Supreme Court has granted certiorari but has not rendered an opinion as of the date

to copy MP3s.¹³⁹ The individuals using the networks are vulnerable because the RIAA monitors activity on the Internet and finds out which infringing files each individual is offering on the network.¹⁴⁰ Freenet appears to offer a solution to this problem by encrypting the communication over the Internet and separating the location of the file from the person who made the file available on the network.¹⁴¹ The RIAA still may be able to find those using Freenet software by posing as someone joining the Freenet Network in order to find those using Freenet to copy music illegally.¹⁴²

III. FREENET AND COPYRIGHT LAW

Freenet is a decentralized P2P network.¹⁴³ Although Freenet is similar to other decentralized P2P networks, the goals and methods of Freenet have significant differences.¹⁴⁴ One goal of Freenet is to have information published anonymously, not just file swapping.¹⁴⁵ Unlike Gnutella which allows users to make files available only if they are on their hard drive, Freenet users donate space on their hard drive which is available for encrypted files published by other

of this Note. *Id.* This Note is based on the state of the law before any opinion from the Supreme Court for the Grokster Case.

139. NPR: All Things Considered, ROBERT SIEGEL, host, Cyberguerrilla warfare heats up as recording industry pursues music file swappers, Tuesday, July 8, 2003, 2003 WL 5580247 (radio interview); Robert Jaques, RIAA Launches P2P File Sharing Legal Blitz: Hundreds of Alleged Downloaders Hit with Lawsuits, Nov. 19, 2004, <http://www.vnunet.com/news/1159534> (last visited Mar. 3, 2005).

140. *Supra* note 2.

141. CNN.com/Technology, Song Swappers Flock to Invitation-Only Internet, Oct. 6, 2003, Assoc. Press.

142. Kenji Hall,

Police arrest two for allegedly swapping copyrighted movies, games, 12/6/03 Contra Costa Times (Walnut Creek, CA) 4 (2003 WL 65737279)

ASSOCIATED PRESS. The two men were using a peer-to-peer network which was derived from Freenet. *Id.* Freenet is not searchable because an exact file name and key is needed to find the file, so using Freenet to find others using Freenet has limited effect. ORAM, ANDY, Gnutella and Freenet Represent True Technological Innovation, May 12, 2000, at <http://www.oreillynet.com/pub/a/network/2000/05/12/magazine/gnutella.html> (last visited Mar. 3, 2005) (describing in detail the technology of decentralized networks).

143. Oram, Andy, Gnutella and Freenet Represent True Technological Innovation, May 12, 2000, at <http://www.oreillynet.com/pub/a/network/2000/05/12/magazine/gnutella.html> (last visited Mar. 3, 2005).

144. Oram, *supra* note 143.

145. Ian Clark et al., Protecting Free Expression Online with Freenet, IEEE Internet Computing, Feb. 2002 at 40, 41 *available at* <http://freenet.sourceforge.net/papers/freenet-ieee.pdf> (last visited Mar. 5, 2005).

users.¹⁴⁶ The content stored on a user's donated disk space is encrypted to protect the user from actual knowledge of the content.¹⁴⁷ When files are requested from donated disk space, the publishers remain anonymous because the publisher's computer is not sending the requested information.¹⁴⁸

Routing using Freenet is another way anonymity is protected.¹⁴⁹ When a user requests a file from the network, and the requested file is sent back to the user, there will always be uncertainty as to where the file is actually stored.¹⁵⁰ Unlike the other P2P networks where the network only returns the location of the desired file, Freenet returns the file itself without revealing the location of the file.¹⁵¹ This was done to protect both the file and the person storing the file, because if either could be identified, the file could be removed and the person holding the file could be prosecuted.¹⁵² When a file is requested often, more copies of a file are made, and the file is easier to access on the network and harder to delete from the network.¹⁵³

Although technological innovations of Freenet are used to make it harder to enforce copyrights, this does not change who is liable for copyright infringement. The issue of who is liable for copyright infringement will depend on how Freenet's features change the knowledge or constructive knowledge of Freenet users, and the relationships between the Freenet users who infringe copyrights.¹⁵⁴ The liability of Freenet developers and Freenet users is discussed in

146. Clark, Ian, *Do I have to donate disk space and bandwidth?*, at <http://freenet.sourceforge.net/index.php?page=faq#donate-bw> (last visited Mar. 3, 2005).

147. Clark, *supra* note 145, at 45; *see also*, <http://freenet.sourceforge.net/index.php?page=faq#hash> (last visited Mar. 3, 2005). The Freenet website admits that the main reason to encrypt the data stored on donated disk space is to protect the person donating the disk space for liability from what is on their disk. *Id.*

148. *Id.*

149. Clark, Ian, <http://freenet.sourceforge.net/index.php?page=faq#attack> (last visited Mar. 3, 2005). The Freenet website acknowledges that complete anonymity is not accomplished, because the computer nodes that directly connect to each user on the network can identify the user. *Id.*

150. Clark, *supra* note 145, at 43-44. Clark uses the following analogy to explain routing: "You might start searching for [Michael] Jordan by asking a friend who once played college basketball, for example, who might pass your request on to a former coach, who would pass it to a talent scout, who could put you in touch with the man himself." *Id.* To further the analogy that Clark set forth, your college friend would actually reply that he had Jordan's phone number, even though he obtained it from a series of friend who would remain nameless. *Id.*

151. Clark, *supra* note 145, at 44.

152. Clark, *supra* note 145, at 45.

153. Clark, *supra* note 145, at 45.

154. *See infra* notes 161, 173, and accompanying text.

this section.¹⁵⁵

A. Freenet Developers

1. Contributory Infringement

There is little dispute at this point whether the users of Napster, Aimster, Kazaa, and other P2P networks are engaged in direct copyright infringement by making copies of MP3 files containing copyrighted works.¹⁵⁶ Direct infringement occurs when one of the six exclusive rights granted to copyright holders is breached.¹⁵⁷ In the case of online music copying, the right to control distribution is the exclusive right which is breached.¹⁵⁸ Freenet does not dispute that copyright infringement and other illegal activities may be occurring using the Freenet software, but says that copyright law is opposed to free speech and that all information should be free.¹⁵⁹

155. See generally, David Mirchin, *A Practical Guide to Copyright Law in the Digital Age Part IX Civil Copyright Infringement: Direct, Contributory, and Vicarious Infringers*, Massachusetts Continuing Legal Education, Inc. 2002

156. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029, 1034 (D. Cal. 2003) *aff'd* *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1160 (9th Cir. Aug. 19, 2004), *cert. granted*, 125 S. Ct. 686, (U.S. Dec 10, 2004) (No. 04-480).

"To establish a prima facie case of copyright infringement, Plaintiffs must show: (1) copyright ownership of the allegedly infringing material, and (2) unauthorized copying of the work that is the original. *Id.* at 1013 (citations omitted). With regard to the second prong, "[Plaintiffs] must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106." *Id.*

157. 17 U.S.C. § 106 (2000). Section 106 provides in relevant part: Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2000).

158. 17 U.S.C. § 106; *supra* note 157.

159. Kevin Featherly, *Freenet: Will it Smash Copyright law?*, March 21, 2001 available at http://linuxtoday.com/news_story.php3?tsn=2001-03-21-021-04-PS-

Even with this attitude, Freenet, or its creator Ian Clark, will not be held liable for direct copyright infringement unless they are using Freenet to copy copyright protected information.¹⁶⁰

a. Knowledge.

The developers of Freenet are not likely to be held liable for contributory copyright infringement.¹⁶¹ Many comparisons can be made between Aimster and Freenet. Under current law the creator of Freenet, Ian Clark, would not likely be held liable for contributory infringement.¹⁶² Clark, unlike the creator of Aimster, is only promoting non-infringing uses, and does not advocate copyright infringement.¹⁶³ Clark does disagree with copyright law, and acknowledges that the network can be used to violate copyright law.¹⁶⁴ This alone would not likely subject Clark to contributory infringement liability for the copyright infringement of those who use Freenet.¹⁶⁵

b. Material Contribution

The developers of Freenet will also not likely meet the element of material contribution because the contribution that Freenet developers made to copyright infringement occurred before the software was controlled by a Freenet user.¹⁶⁶ Freenet is analogous to Sony, where the Betamax was produced and then the contribution ended before the copyright infringement began.¹⁶⁷ Unlike Aimster, Clark has not provided any encouragement to infringe copyrights; therefore the material contribution of providing the software did not occur at the time when Clark knew of copyright infringement.¹⁶⁸

CY (last visited Mar. 3, 2005).

160. See e.g., *A&M Records v. Napster, Inc.* 239 F.3d 1004, 1013-14 (9th Cir. 2001). The case does not focus on copyright infringement by Napster itself, because the relief sought was an injunction to prevent Napster from facilitating the copyright infringement of its customers. *Id.* at 1011; see also *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

161. Ryan Roemer, *The Digital Evolution: Freenet and the Future of Copyright on the Internet*, 2002 UCLA J. L. & Tech. 5.

162. Roemer, *supra* note 161.

163. Ian Clark, *The Philosophy behind Freenet*, <http://freenet.sourceforge.net/index.php?page=philosophy> (last visited Mar. 4, 2005). Clark positions his philosophy as seeking to protect freedom of speech, rather than trying to thwart copyright protections. *Id.*

164. *Id.*

165. *Id.*

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

167. *Id.*

168. *In re Aimster Copyright Litigation*, 252 F. Supp. 2d 634, 652 (N.D. Ill.

If the developers of Freenet can show that the software has substantial non-infringing uses, then according to the Supreme Court in *Sony*, the element of material contribution will fail, and Freenet will be considered a staple article of commerce.¹⁶⁹ Ian Clark claims that one substantial non-infringing use of Freenet is publishing banned religious materials in China.¹⁷⁰ The network can also be used to trade other files which do not infringe copyrights. The court's analysis in *Aimster* suggests that the amount of non-infringing uses must be weighed against the infringing uses.¹⁷¹ Like in *Aimster* this is a problem because the network has encrypted files where the status of files in regard to copyright law cannot be determined.¹⁷²

2. Vicarious Infringement

a. Control

Vicarious copyright liability is based on the legal theory of *respondeat superior* which is broader than the employer - employee relationship.¹⁷³ The Freenet developers will not likely be liable for vicarious copyright infringement, because, like in *Sony*, they do not retain control over the software after the user downloads the software.¹⁷⁴ Freenet developers have also taken many steps to avoid taking control over the Freenet users, by not offering any sort of continual service, by organizing as a non-profit, by not retaining any control in an End Users License Agreement, by not supplying automatic-updates, and by providing no customer support.¹⁷⁵ By taking these steps Freenet developers have distanced themselves from their users, making the necessary relationship harder for the courts to find.¹⁷⁶

2002). Deep, the creator of *Aimster* displayed titles of copyrighted music on the website explaining how to use *Aimster*. *Id.*

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

170. Farmer, *supra* note 4 at 725-26 (citing Freenet use by Falun Gong, a banned spiritual group in China).

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

172. *Id.* at 654-55 (concluding *Aimster*'s use of encryption created a self inflicted wound preventing a staple article of commerce defense).

173. *Gordon v. Nextel Communications and Mullen Adver., Inc.*, 345 F.3d 922, 925-26 (6th Cir. 2003) ("vicarious liability extends beyond the traditional scope of the master-servant theory").

174. *Sony*, 464 U.S. at 421.

175. Fred von Lohmann, *What Peer-to-Peer Developers Need to Know about Copyright Law*, Electronic Frontier Foundation, http://www.eff.org/IP/P2P/p2p_copyright_wp.php, v. 4.0, Sept. 2004 (last visited Mar. 4, 2005).

176. Ryan Roemer, *The Digital Evolution: Freenet and the Future of Copyright*

b. Direct Financial interest

Freenet developers provide the software which enables users to exchange music files, but there are several reasons that they do not meet the element of financial interest.

The most obvious reason is that the software is offered for free.¹⁷⁷ This same fact, however, did not prevent the court from finding Napster received a direct financial interest in the infringement of its users.¹⁷⁸ Napster received a financial benefit by drawing more users to its site so it could attract more financing.¹⁷⁹ For Freenet the benefit is less direct, and may not be considered financial.¹⁸⁰ Freenet users “donate” part of their hard drive space and bandwidth when they load the Freenet software onto their computer.¹⁸¹ With each user the network has better connections, and larger storage space.¹⁸² This gives developers the advantage of testing a larger network, but there is no financial benefit because copyright infringement is not correlated to the strength and user base of the Freenet network.¹⁸³ The only financial benefit that Freenet receives is donations, which can come from anyone whether or not they use Freenet to infringe copyrights.¹⁸⁴

B. Freenet Users

1. Contributory Infringement

The users of Freenet may believe they are free from liability for acts of direct copyright infringement because of the anonymity goals

on the Internet, 2002 UCLA J. L. & TECH. 5.

177. *What is Freenet?*, <http://freenet.sourceforge.net/> (last visited Mar. 4, 2005). Downloading Freenet software does not cost any money, but a part of a user’s hard drive and band with are required for use by the Freenet network. *Id.*

178. *Napster*, 239 F.3d at 1023.

179. *Id.* The court found it was significant that Napster intended to make a profit at some point. *Id.* Freenet is run as a non-profit company and does not intend to make a profit. Clark, *supra* note 146.

180. *See* Clark, *supra* note 146 (asking for donations so that Freenet can continue to protect free speech).

181. *Supra* note 145.

182. *See* Clark, *supra* note 145.

183. The network will work better for copyright infringement if the users are requesting copyrighted files. This, however, is not under the control of the developers of Freenet.

184. It is logical to conclude that those who want free music downloads will use Freenet without making a donation, while those who are interested in other goals of Freenet will donate to see those goals accomplished.

of Freenet, but the anonymity is not absolute.¹⁸⁵ The RIAA may not have the resources to search out every Freenet user, but it may use its resources to find a few and discourage others from using Freenet for infringement of copyrights.¹⁸⁶ Although there may be a great number of individuals using Freenet for copyright infringement, the legal battles will likely focus on contributory and vicarious copyright infringement.¹⁸⁷

a. Knowledge

There are a number of factors which will make it unlikely that a court would hold users of the Freenet software liable for copyright infringement under a contributory infringement theory.¹⁸⁸ Freenet is specifically designed to avoid the first element of contributory infringement: knowledge.¹⁸⁹ The users running the Freenet software are required to store data from the network on their individual computers, as well as use some of their bandwidth to route requests from other users.¹⁹⁰ The Freenet users, however, cannot easily discover the content of the files stored or routed through their computers, because all the routing and files are encrypted.¹⁹¹

This use of encryption may seem much like the one in *Aimster*, where the owners of *Aimster* tried to shield themselves from the copyright infringement by encrypting the file requests which were routed through their computer.¹⁹² The court in *Aimster* stated that “[w]illful blindness is knowledge, in copyright law... as it is in the

185. Kenji Hall, *Police Arrest Two for Allegedly Swapping Copyrighted Movies, Games, Contra Costa Times*, December 6, 2003, Associated Press, 2003 WL 65737279. The two arrested were using a program based on the Freenet software. *Id.*

186. Featherly, *supra* note 159.

187. CNN.com, *supra* note 141.

188. Freenet Frequently Asked Questions, The Free Network Project, Can I get in trouble if I run a node?, *available at* <http://freenet.sourceforge.net/index.php?page=faq>, (last visited Mar. 4, 2005). In response to the question, Can I get in trouble if I run a node (make a personal computer part of the Freenet network)?, the Freenet website responds in part: “We have done everything we can to make it extremely difficult for any sane legal system to justify punishing someone for running a Freenet node, and there is little precedent for such action in today’s developed countries.” *Id.*

189. Ian Clark, *supra* note 145 at 41 and at 44-45. Clark states: “For political or legal reasons, node operators might wish to remain ignorant of the contents of their data stores.” *Id.* at 45.

190. Farmer, John Alan, THE SPECTER OF CRYPTO-ANARCHY: REGULATING ANONYMITY—PROTECTING PEER-TO-PEER NETWORKS, 72 *Fordham L. Rev.* 725, 754-56 (2003).

191. *Id.*

192. *In re Aimster Copyright Litigation*, 334 F.3d 643, 646 (7th Cir. 2003).

law generally.”¹⁹³ The court however was only equating encryption to willful blindness in a situation where one has a strong suspicion of illegal dealings, and chooses to remain ignorant.¹⁹⁴ The Freenet users do not have the choice to remain ignorant when using Freenet.¹⁹⁵ The courts may conclude that willful blindness used in copyright law requires some affirmative steps, but Freenet does not require any affirmative steps beyond the choice to use the network.¹⁹⁶

b. Material Contribution

If the courts find constructive knowledge exists when Freenet is used, they will then need to determine if the users of Freenet provide a material contribution to copyright infringement on the network they are connected to.¹⁹⁷ If Freenet is seen by the courts as a swap meet, then the analysis of Napster and swap meet cases apply.¹⁹⁸ The place and facilities where copyright infringement takes place is the material contribution of the Freenet user.¹⁹⁹ One way to distinguish this from a swap meet is that no one person owns the place where the file trading is taking place.²⁰⁰ This is because the network works effectively when there are multiple users donating facilities to make the online swap meet happen.²⁰¹ This does not mean that the individual user escapes liability, but may mean just the opposite as a conspiracy liability may be imposed.

When a Freenet user requests an infringing file from the network,

193. *Id.* at 650 (*citing* Casella v. Morris, 820 F.2d 362, 365 (11th Cir.1987)); 2 Goldstein, § 6.1, p. 6:6).

194. *Id.* The court analogized the encryption by Aimster to a case where a drug dealer took steps to ensure that he did not see the actual drug deal so he could deny knowledge. *Id.*

195. Clark, *supra* note 145 (stating it is the publisher, and not the individual Freenet user who chooses to encrypt or not); *see also* Farmer, *supra* note 190 at 747-54 (describing other types of encrypted networks).

196. *In re Aimster*, 334 F.3d at 651. The court draws analogies aiding and abetting, distinguishing one who sells dresses used by prostitutes, with the owner of a massage parlor who knows the women are selling only sex and not massages. *Id.* (*citing* United States v. Giovannetti, 919 F.2d at 1227; People v. Lauria, 251 Cal. App. 2d 471, 59 Cal. Rptr. 628 (1967) for the seller of dresses, and United States v. Sigalow, 812 F.2d 783, 784, 785 (2d Cir. 1987); State v. Carpenter, 122 Ohio App. 3d 16, 701 N.E.2d 10, 13, 18-19 (1997) for the massage parlor cases). Similarly, the Freenet user who provides the resources of a computer to others is like the seller of dresses which can be used for prostitution, but is not aiding and abetting prostitution, because the Freenet user cannot easily know how the computer is used. *Id.*

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

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

199. *See* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996).

200. *Id.*

201. Clark, *supra* note 145.

the file is not only copied onto the user's computer, but will likely be stored on other computers because the software is designed to make more copies available when a file is requested.²⁰² The user has knowledge of infringement because the user requested the file.²⁰³ The user is contributing to the infringement of others because requesting the file makes more copies of the file, and the file will be easier to find on the network by others.²⁰⁴ Therefore the user materially contributes to the copyright infringement, of others. Like in *Aimster*, the user's lack of knowledge through encryption should not defeat the element of knowledge. The user who requests a copyrighted file should be held liable for direct *and* contributory infringement.

2. Vicarious Infringement

a. Control

The design of Freenet gave very little control to the Freenet users, in part to prevent creation of a relationship with other Freenet users from which vicarious liability could flow.²⁰⁵ Each Freenet user does have a small amount of control over the network, but for the most part the network is self-controlling.²⁰⁶ In terms of the employer - employee or master - servant model, the user of Freenet plays the master with thousands of other computers acting as the servants.²⁰⁷ Each Freenet user, however, offers his computer as a servant to the other Freenet users.²⁰⁸ The courts describe this element of control as the right and ability to supervise.²⁰⁹ The right and ability a Freenet

202. Clark, *supra* note 145.

203. The Freenet network does not provide a search function because the exact key is required to access the file. Clark, *supra* note 145. This greatly reduces the chance that a request for a file would be made when someone has no idea of the content of the file. Clark, *supra* note 145. The key would be obtained on another file within Freenet as a link, or through private communication with a person who knows the key. Clark, *supra* note 145.

204. See, *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (D.C.N.Y. 1966). Liability of Freenet is compared to the advertiser who placed ads for copyrighted music, should have known the copies of the music were infringing, and contributed to the distribution of the music by advertising. *Id.*

205. Clark, *supra* note 145.

206. Damien A. Riehl, *Peer-to-Peer Distribution Systems: Will Napster, Gnutella, and Freenet Create a Copyright Nirvana or Gehenna?* 27 WMLR 1761, 1787 (2001).

207. Oram, *supra* note 143.

208. Oram, *supra* note 143.

209. See *Shapiro, Bernstein & Co., v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).

user has to supervise what is stored and transmitted through the user's computer is impaired because encryption of all Freenet files is encouraged.²¹⁰ Like *Aimster*, this may be seen as willful blindness, especially where users are attracted by the anonymity features of Freenet.²¹¹

By offering his/her computer as a servant to other Freenet users, a Freenet user supplies the facility for the infringing use and could be deemed to have invited the infringing use.²¹² The court could reason that the user forfeited the right of control over the computer by using Freenet.²¹³ If the user did not use Freenet, the user would retain control over the computer, and the court could reason that the rewards of using Freenet come with the risks of vicarious liability for the user of the computer.²¹⁴

b. Direct financial interest

The Freenet user does have a financial interest from the infringement of others, because as more users request copyrighted material, it is distributed to more locations and easier to find.²¹⁵ When information is easier to find, the network has a higher chance of finding it, and the download will be accomplished faster.²¹⁶ For copyright liability, the courts must determine this is not just a financial interest, but a direct financial interest.²¹⁷ As in *Napster*, the more users there are on the network, the more valuable the network becomes.²¹⁸ As with *Napster*, a court may assume that infringing

210. See *In re Aimster*, 344 F.3d at 650.

211. *In re Aimster*, 344 F.3d at 650.

212. *Id.* In *Aimster*, the court considered the software company to have invited the infringing use of its customers, but did not decide on the issue of whether this was the control needed for vicarious infringement liability. *Id.*

213. See generally *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). The swap meet owner in *Fonovisa* had the right and ability to inspect the vendors who were selling illegal copies of music, but refused to do so. The Freenet user has the right to inspect the contents of his hard drive, but may not have the ability to read the encrypted contents. If the court follows the reasoning in *Aimster*, then this ability has been forfeited, and the Freenet user will be held to have the ability constructively. *In re Aimster* 344 F.3d at 650.

214. See generally *In re Aimster*, 344 F.3d at 650 (describing encryption as a self inflicted wound). Although the Freenet user did not design the system with encryption, the user chose to download the software including the encryption features.

215. Clark, *supra* note 145.

216. Clark, *supra* note 145.

217. Clark, *supra* note 145. As the Freenet network makes more connections the routing works better because the system records where connections are, and what connections are likely to have the requested file. *Id.*

218. *A & M Records v. Napster, Inc.*, 2000 WL 1009483, 7 (N.D. Cal.)

uses are the major draw the network has for users.²¹⁹ The direct financial benefit to the individual Freenet User is the availability of copyrighted music for free over the Freenet network.²²⁰ This argument only succeeds if the individual Freenet user is seeking copyrighted works over the network, therefore whether there is a direct financial interest in the infringement of others will depend on whether the individual user is a direct copyright infringer.²²¹

IV. CONCLUSION

Based on the current state of the law, Freenet developers are not liable for secondary copyright liability. Freenet developers cannot be liable for contributory liability because they do not have knowledge of the copyright infringement. Relying on Sony, Freenet developers can claim the software is a staple article of commerce, capable of substantial non-infringing uses. Freenet developers are not liable for vicarious liability because they do not have control, or the right and ability to supervise the users of Freenet. Freenet developers also do not have the direct financial benefit from the copyright infringement of its users.

Freenet Users, on the other hand, may be found liable for secondary copyright liability. When Freenet users infringe copyrights on the Freenet Network, they have both knowledge, and material contribution. Freenet user liability under vicarious liability is less likely because the Freenet user does not have the right and ability to supervise the acts of other Freenet users.

(transcript of Napster proceedings).

219. File Swapper Flock to Invitation Only Internet, AP, at <http://www.onlinesecurity.com/links/links629.php> (last visited Mar. 4, 2005) (*originally available at* <http://www.cnn.com/2003/TECH/internet/10/06/underground.internet.ap/index.html>).

220. Religious Tech. Ctr. v. Netcom On-Line Communication, 907 F. Supp. 1361, 1377 (N.D. Cal. 1995) (stating increased value of business, or decreased cost to business are direct financial benefits).

221. A & M Records v. Napster, Inc., 2000 WL 1009483, *7 (N.D. Cal.).