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## Metro-Goldwyn-Mayer v. Grokster: Unpredictability in Digital Copyright Law

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*Metro-Goldwyn-Mayer v. Grokster:*  
**Unpredictability in Digital Copyright Law**

*Kent Schoen*



## *Metro-Goldwyn-Mayer v. Grokster:*

# Unpredictability in Digital Copyright Law

By Kent Schoen

### I. INTRODUCTION

¶1 The law of copyright attempts to balance two contrary ideals, and it is prone to unpredictability. Additionally, it is a body of law which has a peculiar need for flexibility, because it must constantly adapt to new technologies. The judiciary has a very important role in shaping copyright law; its involvement provides flexibility when the legislative process is unable to keep up with technology.

¶2 Leading up to the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* (“*Grokster II*”),<sup>1</sup> the unpredictability of digital copyright law was at its apex. *Grokster II* provided the Court an avenue through which it could help stabilize the law. Unfortunately, the Court wasted this opportunity. Its decision is not practically applicable to copyright law in general. Furthermore, it does not remedy the unpredictability already present in digital copyright law.

¶3 Applying the Supreme Court's rationale to three new technologies that may be the subject of future litigation illustrates how *Grokster II* will yield ambiguous results in all but the narrowest applications. Analysis of the three technologies also illustrates that *Grokster II* does nothing to address the unpredictability in digital copyright jurisprudence. The discrepancies between *A & M Records, Inc. v. Napster, Inc.* (“*Napster*”),<sup>2</sup> *In re Aimster Copyright Litigation*, (“*Aimster*”),<sup>3</sup> and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, (“*Grokster I*”)<sup>4</sup> are not addressed by *Grokster II*. However, that is not to say that the decision will have no effect.

¶4 The Court's rationale may at least help clean up current technologies that carelessly advertise their intent to induce copyright infringement. *Grokster II*'s holding does limit any possibility that clearly advertised infringing activity will be allowed to continue.

¶5 However, this slight benefit may come at great expense. The Court's rationale could actually *encourage* intentional inducement by providing a guidepost for how to induce copyright infringement without legal ramification. This is because the *Grokster II* test does not examine actual intent at all, but rather examines carelessly advertised evidence of intent. By taking note of *Grokster II* and its progeny, potential facilitators with a mind to induce infringement will be able to observe what not to do. By arming

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<sup>1</sup> 125 S. Ct. 2764 (2005).

<sup>2</sup> 239 F.3d 1004 (9th Cir. 2001).

<sup>3</sup> 334 F.3d 643 (7th Cir. 2003).

<sup>4</sup> 380 F.3d 1154 (9th Cir. 2004), *rev'd* by 125 S. Ct. 2764.

technological innovators with knowledge of how to mask intent, the Court's rationale may actually promote the expansion of technologies intended to induce infringement.

¶16 Part II of this essay provides a background for this discussion, illustrating the unpredictability of digital copyright jurisprudence leading up to *Grokster II*, and focusing on the Court's rationale in *Grokster II*.

¶17 Part III applies the Court's rationale to three controversial technologies that may inspire future litigation, TiVo ToGo, MyTunes Redux, and LimeWire. This analysis demonstrates the problems with real-world application of the Supreme Court's rationale.

## II. BACKGROUND

¶18 The law of copyright depends on balancing two contrary interests – the interests of inventors who create original works and the interests of innovators who build upon and improve existing works.<sup>5</sup> This means that law makers must balance “the interests of authors and inventors in the control and exploitation of their writings and discoveries” with “society's competing interest in the free flow of ideas, information, and commerce.”<sup>6</sup> The public will benefit from both invention and innovation, and the public's interest is the *only* reason that copyright law exists.<sup>7</sup>

¶19 The Copyright Act of 1976<sup>8</sup> was an effort to make copyright law adaptable to the complex problems often encountered with new technologies.<sup>9</sup> Flexibility is very important for this body of law, because the balance between innovators' rights and the free flow of ideas is constantly in flux.<sup>10</sup> Shaping copyright law is a quintessentially legislative duty.<sup>11</sup> However, in order to promote adaptability, Congress effectively apportioned a part of this duty to the federal courts.<sup>12</sup>

¶10 By giving the courts this duty, the Copyright Act enables federal courts to help this law adapt to new technologies.<sup>13</sup> However, the courts can also hurt copyright law by

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<sup>5</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

<sup>6</sup> *Sony*, 464 U.S. at 429.

<sup>7</sup> In *Sony*, the Court explained the reasons behind copyright law by quoting Justice Stewart's opinion in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), where he opined that “The *sole interest* of the United States and the primary object” for granting copyright protection are “*the general benefits derived by the public* from the labors of authors.” *Sony*, 464 U.S. at 431-432 (emphasis added) (citations omitted).

<sup>8</sup> 17 U.S.C. § 106 (2000).

<sup>9</sup> See generally Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 397, 402-03 (2005).

<sup>10</sup> “The legislative history shows that Congress . . . realized that it was not in a position to anticipate the implications of social and technological changes yet to occur. Just as Congress was aware of the difficulty, ex ante, of specifying the application of copyright to technological developments, it was also aware of the unlikelihood that it would be able to respond ex post in a manner that was either timely or effective.” Sag, *supra* note 9, at 402.

<sup>11</sup> U.S. CONST. art 1, § 8, cl. 8.; *Sony*, 464 U.S. at 428. See Sag, *supra* note 9, at 402.

<sup>12</sup> This was basically a function of legislative reticence. “[W]here Congress knows that a specific policy provision would be initially difficult to draft, would be rapidly made obsolete by external changes, and would be difficult to rewrite in response to those changes, it may rationally (or expediently) choose to enact an incomplete policy, leaving it to the courts to add content to that standard by applying it to particular situations as they arise.” Sag, *supra* note 9, at 401-02.

<sup>13</sup> *Id.*

exacerbating the unpredictability inherent in copyright law. The incompatible circuit court decisions preceding *Grokster II* are a perfect example of the judiciary actually making copyright law less predictable.

### A. Constructing an Unpredictable Jurisprudence

¶11 In *Grokster II*, the Supreme Court analyzed computer programs that are very similar to the technologies discussed in three recent circuit court decisions, *Napster*,<sup>14</sup> *Aimster*,<sup>15</sup> and *Grokster I*.<sup>16</sup> Examining (a) the similarities between the programs discussed in these circuit court decisions and (b) the underlying rationale for the three decisions demonstrates that there was very little continuity in digital copyright jurisprudence prior to *Grokster II*.

¶12 The cases discussed in Part II revolve around four different peer-to-peer programs: Napster, Aimster, Morpheus, and Grokster. Each program is distinct from the others in some way or another, but they all share three important characteristics. Each program (1) facilitates sharing digital media through the internet<sup>17</sup> and (2) operates in a decentralized manner<sup>18</sup> (3) for profit.<sup>19</sup> These three shared qualities are the main reasons that peer-to-peer programs are so widely debated.

¶13 First, all four programs facilitate digital file sharing through the internet.<sup>20</sup> In short, this means that all of the digital media files stored on a peer-to-peer user's computer can be made available to all of the other users within a particular peer-to-peer network.<sup>21</sup> These networks enable users to share both public works and copyrighted works quickly and easily within large populations.<sup>22</sup>

¶14 Second, all four peer-to-peer programs operate in a decentralized manner,<sup>23</sup> which makes it more difficult to track and control infringement.<sup>24</sup> One of the great technological benefits of peer-to-peer software is the ability to search and transfer huge amounts of data without storing everything in a central location.<sup>25</sup> Instead of storing everything on a central server, peer-to-peer programs connect the users' computers to form one huge network, allowing users to download files directly from one another.<sup>26</sup>

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<sup>14</sup> *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>15</sup> *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

<sup>16</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004) (*Grokster I*), *rev'd*, 125 S. Ct. 2764 (2005) (*Grokster II*).

<sup>17</sup> *Napster*, 239 F.3d at 1011; *Aimster*, 334 F.3d at 645; *Grokster I*, 380 F.3d at 1158.

<sup>18</sup> *Napster*, 239 F.3d at 1011; *Aimster*, 334 F.3d at 646-47; *Grokster I*, 380 F.3d at 1158.

<sup>19</sup> *Napster*, 239 F.3d at 1023; *Aimster*, 334 F.3d, at 651-52; *Grokster I*, 380 F.3d at 1164.

<sup>20</sup> *Napster*, 239 F.3d at 1011; *Aimster*, 334 F.3d at 645; *Grokster I*, 380 F.3d at 1158.

<sup>21</sup> *Grokster II*, 125 S. Ct. at 2770.

<sup>22</sup> *Id.*

<sup>23</sup> *Napster*, 239 F.3d at 1011; *Aimster*, 334 F.3d at 646-47; *Grokster I*, 380 F.3d at 1158.

<sup>24</sup> *Grokster II*, 125 S. Ct. at 2770.

<sup>25</sup> Peer-to-peer technology differs in this way from normal internet usage, which requires a person to search for and obtain information directly from a central server. *Grokster I*, 380 F.3d at 1158.

<sup>26</sup> The particular search methods and other details are often unique to each program, but this general description remains accurate. Additionally, it should be noted that peer-to-peer networks have been employed in many different ways. The benefits offered by peer-to-peer programs in terms of cost, security, and efficiency have not only been taken advantage of by private persons, but also by universities, libraries, corporations and government agencies. *Grokster II*, 125 S. Ct. at 2770.

The content available on a peer-to-peer network is dictated by each individual user,<sup>27</sup> making it very “difficult to control the content of files available . . . and the behavior of users.”<sup>28</sup>

¶15 Third, the peer-to-peer programs discussed in Part II operate for profit.<sup>29</sup> Each program either charges a fee to use its service, or sells advertising space on its search interface. The profits increase when traffic increases on the networks.<sup>30</sup> The decentralized sharing capabilities frustrate most efforts to control copyright infringement, and the fact that they are operated for profit logically encourages suspicion that this frustration is precisely the intent.

¶16 The number of persons sharing files on peer-to-peer programs and the resulting volume of music and video downloads are “staggering,”<sup>31</sup> and this has led to an abundance of litigation involving these programs.

¶17 These four very similar peer-to-peer file sharing services are the subjects of three major federal circuit court decisions: *Napster*, *Aimster*, and *Grokster I*. Two of these cases reach the same conclusion on contributory liability, and the circuit courts employed two very different lines of reasoning in the cases. Inexplicably, the two cases using similar reasoning *were not* the two cases which reached the same conclusion. These three decisions are irreconcilable, and left digital copyright jurisprudence fractured and unpredictable.

¶18 The first two cases, *Napster* and *Aimster*, found peer-to-peer services liable for copyright infringement, but they used different reasoning. In *Napster*, the Ninth Circuit determined that the defendant was liable for contributory copyright infringement, because the defendant had knowledge of actual copyright infringement through its network<sup>32</sup> and materially contributed to the infringement.<sup>33</sup>

¶19 Two years after *Napster*, the *Aimster* court found another defendant liable for contributory infringement, but specifically disagreed with the Ninth Circuit's suggestion

<sup>27</sup> *Grokster II*, 125 S. Ct. at 2770.

<sup>28</sup> *Id.*

<sup>29</sup> *Napster*, 239 F.3d at 1023; *Aimster*, 334 F.3d at 651-52; *Grokster I*, 380 F.3d at 1164.

<sup>30</sup> More users means more money. If the service sells advertising space, then the space becomes more valuable if more users are viewing the advertisements. Similarly, more traffic often means more users, which increases the profit margin of the fee-based services. *Grokster II*, 125 S. Ct. at 2781-82.

<sup>31</sup> *Id.* at 2772.

<sup>32</sup> The Ninth Circuit agreed with the district court's determination of the defendant's knowledge: 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 . . . informed Napster of more than 12,000 infringing files, some of which are still available. 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.”

*Napster*, 239 F.3d at 1020 n.5 (emphasis added)(quoting *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 918-19 (N.D. Cal. 2000))(citation omitted).

<sup>33</sup> Napster materially contributed to the infringement because it provided “the site and facilities for direct infringement.” *Napster*, 239 F.3d at 1019-22 (citing *Fonovisa, Inc. v. Cherry Auction, Inc.* 76 F.3d 259, 264 (9th Cir. 1996)).

that “actual knowledge of specific infringing uses is a sufficient condition for deeming a facilitator a contributory infringer.”<sup>34</sup> Instead, the Seventh Circuit found the defendant liable because he failed to produce evidence that Aimster facilitated any actual and substantial non-infringing use.<sup>35</sup> In other words, the Seventh Circuit decided that even if the defendant was aware that its service was being used for infringement, it could escape liability if demonstrated how its service provided non-infringing use.

¶20 The Ninth Circuit tackled this issue once more in *Grokster I*. The court applied the same reasoning that it did previously in *Napster*, examining the defendants' knowledge and material contribution.<sup>36</sup> However, the court found no liability for contributory infringement, because it did not find that the defendant had the requisite level of knowledge,<sup>37</sup> and it did not find that the defendant materially contributed to the infringing activity.<sup>38</sup> The court argued that programming nuances justified perceived discrepancies between *Grokster I* and its earlier decision in *Napster*.<sup>39</sup>

¶21 The differences between *Napster*, *Aimster*, and *Grokster I* may find attenuated justifications based on the theory that design nuances slightly distinguish the programs at issue in each case. However, this theory is impossible to justify in practice, because even allowing for programming nuances, all three programs are very similar. Each program facilitates digital media sharing in a decentralized manner for profit. The circuit decisions represent *three completely different evaluations for three very similar technologies*.

¶22 The *Grokster* case provided the Supreme Court with a perfect opportunity to review these decisions and produce a coherent solution to the circuit courts' incompatible holdings. Unfortunately, the Court did not take advantage of this opportunity.

### B. *The Supreme Court's Solution: Grokster II*

¶23 The *Grokster* decisions revolved around two peer-to-peer services, called Grokster and Morpheus. The Court found liability because the defendants intended to facilitate and encourage direct infringement.<sup>40</sup> Instead of applying one of the lower courts' contributory infringement analyses, the Court used a new test. While the lower courts focused on examining whether defendants had actual knowledge of infringement or could

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<sup>34</sup> *Aimster*, 334 F.3d at 649.

<sup>35</sup> *Id.* at 652.

<sup>36</sup> *Grokster I*, 380 F.3d at 1160.

<sup>37</sup> Citing the Supreme Court's decision in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the district court found that since defendants' technologies were capable of significant noninfringing use, the plaintiffs needed to demonstrate that defendants had “reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement.” *Grokster I*, 380 F.3d at 1160-61.

<sup>38</sup> *Id.* at 1163-64.

<sup>39</sup> The Ninth Circuit justified apparent discrepancies between this decision and its previous decision in *Napster* by pointing out peculiarities in the two technologies at issue, stating that “[i]n the context of this case, the software design is of great import.” *Grokster I*, 380 F.3d at 1163. Specifically, *Napster's* technology allowed the defendant to retain some control, while *Grokster* could have shut down their entire operation and their users could have continued sharing files without them. *See Grokster I*, 380 F.3d at 1163.

<sup>40</sup> *Grokster II*, 125 S. Ct. at 2770.

demonstrate substantial non-infringing use, the Court focused its analysis on the defendants' intent.<sup>41</sup> In doing so, the Court expressly adopted the inducement rule, derived from the common law and from modern patent law, as applicable to copyright law.<sup>42</sup> According to the common law, "a copyright or patent defendant who not only expected, but *invoked* infringing use by advertisement was liable for infringement."<sup>43</sup> Similarly, modern patent law embraces the idea that greater responsibility should be imposed on defendants who *intend* their harmful conduct.<sup>44</sup>

¶24 Applying the inducement rule to digital copyright law, the Court held 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 . . . is liable for the resulting acts of infringement by third parties."<sup>45</sup> The Court considered four pieces of evidence to reach this conclusion. First, defendants made express statements of intent to induce copyright infringement. Second, defendants advertised that they intended to replace a known source of infringement – namely Napster. Third, neither defendant attempted to filter or reduce infringing use. Fourth, the Court viewed defendants' business models as evidence bolstering defendants' unlawful intent.

¶25 First, both defendants expressly stated their intent to induce copyright infringement in a variety of ways.<sup>46</sup> The defendant owner of Morpheus, Streamcast Networks, Inc. ("Streamcast"), demonstrated its intent to promote infringement by "internal communications and advertising designs aimed at Napster users."<sup>47</sup> The Court found the explicit intent of defendant Grokster, Inc. ("Grokster") was "sparser but revealing."<sup>48</sup> This "revealing" evidence of Grokster's explicit intent is the manner in which Grokster attempted to gain former Napster users as clients, and it is discussed below.<sup>49</sup>

¶26 Second, both defendants promoted their programs as a replacement for Napster, a known source for copyright infringement.<sup>50</sup> The Court determined that the name Grokster is an apparent derivative of Napster, and also considered the fact that Grokster

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<sup>41</sup> *Id.* at 2770.

<sup>42</sup> Adoption of patent law principles towards the law of copyrights is not a new concept. In *Sony*, the Court essentially adopted the staple article of commerce doctrine, borrowed from patent law. According to the Court, the principle was perfect for the law of copyright, because it left "breathing room" for both "innovation and a vigorous commerce." *Grokster II*, 125 S. Ct. at 2777-78; *Sony*, 464 U.S. at 442. The Court decided that the inducement rule is similarly sensible for copyright law. *Id.* at 2780.

<sup>43</sup> *Grokster II*, 125 S. Ct. at 2779, quoting *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911), (emphasis added) (internal quotations omitted).

<sup>44</sup> *Id.* at 2780.

<sup>45</sup> *Id.*

<sup>46</sup> *Grokster II*, 125 S. Ct. at 2780-81.

<sup>47</sup> *Id.* at 2781. Specifically, the Court weighed internal emails and memos that included statements of the company's intent. *Id.* One stated that Streamcast's "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 2773. Additionally, the information designed for potential advertisers demonstrated how Morpheus would be able to capture former Napster users, and it included statements such as, "When the lights go off at Napster. . . where did the users go?" *Id.* While it was not proved that the advertising materials were ever sent to potential advertisers, these materials were used to demonstrate Streamcasts's intent. *Id.* at 2773, 2781.

<sup>48</sup> *Id.* at 2773.

<sup>49</sup> *Id.* at 2781.

<sup>50</sup> *Id.*



made efforts to redirect internet searches for “Napster” to its own website.<sup>51</sup> The choice of name and redirection of those in search of Napster to its own website were such clear efforts to draw Napster's client base that the two pieces of evidence were also viewed by the Court as *explicit* demonstrations of intent to facilitate unlawful copying.<sup>52</sup> The two technologies functioned very similarly to Napster, which was also considered as evidence that they were intended to replace Napster.<sup>53</sup> Both defendants also created and distributed a preliminary program that was compatible with Napster and designed to leverage Napster's users towards their own programs, and this was a major piece of evidence weighed by the Court.<sup>54</sup>

¶27 Third, neither defendant attempted to limit infringing use on its network.<sup>55</sup> Grokster never took any steps to block infringing users.<sup>56</sup> Streamcast not only “rejected another company's offer of help to monitor infringement,” it also attempted to frustrate any monitoring by outside parties by “block[ing] the Internet Protocol addresses of entities it believed were trying to engage in such monitoring on its networks.”<sup>57</sup> The evidence that neither defendant attempted to limit infringing use, standing alone, would not have been sufficient to prove inducement, but it did “underscore Grokster's and Streamcast's intentional facilitation of their users' infringement.”<sup>58</sup>

¶28 Fourth, both defendants operated under business models that bolstered the idea that inducement was intentional.<sup>59</sup> The defendants make money from advertisements on their services, and the advertising dollars go up proportionally to the traffic on their services.<sup>60</sup> Additionally, high-volume use is synonymous with infringing use.<sup>61</sup> The Court viewed the fact that defendants make more money from infringing use as important evidence of inducement. While not sufficient to prove the case against the defendants, their business models strengthened the other evidence of inducement.<sup>62</sup>

¶29 Comprehending the four factors of the inducement test is necessary, because interpretation of these factors will dictate how future courts apply *Grokster II* in digital copyright disputes. Further application of these four factors reveals that this decision will be of little use to future courts.

¶30 The *Grokster II* inducement test will result in ambiguity in all but the narrowest situations. This is demonstrated by applying the Court's inducement test to new and existing technologies. Three such analyses are the focus of Part III.

¶31 Part III demonstrates that the inducement test cannot be applied generally to new technologies, nor can it be applied generally to existing technologies. It further shows that the Court's rationale will not find application in cases involving technologies that are

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<sup>51</sup> *Id.*

<sup>52</sup> *Grokster II*, 125 S. Ct. at 2781.

<sup>53</sup> *Id.*

<sup>54</sup> Streamcasts program was called “OpenNap,” and Grokster's was called “Swaptor.” *Id.* at 2772-74, 81.

<sup>55</sup> *Id.* at 2781.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 2774.

<sup>58</sup> *Grokster II*, 125 S. Ct. at 2781.

<sup>59</sup> *Id.* at 2781-82.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2782.

<sup>62</sup> *Id.* at 2781-82.

unique from those at issue in the case, or even in cases involving substantially similar technologies. In fact, the inducement test will not even be generally applicable to cases involving technologies that are nearly identical to those at issue in *Grokster II*.

### III. TiVo ToGo, MYTUNES REDUX, AND LIMEWIRE

¶32 This part is divided into three sections, and each section contains a detailed application of the Court's inducement test to an entity which offers a controversial technology that could be the subject of litigation in the near future. Each section gives a brief overview of each technology, and then discusses the inducement test's four factors: (1) evidence of expressed intent to induce copyright infringement,<sup>63</sup> (2) evidence that the technology was produced and marketed in order to replace a known source of copyright infringement,<sup>64</sup> (3) evidence on whether the entity controlling the technology attempts to filter or reduce copyright infringement,<sup>65</sup> and (4) the controlling entity's business model.<sup>66</sup> The four factors vary in applicability to each technology, but the overall test as applied to the technologies yields one common result: uncertainty.

¶33 Section A discusses a technology called TiVo ToGo, and it illustrates that the inducement test is difficult to apply to new technologies because it does not help to assess the threshold question of whether underlying infringement actually occurred. Additionally, Section A demonstrates that the test cannot be applied generally to new technologies, and it cannot be applied broadly to technologies that are dissimilar to the programs discussed in *Grokster II*.

¶34 Section B discusses a technology called MyTunes Redux (“MyTunes”), and it illustrates that the Court's test cannot be broadly applied to existing technologies or to technologies with substantial similarity to those at issue in *Grokster II*.

¶35 Section C analyzes a peer-to-peer technology called LimeWire, and it demonstrates that the inducement test is not broadly applicable to technologies with capabilities that are identical to the programs at issue in *Grokster II*.

¶36 *Grokster II* is not the much needed solution to the current unpredictability of digital copyright jurisprudence. Applying the Supreme Court's rationale to new and existing technologies demonstrates that the inducement test is only useful towards the most blatant and careless inducement.

#### A. *TiVo ToGo*

¶37 TiVo ToGo is a new technology that may force reexamination of many important issues in the law of copyright. This innovation brings up important questions which are

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<sup>63</sup> *Grokster II*, 125 S. Ct. at 2780. For the purposes of this paper, it is assumed that there are no emails or inter-office memos indicating an expressed intent to induce infringement. This assumption is employed for two reasons. First, it helps narrow the scope of the analysis to demonstrate that *Grokster II* can not be applied to non-blatant inducement. Second, common sense seems to dictate that the presence of this type of information after the *Grokster II* decision will be extremely rare.

<sup>64</sup> *Grokster II*, 125 S. Ct. at 2781.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 2781-82.

similar to those decided by the Supreme Court in *Sony Corp. of America v. Universal Studios, Inc.*,<sup>67</sup> but those questions are complicated by issues unique to the digital age.

¶38 Applying the Supreme Court's inducement test to TiVo ToGo is difficult, because the test does not help assess whether an underlying use is an infringing use. As a result, the test yields more questions than answers. TiVo ToGo illustrates that *Grokster II* is not broadly applicable to new technologies, and is difficult to apply to technologies different from Morpheus or Grokster.

### 1. What is TiVo ToGo, and How Does It Work?

¶39 TiVo enables its users to employ digital technology to record television shows and view them at a later time.<sup>68</sup> TiVo works with any television service, and offers many features to attract users. In addition to recording television shows for later viewing, TiVo users can pause and rewind live television, automatically record certain television shows for an entire season, listen to digital music and view digital photography.<sup>69</sup> The newest TiVo feature, called TiVo ToGo, enables users to connect TiVo digital recorders to their personal computers.<sup>70</sup> This gives users the ability to watch television programs away from their televisions, with either a laptop or another windows-enabled mobile device. TiVo ToGo also enables users to burn television shows on to digital videodiscs (DVDs).<sup>71</sup>

¶40 TiVo is in the process of perfecting another new feature that will be included with TiVo ToGo. This new feature which will enable users to download television shows directly to other mobile devices, such as an Apple iPod Video or a Sony PSP (Playstation Portable).<sup>72</sup> This new proposed capability of TiVo ToGo complicates some very important copyright issues. Complications resulting from this new technology may require reexamination of copyright issues that have been settled for some time.

### 2. The Inducement Test and TiVo ToGo

¶41 The inducement test can not be directly applied to TiVo ToGo, because the test assumes underlying infringing use. This assumption can not be made with TiVo ToGo, because any future litigation that stems from this technology will revolve entirely around whether the underlying use was infringement. Before a plaintiff can rely on *Grokster II*, it will first have to prove that TiVo facilitates actual infringement, and that TiVo was aware that its service facilitated infringement. The former is attenuated at best, making the latter impossible to prove.

¶42 Arguing that TiVo ToGo facilitates infringement will be difficult, because it requires jumping the substantial hurdle provided by *Sony*. In *Sony*, the Supreme Court

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<sup>67</sup> 464 U.S. 417 (1984).

<sup>68</sup> *What is TiVo?*, <http://www.tivo.com/1.0.asp> (last visited Jan. 8, 2006).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Nov. 11, 2005 TiVo Press Release*, [http://www.tivo.com/cms\\_static/press\\_66.html](http://www.tivo.com/cms_static/press_66.html) (last visited Jan. 8, 2006).

determined that privately recording television shows for later viewing, or “time-shifting,” was not an infringing activity.<sup>73</sup> *Sony's* holding is not easily distinguished from this situation, because TiVo essentially offers the same service that was at issue in that case. Both TiVo ToGo and Sony's Betamax are technologies that convert television programming to a new media, so that users can watch television shows at a later date.<sup>74</sup>

¶43 One way to distinguish the two situations is the existence of two different markets. In *Sony*, the concept of home video recording was very new, and therefore the market was also new. That is not true today. The best way to illustrate the different markets is to focus on one of TiVo ToGo's new capabilities – the ability to convert live television into a format that can be viewed on an Apple iPod.<sup>75</sup> Apple's online store sells television shows in iPod format for \$1.99 each.<sup>76</sup> Apple only sells “select NBC Universal, Sci Fi Channel, USA Network, Disney and ABC television shows,” that have been licensed from the networks.<sup>77</sup> It is possible that a court could rule against TiVo because its new technology pushes the *Sony* safe-harbor for time-shifting beyond its intended scope, because television networks are now able to sell their programming in the same format that TiVo ToGo enables users to acquire.

¶44 However, the cornerstone of the inducement test is intent. Even if this argument or another like it finds success, it will be extremely difficult to prove that TiVo *knows* that it is facilitating infringement. TiVo's knowledge that its technology facilitates copyright infringement is a necessary precursor to asserting the inducement test to prove that TiVo was intended to induce infringement.

¶45 Since a question remains as to whether TiVo ToGo facilitates infringement, the inducement test is not a proper measure for this technology. The inducement worked in *Grokster II*, because Morpheus and Grokster were simply improved versions of a technology that has existed for years, and the underlying infringement facilitated by peer-to-peer networks was already recognized. Unless a new technology is simply an improved version of some other technology that has been in existence for a time, then underlying questions of infringement will often not be addressed before it is the subject of litigation.

¶46 Attempting to apply the Court's inducement test to TiVo ToGo illustrates how difficult it is to apply the test to new technologies.

¶47 Section B discusses an existing technology that is more similar to those at issue in *Grokster II*, MyTunes Redux. Direct application of the Court's test is easier with MyTunes than TiVo ToGo, but the end result is similarly ambiguous.

### B. MyTunes Redux

¶48 *MyTunes Redux* is similar to the technologies at issue in *Grokster II*, but is also unique in many ways. Like Morpheus and Grokster, MyTunes can be downloaded on the

<sup>73</sup> *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 456 (1984).

<sup>74</sup> *What is Tivo?*, *supra* note 68; *Sony*, 464 U.S. at 456.

<sup>75</sup> An iPod is a portable digital media player sold by Apple, Inc.

<sup>76</sup> *Apple - iTunes – iTunes Online Video Store*, <http://www.apple.com/itunes/videos> (last visited Jan. 8, 2006).

<sup>77</sup> *Id.*

internet free of charge, and it enables users to share copyrighted and non-copyrighted digital media. The biggest difference between MyTunes and the other peer-to-peer file sharing programs is that it was not created to operate on a huge open source network. Instead, MyTunes operates in conjunction with another program, called iTunes.

¶49 MyTunes helps to demonstrate the subjectivity of the inducement test. Direct application of the inducement test's four factors is appropriate to MyTunes, because it is clear that the technology facilitates copyright infringement. However, applying the test's four factors to MyTunes demonstrates that the Supreme Court's rationale will yield inconsistent results even when it is applied to existing technologies that are very similar to those at issue in *Grokster II*.

### 1. What is MyTunes Redux, and How Does It Work?

¶50 In order to understand how MyTunes operates, one must first be familiar with iTunes, a service copyrighted, distributed, and promoted by Apple Computers, Inc. ("Apple").<sup>78</sup> Apple's iTunes includes many connected services, including a multipurpose website that sells many types of digital media, including radio feeds, audiobooks, music and video.<sup>79</sup> The online store provides access to over 3,000 video files and over 2 million music files, and also offers a free downloadable jukebox, which is the service that is most directly tied to MyTunes.<sup>80</sup>

¶51 The iTunes jukebox has many capabilities. Jukebox users can import their own music from compact disc in order to listen to and store music conveniently on their personal computers. Additionally, users can form networks, within which each user can access another user's files. Within these small networks, a user can listen to another user's music, *but he cannot download* files from another user. Finally, the iTunes jukebox provides access to the iTunes website and online store, where a user can pay to legally download copyrighted digital files. The iTunes jukebox organizes and stores both copyrighted and non-copyrighted digital media.

¶52 Since users cannot directly transfer files to each other through iTunes, it can *not* be considered a file sharing program. That is where MyTunes steps in. MyTunes allows users to download any file that is made available on an iTunes jukebox network. MyTunes can be downloaded online free of charge. Since it piggybacks on iTunes, MyTunes enables users to share files that are both under copyright and those that are not. Apart from the iTunes jukebox, and the networks created by iTunes users, MyTunes has no function.

#### *i) Express Intent to Induce Copyright Infringement*

¶53 It is unclear whether evidence about MyTunes demonstrates an express intent to induce copyright infringement. The Court did not use limiting language in its express intent analysis or give any indication that an express intent determination was limited to certain types of evidence. Therefore, future courts will also be justified in weighing other factors, such as the functional capabilities of a program and a program's use of screen

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<sup>78</sup> *Apple – iTunes - iTunes Overview*, <http://www.apple.com/itunes/overview> (last visited Jan. 8, 2006).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

shots. These factors are not convincing evidence of an express intent to induce infringement. However, the capabilities of MyTunes and the screen shot used, if viewed *along with the capabilities of iTunes*, form a coherent argument for express intent.

¶54 The functional capabilities of a peer-to-peer program are a piece of evidence that should be examined to determine express intent. The capabilities of MyTunes on its own do not demonstrate any intent to induce infringement, because MyTunes has no function as a stand-alone program. MyTunes on its own cannot facilitate any copyright infringement.

¶55 However, one of the primary functions of iTunes is storing and buying copyrighted media, and it is clear that MyTunes facilitates infringement when used in conjunction with the iTunes jukebox. Undoubtedly, most of the files available through the iTunes networks are copyrighted, and MyTunes enables users to share those files. However, the iTunes jukebox also stores and plays non-copyrighted works. Mere evidence that MyTunes can facilitate infringement is not sufficient evidence of express intent to induce infringement.<sup>81</sup>

¶56 Use of a screen shot<sup>82</sup> showing copyrighted works in order to demonstrate how to share files can indicate intent if it can be viewed as an “invitation to infringement.”<sup>83</sup> The screen shot employed on the MyTunes download site is not enough evidence to find an express intent to induce, because it does not display copyrighted works. The screen shot pictures the results of a MyTunes search for “illegal music.”<sup>84</sup> Under the screen shot is the following sentence: “Notice a search for illegal music has no results.”<sup>85</sup> This text explaining the screen shot could be interpreted as a sarcastic indication of the author's views on file sharing.<sup>86</sup>

¶57 Since MyTunes is capable of facilitating copyright infringement when used in conjunction with iTunes, it is possible that this interpretation of the screen shot and accompanying text together could be determined to be an “invitation to infringement.”<sup>87</sup> Even though each part weighed on its own is insufficient, it is possible that the sum is sufficient to support a finding of express intent.

¶58 This argument may be too attenuated to stand up to the Supreme Court's strict standard for express intent,<sup>88</sup> but it illustrates the subjective nature of the first factor of the inducement test.

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<sup>81</sup> See *Grokster II*, 125 S. Ct. at 2779.

<sup>82</sup> A screen shot is “a reproduction of the current display on a computer screen, saved as a graphics file,” which is often used in tutorials to demonstrate how a computer-based product works. Screen Shot – Definitions from Dictionary.com, <http://dictionary.reference.com/search?q=screen%20shot> (last visited Jan. 8, 2005).

<sup>83</sup> *Aimster*, 334 F.3d at 651.

<sup>84</sup> *Download myTunes Redux*, <http://www.cowpimp.com> (last visited Jan. 6, 2006).

<sup>85</sup> *Id.*

<sup>86</sup> If the creator believes that there is no such thing as “illegal music,” then it is more likely that the creator intended to facilitate and encourage sharing copyrighted files. *Id.*

<sup>87</sup> *Aimster*, 334 F.3d at 651.

<sup>88</sup> See *Grokster II*, 125 S. Ct. at 2780-82.

ii) *Replacement of a Known Source of Demand for Infringement*

¶159 There is no evidence available that MyTunes Redux is intended to replace a known source of demand for copyright infringement. While an argument can be made that the program is intended to be a *new* source of demand for infringement, it cannot be convincingly argued that MyTunes is intended to replace an existing source.

iii) *Attempts to Filter or Reduce Infringing Activity*

¶160 There is no evidence that the entity controlling MyTunes has taken any steps to reduce infringing activity. However, the entity in charge of MyTunes retains absolutely no control over MyTunes users, so filtering is not an option. The only practical way that infringing activity could be reduced is if the program was no longer made available. This is an extreme measure, and it would only reduce the number of *new* MyTunes users. Stopping distribution of MyTunes would have no affect on existing users.

¶161 Lack of action to reduce infringing activity will not even support an argument of express intent in this case.

iv) *Business Model*

¶162 There is very little evidence of a business model for MyTunes at all, let alone a business model that contributes to a finding of inducement. The MyTunes interface contains no advertisements. Additionally, the free software download is not accompanied by any other software from other companies, adware, or anything else that even remotely gives the impression that MyTunes is a business venture.

## 2. What Does MyTunes Redux Indicate About *Grokster II*?

¶163 The MyTunes Redux analysis is useful to determine how the Supreme Court's rationale applies to slightly different technologies. This analysis indicates that inconsistency will result if future courts attempt to apply the Supreme Court's rationale to technologies that are not directly in line with either *Grokster* or *Morpheus*. Even though MyTunes is very similar to the technologies at issue in *Grokster II*, the Court's test still raises more questions than it answers.

¶164 Additionally, simple application of the Supreme Court's inducement test seems to ignore common sense. While the evidence examined by the inducement test will not concretely establish MyTunes' intent to induce infringement, common sense points to the conclusion that there is very little purpose for MyTunes aside from copyright infringement. The inducement test was intended to distinguish between technologies that are intended to induce infringing activity and those developed without bad intent. However, in practice, the Court's test distinguishes only between technologies that foolishly *advertise* their intent and those that do not. Actual intent is not assessed, and this narrows the usefulness of *Grokster II*.

¶165 Analyzing MyTunes reveals that *Grokster II* may play only the largely useless role of bringing to light already obvious evidence of wrongful intent.

### C. *Limewire*

¶166 *LimeWire* is nearly identical to the technologies at issue in *Grokster II*. Similar to both Morpheus and Grokster, LimeWire enables its users to share digital media files, and it facilitates both infringing and non-infringing uses. If this controversy comes to fruition, it will revolve around LimeWire's similarities to the technologies at issue in *Grokster II*.

¶167 Application of the four prongs of the inducement test to LimeWire yields ambiguous results. First, it is unclear whether there is sufficient evidence to find express intent to induce infringement. Second, it is unclear whether a court would interpret LimeWire as a service meant to replace a known source of infringement. The third and fourth factors further complicate the issue. The fact that LimeWire does not attempt to filter or reduce infringement supports inducement, but is balanced by the fact that LimeWire is not operated for profit, which goes against inducement.

¶168 This ambiguity provides a damning critique of *Grokster II*, because it is an instance where the Court's rationale results in ambiguity *even when applied to a nearly identical technology*.

#### 1. What is LimeWire, and How Does It Work?

¶169 LimeWire is a peer-to-peer file-sharing program, operating on a global network called "Gnutella."<sup>89</sup> LimeWire's stated purpose is to promote the Gnutella Network, and it was founded on firm beliefs "in open standards, open networks, and that any global networking protocol must have an open source piece at its core if it is to remain uncorrupted."<sup>90</sup> In order to understand how LimeWire operates, it is necessary to understand the Gnutella Network. The description of Gnutella on LimeWire's website is instructive:

Gnutella is not a web site. It doesn't contain web sites. The content that is available on the Gnutella Network does not come from web sites or the publishers of Gnutella-compatible software; it comes from other users running Gnutella-compatible software on their own computers. Gnutella is a networking protocol, which defines a manner in which computers can speak directly to one another in a completely decentralized fashion. Software publishers such as Lime Wire LLC have written and distributed programs which are compatible with the Gnutella protocol, and which therefore allow users to participate in the Gnutella Network.<sup>91</sup>

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<sup>89</sup> See *Limewire – Open Source P2P File Sharing*, <http://www.limewire.org> (last visited Jan. 8, 2006).

<sup>90</sup> *Id.*

<sup>91</sup> LimeWire Open Source Development, <http://www.limewire.com/english/content/development.shtml> (last visited Jan. 8, 2006).



¶70 Gnutella technology is not owned by anyone,<sup>92</sup> is supported by multiple peer-to-peer services, and was used by Morpheus prior to *Grokster II*.<sup>93</sup> LimeWire operates on this global network, and can be downloaded free of charge on the internet.<sup>94</sup>

i) *Express Intent to Induce Copyright Infringement*

¶71 It will be very difficult for a future court to find express intent to induce infringement in LimeWire's case. Since it is assumed that there are no blatantly revealing internal memos or emails, the express intent analysis is focused on LimeWire's use of screen shots and its functional capabilities.<sup>95</sup> Neither satisfies a finding of express intent.

¶72 Although screen shots can be indicative of intent,<sup>96</sup> LimeWire's use of screen shots does not provide evidence of express intent to induce copyright infringement.<sup>97</sup> The screen shot employed by LimeWire displays a search for "speeches," and the works displayed on the screen shot are copies of famous old speeches, which are typically not copyrighted works.<sup>98</sup> LimeWire's use of screen shots does not indicate a clear intent to induce copyright infringement.

¶73 The capabilities of a technology are another piece of evidence that should be examined to determine express intent, but none of LimeWire's capabilities sufficiently indicate an express intent to induce infringement. While a reasonable court may find LimeWire's capabilities to be some evidence of inducement, this evidence of inducement is not on the same level as an express party admission specifically stating intent to induce copyright infringement, such as an email or memo.<sup>99</sup> The capabilities of LimeWire are not sufficient to hold up to the stringent standard defined in *Grokster II* for express intent.<sup>100</sup>

¶74 The evidence weighed above does not indicate an express intent to induce copyright infringement. However, express intent is also affected by the second factor, intent to replace a known source of infringement.<sup>101</sup> The second branch of the inducement test provides the strongest argument against LimeWire, but it also remains highly ambiguous.

ii) *Replacement of a Known Source of Demand for Infringement*

¶75 It is not clear whether LimeWire is intended to replace a known source of demand for copyright infringement.<sup>102</sup> LimeWire was in existence prior to the Supreme Court's

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<sup>92</sup> See *id.*

<sup>93</sup> See *Grokster II*, 125 S. Ct. at 2771.

<sup>94</sup> See LimeWire Download Website, <http://www.limewire.com/english/content/download.shtml> (last visited Jan. 8, 2006).

<sup>95</sup> Much of the evidence weighed in *Grokster II* is unavailable in the present dilemma because LimeWire does not utilize advertisements within its service. See LimeWire Advertisement Website, <http://www.limewire.com/english/content/advertise.shtml> (last visited Jan. 8, 2006).

<sup>96</sup> *Aimster*, 334 F.3d at 652.

<sup>97</sup> See LimeWire Search Screen Shot, <http://www.limewire.com/img/40screenshot.png> (last visited Jan. 8, 2006).

<sup>98</sup> See *id.*

<sup>99</sup> See *Grokster II*, 125 S. Ct. at 2780-82.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.* at 2781.

<sup>102</sup> See *id.*

*Grokster II* decision.<sup>103</sup> As a result, arguments can be made that LimeWire was intended at different points in time to replace both Napster and Morpheus. The crux of both arguments rests on LimeWire's operation on the Gnutella Network – the same network that Morpheus operated on.<sup>104</sup> A recent search indicated that there were active LimeWire users on the Gnutella Network numbering over 2.2 million.<sup>105</sup> This bolsters LimeWire's assertion that its users are a major contribution to the network, and that it is “the flagship client on the Gnutella network.”<sup>106</sup>

¶76 The argument that LimeWire is a replacement for Napster is supported by the fact that LimeWire is essentially the same service as Morpheus, which *was* an intended replacement for a known source of infringement.<sup>107</sup> However, there is not evidence of LimeWire's express intent to induce, while Streamcast's intent through Morpheus was certain.<sup>108</sup> As a result, arguing that LimeWire is intended to replace Napster is essentially arguing *guilt by association*.

¶77 One of the reasons that the Supreme Court decided to adopt patent law's inducement rule in the first place is that greater responsibility should be placed on defendants who intend to do harm.<sup>109</sup> Guilt by association absent explicit evidence of inducement directly opposes that stated purpose, and actually ignores the central element of *Grokster II* – intent.

¶78 The argument that LimeWire is a replacement for Morpheus – now a known source of demand for copyright infringement – is more subtle, and also more convincing. This argument also centers around LimeWire's operation on the Gnutella Network and its similarities to Morpheus. However, it depends on the strained assumption that the Supreme Court's *Grokster II* decision put LimeWire on notice that continued operation on the Gnutella Network constituted inducement.

¶79 It is possible that LimeWire's continued operation could be viewed by a reasonable court as intentional inducement. The name “LimeWire” is not in any way a derivative of Morpheus. Additionally, there is no evidence that LimeWire developed or distributed a program specifically to leverage Morpheus users.<sup>110</sup> However, these pieces of evidence are rendered superfluous by the facts that both technologies are well known, they are already compatible with one another, and they already operate on the *same network*.

¶80 The publicity of the *Grokster* decisions indicates that LimeWire and other Gnutella-based peer-to-peer services probably received the benefits of Streamcast's intentional inducement without suffering any of the detriments. Streamcast leveraged users to Morpheus, and in the process brought them to the Gnutella Network. Even

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<sup>103</sup> The district court decision that was overruled in *Grokster II* mentions LimeWire. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1041 (C.D. Cal. 2003).

<sup>104</sup> See *Limewire – Open Source P2P File Sharing*, *supra* note 89.

<sup>105</sup> The number of active online hosts appears in the upper right-hand corner of LimeWire's official website. See *id.*

<sup>106</sup> *Id.*

<sup>107</sup> See *Grokster II*, 125 S. Ct. at 2781.

<sup>108</sup> *Id.* at 2780-82.

<sup>109</sup> *Id.* at 2780.

<sup>110</sup> See *Grokster II*, 125 S. Ct. at 2781.

though Streamcast took the fall, the users were still aware of the Gnutella network, and this probably brought more users to LimeWire.

¶81 However, even assuming that LimeWire stood idly by and allowed Streamcast to increase its user base by inducing copyright infringement does not necessarily establish that LimeWire *intended* this to occur. The evidence concerning LimeWire's intent to replace a known source of infringement can support either side of the argument.

iii) *Attempts to Filter or Reduce Infringing Activity*

¶82 There is no evidence that LimeWire filters infringing users or attempts to reduce infringing activity. This is compatible with LimeWire's stated goal to promote "open networks."<sup>111</sup> However, the Supreme Court specifically made note of the fact that this factor alone was insufficient to find inducement,<sup>112</sup> and the above two factors are very ambiguous. If application of the first two factors yielded concrete evidence of inducement, then evidence that LimeWire did not attempt to filter or reduce infringing activity could affect the argument. However, this factor means very little without further evidence.

iv) *Business Model*

¶83 LimeWire's business model does not promote the argument that the service is offered to induce its users to infringe copyrights. LimeWire is a free service, and does not sell space for advertisements on its service.<sup>113</sup> Since it is under no pressure to attract advertisers, LimeWire does not have the same incentive as did Grokster and Morpheus for high-volume, infringing use.

¶84 LimeWire does offer an upgrade for a fee, but this does not make its business model the same as that of Grokster or Morpheus. The upgrade is called LimeWire PRO, and it is available for a fee of \$18.88.<sup>114</sup> However, LimeWire's website states that the fee is not for profit, but rather an effort to "help cover costs" associated with promoting the Gnutella Network.<sup>115</sup> LimeWire PRO is not marketed as a tool for access to more copyrighted works; instead, the upgrade offers faster downloads, connection to more sources, and "better search results."<sup>116</sup> There is no evidence that these improvements will promote infringing use any more than they promote non-infringing use.

¶85 LimeWire PRO is roughly comparable to the upgraded version of Morpheus, Morpheus Ultra, which is available for \$19.95 and also offers "better search results" and "faster downloads."<sup>117</sup> However, Morpheus Ultra is also attractive because, unlike the free version, it includes no advertisements.<sup>118</sup> Neither LimeWire's free version nor LimeWire PRO includes advertisements of any kind.<sup>119</sup>

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<sup>111</sup> Limewire – Open Source P2P File Sharing, *supra* note 89.

<sup>112</sup> See *Grokster II*, 125 S. Ct. at 2769.

<sup>113</sup> See LimeWire Advertisement Website, *supra* note 97.

<sup>114</sup> See LimeWire Download Website, *supra* note 94.

<sup>115</sup> LimeWire Open Source Development, *supra* note 91.

<sup>116</sup> LimeWire Download Website, *supra* note 94.

<sup>117</sup> Morpheus Free P2P File Sharing Program Download Website, <http://morpheus.com/download.asp> (last visited Jan. 7, 2006).

<sup>118</sup> See *id.*

<sup>119</sup> LimeWire, About: Why Should I Use Limewire?.

¶86 LimeWire claims that it does not operate for profit, and if this fact proves true, then its business model does not support inducement. Even if LimeWire truly did operate for profit, the questions of high as opposed to low volume use and infringing as opposed to non-infringing use would not matter, since LimeWire receives no financial benefit either way.<sup>120</sup>

## 2. What Does LimeWire Indicate About *Grokster II*?

¶87 Applying the inducement test to LimeWire provides an example of how the Court's rationale applies to a technology with nearly identical capabilities to those of Morpheus and Grokster. Even though LimeWire is nearly identical to the technologies at issue in *Grokster II*, the inducement test still results in ambiguity. Although there is some evidence that LimeWire intended to induce copyright infringement, assessing the weight of the evidence will require a future court to answer at least four very controversial questions. Reasonable courts will disagree on all four.

¶88 First, reasonable courts will differ as to whether LimeWire was intended to replace a known source of infringement. Second, those courts that did find the requisite intent will then differ as to whether the finding was strong enough to support a finding of inducement. Third, reasonable courts will differ as to the effect that LimeWire's business model will have within the inducement test; some may determine that the not-for-profit model weakens evidence of inducement. Since both LimeWire and Morpheus operate on the same network and in the same capacity, the only tangible difference is carelessly advertised intent. Therefore, in addition to the questions above, future courts will also have to make a fourth determination: Can a difference in blatant intent between two identical services like LimeWire and Morpheus justify imposing liability on one and not on the other?

¶89 This analysis also demonstrates that the Court's inducement test could actually protect the actors that the Court intended to hold liable, because it protects intentional inducers that are cautious. Factual evidence and common sense may lead to opposite conclusions in this dilemma. Common sense forces one to acknowledge that LimeWire's developers are not naïve, and that by promoting the Gnutella Network through LimeWire they probably intended to facilitate copyright infringement.<sup>121</sup> *Grokster II*, while effective against blatant, unapologetic, and sloppy infringers, is rendered completely useless by a defendant who has the sense to cover his tracks. Even peer-to-peer services that sell advertising space and clearly promote their services for profit will probably escape liability under a strict application of *Grokster II* as long as they are cautious.<sup>122</sup>

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<http://www.limewire.com/english/content/company.shtml> (last visited Jan. 8, 2006).

<sup>120</sup> This does not necessarily mean that LimeWire does not have an incentive to attract more users. It certainly intends to boost the Gnutella Network, and this may be such an incentive. See LimeWire Open Source Development, *supra* note 91.

<sup>121</sup> This does not contend with the assertion that LimeWire is intended to build and develop Gnutella. History has demonstrated that copyright infringement is the inescapable byproduct of open-source networking. Whether or not infringement is the ultimate goal, it certainly seems to be part of the equation.

<sup>122</sup> Since the original draft of this note, the Recording Industry Association of America, citing to the Grokster II decision, filed suit against LimeWire. See Alex Veiga, *Music Industry Sues LimeWire*, BREITBART.COM, Aug. 4, 2006, <http://www.breitbart.com/news/2006/08/04/D8J9PFS00.html>; Bill

## IV. CONCLUSION

¶90 Digital technology is a thriving market, and it seems to take little more than a few hours for the latest digital craze to become old hat. This begs the question: How long can the arguments contained herein remain relevant? The arguments mentioned here do not rest on the newness of the technologies discussed above.

¶91 For example, consider the fact that MyTunes Redux is already largely obsolete. MyTunes was created to operate with versions 4.1 to 4.7 of iTunes.<sup>123</sup> Since the original draft of this paper, Apple has released several updated versions of its iTunes jukebox,<sup>124</sup> and MyTunes Redux cannot operate with the updated versions of iTunes. Even though MyTunes Redux is now a largely irrelevant technology, the MyTunes analysis is still relevant for two reasons. First, iTunes is not the only software that can be updated. For every new version of iTunes, we can probably expect a program with the same capabilities as MyTunes to be released that will work with the new versions of iTunes.<sup>125</sup> Second, the fact that a particular technology is rendered useless does not address the infringement that it has already facilitated. If MyTunes is interpreted as a peer-to-peer program created to induce copyright infringement, then the future lack of inducement will only mitigate future damages. It will have no effect on the damage already done.

¶92 Even when all three of the technologies discussed above have gone the way of the 8-track, and when the technologies themselves are largely irrelevant to the discussion, the analysis of each will remain useful. The take-away from each analysis is that the *Grokster II* inducement test is extremely difficult to apply to new and existing technologies.

¶93 Applying *Grokster II* to controversial technologies demonstrates that the Supreme Court's inducement test has extremely narrow application to future litigation. The courts were given a role in shaping copyright law to promote flexibility to new technologies, but the inducement test will rarely apply to new technologies, because it does not assess whether underlying use constitutes infringement.

¶94 Additionally, the test will not broadly apply to any particular type of technology – even peer-to-peer programming. Therefore, the inducement test will only yield predictable results when applied to narrow situations where underlying use is recognized as infringing use, and where the defendant has carelessly advertised his intent to induce copyright infringement.

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Rosenblatt, *RIAA Sues LimeWire*, DRM WATCH, Aug. 10, 2006, <http://www.drmwatch.com/legal/article.php/3625736>; Ed Oswald, *RIAA Sues LimeWire Over Piracy*, BETANEWS, Aug. 4, 2006, [http://www.betanews.com/article/RIAA\\_Sues\\_LimeWire\\_Over\\_Piracy/1154722015](http://www.betanews.com/article/RIAA_Sues_LimeWire_Over_Piracy/1154722015). As a result, the concerns mentioned in this analysis will be addressed in the very near future.

<sup>123</sup> See *Download myTunes Redux*, *supra* note 84.

<sup>124</sup> See *Apple – iTunes - Download iTunes*, <http://www.apple.com/itunes/download> (last visited Jan. 8, 2006).

<sup>125</sup> Since the original draft of this essay was completed, just such a technology emerged. The program is called ourTunes. Similar to MyTunes Redux, it is available online free of cost, and it piggybacks on iTunes. Like the MyTunes website, the download site shows no evidence of a for-profit organization. OurTunes works in conjunction with iTunes version 6.0. *OurTunes*, <http://ourtunes.sourceforge.net> (last visited Apr. 2, 2006).

¶95 *Grokster II* leaves a holding so narrow that it cannot remedy the current unpredictability in digital copyright jurisprudence. Even worse, there is a good chance that *Grokster II* will actually *encourage* intentional inducement by providing a guidepost for how to induce copyright infringement without legal ramification. Furthermore, as the three analyses above demonstrate, if future courts are tempted to apply *Grokster II* in situations outside of its narrow holding, there will be no way to predict the rulings.

¶96 Assuming that courts realize that *Grokster II* is a bankrupt test – a mere roadmap to infringement with little or no effect on actual infringement – we are essentially left gazing at the same confusing jurisprudential landscape that we had seen prior to *Grokster II*. We are left with irreconcilable precedents and various tests that courts have yet to figure out.

¶97 Liberty is ill-served by “a jurisprudence of doubt.”<sup>126</sup> Unfortunately, *Grokster II*'s legacy is assured to be a digital copyright jurisprudence haunted by doubt.

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<sup>126</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992).