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Articulación con Traductorado**

“Fallo de la Corte Suprema de los Estados Unidos en materia de derechos de autor: Metro-Goldwyn-Mayer Studios Inc., et al., petitioners v. Grokster, Ltd., et al.”

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Introducción

En este trabajo final de carrera, me propuse presentar una traducción digna al español de un texto de naturaleza jurídica escrito en inglés y, según las pautas establecidas para el trabajo¹, hacer un análisis concienzudo pero breve del proceso de traducción, que sirva de fundamento para las decisiones que tomé a lo largo del trabajo y para las soluciones que resolví dar a los problemas que plantea el texto.

Para eso, elegí un fallo de la Corte Suprema de los Estados Unidos relacionado con el polémico tema del derecho de autor en el entorno digital² y con el dilema que implica proteger los derechos de autor de los usos ilícitos y las infracciones que se cometen a diario gracias a los avances tecnológicos de las redes de comunicación informática a través de Internet. Específicamente, se trata de una apelación (*writ of certiorari*) ante la Corte Suprema presentada por la empresa MGM en la cual esta última solicita al tribunal se revisen las sentencias de tribunales inferiores en favor de los demandados, dos empresas que fabrican y distribuyen programas informáticos de intercambio de archivos por Internet. El fallo versa sobre la responsabilidad que corresponde atribuir a los fabricantes y distribuidores de este tipo de programas, que pueden utilizarse con fines lícitos como ilícitos, cuando un tercero infringe derechos de autor valiéndose de esas herramientas.

La razón por la que elegí un texto jurídico de estas características radica en un interés personal en trabajar con un discurso jurídico que diríase —a riesgo de sucumbir a ciertos prejuicios— de tipo argumentativo. En particular, me interesa abordar los problemas inherentes al lenguaje y la traducción jurídicos que se trataron durante el curso de Articulación con Traductorado Público; por eso, creí conveniente elegir un texto en el que esos problemas fueran manifiestos y en el que, además, se presentara un desafío discursivo considerable que excediera la esfera del texto jurídico en sí, es decir, que planteara además otro tipo de dificultades —ya de interpretación, ya de análisis del discurso—, quizá no tan intrínsecas a la naturaleza jurídica del texto entendida en su dimensión más esencial. Aquí, en mi opinión, es donde se articularían concretamente la formación que recibí durante todo el curso de la Articulación y mi formación anterior como traductora literaria y técnico-científica.

Para encarar la traducción, planteé una finalidad y un destinatario hipotéticos pero realistas: la versión final en español tendría fines informativos y estaría dirigida a un público versado en la materia, por ejemplo, letrados, juristas o especialistas en derecho de autor. Esta hipótesis de trabajo, en la que se contemplaron un propósito concreto y un lector específico con ciertas características distintivas (conocimiento compartido del tema de que se trata, de ciertas convenciones, de los conceptos jurídicos que subyacen a la argumentación, etc.), serviría a su vez de marco para las decisiones fundamentales de traducción que tendría que tomar a lo largo del trabajo y para acotar el abanico de criterios que tiene a su disposición el traductor a la hora de realizar su tarea.

Respecto de la estructura del trabajo, esta tesina consta de dos secciones. En la primera, que sigue a continuación, figura la traducción del texto elegido, cuya versión original aparece a la izquierda, enfrentada a la versión en español, que se encuentra a la derecha, a los fines de facilitar la comparación y el cotejo. La segunda comprende el análisis general del proceso de traducción, la fundamentación de ciertos criterios adoptados y la justificación de algunas de las soluciones que di a los problemas de traducción con los que me fui topando. En cada sección se incluye asimismo la bibliografía consultada. Por último, al final del trabajo, constan las conclusiones extraídas de la labor, se adjuntan tres anexos y se recopila la bibliografía general utilizada.

1. Véase Kunz, Ana, "Trabajo Final de Carrera. Elementos para su elaboración", Buenos Aires, Universidad de Belgrano, 2002. También se tuvieron en cuenta la orientación recibida durante el curso de la materia Taller de tesina y las sugerencias del tutor.

2. Metro-Goldwyn-Mayer Studios Inc., et al., demandantes c/ Grokster, Ltd., et al., [en línea], 545 U. S., Corte Suprema de los Estados Unidos, 2005, [fecha de consulta: 16 de abril de 2006], disponible en <<http://www.copyright.gov/docs/mgm/opinion.pdf>>. El texto completo figura en el Anexo I de este trabajo.

Traducción

SUPREME COURT OF THE UNITED STATES

No. 04–480

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,
PETITIONERS v. GROKSTER, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 27, 2005]

Justice Souter delivered the opinion of the Court.

The question is under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product. We hold that one who distributes a device with the 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.

(...)

II

A

MGM and many of the *amici* fault the Court of Appeals's holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off. See *Sony Corp. v. Universal City Studios, supra*, at 442; see generally Ginsburg, Copyright and Control Over New Technologies of Dissemination, 101 Colum. L. Rev. 1613 (2001); Lichtman & Landes, Indirect Liability for Copyright Infringement: An Economic Perspective, 16 Harv. J. L. & Tech. 395 (2003).

The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many people (especially the young) use file-sharing software to download copyrighted works.

This very breadth of the software's use may well draw the public directly into the debate over copyright policy, Peters, Brace Memorial Lecture: Copyright Enters the Public Domain, 51 J. Copyright Soc. 701, 705–717 (2004) (address by Register of Copyrights), and the indications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection, Wu, When Code Isn't Law, 89 Va. L. Rev. 679, 724–726 (2003). As the case has been presented to us, these fears are said to be offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies. See, e.g., Lemley & Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 Stan. L. Rev. 1345, 1386–1390 (2004); Brief for Innovation Scholars and Economists as *Amici Curiae* 15–20; Brief for Emerging Technology Companies as *Amici Curiae* 19–25; Brief for Intel Corporation as *Amicus Curiae* 20–22.⁸

The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the

3. The mutual exclusivity of these values should not be overstated, however. On the one hand technological innovators, including those writing file-sharing computer programs, may wish for effective copyright protections for their work. See, e.g., Wu, When Code Isn't Law, 89 Va. L. Rev. 679, 750 (2003). (StreamCast itself was urged by an associate to "get [its] technology written down and [its intellectual property] protected." App. 866.) On the other hand the widespread distribution of creative works through improved technologies may enable the synthesis of new works or generate audiences for emerging artists. See *Eldred v. Ashcroft*, 537 U. S. 186, 223–226 (2003) (Stevens, J., dissenting); Van Houweling, Distributive Values in Copyright, 83 Texas L. Rev. 1535, 1539–1540, 1562–1564 (2005); Brief for Sovereign Artists et al. as *Amici Curiae* 11.

CORTE SUPREMA DE LOS ESTADOS UNIDOS

No. 04-480

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,
DEMANDANTES c/ GROKSTER, LTD., ET AL.SOBRE RECURSO EXTRAORDINARIO DE APELACIÓN DE LA SENTENCIA DEL TRIBUNAL FEDERAL DE
APELACIONES DEL NOVENO CIRCUITO

[27 de junio de 2005]

El juez Souter dictó la sentencia de la Corte.

La cuestión radica en determinar en qué circunstancias cabe imputar responsabilidad al distribuidor de un producto que puede emplearse para usos lícitos e ilícitos por las infracciones de los derechos de autor cometidas por terceros mediante el uso de ese producto. Sostenemos que todo el que distribuye un dispositivo con el objeto de promover su uso para infringir derechos de autor, según lo muestre la manifestación inequívoca u otras medidas positivas que se tomen para alentar la infracción, es responsable de las infracciones consiguientes de terceros.

(...)

II

A

MGM y muchos de los amigos del tribunal impugnan la decisión del Tribunal de Apelaciones por alterar el sano equilibrio entre el valor de apoyar las actividades creativas protegiendo el derecho de autor y el de promover la innovación en materia de nuevas tecnologías de la comunicación limitando la incidencia de la responsabilidad por infringir los derechos de autor. Cuanto más se privilegia la protección artística, más riesgo se corre de desalentar la innovación tecnológica; administrar el derecho de autor consiste en preservar ese delicado equilibrio. Véase *Sony Corp. c/ Universal City Studios*, *supra*, pág. 442; véase, en general, Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 Colum. L. Rev. 1613 (2001); Lichtman y Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 Harv. J. L. & Tech. 395 (2003).

La tensión entre los dos valores constituye el objeto de esta causa, en la que se alega que la distribución digital de material sujeto a derechos de autor representa una amenaza sin precedentes para los titulares de esos derechos, ya que cada copia es idéntica al original, resulta fácil hacer reproducciones y muchos (en especial los jóvenes) usan programas informáticos de intercambio de archivos para descargar obras sujetas a derechos de autor.

Dado el uso extendido de esos programas, el público en general bien puede sumarse directamente al debate sobre las políticas de derecho de autor, Peters, *Brace Memorial Lecture: Copyright Enters the Public Domain*, 51 J. Copyright Soc. 701, 705 (717) (discurso de la Directora del Registro de Derechos de Autor), y todo parece indicar que las posibilidades que ofrecen los programas informáticos como el de Grokster y Napster de copiar canciones o películas con tanta facilidad están alentando el desdén por la protección del derecho de autor, Wu, *When Code Isn't Law*, 89 Va. L. Rev. 679, 724-726 (2003). Tal como se ha presentado el caso ante este Tribunal, al parecer esos temores tienen como contrapartida la preocupación por la posibilidad de que, si se responsabiliza no sólo al infractor sino también al distribuidor del programa informático tomando como fundamento el potencial de uso ilícito que presenta el programa, se corre el riesgo de restringir el desarrollo ulterior de tecnologías beneficiosas. Véase, por ej., Lemley y Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev. 1345, 1386-1390 (2004); Presentación de economistas y académicos de la innovación en calidad de amigos del tribunal 15-20; Presentación de empresas de tecnologías emergentes en calidad de amigos del tribunal 19-25; Presentación de Intel Corporation en calidad de amigo del tribunal 20-22⁸.

9. No obstante, no se debería exagerar la exclusividad mutua de esos valores. Por un lado, aquellos que se dedican a la innovación tecnológica, incluso aquellos que escriben programas informáticos de intercambio de archivos, tal vez quieran que los derechos de sus obras gocen de una protección eficaz. Véase, por ej., Wu, *When Code Isn't Law*, 89 Va. L. Rev. 679, 750 (2003). (Uno de los asociados de la propia StreamCast instó a la empresa a que "formalizara por escrito el contenido de [su] tecnología y protegiera [su propiedad intelectual]". App. 866). Por el otro, la distribución generalizada de obras creativas por medio de tecnologías mejoradas tal vez permita la síntesis de nuevas obras o cree un público para los artistas noveles. Véase *Eldred c/ Ashcroft*, 537 U. S. 186, 223-226 (2003) (Stevens, J., en disidencia); Van Houweling, *Distributive Values in Copyright*, 83 Texas L. Rev. 1535, 1539-1540, 1562-1564 (2005); Presentación de Sovereign Artists y otros en calidad de amigos del tribunal 11.

distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement. See *In re Aimster Copyright Litigation*, 334 F. 3d 643, 645–646 (CA7 2003).

One infringes contributorily by intentionally inducing or encouraging direct infringement, see *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 (CA2 1971), and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it, *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 304, 307 (CA2 1963).⁹ Although “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,” *Sony Corp. v. Universal City Studios*, 464 U. S., at 434, these doctrines of secondary liability emerged from common law principles and are well established in the law, *id.*, at 486 (Blackmun, J., dissenting); *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 62–63 (1911); *Gershwin Pub. Corp. v. Columbia Artists Management, supra*, at 1162; 3 M. Nimmer & D. Nimmer, Copyright, §12.04[A] (2005).

B

Despite the currency of these principles of secondary liability, this Court has dealt with secondary copyright infringement in only one recent case, and because MGM has tailored its principal claim to our opinion there, a look at our earlier holding is in order. In *Sony Corp. v. Universal City Studios, supra*, this Court addressed a claim that secondary liability for infringement can arise from the very distribution of a commercial product. There, the product, novel at the time, was what we know today as the videocassette recorder or VCR. Copyright holders sued Sony as the manufacturer, claiming it was contributorily liable for infringement that occurred when VCR owners taped copyrighted programs because it supplied the means used to infringe, and it had constructive knowledge that infringement would occur.

At the trial on the merits, the evidence showed that the principal use of the VCR was for “time-shifting,” or taping a program for later viewing at a more convenient time, which the Court found to be a fair, not an infringing, use. *Id.*, at 423–424. There was no evidence that Sony had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping. *Id.*, at 438. Although Sony’s advertisements urged consumers to buy the VCR to “record favorite shows” or “build a library” of recorded programs, *id.*, at 459 (Blackmun, J., dissenting), neither of these uses was necessarily infringing, *id.*, at 424, 454–455.

On those facts, with no evidence of stated or indicated intent to promote infringing uses, the only conceivable basis for imposing liability was on a theory of contributory infringement arising from its sale of VCRs to consumers with knowledge that some would use them to infringe. *Id.*, at 439. But because the VCR was “capable of commercially significant noninfringing uses,” we held the manufacturer could not be faulted solely on the basis of its distribution. *Id.*, at 442.

This analysis reflected patent law’s traditional staple article of commerce doctrine, now codified, that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways. 35 U. S. C. §271(c); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U. S. 476, 485 (1964) (noting codification of cases); *id.*, at 486, n. 6 (same). The doctrine was devised to identify instances in which it may be presumed from distribution of an article in commerce that the distributor intended the article to be used to infringe another’s patent, and so may justly be held liable for that infringement. “One who makes and sells articles which are only adapted to be used in a patented combination will be presumed to intend the natural consequences of his acts; he will be presumed to intend that they shall be used in the combination of the patent.” *New York Scaffolding Co. v. Whitney*, 224 F. 452, 459 (CA8 1915); see also *James Heekin Co. v. Baker*, 138 F. 63, 66 (CA8 1905); *Canda v. Michigan Malleable Iron Co.*, 124 F. 486, 489 (CA6 1903); *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 80 F. 712, 720–721 (CA6 1897); *Red Jacket Mfg. Co. v. Davis*, 82 F. 432, 439 (CA7 1897); *Holly v. Vergennes Machine Co.*, 4 F. 74, 82 (CC Vt. 1880); *Renwick v. Pond*, 20 F. Cas. 536, 541 (No. 11,702) (CC SDNY 1872).

In sum, where an article is “good for nothing else” but infringement, *Canda v. Michigan Malleable Iron Co.*, *supra*, at 489, there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe, see *Henry v. A. B. Dick Co.*, 224 U. S. 1, 48 (1912), overruled on other grounds, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502 (1917).

4. We stated in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417 (1984), that “‘the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn’ [R]easoned analysis of [the *Sony* plaintiffs’ contributory infringement claim] necessarily entails consideration of arguments and case law which may also be forwarded under the other labels, and indeed the parties . . . rely upon such arguments and authority in support of their respective positions on the issue of contributory infringement,” *id.*, at 435, n. 17 (quoting *Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429, 457–458 (CD Cal. 1979)). In the present case MGM has argued a vicarious liability theory, which allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the defendant initially lacks knowledge of the infringement. See, e.g., *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 304, 308 (CA2 1963); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F. 2d 354, 355 (CA7 1929). Because we resolve the case based on an inducement theory, there is no need to analyze separately MGM’s vicarious liability theory.

No obstante, en esta causa existen razones de peso para declarar la responsabilidad indirecta, dada la cantidad de descargas ilícitas que tienen lugar todos los días mediante los programas de StreamCast y Grokster. Cuando se emplea un producto o servicio de gran difusión para cometer infracciones, tal vez se torne imposible hacer que todos los infractores directos observen los derechos sobre la obra protegida, por lo que la única alternativa práctica consiste en entablar una demanda por responsabilidad subsidiaria contra el distribuidor del dispositivo utilizado para hacer las copias recurriendo a la teoría de la infracción concurrente o por el hecho de otro. Véase *In re Aimster Copyright Litigation*, 334 F. 3d 643, 645-646 (CA7 2003).

Se incurre en infracción concurrente cuando se instiga o alienta intencionalmente a la infracción directa, véase *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 (CA2 1971), y en infracción por el hecho de otro cuando se obtiene un beneficio económico de la infracción directa al tiempo que se repudia el derecho de prevenir o restringir el alcance de esa infracción, *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 304, 307 (CA2 1963)⁹. Aunque “[l]a Ley de derecho de autor no responsabiliza expresamente a nadie por las infracciones ajenas”, *Sony Corp. v. Universal City Studios*, 464 U. S., pág. 434, estas doctrinas de responsabilidad subsidiaria derivan de ciertos principios del *common law* y están muy arraigadas en el derecho, *id.*, pág. 486 (Blackmun, J., en disidencia); *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 62-63 (1911); *Gershwin Pub. Corp. v. Columbia Artists Management, supra*, pág. 1162; 3 M. Nimmer y D. Nimmer, *Copyright*, §12.04[A] (2005).

B

A pesar de la vigencia de estos principios de responsabilidad subsidiaria, esta Corte ha tratado la infracción subsidiaria de los derechos de autor en un solo caso reciente y, dado que MGM ha adaptado su pretensión a la sentencia que dictamos en esa oportunidad, procede que repasemos nuestra decisión previa. En *Sony Corp. v. Universal City Studios, supra*, esta Corte analizó una pretensión según la cual la mera distribución de un producto comercial puede dar lugar a responsabilidad subsidiaria por infracción. En ese caso, el producto, una novedad en aquel momento, era lo que hoy conocemos como videograbador. Varios titulares de derechos de autor demandaron a Sony por ser el fabricante, alegando que la empresa era responsable concurrente por las infracciones que tenían lugar cuando los dueños de los videograbadores grababan programas sujetos a derechos de autor porque les proporcionaba el medio para cometer tales infracciones y porque tenía presunto conocimiento de que éstas ocurrirían.

En las actuaciones sobre el fondo de la causa, las pruebas demostraron que el videograbador se usaba principalmente para el “desplazamiento temporal”, es decir, para grabar un programa con el fin de verlo en otro momento más oportuno, uso que esta Corte consideró lícito y no infractor. *Id.*, págs. 423-424. No se demostró que Sony hubiera expresado el propósito de violar derechos de autor con las grabaciones ni que hubiera tomado medidas para aumentar sus ganancias a partir de las grabaciones ilícitas. *Id.*, pág. 438. Si bien los avisos publicitarios de Sony invitaban a los consumidores a que compraran el videograbador para “grabar sus programas favoritos” o “armar una biblioteca” de programas grabados, *id.*, pág. 459 (Blackmun, J., en disidencia), ninguno de esos usos constituía necesariamente una infracción, *id.*, págs. 424, 454-455.

En vista de esos hechos y sin que mediara prueba de una intención expresa o supuesta de promover usos ilícitos, el único fundamento concebible para declarar la responsabilidad era la teoría de la infracción concurrente derivada de la venta de videograbadores a los consumidores a sabiendas de que algunos los usarían para infringir derechos. *Id.*, pág. 439. No obstante, dado que el videograbador podía “emplearse para usos lícitos de importancia comercial”, sostuvimos que no se podía culpar al fabricante únicamente por distribuirlo. *Id.*, pág. 442.

En este análisis quedó reflejada la doctrina del producto básico de comercio, doctrina clásica del derecho de patentes, ya codificada, según la cual la distribución de un componente de un dispositivo patentado no viola la patente si ese componente se puede emplear de otras maneras. 35 U. S. C. §271(c); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U. S. 476, 485 (1964) (en el que se señala la codificación

10. En el caso *Sony Corp. v. Universal City Studios, Inc.*, 464 U. S. 417 (1984), sostuvimos que “no existe una división tajante entre infracción directa, infracción concurrente y responsabilidad por el hecho de otro”. (...) [P]ara efectuar un análisis fundado de [la acción que interpuso el demandante en el caso Sony por infracción concurrente], necesariamente hay que considerar los alegatos y precedentes jurisprudenciales que quizás se presenten también con los otros rótulos y, por cierto, las partes (...) se fundan en esos alegatos y sentencias que respaldan sus respectivas posturas sobre la cuestión de la infracción concurrente”, *id.*, pág. 435, n. 17 (donde se cita el caso *Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429, 457-458 (CD Cal. 1979)). En el caso de autos, MGM ha alegado la teoría de la responsabilidad por el hecho de otro, en virtud de la cual se puede imputar responsabilidad cuando el demandado se beneficia directamente de la infracción y goza del derecho y la capacidad de supervisar al infractor directo, aunque en un principio no tenga conocimiento de la infracción. Véase, por ej., *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 304, 308 (CA2 1963); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F. 2d 354, 355 (CA7 1929). Como resolvimos el caso fundándonos en la teoría de la instigación, no es necesario analizar por separado la teoría de la responsabilidad por el hecho de otro que propugna MGM.

Conversely, the doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one's products will be misused. It leaves breathing room for innovation and a vigorous commerce. See *Sony Corp. v. Universal City Studios*, *supra*, at 442; *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U. S. 176, 221 (1980); *Henry v. A. B. Dick Co.*, *supra*, at 48.

The parties and many of the *amici* in this case think the key to resolving it is the *Sony* rule and, in particular, what it means for a product to be "capable of commercially significant noninfringing uses." *Sony Corp. v. Universal City Studios*, *supra*, at 442. MGM advances the argument that granting summary judgment to Grokster and StreamCast as to their current activities gave too much weight to the value of innovative technology, and too little to the copyrights infringed by users of their software, given that 90% of works available on one of the networks was shown to be copyrighted. Assuming the remaining 10% to be its noninfringing use, MGM says this should not qualify as "substantial," and the Court should quantify *Sony* to the extent of holding that a product used "principally" for infringement does not qualify. See Brief for Motion Picture Studio and Recording Company Petitioners 31. As mentioned before, Grokster and StreamCast reply by citing evidence that their software can be used to reproduce public domain works, and they point to copyright holders who actually encourage copying. Even if infringement is the principal practice with their software today, they argue, the noninfringing uses are significant and will grow.

We agree with MGM that the Court of Appeals misapplied *Sony*, which it read as limiting secondary liability quite beyond the circumstances to which the case applied. *Sony* 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 is in fact used for infringement. The Ninth Circuit has read *Sony*'s limitation to 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; it read the rule as being this broad, even when an actual purpose to cause infringing use is shown by evidence independent of design and distribution of the product, unless the distributors had "specific knowledge of infringement at a time at which they contributed to the infringement, and failed to act upon that information." 380 F. 3d, at 1162 (internal quotation marks and alterations omitted). Because the Circuit found the StreamCast and Grokster software capable of substantial lawful use, it concluded on the basis of its reading of *Sony* that neither company could be held liable, since there was no showing that their software, being without any central server, afforded them knowledge of specific unlawful uses.

This view of *Sony*, however, was error, converting the case from one about liability resting on imputed intent to one about liability on any theory. Because *Sony* did not displace other theories of secondary liability, and because we find below that it was error to grant summary judgment to the companies on MGM's inducement claim, we do not revisit *Sony* further, as MGM requests, to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur. It is enough to note that the Ninth Circuit's judgment rested on an erroneous understanding of *Sony* and to leave further consideration of the *Sony* rule for a day when that may be required.

C

Sony's rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. But nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law.¹⁰ *Sony Corp. v. Universal City Studios*, 464 U. S., at 439 ("If vicarious liability is to be imposed on *Sony* in this case, it must rest on the fact that it has sold equipment with constructive knowledge" of the potential for infringement). Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*'s staple-article rule will not preclude liability.

The classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, or "entic[es] or persuad[es] another" to infringe, Black's Law Dictionary 790 (8th ed. 2004), as by advertising. Thus at common law a copyright or patent defendant who "not only expected but invoked [infringing use] by advertisement" was liable for infringement "on principles recognized in every part of the law." *Kalem Co. v. Harper Brothers*, 222 U. S., at 62–63 (copyright infringement). See also *Henry v. A. B. Dick Co.*, 224 U. S., at 48–49 (contributory liability for patent infringement may be found where a good's "most conspicuous use is one which will cooperate in an infringement when sale to such user is invoked by advertisement" of the infringing use); *Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co.*, 75 F. 1005, 1007–1008 (CA2 1896) (relying on advertisements and displays to find 5. Nor does the Patent Act's exemption from liability for those who distribute a staple article of commerce, 35 U. S. C. §271(c), extend to those who induce patent infringement, §271(b).

de los casos); *íd.*, pág. 486, n. 6 (*ídem*). La doctrina se creó para determinar en qué instancias se puede suponer, a partir de la distribución de un producto comercial, que el distribuidor pretendía que el producto se utilizara para infringir la patente de otro y, por lo tanto, puede considerarse justamente responsable de esa infracción. “Se considerará que todo aquel que fabrica y comercializa productos que sólo están adaptados para su uso en una combinación patentada pretende que sus actos tengan consecuencias lógicas; se considerará que pretende que esos productos se utilicen en la combinación de la patente”. *New York Scaffolding Co. c/ Whitney*, 224 F. 452, 459 (CA8 1915); véase también *James Heekin Co. c/ Baker*, 138 F. 63, 66 (CA8 1905); *Canda c/ Michigan Malleable Iron Co.*, 124 F. 486, 489 (CA6 1903); *Thomson-Houston Electric Co. c/ Ohio Brass Co.*, 80 F. 712, 720–721 (CA6 1897); *Red Jacket Mfg. Co. c/ Davis*, 82 F. 432, 439 (CA7 1897); *Holly c/ Vergennes Machine Co.*, 4 F. 74, 82 (CC Vt. 1880); *Renwick c/ Pond*, 20 F. Cas. 536, 541 (No. 11.702) (CC SDNY 1872).

En suma, cuando un producto “no sirve” sino para infringir, *Canda c/ Michigan Malleable Iron Co.*, *supra*, pág. 489, no hay interés público legítimo por que ese producto esté disponible sin licencia, y no resulta injusto suponer o imputar una intención de cometer infracción, véase *Henry c/ A. B. Dick Co.*, 224 U. S. 1, 48 (1912), rechazado por otros motivos, *Motion Picture Patents Co. c/ Universal Film Mfg. Co.*, 243 U. S. 502 (1917). A la inversa, la doctrina absuelve la conducta equívoca de comercializar un producto que tiene usos lícitos así como usos ilícitos sustantivos y limita la responsabilidad a las instancias en que la culpa es más grave que la mera conciencia de que se dará un uso inadecuado a algunos productos propios. Deja margen para la innovación y el comercio pujante. Véase *Sony Corp. c/ Universal City Studios*, *supra*, pág. 442; *Dawson Chemical Co. c/ Rohm & Haas Co.*, 448 U. S. 176, 221 (1980); *Henry c/ A. B. Dick Co.*, *supra*, pág. 48.

Las partes y muchos de los amigos del tribunal en este caso creen que la clave para resolverlo radica en el fallo del caso Sony y, en especial, en lo que significa que un producto pueda “emplearse para usos lícitos de importancia comercial”. *Sony Corp. c/ Universal City Studios*, *supra*, pág. 442. MGM sugiere que, al conceder juicio sumario a Grokster y StreamCast respecto de sus actividades actuales, se dio demasiada importancia al valor de la tecnología innovadora y demasiado poca a los derechos de autor que infringieron los usuarios de los programas de esas empresas, dado que, según se demostró, el 90% de las obras disponibles en una de las redes estaba sujeto a derechos de autor. MGM afirma que, suponiendo que el 10% restante correspondiera a los usos lícitos, ese porcentaje no debería considerarse “sustantivo” y el Tribunal tendría que cuantificar el fallo de Sony hasta el punto de resolver que no se incluya un producto empleado “principalmente” para cometer infracciones. Véase la Presentación de los demandantes Motion Picture Studio and Recording Company 31. Como se dijo antes, Grokster y StreamCast responden citando pruebas de que sus programas se pueden emplear para reproducir obras de dominio público y señalan a titulares de derechos de autor que incluso alientan las reproducciones. Sostienen que aunque hoy en día sus programas se utilicen principalmente para cometer infracciones, los usos lícitos son significativos y van en aumento.

Concordamos con MGM en que el Tribunal de Apelaciones aplicó mal el fallo Sony e interpretó que ésta limitaba la responsabilidad subsidiaria mucho más allá de las circunstancias a las que se aplicaba el caso. En el caso Sony se impidió la imputación de responsabilidad subsidiaria sobre la base de una intención supuesta o imputada de que se cometa una infracción sólo por diseñar o distribuir un producto que pueda emplearse para un uso lícito sustantivo pero cuyo distribuidor sabe que de hecho se utiliza para cometer infracciones. El Noveno Circuito ha interpretado que, según la limitación del fallo Sony, cuando un producto puede emplearse para un uso lícito sustantivo, no se puede imputar responsabilidad concurrente al fabricante si un tercero hace uso ilícito de ese producto; interpretó que la norma tiene semejante amplitud, incluso cuando hay pruebas independientes del diseño y la distribución del producto que demuestran un propósito real de que se haga uso ilícito, a menos que los distribuidores tuvieran “conocimiento concreto de la infracción en el momento en que concurrieron a su comisión y no obraran en consecuencia”, 380 F. 3d, pág. 1162 (se omitieron alteraciones y comillas internas). Dado que el Circuito opinó que los programas de StreamCast y Grokster podían emplearse para usos lícitos sustantivos, concluyó, sobre la base de su interpretación del fallo Sony, que no se podía imputar responsabilidad a ninguna de las empresas, ya que no se probó que sus programas, carentes de servidor central, les proporcionarían información de usos ilícitos específicos.

Sin embargo, esa interpretación del fallo Sony fue errónea e hizo que el caso dejara de ser un caso de responsabilidad declarada sobre la base de una intención imputada para convertirse en un caso de responsabilidad sobre la base de cualquier teoría. Habida cuenta de que el fallo Sony no reemplazó otras teorías de responsabilidad subsidiaria y de que a continuación resolvemos que fue un error conceder juicio sumario a las empresas demandadas fundándonos en la acción de instigación promovida por MGM, no volvemos a revisar el fallo Sony, tal como solicita MGM, para dar una descripción más cuantificada del

defendant's "willingness . . . to aid other persons in any attempts which they may be disposed to make towards [patent] infringement"); *Rumford Chemical Works v. Hecker*, 20 F. Cas. 1342, 1346 (No. 12,133) (CC N. J. 1876) (demonstrations of infringing activity along with "avowals of the [infringing] purpose and use for which it was made" supported liability for patent infringement).

The rule on inducement of infringement as developed in the early cases is no different today.¹¹ Evidence of "active steps . . . taken to encourage direct infringement," *Oak Industries, Inc. v. Zenith Electronics Corp.*, 697 F. Supp. 988, 992 (ND Ill. 1988), such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use, see, e.g., *Water Technologies Corp. v. Calco, Ltd.*, 850 F. 2d 660, 668 (CA Fed. 1988) (liability for inducement where one "actively and knowingly aid[s] and abet[s] another's direct infringement" (emphasis omitted)); *Fromberg, Inc. v. Thornhill*, 315 F. 2d 407, 412–413 (CA5 1963) (demonstrations by sales staff of infringing uses supported liability for inducement); *Haworth Inc. v. Herman Miller Inc.*, 37 USPQ 2d 1080, 1090 (WD Mich. 1994) (evidence that defendant "demonstrate[d] and recommend[ed] infringing configurations" of its product could support inducement liability); *Sims v. Mack Trucks, Inc.*, 459 F. Supp. 1198, 1215 (ED Pa. 1978) (finding inducement where the use "depicted by the defendant in its promotional film and brochures infringes the . . . patent"), overruled on other grounds, 608 F. 2d 87 (CA3 1979). Cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 37 (5th ed. 1984) ("There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong").

For the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safeharbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the 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. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential.

Accordingly, just as *Sony* did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, 464 U. S., at 439, n. 19, mere 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.

III

A

The only apparent question about treating MGM's evidence as sufficient to withstand summary judgment under the theory of inducement goes to the need on MGM's part to adduce evidence that StreamCast and Grokster communicated an inducing message to their software users. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. MGM claims that such a message is shown here. It is undisputed that StreamCast beamed onto the computer screens of users of Napster-compatible programs ads urging the adoption of its OpenNap program, which was designed, as its name implied, to invite the custom of patrons of Napster, then under attack in the courts for facilitating massive infringement. Those who accepted StreamCast's OpenNap program were offered software to perform the same services, which a factfinder could conclude would readily have been understood in the Napster market as the ability to download copyrighted music files.

Grokster distributed an electronic newsletter containing links to articles promoting its software's ability to access popular copyrighted music. And anyone whose Napster or free file-sharing searches turned up a link to Grokster would have understood Grokster to be offering the same file-sharing ability as Napster, and to the same people who probably used Napster for infringing downloads; that would also have been the understanding of anyone offered Grokster's suggestively named Swaptor software, its version of OpenNap. And both companies communicated a clear message by responding affirmatively to requests for help in locating and playing copyrighted materials.

In StreamCast's case, of course, the evidence just described was supplemented by other unequivocal indications of unlawful purpose in the internal communications and advertising designs aimed at Napster users ("When the lights went off at Napster . . . where did the users go?" App. 836 (ellipsis in original)). Whether the messages were communicated is not to the point on this record. The function of the message

6. Inducement has been codified in patent law. *Ibid.*

punto de equilibrio entre la protección y el comercio en los casos en que la responsabilidad reside únicamente en la distribución a sabiendas de que se efectuará un uso ilícito. Baste con notar que la sentencia del Noveno Circuito se basó en una interpretación errónea del fallo Sony y con aplazar el análisis del dictamen de Sony para otro momento que así lo requiera.

C

La sentencia Sony limita jurídicamente la imputación de intención culposa por las características o usos del producto que se distribuye. Pero no hay nada en el fallo que exija a los tribunales que hagan caso omiso de las pruebas de la intención si tales pruebas existen, y el caso nunca tuvo por objeto descartar las normas de responsabilidad basada en la culpa derivadas del *common law*¹⁰. *Sony Corp. c/ Universal City Studios*, 464 U. S., pág. 439 (“Si en este caso ha de imputarse a Sony responsabilidad por el hecho de otro, ésta debe residir en el hecho de que la demandada ha vendido equipos con presunto conocimiento” del potencial de uso ilícito). Así, en las instancias en que la prueba excede las características de un producto o el conocimiento de que éste puede emplearse para cometer infracciones y pone de manifiesto declaraciones o actos destinados a promover tales infracciones, la norma del producto básico establecida en el fallo Sony no exime de responsabilidad.

El caso tradicional de prueba directa de un propósito ilícito se da cuando una persona instiga a otra a cometer una infracción o “engañ[a] o convenc[e] a otra” de que cometa una infracción, *Black’s Law Dictionary* 790 (8ª ed., 2004), por ejemplo, mediante la publicidad. Así, en *common law* un acusado de infringir una patente o derechos de autor que “mediante la publicidad, no sólo esperaba sino invocaba que se hiciera [uso ilícito]” fue declarado responsable por infracción “sobre la base de principios reconocidos en todas las ramas del derecho”. *Kalem Co. c/ Harper Brothers*, 222 U. S., págs. 62–63 (infracción de los derechos de autor). Véase también *Henry c/ A. B. Dick Co.*, 224 U. S., págs. 48–49 (es posible imputar responsabilidad concurrente por infringir una patente en los casos en que “el uso más evidente [de un bien] es un uso que contribuirá a una infracción cuando se produzca la venta a ese usuario mediante la publicidad” del uso ilícito); *Thomson-Houston Electric Co. c/ Kelsey Electric R. Specialty Co.*, 75 F. 1005, 1007–1008 (CA2 1896) (que se basa en publicidades y anuncios para declarar la “predisposición [del acusado] (...) a ayudar a otras personas en todo intento que estén dispuestas a hacer con el fin de infringir [una patente]”); *Rumford Chemical Works c/ Hecker*, 20 F. Cas. 1342, 1346 (No. 12.133) (CC N. J. 1876) (las pruebas de actividad ilícita y el “reconocimiento del propósito y uso [ilícitos] para los cuales se hizo” respaldaron la imputación de responsabilidad por infracción de la patente).

La norma respecto de la instigación a cometer una infracción tal como se desarrolló en los primeros casos no difiere hoy en día¹¹. Las pruebas de “medidas (...) destinadas a fomentar las infracciones directas”, *Oak Industries, Inc. c/ Zenith Electronics Corp.*, 697 F. Supp. 988, 992 (ND Ill. 1988), tales como publicitar un uso ilícito o enseñar a efectuar un uso ilícito, demuestran una intención positiva de que el producto se utilice para cometer infracciones, y demostrar que se fomentó la infracción supera la reticencia del derecho a imputar responsabilidad cuando un acusado sólo vende un producto comercial al que se puede dar algún uso lícito, véase, por ej., *Water Technologies Corp. c/ Calco, Ltd.*, 850 F. 2d 660, 668 (CA Fed. 1988) (responsabilidad por instigación cuando una persona “ayud[a] activamente y con conocimiento de causa a otra a que cometa una infracción directa” (énfasis omitido)); *Fromberg, Inc. c/ Thornhill*, 315 F. 2d 407, 412–413 (CA5 1963) (las demostraciones de usos ilícitos hechas por el personal de ventas respaldaron la imputación de responsabilidad por instigación); *Haworth Inc. c/ Herman Miller Inc.*, 37 USPQ 2d 1080, 1090 (WD Mich. 1994) (las pruebas de que el acusado “demostr[ó] y recomend[ó] configuraciones ilícitas” de su producto podrían apoyar la imputación de responsabilidad por instigación); *Sims c/ Mack Trucks, Inc.*, 459 F. Supp. 1198, 1215 (ED Pa. 1978) (declaración de responsabilidad por instigación en un caso en que el uso “que mostraba el acusado en su película y folletos de promoción infringe la (...) patente”), rechazado por otros motivos, 608 F. 2d 87 (CA3 1979). Cf. *W. Keeton, D. Dobbs, R. Keeton y D. Owen, Prosser and Keeton on Law of Torts* 37 (5ª ed., 1984) (“Hay una tendencia clara a imputar más responsabilidad a un acusado cuya conducta lleva la intención de hacer daño o es moralmente errónea”).

Por los mismos motivos por los que en la sentencia Sony se tomó la doctrina del producto básico propia del derecho de patentes como modelo para la norma de salvaguarda en materia de derechos de autor, la norma de la instigación es también pertinente para la materia. La adoptamos aquí y sostenemos que todo el que distribuye un dispositivo con el objeto de promover su uso para infringir derechos de autor, según lo muestre la manifestación inequívoca u otras medidas positivas que se tomen para alentar la infracción, es responsable de las infracciones consiguientes de terceros. Desde luego, tenemos en cuenta la necesidad de evitar que se cercene el comercio normal o se desaliente el desarrollo de tecnologías

11. Tampoco se extiende la exención de responsabilidad que se aplica a quienes distribuyen un producto básico de comercio en virtud de la Ley de patentes, 35 U. S. C. §271(c), a quienes instigan a infringir una patente, §271(b).

12. La instigación se ha codificado en el derecho de patentes. *Ibid.*

in the theory of inducement is to prove by a defendant's own statements that his unlawful purpose disqualifies him from claiming protection (and incidentally to point to actual violators likely to be found among those who hear or read the message). See *supra*, at 17–19. Proving that a message was sent out, then, is the preeminent but not exclusive way of showing that active steps were taken with the purpose of bringing about infringing acts, and of showing that infringing acts took place by using the device distributed. Here, the summary judgment record is replete with other evidence that Grokster and StreamCast, unlike the manufacturer and distributor in *Sony*, acted with a purpose to cause copyright violations by use of software suitable for illegal use. See *supra*, at 6–9.

Three features of this evidence of intent are particularly notable. First, each company showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users. StreamCast's internal documents made constant reference to Napster, it initially distributed its Morpheus software through an OpenNap program compatible with Napster, it advertised its OpenNap program to Napster users, and its Morpheus software functions as Napster did except that it could be used to distribute more kinds of files, including copyrighted movies and software programs. Grokster's name is apparently derived from Napster, it too initially offered an OpenNap program, its software's function is likewise comparable to Napster's, and it attempted to divert queries for Napster onto its own Web site. Grokster and StreamCast's efforts to supply services to former Napster users, deprived of a mechanism to copy and distribute what were overwhelmingly infringing files, indicate a principal, if not exclusive, intent on the part of each to bring about infringement.

Second, this evidence of unlawful objective is given added significance by MGM's showing that neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. While the Ninth Circuit treated the defendants' failure to develop such tools as irrelevant because they lacked an independent duty to monitor their users' activity, we think this evidence underscores Grokster's and StreamCast's intentional facilitation of their users' infringement.¹²

Third, there is a further complement to the direct evidence of unlawful objective. It is useful to recall that StreamCast and Grokster make money by selling advertising space, by directing ads to the screens of computers employing their software. As the record shows, the more the software is used, the more ads are sent out and the greater the advertising revenue becomes. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing.¹³ This evidence alone would not justify an inference of unlawful intent, but viewed in the context of the entire record its import is clear.

The unlawful objective is unmistakable.

7. Of course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.

8. Grokster and StreamCast contend that any theory of liability based on their conduct is not properly before this Court because the rulings in the trial and appellate courts dealt only with the present versions of their software, not "past acts . . . that allegedly encouraged infringement or assisted . . . known acts of infringement." Brief for Respondents 14; see also *id.*, at 34. This contention misapprehends the basis for their potential liability. It is not only that encouraging a particular consumer to infringe a copyright can give rise to secondary liability for the infringement that results. Inducement liability goes beyond that, and the distribution of a product can itself give rise to liability where evidence shows that the distributor intended and encouraged the product to be used to infringe. In such a case, the culpable act is not merely the encouragement of infringement but also the distribution of the tool intended for infringing use. See *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 62–63 (1911); *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F. 2d 829, 846 (CA11 1990); *A & M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1456 (CD Cal. 1996).

que tengan potencial lícito e ilícito.

Por consiguiente, así como en el fallo Sony no se imputó instigación intencional a pesar de que el fabricante del grabador tenía conocimiento de que el dispositivo podía utilizarse para infringir derechos, 464 U. S., pág. 439, n. 19, el mero conocimiento del potencial de uso ilícito o de los usos ilícitos reales no bastaría aquí para declarar responsable a un distribuidor. Tampoco apoyarían la imputación de responsabilidad los actos habituales relacionados con la distribución de un producto, tales como ofrecer apoyo técnico o actualizaciones del producto a los clientes. Por el contrario, la norma de la instigación postula la imputación de responsabilidad sobre la base de la expresión y conducta intencionales y culposas y, así, no pone en peligro el comercio legítimo ni desalienta la innovación que prometa usos lícitos.

III

A

Al parecer, el único problema de considerar como suficientes las pruebas presentadas por MGM para afrontar un juicio sumario fundado en la teoría de la instigación radica en la necesidad de que MGM adujera pruebas de que StreamCast y Grokster transmitían un mensaje instigador a los usuarios de sus programas. El típico caso de instigación consiste en la publicidad o en la incitación que transmite un mensaje pensado para estimular a otros a que cometan infracciones. MGM alega que en este caso se muestra un mensaje de esa naturaleza. Es indiscutible que StreamCast transmitía avisos publicitarios que llegaban a la pantalla de las computadoras de quienes usaban programas compatibles con Napster y en los que invitaba a la adopción de su propio programa, OpenNap, diseñado, como su nombre lo indica, para atraer a los clientes de Napster, que en ese entonces estaba siendo juzgado en los tribunales por facilitar infracciones masivas. A quienes aceptaban el programa OpenNap de StreamCast, se les ofrecían programas informáticos que brindaban los mismos servicios, servicios que, tal como podría determinar cualquier investigador, bien podrían haberse entendido en el mercado de Napster como aptos para descargar archivos de música sujeta a derechos de autor.

Grokster distribuía un boletín electrónico que contenía enlaces a artículos en los que se promovía la capacidad de su programa de acceder a música popular sujeta a derechos de autor. Y todo aquel cuyas búsquedas en Napster o de intercambio libre de archivos arrojaran por resultado un vínculo a Grokster habría entendido que Grokster ofrecía la misma capacidad para intercambiar archivos que Napster y a las mismas personas que probablemente utilizaran Napster para efectuar descargas ilícitas. Lo mismo habría entendido cualquiera a quien se le hubiera ofrecido el programa de Grokster que lleva el sugerente nombre de Swaptor*, la versión de OpenNap que fabricaba esa empresa. Y ambas empresas transmitían un mensaje claro al responder afirmativamente a las solicitudes de ayuda para localizar y reproducir material sujeto a derechos de autor.

Desde luego, en el caso de StreamCast, las pruebas recién descritas se complementaron con otros indicios inequívocos de propósito ilícito en la intención de la publicidad y comunicaciones internas dirigidas a los usuarios de Napster (“Cuando en Napster se apagaron las luces... ¿adónde fueron los usuarios?” App. 836). No importa aquí si se transmitieron o no los mensajes. En la teoría de la instigación, el mensaje cumple la función de demostrar a través de las declaraciones del propio acusado que su propósito ilícito le impide pedir protección (y, por cierto, señalar infractores reales que podrían hallarse entre los que escuchan o leen el mensaje). Véase *supra*, págs. 17–19. Demostrar que se transmitió un mensaje, entonces, es la mejor manera, aunque no la única, de demostrar que se tomaron medidas con el fin de que se cometieran actos violatorios y que tales actos se llevaron a cabo usando el dispositivo distribuido por la empresa. En este caso, el registro del juicio sumario está plagado de otras pruebas que demuestran que, a diferencia del fabricante y el distribuidor del caso Sony, Grokster y StreamCast actuaron con el propósito de provocar violaciones de los derechos de autor mediante el uso de programas aptos para usos ilícitos. Véase *supra*, págs. 6–9.

Estas pruebas que demuestran intención presentan tres características particularmente notables. En primer lugar, ambas empresas mostraron que pretendían satisfacer una fuente conocida de demanda de infracciones de derechos de autor, es decir, el mercado que conformaban los antiguos usuarios de Napster. Los documentos internos de StreamCast se referían constantemente a Napster, la empresa distribuía en un principio su programa Morpheus mediante un programa OpenNap compatible con Napster, publicitaba su programa OpenNap entre los usuarios de Napster y su programa Morpheus funciona igual que Napster, salvo que se podía utilizar para distribuir más tipos de archivos, incluidas películas y programas informáticos sujetos a derechos de autor. Al parecer, el nombre de Grokster deriva de Napster, la empresa también ofrecía en un principio un programa OpenNap, el funcionamiento de su programa también se asemeja al de Napster y Grokster trató de desviar las búsquedas de Napster a su propio sitio

13. N. de la T.: “Swap” significa “intercambiar”. El sufijo “-tor” denota a la persona o cosa que hace la acción que indica el verbo.

web. Los esfuerzos de Grokster y StreamCast por proveer servicios a los antiguos usuarios de Napster, que habían sido privados de un mecanismo para reproducir y distribuir archivos que en su inmensa mayoría violaban derechos de autor, señalan una intención principal, si no exclusiva, por parte de ambas empresas de provocar infracciones.

En segundo lugar, estas pruebas que demuestran un objetivo ilícito adquieren una importancia mayor cuando MGM demuestra que ninguna de las empresas trató de crear herramientas u otros mecanismos filtradores para disminuir la actividad infractora que se llevaba a cabo mediante el uso de sus programas. Si bien el Noveno Circuito consideró irrelevante el hecho de que los acusados no crearan herramientas de ese tipo porque no tenían el deber independiente de supervisar la actividad de sus usuarios, nosotros creemos que estas pruebas ponen de relieve que Grokster y StreamCast facilitaban intencionalmente las infracciones de sus usuarios¹².

En tercer lugar, existe otro complemento a las pruebas directas del objetivo ilícito. Resulta útil recordar que StreamCast y Grokster generan ingresos a partir de la venta de espacio publicitario, dirigiendo los avisos a las pantallas de las computadoras que emplean sus programas. Como se muestra en el registro, cuanto más se usa el programa, más avisos se transmiten y mayor es el ingreso que proviene de la publicidad. Dado que la medida en que se usa el programa determina la ganancia que obtienen los distribuidores, el sentido comercial de su empresa depende de un gran volumen de uso, que, según muestra el registro, es ilícito¹³. Estas pruebas por sí solas no justificarían que se infiriera una intención ilícita pero, vistas en el contexto de todo el registro, su importancia es evidente.

No cabe duda de que hubo un objetivo ilícito.

14. Desde ya que, ante la falta de otras pruebas que pusieran de manifiesto la intención, los tribunales no estaban en posición de declarar responsabilidad por el hecho de otro fundándose meramente en que los acusados no tomaron medidas positivas para prevenir las infracciones si el dispositivo podía emplearse para usos lícitos sustantivos. Una sentencia de ese tenor se acercaría demasiado a la salvaguarda del fallo Sony.

15. Grokster y StreamCast sostienen que toda teoría de responsabilidad que se base en su conducta no compete a esta Corte, ya que las sentencias que dictaron los tribunales de primera y segunda instancia sólo se ocupaban de las versiones actuales de sus programas y no de "actos pasados (...) que supuestamente alentaban las infracciones o contribuían a (...) infracciones conocidas". Presentación de los demandados 14; véase también *id.*, pág. 34. Este argumento malinterpreta el fundamento de la responsabilidad potencial de los demandados. No se trata solamente de que, al alentar a un consumidor determinado a que infrinja derechos de autor, se puede incurrir en responsabilidad subsidiaria por la infracción consiguiente. La responsabilidad por instigación va más allá de eso, y la distribución de un producto puede, en sí misma, implicar responsabilidad en aquellos casos en que las pruebas demuestran que el distribuidor pretendía que el producto se utilizara para cometer infracciones y alentaba ese uso. En ese caso, el acto culposo no consiste meramente en alentar a la infracción, sino también en distribuir la herramienta destinada al uso ilícito. Véase *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 62–63 (1911); *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F. 2d 829, 846 (CA11 1990); *A & M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1456 (CD Cal. 1996).

Bibliografía

- 11º Congreso de las Naciones Unidas sobre Prevención del Delito y Justicia Penal, “Medidas para combatir los delitos informáticos”, [en línea], documento A/CONF.203/14, Bangkok, 2005, [fecha de última consulta: 24 de febrero de 2007], disponible en <<http://daccessdds.un.org/doc/UNDOC/GEN/V05/822/62/PDF/V0582262.pdf?OpenElement>>.
- A&M Records, Inc. c/ Napster, Inc., [en línea], 239 F.3d 1004, 9º Cir., 2001, [fecha de última consulta: 3 de marzo de 2007], disponible en <http://www.law.cornell.edu/copyright/cases/239_F3d_1004.htm>.
- Alterini, Atilio A., Ameal, Oscar J. y López Cabana, Roberto M., Derecho de obligaciones civiles y comerciales, (2ª ed.), Abeledo-Perrot, Buenos Aires, 2003.
- American Association of Law Libraries, AALL Universal Citation Guide, Version 2.1, [en línea], s.d., 2002, [fecha de última consulta: 19 de febrero de 2007], disponible en <<http://www.aallnet.org/committee/citation/ucg/index.html>>.
- Antequera Parilli, Ricardo, “Las limitaciones y excepciones al derecho de autor y los derechos conexos en el entorno digital”, [en línea], documentos preparado para el IX Curso Académico Regional OMPI/SGAE sobre Derecho de Autor y Derechos Conexos para Países de América Latina organizado por la OMPI, la SGAE y el Ministerio de Industria y Comercio de la República del Paraguay, Asunción, 2005, [fecha de última consulta: 2 de marzo de 2007], disponible en <http://www.wipo.int/edocs/mdocs/lac/es/ompi_sgae_da_asu_05/ompi_sgae_da_asu_05_2.pdf>.
- Association of Legal Writing Directors y Dickerson, Darby, ALWD Citation Manual: A Professional System of Citation, [en línea], Nueva York, Aspen Publishers, Inc., 2000, [fecha de última consulta: 19 de febrero de 2007], disponible en <<http://www.alwd.org/cm/>>.
- Black, Henry C., Black’s Law Dictionary, (6ª ed.), St. Paul, West Publishing Co., 1990.
- Clarkson, Kenneth W., Miller, Roger LeRoy, Jentz, Gaylord A. y Cross, Frank B., “Intellectual Property and Internet Law”, West’s Business Law. Text and Cases: Legal, Ethical, International, and E-Commerce Environment, (9ª ed.), South-Western College/West, Nueva York, 2003.
- Corte Suprema de Justicia de la Nación, “Acordada 28/2004 ‘Amigos del Tribunal’”, [en línea], s.d., 2004, [fecha de última consulta: 26 de diciembre de 2006], disponible en <http://www.cels.org.ar/Site_cels/documentos/acordada_CSJN_28-04_amicus_curiae.pdf>.
- Metro-Goldwyn-Mayer Studios Inc., et al., demandantes c/ Grokster, Ltd., et al., [en línea], 545 U. S., Corte Suprema de los Estados Unidos, 2005, [fecha de consulta: 16 de abril de 2006], disponible en <<http://www.copyright.gov/docs/mgm/opinion.pdf>>.
- Cunard, Jeffrey P. y Hill, Keith, “Evolución reciente en el campo de la gestión de los derechos digitales”, [en línea], Comité Permanente de Derecho de Autor y Derechos Conexos de la OMPI, Ginebra, 2004, [fecha de última consulta: 2 de marzo de 2007], disponible en <http://www.wipo.int/edocs/mdocs/copyright/es/sccr_10/sccr_10_2_rev.pdf>.
- Downing, Douglas A., Covington, Michael A. y Covington, Melody M., Dictionary of Computer and Internet Terms, (5ª ed.), Nueva York, Barron’s Educational Series, 1996.
- Fonovisa, Inc. c/ Cherry Auction, Inc., [en línea], 76 F.3d 259, 9º Cir., 1996, [fecha de última consulta: 3 de marzo de 2007], disponible en <http://www.law.cornell.edu/copyright/cases/76_F3d_259.htm>.
- Ginsburg, Jane, “Secondary Liability for Copyright Infringement in the U.S.: Anticipating the Aprés-Grokster”, [en línea], Columbia Law School, 2007, [fecha de última consulta: 15 de febrero de 2007], disponible en <http://www.law.columbia.edu/law_school/communications/reports/winter06/facforum1>.
- Honorable Congreso de la Nación Argentina, Ley 11.723: Régimen legal de la propiedad intelectual, [en línea], Boletín Oficial, 1933, [fecha de última consulta: 27 de febrero de 2007], disponible en <<http://www.infoleg.gov.ar/infolegInternet/anexos/40000-44999/42755/texact.htm>>.
- Honorable Congreso de la Nación Argentina, Ley 23.774: Corte Suprema de Justicia de la Nación - Jueces - Ampliación de la Corte Suprema, [en línea], Boletín Oficial, 1990, [fecha de última consulta: 27 de febrero de 2007], disponible en <<http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/175/texact.htm>>.
- Honorable Congreso de la Nación Argentina, Ley 340: Código Civil de la Nación, [en línea], 1869, [fecha de última consulta: 14 de febrero de 2007], disponible en <<http://www.infoleg.gov.ar/infolegInternet/anexos/105000-109999/109481/texact.htm>>.
- Kunz, Ana, “Trabajo Final de Carrera. Elementos para su elaboración”, Buenos Aires, Universidad de Belgrano, 2002.
- Lipszyc, Delia, “El intercambio en línea de ficheros musicales y audiovisuales digitales”, [en línea], documento preparado para las Jornadas de Derecho de Autor organizadas por la OMPI y el INDAUTOR, México, 2005, [fecha de última consulta: 2 de marzo de 2007], disponible en <http://www.wipo.int/edocs/mdocs/lac/es/ompi_da_mex_05/ompi_da_mex_05_1.pdf>.

- Lipszyc, Delia, Nuevos temas de derecho de autor y derechos conexos, Buenos Aires, UNESCO, CERLALC, Zavalía, 2004.
- Lucas, André, "Ley aplicable a la violación del derecho de autor en el entorno digital", [en línea], Copyright Bulletin, UNESCO, octubre-diciembre de 2005, [fecha de consulta: 22 de febrero de 2007], disponible en <<http://unesdoc.unesco.org/images/0014/001436/143657s.pdf#143657>>.
- Martin, Peter W., Introduction to Basic Legal Citation, [en línea], Legal Information Institute, Cornell Law School, s.d., [fecha de última consulta: 21 de febrero de 2007], disponible en <<http://www.law.cornell.edu/citation/>>.
- Merriam-Webster's Dictionary of Law, [en línea], Merriam-Webster, Inc., 1996, [fecha de última consulta: 6 de marzo de 2007], disponible en <<http://dictionary.lp.findlaw.com>>.
- Oficina Internacional de la OMPI, "La protección internacional del derecho de autor y de los derechos conexos", [en línea], s.d., [fecha de última consulta: 15 de febrero de 2007], disponible en <http://www.wipo.int/copyright/es/activities/pdf/international_protection.pdf>.
- Organización Mundial de la Propiedad Intelectual, "Convenio de Berna para la Protección de las Obras Literarias y Artísticas", [en línea], París, Base de datos de la OMPI de textos legislativos de propiedad intelectual, 1979, [fecha de última consulta: 22 de febrero de 2007], disponible en <http://www.wipo.int/treaties/es/ip/berne/pdf/trtdocs_wo001.pdf>.
- Organización Mundial de la Propiedad Intelectual, "Tratado de la OMPI sobre Derecho de Autor (WCT)", [en línea], Ginebra, Colección de Leyes Electrónicamente Accesible, 1996, [fecha de última consulta: 22 de febrero de 2007], disponible en <http://www.wipo.int/treaties/es/ip/wct/pdf/trtdocs_wo033.pdf>.
- Real Academia Española y Asociación de Academias de la Lengua Española, Diccionario panhispánico de dudas, Bogotá, Santillana, 2005.
- Real Academia Española, Diccionario de la Lengua Española, (22ª ed.), Madrid, Espasa Calpe, 2001.
- Shapiro, Bernstein and Co. c/ H. L. Green Co., [en línea], 316 F.2d 304, 2º Cir., 1963, [fecha de última consulta: 2 de marzo de 2007], disponible en <<http://techlawadvisor.com/docs/SHAPIRO-BERNSTEIN.txt>>.
- Sony Corp. of America c/ Universal City Studios, Inc., [en línea], 464 U.S. 417, 435, Corte Suprema de Justicia de los Estados Unidos, 1984, [fecha de última consulta: 3 de marzo de 2007], disponible en <<http://supreme.justia.com/us/464/417/case.html>>.
- Stephanblome, Markus, "Responsabilidad legal de los proveedores de Internet por infracciones de los derechos de autor bajo la legislación alemana y europea", [en línea], Copyright Bulletin, UNESCO, octubre-diciembre de 2005, [fecha de consulta: 22 de febrero de 2007], disponible en <<http://unesdoc.unesco.org/images/0012/001255/125506s.pdf#page=5>>.
- United States Copyright Office, "Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code", [en línea], s.d., 2003, [fecha de última consulta: 8 de febrero de 2007], disponible en <<http://www.copyright.gov/title17/circ92.pdf>>.
- Villalba, Carlos A. y Lipszyc, Delia, El Derecho de autor en la Argentina, (1ª ed.), Buenos Aires, La Ley, 2001.
- Von Lewinski, Silke, "Certain legal problems related to the making available of literary and artistic works and other protected subject matter through digital networks", [en línea], Copyright Bulletin, UNESCO, enero-marzo de 2005, [fecha de consulta: 22 de febrero de 2007], disponible en <<http://unesdoc.unesco.org/images/0013/001396/139644e.pdf#139644>>.

Análisis y fundamentación

Antes de empezar el análisis puntual de los problemas de traducción y las soluciones que ensayé para cada uno, considero que vale la pena hacer referencia al motivo por el cual decidí no traducir el texto de corrido, desde el principio —que quizá hubiera sido la forma más lógica de proceder—, sino saltar una parte importante hasta llegar a la sección II¹⁶. Teniendo en cuenta la longitud requerida de la traducción, el propósito que me planteé para este trabajo y los desafíos con los que pretendía toparme, resolví que no tendría sentido elegir la parte del fallo en la que se analizaban los antecedentes y las pruebas del caso, ya que esa parte presentaba, en su mayoría, dificultades técnicas, es decir, de vocabulario, y era más bien descriptiva¹⁷. Por el contrario, creí que sería mucho más pertinente y que constituiría un desafío mucho mayor trabajar con la parte II porque en ella aparecía el desarrollo argumentativo de la sentencia del juez —a mi entender, la parte más sustantiva, donde se abordaba el fondo de la causa, sus fundamentos y las bases jurisprudenciales— y, en definitiva, los efectos jurídicos que justificaban la elección del texto como texto de naturaleza jurídica¹⁸.

Con respecto a las dificultades específicas que presentaba el fallo para su traducción, el primer problema y tal vez el más importante de los problemas con los que me encontré fue de índole conceptual, cuando no cultural, en tanto que se relacionaba muy estrechamente con el derecho y la jurisprudencia estadounidenses. Dado que la sentencia tenía por objeto establecer qué tipo de responsabilidad procedía imputar a los demandados, fue preciso desde un primer momento delimitar conceptualmente cada instancia de responsabilidad e investigar sobre las teorías que se han desarrollado al respecto en el derecho estadounidense. Esto implicó, a su vez, plantearme qué criterio habría de adoptar para la traducción de los conceptos jurídicos “indirect liability”, “secondary liability”, “contributory liability” y “vicarious liability”¹⁹ que aparecían a lo largo del texto y que son muy propios de la doctrina de los tribunales estadounidenses en lo que se refiere al derecho de autor en el entorno digital.

Por un lado, se presentaba la posibilidad de buscar equivalentes funcionales en el derecho argentino, es decir, de aplicar la teoría de la equivalencia funcional de la traducción y encontrar un “concepto o institución jurídica que cumpl[iera] el mismo papel en la cultura del texto traducido”²⁰. Sin embargo, como se verá a continuación, tras investigar los conceptos en el marco de la doctrina que les dio origen, llegué a la conclusión de que sería imposible hallar equivalencias exactas en todos los casos, dada la falta de codificación de la materia en el derecho argentino²¹. No obstante, al mismo tiempo descubrí que podría aprovechar ciertos componentes de significado que estaban presentes tanto en las instituciones estadounidenses como en las argentinas y utilizarlos de manera tal que ayudaran a transmitir el sentido del original con una terminología jurídica familiar al lector hipotético de la traducción, aunque no se tratara de instituciones equivalentes o establecidas en el derecho argentino²². De todas maneras, el texto en sí aportaba mucho a la cuestión, ya que, al provenir los conceptos de la jurisprudencia, que se sigue sentando con cada caso nuevo, se proporcionaba un marco teórico explícito que, para el traductor, funcionaba además como fuente de consulta y punto de partida para la investigación.

Siguiendo las pistas que daba el texto, empecé por investigar la teoría de “secondary liability”, que se presentaba como concepto genérico y comprendía las especies de “contributory liability” y “vicarious liability”. Al respecto, fue valiosísimo el aporte sintético de Silke von Lewinski, que me ayudó a dilucidar los aspectos esenciales de cada concepto:

16. Véase el texto completo del fallo en el Anexo I del presente trabajo.

17. En esa parte del fallo, se explica en detalle el funcionamiento de los programas que fabrican y distribuyen los demandados, los precedentes del caso, las pruebas a favor y en contra de las empresas demandadas y los antecedentes de la causa en tribunales inferiores.

18. Nótese que esto fue posible gracias a que la segunda parte es completa en sí misma.

19. Estos tipos de responsabilidad tienen su correlato en los conceptos análogos de “indirect infringement”, “secondary infringement”, “contributory infringement” y “vicarious infringement”, que también aparecen con frecuencia a lo largo del fallo.

20. Mayoral Asensio, Roberto, “La traducción jurídica: un enigma para los estudiosos, una tarea para los profesionales”, *El Lenguaraz*, año 3, número 3, 2001, pág. 20.

21. Además, se sumaba el problema que suscitan las equivalencias cuando no coinciden plenamente con las instituciones del sistema jurídico de la cultura a la que se traduce. Como afirma Roberto Mayoral Asensio, la equivalencia funcional “[c]umple primordialmente con necesidades de comprensión, cuando el destinatario no tiene ninguna familiaridad con el sistema extranjero”, en el sentido de que evoca algo ya conocido que puede servir de referencia, “pero dificulta enormemente las exigencias de identificación (...) y, en muchos casos, es un obstáculo importante para precisar la transformación de la información por dar al destinatario más imprecisiones sobre la referencia que información exacta” (“La traducción jurídica: un enigma para los estudiosos, una tarea para los profesionales”, *El Lenguaraz*, año 3, número 3, 2001, pág. 20).

22. En este sentido, recurrí a lo que Ricardo Chiesa denomina “análisis componencial”, es decir, “el análisis de componentes semánticos del vocablo en la lengua de origen y el o los vocablos elegidos en la lengua meta”. Chiesa afirma que este análisis “nos será de utilidad allí donde *no exista un equivalente cultural o funcional satisfactorio* en la cultura o sistema jurídico de la lengua meta” (énfasis en el original) (“El análisis componencial aplicado a la traducción de textos jurídicos”, ponencia para el Segundo Congreso Latinoamericano de Traducción e Interpretación, CTPCBA, 1998).

"Where authorisation for the acts of reproduction and making available has not been given by the relevant right holders, and no limitation or exception applies, the user who makes the copy, makes it available to the participants of the network and the user who downloads the file are primary infringers and liable to the general sanctions provided under national law. Given the problems of pursuing individual users of file-sharing networks, (...) the question of the liability of other actors in this context becomes relevant. In particular, the providers of the software for the file-sharing system might be liable for secondary infringement of authors' rights and neighbouring rights. (...)

US law knows secondary liability only on the basis of case law (...). According to well-established case law, secondary liability may occur as contributory liability and vicarious liability. Contributory infringement so far has been recognised by the US courts when the defendant has knowledge of the infringement and somehow facilitates it.(...) Vicarious liability in copyright has been widely held to exist if the defendant had the right and ability to supervise the primarily infringing activity and had a financial interest therein."²³

Con esta introducción teórica, seguí indagando en los términos en inglés, poniendo el acento en sus componentes semánticos esenciales, tarea que luego me permitió determinar qué término español (analizados también según sus propias características esenciales) se ajustaría más a cada concepto. Así, en función del análisis y las fuentes consultadas, creí pertinente traducir "vicarious liability" como "responsabilidad por el hecho de otro"²⁴, "contributory liability" como "responsabilidad concurrente" y "secondary liability" como "responsabilidad subsidiaria"²⁵.

Otro de los problemas que presentaba el texto era el sistema de citas de fallos que utilizan los tribunales estadounidenses. Las fuentes consultadas explicaban detalladamente las convenciones que se utilizan para citar todos los elementos que deben figurar a fin de poder identificar un caso²⁶. Sin embargo, teniendo en cuenta la función que cumplen las citas en este contexto —es decir, remitir al lector al texto original que se está citando— y dado el alto grado de concisión y abreviación de que se vale el método, creí más conveniente no traducirlas, siempre teniendo en mente que al lector hipotético de esta traducción podía serle útil contar con la cita original. De traducirlas, corría el riesgo de perder la referencia o dificultar la búsqueda, resultado que hubiera ido en contra del propósito original de la cita. Una vez descartada

23. Von Lewinski, Silke, "Certain legal problems related to the making available of literary and artistic works and other protected subject matter through digital networks", [en línea], *Copyright Bulletin*, UNESCO, enero-marzo de 2005, [fecha de consulta: 22 de febrero de 2007], disponible en <<http://unesdoc.unesco.org/images/0013/001396/139644e.pdf#139644>>.

24. En cuanto al concepto de "vicarious liability", cabe destacar que fue el único que admitió una equivalencia funcional casi exacta, gracias a que tiene el mismo origen que el concepto en español que utilicé como traducción, aunque en la jurisprudencia estadounidense ha adquirido un matiz nuevo. (Como ese matiz aparece explicitado en el texto, me permití usar el equivalente español). Según Kenneth Clarkson, Roger Miller, Gaylord Jentz y Frank Cross, "[v]icarious (substitute) liability exists when one person is subject to liability for another's actions. A common example occurs in the employment context, when an employer is held vicariously liable by third parties for torts committed by employees in the course of their employment" ("Intellectual Property and Internet Law", *West's Business Law. Text and Cases: Legal, Ethical, International, and E-Commerce Environment*, (9ª ed.), South-Western College/West, Nueva York, 2003, pág. 155). El diccionario *Black's Law Dictionary* aporta una definición amplia: "The imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent" (Black, Henry C., *Black's Law Dictionary*, (6ª ed.), St. Paul, West Publishing Co., 1990, pág. 1.566). Estas definiciones teóricas se vieron ampliadas, como se dijo antes, en la jurisprudencia de los tribunales estadounidenses. Así, en el caso "A&M Records, Inc. c/ Napster, Inc." (239 F.3d 1004 (9º Circuito, 2001)) se definió este tipo de responsabilidad como "an 'outgrowth' of *respondeat superior*", noción que se expresó por primera vez en el fallo "Shapiro, Bernstein and Co. c/ H. L. Green Co." (316 F.2d 304 (2º Circuito, 1963)): "Many of the elements which have given rise to the doctrine of *respondeat superior* (...) may also be evident in factual settings other than that of a technical employer-employee relationship. When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials (...) the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation". Aunque no encontré jurisprudencia argentina sobre este tema, me pareció que al rescatar el concepto del cual derivó el desarrollo jurisprudencial estadounidense podría transmitir el sentido de la teoría de la representación vertida en el artículo 1113 del Código Civil, según el cual "la obligación del que ha causado un daño se extiende a los daños que causaren los que están bajo su dependencia", y que Atilio Alterini, Oscar Ameal y Roberto López Cabana definen como "responsabilidad por el hecho de otro": "[e]xiste responsabilidad por el hecho de otro en los casos en que la ley autoriza al damnificado a reclamar a quien, sin haber obrado el acto que causa daño, debe indemnizarlo, en atención a su particular vinculación con el victimario. Esta responsabilidad es *refleja o indirecta*" (*Derecho de obligaciones civiles y comerciales*, (2ª ed.), Abeledo-Perrot, Buenos Aires, 2003, pág. 706). Estos autores también se explayan sobre los distintos fundamentos de tal responsabilidad, y citan una teoría subjetiva, según la cual "[e]l principal respondería en razón de la culpa *in vigilando* o *in eligendo*, o de ambas a la vez: se le achaca una culpa propia, consistente en la omisión en la vigilancia o en la elección del causante del daño", y otra objetiva, por la cual se afirma que "[l]a justificación de esta responsabilidad radicaría en el beneficio que obtiene el principal con la actividad del dependiente (versión *riesgo-provecho*), o simplemente en haber introducido en la sociedad la posibilidad de que el dependiente cause daños (versión *riesgo-creado*)" (*op. cit.*, pág. 706). Ambos elementos están presentes en la noción de "vicarious liability".

25. Respecto del concepto de "contributory liability" y "secondary liability", seguí para su traducción el mismo proceso de investigación y comparación con las posibles traducciones al español que se refleja en la nota *supra*. Para una ampliación de los desarrollos jurisprudenciales estadounidenses al respecto, véase el Anexo II.

26. American Association of Law Libraries, *AALL Universal Citation Guide, Version 2.1*, [en línea], s.d., 2002, disponible en <<http://www.aallnet.org/committee/citation/ucg/index.html>>; Martin, Peter W., *Introduction to Basic Legal Citation*, [en línea], Legal Information Institute, Cornell Law School, s.d., disponible en <<http://www.law.cornell.edu/citation/>>; Association of Legal Writing Directors y Dickerson, Darby, *ALWD Citation Manual: A Professional System of Citation*, [en línea], Nueva York, Aspen Publishers, Inc., 2000, disponible en <<http://www.alwd.org/cm/>>.

la posibilidad anterior, consideré incluir una traducción entre paréntesis, ya que quizás conocer de qué instancia o qué circuito de tribunales se trataba podría proporcionar datos útiles al lector de la traducción; no obstante, desistí de la idea porque hubiera resultado confusa a fin de cuentas, dada la extensión del texto y la profusión de citas. De todas maneras, de haber tenido un destinatario real, quizá hubiera optado por consultarle sus preferencias; en esta instancia, no obstante, opté por no desvirtuar el propósito de la cita y tuve en cuenta también las restricciones en cuanto a la cantidad de palabras que se podía traducir para el trabajo²⁷. Adopté el mismo criterio respecto de los artículos y publicaciones especializadas que se citan a lo largo de todo el fallo.

En términos más generales, el fallo presentaba también dificultades discursivas y de interpretación oracional y contextual. Para ello, fueron de suma utilidad las lecturas adicionales que ofrecía el texto (las citas, entre ellas) y la intertextualidad con otros fallos²⁸. Asimismo, la terminología específica de la rama del derecho sobre la que versaba el fallo constituyó todo un desafío, y para enfrentarlo tuve que valerme de un amplio espectro de fuentes —que no se limitaron a los diccionarios, sino que incluyeron teoría del derecho, doctrina, leyes argentinas, códigos estadounidenses, tratados internacionales, artículos especializados, sitios web relacionados²⁹— y consultar además a traductores públicos y abogados³⁰. Considero que ese proceso me ayudó a adquirir una perspectiva renovada de la tarea del traductor público y enriqueció enormemente el producto final, es decir, la traducción.

Con este breve análisis, pretendí ilustrar el proceso de toma de decisiones y la postura que adopté frente al texto, así como los criterios a los que me ceñí una vez planteada la hipótesis de trabajo. Las descripciones no apuntaron a ser exhaustivas ni abarcaron todos los problemas que surgían del texto, tarea que hubiera resultado casi imposible en este caso, pero creo que constituyeron una buena muestra, concisa y representativa, de la labor que llevé a cabo para arribar, como me propuse en un principio, a una traducción digna.

Bibliografía

- A&M Records, Inc. c/ Napster, Inc., [en línea], 239 F.3d 1004, 9º Cir., 2001, [fecha de última consulta: 3 de marzo de 2007], disponible en <http://www.law.cornell.edu/copyright/cases/239_F3d_1004.htm>.
- Alterini, Atilio A., Ameal, Oscar J. y López Cabana, Roberto M., Derecho de obligaciones civiles y comerciales, (2ª ed.), Abeledo-Perrot, Buenos Aires, 2003.
- American Association of Law Libraries, AALL Universal Citation Guide, Version 2.1, [en línea], s.d., 2002, [fecha de última consulta: 19 de febrero de 2007], disponible en <<http://www.aallnet.org/committee/citation/ucg/index.html>>.
- Association of Legal Writing Directors y Dickerson, Darby, ALWD Citation Manual: A Professional System of Citation, [en línea], Nueva York, Aspen Publishers, Inc., 2000, [fecha de última consulta: 19 de febrero de 2007], disponible en <<http://www.alwd.org/cm/>>.
- Black, Henry C., Black's Law Dictionary, (6ª ed.), St. Paul, West Publishing Co., 1990.
- Chiesa, Ricardo, "El análisis componencial aplicado a la traducción de textos jurídicos", ponencia para el Segundo Congreso Latinoamericano de Traducción e Interpretación, CTPCBA, 1998.
- Clarkson, Kenneth W., Miller, Roger LeRoy, Jentz, Gaylord A. y Cross, Frank B., "Intellectual Property and Internet Law", West's Business Law. Text and Cases: Legal, Ethical, International, and E-Commerce Environment, (9ª ed.), South-Western College/West, Nueva York, 2003.
- Eco, Umberto, Cómo se hace una tesis, Barcelona, Gedisa, 2002.
- Honorable Congreso de la Nación Argentina, Ley 340: Código Civil de la Nación, [en línea], 1869, [fecha de última consulta: 14 de febrero de 2007], disponible en <<http://www.infoleg.gov.ar/infolegInternet/anexos/105000-109999/109481/texact.htm>>.
- Martin, Peter W., Introduction to Basic Legal Citation, [en línea], Legal Information Institute, Cornell Law School, s.d., [fecha de última consulta: 21 de febrero de 2007], disponible en <<http://www.law.cornell.edu/citation/>>.
- Mayoral Asensio, Roberto, "La traducción jurídica: un enigma para los estudiosos, una tarea para los profesionales", El Lenguaraz, año 3, número 3, 2001.

27. Nótese que la traducción de las citas entre paréntesis hubiera insumido una gran cantidad de palabras extra que me habría quitado espacio para traducir más texto argumentativo. Nótese también que esta consideración es estrictamente funcional al trabajo final de carrera.

28. Véase el Anexo II.

29. Véase la bibliografía utilizada para la traducción, que figura en la página 29 del presente trabajo.

30. Para un ejemplo de consultas a otros profesionales, véase el Anexo III.

- Metro-Goldwyn-Mayer Studios Inc., et al., demandantes c/ Grokster, Ltd., et al., [en línea], 545 U. S., Corte Suprema de los Estados Unidos, 2005, [fecha de consulta: 16 de abril de 2006], disponible en <<http://www.copyright.gov/docs/mgm/opinion.pdf>>.
- Real Academia Española y Asociación de Academias de la Lengua Española, Diccionario panhispánico de dudas, Bogotá, Santillana, 2005.
- Real Academia Española, Diccionario de la Lengua Española, (22ª ed.), Madrid, Espasa Calpe, 2001.
- Shapiro, Bernstein and Co. c/ H. L. Green Co., [en línea], 316 F.2d 304, 2º Cir., 1963, [fecha de última consulta: 2 de marzo de 2007], disponible en <<http://techlawadvisor.com/docs/SHAPIRO-BERNSTEIN.txt>>.
- Sony Corp. of America c/ Universal City Studios, Inc., [en línea], 464 U.S. 417, 435, Corte Suprema de Justicia de los Estados Unidos, 1984, [fecha de última consulta: 3 de marzo de 2007], disponible en <<http://supreme.justia.com/us/464/417/case.html>>.
- Von Lewinski, Silke, "Certain legal problems related to the making available of literary and artistic works and other protected subject matter through digital networks", [en línea], Copyright Bulletin, UNESCO, enero-marzo de 2005, [fecha de consulta: 22 de febrero de 2007], disponible en <<http://unesdoc.unesco.org/images/0013/001396/139644e.pdf#139644>>.

Conclusión

El presente trabajo final de carrera plasmó el intento de poner en práctica los objetivos de la Articulación con Traductorado Público y de valerme de los conocimientos, instrumentos y técnicas adquiridos durante el curso para realizar una tarea digna y de calidad, que fuera fundamentada y a conciencia. Traté de concebir una hipótesis realista de trabajo que imitara la tarea cotidiana del traductor público y me permitiera así sacar provecho de lo aprendido, complementándolo con mi formación anterior y reflexionando, al mismo tiempo, sobre lo que significa traducir un texto jurídico.

La instancia del trabajo suscitó una idea renovada de la traducción y de la tarea del traductor en la actualidad, y me sirvió para ahondar en la investigación traductológica, explorar otras disciplinas y plantearme nuevos desafíos. Asimismo, fomentó un ejercicio de análisis crítico, minucioso, de los mecanismos y procesos por los cuales se aplican la teoría y la investigación a la práctica profesional. En perspectiva, considero que ha sido una experiencia sumamente enriquecedora, que me ayudó a replantearme la profesión desde otro punto de vista y, lo que es igual de esperanzador, a vislumbrar otros caminos y posibilidades de especialización para el futuro.

Anexos

Anexo I: Texto original

Cite as: 545 U.S. ____ (2005)

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–480

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL., PETITIONERS v. GROKSTER, LTD.,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

[June 27, 2005]

JUSTICE SOUTER delivered the opinion of the Court.

The question is under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product. We hold that one who distributes a device with the 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.

I
A

Respondents, Grokster, Ltd., and StreamCast Networks, Inc., defendants in the trial court, distribute free software products that allow computer users to share electronic files through peer-to-peer networks, so called because users' computers communicate directly with each other, not through central servers. The advantage of peer-to-peer networks over information networks of other types shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. Since copies of a file (particularly a popular one) are available on many users' computers, file requests and retrievals may be faster than on other types of networks, and since file exchanges do not travel through a server, communications can take place between any computers that remain connected to the network without risk that a glitch in the server will disable the network in its entirety. Given these benefits in security, cost, and efficiency, peer-to-peer networks are employed to store and distribute electronic files by universities, government agencies, corporations, and libraries, among others.³¹

Other users of peer-to-peer networks include individual recipients of Grokster's and StreamCast's software, and although the networks that they enjoy through using the software can be used to share any type of digital file, they have prominently employed those networks in sharing copyrighted music and video files without authorization. A group of copyright holders (MGM for short, but including motion picture studios, recording companies, songwriters, and music publishers) sued Grokster and StreamCast for their

31. Peer-to-peer networks have disadvantages as well. Searches on peer-to-peer networks may not reach and uncover all available files because search requests may not be transmitted to every computer on the network. There may be redundant copies of popular files. The creator of the software has no incentive to minimize storage or bandwidth consumption, the costs of which are borne by every user of the network. Most relevant here, it is more difficult to control the content of files available for retrieval and the behavior of users.

users' copyright infringements, alleging that they knowingly and intentionally distributed their software to enable users to reproduce and distribute the copyrighted works in violation of the Copyright Act, 17 U. S. C. §101 *et seq.* (2000 ed. and Supp. II).³² MGM sought damages and an injunction.

Discovery during the litigation revealed the way the software worked, the business aims of each defendant company, and the predilections of the users. Grokster's eponymous software employs what is known as FastTrack technology, a protocol developed by others and licensed to Grokster. StreamCast distributes a very similar product except that its software, called Morpheus, relies on what is known as Gnutella technology.³³ A user who downloads and installs either software possesses the protocol to send requests for files directly to the computers of others using software compatible with FastTrack or Gnutella. On the FastTrack network opened by the Grokster software, 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.

In the Gnutella network made available by Morpheus, the process is mostly the same, except that in some versions of the Gnutella protocol there are no supernodes. In these versions, peer computers using the 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. As this description indicates, Grokster and StreamCast use no servers to intercept the content of the search requests or to mediate the file transfers conducted by users of the software, there being no central point through which the substance of the communications passes in either direction.³⁴

Although Grokster and StreamCast do not therefore know when particular files are copied, a few searches using their software would show what is available on the networks the software reaches. MGM commissioned a statistician to conduct a systematic search, and his study showed that nearly 90% of the files available for download on the FastTrack system were copyrighted works.³⁵ Grokster and StreamCast dispute this figure, raising methodological problems and arguing that free copying even of copyrighted works may be authorized by the rightholders. They also argue that potential noninfringing uses of their software are significant in kind, even if infrequent in practice. Some musical performers, for example, have gained new audiences by distributing their copyrighted works for free across peer-to-peer networks, and some distributors of unprotected content have used peer-to-peer networks to disseminate files, Shakespeare being an example. Indeed, StreamCast has given Morpheus users the opportunity to download the briefs in this very case, though their popularity has not been quantified.

As for quantification, the parties' anecdotal and statistical evidence entered thus far to show the content available on the FastTrack and Gnutella networks does not say much about which files are actually downloaded by users, and no one can say how often the software is used to obtain copies of unprotected material. But MGM's evidence gives reason to think that the vast majority of users' downloads are acts of infringement, and because well over 100 million copies of the software in question are known to have been downloaded, and billions of files are shared across the FastTrack and Gnutella networks each month, the probable scope of copyright infringement is staggering.

Grokster and StreamCast concede the infringement in most downloads, Brief for Respondents 10, n. 6, and it is uncontested that they are aware that users employ their software primarily to download copyrighted files, even if the decentralized FastTrack and Gnutella networks fail to reveal which files are being copied, and when. From time to time, moreover, the companies have learned about their users' infringement directly, as from users who have sent e-mail to each company with questions about playing copyrighted movies they had downloaded, to whom the companies have responded with guidance.³⁶ App.

32. The studios and recording companies and the songwriters and music publishers filed separate suits against the defendants that were consolidated by the District Court.

33. Subsequent versions of Morpheus, released after the record was made in this case, apparently rely not on Gnutella but on a technology called Neonet. These developments are not before us.

34. There is some evidence that both Grokster and StreamCast previously operated supernodes, which compiled indexes of files available on all of the nodes connected to them. This evidence, pertaining to previous versions of the defendants' software, is not before us and would not affect our conclusions in any event.

35. By comparison, evidence introduced by the plaintiffs in *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (CA9 2001), showed that 87% of files available on the Napster filesharing network were copyrighted, *id.*, at 1013.

36. The Grokster founder contends that in answering these e-mails he often did not read them fully. App. 77, 769.

559–563, 808–816, 939–954. And MGM notified the companies of 8 million copyrighted files that could be obtained using their software.

Grokster and StreamCast are not, however, merely passive recipients of information about infringing use. The record is replete with evidence that from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.

After the notorious file-sharing service, Napster, was sued by copyright holders for facilitation of copyright infringement, *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (ND Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (CA9 2001), StreamCast gave away a software program of a kind known as OpenNap, designed as compatible with the Napster program and open to Napster users for downloading files from other Napster and OpenNap users' computers. Evidence indicates that "[i]t was always [StreamCast's] intent to use [its OpenNap network] to be able to capture email addresses of [its] initial target market so that [it] could promote [its] StreamCast Morpheus interface to them," App. 861; indeed, the OpenNap program was engineered "to leverage Napster's 50 million user base," *id.*, at 746.

StreamCast monitored both the number of users downloading its OpenNap program and the number of music files they downloaded. *Id.*, at 859, 863, 866. It also used the resulting OpenNap network to distribute copies of the Morpheus software and to encourage users to adopt it. *Id.*, at 861, 867, 1039. Internal company documents indicate that StreamCast hoped to attract large numbers of former Napster users if that company was shut down by court order or otherwise, and that StreamCast planned to be the next Napster. *Id.*, at 861. A kit developed by StreamCast to be delivered to advertisers, for example, contained press articles about StreamCast's potential to capture former Napster users, *id.*, at 568–572, and it introduced itself to some potential advertisers as a company "which is similar to what Napster was," *id.*, at 884. It broadcast banner advertisements to users of other Napster-compatible software, urging them to adopt its OpenNap. *Id.*, at 586. An internal e-mail from a company executive stated: "We have put this network in place so that when Napster pulls the plug on their free service . . . or if the Court orders them shut down prior to that . . . we will be positioned to capture the flood of their 32 million users that will be actively looking for an alternative." *Id.*, at 588–589, 861.

Thus, StreamCast developed promotional materials to market its service as the best Napster alternative. One proposed advertisement read: "Napster Inc. has announced that it will soon begin charging you a fee. That's if the courts don't order it shut down first. What will you do to get around it?" *Id.*, at 897. Another proposed ad touted StreamCast's software as the "#1 alternative to Napster" and asked "[w]hen the lights went off at Napster . . . where did the users go?" *Id.*, at 836 (ellipsis in original).³⁷ StreamCast even planned to flaunt the illegal uses of its software; when it launched the OpenNap network, the chief technology officer of the company averred that "[t]he goal is to get in trouble with the law and get sued. It's the best way to get in the new[s]." *Id.*, at 916.

The evidence that Grokster sought to capture the market of former Napster users is sparser but revealing, for Grokster launched its own OpenNap system called Swaptor and inserted digital codes into its Web site so that computer users using Web search engines to look for "Napster" or "[f]ree filesharing" would be directed to the Grokster Web site, where they could download the Grokster software. *Id.*, at 992–993. And Grokster's name is an apparent derivative of Napster.

StreamCast's executives monitored the number of songs by certain commercial artists available on their networks, and an internal communication indicates they aimed to have a larger number of copyrighted songs available on their networks than other file-sharing networks. *Id.*, at 868. The point, of course, would be to attract users of a mind to infringe, just as it would be with their promotional materials developed showing copyrighted songs as examples of the kinds of files available through Morpheus. *Id.*, at 848. Morpheus in fact allowed users to search specifically for "Top 40" songs, *id.*, at 735, which were inevitably copyrighted. Similarly, Grokster sent users a newsletter promoting its ability to provide particular, popular copyrighted materials. Brief for Motion Picture Studio and Recording Company Petitioners 7–8.

In addition to this evidence of express promotion, marketing, and intent to promote further, the business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works. Grokster and StreamCast receive no revenue from users, who obtain the software itself for nothing. Instead, both companies generate income by selling advertising space, and they stream the advertising to Grokster and Morpheus users while they are employing the programs. As the number of users of each program increases, advertising opportunities become worth more. Cf. App. 539, 804. While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work. Users seeking Top 40 songs, for example, or the

37. The record makes clear that StreamCast developed these promotional materials but not whether it released them to the public. Even if these advertisements were not released to the public and do not show encouragement to infringe, they illuminate StreamCast's purposes.

latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron, and Grokster and StreamCast translated that demand into dollars.

Finally, there is no evidence that either company made an effort to filter copyrighted material from users' downloads or otherwise impede the sharing of copyrighted files. Although Grokster appears to have sent e-mails warning users about infringing content when it received threatening notice from the copyright holders, it never blocked anyone from continuing to use its software to share copyrighted files. *Id.*, at 75–76. StreamCast not only rejected another company's offer of help to monitor infringement, *id.*, at 928–929, but blocked the Internet Protocol addresses of entities it believed were trying to engage in such monitoring on its networks, *id.*, at 917–922.

B

After discovery, the parties on each side of the case cross-moved for summary judgment. The District Court limited its consideration to the asserted liability of Grokster and StreamCast for distributing the current versions of their software, leaving aside whether either was liable “for damages arising from *past* versions of their software, or from other past activities.” 259 F. Supp. 2d 1029, 1033 (CD Cal. 2003). The District Court held that those who used the Grokster and Morpheus software to download copyrighted media files directly infringed MGM's copyrights, a conclusion not contested on appeal, but the court nonetheless granted summary judgment in favor of Grokster and StreamCast as to any liability arising from distribution of the then current versions of their software. Distributing that software gave rise to no liability in the court's view, because its use did not provide the distributors with actual knowledge of specific acts of infringement. Case No. CV 01 08541 SVW (PJWx) (CD Cal., June 18, 2003), App. 1213.

The Court of Appeals affirmed. 380 F. 3d 1154 (CA9 2004). In the court's analysis, a defendant was liable as a contributory infringer when it had knowledge of direct infringement and materially contributed to the infringement. But the court read *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417 (1984), as holding 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 fact that the software was capable of substantial noninfringing uses in the Ninth Circuit's view meant that Grokster and StreamCast were not liable, because they had no such actual knowledge, owing to the decentralized architecture of their software. The court also held that Grokster and StreamCast did not materially contribute to their users' infringement because it was the users themselves who searched for, retrieved, and stored the infringing files, with no involvement by the defendants beyond providing the software in the first place.

The Ninth Circuit also considered whether Grokster and StreamCast could be liable under a theory of vicarious infringement. The court held against liability because the defendants did not monitor or control the use of the software, had no agreed-upon right or current ability to supervise its use, and had no independent duty to police infringement. We granted certiorari. 543 U. S. ____ (2004).

II

A

MGM and many of the *amici* fault the Court of Appeals's holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off. See *Sony Corp. v. Universal City Studios, supra*, at 442; see generally Ginsburg, Copyright and Control Over New Technologies of Dissemination, 101 Colum. L. Rev. 1613 (2001); Lichtman & Landes, Indirect Liability for Copyright Infringement: An Economic Perspective, 16 Harv. J. L. & Tech. 395 (2003).

The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many people (especially the young) use file-sharing software to download copyrighted works. This very breadth of the software's use may well draw the public directly into the

debate over copyright policy, Peters, Brace Memorial Lecture: Copyright Enters the Public Domain, 51 J. Copyright Soc. 701, 705–717 (2004) (address by Register of Copyrights), and the indications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection, Wu, When Code Isn't Law, 89 Va. L. Rev. 679, 724–726 (2003). As the case has been presented to us, these fears are said to be offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies. See, e.g., Lemley & Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 Stan. L. Rev. 1345, 1386–1390 (2004); Brief for Innovation Scholars and Economists as *Amici Curiae* 15–20; Brief for Emerging Technology Companies as *Amici Curiae* 19–25; Brief for Intel Corporation as *Amicus Curiae* 20–22.³⁸

The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement. See *In re Aimster Copyright Litigation*, 334 F. 3d 643, 645–646 (CA7 2003).

One infringes contributorily by intentionally inducing or encouraging direct infringement, see *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 (CA2 1971), and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it, *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 304, 307 (CA2 1963).³⁹ Although “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,” *Sony Corp. v. Universal City Studios*, 464 U. S., at 434, these doctrines of secondary liability emerged from common law principles and are well established in the law, *id.*, at 486 (Blackmun, J., dissenting); *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 62–63 (1911); *Gershwin Pub. Corp. v. Columbia Artists Management, supra*, at 1162; 3 M. Nimmer & D. Nimmer, Copyright, §12.04[A] (2005).

B

Despite the currency of these principles of secondary liability, this Court has dealt with secondary copyright infringement in only one recent case, and because MGM has tailored its principal claim to our opinion there, a look at our earlier holding is in order. In *Sony Corp. v. Universal City Studios, supra*, this Court addressed a claim that secondary liability for infringement can arise from the very distribution of a commercial product. There, the product, novel at the time, was what we know today as the videocassette recorder or VCR. Copyright holders sued Sony as the manufacturer, claiming it was contributorily liable for infringement that occurred when VCR owners taped copyrighted programs because it supplied the means used to infringe, and it had constructive knowledge that infringement would occur. At the trial on the merits, the evidence showed that the principal use of the VCR was for “time-shifting,” or taping a program for later viewing at a more convenient time, which the Court found to be a fair, not an infringing, use. *Id.*, at 423–424. There was no evidence that Sony had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping. *Id.*, at 438. Although Sony's advertisements urged consumers to buy the VCR to “record favorite shows” or “build a library” of recorded programs, *id.*, at 459 (Blackmun, J., dissenting), neither of these uses was necessarily infringing, *id.*, at 424, 454–455.

On those facts, with no evidence of stated or indicated intent to promote infringing uses, the only conceivable basis for imposing liability was on a theory of contributory infringement arising from its sale of

38. The mutual exclusivity of these values should not be overstated, however. On the one hand technological innovators, including those writing file-sharing computer programs, may wish for effective copyright protections for their work. See, e.g., Wu, When Code Isn't Law, 89 Va. L. Rev. 679, 750 (2003). (StreamCast itself was urged by an associate to “get [its] technology written down and [its intellectual property] protected.” App. 866.) On the other hand the widespread distribution of creative works through improved technologies may enable the synthesis of new works or generate audiences for emerging artists. See *Eldred v. Ashcroft*, 537 U. S. 186, 223–226 (2003) (Stevens, J., dissenting); Van Houweling, Distributive Values in Copyright, 83 Texas L. Rev. 1535, 1539–1540, 1562–1564 (2005); Brief for Sovereign Artists et al. as *Amici Curiae* 11.

39. We stated in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417 (1984), that “‘the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn’ [R]easoned analysis of [the *Sony* plaintiffs' contributory infringement claim] necessarily entails consideration of arguments and case law which may also be forwarded under the other labels, and indeed the parties . . . rely upon such arguments and authority in support of their respective positions on the issue of contributory infringement,” *id.*, at 435, n. 17 (quoting *Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429, 457–458 (CD Cal. 1979)). In the present case MGM has argued a vicarious liability theory, which allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the defendant initially lacks knowledge of the infringement. See, e.g., *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 304, 308 (CA2 1963); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F. 2d 354, 355 (CA7 1929). Because we resolve the case based on an inducement theory, there is no need to analyze separately MGM's vicarious liability theory.

VCRs to consumers with knowledge that some would use them to infringe. *Id.*, at 439. But because the VCR was “capable of commercially significant noninfringing uses,” we held the manufacturer could not be faulted solely on the basis of its distribution. *Id.*, at 442.

This analysis reflected patent law’s traditional staple article of commerce doctrine, now codified, that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways. 35 U. S. C. §271(c); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U. S. 476, 485 (1964) (noting codification of cases); *id.*, at 486, n. 6 (same). The doctrine was devised to identify instances in which it may be presumed from distribution of an article in commerce that the distributor intended the article to be used to infringe another’s patent, and so may justly be held liable for that infringement. “One who makes and sells articles which are only adapted to be used in a patented combination will be presumed to intend the natural consequences of his acts; he will be presumed to intend that they shall be used in the combination of the patent.” *New York Scaffolding Co. v. Whitney*, 224 F. 452, 459 (CA8 1915); see also *James Heekin Co. v. Baker*, 138 F. 63, 66 (CA8 1905); *Canda v. Michigan Malleable Iron Co.*, 124 F. 486, 489 (CA6 1903); *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 80 F. 712, 720–721 (CA6 1897); *Red Jacket Mfg. Co. v. Davis*, 82 F. 432, 439 (CA7 1897); *Holly v. Vergennes Machine Co.*, 4 F. 74, 82 (CC Vt. 1880); *Renwick v. Pond*, 20 F. Cas. 536, 541 (No. 11,702) (CC SDNY 1872).

In sum, where an article is “good for nothing else” but infringement, *Canda v. Michigan Malleable Iron Co.*, *supra*, at 489, there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe, see *Henry v. A. B. Dick Co.*, 224 U. S. 1, 48 (1912), overruled on other grounds, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502 (1917). Conversely, the doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one’s products will be misused. It leaves breathing room for innovation and a vigorous commerce. See *Sony Corp. v. Universal City Studios*, *supra*, at 442; *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U. S. 176, 221 (1980); *Henry v. A. B. Dick Co.*, *supra*, at 48.

The parties and many of the *amici* in this case think the key to resolving it is the *Sony* rule and, in particular, what it means for a product to be “capable of commercially significant noninfringing uses.” *Sony Corp. v. Universal City Studios*, *supra*, at 442. MGM advances the argument that granting summary judgment to Grokster and StreamCast as to their current activities gave too much weight to the value of innovative technology, and too little to the copyrights infringed by users of their software, given that 90% of works available on one of the networks was shown to be copyrighted. Assuming the remaining 10% to be its noninfringing use, MGM says this should not qualify as “substantial,” and the Court should quantify *Sony* to the extent of holding that a product used “principally” for infringement does not qualify. See Brief for Motion Picture Studio and Recording Company Petitioners 31. As mentioned before, Grokster and StreamCast reply by citing evidence that their software can be used to reproduce public domain works, and they point to copyright holders who actually encourage copying. Even if infringement is the principal practice with their software today, they argue, the noninfringing uses are significant and will grow.

We agree with MGM that the Court of Appeals misapplied *Sony*, which it read as limiting secondary liability quite beyond the circumstances to which the case applied. *Sony* 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 is in fact used for infringement. The Ninth Circuit has read *Sony*’s limitation to 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; it read the rule as being this broad, even when an actual purpose to cause infringing use is shown by evidence independent of design and distribution of the product, unless the distributors had “specific knowledge of infringement at a time at which they contributed to the infringement, and failed to act upon that information.” 380 F. 3d, at 1162 (internal quotation marks and alterations omitted). Because the Circuit found the StreamCast and Grokster software capable of substantial lawful use, it concluded on the basis of its reading of *Sony* that neither company could be held liable, since there was no showing that their software, being without any central server, afforded them knowledge of specific unlawful uses.

This view of *Sony*, however, was error, converting the case from one about liability resting on imputed intent to one about liability on any theory. Because *Sony* did not displace other theories of secondary liability, and because we find below that it was error to grant summary judgment to the companies on MGM’s inducement claim, we do not revisit *Sony* further, as MGM requests, to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur. It is enough to note that the Ninth Circuit’s judgment rested on an erroneous understanding of *Sony* and to leave further consideration of the *Sony* rule for a day when that may be required.

C

Sony's rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. But nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law.⁴⁰ *Sony Corp. v. Universal City Studios*, 464 U. S., at 439 (“If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge” of the potential for infringement). Thus, where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* staple-article rule will not preclude liability.

The classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, or “entic[es] or persuad[es] another” to infringe, Black’s Law Dictionary 790 (8th ed. 2004), as by advertising. Thus at common law a copyright or patent defendant who “not only expected but invoked [infringing use] by advertisement” was liable for infringement “on principles recognized in every part of the law.” *Kalem Co. v. Harper Brothers*, 222 U. S., at 62–63 (copyright infringement). See also *Henry v. A. B. Dick Co.*, 224 U. S., at 48–49 (contributory liability for patent infringement may be found where a good’s “most conspicuous use is one which will cooperate in an infringement when sale to such user is invoked by advertisement” of the infringing use); *Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co.*, 75 F. 1005, 1007–1008 (CA2 1896) (relying on advertisements and displays to find defendant’s “willingness . . . to aid other persons in any attempts which they may be disposed to make towards [patent] infringement”); *Rumford Chemical Works v. Hecker*, 20 F. Cas. 1342, 1346 (No. 12,133) (CC N. J. 1876) (demonstrations of infringing activity along with “avowals of the [infringing] purpose and use for which it was made” supported liability for patent infringement).

The rule on inducement of infringement as developed in the early cases is no different today.⁴¹ Evidence of “active steps . . . taken to encourage direct infringement,” *Oak Industries, Inc. v. Zenith Electronics Corp.*, 697 F. Supp. 988, 992 (ND Ill. 1988), such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law’s reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use, see, e.g., *Water Technologies Corp. v. Calco, Ltd.*, 850 F. 2d 660, 668 (CA Fed. 1988) (liability for inducement where one “actively and knowingly aid[s] and abet[s] another’s direct infringement” (emphasis omitted)); *Fromberg, Inc. v. Thornhill*, 315 F. 2d 407, 412–413 (CA5 1963) (demonstrations by sales staff of infringing uses supported liability for inducement); *Haworth Inc. v. Herman Miller Inc.*, 37 USPQ 2d 1080, 1090 (WD Mich. 1994) (evidence that defendant “demonstrate[d] and recommend[ed] infringing configurations” of its product could support inducement liability); *Sims v. Mack Trucks, Inc.*, 459 F. Supp. 1198, 1215 (ED Pa. 1978) (finding inducement where the use “depicted by the defendant in its promotional film and brochures infringes the . . . patent”), overruled on other grounds, 608 F. 2d 87 (CA3 1979). Cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 37 (5th ed. 1984) (“There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong”).

For the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safeharbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the 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. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, just as *Sony* did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, 464 U. S., at 439, n. 19, mere 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.

40. Nor does the Patent Act’s exemption from liability for those who distribute a staple article of commerce, 35 U. S. C. §271(c), extend to those who induce patent infringement, §271(b).

41. Inducement has been codified in patent law. *Ibid.*

III

A

The only apparent question about treating MGM's evidence as sufficient to withstand summary judgment under the theory of inducement goes to the need on MGM's part to adduce evidence that StreamCast and Grokster communicated an inducing message to their software users. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. MGM claims that such a message is shown here. It is undisputed that StreamCast beamed onto the computer screens of users of Napster-compatible programs ads urging the adoption of its OpenNap program, which was designed, as its name implied, to invite the custom of patrons of Napster, then under attack in the courts for facilitating massive infringement. Those who accepted StreamCast's OpenNap program were offered software to perform the same services, which a factfinder could conclude would readily have been understood in the Napster market as the ability to download copyrighted music files. Grokster distributed an electronic newsletter containing links to articles promoting its software's ability to access popular copyrighted music. And anyone whose Napster or free file-sharing searches turned up a link to Grokster would have understood Grokster to be offering the same file-sharing ability as Napster, and to the same people who probably used Napster for infringing downloads; that would also have been the understanding of anyone offered Grokster's suggestively named Swaptor software, its version of OpenNap. And both companies communicated a clear message by responding affirmatively to requests for help in locating and playing copyrighted materials.

In StreamCast's case, of course, the evidence just described was supplemented by other unequivocal indications of unlawful purpose in the internal communications and advertising designs aimed at Napster users ("When the lights went off at Napster . . . where did the users go?" App. 836 (ellipsis in original)). Whether the messages were communicated is not to the point on this record. The function of the message in the theory of inducement is to prove by a defendant's own statements that his unlawful purpose disqualifies him from claiming protection (and incidentally to point to actual violators likely to be found among those who hear or read the message). See *supra*, at 17–19. Proving that a message was sent out, then, is the preeminent but not exclusive way of showing that active steps were taken with the purpose of bringing about infringing acts, and of showing that infringing acts took place by using the device distributed. Here, the summary judgment record is replete with other evidence that Grokster and StreamCast, unlike the manufacturer and distributor in *Sony*, acted with a purpose to cause copyright violations by use of software suitable for illegal use. See *supra*, at 6–9.

Three features of this evidence of intent are particularly notable. First, each company showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users. StreamCast's internal documents made constant reference to Napster, it initially distributed its Morpheus software through an OpenNap program compatible with Napster, it advertised its OpenNap program to Napster users, and its Morpheus software functions as Napster did except that it could be used to distribute more kinds of files, including copyrighted movies and software programs. Grokster's name is apparently derived from Napster, it too initially offered an OpenNap program, its software's function is likewise comparable to Napster's, and it attempted to divert queries for Napster onto its own Web site. Grokster and StreamCast's efforts to supply services to former Napster users, deprived of a mechanism to copy and distribute what were overwhelmingly infringing files, indicate a principal, if not exclusive, intent on the part of each to bring about infringement.

Second, this evidence of unlawful objective is given added significance by MGM's showing that neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. While the Ninth Circuit treated the defendants' failure to develop such tools as irrelevant because they lacked an independent duty to monitor their users' activity, we think this evidence underscores Grokster's and StreamCast's intentional facilitation of their users' infringement.⁴²

Third, there is a further complement to the direct evidence of unlawful objective. It is useful to recall that StreamCast and Grokster make money by selling advertising space, by directing ads to the screens of computers employing their software. As the record shows, the more the software is used, the more ads are sent out and the greater the advertising revenue becomes. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing.⁴³ This evidence alone would not justify an inference of unlawful

42. Inducement has been codified in patent law. *Ibid.*

43. Grokster and StreamCast contend that any theory of liability based on their conduct is not properly before this Court because the rulings in the trial and appellate courts dealt only with the present versions of their software, not "past acts . . . that allegedly encouraged infringement or assisted . . . known acts of infringement." Brief for Respondents 14; see also *id.*, at 34. This contention misapprehends the basis for their potential liability. It is not only that encouraging a particular consumer to infringe a copyright can give

intent, but viewed in the context of the entire record its import is clear.

The unlawful objective is unmistakable.

B

In addition to intent to bring about infringement and distribution of a device suitable for infringing use, the inducement theory of course requires evidence of actual infringement by recipients of the device, the software in this case. As the account of the facts indicates, there is evidence of infringement on a gigantic scale, and there is no serious issue of the adequacy of MGM's showing on this point in order to survive the companies' summary judgment requests. Although an exact calculation of infringing use, as a basis for a claim of damages, is subject to dispute, there is no question that the summary judgment evidence is at least adequate to entitle MGM to go forward with claims for damages and equitable relief.

* * *

In sum, this case is significantly different from *Sony* and reliance on that case to rule in favor of StreamCast and Grokster was error. *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.

MGM's evidence in this case most obviously addresses a different basis of liability for distributing a product open to alternative uses. 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.

There is substantial evidence in MGM's favor on all elements of inducement, and summary judgment in favor of Grokster and StreamCast was error. On remand, reconsideration of MGM's motion for summary judgment will be in order. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

rise to secondary liability for the infringement that results. Inducement liability goes beyond that, and the distribution of a product can itself give rise to liability where evidence shows that the distributor intended and encouraged the product to be used to infringe. In such a case, the culpable act is not merely the encouragement of infringement but also the distribution of the tool intended for infringing use. See *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 62–63 (1911); *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F. 2d 829, 846 (CA11 1990); *A & M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1456 (CD Cal. 1996).

Anexo II: Ejemplos de sentencias de tribunales estadounidenses que sentaron precedente en materia de responsabilidad por infracciones a los derechos de autor

Shapiro, Bernstein and Co. c/ H. L. Green Co.

SHAPIRO, BERNSTEIN & CO., Inc., et al., Plaintiffs-Appellants, v. H. L. GREEN COMPANY, Inc., Defendant and Third Party Plaintiff-Appellee, JALEN AMUSEMENT COMPANY, Inc., Defendant and Third Party Defendant

No. 294, Docket 27979

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

316 F.2d 304; 1963 U.S. App. LEXIS 5592; 137 U.S.P.Q. (BNA) 275

March 27, 1963, Argued

April 15, 1963, Decided

COUNSEL: [**1]

Julien T. Abeles, New York City, for plaintiffs-appellants.

Sidney Hut, of Danson & Hut, New York City for defendant and third party plaintiff-appellee.

JUDGES: Before WATERMAN and KAUFMAN, Circuit Judges, and WEINFELD, District judge.

OPINION BY: KAUFMAN

OPINION: [*305]

This action for copyright infringement presents us with a picture all too familiar in copyright litigation: a legal problem vexing in its difficulty, a dearth or squarely applicable precedents, a business setting so common that the dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the Copyright Act, 17 U.S.C. § 1 et seq. Compare *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847 (2d Cir. March 21, 1963); *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260, 262, 266 (2d Cir. 1957), cert. denied, 355 U.S. 952, 78 S.Ct. 536, 2 L.Ed.2d 529 (1958). The plaintiffs in the court below, appellants here, are the copyright proprietors of several musical compositions, recordings of which have met with considerable popularity, especially amongst the younger set. The defendant Jalen Amusement Company, [**2] Inc. was charged in the complaint with having infringed the copyrights on these songs by manufacturing records, close copies of the 'hit-type' authorized records of major record manufacturers in violation of 17 U.S.C. § 101(e): [*306] 'in the absence of a license agreement' with the plaintiffs and without having served upon them a notice of intention 'to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work.'

Jalen operated the phonograph record department as concessionaire in twenty-three stores of defendant H. L. Green Co., Inc., pursuant to written licenses from the Green Company. The complaint alleged that Green was liable for copyrights infringement because it 'sold, or contributed to and participated actively in the sale of' the so-called 'bootleg' records manufactured by Jalen and sold by Jalen in the Green stores. n1

The District Judge, after trial, found Jalen liable as manufacturer of the 'bootleg' records, and imposed a liability for the statutory royalty of two cents for each record which reproduced one of the plaintiffs' copyrighted compositions, and a further sum of six cents [**3] per record as damages. He concluded, however, that Green had not sold any of the phonograph records and was not liable for any sales made by Jalen; he accordingly dismissed the complaint as to Green. Jalen takes no appeal, but plaintiffs come before us to challenge the dismissal of the claims asserted against Green. The validity of those claims depends upon a detailed examination of the relationship between Green and the conceded infringer Jalen.

At the time of suit, Jalen had been operating under license from Green the phonograph record department in twenty-three of its stores, in some for as long as thirteen years. The licensing agreements provided that Jalen and its employees were to 'abide by, observe and obey all rules and regulations promulgated from time to time by H. L. Green Company, Inc. * * * Green, in its 'unreviewable discretion', had the authority to discharge any employee believed to be conducting himself improperly. Jalen, in turn, agreed to save Green harmless from any claims arising in connection with the conduct of the phonograph record concession. Significantly, the licenses provided that Green was to receive a percentage -- in some cases 10%, in others [**4] 12% -- of Jalen's gross receipts from the sale of records, as its full compensation as licensor.

In the actual day-to-day functioning of the record department, Jalen ordered and purchased all records, was billed for them, and paid for them. All sales were made by Jalen employees, who, as the District Court found, were under the effective control and supervision of Jalen. All of the daily proceeds from record sales went into Green's cash registers and were removed therefrom by the cashier of the store. At regular accounting periods, Green deducted its 10% Or 12% Commission and deducted the salaries of the Jalen employees, which salaries were handed over by the Green cashier to one of Jalen's employees to be distributed to the others. Social security and withholding taxes were withheld from the salaries of the employees by Green, and the withholdings then turned over to Jalen. Only then was the balance of the gross receipts of the record department given to Jalen. Customers purchasing records were given a receipt on a printed form marked 'H. L. Green Company, Inc.:'; Jalen's name was wholly absent from the premises. The District Judge found that Green did not actively participate [**5] in the sale of the records and that it had no knowledge of the unauthorized manufacture of the records.

When a District Court's determination of infringement hinges upon such purely factual questions as whether the defendant had access to the plaintiff's copyrighted materials and whether the physical acts of copying or selling actually occurred, the scope of review on appeal is limited to determining if the District Court's conclusions are clearly erroneous. *Rosen v. Loew's, Inc.*, 162 F.2d 785 (2d Cir. 1947); *Arnstein v. [**307] Porter*, 154 F.2d 464, 469 (2d Cir. 1946). But where, as here, the facts are undisputed, and the issue of infringement depends merely upon a legal conclusion to be drawn from a consideration of the parties' relationship, we feel that an appellate court's power of review need not be so constrained. On the facts before us, therefore, we hold that appellee Green is liable for the sale of the infringing 'bootleg' records, and we therefore reverse the judgment dismissing the complaint and remand for a determination of damages.

[**6] Section 101(e) of the Copyright Act makes unlawful the 'unauthorized manufacture, use, or sale' of phonograph records. Because of the open-ended terminology of the section, and the related section 1(e), courts have had to trace, case by case, a pattern of business relationships which would render one person liable for the infringing conduct of another. It is quite clear, for example, that the normal agency rule of respondeat superior applies to copyright infringement by a servant within the scope of his employment. See, e.g., *M. Witmark & Sons v. Calloway*, 22 F.2d 412, 414 (E.D.Tenn.1927). Realistically, the courts have not drawn a rigid line between the strict cases of agency, and those of independent contract, license, and lease. See Study No. 25, Latman & Tager, 'Liability of innocent Infringers of Copyrights', prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2d Sess. 146. Many of the elements which have given rise to the doctrine of respondeat superior, see Seavey, *Studies in Agency*, 145-53 (1949), may also be evident in factual settings other [**7] than that of a technical employer-employee relationship. When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials -- even in the absence of actual knowledge that the copyright monopoly is being impaired, see *De Acosta v. Brown*, 146 F.2d 408 (2d Cir. 1944), cert. denied, *Hearst Magazines v. De Acosta* 325 U.S. 862, 65 S.Ct. 1197, 89 L.Ed. 1983 (1945) -- the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.

The two lines of precedent most nearly relevant to the case before us are those which deal, on the one hand, with the landlord leasing his property at a fixed rental to a tenant who engages in copyright-infringing conduct on the leased premises and, on the other hand, the proprietor or manager of a dance hall or music hall leasing his premises to or hiring a dance band, which brings in customers and profits to the proprietor by performing copyrighted music but without complying with the terms of the Copyright Act. If the landlord lets his premises without knowledge of the impending infringement [**8] by his tenant, exercises no supervision over him, charges a fixed rental and receives no other benefit from the infringement, and contributes in no way to it, it has been held that the landlord is not liable for his tenant's wrongdoing. See *Deutsch v. Arnold*, 98 F.2d 686 (2d Cir. 1938); cf. *Fromont v. Aeolian Co.*, 254 F. 592 (S.D.N.Y.1918). But, the cases are legion which hold the dance hall proprietor liable for the infringement of copyright re-

sulting from the performance of a musical composition by a band or orchestra whose activities provide the proprietor with a source of customers and enhanced income. He is liable whether the bandleader is considered, as a technical matter, an employee or an independent contractor, and whether or not the proprietor has knowledge of the compositions to be played or any control over their selection. See *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198-199, 51 S.Ct. 410, 75 L.Ed. 971 (1931); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); *M. Witmark & Sons v. Tremont Social & Athletic Club*, 188 F.Supp. 787 (D.Mass.1960); *Remick Music Corp. v. Interstate Hotel Co.*, 58 F.Supp. 523 (D.Neb.1944), [*9] aff'd. 157 F.2d 744 (8th Cir. 1946), cert. denied, 329 U.S. 809, 67 S.Ct. 622, 91 L.Ed. [*308] 691 (1947); *Buck v. Pettijohn*, 34 F.Supp. 968 (E.D.Tenn.1940); *Buck v. Crescent Gardens Operating Co.*, 28 F.Supp. 576 (D.Mass.1939); *Buck v. Russo*, 25 F.Supp. 317 (D.Mass.1938); *Irving Berlin, Inc. v. Daigle*, 26 F.2d 149 other grounds, 31 F.2d 832 (5th Cir. other grounds, 31 F.2d 832 (5th Cir. 1929); *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470 (E.D.S.C.), aff'd, 2 F.2d 1020 (4th Cir. 1924); *Harms v. Cohen*, 279 F. 276 (E.D.Pa.1922); Comment, 8 *Fordham L.Rev.* 400, 407-08 (1939); 43 *Harv.L.Rev.* 828, 829 (1930).

We believe that the principle which can be extracted from the dance hall cases is a sound one and, under the facts of the cases before us, is here applicable. Those cases and this one lie closer on the spectrum to the employer-employee model than to the landlord-tenant model. Green licensed one facet of its variegated business enterprise, for some thirteen years, to the Jalen Amusement [*10] Company. Green retained the ultimate right of supervision over the conduct of the record concession and its employees. By reserving for itself a proportionate share of the gross receipts from Jalen's sales of phonograph records, Green had a most definite financial interest in the success of Jalen's concession; 10% Or 12% Of the sales price of every record sold by Jalen, whether 'bootleg' or legitimate, found its way -- both literally and figuratively -- into the coffers of the Green Company. We therefore conclude, on the particular facts before us, that Green's relationship to its infringing licensee, as well as its strong concern for the financial success of the phonograph record concession, renders it liable for the unauthorized sales of the 'bootleg' records.

The imposition of liability upon the Green Company, even in the absence of an intention to infringe or knowledge of infringement, is not unusual. As one observer has noted, 'Although copyright infringements are quite generally termed piracy, only a minority of infringers fly the Jolly Roger.' Letter from Sydney M. Kaye to the Copyrights Office, in Study No. 22 Prepared for the Subcommittee on Patents, Trademarks, [*11] and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2d Sess. 41 (Strauss, 'The Damage Provisions of the Copyright Law'). While there have been some complaints concerning the harshness of the principle of strict liability in copyright law, see *Barry v. Hughes*, 103 F.2d 427 (2d Cir.), cert. denied, 308 U.S. 604, 60 S.Ct. 141, 84 L.Ed. 505 (1939); Chafee, 'Reflections on the Law of Copyright,' 45 *Colum.L.Rev.* 503, 526-27 (1945); cf. *De Acosta v. Brown*, 146 F.2d 408, 413 (2d Cir. 1944) (L. Hand, J., dissenting), courts have consistently refused to honor the defense of absence of knowledge or intention. The reasons have been variously stated. 'The protection accorded literary property would be of little value if * * * insulation from payment of damages could be secured * * * by merely refraining from making inquiry.' *De Acosta v. Brown*, 146 F.2d at 412. 'It is the innocent infringer who must suffer, since he, unlike the copyright owner, either has an opportunity to guard against the infringement (by diligent inquiry), or at least the ability to guard against the infringement (by an indemnity agreement [*12] * * * and/or by insurance).' Letter from Melville B. Nimmer to the Copyright Office, in Study No. 25 Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2nd Sess. 169 (Latman & Tager, 'Liability of Innocent Infringers of Copyrights'.)

For much the same reasons, the imposition of vicarious liability in the case before us cannot be deemed unduly harsh or unfair. Green has the power to police carefully the conduct of its concessionaire Jalen; our judgment will simply encourage it to do so, thus placing responsibility where it can and should be effectively exercised. Green's burden will not be unlike that quite commonly imposed upon publishers, printers, and vendors of copyrighted materials. See, [*309] e.g., *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 73 S.Ct. 222, 97 L.Ed. 276 (1952); *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260, 264 (2d Cir. 1957); *De Acosta v. Brown*, 146 F.2d at 412; 93 *U. of Pa.L.Rev.* 459, 460 (1945). Indeed, the record in this case reveals that the 'bootleg' recordings were somewhat suspicious on their face; they bore no name [*13] of any manufacturer upon the labels or on the record jackets, as is customary in the trade. Moreover, plaintiffs' agent and attorneys wrote to Green in March and April 1958, requesting information regarding certain of the 'bootleg' records and finally, upon receiving no reply from Green, threatening to institute suit for copyright infringement. The suit was in fact commenced the following month. Although these last-recited facts are not essential to our holding of copyright infringement by Green, they reinforce our conclusion that in many cases, the party found strictly liable is in a position to police the conduct of the 'primary' infringer. Were we to hold otherwise, we might foresee the prospect -- not wholly unreal -- of

large chain and department stores establishing 'dummy' concessions and shielding their own eyes from the possibility of copyright infringement, thus creating a buffer against liability while reaping the proceeds of infringement.

Even if a fairly constant system of surveillance is thought too burdensome, Green is in the position to safeguard itself in a less arduous manner against liability resulting from the conduct of its concessionaires. It has in fact [**14] done so, by incorporating a save-harmless provision in its licensing agreements with Jalen. n2 See Study No. 23, R. Brown, Jr., 'The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study,' Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, U.S. Senate, 86th Cong., 2nd Sess. 59, 86-88; Letters from Ralph S. Brown and Harry G. Henn to the Copyright Office, in Study No. 25, supra, at 164-65. Surely the beneficent purposes of the copyright law would be advanced by placing the jeopardy of Jalen's insolvency upon Green rather than upon the proprietor of the copyright.

The parties have raised a question as to the precise nature of Green's liability for the two cent royalty payment which the Copyright Act sets down as the measure of liability for the unauthorized sale of phonograph records embodying copyrighted musical compositions. See 17 U.S.C. § 101(e); Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260, 266 (2d Cir. 1957). The appellee contends that its liability can only be joint and several with that of Jalen, which has been already found liable for infringement by sales of [**15] the 'bootleg' records; Green claims, therefore, that there can be only a single recovery of the statutory royalty from Jalen or Green, and that its liability should be deemed 'secondary' to that of Jalen. See Detective Comics, Inc. v. Bruns Publications, 28 F.Supp. 399 (S.D.N.Y.1939), aff'd, 111 F.2d 432 (2d Cir. 1940). The appellants, however, relying upon much of this Court's language in Shapiro, Bernstein & Co. v. Goody, 248 F.2d at 266-267, assert that Green's liability for the unlawful sales is several, thus permitting separate recoveries of the two cent royalty from Green as well as Jalen.

We note that this question of the nature of Green's liability is of practical moment as between plaintiffs and Green only if Jalen is found liable for infringement because of its sales of the 'bootleg' records as distinguished from its manufacture thereof; for only in such a case are we presented with the possibility of double recovery for a single sale. Since [*310] the plaintiffs' complaint was apparently deliberately drawn so as to state a cause of action against Jalen solely for unauthorized manufacture, and since the District Court found [**16] Jalen liable only for that and not for unlawful sales, the question whether Green is liable in addition to Jalen, or merely as an alternative to Jalen, is moot, and need not be decided at this time.

Reversed and remanded.

----- Footnotes -----

n1. For the background of the 'disklegging' industry, see Note, 'Piracy on Records,' 5 Stanford L.Rev. 433 (1953).

n2. As an aftermath of this Court's decision in Shapiro, Bernstein & Co. v. Goody, supra, this note appeared in Variety:

'A flock of retailers and chain stores have already notified disk companies that they will not handle any disks from any company without indemnification or other guarantees that they will not be responsible for disks that are not licensed by publishers.' Variety, Oct. 16, 1957, p. 63, col. 1.

----- End Footnotes -----

Fonovisa, Inc. c/ Cherry Auction, Inc.

FONOVISA, INC. v. CHERRY AUCTION, INC., 76 F.3d 259 (9th Cir. 1996)

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER,[n*] District Court Judge.

SCHROEDER, Circuit Judge:

- [1] This is a copyright and trademark enforcement action against the operators of a swap meet, sometimes called a flea market, where third-party vendors routinely sell counterfeit recordings that infringe on the plaintiff's copyrights and trademarks. The district court dismissed on the pleadings, holding that the plaintiffs, as a matter of law, could not maintain any cause of action against the swap meet for sales by vendors who leased its premises. The district court's decision is published. *Fonovisa Inc. v. Cherry Auction, Inc.*, 847 F. Supp. 1492 (E.D. Cal. 1994). We reverse.
- [2] *Background*
- [3] The plaintiff and appellant is Fonovisa, Inc., a California corporation that owns copyrights and trademarks to Latin/Hispanic music recordings. Fonovisa filed this action in district court against defendant-appellee, Cherry Auction, Inc., and its individual operators (collectively "Cherry Auction"). For purposes of this appeal, it is undisputed that Cherry Auction operates a swap meet in Fresno, California, similar to many other swap meets in this country where customers come to purchase various merchandise from individual vendors. See generally, *Flea Market Owner Sued for Trademark Infringement*, 4 No. 3 J. Proprietary Rts. 22 (1992). The vendors pay a daily rental fee to the swap meet operators in exchange for booth space. Cherry Auction supplies parking, conducts advertising and retains the right to exclude any vendor for any reason, at any time, and thus can exclude vendors for patent and trademark infringement. In addition, Cherry Auction receives an entrance fee from each customer who attends the swap meet.
- [4] There is also no dispute for purposes of this appeal that Cherry Auction and its operators were aware that vendors in their swap meet were selling counterfeit recordings in violation of Fonovisa's trademarks and copyrights. Indeed, it is alleged that in 1991, the Fresno County Sheriff's Department raided the Cherry Auction swap meet and seized more than 38,000 counterfeit recordings. The following year, after finding that vendors at the Cherry Auction swap meet were still selling counterfeit recordings, the Sheriff sent a letter notifying Cherry Auction of the on-going sales of infringing materials, and reminding Cherry Auction that they had agreed to provide the Sheriff with identifying information from each vendor. In addition, in 1993, Fonovisa itself sent an investigator to the Cherry Auction site and observed sales of counterfeit recordings.
- [5] Fonovisa filed its original complaint in the district court on February 25, 1993, and on March 22, 1994, the district court granted defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). In this appeal, Fonovisa does not challenge the district court's dismissal of its claim for direct copyright infringement, but does appeal the dismissal of its claims for contributory copyright infringement, vicarious copyright infringement and contributory trademark infringement.
- [6] The copyright claims are brought pursuant to 17 U.S.C. § 101 et seq. Although the Copyright Act does not expressly impose liability on anyone other than direct infringers, courts have long recognized that in certain circumstances, vicarious or contributory liability will be imposed. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (explaining that "vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying circumstances in which it is just to hold one individually accountable for the actions of another").
- [7] Similar principles have also been applied in the trademark field. See *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 102 S.Ct. 2182, 2184 (1982). The Seventh Circuit, for example, has upheld the imposition of liability for contributory trademark infringement against the owners of a flea market similar to the swap meet operated by Cherry Auction. *Hard Rock Cafe Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143 (7th Cir. 1992). The district court in this case, however, expressly rejected the Seventh Circuit's reasoning on the contributory trademark infringement claim. Contributory and vicarious copyright infringement, however, were not addressed in *Hard Rock Cafe*, making this the first case to reach a federal appeals court raising issues of contributory and vicarious copyright infringement in the context of swap meet or flea market operations.
- [8] We analyze each of the plaintiff's claims in turn.
- [9] *Vicarious Copyright Infringement*
- [10] The concept of vicarious copyright liability was developed in the Second Circuit as an outgrowth of the agency principles of respondeat superior. The landmark case on vicarious liability for sales of counterfeit recordings is *Shapiro, Bernstein and Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).

- In *Shapiro*, the court was faced with a copyright infringement suit against the owner of a chain of department stores where a concessionaire was selling counterfeit recordings. Noting that the normal agency rule of respondeat superior imposes liability on an employer for copyright infringements by an employee, the court endeavored to fashion a principle for enforcing copyrights against a defendant whose economic interests were intertwined with the direct infringer's, but who did not actually employ the direct infringer.
- [11] The *Shapiro* court looked at the two lines of cases it perceived as most clearly relevant. In one line of cases, the landlord-tenant cases, the courts had held that a landlord who lacked knowledge of the infringing acts of its tenant and who exercised no control over the leased premises was not liable for infringing sales by its tenant. See e.g. *Deutsch v. Arnold*, 98 F.2d 686 (2d Cir. 1938); c.f. *Fromott v. Aeolina Co.*, 254 F.2d 592 (S.D.N.Y. 1918). In the other line of cases, the so-called "dance hall cases," the operator of an entertainment venue was held liable for infringing performances when the operator (1) could control the premises and (2) obtained a direct financial benefit from the audience, who paid to enjoy the infringing performance. See e.g. *Buck v. Jewell-LaSalle Realty Co.*, 238 U.S. 191, 198-199 (1931); *Dreamland Ballroom, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929).
- [12] From those two lines of cases, the *Shapiro* court determined that the relationship between the store owner and the concessionaire in the case before it was closer to the dance-hall model than to the landlord-tenant model. It imposed liability even though the defendant was unaware of the infringement. *Shapiro* deemed the imposition of vicarious liability neither unduly harsh nor unfair because the store proprietor had the power to cease the conduct of the concessionaire, and because the proprietor derived an obvious and direct financial benefit from the infringement. 316 F.2d at 307. The test was more clearly articulated in a later Second Circuit case as follows: "even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). See also 3 Melville Nimmer & David Nimmer, *Nimmer on Copyright* 1204(A)[1], at 1270-72 (1995). The most recent and comprehensive discussion of the evolution of the doctrine of vicarious liability for copyright infringement is contained in Judge Keeton's opinion in *Polygram Intern. Pub., Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314 (D. Mass. 1984).
- [13] The district court in this case agreed with defendant Cherry Auction that Fonovisa did not, as a matter of law, meet either the control or the financial benefit prong of the vicarious copyright infringement test articulated in *Gershwin, supra*. Rather, the district court concluded that based on the pleadings, "Cherry Auction neither supervised nor profited from the vendors' sales." 847 F. Supp. at 1496. In the district court's view, with respect to both control and financial benefit, Cherry Auction was in the same position as an absentee landlord who has surrendered its exclusive right of occupancy in its leased property to its tenants.
- [14] This analogy to absentee landlord is not in accord with the facts as alleged in the district court and which we, for purposes of appeal, must accept. The allegations below were that vendors occupied small booths within premises that Cherry Auction controlled and patrolled. According to the complaint, Cherry Auction had the right to terminate vendors for any reason whatsoever and through that right had the ability to control the activities of vendors on the premises. In addition, Cherry Auction promoted the swap meet and controlled the access of customers to the swap meet area. In terms of control, the allegations before us are strikingly similar to those in *Shapiro* and *Gershwin*.
- [15] In *Shapiro*, for example, the court focused on the formal licensing agreement between defendant department store and the direct infringer-concessionaire. There, the concessionaire selling the bootleg recordings had a licensing agreement with the department store (H. L. Green Company) that required the concessionaire and its employees to "abide by, observe and obey all regulations promulgated from time to time by the H. L. Green Company," and H. L. Green Company had the "unreviewable discretion" to discharge the concessionaires' employees. 316 F.2d at 306. In practice, H. L. Green Company was not actively involved in the sale of records and the concessionaire controlled and supervised the individual employees. *Id.* Nevertheless, H. L. Green's ability to police its concessionaire - which parallels Cherry Auction's ability to police its vendors under Cherry Auction's similarly broad contract with its vendors - was sufficient to satisfy the control requirement. *Id.* at 308.
- [16] In *Gershwin*, the defendant lacked the formal, contractual ability to control the direct infringer. Nevertheless, because of defendant's "pervasive participation in the formation and direction" of the direct infringers, including promoting them (i.e. creating an audience for them), the court found that defendants were in a position to police the direct infringers and held that the control element was satisfied.

443 F.2d at 1163. As the promoter and organizer of the swap meet, Cherry Auction wields the same level of control over the direct infringers as did the *Gershwin* defendant. See also *Polygram*, 855 F. Supp. at 1329 (finding that the control requirement was satisfied because the defendant (1) could control the direct infringers through its rules and regulations; (2) policed its booths to make sure the regulations were followed; and (3) promoted the show in which direct infringers participated).

- [17] The district court's dismissal of the vicarious liability claim in this case was therefore not justified on the ground that the complaint failed to allege sufficient control.
- [18] We next consider the issue of financial benefit. The plaintiff's allegations encompass many substantive benefits to Cherry Auction from the infringing sales. These include the payment of a daily rental fee by each of the infringing vendors; a direct payment to Cherry Auction by each customer in the form of an admission fee, and incidental payments for parking, food and other services by customers seeking to purchase infringing recordings.
- [19] Cherry Auction nevertheless contends that these benefits cannot satisfy the financial benefit prong of vicarious liability because a commission, directly tied to the sale of particular infringing items, is required. They ask that we restrict the financial benefit prong to the precise facts presented in *Shapiro*, where defendant H. L. Green Company received a 10 or 12 per cent commission from the direct infringers' gross receipts. Cherry Auction points to the low daily rental fee paid by each vendor, discounting all other financial benefits flowing to the swap meet, and asks that we hold that the swap meet is materially similar to a mere landlord. The facts alleged by Fonovisa, however, reflect that the defendants reap substantial financial benefits from admission fees, concession stand sales and parking fees, all of which flow directly from customers who want to buy the counterfeit recordings at bargain basement prices. The plaintiff has sufficiently alleged direct financial benefit.
- [20] Our conclusion is fortified by the continuing line of cases, starting with the dance hall cases, imposing vicarious liability on the operator of a business where infringing performances enhance the attractiveness of the venue to potential customers. In *Polygram*, for example, direct infringers were participants in a trade show who used infringing music to communicate with attendees and to cultivate interest in their wares. 855 F. Supp. at 1332. The court held that the trade show participants "derived a significant financial benefit from the attention" that attendees paid to the infringing music. *Id.*; See also *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass'n*, 554 F.2d 1213, 1214 (1st Cir. 1977) (race track owner vicariously liable for band that entertained patrons who were not "absorbed in watching the races"); *Shapiro*, 316 F.2d at 307 (dance hall cases hold proprietor liable where infringing "activities provide the proprietor with a source of customers and enhanced income"). In this case, the sale of pirated recordings at the Cherry Auction swap meet is a "draw" for customers, as was the performance of pirated music in the dance hall cases and their progeny.
- [21] Plaintiffs have stated a claim for vicarious copyright infringement.
- [22] *Contributory Copyright Infringement*
- [23] Contributory infringement originates in tort law and stems from the notion that one who directly contributes to another's infringement should be held accountable. See *Sony v. Universal City*, 464 U.S. at 417; 1 Niel Boorstyn, Boorstyn On Copyright 10.06[2], at 10-21 (1994) ("In other words, the common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor, is applicable under copyright law"). Contributory infringement has been described as an outgrowth of enterprise liability, see 3 Nimmer 1204[a][2], at 1275; *Demetrigdes v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988), and imposes liability where one person knowingly contributes to the infringing conduct of another. The classic statement of the doctrine is in *Gershwin*, 443 F.2d 1159, 1162: "[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." See also *Universal City Studios v. Sony Corp. of America*, 659 F.2d 963, 975 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 417 (1984) (adopting *Gershwin* in this circuit).
- [24] There is no question that plaintiff adequately alleged the element of knowledge in this case. The disputed issue is whether plaintiff adequately alleged that Cherry Auction materially contributed to the infringing activity. We have little difficulty in holding that the allegations in this case are sufficient to show material contribution to the infringing activity. Indeed, it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the swap meet. These services include, *inter alia*, the provision of space, utilities, parking, advertising, plumbing, and customers.
- [25] Here again Cherry Auction asks us to ignore all aspects of the enterprise described by the plaintiffs, to concentrate solely on the rental of space, and to hold that the swap meet provides nothing more. Yet Cherry Auction actively strives to provide the environment and the market for counterfeit recording

- sales to thrive. Its participation in the sales cannot be termed “passive,” as Cherry Auction would prefer.
- [26] The district court apparently took the view that contribution to infringement should be limited to circumstances in which the defendant “expressly promoted or encouraged the sale of counterfeit products, or in some manner protected the identity of the infringers.” 847 F. Supp. 1492, 1496. Given the allegations that the local sheriff lawfully requested that Cherry Auction gather and share basic, identifying information about its vendors, and that Cherry Auction failed to comply, the defendant appears to qualify within the last portion of the district court’s own standard that posits liability for protecting infringers’ identities. Moreover, we agree with the Third Circuit’s analysis in *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3rd Cir. 1986) that providing the site and facilities for known infringing activity is sufficient to establish contributory liability. See 2 William F. Patry, *Copyright Law & Practice* 1147 (“Merely providing the means for infringement may be sufficient” to incur contributory copyright liability).
- [27] *Contributory Trademark Infringement*
- [28] Just as liability for copyright infringement can extend beyond those who actually manufacture or sell infringing materials, our law recognizes liability for conduct that assists others in direct trademark infringement. In *Inwood Laboratories*, 456 U.S. 844, 102 S.Ct. 2182, the Court said that contributory trademark liability is applicable if defendant (1) intentionally induces another to infringe on a trademark or (2) continues to supply a product knowing that the recipient is using the product to engage in trademark infringement. *Inwood* at 854-55. As Cherry Auction points out, the *Inwood* case involved a manufacturer-distributor, and the *Inwood* standard has generally been applied in such cases. The Court in *Inwood*, however, laid down no limiting principle that would require defendant to be a manufacturer or distributor.
- [29] The defendant in *Inwood* distributed drugs to a pharmacist, knowing that the pharmacist was mislabeling the drugs with a protected trademark rather than a generic label. In this case, plaintiffs correctly point out that while Cherry Auction is not alleged to be supplying the recordings themselves, it is supplying the necessary marketplace for their sale in substantial quantities.
- [30] In *Hard Rock Cafe*, 955 F.2d 1143, the Seventh Circuit applied the *Inwood* test for contributory trademark liability to the operator of a flea market. In that case, there was no proof that the flea market had actual knowledge of the sale by vendors of counterfeit Hard Rock Cafe trademark merchandise, but the court held that contributory liability could be imposed if the swap meet was “willfully blind” to the ongoing violations. *Hard Rock Cafe*, 955 F.2d at 1149. It observed that while trademark infringement liability is more narrowly circumscribed than copyright infringement, the courts nevertheless recognize that a company “is responsible for the torts of those it permits on its premises `knowing or having reason to know that the other is acting or will act tortiously. . . .’” *Id. quoting* Restatement (Second) of Torts 877(c) & cmt.d (1979).
- [31] *Hard Rock Cafe*’s application of the *Inwood* test is sound; a swap meet can not disregard its vendors’ blatant trademark infringements with impunity. Thus, Fonovisa has also stated a claim for contributory trademark infringement.
- [32] The judgment of the district court is REVERSED and the case is REMANDED FOR FURTHER PROCEEDINGS.

* Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

A&M Records, Inc. c/ Napster, Inc.

A&M RECORDS, Inc. v. NAPSTER, INC., 239 F.3d 1004 (9th Cir. 2001)

Before: SCHROEDER, Chief Judge, BEEZER and PAEZ, Circuit Judges.

BEEZER, Circuit Judge:

- [1] Plaintiffs are engaged in the commercial recording, distribution and sale of copyrighted musical compositions and sound recordings. The complaint alleges that Napster, Inc. ("Napster") is a contributory and vicarious copyright infringer. On July 26, 2000, the district court granted plaintiffs' motion for a preliminary injunction. The injunction was slightly modified by written opinion on August 10, 2000. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000). The district court preliminarily enjoined Napster "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner." *Id.* at 927. Federal Rule of Civil Procedure 65(c) requires successful plaintiffs to post a bond for damages incurred by the enjoined party in the event that the injunction was wrongfully issued. The district court set bond in this case at \$5 million.
- [2] We entered a temporary stay of the preliminary injunction pending resolution of this appeal. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). We affirm in part, reverse in part and remand.
- I
- [3] We have examined the papers submitted in support of and in response to the injunction application and it appears that Napster has designed and operates a system which permits the transmission and retention of sound recordings employing digital technology.
- [4] In 1987, the Moving Picture Experts Group set a standard file format for the storage of audio recordings in a digital format called MPEG-3, abbreviated as "MP3." Digital MP3 files are created through a process colloquially called "ripping." Ripping software allows a computer owner to copy an audio compact disk ("audio CD") directly onto a computer's hard drive by compressing the audio information on the CD into the MP3 format. The MP3's compressed format allows for rapid transmission of digital audio files from one computer to another by electronic mail or any other file transfer protocol.
- [5] Napster facilitates the transmission of MP3 files between and among its users. Through a process commonly called "peer-to-peer" file sharing, Napster allows its users to: (1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users; (2) search for MP3 music files stored on other users' computers; and (3) transfer exact copies of the contents of other users' MP3 files from one computer to another via the Internet. These functions are made possible by Napster's MusicShare software, available free of charge from Napster's Internet site, and Napster's network servers and server-side software. Napster provides technical support for the indexing and searching of MP3 files, as well as for its other functions, including a "chat room," where users can meet to discuss music, and a directory where participating artists can provide information about their music.

A. Accessing the System

- [6] In order to copy MP3 files through the Napster system, a user must first access Napster's Internet site and download [n1] the MusicShare software to his individual computer. See <http://www.Napster.com>. Once the software is installed, the user can access the Napster system. A first-time user is required to register with the Napster system by creating a "user name" and password.

B. Listing Available Files

- [7] If a registered user wants to list available files stored in his computer's hard drive on Napster for others to access, he must first create a "user library" directory on his computer's hard drive. The user then saves his MP3 files in the library directory, using self-designated file names. He next must log into the Napster system using his user name and password. His MusicShare software then searches his user library and verifies that the available files are properly formatted. If in the correct MP3 format, the names of the MP3 files will be uploaded from the user's computer to the Napster servers. The content of the MP3 files remains stored in the user's computer.
- [8] Once uploaded to the Napster servers, the user's MP3 file names are stored in a server-side "library" under the user's name and become part of a "collective directory" of files available for transfer during the time the user is logged onto the Napster system. The collective directory is fluid; it tracks users who are connected in real time, displaying only file names that are immediately accessible.

C. Searching For Available Files

- [9] Napster allows a user to locate other users' MP3 files in two ways: through Napster's search function and through its "hotlist" function.
- [10] Software located on the Napster servers maintains a "search index" of Napster's collective directory. To search the files available from Napster users currently connected to the network servers, the individual user accesses a form in the MusicShare software stored in his computer and enters either the name of a song or an artist as the object of the search. The form is then transmitted to a Napster server and automatically compared to the MP3 file names listed in the server's search index. Napster's server compiles a list of all MP3 file names pulled from the search index which include the same search terms entered on the search form and transmits the list to the searching user. The Napster server does not search the contents of any MP3 file; rather, the search is limited to "a text search of the file names indexed in a particular cluster. Those file names may contain typographical errors or otherwise inaccurate descriptions of the content of the files since they are designated by other users." *Napster*, 114 F. Supp. 2d at 906.
- [11] To use the "hotlist" function, the Napster user creates a list of other users' names from whom he has obtained MP3 files in the past. When logged onto Napster's servers, the system alerts the user if any user on his list (a "hotlisted user") is also logged onto the system. If so, the user can access an index of all MP3 file names in a particular hotlisted user's library and request a file in the library by selecting the file name. The contents of the hotlisted user's MP3 file are not stored on the Napster system.

D. Transferring Copies of an MP3 file

- [12] To transfer a copy of the contents of a requested MP3 file, the Napster server software obtains the Internet address of the requesting user and the Internet address of the "host user" (the user with the available files). See generally *Brookfield Communications, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1044 (9th Cir. 1999) (describing, in detail, the structure of the Internet). The Napster servers then communicate the host user's Internet address to the requesting user. The requesting user's computer uses this information to establish a connection with the host user and downloads a copy of the contents of the MP3 file from one computer to the other over the Internet, "peer-to-peer." A downloaded MP3 file can be played directly from the user's hard drive using Napster's MusicShare program or other software. The file may also be transferred back onto an audio CD if the user has access to equipment designed for that purpose. In both cases, the quality of the original sound recording is slightly diminished by transfer to the MP3 format.
- [13] This architecture is described in some detail to promote an understanding of transmission mechanics as opposed to the content of the transmissions. The content is the subject of our copyright infringement analysis.

II

- [14] We review a grant or denial of a preliminary injunction for abuse of discretion. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc). Application of erroneous legal principles represents an abuse of discretion by the district court. *Rucker v. Davis*, ___ F.3d ___, 2001 WL 55724, at *4 (9th Cir. Jan. 24, 2001) (en banc). If the district court is claimed to have relied on an erroneous legal premise in reaching its decision to grant or deny a preliminary injunction, we will review the underlying issue of law de novo. *Id.* at *4 (citing *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996)).
- [15] On review, we are required to determine, "whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case." *Id.* "As long as the district court got the law right, 'it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995) (quoting *Sports Form, Inc. v. United Press, Int'l*, 686 F.2d 750, 752 (9th Cir. 1982)).
- [16] Preliminary injunctive relief is available to a party who demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor. *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id.*

III

[17] Plaintiffs claim Napster users are engaged in the wholesale reproduction and distribution of copyrighted works, all constituting direct infringement.^[n2] The district court agreed. We note that the district court's conclusion that plaintiffs have presented a prima facie case of direct infringement by Napster users is not presently appealed by Napster. We only need briefly address the threshold requirements.

A. Infringement

[18] 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. See 17 U.S.C. § 501(a) (infringement occurs when alleged infringer engages in activity listed in § 106); see also *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987); see, e.g., *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 n.3 (9th Cir. 1989) ("The word 'copying' is shorthand for the infringing of any of the copyright owner's five exclusive rights . . ."). Plaintiffs have sufficiently demonstrated ownership. The record supports the district court's determination that "as much as eighty-seven percent of the files available on Napster may be copyrighted and more than seventy percent may be owned or administered by plaintiffs." *Napster*, 114 F. Supp. 2d at 911.

[19] The district court further determined that plaintiffs' exclusive rights under § 106 were violated: "here the evidence establishes that a majority of Napster users use the service to download and upload copyrighted music. . . . And by doing that, it constitutes—the uses constitute direct infringement of plaintiffs' musical compositions, recordings." *A&M Records, Inc. v. Napster, Inc.*, Nos. 99-5183, 00-0074, 2000 WL 1009483, at *1 (N.D. Cal. July 26, 2000) (transcript of proceedings). The district court also noted that "it is pretty much acknowledged . . . by Napster that this is infringement." *Id.* We agree that plaintiffs have shown that Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction, § 106(1); and distribution, § 106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.

[20] Napster asserts an affirmative defense to the charge that its users directly infringe plaintiffs' copyrighted musical compositions and sound recordings.

B. Fair Use

[21] Napster contends that its users do not directly infringe plaintiffs' copyrights because the users are engaged in fair use of the material. See 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright."). Napster identifies three specific alleged fair uses: 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.

[22] The district court considered factors listed in 17 U.S.C. § 107, which guide a court's fair use determination. These factors are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the "amount and substantiality of the portion used" in relation to the work as a whole; and (4) the effect of the use upon the potential market for the work or the value of the work. See 17 U.S.C. § 107. The district court first conducted a general analysis of Napster system uses under § 107, and then applied its reasoning to the alleged fair uses identified by Napster. The district court concluded that Napster users are not fair users.^[n3] We agree. We first address the court's overall fair use analysis.

1. Purpose and Character of the Use

[23] This factor focuses on whether the new work merely replaces the object of the original creation or instead adds a further purpose or different character. In other words, this factor asks "whether and to what extent the new work is 'transformative.'" See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

[24] The district court first concluded that downloading MP3 files does not transform the copyrighted work. *Napster*, 114 F. Supp. 2d at 912. This conclusion is supportable. Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium. See, e.g., *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1994) (concluding that retransmission of radio broadcast over telephone lines is not transformative); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y.) (finding that reproduction of audio CD into MP3 format does not "transform" the work), *certification denied*, 2000 WL 710056 (S.D.N.Y. June 1, 2000) ("Defendant's

copyright infringement was clear, and the mere fact that it was clothed in the exotic webbing of the Internet does not disguise its illegality.”).

- [25] This “purpose and character” element also requires the district court to determine whether the allegedly infringing use is commercial or noncommercial. See *Campbell*, 510 U.S. at 584-85. A commercial use weighs against a finding of Napster users engage in commercial use of the copyrighted materials largely because (1) “a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester” and (2) “Napster users get for free something they would ordinarily have to buy.” *Napster*, 114 F. Supp. 2d at 912. The district court’s findings are not clearly erroneous.
- [26] Direct economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use. See *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000) (stating that church that copied religious text for its members “unquestionably profit[ed]” from the unauthorized “distribution and use of [the text] without having to account to the copyright holder”); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (finding that researchers at for-profit laboratory gained indirect economic advantage by photocopying copyrighted scholarly articles). In the record before us, commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies. See *Worldwide Church*, 227 F.3d at 1117-18; *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (finding commercial use when individuals downloaded copies of video games “to avoid having to buy video game cartridges”); see also *American Geophysical*, 60 F.3d at 922. Plaintiffs made such a showing before the district court. [n4]
- [27] We also note that the definition of a financially motivated transaction for the purposes of criminal copyright actions includes trading infringing copies of a work for other items, “including the receipt of other copyrighted works.” See No Electronic Theft Act (“NET Act”), Pub. L. No. 105-147, 18 U.S.C. § 101 (defining “Financial Gain”).

2. The Nature of the Use

- [28] Works that are creative in nature are “closer to the core of intended copyright protection” than are more fact-based works. See *Campbell*, 510 U.S. at 586. The district court determined that plaintiffs’ “copyrighted musical compositions and sound recordings are creative in nature . . . which cuts against a finding of fair use under the second factor.” *Napster*, 114 F. Supp. 2d at 913. We find no error in the district court’s conclusion.

3. The Portion Used

- [29] “While ‘wholesale copying does not preclude fair use per se,’ copying an entire work ‘militates against a finding of fair use.’” *Worldwide Church*, 227 F.3d at 1118 (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986)). The district court determined that Napster users engage in “wholesale copying” of copyrighted work because file transfer necessarily “involves copying the entirety of the copyrighted work.” *Napster*, 114 F. Supp. 2d at 913. We agree. We note, however, that under certain circumstances, a court will conclude that a use is fair even when the protected work is copied in its entirety. See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) (acknowledging that fair use of time-shifting necessarily involved making a full copy of a protected work).

4. Effect of Use on Market

- [30] “Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566-67 (1985). “[T]he importance of this [fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.” *Campbell*, 510 U.S. at 591 n.21. The proof required to demonstrate present or future market harm varies with the purpose and character of the use:

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. . . . *If the intended use is for commercial gain, that likelihood [of market harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.*

Sony, 464 U.S. at 451 (emphases added).

- [31] Addressing this factor, the district court concluded that Napster harms the market in “at least” two

ways: it reduces audio CD sales among college students and it “raises barriers to plaintiffs’ entry into the market for the digital downloading of music.” *Napster*, 114 F. Supp. 2d at 913. The district court relied on evidence plaintiffs submitted to show that Napster use harms the market for their copyrighted musical compositions and sound recordings. In a separate memorandum and order regarding the parties’ objections to the expert reports, the district court examined each report, finding some more appropriate and probative than others. *A&M Records, Inc. v. Napster, Inc.*, Nos. 99-5183 & 00-0074, 2000 WL 1170106 (N.D. Cal. August 10, 2000). Notably, plaintiffs’ expert, Dr. E. Deborah Jay, conducted a survey (the “Jay Report”) using a random sample of college and university students to track their reasons for using Napster and the impact Napster had on their music purchases. *Id.* at *2. The court recognized that the Jay Report focused on just one segment of the Napster user population and found “evidence of lost sales attributable to college use to be probative of irreparable harm for purposes of the preliminary injunction motion.” *Id.* at *3.

- [32] Plaintiffs also offered a study conducted by Michael Fine, Chief Executive Officer of Soundscan, (the “Fine Report”) to determine the effect of online sharing of MP3 files in order to show irreparable harm. Fine found that online file sharing had resulted in a loss of “album” sales within college markets. After reviewing defendant’s objections to the Fine Report and expressing some concerns regarding the methodology and findings, the district court refused to exclude the Fine Report insofar as plaintiffs offered it to show irreparable harm. *Id.* at *6.
- [33] Plaintiffs’ expert Dr. David J. Teece studied several issues (“Teece Report”), including whether plaintiffs had suffered or were likely to suffer harm in their existing and planned businesses due to Napster use. *Id.* Napster objected that the report had not undergone peer review. The district court noted that such reports generally are not subject to such scrutiny and overruled defendant’s objections. *Id.*
- [34] As for defendant’s experts, plaintiffs objected to the report of Dr. Peter S. Fader, in which the expert concluded that Napster is *beneficial* to the music industry because MP3 music file-sharing stimulates more audio CD sales than it displaces. *Id.* at *7. The district court found problems in Dr. Fader’s minimal role in overseeing the administration of the survey and the lack of objective data in his report. The court decided the generality of the report rendered it “of dubious reliability and value.” The court did not exclude the report, however, but chose “not to rely on Fader’s findings in determining the issues of fair use and irreparable harm.” *Id.* at *8.
- [35] The district court cited both the Jay and Fine Reports in support of its finding that Napster use harms the market for plaintiffs’ copyrighted musical compositions and sound recordings by reducing CD sales among college students. The district court cited the Teece Report to show the harm Napster use caused in raising barriers to plaintiffs’ entry into the market for digital downloading of music. *Napster*, 114 F. Supp. 2d at 910. The district court’s careful consideration of defendant’s objections to these reports and decision to rely on the reports for specific issues demonstrates a proper exercise of discretion in addition to a correct application of the fair use doctrine. Defendant has failed to show any basis for disturbing the district court’s findings.
- [36] We, therefore, conclude that the district court made sound findings related to Napster’s deleterious effect on the present and future digital download market. Moreover, lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works. *See L.A. Times v. Free Republic*, 54 U.S.P.Q.2d 1453, 1469-71 (C.D. Cal. 2000) (stating that online market for plaintiff newspapers’ articles was harmed because plaintiffs demonstrated that “[defendants] are attempting to exploit the market for viewing their articles online”); *see also UMG Recordings*, 92 F. Supp. 2d at 352 (“Any allegedly positive impact of defendant’s activities on plaintiffs’ prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs’ copyrighted works.”). Here, similar to *L.A. Times* and *UMG Recordings*, the record supports the district court’s finding that the “record company plaintiffs have already expended considerable funds and effort to commence Internet sales and licensing for digital downloads.” 114 F. Supp. 2d at 915. Having digital downloads available for free on the Napster system necessarily harms the copyright holders’ attempts to charge for the same downloads.
- [37] Judge Patel did not abuse her discretion in reaching the above fair use conclusions, nor were the findings of fact with respect to fair use considerations clearly erroneous. We next address Napster’s identified uses of sampling and space-shifting.

5. Identified Uses

- [38] Napster maintains that its identified uses of sampling and space-shifting were wrongly excluded as fair uses by the district court.

a. Sampling

- [39] Napster contends that its users download MP3 files to “sample” the music in order to decide whether to purchase the recording. Napster argues that the district court: (1) erred in concluding that sampling is a commercial use because it conflated a noncommercial use with a personal use; (2) erred in determining that sampling adversely affects the market for plaintiffs’ copyrighted music, a requirement if the use is noncommercial; and (3) erroneously concluded that sampling is not a fair use because it determined that samplers may also engage in other infringing activity.
- [40] The district court determined that sampling remains a commercial use even if some users eventually purchase the music. We find no error in the district court’s determination. Plaintiffs have established that they are likely to succeed in proving that even authorized temporary downloading of individual songs for sampling purposes is commercial in nature. See *Napster*, 114 F. Supp. 2d at 913. The record supports a finding that free promotional downloads are highly regulated by the record company plaintiffs and that the companies collect royalties for song samples available on retail Internet sites. *Id.* Evidence relied on by the district court demonstrates that the free downloads provided by the record companies consist of thirty-to-sixty second samples or are full songs programmed to “time out,” that is, exist only for a short time on the downloader’s computer. *Id.* at 913-14. In comparison, Napster users download a full, free and permanent copy of the recording. *Id.* at 914-15. The determination by the district court as to the commercial purpose and character of sampling is not clearly erroneous.
- [41] The district court further found that both the market for audio CDs and market for online distribution are adversely affected by Napster’s service. As stated in our discussion of the district court’s general fair use analysis: the court did not abuse its discretion when it found that, overall, Napster has an adverse impact on the audio CD and digital download markets. Contrary to Napster’s assertion that the district court failed to specifically address the market impact of sampling, the district court determined that “[e]ven if the type of sampling supposedly done on Napster were a non-commercial use, plaintiffs have demonstrated a substantial likelihood that it would adversely affect the potential market for their copyrighted works if it became widespread.” *Napster*, 114 F. Supp. 2d at 914. The record supports the district court’s preliminary determinations that: (1) the more music that sampling users download, the less likely they are to eventually purchase the recordings on audio CD; and (2) even if the audio CD market is not harmed, Napster has adverse effects on the developing digital download market.
- [42] Napster further argues that the district court erred in rejecting its evidence that the users’ downloading of “samples” increases or tends to increase audio CD sales. The district court, however, correctly noted that “any potential enhancement of plaintiffs’ sales . . . would not tip the fair use analysis conclusively in favor of defendant.” *Id.* at 914. We agree that increased sales of copyrighted material attributable to unauthorized use should not deprive the copyright holder of the right to license the material. See *Campbell*, 510 U.S. at 591 n.21 (“Even favorable evidence, without more, is no guarantee of fairness. Judge Leval gives the example of the film producer’s appropriation of a composer’s previously unknown song that turns the song into a commercial success; the boon to the song does not make the film’s simple copying fair.”); see also *L.A. Times*, 54 U.S.P.Q.2d at 1471-72. Nor does positive impact in one market, here the audio CD market, deprive the copyright holder of the right to develop identified alternative markets, here the digital download market. See *id.* at 1469-71.
- [43] We find no error in the district court’s factual findings or abuse of discretion in the court’s conclusion that plaintiffs will likely prevail in establishing that sampling does not constitute a fair use.

b. Space-Shifting

- [44] Napster also maintains that space-shifting is a fair use. Space-shifting occurs when a Napster user downloads MP3 music files in order to listen to music he already owns on audio CD. See *id.* at 915-16. Napster asserts that we have already held that space-shifting of musical compositions and sound recordings is a fair use. See *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (“Rio [a portable MP3 player] merely makes copies in order to render portable, or ‘space-shift,’ those files that already reside on a user’s hard drive. . . . Such copying is a paradigmatic noncommercial personal use.”). See also generally *Sony*, 464 U.S. at 423 (holding that “time-shifting,” where a video tape recorder owner records a television show for later viewing, is a fair use).
- [45] We conclude that the district court did not err when it refused to apply the “shifting” analyses of *Sony* and *Diamond*. Both *Diamond* and *Sony* are inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user. In

Diamond, for example, the copyrighted music was transferred from the user's computer hard drive to the user's portable MP3 player. So too *Sony*, where "the majority of VCR purchasers . . . did not distribute taped television broadcasts, but merely enjoyed them at home." *Napster*, 114 F. Supp. 2d at 913. Conversely, it is obvious that once a user lists a copy of music he already owns on the Napster system in order to access the music from another location, the song becomes "available to millions of other individuals," not just the original CD owner. See *UMG Recordings*, 92 F. Supp. 2d at 351-52 (finding space-shifting of MP3 files not a fair use even when previous ownership is demonstrated before a download is allowed); cf. *Religious Tech. Ctr. v. Lerma*, No. 95-1107A, 1996 WL 633131, at *6 (E.D. Va. Oct. 4, 1996) (suggesting that storing copyrighted material on computer disk for later review is not a fair use).

c. Other Uses

- [46] Permissive reproduction by either independent or established artists is the final fair use claim made by Napster. The district court noted that plaintiffs did not seek to enjoin this and any other noninfringing use of the Napster system, including: chat rooms, message boards and Napster's New Artist Program. *Napster*, 114 F. Supp. 2d at 917. Plaintiffs do not challenge these uses on appeal.
- [47] We find no error in the district court's determination that plaintiffs will likely succeed in establishing that Napster users do not have a fair use defense. Accordingly, we next address whether Napster is secondarily liable for the direct infringement under two doctrines of copyright law: contributory copyright infringement and vicarious copyright infringement.

IV

- [48] We first address plaintiffs' claim that Napster is liable for contributory copyright infringement. Traditionally, "one 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." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); see also *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). Put differently, liability exists if the defendant engages in "personal conduct that encourages or assists the infringement." *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998).
- [49] The district court determined that plaintiffs in all likelihood would establish Napster's liability as a contributory infringer. The district court did not err; Napster, by its conduct, knowingly encourages and assists the infringement of plaintiffs' copyrights.

A. Knowledge

- [50] Contributory liability requires that the secondary infringer "know or have reason to know" of direct infringement. *Cable/Home Communication Corp. Network Prods., Inc.*, 902 F.2d 829, 845 & 846 n.29 (11th Cir. 1990); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1373-74 (N.D. Cal. 1995) (framing issue as "whether Netcom knew or should have known of" the infringing activities). The district court found that Napster had both actual and constructive knowledge that its users exchanged copyrighted music. The district court also concluded that the law does not require knowledge of "specific acts of infringement" and rejected Napster's contention that because the company cannot distinguish infringing from noninfringing files, it does not "know" of the direct infringement. 114 F. Supp. 2d at 917.
- [51] It is apparent from the record that Napster has knowledge, both actual and constructive, [n5] of direct infringement. Napster claims that it is nevertheless protected from contributory liability by the teaching of *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). We disagree. We observe that Napster's actual, specific knowledge of direct infringement renders *Sony's* holding of limited assistance to Napster. We are compelled to make a clear distinction between the architecture of the Napster system and Napster's conduct in relation to the operational capacity of the system.
- [52] The *Sony* Court refused to hold the manufacturer and retailers of video tape recorders liable for contributory infringement despite evidence that such machines could be and were used to infringe plaintiffs' copyrighted television shows. *Sony* stated that if liability "is to be imposed on petitioners in this case, it must rest on the fact that they have sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material." *Id.* at 439 (emphasis added). The *Sony* Court declined to impute the requisite level of knowledge where the defendants made and sold equipment capable of both infringing and "substantial noninfringing uses." *Id.* at 442 (adopting a modified "staple article of commerce" doctrine from patent law). See also *Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429, 459 (C.D. Cal. 1979) ("This court

- agrees with defendants that their knowledge was insufficient to make them contributory infringers.”), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Geo. L.J. 1833, 1874 & 1893 n.210 (2000) (suggesting that, after *Sony*, most Internet service providers lack “the requisite level of knowledge” for the imposition of contributory liability).
- [53] We are bound to follow *Sony*, and will not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs’ copyrights. See 464 U.S. at 436 (rejecting argument that merely supplying the “means” to accomplish an infringing activity” leads to imposition of liability). We depart from the reasoning of the district court that Napster failed to demonstrate that its system is capable of commercially significant noninfringing uses. See *Napster*, 114 F. Supp. 2d at 916, 917-18. The district court improperly confined the use analysis to current uses, ignoring the system’s capabilities. See *generally Sony*, 464 U.S. at 442-43 (framing inquiry as whether the video tape recorder is “capable of commercially significant noninfringing uses”) (emphasis added). Consequently, the district court placed undue weight on the proportion of current infringing use as compared to current and future noninfringing use. See *generally Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 264-67 (5th Cir. 1997) (single noninfringing use implicated *Sony*). Nonetheless, whether we might arrive at a different result is not the issue here. See *Sports Form, Inc. v. United Press Int’l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). The instant appeal occurs at an early point in the proceedings and “the fully developed factual record may be materially different from that initially before the district court” *Id.* at 753. Regardless of the number of Napster’s infringing versus noninfringing uses, the evidentiary record here supported the district court’s finding that plaintiffs would likely prevail in establishing that Napster knew or had reason to know of its users’ infringement of plaintiffs’ copyrights.
- [54] This analysis is similar to that of *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, which suggests that in an online context, evidence of actual knowledge of specific acts of infringement is required to hold a computer system operator liable for contributory copyright infringement. 907 F. Supp. at 1371. *Netcom* considered the potential contributory copyright liability of a computer bulletin board operator whose system supported the posting of infringing material. *Id.* at 1374. The court, in denying *Netcom*’s motion for summary judgment of noninfringement and plaintiff’s motion for judgment on the pleadings, found that a disputed issue of fact existed as to whether the operator had sufficient knowledge of infringing activity. *Id.* at 1374-75.
- [55] The court determined that for the operator to have sufficient knowledge, the copyright holder must “provide the necessary documentation to show there is likely infringement.” 907 F. Supp. at 1374; *cf. Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (recognizing that online service provider does not and cannot examine every hyperlink for potentially defamatory material). If such documentation was provided, the court reasoned that *Netcom* would be liable for contributory infringement because its failure to remove the material “and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation” in distribution of copyrighted material. *Id.*
- [56] We agree 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. See *Netcom*, 907 F. Supp. at 1374. Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. See *Sony*, 464 U.S. at 436, 442-43. To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use.
- [57] We nevertheless conclude that sufficient knowledge exists to impose contributory liability when linked to demonstrated infringing use of the Napster system. See *Napster*, 114 F. Supp. 2d at 919 (“*Religious Technology Center* would not mandate a determination that Napster, Inc. lacks the knowledge requisite to contributory infringement.”). The record supports the district court’s finding 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. See *Napster*, 114 F. Supp. 2d at 918, 920-21. [n6]

B. Material Contribution

- [58] Under the facts as found by the district court, Napster materially contributes to the infringing activity. Relying on *Fonovisa*, the district court concluded that “[w]ithout the support services defendant provides, Napster users could not find and download the music they want with the ease of which

defendant boasts.” *Napster*, 114 F. Supp. 2d at 919-20 (“Napster is an integrated service designed to enable users to locate and download MP3 music files.”). We agree that Napster provides “the site and facilities” for direct infringement. See *Fonovisa*, 76 F.3d at 264; cf. *Netcom*, 907 F. Supp. at 1372 (“Netcom will be liable for contributory infringement since its failure to cancel [a user’s] infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation.”). The district court correctly applied the reasoning in *Fonovisa*, and properly found that Napster materially contributes to direct infringement.

- [59] We affirm the district court’s conclusion that plaintiffs have demonstrated a likelihood of success on the merits of the contributory copyright infringement claim. We will address the scope of the injunction in part VIII of this opinion.

V

- [60] We turn to the question whether Napster engages in vicarious copyright infringement. Vicarious copyright liability is an “outgrowth” of *respondeat superior*. *Fonovisa*, 76 F.3d at 262. In the context of copyright law, vicarious liability extends beyond an employer/employee relationship to cases in which a defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Id.* (quoting *Gershwin*, 443 F.2d at 1162); see also *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325-26 (D. Mass. 1994) (describing vicarious liability as a form of risk allocation). Before moving into this discussion, we note that *Sony*’s “staple article of commerce” analysis has no application to Napster’s potential liability for vicarious copyright infringement. See *Sony*, 464 U.S. at 434-435; see generally Anne Haring, *Copyright Infringement Issues on the Internet*, 617 PLI/Pat 455, 528 (Sept. 2, 2000) (indicating that the “staple article of commerce” doctrine “provides a defense only to contributory infringement, not to vicarious infringement”). The issues of *Sony*’s liability under the “doctrines of ‘direct infringement’ and ‘vicarious liability’” were not before the Supreme Court, although the Court recognized that the “lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn.” *Id.* at 435 n.17. Consequently, when the *Sony* Court used the term “vicarious liability,” it did so broadly and outside of a technical analysis of the doctrine of vicarious copyright infringement. *Id.* at 435 (“[V]icarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.”); see also *Black’s Law Dictionary* 927 (7th ed. 1999) (defining “vicarious liability” in a manner similar to the definition used in *Sony*).

A. Financial Benefit

- [61] The district court determined that plaintiffs had demonstrated they would likely succeed in establishing that Napster has a direct financial interest in the infringing activity. *Napster*, 114 F. Supp. 2d at 921-22. We agree. Financial benefit exists where the availability of infringing material “acts as a ‘draw’ for customers.” *Fonovisa*, 76 F.3d at 263-64 (stating that financial benefit may be shown “where infringing performances enhance the attractiveness of a venue”). Ample evidence supports the district court’s finding that Napster’s future revenue is directly dependent upon “increases in userbase.” More users register with the Napster system as the “quality and quantity of available music increases.” 114 F. Supp. 2d at 902. We conclude that the district court did not err in determining that Napster financially benefits from the availability of protected works on its system.

B. Supervision

- [62] The district court determined that Napster has the right and ability to supervise its users’ conduct. *Napster*, 114 F. Supp. 2d at 920-21 (finding that Napster’s representations to the court regarding “its improved methods of blocking users about whom rights holders complain . . . is tantamount to an admission that defendant can, and sometimes does, police its service”). We agree in part.
- [63] The ability to block infringers’ access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise. See *Fonovisa*, 76 F.3d at 262 (“Cherry Auction had the right to terminate vendors for any reason whatsoever and through that right had the ability to control the activities of vendors on the premises.”); cf. *Netcom*, 907 F. Supp. at 1375-76 (indicating that plaintiff raised a genuine issue of fact regarding ability to supervise by presenting evidence that an electronic bulletin board service can suspend subscriber’s accounts). Here, plaintiffs have demonstrated that Napster retains the right to control access to its system. Napster has an express reservation of rights policy, stating on its website that it expressly reserves the “right to refuse service and terminate accounts in [its] discretion, including, but not limited to, if Napster believes that user conduct violates

- applicable law . . . or for any reason in Napster's sole discretion, with or without cause."
- [64] To escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability. See, e.g., *Fonovisa*, 76 F.3d at 261 ("There is no dispute for the purposes of this appeal that Cherry Auction and its operators were aware that vendors in their swap meets were selling counterfeit recordings."); see also *Gershwin*, 443 F.2d at 1161-62 (citing *Shapiro, Bernstein & Co. v. H.L. Greene Co.*, 316 F.2d 304 (2d Cir. 1963), for the proposition that "failure to police the conduct of the primary infringer" leads to imposition of vicarious liability for copyright infringement).
- [66] The district court correctly determined that Napster had the right and ability to police its system and failed to exercise that right to prevent the exchange of copyrighted material. The district court, however, failed to recognize that the boundaries of the premises that Napster "controls and patrols" are limited. See, e.g., *Fonovisa*, 76 F.2d at 262-63 (in addition to having the right to exclude vendors, defendant "controlled and patrolled" the premises); see also *Polygram*, 855 F. Supp. at 1328-29 (in addition to having the contractual right to remove exhibitors, trade show operator reserved the right to police during the show and had its "employees walk the aisles to ensure 'rules compliance'"). Put differently, Napster's reserved "right and ability" to police is cabined by the system's current architecture. As shown by the record, the Napster system does not "read" the content of indexed files, other than to check that they are in the proper MP3 format.
- [67] Napster, however, has the ability to locate infringing material listed on its search indices, and the right to terminate users' access to the system. The file name indices, therefore, are within the "premises" that Napster has the ability to police. We recognize that the files are user-named and may not match copyrighted material exactly (for example, the artist or song could be spelled wrong). For Napster to function effectively, however, file names must reasonably or roughly correspond to the material contained in the files, otherwise no user could ever locate any desired music. As a practical matter, Napster, its users and the record company plaintiffs have equal access to infringing material by employing Napster's "search function." Our review of the record requires us to accept the district court's conclusion that plaintiffs have demonstrated a likelihood of success on the merits of the vicarious copyright infringement claim. Napster's failure to police the system's "premises," combined with a showing that Napster financially benefits from the continuing availability of infringing files on its system, leads to the imposition of vicarious liability. We address the scope of the injunction in part VIII of this opinion.

VI

- [68] We next address whether Napster has asserted defenses which would preclude the entry of a preliminary injunction.
- [69] Napster alleges that two statutes insulate it from liability. First, Napster asserts that its users engage in actions protected by § 1008 of the Audio Home Recording Act of 1992, 17 U.S.C. § 1008. Second, Napster argues that its liability for contributory and vicarious infringement is limited by the Digital Millennium Copyright Act, 17 U.S.C. § 512. We address the application of each statute in turn.

A. Audio Home Recording Act

- [70] The statute states in part:
- No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.*
- 17 U.S.C. § 1008 (emphases added). Napster contends that MP3 file exchange is the type of "non-commercial use" protected from infringement actions by the statute. Napster asserts it cannot be secondarily liable for users' nonactionable exchange of copyrighted musical recordings.
- [71] The district court rejected Napster's argument, stating that the Audio Home Recording Act is "irrelevant" to the action because: (1) plaintiffs did not bring claims under the Audio Home Recording Act; and (2) the Audio Home Recording Act does not cover the downloading of MP3 files. *Napster*, 114 F. Supp. 2d at 916 n.19.
- [72] We agree with the district court that the Audio Home Recording Act does not cover the downloading of MP3 files to computer hard drives. First, "[u]nder the plain meaning of the Act's definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their 'primary purpose' is not to make digital audio copied recordings." *Recording Indus.*

Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078 (9th Cir. 1999). Second, notwithstanding Napster's claim that computers are "digital audio recording devices," computers do not make "digital music recordings" as defined by the Audio Home Recording Act. *Id.* at 1077 (citing S. Rep. 102-294) ("There are simply no grounds in either the plain language of the definition or in the legislative history for interpreting the term 'digital musical recording' to include songs fixed on computer hard drives.").

B. Digital Millennium Copyright Act

[73] Napster also interposes a statutory limitation on liability by asserting the protections of the "safe harbor" from copyright infringement suits for "Internet service providers" contained in the Digital Millennium Copyright Act, 17 U.S.C. § 512. See *Napster*, 114 F. Supp. 2d at 919 n.24. The district court did not give this statutory limitation any weight favoring a denial of temporary injunctive relief. The court concluded that Napster "has failed to persuade this court that subsection 512(d) shelters contributory infringers." *Id.*

[74] We need not accept a blanket conclusion that § 512 of the Digital Millennium Copyright Act will never protect secondary infringers. See S. Rep. 105-190, at 40 (1998) ("The limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious, and contributory infringement."), reprinted in Melville B. Nimmer & David Nimmer, *Nimmer on Copyright: Congressional Committee Reports on the Digital Millennium Copyright Act and Concurrent Amendments* (2000); see also Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement Into the Digital Millennium Copyright Act of 1998*, 75 Wash. L. Rev. 1005, 1028-31 (July 2000) ("[T]he committee reports leave no doubt that Congress intended to provide some relief from vicarious liability").

[75] We do not agree that Napster's potential liability for contributory and vicarious infringement renders the Digital Millennium Copyright Act inapplicable per se. We instead recognize that this issue will be more fully developed at trial. At this stage of the litigation, plaintiffs raise serious questions regarding Napster's ability to obtain shelter under § 512, and plaintiffs also demonstrate that the balance of hardships tips in their favor. See *Prudential Real Estate*, 204 F.3d at 874; see also *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1109 (9th Cir. 1998) ("A party seeking a preliminary injunction must show . . . 'that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor.'").

[76] Plaintiffs have raised and continue to raise significant questions under this statute, including: (1) whether Napster is an Internet service provider as defined by 17 U.S.C. § 512(d); (2) whether copyright owners must give a service provider "official" notice of infringing activity in order for it to have knowledge or awareness of infringing activity on its system; and (3) whether Napster complies with § 512(i), which requires a service provider to timely establish a detailed copyright compliance policy. See *A&M Records, Inc. v. Napster, Inc.*, No. 99-05183, 2000 WL 573136 (N.D. Cal. May 12, 2000) (denying summary judgment to Napster under a different subsection of the Digital Millennium Copyright Act, § 512(a)).

[77] The district court considered ample evidence to support its determination that the balance of hardships tips in plaintiffs' favor:

Any destruction of Napster, Inc. by a preliminary injunction is speculative compared to the statistical evidence of massive, unauthorized downloading and uploading of plaintiffs' copyrighted works—as many as 10,000 files per second by defendant's own admission. See Kessler Dec. ¶ 29. The court has every reason to believe that, without a preliminary injunction, these numbers will mushroom as Napster users, and newcomers attracted by the publicity, scramble to obtain as much free music as possible before trial.

114 F. Supp. 2d at 926.

VII

[78] Napster contends that even if the district court's preliminary determinations that it is liable for facilitating copyright infringement are correct, the district court improperly rejected valid affirmative defenses of waiver, implied license and copyright misuse. We address the defenses in turn.

A. Waiver

[79] "Waiver is the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it." *United States v. King Features Entm't, Inc.*, 843 F.2d 394, 399 (9th Cir. 1988). In copyright, waiver or abandonment of copyright "occurs only if there is an intent by the copyright proprietor to surrender rights in his work." 4 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright*

¶ 13.06 (2000); see also *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998) (discussing abandonment).

- [80] Napster argues that the district court erred in finding that plaintiffs knowingly provided consumers with technology designed to copy and distribute MP3 files over the Internet and, thus, waived any legal authority to exercise exclusive control over creation and distribution of MP3 files. The district court, however, was not convinced “that the record companies created the monster that is now devouring their intellectual property rights.” *Napster*, 114 F. Supp. 2d at 924. We find no error in the district court’s finding that “in hastening the proliferation of MP3 files, plaintiffs did [nothing] more than seek partners for their commercial downloading ventures and develop music players for files they planned to sell over the Internet.” *Id.*[n7]

B. Implied License

- [81] Napster also argues that plaintiffs granted the company an implied license by encouraging MP3 file exchange over the Internet. Courts have found implied licenses only in “narrow” circumstances where one party “created a work at [the other’s] request and handed it over, intending that [the other] copy and distribute it.” *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc.*, 211 F.3d 21, 25 (2d Cir. 2000) (quoting *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990)), *cert. denied*, 121 S. Ct. 173 (2000). The district court observed that no evidence exists to support this defense: “indeed, the RIAA gave defendant express notice that it objected to the availability of its members’ copyrighted music on Napster.” *Napster*, 114 F. Supp. 2d at 924-25. The record supports this conclusion.

C. Misuse

- [82] The defense of copyright misuse forbids a copyright holder from “secur[ing] an exclusive right or limited monopoly not granted by the Copyright Office.” *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977-79 (4th Cir. 1990), *quoted in Practice Mgmt. Info. Corp. v. American Med. Ass’n*, 121 F.3d 516, 520 (9th Cir.), *amended by* 133 F.3d 1140 (9th Cir. 1997). Napster alleges that online distribution is not within the copyright monopoly. According to Napster, plaintiffs have colluded to “use their copyrights to extend their control to online distributions.”
- [83] We find no error in the district court’s preliminary rejection of this affirmative defense. The misuse defense prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly. See *Lasercomb*, 911 F.2d 970 at 976-77; see also *Religious Tech. Ctr. v. Lerma*, No. 95-1107A, 1996 WL 633131, at *11 (E.D. Va. Oct. 4, 1996) (listing circumstances which indicate improper leverage).[n8] There is no evidence here that plaintiffs seek to control areas outside of their grant of monopoly. Rather, plaintiffs seek to control reproduction and distribution of their copyrighted works, exclusive rights of copyright holders. 17 U.S.C. § 106; see also, e.g., *UMG Recordings*, 92 F. Supp. 2d at 351 (“A [copyright holder’s] ‘exclusive’ rights, derived from the Constitution and the Copyright Act, include the right, within broad limits, to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable.”). That the copyrighted works are transmitted in another medium—MP3 format rather than audio CD—has no bearing on our analysis. See *id.* at 351 (finding that reproduction of audio CD into MP3 format does not “transform” the work).

VIII

- [84] The district court correctly recognized that a preliminary injunction against Napster’s participation in copyright infringement is not only warranted but required. We believe, however, that the scope of the injunction needs modification in light of our opinion. Specifically, we reiterate that contributory liability may potentially be imposed only to the extent that Napster: (1) receives reasonable knowledge of specific infringing files with copyrighted musical compositions and sound recordings; (2) knows or should know that such files are available on the Napster system; and (3) fails to act to prevent viral distribution of the works. See *Netcom*, 907 F. Supp. at 1374-75. The mere existence of the Napster system, absent actual notice and Napster’s demonstrated failure to remove the offending material, is insufficient to impose contributory liability. See *Sony*, 464 U.S. at 442-43.
- [85] Conversely, Napster may be vicariously liable when it fails to affirmatively use its ability to patrol its system and preclude access to potentially infringing files listed in its search index. Napster has both the ability to use its search function to identify infringing musical recordings and the right to bar participation of users who engage in the transmission of infringing files.
- [86] The preliminary injunction which we stayed is overbroad because it places on Napster the entire

burden of ensuring that no “copying, downloading, uploading, transmitting, or distributing” of plaintiffs’ works occur on the system. As stated, we place the burden on plaintiffs to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content. Napster, however, also bears the burden of policing the system within the limits of the system. Here, we recognize that this is not an exact science in that the files are user named. In crafting the injunction on remand, the district court should recognize that Napster’s system does not currently appear to allow Napster access to users’ MP3 files.

- [87] Based on our decision to remand, Napster’s additional arguments on appeal going to the scope of the injunction need not be addressed. We, however, briefly address Napster’s First Amendment argument so that it is not reasserted on remand. Napster contends that the present injunction violates the First Amendment because it is broader than necessary. The company asserts two distinct free speech rights: (1) its right to publish a “directory” (here, the search index) and (2) its users’ right to exchange information. We note that First Amendment concerns in copyright are allayed by the presence of the fair use doctrine. See 17 U.S.C. § 107; see generally *Nihon Keizai Shimbun v. Comline Business Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999); *Netcom*, 923 F. Supp. at 1258 (stating that the Copyright Act balances First Amendment concerns with the rights of copyright holders). There was a preliminary determination here that Napster users are not fair users. Uses of copyrighted material that are not fair uses are rightfully enjoined. See *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997) (rejecting defendants’ claim that injunction would constitute a prior restraint in violation of the First Amendment).

IX

- [88] We address Napster’s remaining arguments: (1) that the court erred in setting a \$5 million bond, and (2) that the district court should have imposed a constructive royalty payment structure in lieu of an injunction.

A. Bond

- [89] Napster argues that the \$5 million bond is insufficient because the company’s value is between \$1.5 and \$2 billion. We review objections to the amount of a bond for abuse of discretion. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725 (9th Cir. 1999).
- [90] We are reluctant to dramatically raise bond amounts on appeal. See *GoTo.com, Inc. v. The Walt Disney Co.*, 202 F.3d 1199, 1211 (9th Cir. 2000); see also Fed. R. Civ. P. 65(c). The district court considered competing evidence of Napster’s value and the deleterious effect that any injunction would have upon the Napster system. We cannot say that Judge Patel abused her discretion when she fixed the penal sum required for the bond.

B. Royalties

- [91] Napster contends that the district court should have imposed a monetary penalty by way of a compulsory royalty in place of an injunction. We are asked to do what the district court refused.
- [92] Napster tells us that “where great public injury would be worked by an injunction, the courts might . . . award damages or a continuing royalty instead of an injunction in such special circumstances.” *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988) (quoting 3 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 14.06[B] (1988)), *aff’d*, 495 U.S. 207 (1990). We are at a total loss to find any “special circumstances” simply because this case requires us to apply well-established doctrines of copyright law to a new technology. Neither do we agree with Napster that an injunction would cause “great public injury.” Further, we narrowly construe any suggestion that compulsory royalties are appropriate in this context because Congress has arguably limited the application of compulsory royalties to specific circumstances, none of which are present here. See 17 U.S.C. § 115.
- [93] The Copyright Act provides for various sanctions for infringers. See, e.g., 17 U.S.C. §§ 502 (injunctions); 504 (damages); and 506 (criminal penalties); see also 18 U.S.C. § 2319A (criminal penalties for the unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances). These statutory sanctions represent a more than adequate legislative solution to the problem created by copyright infringement.
- [94] Imposing a compulsory royalty payment schedule would give Napster an “easy out” of this case. If such royalties were imposed, Napster would avoid penalties for any future violation of an injunction, statutory copyright damages and any possible criminal penalties for continuing infringement. The royalty structure would also grant Napster the luxury of either choosing to continue and pay royalties

or shut down. On the other hand, the wronged parties would be forced to do business with a company that profits from the wrongful use of intellectual properties. Plaintiffs would lose the power to control their intellectual property: they could not make a business decision *not* to license their property to Napster, and, in the event they planned to do business with Napster, compulsory royalties would take away the copyright holders' ability to negotiate the terms of any contractual arrangement.

X

[95] We affirm in part, reverse in part and remand.

[96] We direct that the preliminary injunction fashioned by the district court prior to this appeal shall remain stayed until it is modified by the district court to conform to the requirements of this opinion. We order a partial remand of this case on the date of the filing of this opinion for the limited purpose of permitting the district court to proceed with the settlement and entry of the modified preliminary injunction.

[97] Even though the preliminary injunction requires modification, appellees have substantially and primarily prevailed on appeal. Appellees shall recover their statutory costs on appeal. See Fed. R. App. P. 39(a)(4) (“[i]f a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.”).

[98] AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

1. “To download means to receive information, typically a file, from another computer to yours via your modem The opposite term is upload, which means to send a file to another computer.” *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) (quoting Robin Williams, *Jargon, An Informal Dictionary of Computer Terms* 170-71 (1993)).
2. Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995) (“[T]here can be no contributory infringement by a defendant without direct infringement by another.”). It follows that Napster does not facilitate infringement of the copyright laws in the absence of direct infringement by its users.
3. Napster asserts that because plaintiffs seek injunctive relief, they have the burden of showing a likelihood that they would prevail against any affirmative defenses raised by Napster, including its fair use defense under 17 U.S.C. § 107. See *Atari Games Corp. v. Nintendo*, 975 F.2d 832, 837 (Fed. Cir. 1992) (following Ninth Circuit law, and stating that plaintiff must show likelihood of success on prima facie copyright infringement case and likelihood that it would overcome copyright misuse defense); see also *Dr. Seuss Enters. v. Penguin Books USA*, 924 F. Supp. 1559, 1562 (S.D. Cal. 1996) (“The plaintiff’s burden of showing a likelihood of success on the merits includes the burden of showing a likelihood that it would prevail against any affirmative defenses raised by the defendant.”), *aff’d*, 109 F.3d 1394 (9th Cir. 1997); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 923 F. Supp. 1231, 1242 n.12 (1995) (same); 2 William W. Schwarzer et al., *California Practice Guide, Federal Civil Procedure Before Trial* ¶ 13:47 (2000) (advising that when a preliminary injunction is sought “plaintiff must demonstrate a likelihood of prevailing on any affirmative defense as well as on plaintiff’s case in chief”). *But see Fair Use of Copyrighted Works*, H.R. Rep. 102- 836 n.3 (criticizing a Northern District of New York case in which “the district court erroneously held that where the copyright owner seeks a preliminary injunction, the copyright owner bears the burden of disproving the [fair use] defense”); see also 1 William F. Patry, *Copyright Law & Practice*, 725, 725 n.27 (1994) (citing cases placing burden on defendant at preliminary injunction stage).
The district court stated that “defendant bears the burden of proving . . . affirmative defenses.” *Napster*, 114 F. Supp. 2d at 912. Plaintiffs assert that the district court did not err in placing the burden on Napster. We conclude that even if plaintiffs bear the burden of establishing that they would likely prevail against Napster’s affirmative defenses at the preliminary injunction stage, the record supports the district court’s conclusion that Napster users do not engage in fair use of the copyrighted materials.
4. Napster counters that even if certain users engage in commercial use by downloading instead of purchasing the music, space-shifting and sampling are nevertheless *noncommercial* in nature. We address this contention in our discussion of these specific uses, *infra*.
5. The district court found actual knowledge because: (1) a document authored by Napster co-founder Sean Parker mentioned “the need to remain ignorant of users’ real names and IP addresses ‘since they are exchanging pirated music’”; and (2) the Recording Industry Association of America (“RIAA”) informed Napster of more than 12,000 infringing files, some of which are still available. 114 F. Supp.

2d at 918. The district court found constructive knowledge because: (a) Napster executives have recording industry experience; (b) they have enforced intellectual property rights in other instances; (c) Napster executives have downloaded copyrighted songs from the system; and (d) they have promoted the site with “screen shots listing infringing files.” *Id.* at 919.

6. As stated by the district court:

Plaintiff[s] . . . demonstrate that defendant had actual notice of direct infringement because the RIAA informed it of more than 12,000 infringing files. See Creighton 12/3/99 Dec., Exh. D. Although Napster, Inc. purportedly terminated the users offering these files, the songs are still available using the Napster service, as are the copyrighted works which the record company plaintiffs identified in Schedules A and B of their complaint.

See Creighton Supp. Dec. PP 3-4. 114 F. Supp. 2d at 918.

7. Napster additionally asserts that the district court improperly refused to allow additional discovery into affirmative defenses and also erroneously failed to hold an evidentiary hearing. The denial of an evidentiary hearing is reviewed for abuse of discretion, *Kenneally v. Lungren*, 967 F.2d 329, 335 (9th Cir. 1992), as is the court’s decision to deny further discovery. See *Sablan v. Dep’t of Finance*, 856 F.2d 1317, 1321 (9th Cir. 1988) (stating that decision to deny discovery will not be disturbed except upon a clear showing “that the denial of discovery results in actual and substantial prejudice”). We conclude that the court did not abuse its discretion in denying further discovery and refusing to conduct an evidentiary hearing.

8. The district court correctly stated that “most of the cases” that recognize the affirmative defense of copyright misuse involve unduly restrictive licensing schemes. See *Napster*, 114 F. Supp. 2d at 923; see also *Lasercomb*, 911 F.2d at 973 (stating that “a misuse of copyright defense is inherent in the law of copyright”). We have also suggested, however, that a unilateral refusal to license a copyright may constitute wrongful exclusionary conduct giving rise to a claim of misuse, but assume that the “desire to exclude others . . . is a presumptively valid business justification for any immediate harm to consumers.” See *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1218 (9th Cir. 1997). But see *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999) (“[M]arket power does not ‘impose on the intellectual property owner an obligation to license the use of that property to others.’” (quoting United States Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for the Licensing of Intellectual Property* 4 (1995))).

Anexo III: E-mail de consulta a traductor público

----- Original Message -----

Subject: Re: Consulta de traducción
Date: Wed, 24 Jan 2007 16:28:44 -0300
From: Sergio Murias <smurias@ciudad.com.ar>
To: Guillermina Ruiz <guillermina_ruiz@arnet.com.ar>
References: <45B6965C.5080603@arnet.com.ar>

(...) [T]engo una noción más o menos clara de los casi infinitos caminos de la teoría de la responsabilidad en nuestro sistema, que está desarrolladísima, para bien o para mal.

Sin embargo, que la teoría de la responsabilidad o “derecho de daños”, por usar un anglicismo difundidísimo en la literatura vernácula (cada vez menos vernácula, como se advierte), esté desarrolladísima en nuestro país, gracias a que trae consigo un generosísimo caudal de diversas vertientes de tradiciones jurídicas, desde Roma hasta el Código Napoleón, no quiere decir que sea plenamente traducible a la que paralelamente se desarrolló en nuestros amigos países angloparlantes.

Hasta donde sé, la distinción entre responsabilidad directa e indirecta la podemos buscar en dos ámbitos: los factores de atribución de la responsabilidad y la causalidad, si bien en ninguna de estas dos nociones se puede encontrar una división que corresponda con exactitud a la “direct liability” y “secondary liability”, y menos aún a la subdivisión “contributory/vicarious”; pero ya veremos.

Admito que hay una cosa que me confunde en este caso, y es el hecho de que, normalmente, el concepto de “vicarious liability” originalmente desarrollado en la teoría de la responsabilidad del Common Law, se refiere a una “liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two parties”. En esta definición clásica del Black’s no se hace referencia al requisito de que una de las dos partes deba enriquecerse para que surja la responsabilidad del principal. No obstante, como se hace referencia a “declining to exercise a right to stop or limit it”, e infiero que este derecho a impedir el acto dañoso surge de una relación de subordinación, voy a invocar parcialmente para nuestro problema el ámbito donde nuestra doctrina se dedica a estas cuestiones, que es la **teoría de la representación**. Esta teoría dice, ni más ni menos, que las consecuencias civiles de los actos de una persona son atribuibles a una segunda persona en virtud de un **factor de imputación secundaria**. Es decir, A responde de las consecuencias de los actos de B. La imputación es secundaria porque lo normal es que a B se le impute la responsabilidad de sus propios actos. No mediando supuestos eximentes, si un camión de La Serenísima S.A. choca contra un auto en la ruta y provoca daños cuantificables pecuniariamente, no responde el chofer, sino la persona jurídica La Serenísima S.A.

Otra cuestión es la de la “secondary liability”. No sé qué fuentes usaste para llegar a la conclusión de que “secondary liability” engloba a “vicarious liability”, ni pretendo desacreditarlas. Pero como hace bastante que estudié eso, es altamente probable que la erosión del tiempo me haya hecho huecos en mi marco de referencia. Yo sabía que “secondary liability” es una responsabilidad, digamos, **subsidiaria** (y con esto estoy plenamente de acuerdo con tu solución), como la que surge en el caso de la fianza y otras obligaciones de garantía, en las que la responsabilidad de B surge únicamente ante la negativa o imposibilidad de A de responder de sus actos, lo que es distinto de la responsabilidad indirecta, es decir, aquellos casos en los que hay imputación secundaria. En el derecho anglosajón, tenemos el concepto de “accommodation party” y “surety” que responderían en principio a esta clasificación. Pero bueno, como no sé qué fuentes tenés vos, no pongo las manos en el fuego por mi teoría...

Los factores de atribución de la responsabilidad son dos: objetiva y subjetiva. En la objetiva, no se atiende a una relación “moral” del sujeto de imputación de responsabilidad con el daño causado por sus actos. En la subjetiva, por el contrario, se distingue entre “culpa” y “dolo”, además de “impericia” e “imprudencia”, que tienen que ver con situaciones psicológicas del sujeto. La doctrina habla de una **culpa concurrente** cuando se conecta la culpa del damnificado con la del autor del hecho. Esto se da, por ejemplo, cuando un conductor choca un auto que estaba mal estacionado. Para atribuir responsabilidad se atiende a la gravitación de de cada culpa.

Hablar de “culpa concurrente” en tu caso parece problemático porque implica que hay un damnificado que tiene culpa, mientras que en el caso que citás parece generarse una **obligación con pluralidad de sujetos** u obligación mancomunada, ya sea simple o solidaria. O sea, sin que el damnificado tenga culpa, dos sujetos le ocasionan un daño en forma **concurrente**, uno como autor material y otro como instigador (advierto que esto es terminología del derecho penal).

Pero sí se habla de “concasusa”, cuando concurren varios a producir un resultado, y en particular de “**causalidad conjunta**” o “**común**” cuando varias personas cooperan al mismo resultado, como en el caso de los coautores de un delito, o el de los cointervinientes en un cuasidelito, que en nuestro derecho responden solidariamente. Se me ocurre que esta terminología nos acerca a la noción de “contributory liability”, no obstante que puedas dar con alguna solución satisfactoria con los conceptos de los párrafos anteriores.

Decía antes que la “vicarious liability” supone una relación de subordinación, o dependencia. En nuestro derecho, tales supuestos son absorbidos por la teoría de la **responsabilidad por el hecho de otro**. Es lo que ocurre en los casos en que la ley autoriza al damnificado a reclamar a quien, sin haber obrado el acto que causa daño, debe indemnizarlo, en atención a su particular vinculación con el victimario. Esta es una **responsabilidad refleja**, y surge del artículo 1113 del Código de Vélez Sársfield, que reza: “la obligación el que ha causado un daño se extiende a los daños que causaren los que están bajo su dependencia”.

Así, el Código hace responder por hechos de los dependientes (a sus empleadores), de los incapaces (a los padres, curadores o tutores) y hasta por hechos de extraños, en determinados casos. El principal responde por el hecho del dependiente cuando hay un hecho ilícito imputable al dependiente (y aquí no importa si es un delito o un cuasidelito, porque la **responsabilidad es objetiva**), hay una relación de dependencia y el daño se produce con ocasión de las funciones.

Está claro, entonces, que la responsabilidad refleja no es lo mismo que la “secondary liability”, y que en nuestro derecho hasta tienen diversos orígenes.

Yo creo que para “vicarious liability” conviene utilizar una terminología de la responsabilidad objetiva por el hecho del otro, porque trae consigo las nociones de dependencia y responsabilidad refleja, que están presentes en “vicarious liability”. Si esto te produce problemas con “indirect liability”, podés optar por describir a esta última lisa y llanamente como una responsabilidad refleja en virtud de un factor de imputación secundaria y a “vicarious liability” como una responsabilidad por el hecho del dependiente.

A lo largo del mail resalté en negrita palabras o frases de nuestro repertorio que pueden ser útiles para describir los institutos que te tocó traducir, de modo que puedas satisfacer los requisitos de la adaptabilidad a nuestro sistema, tal vez un poco en desmedro del color del sistema fuente. Para situarse en el medio de la dicotomía color/adaptabilidad, podés optar por soluciones intermedias, como dejar el término original en inglés además de una traducción más o menos perifrástica en castellano, pero de eso no soy quién para darte consejo.

También podemos considerar que, como la discusión que se plantea en el fallo es en gran medida metalingüística, podés optar por términos más o menos ambiguos para que tu traducción preserve el “quid” del fallo, que es la discusión sobre el significado de estos términos.

(...)

Sergio

Bibliografía general

- 1º Congreso de las Naciones Unidas sobre Prevención del Delito y Justicia Penal, “Medidas para combatir los delitos informáticos”, [en línea], documento A/CONF.203/14, Bangkok, 2005, [fecha de última consulta: 24 de febrero de 2007], disponible en <<http://daccessdds.un.org/doc/UNDOC/GEN/V05/822/62/PDF/V0582262.pdf?OpenElement>>.
- A&M Records, Inc. c/ Napster, Inc., [en línea], 239 F.3d 1004, 9º Cir., 2001, [fecha de última consulta: 3 de marzo de 2007], disponible en <http://www.law.cornell.edu/copyright/cases/239_F3d_1004.htm>.
- Alterini, Atilio A., Ameal, Oscar J. y López Cabana, Roberto M., Derecho de obligaciones civiles y comerciales, (2ª ed.), Abeledo-Perrot, Buenos Aires, 2003.
- American Association of Law Libraries, AALL Universal Citation Guide, Version 2.1, [en línea], s.d., 2002, [fecha de última consulta: 19 de febrero de 2007], disponible en <<http://www.aallnet.org/committee/citation/ucg/index.html>>.
- Antequera Parilli, Ricardo, “Las limitaciones y excepciones al derecho de autor y los derechos conexos en el entorno digital”, [en línea], documentos preparado para el IX Curso Académico Regional OMPI/SGAE sobre Derecho de Autor y Derechos Conexos para Países de América Latina organizado por la OMPI, la SGAE y el Ministerio de Industria y Comercio de la República del Paraguay, Asunción, 2005, [fecha de última consulta: 2 de marzo de 2007], disponible en <http://www.wipo.int/edocs/mdocs/lacs/OMPI_SGAE_da_asu_05/OMPI_SGAE_da_asu_05_2.pdf>.
- Association of Legal Writing Directors y Dickerson, Darby, ALWD Citation Manual: A Professional System of Citation, [en línea], Nueva York, Aspen Publishers, Inc., 2000, [fecha de última consulta: 19 de febrero de 2007], disponible en <<http://www.alwd.org/cm/>>.
- Black, Henry C., Black’s Law Dictionary, (6ª ed.), St. Paul, West Publishing Co., 1990.
- Chiesa, Ricardo, “El análisis componencial aplicado a la traducción de textos jurídicos”, ponencia para el Segundo Congreso Latinoamericano de Traducción e Interpretación, CTPCBA, 1998.
- Clarkson, Kenneth W., Miller, Roger LeRoy, Jentz, Gaylord A. y Cross, Frank B., “Intellectual Property and Internet Law”, West’s Business Law. Text and Cases: Legal, Ethical, International, and E-Commerce Environment, (9ª ed.), South-Western College/West, Nueva York, 2003.
- Corte Suprema de Justicia de la Nación, “Acordada 28/2004 ‘Amigos del Tribunal’”, [en línea], s.d., 2004, [fecha de última consulta: 26 de diciembre de 2006], disponible en <http://www.cels.org.ar/Site_cels/documentos/acordada_CSJN_28-04_amicus_curiae.pdf>.
- Cunard, Jeffrey P. y Hill, Keith, “Evolución reciente en el campo de la gestión de los derechos digitales”, [en línea], Comité Permanente de Derecho de Autor y Derechos Conexos de la OMPI, Ginebra, 2004, [fecha de última consulta: 2 de marzo de 2007], disponible en <http://www.wipo.int/edocs/mdocs/copyright/es/sccr_10/sccr_10_2_rev.pdf>.
- Downing, Douglas A., Covington, Michael A. y Covington, Melody M., Dictionary of Computer and Internet Terms, (5ª ed.), Nueva York, Barron’s Educational Series, 1996.
- Eco, Umberto, Cómo se hace una tesis, Barcelona, Gedisa, 2002.
- Fonovisa, Inc. c/ Cherry Auction, Inc., [en línea], 76 F.3d 259, 9º Cir., 1996, [fecha de última consulta: 3 de marzo de 2007], disponible en <http://www.law.cornell.edu/copyright/cases/76_F3d_259.htm>.
- Ginsburg, Jane, “Secondary Liability for Copyright Infringement in the U.S.: Anticipating the Aprés-Grokster”, [en línea], Columbia Law School, 2007, [fecha de última consulta: 15 de febrero de 2007], disponible en <http://www.law.columbia.edu/law_school/communications/reports/winter06/facforum1>.
- Honorable Congreso de la Nación Argentina, Ley 11.723: Régimen legal de la propiedad intelectual, [en línea], Boletín Oficial, 1933, [fecha de última consulta: 27 de febrero de 2007], disponible en <<http://www.infoleg.gov.ar/infolegInternet/anexos/40000-44999/42755/texact.htm>>.
- Honorable Congreso de la Nación Argentina, Ley 23.774: Corte Suprema de Justicia de la Nación - Jueces - Ampliación de la Corte Suprema, [en línea], Boletín Oficial, 1990, [fecha de última consulta: 27 de febrero de 2007], disponible en <<http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/175/texact.htm>>.
- Honorable Congreso de la Nación Argentina, Ley 340: Código Civil de la Nación, [en línea], 1869, [fecha de última consulta: 14 de febrero de 2007], disponible en <<http://www.infoleg.gov.ar/infolegInternet/anexos/105000-109999/109481/texact.htm>>.
- Kunz, Ana, “Trabajo Final de Carrera. Elementos para su elaboración”, Buenos Aires, Universidad de Belgrano, 2002.
- Lipszyc, Delia, “El intercambio en línea de ficheros musicales y audiovisuales digitales”, [en línea], documento preparado para las Jornadas de Derecho de Autor organizadas por la OMPI y el INDAUTOR, México, 2005, [fecha de última consulta: 2 de marzo de 2007], disponible en <<http://www.wipo>>.

- int/edocs/mdocs/lac/es/ompi_da_mex_05/ompi_da_mex_05_1.pdf>.
- Lipszyc, Delia, Nuevos temas de derecho de autor y derechos conexos, Buenos Aires, UNESCO, CERLALC, Zavalia, 2004.
 - Lucas, André, "Ley aplicable a la violación del derecho de autor en el entorno digital", [en línea], Copyright Bulletin, UNESCO, octubre-diciembre de 2005, [fecha de consulta: 22 de febrero de 2007], disponible en <<http://unesdoc.unesco.org/images/0014/001436/143657s.pdf#143657>>.
 - Martin, Peter W., Introduction to Basic Legal Citation, [en línea], Legal Information Institute, Cornell Law School, s.d., [fecha de última consulta: 21 de febrero de 2007], disponible en <<http://www.law.cornell.edu/citation/>>.
 - Mayoral Asensio, Roberto, "La traducción jurídica: un enigma para los estudiosos, una tarea para los profesionales", El Lenguaraz, año 3, número 3, 2001.
 - Merriam-Webster's Dictionary of Law, [en línea], Merriam-Webster, Inc., 1996, [fecha de última consulta: 6 de marzo de 2007], disponible en <<http://dictionary.lp.findlaw.com>>.
 - Metro-Goldwyn-Mayer Studios Inc., et al., demandantes c/ Grokster, Ltd., et al., [en línea], 545 U. S., Corte Suprema de los Estados Unidos, 2005, [fecha de consulta: 16 de abril de 2006], disponible en <<http://www.copyright.gov/docs/mgm/opinion.pdf>>.
 - Oficina Internacional de la OMPI, "La protección internacional del derecho de autor y de los derechos conexos", [en línea], s.d., [fecha de última consulta: 15 de febrero de 2007], disponible en <http://www.wipo.int/copyright/es/activities/pdf/international_protection.pdf>.
 - Organización Mundial de la Propiedad Intelectual, "Convenio de Berna para la Protección de las Obras Literarias y Artísticas", [en línea], París, Base de datos de la OMPI de textos legislativos de propiedad intelectual, 1979, [fecha de última consulta: 22 de febrero de 2007], disponible en <http://www.wipo.int/treaties/es/ip/berne/pdf/trtdocs_wo001.pdf>.
 - Organización Mundial de la Propiedad Intelectual, "Tratado de la OMPI sobre Derecho de Autor (WCT)", [en línea], Ginebra, Colección de Leyes Electrónicamente Accesible, 1996, [fecha de última consulta: 22 de febrero de 2007], disponible en <http://www.wipo.int/treaties/es/ip/wct/pdf/trtdocs_wo033.pdf>.
 - Real Academia Española y Asociación de Academias de la Lengua Española, Diccionario panhispánico de dudas, Bogotá, Santillana, 2005.
 - Real Academia Española, Diccionario de la Lengua Española, (22ª ed.), Madrid, Espasa Calpe, 2001.
 - Shapiro, Bernstein and Co. c/ H. L. Green Co., [en línea], 316 F.2d 304, 2º Cir., 1963, [fecha de última consulta: 2 de marzo de 2007], disponible en <<http://techlawadvisor.com/docs/SHAPIRO-BERNSTEIN.txt>>.
 - Sony Corp. of America c/ Universal City Studios, Inc., [en línea], 464 U.S. 417, 435, Corte Suprema de Justicia de los Estados Unidos, 1984, [fecha de última consulta: 3 de marzo de 2007], disponible en <<http://supreme.justia.com/us/464/417/case.html>>.
 - Stephanblome, Markus, "Responsabilidad legal de los proveedores de Internet por infracciones de los derechos de autor bajo la legislación alemana y europea", [en línea], Copyright Bulletin, UNESCO, octubre-diciembre de 2005, [fecha de consulta: 22 de febrero de 2007], disponible en <<http://unesdoc.unesco.org/images/0012/001255/125506s.pdf#page=5>>.
 - United States Copyright Office, "Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code", [en línea], s.d., 2003, [fecha de última consulta: 8 de febrero de 2007], disponible en <<http://www.copyright.gov/title17/circ92.pdf>>.
 - Villalba, Carlos A. y Lipszyc, Delia, El Derecho de autor en la Argentina, (1ª ed.), Buenos Aires, La Ley, 2001.
 - Von Lewinski, Silke, "Certain legal problems related to the making available of literary and artistic works and other protected subject matter through digital networks", [en línea], Copyright Bulletin, UNESCO, enero-marzo de 2005, [fecha de consulta: 22 de febrero de 2007], disponible en <<http://unesdoc.unesco.org/images/0013/001396/139644e.pdf#139644>>.

