

APPLYING GROKSTER TO STREAMING PEER-TO-PEER BROADCASTERS AND LIVE SPORTING EVENTS

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Introduction	195
I. A Brief History of Contributory Copyright Liability	197
A. Sony and the Betamax Defense	197
B. Centralized v. Decentralized Servers	198
C. The Inducement theory	200
II. Does the DMCA apply to peer-to-peer networks?	202
III. Does Streaming Live Sports Change Everything?	204
IV. Can Streaming Peer-to-Peer Broadcasters claim protection as “Information Location Tools”?	207
V. Conclusion	210

INTRODUCTION

“Law and order exist for the purpose of establishing justice
and when they fail in this purpose they become the
dangerously structured dams that block the flow of social
progress.” -Martin Luther King Jr.¹

Every day consumers of satellite and cable television cancel
subscriptions in favor of free or cheaper online alternatives.² This
push towards cheaper broadcasting has negatively affected the
entertainment industry.³ A consumer’s ability to watch live sports
once hinged upon a satellite or cable television subscription;
however, the internet has removed this barrier. Websites such as

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¹ Letter from a Birmingham Jail, Martin Luther King Jr. (Apr. 16, 1963).

² Peter Svensson, Cable and Satellite TV Lose Record Number of Subscribers,
HUFFINGTON POST, (Aug. 10, 2011), http://www.huffingtonpost.com/2011/08/10/cable-tv-satellite-loses-subscribers_n_923034.html.

³ *Id.*

Justin.tv host streaming peer-to-peer (SOP) broadcasting for users, which allows users to connect with one another and view streams of live images. The problem is that many of these streams display copyrighted live television broadcasts of sports, movies, award shows, and news.

Normally, copyright holders ask courts to serve injunctions against copyright infringers; however, a service provider such as Justin.tv receives protection from copyright liability under the Digital Millennium Copyright Act (DMCA). Absent actual knowledge of infringing activity, service providers are not liable for the actions of their users.⁴ Similarly, holding a service provider liable within one section of the DMCA does not preclude protection within the other sections.⁵ With the increasing popularity of SOP broadcasting, questions arise as to whether this new technology can receive protection from contributory copyright liability under the DMCA.

The courts recently grappled with this liability issue when Ultimate Fighting Championship's (UFC) parent company, Zuffa, sued Justin.tv for claims of copyright and patent infringement.⁶ Zuffa contends that Justin.tv allows its users to stream live UFC fights and that it has failed to take adequate measures to remove such streams.⁷ In their complaint, Zuffa stated that Justin.tv allows users to "broadcast through Justin.tv or create his or her own channel through which to broadcast."⁸

While the district court has not ruled on the claims of copyright liability for SOP broadcasters, this note will argue that the court should hold SOP broadcasters liable for contributory copyright infringement.⁹ The courts must also define when a technology's lawful uses outweigh its unlawful uses. The ability to distinguish a lawful, abused technology from an unlawful one will promote innovation, while protecting the interests of copyright holders. In contrast, copyright holders must also recognize that as

⁴ See *Viacom Int'l Inc. v. Youtube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2012).

⁵ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

⁶ Complaint, *Zuffa L.L.C. v. Justin.tv, Inc.*, No. 11cv00114, 2011 WL 2333140, (D.Nev. Apr. 8, 2011).

⁷ *Id.* at 5.

⁸ *Id.* at 3.

⁹ This note assumes two things. First, that jurisdiction is proper within the United States. Secondly, that a hosting user streams a live copyright sporting event.

technology changes, new challenges will arise in protecting their valid interests. The courts must aim to strike a balance between promoting innovation, at the expense of others, and protecting the monetary interests of the copyright holder.

Part I discusses the history of contributory copyright liability and the conflicting views espoused by courts in the United States. Part II examines how the DMCA theoretically applies to streaming SOP broadcasters and peer-to-peer (P2P) networks. Part III inquires whether a SOP broadcaster, streaming live sports, should be classified as a transitory digital network communication or a decentralized P2P network under the DMCA. Part IV analyzes whether DMCA § 512(d) protects streaming SOP broadcasters. Finally, Part V argues that the courts must define the Betamax defense and provides two suggestions for the courts to implement in contributory copyright infringement cases.

I. A BRIEF HISTORY OF CONTRIBUTORY COPYRIGHT LIABILITY

The cases below highlight the difference between a centralized server and a decentralized server, and how this difference is crucial in assigning contributory copyright infringement liability. A centralized server is liable for contributory copyright infringement, while a decentralized server is not. This distinction is important because holding a SOP broadcaster liable is akin to holding a decentralized server liable for others' acts of direct infringement. SOP broadcasters share the same decentralized structure as Grokster; however, the DMCA protects websites like Justin.tv from liability. Further, the cases below demonstrate the evolution of the contributory copyright liability, and how the inducement theory may chill innovation rather than foster it.

A. Sony and the Betamax Defense

Sony Corp of America developed a "time-shifting" technology called the Betamax. Copyright holders of television programs feared that Betamax users recorded copyrighted television broadcasts at home so they sued Sony in 1984 in order to protect

their interests.¹⁰ The Court considered whether Betamax was “capable of commercially significant non-infringing uses.”¹¹ The Supreme Court held that Sony was not liable for contributory copyright infringement because there was not an ongoing relationship between the contributor, Sony, and direct infringer, Betamax customers, at the time of infringing conduct.¹² Users of the Sony Betamax tapped television programs outside of Sony’s control. The Court reasoned that to hold Sony liable for its customers’ infringement when it had no control over what consumers did was improper. Further, the Court articulated its position that it should not bar access to a “staple article of commerce,” even though the technology enabled infringing activities.¹³ The Court applied the patent law defense of contributory liability to copyright law. Called the Betamax defense, this defense bars contributory copyright liability for “a staple article or commodity of commerce” with “substantial non-infringing uses.”¹⁴

B. Centralized v. Decentralized Servers

Shawn Fanning created Napster Inc. (“Napster”) in 1999, bringing the P2P network mainstream.¹⁵ Napster’s software connected users by using a centralized server.¹⁶ Users uploaded a file to the Napster database, which in turn allowed other users to download the file from the central server. With over sixty million contributing users, the Napster database hosted almost any desired file.¹⁷ Amid projected losses in the billions of dollars, the recording industry sued Napster for copyright infringement.¹⁸ The

¹⁰ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

¹¹ *Id.* at 442.

¹² *Id.* at 438.

¹³ *See id.* at 440.

¹⁴ *Id.* at 440-42.

¹⁵ Charlie Rose, The Brain Behind Napster, CBSNEWS.COM (Feb. 11, 2009), http://www.cbsnews.com/2100-500164_162-239876.html.

¹⁶ *Id.*

¹⁷ David Goldman, Music’s Lost Decade: Sales Cut in Half, CNNMONEY (Feb. 3, 2010), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/.

¹⁸ Courtney Macavinta, Recording Industry Sues Music Start-Up, Cites Black Market, CNET (Dec. 7, 1999), <http://news.cnet.com/2100-1023-234092.html>.

Ninth Circuit Court of Appeals affirmed the lower court's decision, forcing Napster to shut down.¹⁹

Two software distributors, Grokster Ltd. ("Grokster") and StreamCast Network Inc. filled the void left by Napster when they created the Grokster software. Learning from Napster's mistakes, the two companies created a decentralized P2P file sharing system. Users connected and traded files with each other, eliminating the need for a centralized server.²⁰ The recording industry again sued, but this time the district court held in favor of the software distributors.²¹ On appeal, the Ninth Circuit Court of Appeals affirmed the lower court's decision in favor of the software distributors.²² Both courts relied heavily on the *Sony* Supreme Court opinion.²³ The Ninth Circuit applied the Betamax defense to this case, finding that Grokster was not contributory liable for copyright infringement. Grokster's software utilized a decentralized server that connects users to one another to exchange files. Napster software, on the other hand, utilized a centralized server that connected users to files. While both software servers are P2P networks, a decentralized network avoids liability because of its passive server structure. Akin to *Sony*, the Grokster server had no control over its users' conduct when the infringing conduct occurred.

The Ninth Circuit explained, "[i]f the product at issue is capable of substantial or commercially significant non-infringing uses, then the copyright owner must demonstrate that the defendant had reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement."²⁴ Even though only ten percent of files exchanged between the users of Grokster's software were non-infringing, the court found this satisfied the "substantial or commercially significant non-

¹⁹ *A&M Records*, 239 F.3d 1004 (9th Cir. 2001).

²⁰ John Borland, Suit Hits Popular Post-Napster Network, CNET (Oct. 3, 2001), <http://news.cnet.com/2100-1023-273855.html>.

²¹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003). [hereinafter *Grokster I*.]

²² *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004). [hereinafter *Grokster II*.]

²³ *Sony*, 464 U.S. 417 (1984).

²⁴ *Grokster II*, 380 F.3d at 1161.

infringing use” requirement.²⁵ Because of this, the plaintiff had to show that the defendant both had “reasonable knowledge” of specific infringement and failed to act on that knowledge to prevent infringement. To determine whether Grokster failed to act on “reasonable knowledge,” the court focused on when it received notice of the infringing activity.²⁶ The court determined that Grokster received knowledge only after a user submitted copyright infringing material, and it could do nothing until after the infringing conduct occurred.²⁷ The court reasoned that even if the software were shut down, users could still exchange files with one another.²⁸ Therefore, finding Grokster liable for contributory copyright infringement was improper. The court also found that, even though the company received profits from advertising, the imposition of vicarious liability was improper.²⁹ Grokster never stated it would control users or their conduct. Furthermore, plaintiffs failed to provide direct evidence to suggest such control existed.³⁰ Grokster’s passiveness led the Ninth Circuit to find the software company free from contributory copyright liability.

C. The Inducement theory

Before the Supreme Court decision in *Grokster*, two different knowledge requirements existed for finding contributory copyright liability. The Ninth Circuit’s “technology friendly” approach holds a software distributor liable for contributory infringement if it had reasonable knowledge of specific infringement.³¹ The Ninth

²⁵ *Grokster I*, 259 F. Supp. 2d at 1035; *Grokster II*, 380 F.3d at 1160 (“The Copyright Owners allege that over 90% of the files exchanged through use of the ‘peer-to-peer’ file-sharing software offered by the Software Distributors [defendants] involves copyrighted material . . .”).

²⁶ *Grokster II*, 380 F.3d at 1162 (“[T]he copyright owners were required to establish that the Software Distributors had ‘specific knowledge of infringement at a time at which they contributed to the infringement, and failed to act upon that information.’”) (alteration in original) (quoting *Grokster I*, 259 F. Supp.2d at 1030).

²⁷ *Id.*

²⁸ *Id.* at 1165.

²⁹ *Id.* at 1164.

³⁰ *Id.* at 1165.

³¹ *Grokster I*, 259 F. Supp. 2d 1029, 1038 (C.D. Cal. 2003) (“The question, however, is whether actual knowledge of specific infringement accrues at a time when either [d]efendant materially contributes to the alleged infringement, and can therefore do something about it.”).

Circuit also stated that this knowledge does not exist with respect to decentralized P2P architecture.

On the other hand, the Seventh Circuit's "copyright" friendly test weighs the pros and cons of a technology against the detriment of the copyright infringement.³²

The Supreme Court certified *Grokster* for review. Finding that the Ninth Circuit incorrectly applied *Sony*, the Court decided the case using the inducement theory.³³ The Court stated that the *Sony* opinion does not preclude imputing culpable intent if evidence is available to show fault-based liability.³⁴ The inducement theory finds a third party liable for contributory copyright infringement if it promotes the use of its tool to infringe copyright "as shown by clear expression or other affirmative steps."³⁵ Grokster's software clearly induced copyright infringement, and documentation showed that actual infringement occurred.³⁶ The Court primarily discussed the intent to bring about infringement. Grokster actively induced known copyright infringers from Napster to join its network.³⁷ Several emails among Grokster's high-ranking officers also showed that if copyrighted material were available for download, higher revenues would ensue from increased user traffic.³⁸ Grokster provided guides instructing users how to upload infringing material and failed to take preventative steps to block or remove infringing material.³⁹ The Court found sufficient evidence to prove intent and thus held Grokster liable for copyright infringement.

³² *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) ("If the only effect of a service challenged as contributory infringement is to enable copyrights to be infringed, the magnitude of the resulting loss, even whether there is a net loss, becomes irrelevant to liability.").

³³ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005). ("[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, is liable for the resulting acts of infringement by third parties.").

³⁴ *Id.*

³⁵ *Id.* at 936.

³⁶ *Id.* at 939 ("[C]ompany showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users.").

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

To differentiate this case from *Sony*, the Court stated that the issue is whether there is a claim of protection when there is actual intent and affirmative steps are taken to encourage copyright infringement.⁴⁰ *Sony*, dealt with the narrower issue of whether there is “a claim of liability based solely on distributing a product with alternative lawful and unlawful uses, with knowledge that some users would follow the unlawful course.”⁴¹ Sony never took affirmative steps encouraging users to use Betamax as a copyright infringement tool nor did it try to profit from unlawful taping.

II. DOES THE DMCA APPLY TO PEER-TO-PEER NETWORKS?

The Supreme Court sidestepped some lingering questions by using the intent-based inducement theory to find contributory infringement. Technology is ever changing, and new ways to infringe upon copyrights exist. The emergence of SOP broadcasting brings to the forefront the questions the Supreme Court failed to address in the *Grokster* opinion.

SOP broadcasts occur easily. With nothing more than software and an image, anyone is able to stream live video onto the internet. Users wishing to broadcast live images create an account on a SOP broadcaster’s website and download the required software. A stream goes live at the push of a button, and anything in front of the camera appears on the stream. Users wishing to view live streams do not always have to download software; some websites allow users to connect directly to the “host” user.⁴² In this situation, the website acts as a search engine that indexes user-generated content allowing viewers to specifically search for a stream or browse freely.

The three major providers of SOP broadcasting- Justin.tv, Livestream, and Ustream - all try to comply with DMCA.⁴³ The DMCA criminalizes circumventing protection on any form of copyrighted media and increases the penalties for providing

⁴⁰ *Id.* at 941.

⁴¹ *Id.*

⁴² Complaint, Zuffa L.L.C. v. Justin.tv, Inc., No. 11cv00114, 2011 WL 2333140, *3 (D.Nev. Apr. 8, 2011) (“[E]nables its members to ‘broadcast’ through Justin.tv or create his or her own channel through which to broadcast.”).

⁴³ 17 U.S.C. § 501 (2006).

copyrighted media on the internet. The “safe harbor” clause within the DMCA bars liability for service provided in copyright infringement cases. In turn, the 17 U.S.C. § 512(a) safe harbor should intrinsically apply to SOP broadcasters.

One must first examine the DMCA safe harbor statute to determine if streaming SOP broadcasters meet the “service providers” requirement set forth in 17 U.S.C. § 512 (k)(1)(a). A “service provider,” within the statutory context, is “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”⁴⁴ SOP broadcasters are service providers within the statutory definition because they provide transmission of live, unmodified digital video between users. In addition, service providers must comply with the requirements set forth in 17 U.S.C. § 512(i). Service providers must adopt and reasonably implement a policy that provides for termination of repeat infringers as well as accommodates “standard technical measures.”⁴⁵ “Standard technical measures” are tools that a copyright holder can use to identify and protect a copyrighted work. These tools must not be financially overbearing or produce substantial burden to a service provider. 17 U.S.C. § 512(a) provides protection for SOP broadcasters as transitory digital network communications once compliance with 17 U.S.C. § 512(i) as well as (k)(1)(a) is established.

Section 512(a) theoretically insulates P2P file sharing programs from copyright liability given full compliance with 17 U.S.C. § 512(i) as well as (k)(1)(a). A decentralized P2P network allows users to connect with one another and exchange files, as long as the service provider does not modify content or provide infringing content. P2P networks, however, may not claim protection under the safe harbor exception section of § 512(a). This is a result of the narrow interpretation that P2P programs do “not operate as a passive conduit within the meaning of subsection 512 (a)”⁴⁶ because “the transmission goes from one part of the system

⁴⁴ 17 U.S.C. § 512(k)(1)(A) (2006).

⁴⁵ 17 U.S.C. § 512(i) (2006).

⁴⁶ *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183, 2000 WL 573136 (N.D. Cal. 2000).

to another, or between parts of the system, but not ‘through’ the system.”⁴⁷

III. DOES STREAMING LIVE SPORTS CHANGE EVERYTHING?

There are some inherently problematic issues with broadcasting live sports. First, the entire economic value of a sporting event derives from the fact that it is viewed live and determined within a fixed time. Secondly, the end user only needs to watch the last few minutes of any game or match to see the outcome. These inherent problems mixed with the ease of broadcasting SOP streams allow for a saturation of sporting event streams to occur. With hundreds of streams on thousands of websites, copyright holders face an impossible task of taking down all relevant streams before the end of a televised game. Copyright holders send DMCA takedown notices to SOP broadcasters for streams they believe infringe upon their copyright.⁴⁸ Investigation of the stream in question begins immediately, and a determination is made on the validity of the notice.⁴⁹ Users streaming copyrighted materials have their stream removed and are often times banned from providing further service.⁵⁰ With takedown notices only corresponding to one stream, the copyright holder constantly battles to take down one stream, only to see another pop up in its place. Absent knowledge of copyright infringing material on its website or failure to take down infringing material, SOP broadcast providers comply with the safe harbor exemption as “transitory digital network communications.”⁵¹

Live sporting events retain monetary value for a fixed period, differing completely from music, movies, and books. SOP

⁴⁷ *In re Aimster*, 252 F. Supp. 2d 634, 660 (N.D. Ill. 2002). (quoting *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183, 2000 WL 573136 (N.D. Cal. 2000)).

⁴⁸ See Protecting Your Copyrighted Work Online, CITIZEN MEDIAL LAW PROJECT (May 8, 2008), <http://www.citmedialaw.org/legal-guide/protecting-your-copyrighted-work-online>.

⁴⁹ See Digital Millennium Copyright Act Notification Guidelines, JUSTIN.TV, (last visited Apr. 20, 2012) <http://www.justin.tv/p/dmca> (“It is our policy to respond to clear notices of alleged copyright infringement that comply with Digital Millennium Copyright Act.”).

⁵⁰ *Id.*

⁵¹ 17 U.S.C. § 512 (2006).

broadcasters offer a network that enables users to exchange this live “commodity.” The 17 U.S.C. § 512(a) safe harbor exemption should not apply to SOP broadcasters that allow users to stream live sporting events because SOP broadcasters move away from being passive conduits and towards a P2P sharing network.⁵² Transmissions of streams occur from user to user through the internet. Akin to Grokster, streaming SOP broadcasters catalog streams and allow users to connect to one another. Transmission occurs through the internet; the software or website merely allows a user’s response to go from one part of the system to another.⁵³ Section 512(a) is disjunctive, and the second half must be analyzed independently of the first. 512(a) also applies to “routing” and “providing connections.” While software and websites enable easier access to connections, they are not the reason for the connection. Live streams must flow through the internet just like files from Napster’s software network. Legislative history sheds further light into the meaning of “providing connections.” Congress intended the clause to apply to internet service providers (ISP), such as AOL and CompuServe.⁵⁴ Without the software of AOL or CompuServe a user could not connect to the internet; thus, the information went through the network. As stated by the court in *Napster*, “routing” must have a different meaning from “providing connections.”⁵⁵ Looking back at the legislative history, “routing” was not held to be different from “providing connections,” and the court failed to consider what exactly “routing” might mean.⁵⁶ In order to understand the term “routing” in the context of a service provider, one must look to its definition. Service providers “route” information to users based on user generated responses, and this “routing” creates the internet. Internet service providers create vast networks, but these

⁵² See *In re Aimster*, 252 F. Supp. 2d. 634, 660 (N.D. Ill. 2002) (quoting *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183, 2000 WL 573136 (N.D. Cal. 2000)).

⁵³ *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183, 2000 WL 573136, at *8 (N.D. Cal. 2000) (“It is clear from both parties’ submissions that the route of the allegedly infringing material goes through the Internet from the host to the requesting user, not through the Napster server.”).

⁵⁴ See *id.*

⁵⁵ *Id.* (“[T]he court doubts that Congress would have used the terms ‘routing’ and ‘providing connections’ disjunctively if they had the same meaning.”).

⁵⁶ See *id.*

networks differ from P2P networks. ISPs create client-server networks; this type of networking dedicates devices to serve and route client's requests. In P2P networks, users act as both client and server; the transmission goes through the internet moving "from one part of the system to another . . . but not 'through' the system."⁵⁷ Construing the legislative history on "providing connections" clarified that Congress intended for "routing" to apply to internet service providers and not to P2P networks. ISPs have to route client requests to a dedicated server through a connection. As stated earlier, users would not be able to connect to one another without the internet (client-server), but they would be able to connect to one another without the P2P software or website.

SOP broadcasters receive advertising money at the detriment of the copyright holder. Streams of live sporting events shut down after broadcasters receive and investigate DMCA takedown notices. With many users streaming live sporting events, SOP broadcasters attract and retain large amounts of user traffic.⁵⁸ Shutting down one stream does not affect the number of users watching a live sports stream on a service provider's network because the affected users simply switch to another stream.⁵⁹ By allowing users to exchange live sports feeds, SOP broadcasters act like P2P networks, not like transitory digital network communications. The specific actions of SOP broadcasters give the highest credence towards finding that § 512(a) does not apply. 512(a) does not require transitory digital network communications to respond "expeditiously" to remove the claimed infringing material.⁶⁰ As the Eighth Circuit noted in *Charter*, a conduit ISP cannot locate and remove infringing material, and safe harbor should not hinge on their ability to do so either.⁶¹ Streaming P2P broadcasters are able to identify specific instances of copyright infringement, and they receive DMCA takedown notices pertaining to a single stream. SOP broadcasters provide a

⁵⁷ *Id.* at 7.

⁵⁸ Complaint, *Zuffa L.L.C. v. Justin.tv, Inc.*, No. 11cv00114, 2011 WL 2333140, at *3 (D.Nev. Apr. 8, 2011).

⁵⁹ *Id.*

⁶⁰ 17 U.S.C. § 512(a) (2006).

⁶¹ *See In Re Charter Commc'ns, Inc.*, 393 F.3d 771, 777 (8th Cir. 2005).

“commodity” when it is most valuable and enable users to exchange it. This SOP technology allows massive infringement of live copyrighted sporting events to occur, and promotes the infringing use for substantial financial gains. Holding SOP broadcasters liable for copyright infringement is the correct decision, for they are essentially virtual marketplaces for live sporting events with users paying the SOP broadcaster by watching advertisements.

Even establishing that the § 512(a) safe harbor does not apply to SOP broadcasters; imposing liability still requires further analysis. The issue of a centralized versus decentralized network is relevant. Users download software in order to stream to the internet, but receiving users are able to connect to broadcasting users via websites. The website or software that connects the two users merely acts as a catalog of live streams, not as a central server to download files. Users connect with each other to exchange “files.” SOP broadcasting networks fit within the description of decentralized networking because they do not store or allow users to download from a central server.

IV. CAN STREAMING PEER-TO-PEER BROADCASTERS CLAIM PROTECTION AS “INFORMATION LOCATION TOOLS”?

As each claim under the DMCA safe harbor provision is independent, claiming that § 512(a) does not apply to streaming SOP broadcasters does not bar a claim under § 512(d).⁶² The trier of fact determines on a case-by-case basis whether service providers expeditiously complied with DMCA takedown notices.⁶³ The trier of fact also determines if service providers received a direct financial benefit attributable to the copyrighted material. United States courts have failed to define “expeditiously” as it pertains to removing infringing material. Merriam-Webster Dictionary defines “expeditious” as “marked by or having prompt efficiency.”⁶⁴ Every minute of a live sports broadcast directly correlates to the outcome of the sporting event. Acting

⁶² A&M Records, Inc. v. Napster, Inc., No. C 99-05183, 2000 WL 573136, at *5 (N.D. Cal. 2000).

⁶³ 17 U.S.C. § 512(d) (2006).

⁶⁴ MERRIAM-WEBSTER, (last visited Apr. 12, 2012), <http://www.merriam-webster.com/dictionary/expeditious>.

expeditiously, as it relates to taking down live sports broadcasts, means in seconds, if not immediately. Giving every factual example would be impossible, yet it is important to note that the trier of fact defines “expeditiously” differently in each circumstance. Some situations will allow smaller providers twenty-four hours or more for an “expeditious” takedown, while larger providers of streaming P2P broadcasts are given mere minutes. The facts get more convoluted considering that many, if not all, sporting events air during primetime or on weekends. A person qualified to determine the validity of DMCA notices might not even be at work during these times. Requiring service providers to manage their systems or networks around the clock creates substantial costs and undue burdens even the largest SOP provider. Yet, for every second a live sports stream stays online, the streaming P2P service provider accrues a direct financial benefit through advertisements.

The question then is whether a service provider has the right and ability to control infringing activity this is known as the §512 (c)(1)(b) requirement. Interpreting the statutory language is necessary to determine whether a service provider has the right and ability to control infringing activity under § 512(d). The Second Circuit Court of Appeals recently cited in the *Viacom* opinion that “a service provider exerting substantial influence on the activities of users, without necessarily - or even frequently - acquiring knowledge of specific infringing activity” gives rise to the right and ability to control infringing activity.⁶⁵ While failing to define a specific test or requirement, the Second Circuit pointed to two cases where a service provider exerted substantial influence on the activities of their users and thus would likely fail §512 (c)(1)(b).⁶⁶

In *Perfect 10, Inc. v. Cybernet Ventures*, Cybernet operated an age verification service for online adult websites. Members paid monthly dues to view the different websites. As part of their operations, Cybernet enforced strict rules on its member sites. Websites included in the Cybernet operation received “detailed instructions regard[ing] issues of layout, appearance, and

⁶⁵ *Viacom Int'l, Inc. v. Youtube, Inc.*, 676 F.3d 19, 38 (2nd Cir. 2012).

⁶⁶ *Id.*

content.”⁶⁷ Cybernet forbade websites to post certain types of pictures or previously posted pictures. Users failing to comply with the rules had their access revoked. The district court found Cybernet so closely monitored the involvement of its member websites’ activities that it was likely to fail the (c)(1)(B) requirement.⁶⁸

The Second Circuit pointed to *Grokster* as its second example. The court stated, “inducement of copyright infringement under [*Grokster*] which, ‘premises liability on purposeful, culpable expression and conduct,’ might also rise to the level of control under § 512(c)(1)(B).”⁶⁹ A service provider that induces its users to infringe copyright has actual knowledge and notice of infringing activity on its network, consequently barring claims of statutory defense.

The Supreme Court found *Grokster*, a decentralized P2P network, contributory liable for copyright infringement.⁷⁰ Applying the inducement theory to streaming P2P service providers should be no different once the service is established as a decentralized P2P network. A plaintiff must establish that a service provider engaged in active steps to induce copyright infringement. Providing guides that instruct users on how to broadcast streams as well as continuous technical support enables users to broadcast copyrighted material on a service provider’s network. Recognizable patterns indicate that copyrighted live streams attract the highest number of viewers and advertising revenue. Further, the service provider’s failure to implement reasonable technology to monitor recognizable patterns constitutes willful blindness of users’ infringing activities. Screening streams with the highest number of viewers or clicks by users is not burdensome to the service provider and is accepted industry practice in advertising. Collecting revenue from advertisements on illegal streams further proves intent of SOP broadcasters to induce copyright infringement. Advertisers directly compensate the service provider based on the number of

⁶⁷ *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1173 (C.D. Cal. 2002).

⁶⁸ *See id.*

⁶⁹ *Viacom Int’l, Inc.*, 679 F.3d at 38.

⁷⁰ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

users viewing or clicking an advertisement on a given host stream. In an effort to increase viewership, service providers permit the streaming user to collect an advertising profit from viewers. Shifting monetary gains of advertisements to a hosting user encourages, if not induces, streaming of copyrighted material. Additionally, it is improper to hold the hosting user's liability absolves the service provider's liability when both collect revenue from advertisements on illegal streams. High-ranking employee emails, documents, and memos establishing knowledge or awareness of infringing activity also prove a clear intent to infringe copyright. Overall, a trier of fact must conclude from the evidence that the service provider induced the actions of its users, which amounted to actual infringement on its services.

Finding that a SOP broadcaster induced copyright infringement bars claims of protection under the DMCA, specifically under § 512(d).⁷¹ “The inducement rule . . . premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”⁷²

V. CONCLUSION

The Supreme Court failed to see that the inducement rule limits innovation. Holding streaming SOP broadcasters liable for copyright infringement might be correct in the limited view of broadcasting sports' streams; however, the few unlawful uses that its users choose to engage in should not outweigh the lawful uses. The Supreme Court noticed this in *Sony* and allowed Betamax to push the envelopes of technology.⁷³ Courts must define the “staple article of commerce” doctrine to figure out when a technology's “substantial” lawful use outweigh its unlawful use. Live streaming allows images to be shown halfway around the world, whether it be for teaching children, talking to a family member, or just showing a day in someone's life. It is an unfortunate reality that people unlawfully use new technology, but we must actively protect innovation. Courts holding P2P services liable for

⁷¹ See *Viacom Int'l, Inc.*, 676 F.3d 19, 38 (2nd Cir. 2012).

⁷² *Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at 936.

⁷³ See *Sony*, 464 U.S. 417 (1984).

copyright infringement must turn to a focused balancing inquiry. The DMCA provides protection of internet service providers, but courts have not extended the protection to P2P networks.⁷⁴ At the substantial risk of chilling innovation, courts must define the “staple article of commerce” doctrine as an affirmative defense for product suppliers.

This note provides courts two options when defining a “staple article of commerce” doctrine. The inducement theory has common links to criminal law; both require a *mens rea* and specific inducement, or actions. In limited circumstances, criminal law defendants claim the necessity or lesser evil defense. Defendants claiming the Betamax defense in copyright parallel the necessity defense in criminal law. In limited circumstances, where a technology is “a staple to society,” extreme deference would protect the innovation. Such technologies would be televisions, computers, the internet, cell phones, Betamax, etc. - technologies that have forever shaped everyday society. Just as in criminal law, the defendant must prove requisite elements for the Betamax defense. The (a) chilling of “substantial” innovation is greater than the charged copyright infringement; (b) no reasonable technological alternatives exist; (c) as soon as a reasonable technological alternative exists or technology reaches the point where copyright no longer has to be infringed upon, the defendant ceases to engage in the prohibited conduct; and (d) the defendant took “reasonable” active steps to mitigate the amount or extent of copyright infringement. While this is only a guideline of possible analysis, defendants invoking the Betamax defense automatically admit requisite intent to infringe upon copyright. This “strict” interpretation of a “staple article of commerce” raises the threshold and provides protection only in extreme cases.

The second option is to define “a staple article of commerce” for new technologies, which balances the past and future uses of a technology. To quell confusion, the doctrine applies to both contributory infringement and vicarious liability as well as to both service and product providers. Acting as an affirmative defense for indirect copyright liability, the doctrine protects technology

⁷⁴ See *In re Aimster*, 252 F. Supp. 2d 634 (N.D. Ill. 2002); see also *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183, 2000 WL 573136 (N.D. Cal. 2000).

“capable of substantial non-infringing uses.” A trier of fact judges a “substantial non-infringing use,” giving the highest deference to technologies that have been abused, rather than to those used or made to promote copyright infringement. Ultimately, the doctrine should “strike a balance between a copyright holder’s legitimate demand for effective - not merely symbolic - protection of the statutory monopoly, and the rights of others to freely engage in substantially unrelated areas of commerce.”⁷⁵ By affirmatively allowing the defense to be implemented, the requisite knowledge for the inducement theory is determined from the defendant’s own words. Further, this doctrine both promotes innovation of legitimate technologies and works with the inducement theory to find liability for the “Groksters” of the world.

⁷⁵ *Sony*, 464 U.S. at 442.