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# A Tale of Two Rights: Mediating Between P2P Owners and Digital Copyright Holders

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## **Abstract**

The emergence of peer-to-peer file sharing technology revolutionises the discourse around copyright infringement. This new pirate of digital technology poses challenges not only to legal structures but it redefines tensions among various stakeholders: artists and creators genuine users of copyrighted works, content industries and technologists. They threaten cultural production turning users to consumers without effort to become producers. Conversely, it is contended that such software increase collaborative interactions and change the way we perceive social and communicative structures. A caveat is that the response of law when juxtapose with technological changes in the internet itself, has heavily increased the effective regulation of creativity. This paper examines the early debate around the regulation of p2p software. Can there be a middle ground?

**Keywords:** Copyright, dual-use technology, authorisation, secondary infringement, peer-to-peer

## **1. INTRODUCTION**

Online sharing of music, sound recordings and videos have been caught between the battle for ownership and public right of usage. Technologies like peer-to-peer (P2P) which facilitate their communication and distribution have fallen under serious attack for being tools of commercial and non-commercial infringements yet they are capable of non-infringing purposes. The impact of P2P on music sales continue to be subject to constant debate. Forty billion files of copyrighted digital materials were alleged to have been shared illegally in 2008.<sup>1</sup> Such allegations have been contested as assertions not based on statistically reliable information.<sup>2</sup> This paper re-examines the conundrum of online copyright infringement and P2P technology relationship. From Australian, American and Canadian perspectives, it investigates how courts try balance conflicting rights of technology developers and copyright owners. Does a constructive knowledge of infringing activities make an internet service providers or software manufacturer liable? How do court strike a balance between the right

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<sup>1</sup> IFPI, Digital Music Report 2009 available at <http://www.ifpi.org/content/library/dmr2009.pdf> accessed on 20 March 2014

<sup>2</sup> Marshall L, "Infringers" in Frith S and Marshall L (eds) *Music and Copyright* (Edinburgh University Press, 2<sup>nd</sup> ed 2004 p 194

of copyright holders interests and the needs of the society in encouraging technological innovation where software or material provided are *capable of commercially non-infringing uses* like time-shifting?

## **2. DUAL USE TECHNOLOGIES**

P2P software technologies are not the first generation of dual-use technologies. Printing machines are the first known of dual use technologies which helped massive production of books, and other reading materials. These machines were good until they were used to print seditious materials or copyrighted materials without permission. More recent examples of dual use technologies are nuclear reactors that could generate plutonium for nuclear weapons and could also be used in generation of electricity and life saving pharmaceuticals.

Dual use technologies like VCR, internet, computer and p2p file sharing software have transformed the way we access and distribute materials. They allow a more democratic mode of publishing, free from state censorship and publisher monopolies. To copyright owners, these technologies are a destructive force to creativity.<sup>3</sup> Such criticism glosses over the contribution of these technologies in enhancing the popularity of creators through legal mass production and distribution of authors' works.

### **2.1. The nature of peer to peer technology**

Though the popularity of term peer-to-peer could be attributed to Napster, the concept and technology which influenced P2P could be traced to older technologies like IP routers, Usenet news server system, FidoNet and others. These technologies moved towards distributed systems rather than monolithic systems

Winer describes P2P as “a class of applications that take advantage of the resources – storage, cycles, content, human presence available at the edges of the internet.”<sup>4</sup> A P2P as a network utilises the computing power and the bandwidth of the users in the network, each generally regarded as a peer. Each peer acts as a *servent* that is the nodes act at the same time as a client and as a server unlike a client-server networking, where the server has the responsibility for

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<sup>3</sup> John Philip Sousa, "The Menace of Mechanical Music," Vol. 8 (1906) *Appleton's Magazine* 278 - 284

<sup>4</sup> David Winer 'Clay Shirky on P2P' available at <http://scripting.com/davenet/2000/11/15/clayShirkyOnP2p.html>

providing or serving network information and the client consumes or otherwise act as clients of those servers.<sup>5</sup> P2P networks do not have problems of scalability and redundancy. As participants on the network increase, the resource of the system also increases more so that every participant is both a provider as well as requestor.

P2P networks could be divided into two, namely those with a central entity and those without any central entities. A pure P2P network has no central server managing the network. Any single and arbitrary chosen peer can be removed without any disruption of the network service. Hybrid P2P networks on the other hand need a central server which maintains information on peers and responds to requests for such information. Some P2P networks use stronger peers called ‘super-peers’ or super-nodes’ as servers; client peers are then connected to a single super-peer. Super-peers are decentralized networks because no specific machines serve as index servers. Instead the software running on all the peers takes stock of each other’s available resources, including bandwidth, drive space, and processing power.

### **3.0 UNITED STATES COURTS AND DUAL USE TECHNOLOGIES**

#### **3.1 The Pre-Napster Approach**

Under US copyright law, providers of technologies used for infringement could be held liable under the doctrine of secondary infringement (contributory infringement and vicarious liability). In respect of contributory infringement, “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.”<sup>6</sup> On the other hand, a manufacturer 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.<sup>7</sup>

In *Sony Corp. v. Universal City Studios, Inc*<sup>8</sup> the court sought to answer the question whether manufacturers of dual use technologies such as printing machines, photocopy machines and VCRs should be held liable for copyright infringements committed by users of their

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<sup>5</sup> Schollmeier R (2001) A definition of peer-to-peer networking for the classification of peer-to-peer architectures and applications. Proc. of 1st Intern. Conf. on Peer-to-Peer Computing, Linkoping, Sweden, pp. 101–102,

<sup>6</sup> *Gershwin Publishing Corp. v Columbia Artists Management Inc.*, 443 F. 2d 1159, 1162 (2d Cir 1971).

<sup>7</sup> *ibid*

<sup>8</sup> 464 U.S. 417 (1984)

technologies. The plaintiffs alleged that Sony had contributed to infringement of its copyright by manufacturing and selling video cassette recorders (VCRs) which were being used by Sony's customers to infringe their copyrights in many motion pictures and television shows. It was led in evidence that Sony's advertisement encouraged users to record their favourite shows and build their own libraries.<sup>9</sup> The evidence also confirmed that some Betamax users had recorded and built libraries of television programmes produced by Universal Studios.<sup>10</sup> Sony argued that VCRs were "capable of commercially significant non-infringing uses", namely time-shifting of TV broadcasts.<sup>11</sup> It added that time-shifting was one of the fair usages contemplated under the US Copyright Act and more importantly the Congress had exempted private use of home recording from copyright violations. It would therefore be wrong for Sony to be held for infringements committed by VCR users merely because it sold the machine.<sup>12</sup>

The trial court ruled in favour of Sony but this was reversed by the Ninth Circuit.<sup>13</sup> That court rejected Sony's argument and held that time shifting of televised movies infringed Universal's copyright.<sup>14</sup> The court also held that the main aim of Betamax was to facilitate copyright infringement and Sony was aware of various acts of copyright violations being carried out by its customers.<sup>15</sup>

Dismissing the claims of the plaintiffs, the Supreme Court in its ruling acknowledged the necessity of balancing between the rights of copyright holders and the needs of society in encouraging technology. Justice Stevens explained that one of the duties of the Congress is to formulate a "difficult balance between the interest of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of information and commerce on the other hand."<sup>16</sup>

On liability for contributory infringement, the Supreme Court agreed that it may be manifestly just in some instances to impose secondary liability but constructive knowledge of

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<sup>9</sup> Ibid at 459

<sup>10</sup> Ibid at 483

<sup>11</sup> ibid

<sup>12</sup> Ibid at 447- 456

<sup>13</sup> *Universal Studios, Inc v. Sony Corp. of Am.*, 659 F.2d 963 (9<sup>th</sup> Cir. 1981)

<sup>14</sup> Ibid at 971 - 972

<sup>15</sup> Ibid at 975 - 976

<sup>16</sup> Supreme Court at 429

infringing activity should not be imputed from a general awareness that a machine could be used for infringement.<sup>17</sup> The Supreme Court imported the “staple article of commerce” doctrine from patent law where a technology innovator would be contributory liable if his invention has been “especially made or especially adapted for use in an infringement of a patent.”<sup>18</sup> It would therefore be wrong to allow copyright owners to control the development of new technologies used in connection with copyrighted works. According to the court “the sale of copying equipment, like the sale of other articles of commerce does not constitute contributory *infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial non-infringing uses.*”<sup>19</sup>

The decision in *Sony* established the fact that dual use technology owners would not be liable if they could prove that their technology is capable of substantial non-infringing uses even if they have constructive notice of infringing usages. This decision paved ways for future development of other technologies that facilitate private and personal use copying.<sup>20</sup> However some bleak areas about the decision remained. It is not clear from the court’s decision the importance it attaches or that should be attached to the word “substantial” when determining the quantum of infringement. Some authors concluded that the court erred by not putting its conclusion “capable of substantial non-infringement uses into context.”<sup>21</sup> They explained that benefits derived from legitimate use should have been compared with harm occurring from illegitimate use. It appears that no matter the extent of copying, the owner of the technology would not be liable if it is private and there is no intention of any commercial benefit. The copyright holder must discharge the burden that such act of copying is harmful or that the widespread would have the market potential of the copyrighted work.

### **3.2 Liability of Peer-to-Peer Software Providers**

It would seem obvious that the *Sony* decision has provided a safe harbour for makers of dual-use technologies. In 2000, A&M Records claimed that Napster through its P2P technology allowed its users to: (1) make MP3 music files stored on individual computer hard drives

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<sup>17</sup> Ibid 436

<sup>18</sup> 35 U.S.C §271(c)(2000)

<sup>19</sup> Note 8 at 442 (emphasis supplied)

<sup>20</sup>Pamela Samuelsson The Generativity of *Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens *Fordham Law Review* 2006 Vol 74 101 - 145

<sup>21</sup> William Landes & Douglas Litchman, “Indirect Liability for Copyright Infringement: An Economic Perspective,” *16 Harvard. J.L. & Tech* (2003) 395

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.<sup>22</sup> Napster argued that activities of its users fell within the exception of fair use. The court held that the wholesale reproduction and distribution of copyrighted works by Napster users constituted direct infringement.<sup>23</sup>

On allegation of contributory infringement, relying on the decision in *Sony Corp v Universal City Studio*,<sup>24</sup> Napster argued that its facilities were capable of substantial non-infringing activities and it had no actual knowledge that its software was being used for infringing activities and if it had any notice it was a constructive one. The court agreed with the defendant on this point of law and explained that action premised on contributory liability would fail if it could not be proved that a manufacturer did more than 'merely supplying the means to accomplish an infringing activity' and that the software was capable of commercially significant non-infringing activity. The court inferred actual and specific knowledge of direct infringements from the 12,000 copyright notices of infringing files supplied by RIAA and a document authored by a co-author of Napster on the "need to remain ignorant of users' real names and IP addresses..."<sup>25</sup>

Turning to the issue of vicarious liability, the defendant was also found liable for having a financial interest in the infringing activities and for failing to exercise its supervisory power in curtailing the activities. The District Court judge agreed that Napster software was capable of non infringing uses but held that the main aim of the software was to facilitate unauthorised copying and distribution of copyrighted songs.<sup>26</sup>

On appeal by the defendant, the Ninth Circuit dismissing the appeal expounded further that in the context of the 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."<sup>27</sup> The higher court agreed with the argument that the financial interest of Napster lied in the increases in the number of its base users and in fact more users did register as the quantity and quality of

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<sup>22</sup>A & M Records v Napster, 114 F Supp 2d 896 CND Cal 2000

<sup>23</sup> ibid at p 4427

<sup>24</sup> 464 US 417 (1984)

<sup>25</sup> A& M Records v Napster 2001 114 F Supp 2d 896 Napster

<sup>26</sup> Ibid 916 - 917

<sup>27</sup> ibid (quoting *Gershwin*, 443 F.2d at 1162);

music increased.<sup>28</sup> The court varied the imposition of vicarious liability on the defendant on the ground that the district court failed to recognize that the boundaries of the premises that Napster “controls and patrols” are limited. ” In other words Napster’s reserved “right and ability” to police is cabined by the system’s current architecture because the Napster system does not “read” the content of indexed files, other than to check that they are in the proper MP3 format.<sup>29</sup>

The Ninth Circuit gives *Sony* a narrow interpretation. It is doubtful if Sony’s makers would have escaped liability as carved by the Ninth Circuit here because according to the court what the Supreme Court was guarding against was the imputation of constructive knowledge of another’s party’s infringement if the defendant was the maker of copying equipment capable of substantial non-infringing use. The opinion of Judge Bezzar suggests that more weight is placed on the sufficient notice. Though the court does not provide further explanation on the meaning of capable of substantial non-infringing activities, his analogy to computer network suggests that if the technology is capable of dual usages one of which is good the maker would not be liable except he engages in extra act which facilitates the infringement.

In *re Aimster Copyright Litigation*<sup>30</sup>, the plaintiffs sought a preliminary injunction against the defendants for vicarious and contributory infringements.<sup>31</sup> The plaintiff alleged that the Aimster system proprietary software that can be downloaded free of charge from Aimster's Web site had been used in facilitating swapping of digital copies of music though Aimster did not make copies of the swapped files itself. It also provided computerized tutorials instructing users of the software on how to use it for swapping computer files; and formed "Club Aimster," a related Internet service that users of Aimster's software could join for a fee and use to download the "top 40" popular-music files more easily.

The court held that the principle in *Sony* would not be applicable where the product was specifically manufactured for infringing activity even if the product was capable on non-infringing uses. Whether a technology is capable of substantial non-infringing uses or not would be irrelevant to the innovator’s secondary copyright liability if the product’s actual use was infringing.

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<sup>28</sup> District Court’s decision 114 F. Supp. 2d at 902

<sup>29</sup> Ibid

<sup>30</sup> 334 F 3d 643 (7<sup>th</sup> Circuit, 2003)

<sup>31</sup> 252 F.Supp.2d 634



On appeal, the Seventh Circuit affirmed the preliminary injunction solely on the contributory infringement claim and substantially narrower grounds. The court concluded that in applying the *Sony's* doctrine to the provider of an ongoing service, the provider's ability to supervise and prevent its customers from infringing is a vital condition to be considered in determining whether the provider is a contributory infringer. This ability to prevent should not form a sole factor in determining liability as this would have adverse consequences for the provision of dual services. The court explained that "if a service facilitates both infringing and non-infringing uses...and the detection and prevention of the infringing uses would highly be burdensome, the rule could result in the shutting down of the service or its annexation by the copyright owners..."<sup>32</sup>

With respect to knowledge, the appeal court rejected the argument of the defendant founded on *Sony's case*<sup>33</sup> that "mere constructive knowledge of infringing uses is not enough for contributory infringement"<sup>34</sup> and that Aimster network traffic was encrypted and was thereby incapable of knowing exactly what files were being shared by individual end users.<sup>35</sup> In the lead judgement, Posner C.J. relied on *Casella v. Morris*,<sup>36</sup> and held that "[w]ilful blindness is knowledge, in copyright law."<sup>37</sup>

Returning to the defendant's reliance on *Sony*, the higher court found that the defendant failed to demonstrate either in its pleadings or evidence that its software had been used for anything other than infringing activity. It however went to suggest that the application of the *Sony* case requires a consideration of the proportion of the infringing to non-infringing uses.<sup>38</sup>

This writer thinks that this decision conflicts with the Supreme Court's opinion as stated in *Sony*. The Seventh Circuit's decision underscores the continuing controversy whether the *proportion* of infringing and non-infringing uses is relevant to *Sony*. Though the Aimster's decision is more in tandem with the *Sony's* protection for providers of dual-use technology when compared with the decision by the Ninth Circuit in *Napster*, this interpretation creates a

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<sup>32</sup> *ibid* at 649-650

<sup>33</sup> 464 U.S. 104 S.Ct. 774

<sup>34</sup> *ibid* at 439,

<sup>35</sup> *ibid* 651

<sup>36</sup> 820 F.2d 362, 365 (11th Cir.1987)

<sup>37</sup> *ibid*

<sup>38</sup> *Aimster ibid*

serious hurdle for innovation.<sup>39</sup> A provider of dual-use technology must take into cognisance whether non-infringing use of his technology will not only be substantial but whether it will be the primary use and whether either use could be substantiated in the court.<sup>40</sup>

*Metro-Goldwyn-Mayer Studios Inc v Grokster*<sup>41</sup> is important because (i) it was decided by the US Supreme Court; (ii) it acknowledged the *Sony* Safe harbour for technology providers; (iii) it introduced a copyright inducement liability and very importantly and; (iv) unlike other cases discussed above, the software was decentralised in nature.

A consortium of entertainment companies led by Metro-Goldwyn-Mayer Studios Inc (MGM) brought an action for copyright infringement on the ground of contributory infringement against Grokster Ltd and StreamCast Networks, Inc.<sup>42</sup> According to the plaintiffs, the defendants knowingly and intentionally distributed their software to enable users to infringe copyrighted works in violation of the Copyright Act. The defendants did not contest direct copyright infringement by end users but counterclaimed that all they did was to connect all of the users of software into a network. Convinced by the arguments of the defendants, the trial court found them not liable for either contributory or vicarious copyright infringement.

The court, dismissing the appeal enumerated the principles contributory copyright infringement claim *viz.* (i) direct infringement by a third party (ii) knowledge of the infringement by the defendant (iii) material contribution to the infringement.<sup>43</sup> The first principle was not disputed by the parties. On the issues of knowledge, the court concluded that what the plaintiff must show is that the defendant had the actual and specific knowledge of the infringement; a constructive knowledge or mere awareness that end-users might use the technology to carry out infringement would not be enough especially in circumstances where it was also capable of non-infringing uses.<sup>44</sup> The plaintiff failed to establish this. Again, it was not proved that defendant could control the index files available for sharing; the network would operate even if the distributors withdrew from the network.<sup>45</sup> The Court of

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<sup>39</sup> Mark A. Lemley & R. Anthony Reese (2004) "Stopping Digital Copyright Infringement Without Stopping Innovation" *Stanford Law Review* 56

<sup>40</sup> *ibid*

<sup>41</sup> 380 F 3d 1154 (9<sup>th</sup> Circuit, 2004); 545 US 913 (2005, US Supreme Court)

<sup>42</sup> 380 F 3D 1154 (9<sup>th</sup> Cir. 2004)

<sup>43</sup> 17 U.S.C.A 501- 513

<sup>44</sup> *Supra* note 192 at p 1160

<sup>45</sup> *ibid*

Appeal also found the defendant did not materially contribute to the infringement. It provided neither site (unlike Napster or Aimster) nor facilities for the infringement all it did was to make “a software” available.

Direct financial benefits to the defendant, the right and ability to control or supervise, and direct infringements are proofs to establish vicarious copyright infringement.<sup>46</sup> The court said that unlike Napster which has a central file server and could control access to it, neither Grokster nor StreamCast could search for infringing files or block the access to users. The defendants did not operate as a super-node, and the whole process of locating and connecting to a super-node occurred independently of them. It is erroneous to assume that the defendants have the ability to supervise or control the users. With this ruling we need to ask whether there could be liability for authorisation of copyright infringement as regards “decentralised” P2P network generally if a defendant proves that he cannot prevent infringement.

The Supreme Court, rather than addressing the issues of contributory and vicarious liability which were at the heart of the lower courts’ decisions, propounded a new theory of copyright inducement of liability:

“[O]ne 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, going beyond mere distribution with knowledge of third part action, is liable for the resulting acts of infringement by third parties using the device regardless of device’s lawful uses.”<sup>47</sup>

To determine the infringer’s unlawful objective, it must be ascertained whether the alleged infringer: (a) showed itself to be aiming to satisfy a known source of demand of copyright infringement; (b) attempted to develop filtering tools or other mechanisms to diminish the infringing activity using the software or technology in question; (c) makes money by selling advertising space, by directing ads to the screens of computers employing their software.<sup>48</sup>

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<sup>46</sup> *ibid* at 1164

<sup>47</sup> *MGM Studios v Grokster Ltd* 125 S. Ct 2764 (2005) at 2770, 2780

<sup>48</sup> *ibid* 2781-2780

The apex court found that the defendants showed intent to foster infringing uses by targeting markets comprising former Napster users and the defendant failed to make any attempt to control end users' activities but engaged in active selling of spaces.<sup>49</sup>

On the issue of actual or constructive knowledge, Souter J clarified that the doctrine in *Sony* would not immunise someone who is seen to actively induce copyright infringement. According to him “*Sony* did not displace other theories of secondary liability and *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 court to ignore evidence of intent if there is such evidence, and that the case was never meant to foreclose rules of fault-based liability derived from common law.”<sup>50</sup> The Supreme Court unanimously overruled the judgement of the lower courts and remanded back to the District Court for disposition.

Is this the decision actually sought by the plaintiffs? Samuelson argued the actual winners are Grokster and other peer to peer developers because the court refuses to reverse or eliminate the safe harbour for technologies capable of substantial infringement non-infringing uses which was the actual aim of MGM.<sup>51</sup> She concluded that ‘the copyright industry legal toolkit to challenge developers of p2p file-sharing technologies is only marginally greater than before the Supreme Court decided the case.’<sup>52</sup> Therefore the decision of the Supreme Court did not actually translate into victory for digital copyright owners because it has actually deprived them what might be the strongest arguments in shutting p2p and other disruptive technology developers out of business.

#### **4.0 FILE SHARING AND AUTHORISATION OF COPYRIGHT INFRINGEMENT IN AUSTRALIA**

For a party to be liable of authorising an infringement of copyright there must have first occurred, “an act of infringement of the kind purportedly authorised.”<sup>53</sup> Ricketson explained that unless a person who performed an infringing act did it as an agent of the defendant, the

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<sup>49</sup> *ibid*

<sup>50</sup> *ibid* 2778-2779

<sup>51</sup> Pamela Samuelson, “Legally Speaking: Did MGM Really Win the *Grokster* Case?” Available at <http://people.ischool.berkeley.edu/~pam/papers/CACM%20SCT%20decides%20MGM.pdf> accessed on 23 March 2014

<sup>52</sup> *ibid* at p 1

<sup>53</sup> Lahore J and Rothnie WA, Copyright and Designs ( Butterworth Lexis-Nexis online) at [34,095] <http://www.butterworthsonline.com>

defendant would not be liable.<sup>54</sup> Section 36(1A) of the Australian Copyright Act 1968 lists three factors upon which the liability of authorisation of infringement may be premised. The court must ask: (i) does the defendant have any power to control the infringement concerned; (ii) what is the nature of the relationship existing between the defendant and the direct infringer and (iii) has the defendant taken any reasonable steps to avoid the doing of the act, including whether the person complied with any relevant industry codes of practice?<sup>55</sup>

The case of *Moorhouse v University of New South Wales*<sup>56</sup> presents Australian courts position on balancing conflicting right of fair use and copyright ownership with dual use technologies. The plaintiffs had alleged that the defendant authorised massive infringement of copyrighted materials in which he has ownership outside the exemption of fair dealing for purposes of private study fair dealing and criticism. On 28 September 1973, Paul Brennan purposely copied some chapters from two books to gain evidence for the proceedings against University of NSW. The High Court asked the following questions (i) did Paul Brennan infringe the copyright of Mr. Moorhouse when he made those copies and (ii) if so, did the University authorise the act done by Mr. Brennan that infringed the respondents' copyright, namely, the making of the photocopies?

On the issues of authorisation, the court found the university liable on constructive knowledge of the act of infringement because if the University claimed that it did not know of infringements, there was ample evidence that it might have suspected it. Also, the University had failed to attach notices to the photocopy machines in a form prepared at the request of the Australian Vice-Chancellor's Committee. Placing of photocopier machines in the library without appropriate guidelines of terms of usage and adequate supervision is synonymous to invitation to copy. The notices placed in pursuance to s.49 of the Copyright Act by the university was applicable to photocopies made by and on behalf of the librarian and not to photocopies made by individuals for their own use. Absence of qualifying invitation might warrant indiscriminate copying by library users.<sup>57</sup>

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<sup>54</sup> Ricketson, S; *The Law of Intellectual Property: Copyright Designs and Intellectual Property* (Lawbook Co., looseleaf service p 182)

<sup>55</sup> ACA section 101(1A)

<sup>56</sup> [1976] RPC 157

<sup>57</sup> Margaret Jackson and Marita Shelly, "Black hats and white hats: Authorisation and Copyright Infringement in Australia and the United States" *I.J.L. & I.T.* (2006) 14(1), 28-46

This decision may be of limited application to liability of peer-to-peer file sharing technology providers. Much focus was on the compliance of the university with set of rules inviting users to make use of the machine. The caution which the American court emphasised on the dual-use technologies is absent. If the case applied to peer-to-peer file sharing the standard of supervision which the court places on providers might be too onerous. In a 'small' setting of the university, it is doubtful the level of supervision which a school can provide in monitoring materials being photocopied. The insufficiency of notices found by court is another strain. Factually, will hosting of billboards in a university library prevent illegal photocopying? The narrow approach in *Moorhouse* has largely influenced the peer-to-peer cases in the case below. What clearly follows is that activities which countenanced infringement either by omission or commission as in the American jurisdiction will be deemed as authorisation. This decision therefore shifts the balance in copyright too far in favour of the owner's rights and to the detriment of the proper use of copyrighted works for the good of the society as a whole.

### **Universal Music Australia Pty Ltd v Sharman License Holdings Ltd<sup>58</sup>**

Universal Studios and 30 copyrighted music owners sued Sharman Networks; the manufacturer of the software, KaZaA,<sup>59</sup> for authorising illegal downloads of its copyrighted songs in contrary to the Australian Copyright Act.

The applicants claimed that the respondent, by offering for download to members of the public in Australia and by developing and maintaining technical distribution systems authorised the copying of whole or substantial parts of their copyrighted digital musical recordings without licence. The respondent contended that users of Kazaa and Altnet used a graphical user interface (GUI) which allowed them access to peer-to-peer network known as FastTrack. And FastTrack is content neutral software. There was no power or ability to control the files that users made available to each other or the content which they searched for or the content from which they made choices of downloads. Thus they did not authorise the alleged infringement acts but only conferred on users of the software the ability to make

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<sup>58</sup> [2005] FCA 1242

<sup>59</sup> KaZaA is an internet peer-to-peer file sharing system which allowed users to exchange materials with one another irrespective of their location or distance to one another and whether or not the materials being exchanged are copyrighted.

available for download by other users any file in digital format.<sup>60</sup> In its decision, the court found no liability on the claims but consider whether Sharman and its cohort were actually responsible for the authorisation of infringement committed by users of their software.

Section 112E provides that a person who provides facilities for making or facilitating the making of a communication is not taken to have authorized any infringement of copyright in an audio-visual item merely because another person uses the facilities to infringe copyright. The court was of the opinion that the exemption created by section 112E would not be available to a person where for reasons other than mere provision of facilities, he or she may have authorised the infringement in question. Wilcox J examined the non-exhaustive factors laid down in section 101(1A) and tried to strike a balance between the rulings of the court in *Adelaide Corporation v Australasian Performing Right Association Limited*<sup>61</sup> and *Moorhouse v University of New South Wales*.<sup>62</sup> It had been held in the latter case that authorisation can be made good *only* where it is established that the person has sanctioned, approved or countenanced the infringement. He thus concluded that authorisation here should not be narrowly construed as “express or formal permission or sanction”<sup>63</sup> rather it entails “inactivity or indifference exhibited by commission or omission.”<sup>64</sup>

In holding Sharman Networks Ltd liable of authorisation of infringing activities of end users, the found that the respondent had gone beyond “something more” mere provision of facilities. There were series of positive conducts confirming authorisation (i) active promotion of its website as a file sharing facility and (ii) popularisation of unlawful file sharing by promoting the “Join the Revolution” movement. Furthermore, the respondents failed to install any sort of filtering devices despite their awareness of massive infringing acts.

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<sup>60</sup> The respondents like the defendants in *Grokster* highlighted the positive uses to which the software could be put. *There is a revolution underway which is changing the world of entertainment. It will effect how you discover, buy and share songs, movies, games and ideas. Peer-to-peer technology is driving the revolution and it could make life better for everyone. Lower prices, unlimited catalogs and more.*” See *Universal Music para 81*

<sup>61</sup> [1928] HCA 10; (1928) 40 CLR 481

<sup>62</sup> [1976] R.P.C. 151

<sup>63</sup> *Universal Music* *ibid* para 367

<sup>64</sup> *ibid*

## 5.0 GROKSTER AND SHARMAN COMPARED

### 5.1. Imposition of Liability

Decisions given by the US Supreme Court in *Grokster*'s case and the Australian Federal Court in *KaZaA* agree that actions taken by the vendors of peer-to-peer file-sharing software might justify the imposition of secondary copyright liability for copyright infringement. Though the facts are seemingly similar, they decisions are based on different factual merit and a different standard of liability. A direct infringement by the end-users is a common ground which all the cases recognise as a condition precedent for imposition of secondary liability. Before arriving at the liability of the producers, the cases conclude that there must be a primary infringement which is traceable to the software produced by the manufacturer. Mere production is not enough but there must be inducement or "something more."

In *Grokster*, the U.S Supreme Court formulated a new theory of copyright inducement liability against third parties who produce and distribute devices capable of both infringing and non-infringing uses. This new theory is meant to complement the doctrines of contributory copyright liability and vicarious copyright liability. What this decision however suggests is that tangible evidence of actions motivating the use of the software for copyright infringement must be adduced.

Though the Australian court directed its mind to other inducements actions, this only formed one of the several elements the court considered in arriving at its decision. The court has been largely influenced by section 101 and 101(A) of the Australian Copyright Act. Section 101 imposes secondary liability on any person who, not being the owner of the copyright and without the licence of the copyright owner, authorises another person to do in Australia an infringing act.<sup>65</sup> Section 101(1A) provides further that regards must be had to "(a) the extent (if any) of the person's power to prevent the doing of the act concerned; (b) the nature of any relationship existing between the person and the person who did the act concerned; (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice."<sup>66</sup> Also the court did not accept that section 112E on safe harbour as immunising against a liability

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<sup>65</sup> ACA 1968 s101(1)

<sup>66</sup> *Copyright Amendment (Digital Agenda) Act 2000 Amendments* from Act No. 63 of 2002



for authorisation. Section 112 has excluded from liability a provider whose facilities have been used to violate copyright.

It is submitted that the decision in Australian's *KaZaA* is narrow compared to US *Grokster*. The Australian decision imposes a duty of care to adopt standards and provide mechanisms for the prevention of copyright infringement on manufacturers and distributors of peer-to-peer file sharing software. This negligence-type rule holds providers of software liable for any failure to design any economically reasonable measures to prevent the harm of infringements.<sup>67</sup> Though the US Supreme Court settled for the theory of inducement, it does not mean the common law doctrine of secondary liability could not be shaped into negligence-type rule as did by the Australian federal court.<sup>68</sup> Apparently, the US court contemplated the side effects of secondary liability and such other factors like the fear that copyright owners might gain control over new and the budding technologies and the resultant effect of imposition of liability on manufacturers and distributors might have on non-infringing activities that rely on and use the same devices.<sup>69</sup>

By and large, *Grokster* protects distributors and manufacturers of peer-to-peer file-sharing software from secondary liability unless copyright owners discharge the burden of proof of inducement of copyright infringements engaged in. In *KaZaA* on the other hand, the duty of care standard has far reaching implications for providers of software. Is the *KaZaA* decision not over stretching the "neighbour test" and "reasonably foreseeable test" negligence doctrine of common law? What does this suggest to internet service providers who have no capabilities of taking reasonable step to prevent or control copyright infringements of peer-to-peer file sharing activity? A common conclusion of the court approach both the negligence rule and imposition of secondary liability save enforcement costs of suing a large number of end users who are engaging in primary infringement activity.<sup>70</sup>

*Grokster* did not discuss how contributory infringement and inducement of infringement liabilities might extend to joint venture parties. On the other hand the court in the *KaZaA* case adopted a wide approach and found liable other respondents who had real control or influence

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<sup>67</sup> Guy Pessach, "An International Comparative Perspective on Peer-to-Peer File Sharing and Third Part Liability in Copyright Law: Framing the Past, Present, and Next Generations' Question" *Vanderbilt Journal of Transnational Law* Vol. 40 (2007) 1 at 7

<sup>68</sup> *Supra* note 21 at 405

<sup>69</sup> See Breyer J concurring opinion in *MGM Studios Inc v. Grokster Ltd.*, 125 S. Ct 2764, 2792-96 (2004)

<sup>70</sup> Guy Pessach Note 67 at 8

over policy making in the development and operation of the KaZaA system. These fringe players (controlling corporate shareholders and dominant sole directors) were liable individually and joint tortfeasors pursuant to a common design<sup>71</sup> of having the knowledge of end users infringing activities because despite their powers they failed to implement preventive measures or control the acts. This liability will exclude employees without any real say or influence in companies' policy making.

## 5.2 Knowledge

Generally, knowledge is a condition precedent for proof of liability under contributory infringement doctrine and inducement of infringement doctrine in the US. It was held in some cases that actual knowledge of specific infringement is required where the product is capable of substantial non-infringement and constructive knowledge suffices where the product is not capable of such uses. Elsewhere, proof of constructive knowledge by the defendant discharges the burden. It is unfortunate that US Supreme Court failed to stipulate the required form of knowledge. This has led to further contradictory interpretations by the lower courts. In the re-hearing of the *Grokster* case, Wilson J was of the opinion that what the Supreme Court suggested was that liability may attach if all the defendant had is constructive knowledge of the infringement.<sup>72</sup> However in *Monotype Imaging, Inc et al v Bitstream Inc*,<sup>73</sup> the court was of the opinion that *Grokster* precluded constructive knowledge.

The Australian court places less emphasis on the type of knowledge required. The court is of the view that there may be authorisation without knowledge and yet mere knowledge will not be enough.<sup>74</sup> It follows that knowledge forms one of the factors which Australian court will put into consideration and its absence would not be detrimental to proof of authorisation due to the negligence-type rule and the provision of section 101(1A) of the Australian Copyright Act as amended by the Digital Agenda Act 2000.

## 5.3 Safe Harbour

The importance of safe harbour is to exclude genuine providers and users from liabilities. Its purpose is to strike a balance between innovation and competition on one hand and copyright

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<sup>71</sup> Sharman 2005 at para 489;

<sup>72</sup> Actual transcript cited in Jeffrey C.J. Lee, "The ongoing Design Duty in Universal Music Australia Pty Ltd v Sharman License Holdings Ltd: Casting the Scope of Copyright Infringement Even Wider" *Int J.L. & I.T* (2007) 275 at 292

<sup>73</sup> Civ. No. 03 C4349 (N.D. 111, July 12, 2005)

<sup>74</sup> Sharman para 370

owners' interest on the other hand. The court in *Sony* stipulates what constitutes a defence to contributory infringement and section 112E prescribes a safe harbour under the Australian Copyright Act. *Sony* has excluded from contributory liability producers of product capable of substantial non-infringing uses. According to the court no liability would lie on presumption of intent to cause infringement solely from design or contribution of a product capable of lawful use. The US Supreme Court complicated issues by failing to address or expatiate on some elements which were not resolved in *Aimster* and the Court of Appeals' decision in *Grokster*. For example the Supreme could have defined 'capable of substantial non-infringing uses' the point at which contribution could said to have occurred when we say substantial, is it on quality or quantity?

Unlike the court in *Grokster*, the Australian court's approach though wide seems clearer. The court puts manufacturer and providers under a strict liability similar to the old English authority in *Ryland v. Fletcher*.<sup>75</sup> According to Wilcox J section 112E does not confer *general* immunity against a finding of authorisation' when for other reasons, the alleged infringer may have taken to have authorised the primary infringement. Two things come to mind when considering the court's interpretation of s112E. First, the court must have adopted the "mischief rule of interpretation" to make sure that *Digital Amendment Act* responds to the purpose of its enactment; to combat technological threat to IPR regime. Second, a defendant must really prove that he fits within the exception to invoke the safe harbour provision. Therefore a defendant must establish that there is no authorisation in any form. On the contrary, the defendant had an actual knowledge that the predominant use of the software was for sharing of copyright material.<sup>76</sup>

Casting the scope of secondary infringement wider, the Australian court failed to really define what would the safe harbour be. It failed to outline circumstances under which circumstances under which technology distributor may seek fortress of section 112E when confronted with liability from misuse of their of their products. Has the Australian court not rendered the section 112E safe harbour provision useless? Will such an approach not stifle technological development and innovation when the essence of copyright is to develop science and arts? There is little contention that the Australian approach is strictly pro-copyright protection.

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<sup>75</sup> (1868) LR 3 HL 330

<sup>76</sup> para 186

## 6.0 PEER-TO-PEER FILE-SHARING IN CANADA – PURSUING THE INDIVIDUALS

The approach to liability of distributors of p2p software in Canada is pretty vague and most complex of all jurisdictions examined in this paper.<sup>77</sup> Canada is described as “a haven where technologically sophisticated international piracy organizations can operate with virtual impunity”<sup>78</sup> because it lacks controversial legislation like the American DCMA which expressly prohibits the breaking or the distribution of tools for breaking technology preventing piracy.

In the US and Australia, primary infringement by end-users set the ground for the secondary liability of the up-loaders and distributors of software. The Canadian copyright law allows making of a copy for personal use but fails to address the source of that copy. In the absence of specific legislation, the legality or otherwise of uploading will be in favour of end-users.

Section 80(1) of the Canadian Copyright Act excludes users from liability for downloading of musical works and sound recordings for private use purposes. If an end-user however copies a copyrighted work with the aim of selling or renting, distributing, communicating to the public by telecommunication or performing in the public according to s.80 (2) it shall no longer be deemed as private copying. The *Private Copying Decision*,<sup>79</sup> by the Canadian Copyright Board confirmed that private copying onto audio recording media by end-users is permissible but the liability of those uploading or providing software or operating networks or internet connection is not in issue.<sup>80</sup> It does not matter whether the source of the track is a borrowed CD or downloaded from the internet.<sup>81</sup> The Canadian Recording Industry Association (CRIA) alleged that some users infringed its copyright by illegally trading in music downloaded from the internet by means of KaZaA software. The Canadian Federal Court was invited in *BMG Canada Inc v John Doe*<sup>82</sup> to compel five Canadian ISPs to disclose the identity of these end-users. The court declared that “copyright law can be invoked by

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<sup>77</sup> International Intellectual Property Alliance Canada 2011Special 301 Report on Copyright Protection and Enforcement available at <http://www.iipa.com/rbc/2011/2011SPEC301CANADA.pdf> accessed 23 March 2014

<sup>78</sup> *ibid*

<sup>79</sup> Private Copying 2003-2004 (Copying for Private Use (2003) available at <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf> accessed on 27 March 2014

<sup>80</sup> *ibid* at p 19

<sup>81</sup> *ibid* at p 20

<sup>82</sup> See also *BMG Canada Inc v John Doe* [2004] FC 488

owners only to the extent explicitly set forth in the statute. A court cannot infer or provide right that are not provided for in the statute.”<sup>83</sup> Placing of a copy on a shared directory in a computer where that copy can be accessed via a P2P service does not amount to distribution.

On what might contribute authorisation, the court alluded to the Canadian Supreme Court’s decision in *CCH Canadian Ltd v Law Society of Upper Canada*<sup>84</sup> where it was held that “a person does not authorise infringement by authorising the mere use of equipment that could be used to infringe copyright.” The court was of the view that rule of authorisation must be limited in scope particularly attention must be paid to the relationship or degree of control which exist between alleged authoriser and the person who committed the copyright infringement. On the legality or otherwise of P2P, it was held that such a decision should be left for the future. This over-cautious approach perpetuates the legal vacuum and ambiguity surrounding the Canadian approach to P2P music file sharing.

The CCH decision suggests that authorisation in Canada would also require active participation by inducer as found in earlier examined cases; and the control which the distributor could exercise on users and their activities. It is also clear that a user for private purpose must not distribute but the way P2P works does not require any action from a user before a recipient could have access to his shared directory. Can liability be imposed on a private user for not blocking access to his shared directory? That is, liability based on omission to act.

Cases such as *Voltages Pictures LLC v. Jane Doe*<sup>85</sup> and *NGN Prima Productions Inc v Does*<sup>86</sup> suggest that copyright holders prefer to pursue human distributors instead of technology developers. So the Canadian court has not properly had the opportunity to examine the nature of P2P technology. The *Demonoid’s* owner shut down its system and later prevented access of downloaders with Canadian IP address.<sup>87</sup> There seems little doubt that this case may afford

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<sup>83</sup> *ibid* at 23

<sup>84</sup> [2004] SCR 339 at 38

<sup>85</sup> [2011] F.C.J. No. 1260 available at [https://cippic.ca/uploads/Voltage\\_v.\\_Does-2014FC161.pdf](https://cippic.ca/uploads/Voltage_v._Does-2014FC161.pdf) accessed on 20 March 2014

<sup>86</sup> Federal Court, Montreal Quebec November 19, 2012 available at <http://copyrighthenforcement.ca/wp-content/uploads/2012/11/NGN-Order-Montreal.pdf> accessed on 20 March 2014

<sup>87</sup> Nick Farrell “Demonoid p2p site returns from dead”

<http://www.theinquirer.net/inquirer/news/1002844/demoniod-p2p-site-returns-dead> accessed on 20 March 2014

the court the opportunity create or follow the concept of capable of substantial non infringing uses.

## **7.0 CONCLUSION**

This essay has retraced the interaction of P2P networks with copyright law. It establishes that a complex and interdependent relationship between copyright law and technology still exists. Copyright law provides an incentive for author to create new works and also gives the society the opportunity to have access to the information it needs. Peer-to-peer software revolutionises access and consumption of entertainment by snatching control of distribution away from the authors and creators. With the help of the court, copyright law is however expanding in determining the fate of technologies which are a tool which facilitates the dissemination of this information. Such expansion has been not a blanket or unbridled one as they are strictly regulated by the courts. The courts in the jurisdictions considered have used various factors among which are: the dual nature or the significance of non-infringing uses, absence or lack of intent in promoting infringement, the level of control on the use of technology, knowledge of infringement and the financial benefits to determine the extent of liability of technology owners. Comparing these decisions, it is obvious that finding search for middle grounds continue to remain blurry. The approaches in the US and Australia share some similarities while Canada offers something which is at the far end of the spectrum.

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