

Paying for Cable in Boston, Watching It on a Laptop in L.A.: Does Slingbox Violate Federal Copyright Laws?

*“The Slingbox does not make a copy, or allow indiscriminate redistribution over the internet. It simply takes the TV programming that you have already bought and paid for, and “slings” it somewhere else.”*¹

*“I can’t believe [Slingbox] hasn’t been stopped already . . . They can’t do that; there’s no way that’s legal.”*²

I. INTRODUCTION

Within only the past three years, inventors Blake and Jason Krikorian launched the company Sling Media, marketed one of the world’s most critically acclaimed new gadgets, sold hundreds of thousands of these gadgets, and then flipped their company for \$380 million.³ The Krikorians made themselves rich

1. *Digital Content and Enabling Technology: Satisfying the 21st Century Consumer: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. 19 (2006) (statement of Blake Krikorian, Co-Founder and CEO, Sling Media) [hereinafter *Statement of Krikorian*] (arguing Slingbox’s legitimate noninfringing qualities).

2. Joel Topcik, *Goodmon: Stop the Slingbox!*, BROADCASTING & CABLE, Feb. 6, 2006, at 9 (quoting Capitol Broadcasting President Jim Goodmon). Goodmon believes Slingbox violates retransmission laws, despite using the device himself. *Id.*

3. *Brilliance You Can Buy*, POPULAR MECHANICS, Nov. 1, 2005, at 80 (listing Slingbox among “Breakthrough Award” winners for 2005); Kate Bulkley, *Sling Your Telly Around the World: Interview, Blake Krikorian*, GUARDIAN (London), Sept. 14, 2006, at 5 (claiming Slingbox sold 100,000 units in first six months on market); *Home Runs*, TIME, Nov. 21, 2005, at 101 (listing Slingbox among “Most Amazing Inventions” of 2005); Bruce Nussbaum, *Best Of 2005: It was a Vintage Year for Innovative Leadership, Creative Ideas, and Terrific Products*, BUS. WK., Dec. 19, 2005, at 58 (naming Slingbox among “Best Products of 2005”); *EchoStar Announces Agreement to Acquire Sling Media, Inc.*, BUS. WIRE, Sept. 24, 2007, http://home.businesswire.com/portal/site/home/index.jsp?epi-content=NEWS_VIEW_POPUP_TYPE&newsId=20070924006504&ndmHsc=v2*A1190642400000*B1190717730000*DgroupByDate*J1*N1000003&newsLang=en&beanID=2133606841&viewID=news_view_popup [hereinafter *EchoStar Announces Agreement*] (noting Sling Media launched in 2004 and stating \$380 million sale price in 2007); Sling Media - Awards, <http://us.slingmedia.com/page/awards.html> (last visited June 3, 2007) (listing more than twenty awards from various publications). Blake Krikorian invented Slingbox with his brother, Jason. See U.S. Patent App. No. 20060095471, Ser. No. 147664 (filed June 7, 2005) (identifying device as “Personal Media Broadcasting System”) [hereinafter *Primary Slingbox Patent Application*] (requesting patent for Slingbox). In September of 2007, EchoStar Communications, purveyors of Dish Network, purchased the Krikorians’ company Sling Media, Inc. See *EchoStar Announces Agreement*, *supra* (stating agreement subject to closing conditions but expecting closure late in 2007). Sling Media will function as a wholly-owned subsidiary of EchoStar, with Blake Krikorian remaining on board. See Erica Ogg, *Sling Founder ‘Stoked’ About Sale to EchoStar*, CNET NEWS.COM, Sept. 25, 2007, http://www.news.com/8301-10784_3-9784788-7.html (expecting “business as usual” at Sling Media after EchoStar buyout). EchoStar had been an early investor in Sling Media. *Id.* Recently, news media have reported speculation that EchoStar might merge into a larger entity such as DirecTV or AT&T. See Jeff Smith, *DirecTV-EchoStar Merger Touted*, ROCKYMOUNTAINNEWS, Sept. 27, 2007, available at <http://www.rockymountainnews.com/drmn/tech/article/>

by enabling the populace to watch more television, on more channels, in more locations, in more situations, and on more devices than with any imagined combination of previously available technologies.⁴ They did so with Slingbox, a trapezoid-shaped contraption that captures a live television signal from a consumer's home and then redirects, or "slings," the signal over the internet to devices such as laptops and mobile phones, located in some other part of the world.⁵ With Slingbox, the end-user can channel-surf on his laptop or mobile phone, as if viewing the television in his living room.⁶ This consumer empowerment may result in a new generation of American business travelers who watch their hometown sports teams live from European hotels, college students who watch their parents' satellite channels from faraway dorm rooms, and cubicle corporate workers who surreptitiously watch soap operas on company time.⁷

The Krikorians may remember subsequent years more ambivalently, as opposing interests and adverse case law converge to question the legality of their invention.⁸ Cable and satellite television companies generally contend that Slingbox illegally usurps their exclusive rights to broadcast or rebroadcast certain programming.⁹ Cable companies, in particular, decry the inequity of

0,2777,DRMN_23910_5708288,00.html (stating DirecTV/EchoStar merger unlikely due to antitrust concerns).

4. See Sling Media, <http://us.slingmedia.com/page/home> (last visited June 28, 2007) (identifying numerous uses for Slingbox, distinguishing it from previously available technologies). This URL contains an animated presentation suggesting numerous locations to which one could sling televised content and numerous devices on which one could view that content. *Id.* For example, one animated sequence reads, "watch your local news on your mobile phone while you are in Guam." *Id.*; see also *infra* note 6 and accompanying text (noting ability to view any channels available at home on your remote device).

5. About Sling Media, <http://uk.slingmedia.com/page/aboutus.html> (last visited Aug. 30, 2007) (explaining basics of Slingbox technology). Slingbox "slings" the broadcast stream via the internet from a subscriber's cable box, satellite recorder, or digital video recorder to internet-enabled devices such as laptops and mobile phones. *Id.*; see also *Statement of Krikorian, supra* note 1, at 19 (introducing "slings" into lexicon by utilizing the verb form during statement to Congress).

6. Ken Belson, *Take Your Cable Channels With You on the Road*, N.Y. TIMES, Dec. 21, 2005, at C1 (describing remote control-like features of Slingbox's viewing software); Sling Player, <http://us.slingmedia.com/page/slingplayer.html> (last visited Aug. 30, 2007) (describing Slingbox's innovative features and capabilities).

7. See, e.g., *Statement of Krikorian, supra* note 1, at 19 (stating desire to watch San Francisco Giants games in remote places inspired Slingbox); Posting of IntelInside to ARS TECHNICA, <http://episteme.arstechnica.com/eve/forums/a/tpc/f/174096756/m/526005788731?r=381001888731#381001888731> (Apr. 27, 2006, 18:23 EST) (claiming Slingbox on parents' cable box in Illinois enabled viewing via laptop in Indiana); Andrew Wallenstein, *TV Technology at Edge of Legal Frontier*, RED ORBIT, July 6, 2005, http://www.redorbit.com/news/technology/166041/tv_technology_at_edge_of_legal_frontier/# (speculating workers will use Slingbox to watch soap operas during workday).

8. See *infra* note 13 and accompanying text (speculating *Grokster* precedent will embolden copyright holders to sue Sling Media to force Slingbox's elimination).

9. See Topcik, *supra* note 2, at 9 (reporting Capitol Broadcasting President suspicious Slingbox violates copyright laws); Mark Sullivan, *HBO Exec: Sling Slags Copyrights*, LIGHT READING, Apr. 25, 2006, http://www.lightreading.com/document.asp?doc_id=93320&WT.svl=news1_4 [hereinafter Sullivan, *Sling Slags Copyrights*] (reporting HBO executive's generalization revealing content owners dislike Slingbox and believe it violates their copyrights). *But see* Topcik, *supra* note 2, at 9 (reporting cable company Liberty Media among chief Sling Media financiers despite other cable companies' objections); *EchoStar Announces*

having invested billions of dollars in infrastructure, only to see an invention emerge that induces consumers to opt against paying for cable in their offices and second homes.¹⁰ Further, major professional sports leagues, for whom licensing of live sporting events is a primary source of revenue, fear and loathe an invention that allows consumers to subvert geographic blackouts and eschew league-marketed streaming internet broadcasts.¹¹ The United States Supreme Court's unanimous 2005 decision in *MGM Studios, Inc. v. Grokster, Ltd.*,¹² holding that companies can be contributorily and vicariously liable for their customers' illegal file sharing, may embolden media companies and sports leagues to try forcing Sling Media out of business by suing them with analogous legal theories.¹³ Meanwhile, proponents of Slingbox defend it on

Agreement, *supra* note 3 (revealing prominent satellite provider EchoStar acquired Sling Media); Posting of Ian Fogg to Jupiter Research Analyst Weblogs,

<http://weblogs.jupiterresearch.com/analysts/fogg/archives/016864.html> (Aug. 16, 2006, 15:11 EST)

[hereinafter Posting of Ian Fogg] (reporting leading Swedish cable company offering Sling Media product with cable TV service). "[I]t's being sold by leading satellite TV operator Viasat under the name Viasat Everywhere. . . . Viasat is looking to add additional value for their pay TV customers by offering Slingboxes alongside their NDS-powered DVR." Posting of Ian Fogg, *supra*; see also Louis Hau, *CES: Moonves Keynote*, FORBES.COM, Jan. 10, 2007, http://www.forbes.com/digitalentertainment/2007/01/10/cbs-krikorian-sling-tech-media-cx_lh_0110ces-moonves.html (announcing CBS first media company to participate in Slingbox's "Clip+Sling"). Clip+Sling, currently in beta-testing, will allow Slingbox users to clip a short portion of PC-viewed video and then sling it to friends, including those who are not Slingbox customers. See Hau, *supra*.

10. See *The Communications Opportunity, Promotion, and Enhancement Act of 2006: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. 84 (2006) (statement of Kyle McSlarrow, President and CEO, National Cable & Telecommunications Association) [hereinafter *Statement of McSlarrow*] (claiming cable industry invested \$100 billion in fiber optic infrastructure since 1996); see also Topcik, *supra* note 2, at 9 (quoting Capitol Broadcasting President Bob Goodmon); *infra* note 124 and accompanying text (explaining retransmission agreements). In his article, Topcik cites a statement in which Goodmon implies that Slingbox is free-riding on the cable industry's retransmission consent agreements, which the industry has expended time and money to negotiate. Topcik, *supra* note 2, at 9. Furthermore, in his statement before the Subcommittee on Telecommunications and the Internet, McSlarrow implied that the cable industry has already lost substantial market share to satellite. *Statement of McSlarrow*, *supra*, at 77-78.

11. See Greg Sandoval, *Major League Baseball Takes Swing at Sling Media*, CNET NEWS.COM, June 6, 2006, http://news.com.com/2100-1025_3-6080665.html (revealing Major League Baseball's objections to Slingbox); *infra* note 127 and accompanying text (describing sports leagues' government-granted television monopolies under Sports Broadcasting Act). Major League Baseball Advanced Media's (MLBAM) Vice President, George Kliavkoff, claims that Slingbox users violate their cable and satellite subscription agreements when they use the technology to send television signals over the internet. Sandoval, *supra*. But see Press Release, Sling Media, National Hockey League Becomes First Professional Sports League to Team With Sling Media Inc. Around Forthcoming "Clip and Sling" Service (June 6, 2007), available at http://us.slingmedia.com/object/io_1181141533709.html [hereinafter Sling & NHL Press Release] (announcing beta technology will allow Slingbox customers to sling clips of hockey games to friends).

12. 545 U.S. 913 (2005).

13. *Id.* at 930 (holding defendants' technology combined with business model constituted illegal inducement of infringement); Nate Anderson, *Will Hollywood Sue the SlingBox Out of Existence?*, ARS TECHNICA, Apr. 27, 2006, <http://arstechnica.com/news.ars/post/20060427-6691.html> (predicting cable companies will sue Sling Media and expressing surprise they have not yet sued); Posting of David LaGessee to Dave's Download, <http://www.usnews.com/blogs/daves-download/2007/9/26/echo-star-buys-the-slingbox.html> (Sept. 26, 2007 14:33 PM EST) (speculating EchoStar's deep pocket might increase lawsuit's likelihood);

“fair use” grounds, dismissing media companies’ arguments as specious attempts to force consumers into paying for cable multiple times.¹⁴

This potential legal battle is reminiscent of the “*Sony-Betamax*” case, which transpired from the late 1970s through the early 1980s.¹⁵ In *Sony*, manufacturers of an early Video Cassette Recorder (VCR), the precursor to the modern Digital Video Recorder (DVR), narrowly survived a contributory infringement action filed by owners of television program copyrights.¹⁶ Similarly, in the Slingbox controversy, a cutting-edge piece of technology allows for more convenient and frequent television viewing, but threatens television copyright holders’ abilities to fully enjoy the benefit of their property rights, and might someday inspire such copyright holders to sue.¹⁷ If Sling Media is sued, however, it will face additional challenges that the *Sony* manufacturers did not encounter, including the ambiguous *Grokster* precedent and retransmission claims stemming from Slingbox’s ability to “broadcast.”¹⁸

This Note will first pinpoint the sources of federal copyright laws and introduce the Supreme Court’s current tendency regarding such laws.¹⁹ This Note will then focus on contributory and vicarious copyright cases from *Sony* to the present.²⁰ Next, this Note will introduce statutes and cases within broadcasting and retransmission law that may offer insight into the legality of Slingbox.²¹ This Note will then analyze whether Slingbox violates federal copyright laws, particularly in light of the Supreme Court’s guidance in *Sony* and *Grokster*.²² Finally, this Note will discuss the adequacy of the tests

Wallenstein, *supra* note 7 (reporting belief that Slingbox will represent next major post-*Grokster* intellectual property “showdown”). *But see* Ogg, *supra* note 3 (speculating “EchoStar acting as a proverbial bodyguard might scare the bullies away”).

14. *See* Posting of Matt McKenzie to TechSearch Blog, http://techsearch.cmp.com/blog/archives/2006/05/is_slingbox_the.html?loc=government_legal_regulatory (May 8, 2006, 17:10 EST) (referring to potential plaintiffs as “greedy weasels” and distinguishing Sling and *Grokster* defendants); *see also infra* notes 55-58 and accompanying text (discussing fair use).

15. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454-55 (1984) (holding *Betamax*’s ability to time-shift exonerates defendants despite *Betamax*’s infringing capabilities); *infra* text accompanying note 16 (comparing Slingbox and *Betamax* controversies). In 1984, the Supreme Court decided *Sony*, although plaintiffs filed the case in 1976. *Sony*, 464 U.S. at 417, 420. Judges have referred to this case as “*Sony-Betamax*.” *See* *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir. 2004) (using shorthand “*Sony-Betamax*”), *rev’d*, 545 U.S. 913 (2005).

16. *Sony*, 464 U.S. at 456 (overturning Ninth Circuit decision in favor of copyright holders by 5-4 margin). *See infra* Part II.B (discussing *Sony* and implications if Court had decided differently).

17. *See* Anderson *supra*, note 13 (identifying likelihood that Slingbox copyright owners will sue Slingbox and stating owners’ belief Slingbox violates copyrights).

18. *See infra* Part II.B (discussing *Sony* decision); *infra* Part II.C (discussing *Grokster* decision and cases leading up to it); *infra* notes 118-121, 124-127 and accompanying text (discussing retransmission cases and broadcasting law).

19. *See infra* Part II.A (discussing the Copyright Act).

20. *See infra* Part II.B-C (discussing Supreme Court tests for vicarious and contributory infringement).

21. *See infra* Part II.D (discussing retransmission cases and broadcasting law); *see also infra* Part III.B (analyzing applicability of broadcasting statutes to Slingbox).

22. *See infra* Part III.A (inferring legitimacy of Slingbox under federal copyright laws); *see also infra* Part

established in *Grokster* and suggest necessary clarifications and revisions.²³

II. HISTORY

A. Federal Copyright Laws

In order to promote the “useful arts,” the Founding Fathers provided Congress with a constitutional option to grant authors monopoly power over their writings “for limited times.”²⁴ The very first Congress exercised this option by passing the Copyright Act of 1790, which provided exclusive rights to authors for fourteen years with the possibility of an additional fourteen-year renewal.²⁵ Over time, Congress repeatedly increased the duration of an author’s exclusive rights, such that copyrights now extend seventy years beyond the author’s life.²⁶

III.C (examining purposes of intellectual property laws and relevance to Slingbox).

23. See *infra* Part III.D (probing adequacy of tests set forth in *Grokster*).

24. U.S. CONST. art. I, § 8, cl. 8 (granting Congress power to regulate intellectual property). “The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.* In addition, while this paper focuses on Slingbox’s legality under copyright laws, Slingbox’s broadcasting capability potentially warrants analysis through the lens of right-to-travel jurisprudence. See *infra* notes 206-209 and accompanying text (exploring Slingbox’s impact on implied constitutional right to travel); see also *Saenz v. Roe*, 526 U.S. 489, 510 (1999) (holding that Constitution implies right to travel from one state to another); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964) (holding Georgia hotel’s denial of services to African Americans burdened interstate commerce).

25. See Copyright Act of 1790, ch. 15, 1 Stat. 124 (amended 1839) (granting first federal copyright protection); see also *infra* note 26 (presenting all subsequent amending statutes extending copyright term).

26. See Act of Feb. 3, 1831, ch. 16, 4 Stat. 436, 436-37 (1831) (amended 1909) (extending term to twenty-eight years with possible fourteen-year renewal term); Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, 1080-81 (1909) (amended 1976) (extending possible renewal term from fourteen years to twenty-eight years); Pub. L. No. 94-553, 90 Stat. 2541, 2572, Title I, § 302(a) (1976) (amended 1998) (extending term to fifty years beyond life of author); Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827, 2827, Title I, § 102(b) (1998) (extending term to seventy years beyond life of author); see also *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (holding Congress possesses tremendous latitude in extending copyright protections). In *Eldred*, plaintiffs claimed that a congressionally mandated copyright term of seventy years beyond the life of the author unconstitutionally denied citizens access to public domain information and created a perpetual copyright. *Eldred*, 537 U.S. at 193. In a 7-2 decision, the Court held that this copyright term did not violate the constitutional “limited times” directive. *Id.* at 198. *But see id.* at 223-24 (Stevens, J., dissenting) (arguing length of copyright protection should more resemble patent’s twenty year terms); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 23-24 (2004) (arguing overly lengthy copyright terms stifle creative process by making necessary “borrowing” impossible). Justice Stevens argued that the judiciary should have a greater role in reviewing grants of monopoly privilege for intellectual property. *Eldred*, 537 U.S. at 223 (Stevens, J., dissenting). Lessig, who argued for the losing petitioners before the Supreme Court in *Eldred*, notes the irony that the Walt Disney Company, which traditionally lobbied in favor of lengthier copyright terms that inherently decrease the public domain, gained power and notoriety by using public domain creations of prior authors:

Sometimes this borrowing was slight. Sometimes it was significant. Think about the fairy tales of the Brothers Grimm Disney took these stories and retold them in a way that carried them into a new age Indeed, the catalog of work drawing upon others is astonishing when set together:

Congress has also expanded the definition of “writings” and provided those constitutionally characterized as “[a]uthors” with multiple ways to exploit the proprietary interests in their creations.²⁷ The Copyright Act now presumes “writings” to encompass any “original works of authorship fixed in any tangible medium of expression,” including sound recordings, architectural works, sculptures, choreography and pantomimes, and most germane to the Slingbox controversy, motion pictures and audiovisual works.²⁸ The current Act also provides the author with a bundle of rights, any part of which she may sell, transfer, lease, lend, or retain, similar to other forms of tangible and intangible property.²⁹ For example, a screenwriter might sell the distribution and reproduction rights to her script to a film studio, while reserving the right to prepare “derivative works,” such as sequels.³⁰ Thus, “copyright owners” include persons or entities holding legal title to *any portion* of the bundle of rights.³¹ Federal copyright laws provide a variety of remedies to deter and

Snow White (1937), *Fantasia* (1940), *Pinocchio* (1940). . . . The public domain is a “lawyer-free zone.” Thus, most of the content from the nineteenth century was free for Disney to use and build upon. . . . This is the way things were—until quite recently. For most of our history, the public domain was just over the horizon.

LESSIG, *supra*, at 223-24. See generally Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003) (proposing copyright owners’ monopoly of rights should incrementally shrink as copyrighted work ages).

27. U.S. CONST. art. I, § 8, cl. 8 (granting “Authors and Inventors” limited monopoly power over their creations); 17 U.S.C. § 106 (2006) (listing Copyright Act’s bundle of rights). These rights include the right to reproduce works, prepare derivative works, distribute copies or phonorecords, perform the copyrighted works, and display copyrighted artwork. 17 U.S.C. § 106.

28. See 17 U.S.C. § 102 (enumerating subject matter of copyrights). “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *Id.*

29. See *id.* § 201(d). The statute reads:

- (1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.
- (2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights . . . may be transferred . . . and owned separately.

Id.; see also 1-1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[A] (2006) [hereinafter NIMMER ON COPYRIGHT] (discussing state copyright powers). The Copyright Act and other federal copyright laws do not completely preempt states’ rights to pass additional copyright protection. 1-1 NIMMER ON COPYRIGHT, *supra*, at § 1.01[A]. For example, states may extend copyright protections to non-tangible media of expression such as speeches, choreography, and improvised musical compositions that have never been videotaped or notated. *Id.* at § 1.01[B][2][a].

30. See 17 U.S.C. § 103(a) (noting subject matter of copyright includes derivative works); cf. Harris E. Tulchin, *Filmmakers Beware: Protecting Profits Through International Licensing Agreements*, 4 VAND. J. ENT. L. & PRAC. 17, 18 (2002) (describing screenwriter’s typical transfer of rights to film producers and directors).

31. 3-10 NIMMER ON COPYRIGHT, *supra* note 29, at § 10.02[A] (implying government considers licensee of any exclusive right owner of that right). “Suppose the exclusive license is limited to given rights at a particular time, in a particular geographic area . . . [S]uch a grant will convey copyright ownership in such

punish infringers and compensate copyright owners whose bundles of rights have been usurped.³²

Historically, as copyright owners have pushed for broader protection of their exclusive rights, the judiciary has struggled to assure that such protections conform to their constitutional purpose.³³ As Justice Stewart wrote in 1975:

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors." When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.³⁴

Recently, however, the Supreme Court has displayed acute deference to Congress in defining the limit of the copyright owner's monopoly.³⁵ In 2003, after copyright owners successfully lobbied Congress to pass the Sonny Bono Copyright Extension Act in 1998, the Supreme Court decided *Eldred v. Ashcroft*,³⁶ and upheld the constitutionality of the Act by concluding that a monopoly of seventy years beyond the life of the author and ninety-five years for works-for-hire did not violate the Constitution's "limited times" directive.³⁷

rights." *Id.*

32. See 17 U.S.C. § 504(b) (allowing aggrieved party to recover actual civil damages and extract infringer's profits); 17 U.S.C. § 504(c)(1) (allowing civil courts to award statutory damages between \$750 and \$30,000 in alternative to actual damages); 17 U.S.C. § 505 (allowing civil court discretion to award attorney's fees to prevailing party); 17 U.S.C. § 506(a) (mandating criminal penalties for willful infringers seeking commercial or financial gain). *But see* 4-14 NIMMER ON COPYRIGHT, *supra* note 29, at § 14.01[C][1] (describing typical plaintiff recoveries in infringement suits). The Nimmers write, "Prevailing in a copyright infringement suit can at times bring astronomical monetary recovery. But a finding of liability is not a lottery ticket. In all instances, the relief should match the proof. The result is that prevailing plaintiffs at times recover little to nothing." *Id.*

33. See *supra* note 26 (summarizing *Eldred* and legislative history of Copyright Act).

34. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (citations omitted). *But see generally*, William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI L. REV. 471 (2003) (disputing belief that society necessarily benefits from finite copyright terms). The authors employ regression analysis and suggest that Congress could achieve economic efficiency by legislating the right to indefinite copyright renewals. *Id.* at 517. In conjunction with indefinite renewals, the authors suggest higher registration fees, higher renewal fees, and a shorter initial term of approximately twenty years. *Id.* at 517-18.

35. See *supra* note 26 (documenting repeated extension of copyright term and noting Supreme Court approval in *Eldred*).

36. 537 U.S. 186 (2003).

37. *Id.* at 194 (holding Congress did not abuse its authority); Richard A. Posner, *The Constitutionality of*

Congress has also fashioned federal copyright laws to conform to technological advances.³⁸ For example, sections 111 and 119 of title 17, the portion of United States Code devoted to copyright matters, allow cable and satellite providers to rebroadcast certain programs that originally appeared on network television, without first obtaining express permission from the copyright holders.³⁹ Under these provisions, cable and satellite providers must still pay for copyrighted content but can acquire licenses according to statutory procedure, rather than by soliciting and acquiring permission from each individual copyright owner.⁴⁰ In 1998, with the enactment of the Digital Millennium Copyright Act (DMCA), Congress further amended title 17 by forbidding the manufacture and distribution of devices whose only significant commercial use is to circumvent copyright protection technologies.⁴¹

Today, many copyright infringement actions involve vicarious or contributory infringement, in addition to the more intuitive, statutorily-defined direct infringement.⁴² Similar to tort-based vicarious liability, a master in an employment relationship will face civil liability for copyrights that his servant infringes within the course and scope of employment.⁴³ Unlike tort-based

the Copyright Term Extension Act: Economics, Politics, Law and Judicial Technique in Eldred v. Ashcroft, 2003 SUP. CT. REV. 143, 145 (2003) (describing lobbying effort resulting in Sonny Bono Act). See generally Stephen M. McJohn, Eldred's Aftermath: Tradition, The Copyright Clause, and the Constitutionalization of Fair Use, 10 MICH. TELECOMM. TECH. L. REV. 95 (2003) (investigating pros and cons of Eldred on creativity and innovation). Posner identified the proponents of the Sonny Bono Act as follows: "[t]he initial push for the legislation that eventuated in the Sonny Bono Act had come years earlier from the children and grandchildren of Tin Pan Alley composers . . . later joined by the Disney corporation . . . and by other owners of lucrative copyrights soon to expire." Posner, *supra*, at 145.

38. E.g., Small Webcaster Settlement Act, 17 U.S.C. § 114(f)(5) (Supp. 2003) (providing timetable for recording industry and small webcasters to negotiate royalty fees); Audio Home Recording Act (AHRA), 17 U.S.C. § 1001-1010 (2006) (requiring manufacturers and importers of digital recorders to pay royalties to copyright holders); Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1201-1205 (2006) (preventing circumvention of digital copy protections).

39. 17 U.S.C. § 111(a) (stating situations in which unauthorized secondary transmission not infringement of copyright); see also 17 U.S.C. § 111(c)(1) (stating licensing requirement for compliant secondary transmissions); 17 U.S.C. § 119(a)(2)(A) (providing analogous statutory licensing provision for satellite providers). See generally 2-8 NIMMER ON COPYRIGHT, *supra* note 29, at § 8.18[E] (detailing compulsory licensing for cable television). Section 111(c) states that "secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico shall be subject to statutory licensing . . ." 17 U.S.C. § 111(c)(1).

40. See *supra* note 39 and accompanying text (discussing bases for statutory licensing to cable and satellite providers).

41. 17 U.S.C. § 1201(b) (prohibiting circumvention of copy protection within DMCA).

42. E.g., MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 931-34 (2005) (considering whether file-sharing software companies directly or vicariously infringed copyrights); *In re Aimster Copyright Litig.*, 334 F.3d 643, 647 (7th Cir. 2003) (explaining Sony contributory infringement analysis appropriate in file-sharing cases); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013, 1013 n.2 (9th Cir. 2001) (explaining direct infringement must exist before secondary liability possible).

43. See 3-12 NIMMER ON COPYRIGHT, *supra* note 29, at § 12.04[A] (clarifying that master liable even when servant acts without express authority). In this situation, the servant is the direct infringer while the master is the vicarious infringer. *Id.* Vicarious copyright liability requires a "right and ability to supervise the

vicarious liability, however, there is no independent contractor exemption in copyright law.⁴⁴ Thus, copyright laws hold proprietors civilly liable for the direct infringement by their independent contractors, as well as their employees.⁴⁵ The oft-cited illustration of this concept is that a dance hall will be liable for the infringement of its independently contracted band if the band plays unauthorized copyrighted material and the dance hall fails to make reasonable efforts to prevent the infringement.⁴⁶ Courts have imposed this burden on proprietors for at least two policy reasons: to prevent proprietors from claiming ignorance of repeated violations while benefiting from them financially; and to assuage the difficulty in obtaining a remedy against transient direct infringers.⁴⁷

When the supervisory element found in vicarious liability is lacking, liability can still indirectly attach to a defendant via the theory of contributory infringement.⁴⁸ The theory of contributory copyright liability emerged as early as the 1960s, deriving from analogous common-law tort-based theories.⁴⁹ This theory posits that entities with knowledge of infringement, that nonetheless

infringing conduct” and a financial interest in the infringing conduct. *Id.* at § 12.04[A][2].

44. 3-12 NIMMER ON COPYRIGHT, *supra* note 29, at § 12.04[A][2].

45. 3-12 NIMMER ON COPYRIGHT, *supra* note 29, at § 12.04[A][2] (noting House Committee considered and rejected amendment exempting independent contractors from vicarious liability).

46. *See Aimster*, 334 F.3d at 654 (describing dance hall scenario as “canonical illustration” of vicarious copyright infringement); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929) (upholding vicarious infringement award against dance hall despite direct infringer being independent contractor).

47. *Aimster*, 334 F.3d at 654 (justifying vicarious liability due to difficulty in obtaining judgments against direct infringer); *Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assoc.*, 554 F.2d 1213, 1215 (1st Cir. 1977) (arguing vicarious liability necessary to prevent establishments from reaping benefits from transitory direct infringers).

48. *See* 3-12 NIMMER ON COPYRIGHT, *supra* note 29, at § 12.04[A][3][a] (implying supervision element not necessary for contributory copyright infringement).

49. *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966) (introducing theory of contributory copyright infringement). In *Screen Gems*, plaintiff record company named radio stations and others as co-defendants in a copyright infringement suit against a primary infringer who was illegally duplicating, or “pirating,” recordings. *Id.* at 401. The plaintiff alleged that because the co-defendants purchased and transmitted the pirated recordings, the co-defendants were jointly liable as infringers, even if they did not have actual knowledge of the infringement. *Id.* at 403. The court never opined as to whether actual knowledge is an element of contributory infringement. *See id.* Instead, the court determined that genuine issues of material fact existed as to whether the radio station possessed actual knowledge of the infringement. *Id.* at 403-04. For example, the radio station had allegedly purchased the records for “suspiciously” below market value. *Id.* at 404. If a trier of fact were to find advance knowledge, the court held that “[s]ince infringement constitutes a tort, common-law concepts of tort liability are relevant . . . and the basic common-law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor is applicable in suits arising under the Copyright Act.” *Id.* at 403. *But see* 3-12 NIMMER ON COPYRIGHT, *supra* note 29, at § 12.04[A][3][a] n.113 (citing 1943 case as contributory infringement case). The Nimmers imply an earlier beginning for contributory copyright infringement. *See id.* The co-defendant that the Nimmers presumably refer to, however, was arguably a classic direct infringer rather than an innovatively contributory one. *See Select Theatres Corp. v. Ronzoni Macaroni Co.*, 59 U.S.P.Q. 288, 291 (S.D.N.Y. 1943) (holding broadcasting company liable for rebroadcasting another company’s infringing broadcast via telephone).

continue to benefit from the infringement, should be held jointly and severally liable along with the actual infringers.⁵⁰ The Second Circuit refined this concept in the 1971 case *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*,⁵¹ requiring two elements—knowledge of infringement and material contribution—in order to find contributory infringement by a non-direct infringer.⁵² However, a literal reading of Justice Souter’s 2005 *Grokster* opinion and the decision’s multiple concurrences suggest that the latter element of “material contribution” has either vanished or courts have deemphasized it in favor of other considerations.⁵³ Further, courts may allow would-be contributory infringing technologists to avoid liability when the technology in question performs “substantial noninfringing uses.”⁵⁴

Historically, ostensibly contributory infringers have defended themselves from liability by utilizing the doctrine of fair use.⁵⁵ Frequently misunderstood by laymen and disagreed upon even by learned judges, the doctrine of fair use allows limited unauthorized uses of another’s intellectual property for public policy reasons.⁵⁶ Examples of fair use include quoting a few lines of a film in order to write a newspaper review, performing a copyrighted dramatic religious work during a service at a place of worship, and making a digital copy of a compact disc from an original that one has already legally purchased for one’s own non-commercial use.⁵⁷ Some fair uses are solely the product of judicial decisions, while Congress has explicitly codified others in federal statutes.⁵⁸ Section 107 of the Copyright Act provides judges with four factors for determining whether a particular application constitutes fair use:

50. See *Screen Gems*, 256 F. Supp. at 403 (extending tort-based joint and several liability concept to contributory infringers).

51. 443 F.2d 1159 (2d Cir. 1971).

52. *Id.* at 1162 (establishing two elements for contributory copyright infringement).

53. See *infra* note 105 and accompanying text (identifying post-*Grokster* standard for contributory infringement). But see *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 951-52 (2005) (Breyer, J., concurring) (reconciling *Sony* with *Grokster*). Justice Breyer pointed out that the *Sony* Court was correct in rejecting contributory liability by VCR manufacturers despite the fact that copyright owners had authorized only an estimated nine percent of VCR home tapings. *Id.* at 950-51.

54. See *infra* note 75 and accompanying text (describing “significant noninfringing use” defense).

55. *E.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 425 (1984) (claiming noncommercial home recording of broadcast television as fair use); *In re Aimster Copyright Litigation*, 334 F.3d 643, 652 (7th Cir. 2003) (suggesting unauthorized internet download of music that one already owns is fair use); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1359 (Ct. Cl. 1973) (claiming photocopying medical journals for research as fair use).

56. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990) (admitting doctrine of fair use baffles judges, writers, and historians); see also *id.* at 1135-36 (noting public policy importance of fair use doctrine for inspiring creative thought).

57. See 17 U.S.C. § 110(3) (2006) (exempting churches from prosecution for certain unauthorized performances during religious services); 17 U.S.C. § 1008 (exempting consumers from prosecution for certain duplications of digital recordings); Leval, *supra* note 56, at 1111 (identifying literary criticism and transformation as justifications for fair use).

58. *E.g.*, 17 U.S.C. § 107 (demonstrating statutory fair-use defense); 17 U.S.C. § 1008 (demonstrating statutory fair-use defense); *Sony*, 464 U.S. at 442 (demonstrating judicial fair-use defense).

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁹

As demonstrated in the following section, the defendants in *Sony* successfully asserted “time-shifting”—automatically recording programming for viewing at a time more convenient than the time of broadcast—as a novel fair use defense in the 1980s.⁶⁰ This inspired cutting-edge technology companies in subsequent decades to test “space-shifting” and “placeshifting” fair-use defenses in both courts of law and public opinion.⁶¹

B. Sony

In 1976, Universal Studios and Walt Disney Productions, which held numerous television programming copyrights, sued the manufacturers and marketers of the Sony Betamax, a leading consumer video tape recorder.⁶² The plaintiffs alleged that the defendants were contributorily liable for the copyright infringements committed by Betamax users, most notably those users who created home libraries of the plaintiffs’ televised movies.⁶³ The plaintiffs

59. 17 U.S.C. § 107; *see also* *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 448 (C.D. Cal. 1979) (offering judicial and legislative history of four factors), *rev’d*, 659 F.2d 963 (9th Cir. 1981), *rev’d*, 464 U.S. 417 (1984). The factors listed in the Copyright Act mirror those that prior judicial decisions have recognized. *Sony*, 480 F. Supp. at 448. The factors are not exhaustive and judges are not obliged to weigh any one with particular significance. *Id.*

60. *See Sony*, 464 U.S. at 456 (accepting time-shifting defense).

61. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014-15 (9th Cir. 2001) (attempting space-shifting defense unsuccessfully); *Statement of Krikorian, supra* note 1, at 19-20 (arguing Slingbox’s placeshifting constitutes fair use); *see also infra* Parts II.B-II.D (elaborating on space-shifting, placeshifting, and time-shifting).

62. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984) (stating case parties and facts); *Sony*, 480 F. Supp. at 465 (noting extent of Betamax usage); *see also* JAMES LARDNER, *FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR* 112-21 (1987) (providing account of five-week *Sony* trial and events preceding and following); Jessica Litman, *Copyright and Personal Copying: Sony v. Universal Studios Twenty-One Years Later: The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 922-925 (2005) (describing trial and historical context). At the time of the district court’s 1979 decision, the Betamax retailed for approximately \$875, and each tape for approximately twenty dollars. *Sony*, 480 F. Supp. at 465.

63. *See Sony*, 464 U.S. at 420, 423 (discussing library building and plaintiff’s assertion of defendant’s contributory liability); *see also* *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 964 (9th Cir. 1981) (detailing additional claims against defendants), *rev’d*, 464 U.S. 417 (1984). Defendants included

sought monetary damages and an injunction to stop the defendants from manufacturing and marketing the Betamax.⁶⁴

The defendants claimed that the Betamax's ability to time-shift constituted fair use despite the device's obvious capacity for infringement.⁶⁵ To buttress the case that time-shifting constituted fair use, the defendants utilized substantial amounts of prominent witness testimony, including commissioners of major sports leagues, who testified against the Betamax's demise.⁶⁶ Among the distinguished witnesses, Fred Rogers, television star and copyright holder of the children's program *Mr. Rogers' Neighborhood*, testified that the Betamax's ability to time-shift allowed families to watch his program as a complete unit.⁶⁷

The plaintiffs, for multiple reasons, disagreed that time-shifting constituted fair use.⁶⁸ For one, time-shifting allowed consumers to fast-forward through commercials, which the plaintiffs said devalued their copyrights by depriving advertisers of the benefits that they paid for in exchange for sponsoring the telecast.⁶⁹ Moreover, the convenience of time-shifting, the plaintiffs argued, deprived the copyright owner of his legitimate monopolistic right to ration the supply of telecasts.⁷⁰ Finally, the plaintiffs argued that even if the law were to

retailers accused of contributory infringement for recording plaintiffs' programs to demonstrate the Betamax to customers. *Id.*

64. See *Sony*, 659 F.2d at 964 (enumerating plaintiffs' requested remedies).

65. See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 465-66 (C.D. Cal. 1979) (investigating fair-use merits of time-shifting), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

66. *Id.* at 468 (mentioning sport, religious, educational, and other testimony for defendants); see also *Sony*, 464 U.S. at 443 n.27 (justifying time-shifting further). Defendants proffered that time-shifting may increase a program's total viewing, resulting in no harm to plaintiffs. *Id.*

67. *Sony*, 464 U.S. at 445 (quoting Rogers's testimony from district court record). Rogers elaborates:

Some public stations, as well as commercial stations, program the "Neighborhood" at hours when some children cannot use it. I think that it's a real service to families to be able to record such programs and show them at appropriate times. I have always felt that with the advent of all of this new technology that allows people to tape the "Neighborhood" off-the-air, and I'm speaking for the "Neighborhood" because that's what I produce, that they then become much more active in the programming of their family's television life. Very frankly, I am opposed to people being programmed by others. My whole approach in broadcasting has always been "You are an important person just the way you are. You can make healthy decisions." Maybe I'm going on too long, but I just feel that anything that allows a person to be more active in the control of his or her life, in a healthy way, is important.

Id.

68. *Sony*, 480 F. Supp. at 466 (detailing plaintiff's time-shifting objections).

69. *Id.* at 440, 452 (describing advertisers' role in structure of broadcast industry and their opposition to Betamax). See generally Ethan O. Notkin, Note, *Television Remixed: The Controversy Over Commercial-Skipping*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 899 (2006) (investigating uncertainty about legality of commercial-skipping). The author opines that Congress should amend the Copyright Act to eliminate copyright infringement claims against ad-skipping technologies. *Id.* at 937-38. But see *In re Aimster Copyright Litig.*, 334 F.3d 643, 647-48 (7th Cir. 2003) (holding commercial-skipping technologies create commercial-free derivative works thereby violating Copyright Act).

70. *Sony*, 480 F. Supp. at 466-68 (contending copyright holder revenues would decrease).

recognize the benefits of time-shifting, such behavior was insignificant in proportion to the clearly-infringing and damaging behavior of library-building.⁷¹

After the district court held in favor of Sony and its codefendants, and the Ninth Circuit reversed in favor of plaintiff copyright holders, the Supreme Court granted Sony's petition for certiorari.⁷² The Court, in a 5-4 decision, reversed the Ninth Circuit, holding that the defendants' sale and marketing of the Betamax did not contributorily infringe upon the plaintiffs' copyrights.⁷³ The majority based its conclusion largely on two factors in the district court record: "a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers;" and the plaintiffs' failed to demonstrate "nonminimal harm" to the value of their copyrights.⁷⁴ The presence of these two factors, the Court stated, indicated that the Betamax was "capable of substantial noninfringing uses."⁷⁵

While *Sony* was not a class action, film copyright holders in Hollywood and elsewhere closely monitored the case.⁷⁶ After witnessing a discouraging defeat in court, film studios adapted by creating a new market for their movies: home

71. *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 467-68 (C.D. Cal. 1979) (contending copyright holder revenues would decrease), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984) (describing plaintiffs' fears of "librarying").

72. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 457 U.S. 1116 (1982) (granting certiorari); *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 977 (9th Cir. 1981) (concluding no congressional intent for home video recording fair-use exception), *rev'd*, 464 U.S. 417 (1984); *Sony*, 480 F. Supp. at 468 (rejecting injunction and recall of Betamax because impossible to enforce).

73. *Sony*, 464 U.S. at 456 (holding defendants not liable).

74. *Id.* (recounting factors leading to holding no infringement existed).

75. *Id.* (creating "significant noninfringing use" defense in copyright law). The Court inferred the doctrine of substantial noninfringing use in copyright law from a similar concept in patent law. *See id.* at 440-442. The Court noted that the Patent Act "expressly provides that the sale of a 'staple article or commodity of commerce suitable for substantial noninfringing use' is not contributory infringement." *Id.* at 440 (quoting Patent Act, current version at 35 U.S.C. § 271(c) (2006)).

76. *Sony*, 464 U.S. at 434 n.16 (stating suit not class action); *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong. (1982) (testimony of Jack Valenti, President, Motion Picture Association of America, Inc. (MPAA)) [hereinafter *Testimony of Jack Valenti*], available at <http://cryptome.org/hrcw-hear.htm> (predicting VCR would harm Hollywood and American public); *see also* LARDNER, *supra* note 62, at 229 (noting Hollywood's vocal concern during *Sony* case that home taping could destroy audiovisual marketplace). The plaintiffs in *Sony* were two film studios, Walt Disney and Universal, which combined to own less than ten percent of total television copyrights. *Sony*, 464 U.S. at 443, 443 n.22. The Court reinstated the finding of the district court that "many" of the remaining ninety-plus percent of copyright holders would approve of private time-shifting, and thus would not favor the abolition of time-shifting sought by Universal and Disney. *Id.* at 456. At least one non-plaintiff film studio, Warner Brothers, contributed money toward legal costs of the case. LARDNER, *supra* note 62, at 34. In his testimony on behalf of the film industry, Valenti vehemently noted his opposition to the VCR: "[I] say to you that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone." *Testimony of Jack Valenti, supra*.

videos.⁷⁷ By 2002, motion picture studios were grossing more than twice as much from the sale and rental of home videos than they were from box office receipts.⁷⁸ Today, legal scholars and contributory infringement defendants recount this epilogue to *Sony* in order to demonstrate their position favoring the significant noninfringing use defense.⁷⁹ According to this argument, but for the narrow 5-4 *Sony* decision, the home video market might never have materialized, a major multinational corporation in Sony might have crumbled under the weight of infringement damages, inventors would never have pioneered numerous video and audio duplication technologies, and the benefits of time-shifting would have never reached the consumer.⁸⁰

C. *Grokster and Its Ancestral File-Sharing Cases*

1. *Ancestors to Grokster*

The internet file-sharing craze of the 1990s tested the limits of the significant noninfringing use doctrine.⁸¹ In *A&M Records v. Napster*,⁸² the Ninth Circuit rejected a music file-sharing company's significant noninfringing use defense, holding Napster liable for contributory infringement.⁸³ The court upheld the district court's finding that Napster's primary, active, and facilitating role in maintaining a server used for infringement rendered the *Sony* precedent inapplicable.⁸⁴ In doing so, the court noted that Napster operated with "actual knowledge" of its customers' infringement.⁸⁵

77. Brief for the Respondents at 42-43, *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480) (documenting home video market now exceeds movie theater market).

78. *Id.* at 43 (alleging \$9.52 billion theater receipts and \$24.42 billion home video receipts in 2002).

79. *See id.* at 42-44 (arguing home video boom after *Sony* justifies judicial restraint in stifling new technologies); Jessica Litman, *Copyright in the Twenty-First Century: The Exclusive Right to Read*, 13 *CARDOZO ARTS & ENT. L.J.* 29, 47 (1994) (noting film industry thrived after *Sony* despite predictions of doom and gloom).

80. *See supra* note 79 and accompanying text (describing unintended positive consequences of *Sony* holding). *But see* David Nimmer, *Codifying Copyright Comprehensibly*, 51 *UCLA L. REV.* 1233, 1362 n.698 (2004) (considering possibility home video market would have emerged even if *Sony* lost). Nimmer notes that the circuitry enabling playback on the Betamax was entirely separate from the circuitry that enabled recording. *Id.* Thus, had *Sony* lost, manufacturers could have still sold playback-only video machines, still allowing for a home video market. *Id.* Nimmer admits, however, that this is speculative, as fewer consumers might have bought the playback-only machines, thereby limiting the potential market for home videos. *Id.*

81. *See* Patti Hartigan, *Free Riders Who Don't Share in the Digital Community*, *BOSTON GLOBE*, Aug. 25, 2000, at C9 (describing rampant unauthorized file sharing of copyrighted digital content and potential impact); *see also infra* notes 83-89 (describing leading file-sharing cases prior to *Grokster*).

82. 239 F.3d 1004 (9th Cir. 2001)

83. *Id.* at 1027-28 (finding contributory liability but staying monetary bond).

84. *Id.* at 1027 (upholding district court finding of contributory liability); *see also* *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 916-17 (N.D. Cal. 2000) (distinguishing facts of *Napster* from *Sony*), *aff'd in part*, 239 F.3d 1004 (9th Cir. 2001).

85. *See infra* notes 88-89 and accompanying text (comparing "actual knowledge" standard in Ninth Circuit to "ostrich" standard in Seventh Circuit).

In *In re Aimster Copyright Litigation*,⁸⁶ the Seventh Circuit also held file-sharing companies liable for contributory infringement but for slightly different reasons.⁸⁷ Judge Posner's Seventh Circuit decision chided the *Aimster* defendants for their "willful blindness" and "ostrich-like refusal" to discover the malfeasance of their customers, who were clearly engaging in illegal downloads.⁸⁸ In contrast, Judge Beezer of the Ninth Circuit required actual knowledge of infringement before imputing contributory liability to the *Napster* defendants.⁸⁹

2. Grokster

This split over the issue of actual knowledge compelled the Supreme Court to grant certiorari in the case of *MGM Studios v. Grokster*.⁹⁰ As in *Aimster* and *Napster*, *Grokster* confronted the issue of whether internet file-sharing businesses should bear secondary copyright liability for its customer's illegal internet music and film downloads.⁹¹ The *Grokster* defendants, however, through "supernode" peer-to-peer software, had completely eliminated the need for a central server.⁹² In other words, the *Grokster* defendants' customers, unlike the *Aimster* or *Napster* defendants' customers, directly and exclusively downloaded music from the hard drives of other customers, without any monitoring by the file-sharing companies or their computers.⁹³ The defendants

86. 334 F.3d 643 (7th Cir. 2003).

87. *Id.* at 655 (holding defendants' contributory liability stems from refusal to discern customer infringement).

88. *Id.* at 650, 653-55 (rejecting lack of actual knowledge as defense).

89. *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001) (requiring actual knowledge for contributory liability).

90. 543 U.S. 1032 (2004) (granting certiorari).

91. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-21 (2005); *Aimster*, 334 F.3d at 645-46; *Napster*, 239 F.3d at 1011-12 (identifying file-sharing or music swapping cases).

92. *Grokster*, 545 U.S. at 919-21 (expressing defendants' claims that their software differentiated them from Napster).

93. See John M. Moyer, Comment, *How Sony Survived: Peer-to-Peer Software, Grokster, and Contributory Copyright Liability in the Twenty-First Century*, 84 N.C. L. REV. 646, 660-61 (2006) (explaining standard and supernode peer-to-peer software). In order for peer-to-peer networks to function, each peer must utilize software that links each peer's computer to the others. *Id.* In the *Grokster* case, the defendants distributed this type of software. *Grokster*, 545 U.S. at 919-20. The Court explains:

On the FastTrack network opened by the Grokster software, the user's request goes to a computer given an indexing capacity by the software and designated a supernode, or to some other computer with comparable power and capacity to collect temporary indexes of the files available on the computers of users connected to it. The supernode (or indexing computer) searches its own index and may communicate the search request to other supernodes. If the file is found, the supernode discloses its location to the computer requesting it, and the requesting user can download the file directly from the computer located. The copied file is placed in a designated sharing folder on the requesting user's computer, where it is available for other users to download in turn, along with any other file in that folder.

Id. at 921.

also claimed that their customers used this software for significant numbers of *legal* downloads and thus the defendants should survive scrutiny under the *Sony* standard for significant noninfringing use.⁹⁴ Prior to *Grokster* reaching the Supreme Court, the Ninth Circuit had differentiated *Grokster* from *Napster* by finding that the *Grokster* defendants lacked the “actual knowledge” required for contributory infringement and thus held for defendants.⁹⁵

In 2005, the Supreme Court unanimously held that the *Grokster* defendants infringed plaintiffs’ copyrights.⁹⁶ Two concurring opinions, however, evidenced that the Court did not fully agree on how much of the *Sony* standard should survive.⁹⁷ Concerned about the potential chilling effect on new technology, Justice Breyer’s concurrence, joined by Justices Stevens and O’Connor, rejected the plaintiffs’ contention that the Court should modify the *Sony* standard, but nonetheless asserted that the defendants’ specific intent to “induce” infringement made them liable.⁹⁸ Justice Ginsburg’s concurrence, joined by Chief Justice Rehnquist and Justice Kennedy, rejected the defendants’ contention that legitimate file-sharing might increase as a percentage of total file-sharing over time.⁹⁹ Without explicitly calling to modify the *Sony* rule, Ginsburg’s concurrence implied that the Court should change the *Sony* standard from “capable of” substantial noninfringing use to *likely* capable of substantial noninfringing use.¹⁰⁰

94. See Brief for the Respondents at 20-21, *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480) (expressing defendants’ claim that percentage of infringing use similar to *Sony* defendants).

95. *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1163-64 (9th Cir. 2004) (upholding district court finding of lack of requisite knowledge), *rev’d*, 545 U.S. 913 (2005). Thus, it was the plaintiffs—numerous songwriters, music publishers, and motion picture studios—who successfully petitioned for certiorari. *Grokster*, 545 U.S. at 920-21 (identifying diverse class of plaintiffs).

96. *Grokster*, 545 U.S. 913 at 941 (holding defendants liable and vacating Ninth Circuit’s summary judgment order).

97. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 956-58 (2005) (Breyer, J., concurring) (arguing for maintenance of *Sony* standard); *id.* at 944-48 (Ginsburg, J., concurring) (implying desire for less speculative standard for clearly infringing technologies).

98. *Id.* at 952, 957 (Breyer, J. concurring) (noting clarity of *Sony* rule).

When measured against Sony’s underlying evidence and analysis, the evidence now before us shows that *Grokster* passes Sony’s test—that is, whether the company’s product is capable of substantial or commercially significant noninfringing uses. For one thing, petitioners’ . . . own expert declared that 75% of current files available on *Grokster* are infringing and 15% are “likely infringing.” That leaves some number of files near 10% that apparently are noninfringing, a figure very similar to the 9% or so of authorized time-shifting uses of the VCR that the Court faced in *Sony*.

Id. at 952 (citations omitted) (noting defendants’ file-sharing technology used overwhelmingly for infringing purposes).

99. *Id.* at 948 (Ginsburg, J., concurring). Ginsburg wrote, “Fairly appraised, the evidence was insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over time.” *Id.*

100. Compare *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (holding substantial noninfringing use capability alone sufficient), with *Grokster*, 545 U.S. at 948 (Ginsburg, J., concurring) (questioning *Sony* standard as too speculative). In *Sony*, the Court held that copying equipment

Justice Souter, writing for the *Grokster* Court, held that the defendants' behavior amounted to "inducement," a common-law liability theory that neither the Copyright Act nor *Sony* had extinguished.¹⁰¹ As evidence of inducement, Souter pointed to the defendants' decisions to advertise themselves as Napster alternatives, after the Seventh Circuit had effectively shut down Napster for infringement.¹⁰² Further distinguishing the *Grokster* defendants from those in *Sony*, Souter wrote that the *Grokster* defendants failed to utilize copy protection technologies such as filters, which did not exist when Sony launched Betamax.¹⁰³ Souter also discussed the *Grokster* defendants' motive to encourage excessive downloading, as evidenced by defendants' business model, whereby advertisers would compensate the defendant companies in proportion to their numbers of users.¹⁰⁴ The *Grokster* Court thus held, "[o]ne infringes a copyright contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."¹⁰⁵

D. *Placeshifting, Slingbox, and Retransmission Law*

In the 1990s, certain file-sharing defendants began using the term "space-shifting" as an attempted fair-use defense.¹⁰⁶ Under this theory, a person who owns a copyrighted compact disc who then copies the content to a digital file does not engage in infringement.¹⁰⁷ Instead, that person is merely shifting

"need merely be *capable of* substantial noninfringing uses" in order to avoid copyright infringement. *Sony*, 464 U.S. at 442 (emphasis added). Justice Ginsburg noted in her concurrence in *Grokster* that "the evidence was insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were *likely to* develop over time." *Grokster*, 545 U.S. at 948 (Ginsburg, J., concurring) (emphasis added).

101. *Grokster*, 545 U.S. at 934-36 (holding defendants liable for inducement).

102. *Id.* at 938-40 (revealing defendants' marketing scheme). One of the *Grokster* defendants distributed promotional materials stating, "Napster Inc. has announced that it will soon begin charging you a fee. That's if the courts don't order it shut down first. What will you do to get around it?" *Id.* at 925.

103. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939 (2005) (expressing defendants' duty to monitor).

104. *Id.* at 938-940 (revealing motive for contributory infringement).

[Defendants] make money by selling advertising space, by directing ads to the screens of computers employing their software [T]he more the software is used, the more ads are sent out and the greater the advertising revenue becomes. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing.

Id. at 939-940.

105. *Id.* at 930.

106. See *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (using term space-shifting); *UMG Recordings v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (alleging space-shifting as fair-use defense).

107. *Napster*, 239 F.3d at 1014 (revealing defendants' space-shifting theory).

material that she already owns from one “space” to another.¹⁰⁸ Courts in multiple jurisdictions rejected this defense.¹⁰⁹ Currently, Sling Media uses the term “placeshifting” to refer to Slingbox’s ability to shift live content from a cable television box to an internet-enabled device such as a laptop or mobile phone.¹¹⁰ Courts have not tested the placeshifting fair use defense or considered whether *Sony*’s time-shifting defense is analogous.¹¹¹

Sling Media currently markets three products, all of which allow users to access and control their televised programming from remote locations via the internet.¹¹² Despite the aforementioned praise for Slingbox, the current technology generates a picture on the remote device inferior to that of the original, even when the source of that image is digital.¹¹³ A pending Sling Media patent application describes the invention as a “personal media broadcasting system,” albeit only capable of broadcasting to one internet-based device at a time.¹¹⁴

In addition to their inability to broadcast to multiple end-users, the devices lack the ability to record content.¹¹⁵ Content owners, nonetheless, fear future underground attempts to circumvent Slingbox’s inherent copy protections.¹¹⁶ Already, online postings have revealed a new phenomenon called “Slingbox buddies,” whereby a person without access to cable or satellite television in a particular market, often overseas, convinces someone with such access to hook

108. *See id.*

109. *See id.* at 1019 (affirming district court’s rejection of defendant’s space-shifting fair-use theory); *UMG*, 92 F. Supp. at 351 (dismissing space-shifting as illegal file-sharing).

110. *Statement of Krikorian*, *supra* note 1, at 19 (employing term “placeshifting”).

111. *See Wallenstein*, *supra* note 7 (speculating legal showdown over placeshifting in future).

112. Sling Media, <http://us.slingmedia.com/page/products.html> (last visited Sept. 5, 2007) (describing three Slingbox models). Consumers must use different models for digital cable and traditional cable. *Id.* “Slingbox Pro” can control multiple devices in a home theater setup. *Id.*

113. *See Matt Dunn, Watching TV Bounced Over the Internet Is a Nifty Idea, But Not if You Plan to Watch Live Sports*, *GUARDIAN* (London), Oct. 5, 2006, Technology Pages, at 4 (noting suboptimal quality of Slingbox signal for watching sporting events); Mark Sullivan, *Sling Media: We’re Good for Cable*, *INFORMATIONWEEK.COM*, Mar. 30, 2006,

<http://www.informationweek.com/story/showArticle.jhtml?articleID=184417096> [hereinafter Sullivan, *We’re Good for Cable*] (labeling quality of “slung” signal as “poor given bandwidth constraints”). *But see* Posting of IntelInside, *supra* note 7 (declaring Slingbox picture quality “exceptionally good” in conjunction with high speed internet connection); *supra* note 3 and accompanying text (enumerating praise and awards for Slingbox).

114. *See Statement of Krikorian*, *supra* note 1, at 19 (stating Slingbox only transmits to one end-user at a time); Primary Slingbox Patent Application, *supra* note 3 (including “broadcasting” in name of device patent).

115. *See Statement of Krikorian*, *supra* note 1, at 19 (specifying Slingbox’s inability to record).

116. Wallenstein, *supra* note 7 (noting Slingbox’s potential for increasing piracy). CBS Executive Vice-President Martin Franks stated:

Even if you take it at face value that it is a one-to-one transmittal device, I don’t think it will be very long before some hacker in Cupertino posts on the Web the way to modify it . . . that turns it into something that can be tapped by fifty people.

Id. (quoting Franks).

up a Slingbox and stream content to him.¹¹⁷

Federal law currently protects the cable and satellite television industries from illegal reception of pay television signals.¹¹⁸ Federal law also explicitly outlaws the manufacture of equipment that aids in unauthorized reception of cable programming.¹¹⁹ Courts have historically assessed damages against parties who rebroadcast copyrighted material and have rejected the fair use defense in such instances.¹²⁰ Even when an event is a live broadcast, and not necessarily fixed in a tangible medium of expression, courts may find against the unauthorized broadcasters on common-law theories.¹²¹

The cable industry, networks, and sports leagues have criticized Sling Media for free-riding in a broadcasting industry that typically poses expensive barriers to entry.¹²² For example, according to the March 2006 congressional testimony

117. Cf. Posting of stlspartan to SPARTAN TAILGATE, <http://www.spartantailgate.com/forums/archive/index.php/t-204302.html> (Sept. 14, 2006, 23:36 EST) (requesting Michigan State football game in exchange for premium college basketball content); Posting of mwa. . .@smad.com to GOOGLE GROUPS, http://groups.google.com/group/alt.video.tape-trading.pal/tree/browse_frm/month/2006-01?_done=%2Fgroup%2Falt.video.tape-trading.pal%2Fbrowse_frm%2Fmonth%2F2006-01%3F& (Jan. 21, 2006, 07:41 EST) (soliciting Slingbox buddy in England in exchange for content in United States). As one online solicitation stated:

With the chances of seeing the game in STL quickly fading[,] I'm looking for a SlingBox buddy who would like to send the game to me. I'll return the favor[;] I'm tivo'ed and subscribe to ESPN+ and college basketball and the full march madness. I have guaranteed upstream bandwidth so there will be something [sic] I can beam to you in high quality in the future.

Posting of stlspartan, *supra*.

118. See, e.g., 47 U.S.C. § 553(b) (2006) (creating misdemeanor fines and sentencing for unauthorized cable reception); 47 U.S.C. § 605(e) (creating misdemeanor fines and sentencing for unauthorized use of communication scrambling such as satellite descramblers); *Int'l Cablevision v. Noel*, 859 F. Supp. 69, 79-80 (W.D.N.Y. 1994) (imposing § 553 damages against individual for unauthorized interception of cable signal); see also *Adelphia Cable Partners L.P. v. E&A Beepers Corp.*, 188 F.R.D. 662, 665 (S.D. Fla. 1999) (inferring purpose of penalties within 47 U.S.C. §§ 553 and 605). According to Judge James Lawrence King of the Southern District of Florida, 47 U.S.C. §§ 553 and 605 are "aimed at combating the piracy of radio and television signals." *Adelphia*, 188 F.R.D. at 665. See generally David V. Lampman, II, *The Unusual Suspects: Unscrambling Satellite Piracy*, 22 CARDOZO ARTS & ENT. L.J. 553 (2004) (providing historical overview of battle against satellite piracy).

119. 47 U.S.C. § 553(a)(2) (including manufacturers and distributors in statutory definition of violators).

120. See, e.g., *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 106 (2d Cir. 1998) (rejecting fair-use defense for unauthorized rebroadcast via telephone); *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 997 (9th Cir. 1998) (barring fair-use defense for retransmitting copyrighted news clips for news purposes); *Select Theatres Corp. v. Ronzoni Macaroni Co.*, 59 U.S.P.Q. 288, 291 (S.D.N.Y. 1943) (holding company liable for rebroadcasting infringing radio program).

121. See *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 492 (W.D. Pa. 1938) (finding unfair competition for pirated broadcast of baseball game). During Pittsburgh Pirates home games, defendants watched from where they could see over the field's fences and made unauthorized broadcasts. The court explained, "[Defendant's scheme] amounts to unfair competition, and is a violation of the property rights of the plaintiffs." *Id.*

122. *Statement of McSlarrow*, *supra* note 10, at 76-78, 84 (implying cable industry's multi-billion dollar fiber-optic investment enabled future competitors); Anderson, *supra* note 13 (reporting Capitol Broadcasting President's contention that Sling Media sidesteps retransmission agreements).

of the National Cable and Telecommunications Association's CEO, the cable industry invested billions of dollars in telecommunication infrastructure in previous decades.¹²³ Further, cable systems in each geographic market negotiate, and in effect pay for, retransmission consent agreements with various pay-television networks.¹²⁴ Networks also pay handsome sums in order to acquire the rights to copyrighted programming, such as the rights to broadcast professional sports contests.¹²⁵

The media arm of Major League Baseball (MLB) has expressed public doubts about the legality of Slingbox.¹²⁶ MLB, like the three other major professional United States sports leagues, possesses statutory protection beyond that of most content owners.¹²⁷ The Sports Broadcasting Act of 1961 allows the four leagues to regulate their supply and distribution of telecasts by blacking-out contests in certain markets without running afoul of antitrust laws.¹²⁸ Sling Media, in turn, claims that it is not violating any broadcasting

123. *Statement of McSparrow*, *supra* note 10, at 76-78 (implying cable market share already diminishing from satellite competition despite cable industry's investment).

124. Fact Sheet on Cable Carriage of Broadcast Stations, <http://www.fcc.gov/mb/facts/cblbdcst.html> (last visited Sept. 6 2007) [hereinafter Cable Fact Sheet] (requiring cable systems to negotiate retransmission agreements); *see also* Press Release, Time Warner Cable, NBC and Time Warner Cable Sign Long-Term Retransmission Consent Agreement for Analog and Digital Signals (May 17, 2000), available at <http://www.timewarner.com/corp/newsroom/pr/0,20812,667712,00.html> [hereinafter NBC & Time Warner Press Release] (exemplifying retransmission consent arrangement). According to the Federal Communications Commission, in exchange for allowing a cable system to carry its signal, "a television station may require the payment of a fee or other consideration (for instance, carriage of another programming service or advertising time). Any new or additional costs incurred as a result of retransmission consent agreements may be passed through to cable subscribers." Cable Fact Sheet, *supra*. Similarly, in exchange for unspecified consideration, NBC extended Time Warner's right to broadcast or rebroadcast CNBC, MSNBC, and NBC to its cable subscribers. NBC & Time Warner Press Release, *supra*.

125. *John Kerry Asks FCC to Look into MLB's Extra Innings Future*, SPORTSBUSINESSDAILY, Feb. 2, 2007, <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=sbd.main&storyID=SBD2007020210> (reporting DirecTV's \$700 million bid for exclusive seven-year right to broadcast out-of-market baseball games).

126. *MLBAM After Sling Media to Pony Up Fees for Slingbox Device*, SPORTSBUSINESSDAILY, June 20, 2006, <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=article.main&articleId=103615&keyword=slingbox> [hereinafter *MLBAM After Sling*] (demanding Sling pay retransmission fees). *See generally* Dave Weekley, *SC's 1959 Team Visits Ex-Coach for Tribute*, CHARLESTON GAZETTE, July 26, 2005, at 1B (hinting at monetary value of MLB internet rights).

127. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2006) (providing limited television antitrust exemption to four major sports leagues). The exemption allows teams in professional baseball, football, hockey, and basketball leagues to act in concert for the purposes of negotiating broadcasting contracts without fear of an antitrust lawsuit. *See id.* By contrast, college sports teams cannot legally act in concert to fix the price or supply of college sports broadcasts. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984) (holding college football teams' agreement to limit supply of televised games violated Sherman Act).

128. *See* 15 U.S.C. § 1291 (bestowing teams within four major sports leagues antitrust immunity so far as television contracts); Chris Garmire, *The Super Bowl III Problem: A Review of the Development of the Property Right in Live Professional Sports Broadcasts and a Practical Application of Copyright Law to an Infringement Action for the Unauthorized Reproduction and Distribution of a Taped Broadcast of Super Bowl III*, 2 CHI.-KENT J. INTELL. PROP. 3, 7 (2000) (describing NFL blackout rule and resulting litigation).

laws or agreements but is instead providing devices that allow consumers the ability to watch the content that they already purchased.¹²⁹

E. Technologies at Risk in the Post-Grokster Era

Slingbox is not the only technology facing potential or actual litigation during this uncertain post-*Grokster* state of secondary copyright liability.¹³⁰ Potential defendants include Slingbox's placeshifting competitors, such as the SageTV Placeshifter, Orb Networks's MyCasting, and Sony's LocationFree.¹³¹ In addition, content owners may challenge space-shifters, time-shifters, and manufacturers of hybrid devices such as BitTorrent, TiVoToGo, basic TiVo, as well as non-TiVo based DVRs.¹³² Current or recent defendants range from the

Traditionally, teams or leagues have blacked-out games in certain geographic markets in order to encourage persons in that market to pay admission to the nearby game. Garmire, *supra*, at 7.

129. *Statement of Krikorian*, *supra* note 1, at 19 (arguing Slingbox's legality).

130. See Tiffany A. Parcher, Comment, *The Fact and Fiction of Grokster and Sony: Using Factual Comparisons to Uncover the Legal Rule*, 54 UCLA L. REV. 509, 535-45 (2006) (examining potential liability of emerging technology companies after *Grokster*); *infra* note 131 and accompanying text (describing other placeshifting technologies); *infra* note 132 and accompanying text (describing non-placeshifting technologies accused of contributory infringement or inducement). In her article, Parcher examines XM's recordable devices-TiVo, TiVoToGo, and Slingbox. Parcher, *supra*.

131. See Mike Musgrove, *Sony Reintroduces TV "Place-Shifting" Products*, WASH. POST, Sept. 6, 2006, at D05 (comparing Slingbox to LocationFree); Evan Blass, *SageTV Placeshifter Offers Mobile Content Streaming*, ENGADGET, Apr. 25, 2006, <http://networking.engadget.com/2006/04/25/sagetv-placeshifter-offers-mobile-content-streaming> (comparing SageTV Placeshifter to Orb Networks' MyCasting); Joe Lozito, *Orb Networks Takes Placeshifting to the Next Level with MyCasting*, BIG PICTURE BIG SOUND, Oct. 15, 2006, <http://www.bigpicturebigsound.com/orbcast-902.shtml> (comparing MyCasting to Slingbox); Wallenstein, *supra* note 7 (speculating placeshifting legality will someday reach Supreme Court). Orb Network's CEO stated in 2005, "I'll bet there will be a Supreme Court ruling sometime in the next decade specifically addressing this issue: Does the consumer have the right to placeshift as they do time-shift their content?" Wallenstein, *supra* note 7. In order to broadcast live televised content, both SageTV Placeshifter and Orb's MyCasting require a TV tuner card and software within one computer, which can then send content over the internet to another computer. Blass, *supra*. MyCasting, unlike Slingbox, does not require installing software on the remote computer. Lozito, *supra*. LocationFree differs in that, when Sony introduced it in 2006, it could not broadcast to mobile phones. Musgrove, *supra*, at D05. *But cf.* Julio Ojeda-Zapata, *Can't Get Enough TV? Watch Your Cell Phone*, ST. PAUL PIONEER PRESS, Mar. 19, 2007, at 1D (revealing MobiTV "mobile video" as additional option for receiving televised content by mobile phone). MobiTV, on the other hand, offers a limited amount of current television shows and reruns for broadcast to mobile phones or laptops. Ojeda-Zapata, *supra*, at 1D. Unlike Slingbox or SageTV, these broadcasts occur presumably with the consent of the copyright owner. *Cf. id.* However, MobiTV does not "entirely [replicate] what you'd get from [cable]. You'll only get a sampling of available programming The shows don't always air when you expect." *Id.*

132. See Andrew Beckerman-Rodau, *MGM v. Grokster: Judicial Activism or A Good Decision?*, 74 U. MO. KAN.-CITY L. REV. 921, 935 (2006) (implying DVR marketers possibly liable post-*Grokster* if product advertisements encourage infringing use); see also Matthew Helton, Article, *Secondary Liability for Copyright Infringement: BitTorrent as a Vehicle for Establishing a New Copyright Definition for Staple Articles of Commerce*, 40 COLUM. J.L. & SOC. PROBS. 1, 24-25 (2006) (speculating on BitTorrent's defenses if sued); TiVo, <http://www.tivo.com/mytivo/domore/tivotogo/index.html> (last visited Sept. 6, 2007) (describing TiVoToGo technology and accessories). TiVoToGo is a space-shifting technology allowing consumers to play back content that they recorded on the popular time-shifting TiVo device. TiVo, *supra*. BitTorrent, on the other hand, is a peer-to-peer duplication technology, which allows users to quickly transfer large amounts of data at a low cost. Helton, *supra*, at 3-4.

well-known, publicly-traded XM Satellite Radio to the lesser-known, closely held retailer Load 'N Go Video.¹³³

In 2006, music recording labels sued XM Radio because of its devices that record and store material broadcast via satellite, while film studios sued Load 'N Go for transferring legitimately purchased DVD movies into an I-Pod-friendly format.¹³⁴ The *Load 'N Go* case has since settled while the *XM* case is still pending.¹³⁵ In a case pending review by the Second Circuit, numerous film studios enjoined Cablevision from employing its "remote storage" DVR technology, a concept that would allow subscribers to acquire streamed content and store it remotely on Cablevision equipment.¹³⁶ Finally, in 2007, the English Premier Football League initiated a class action lawsuit against YouTube, a popular website that allows users to easily post video clips for others to view over the internet.¹³⁷ The complaint in the pending suit accuses

133. See *infra* note 134 and accompanying text (describing *XM* and *Load 'N Go* cases); *infra* note 135 and accompanying text (noting parties settled *Load 'N Go* case).

134. Atlantic Recording Corp. v. XM Satellite Radio, Inc., No. 06 Civ. 3733, 2007 U.S. Dist. LEXIS 4290, at *25 (S.D.N.Y. Jan. 19, 2007) (denying defendant's motion to dismiss); Plaintiffs' Complaint for Copyright Infringement, 17 U.S.C. § 101, *et. seq.* and Violations of Digital Millennium Act, 17 U.S.C. § 1201, *et. seq.* at 9-11; Paramount Pictures Corp. v. Load 'N Go Video, Inc., No. 06 Civ. 12931 (S.D.N.Y. Feb. 16, 2007) (dismissing copyright infringement claim); Parcher, *supra* note 130 at 535-38 (dissecting *XM* case and describing recording device); Annys Shin, *Music Labels Sue XM Over Recording Device*, WASH. POST, May 17, 2006, at D1 (describing XM products with recording capability); see also Paul Sweeting, *Shifting Time and Space*, VIDEO BUSINESS, Nov. 22, 2006, <http://www.videobusiness.com/article/CA6394569.html> (predicting Load 'N Go would have lost if case had not settled). Sweeting writes, "Load 'N Go is almost certainly toast. The DMCA prohibits circumvention . . . so unless Load 'N Go has figured out some way to rip the DVDs without first circumventing the CSS encryption, the studios have them dead to rights." Sweeting, *supra*. As for XM, recording label plaintiffs admit to contractually providing content to XM but contend that XM should negotiate a separate license and fee to allow its customers to record the music. Shin, *supra*, at D1.

135. Order at 1, Paramount Pictures Corp. v. Load 'N Go Video, Inc., No. 06 Civ. 12931 (S.D.N.Y. Feb. 16, 2007) (dismissing case without prejudice but not revealing terms of settlement reached by all parties); Civil Docket For Case #: 1:06-cv-03733-DAB, Atlantic Recording Corp. v. XM Satellite Radio, Inc., No. 06 Civ. 3733 (S.D.N.Y.) (demonstrating case still pending). XM filed an answer to the complaint in March 2007, and the case is currently in discovery. *Cf. id.*

136. Twentieth Century Fox Film Corp. v. Cablevision Systems Corp., 478 F. Supp. 2d 607, 624 (S.D.N.Y. 2007) (granting plaintiff's motion for summary judgment); Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 10-11, Twentieth Century Fox Film Corp. v. Cablevision Systems Corp., No. 06 Civ. 3990 (S.D.N.Y. 2007) (distinguishing instant case from *Sony* and accusing Cablevision of direct and contributory infringement). The plaintiffs explained:

In contrast to *Sony*, Cablevision has not manufactured, nor would it sell its subscribers, any equipment; it would provide its subscribers with the universe of programming eligible for copying . . . and the unauthorized copying would occur not in the privacy of the subscribers' homes but in facilities over which Cablevision alone has total control.

Id. at 11. Plaintiffs view Cablevision's storage and subsequent streaming as rebroadcasting, rather than time-shifting, and thus want Cablevision to negotiate a separate retransmission agreement. See Ken Fisher, *TV Networks say "No!" to Remote Storage DVRs, File Suit in US District Court*, ARS TECHNICA, May 25, 2006, <http://arstechnica.com/news.ars/post/20060525-6913.html>.

137. See Class Action Complaint, Jury Trial Demanded at 32-34, Football Ass'n Premier League, Ltd. v. YouTube, Inc., No. 07 Civ. 3582 (S.D.N.Y. filed May 4, 2007) [hereinafter, YouTube Complaint] (alleging

YouTube of inducing infringement and intentionally hampering copyright owners' abilities to monitor their protected works.¹³⁸

Meanwhile, holders of digital copyrights are lobbying both Congress and analogous international legislative bodies to mandate "broadcast flag" technologies for digital television and radio hardware.¹³⁹ Broadcast flags are bits of digital information transmitted alongside digital television or radio signals, which indicate the extent to which the copyright owner has authorized the public to record the program.¹⁴⁰ For example, if a member of Congress used his DVR to record himself on a "flagged" evening newscast, the flag could prevent that Congressman from emailing a clip of the newscast to his home office.¹⁴¹ To the vexation of content owners, neither Slingbox, XM, nor Linux-based television receivers employ broadcast flags.¹⁴² Such companies,

direct infringement, contributory infringement, vicarious infringement, and inducement). The complaint includes the music publisher Bourne as co-lead plaintiff and names Google, YouTube's successor in interest, as a co-defendant. *Id.* at 5-8; *see also* YouTube, <http://youtube.com> (expressing YouTube's trademark, "Broadcast Yourself").

138. YouTube Complaint, *supra* note 137, at 19-20 (alleging Premier League's copyrighted video clips sometimes illegally viewed 100,000 times in matter of days). The plaintiff alleges:

Defendants are pursuing a deliberate strategy of engaging in, permitting, encouraging, and facilitating massive copyright infringement on the YouTube website because the presence of large amounts of valuable intellectual property generates interest in that website, resulting in public and media attention and increased traffic (which, in turn, increase YouTube's advertising revenues and projected value as a site, platform, or destination).

Id. at 3.

139. *See* Am. Library Ass'n v. FCC, 406 F.3d 689, 708 (D.C. Cir. 2005) (holding unilateral implementation of broadcast flags exceeds FCC authority); Jim Puzzanghera, *Proposed Treaty on TV Signals Spurs Criticism*, L.A. TIMES, Sept. 13, 2006, at C1 (revealing World Intellectual Property Organization's push for international treaty to limit unauthorized retransmissions). In the events leading up to *American Library*, the FCC mandated that all demodulator products manufactured after July 1, 2005, be equipped with broadcast flags, after copyright owners persuaded the FCC that they were necessary. *American Library*, 406 F.3d at 693-94. In response, nine public interest and library groups successfully persuaded the D.C. Circuit to vacate the FCC mandate, thereby leaving the broadcast flag issue for Congress to decide. *Id.* at 692. *See generally* Audio Broadcast Flag Licensing Act of 2006, H.R. 4861, 109th Cong. (2006) (proposing FCC regulation of digital radio content to prevent unauthorized distribution). Proponents of this treaty, mainly European and American TV networks, believe that such regulation is necessary to reduce theft of cable and satellite television signals. *Id.* Conversely, opponents claim that legislators craft such regulations in order to give content-owners leverage to compel technology companies like Slingbox to install broadcast flags and pay a license fee for their customers' use of content. *Id.*

140. Gigi B. Sohn, *Don't Mess With Success: Government Technology Mandates and the Marketplace for Online Content*, 5 J. ON TELECOMM. & HIGH TECH. L. 73, 76 (2006) (defining broadcast flag).

141. *Id.* at 75-76 (demonstrating examples of legitimate uses broadcast flags might stifle).

142. *See* Wendy Seltzer, *The Broadcast Flag: It's not Just TV*, 57 FED. COMM. L.J. 209, 210-11 (2005) (arguing broadcast flags frustrate tinkering spirit of Linux and open-source movements). *See generally* CENTER FOR DEMOCRACY AND TECHNOLOGY, ALL EYES ON TiVO: THE BROADCAST FLAG AND THE INTERNET (2004), <http://www.cdt.org/copyright/20040726tivoflag.pdf> (chronicling content owner objections to technologies lacking distance-based transmission limitations such as TiVo). Seltzer remarks in her article:

The broadcast flag rule means I cannot tinker with my TV. It means others cannot either, including

some argue, risk extinction or expensive redesign if the flags become mandatory.¹⁴³

III. ANALYSIS

Slingbox owners have indeed used the device for direct infringement of copyrights.¹⁴⁴ While one can make a case that Sling Media itself has directly infringed copyrights, a more plausible cause of action against Sling Media is one of secondary liability, such as contributory infringement, vicarious infringement, or inducement.¹⁴⁵ Slingbox's very existence, therefore, hinges on the following question: Do copyright laws require that the actual and potential abuses by Sling Media's customers be imputed to the company?¹⁴⁶ To confront this ultimate issue, this paper first asks three preliminary questions: Would Slingbox survive the *Sony* and *Grokster* tests?¹⁴⁷ If so, does Slingbox's ability to "broadcast," unlike a VCR (i.e., *Sony*) or a peer-to-peer file-sharing network (i.e., *Grokster*), warrant additional considerations beyond the scope of *Sony* and *Grokster*?¹⁴⁸ Finally, assuming that the above considerations fail to determine Slingbox's legality, how might society benefit or suffer if a court were to hold Sling Media liable for infringement?¹⁴⁹

the technologists who might want to bring us the next great advance like TiVo. They have to engineer to government approval, more than consumer demand or technological requirements. Before they could bring a new product near market, they would have to hire a bevy of lawyers to seek Commission approval or to obtain a license for an existing approved technology, with complex licensing requirements and restrictions that often surpass those of the Commission's mandate. By the time the technology escaped that process, if it emerged at all, it would likely have had the life sucked out of it in the name of compliance.

Seltzer, *supra*, at 211.

143. Sohn, *supra* note 140, at 78 (alleging audio broadcast flag mandate would "cripple" XM Radio). Sohn contends that satellite radio's growth occurred in part due to consumers' ability to store and play back songs. *Id.* She alleges outlawing recordable satellite radios would slow this growth. *Id.* Sohn makes similar contentions about the emergence of digital radio, explaining that consumers will continue to favor analog radio over the sonically superior digital radio if they can record the former and not the latter. *Id.*

144. *See supra* note 117 and accompanying text (providing solicitation "Slingbox buddy" to access copyrighted content without permission of copyright owners).

145. *See supra* note 105 and accompanying text (announcing *Grokster* standards for contributory and vicarious infringement). Plaintiffs in a potential suit could allege that Sling Media has infringed copyrights in a contributory manner by intentionally inducing or encouraging its customers to "sling" copyrighted material over the internet, and that it has infringed vicariously because it has profited from direct infringement while not doing enough to limit it. *Id.*

146. *See supra* notes 49-52 and accompanying text (introducing secondary copyright liability of companies for their customer's actions).

147. *See supra* Parts II.B, II.C (revealing mandatory consideration of *Sony* and *Grokster* in copyright law analysis of emerging technologies). *See generally* Parcher, *supra* note 130 (considering legal rules Court established in *Sony* and *Grokster*).

148. *See supra* notes 118-121, 124-128 and accompanying text (investigating whether Slingbox's broadcasting capability warrants legal considerations beyond scope of *Sony* and *Grokster*).

149. *See supra* note 34 and accompanying text (revealing Copyright Act's basic purpose and considerations for copyright law analysis in times of ambiguity).

A. *Does Slingbox Pass the Sony and Grokster Tests?*

A new technology can survive *Sony* scrutiny if it is capable of substantial noninfringing use.¹⁵⁰ Slingbox's capabilities suggest that the device is indeed capable of substantial noninfringing uses.¹⁵¹ For example, Slingbox lets consumers to keep abreast of local news when traveling, permits aspiring chefs to watch cooking shows on a laptop near the stove, and allows cable subscribers to continue watching televised programming during a trip to the laundromat.¹⁵² Additionally, Slingbox generates a number of public policy benefits, including the encouragement of a mobile populace.¹⁵³ Therefore, if a court were to construe the phrase "substantial noninfringing use" in its most literal sense, it would likely find enough such uses to allow Slingbox to clear the *Sony* hurdle.¹⁵⁴

A close comparison of the *Sony* case and Slingbox controversies, however, reveals that one or more of the factors compelling the *Sony* Court to recognize the presence of substantial noninfringing use is not present in the case of Slingbox.¹⁵⁵ First, in *Sony*, the Supreme Court upheld the district court's finding that "substantial numbers" of television copyright holders approved of, or did not object to, the time-shifting of television programming.¹⁵⁶ Similarly, in a Slingbox lawsuit, Sling Media would seek compelling testimony from television copyright holders expressing analogous approval of placeshifting.¹⁵⁷ As the landscape of the television business has changed since the late 1970s and early 1980s, such a feat might prove difficult.¹⁵⁸ Professional sports

150. See *supra* note 75 and accompanying text (borrowing significant noninfringing use defense from patent law).

151. See *infra* note 152 (providing examples of substantial noninfringing uses).

152. Sling Media, *supra* note 4 (suggesting local news, cooking show, laundromat, and various other uses for Slingbox); see also *Statement of Krikorian, supra* note 1, at 20-21 (describing Slingbox's numerous substantial noninfringing uses). Krikorian testified that Disney used Slingboxes in order to enable its employees to remotely view daily filming. *Statement of Krikorian, supra* note 1, at 19. He also noted that a firefighting crew had used Slingbox to "placeshift the local news helicopter video feed from the fire station to a mobile phone at the scene of the fire, thereby providing the firefighting crew with an overhead view." *Id.* at 20. The Slingbox website also suggests some less intuitive places to use the technology, including at funerals, weddings, night classes, and in the bathroom. Sling Media, *supra* note 4.

153. See *infra* Part III.C.1 (measuring public policy benefits of Slingbox).

154. See *supra* note 152 and accompanying text (listing examples of Slingbox's substantial noninfringing uses); *infra* Parts III.C.1-2 (comparing public policy pros and cons); see also *supra* notes 99-100 and accompanying text (discussing whether Court should modify *Sony*'s "capable of" standard to remove excess speculation). While Slingbox might defend itself by contending that additional substantial noninfringing uses may emerge in the future, Justice Ginsburg's concurrence in *Grokster* suggests that such uses must be likely to occur. See *supra* notes 99-100 and accompanying text.

155. See *infra* notes 156-157 and accompanying text (suggesting modern copyright owners more skeptical of benefits of emerging technologies than during *Sony*).

156. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (citing survey data at trial court level).

157. See *id.* (implying copyright owners' lack of universal objection factored into Court's pro-defendant holding).

158. See *Statement of McSarrow, supra* note 10 (noting cable industry's investment in reliance on

leagues, for example, which were generally supportive of the time-shifting experiment in the Sony Betamax days, are unlikely to lend similar support if copyright owners put placeshifting on trial.¹⁵⁹

A second factor that compelled a holding of substantial noninfringing use from the *Sony* Court was the plaintiffs' failure to demonstrate a "likelihood of nonminimal harm to the potential market for, or value of, their copyrighted works."¹⁶⁰ In a potential case against Sling Media, plaintiff copyright owners could obtain data about the modern telecommunications industry that distinguishes their plight from the *Sony* plaintiffs.¹⁶¹ For example, prospective plaintiff MLB might argue that Slingbox nonminimally threatens its internet rights.¹⁶² Indeed, in 2005, MLB netted an estimated \$130 million in a deal that featured internet broadcast rights.¹⁶³ Another class of prospective plaintiffs—cable companies—might proffer a reliance argument, contending that they provided Americans with billions of dollars in cable infrastructure under the reasonable expectation that viewers in a particular geographic area would have to go through cable companies in order to obtain copyrighted premium televised content.¹⁶⁴

In summary, Slingbox's survival under *Sony* might depend on how literally a court construes the "substantial noninfringing use" mantra.¹⁶⁵ The more deeply a court probes into the two factors buttressing the *Sony* holding, the greater the possibility that it will uncover dissimilarities between the two sets of facts.¹⁶⁶

sustained revenues); Topcik, *supra* note 2, at 9 (revealing CBS executive's skepticism about Slingbox's legality); Anderson, *supra* note 13 (alleging content owners do not like Slingbox); Sandoval, *supra* note 11 (expressing MLB's clear objection to Slingbox); *supra* note 126 and accompanying text (highlighting MLB's opposition to Slingbox). *But see* Topcik, *supra* note 2, at 9 (mentioning copyright owner Liberty Media embracing Slingbox); Fogg, *supra* note 9 (noting Viasat as satellite TV operator embracing Slingbox); Hau, *supra* note 9 (noting CBS president's praise for Sling Media and CBS's collaboration in Clip+Sling).

159. Compare *supra* note 126 and accompanying text (discussing MLB's opposition to Slingbox), with *Sony*, 464 U.S. at 424 (demonstrating prior sports league support for Betamax experiment). The Court writes, "[Sony's] survey indicated that 7.3% of all Betamax use is to record sports events, and representatives of professional baseball, football, basketball, and hockey testified that they had no objection to the recording of their televised events for home use." *Sony*, 464 U.S. at 424. *But see* Sling & NHL Press Release, *supra* note 11 (announcing hockey's participation in Clip+Sling and suggesting willingness to cooperate with Sling Media).

160. *Sony*, 464 U.S. at 456 (concluding plaintiffs failed to prove second factor of substantial noninfringing use test).

161. See Topcik, *supra* note 2, at 9 (reporting general disapproval of Slingbox among cable providers); *supra* note 126 and accompanying text (voicing MLB's objection to Slingbox); *infra* text accompanying notes 162-164 (supporting likelihood that plaintiffs would argue nonminimal harm and detrimental reliance).

162. See *supra* note 126 and accompanying text (discussing MLB's opposition to Slingbox); *infra* text accompanying note 163 (discussing substantial monies MLB paid for limited internet broadcast rights in 2005).

163. Weekley, *supra* note 126, at 1B (announcing limited internet rights deal between MLB and ESPN).

164. See *supra* note 10 (expressing cable industry's desire to maintain ability to geographically ration content). The cable industry has also expressed frustration about the lack of reward for its cable infrastructure investment. *Id.*

165. See *supra* note 152 and accompanying text (suggesting prima facie analysis of Slingbox reveals substantial noninfringing uses).

166. *C.f.* *supra* notes 156-157 and accompanying text (revealing two elements factoring into *Sony* holding).

Such dissimilarities are, on balance, detrimental to Slingbox's defense.¹⁶⁷

Under *Grokster*, a new technology can survive scrutiny by demonstrating that it is not inducing or encouraging direct infringement and is "exercising a right" to limit direct infringement.¹⁶⁸ Sling Media's survival of *Grokster*'s first prong hinges on how broadly a court defines direct infringement.¹⁶⁹ Sling Media has encouraged its customers to sling copyrighted television programming to themselves over the internet for viewing on a variety of devices in limitless geographic locations.¹⁷⁰ Sling Media, however, has not induced or encouraged its customers to sling copyrighted television programming to others.¹⁷¹ In this way, Sling Media is distinguishable from the *Grokster* defendants, whose entire business model was predicated on customers sharing content.¹⁷² Further, the *Grokster* defendants, by labeling themselves as Napster alternatives and developing advertising schemes in which more downloads equaled more profits, induced and encouraged direct infringement in a way that Slingbox has not.¹⁷³

In a potential case against Slingbox, parties would likely disagree as to what types of customer uses constitute direct infringement.¹⁷⁴ For example, Sling Media might concede that "Slingbox buddy" exchanges, or parental transmissions to their children away at college, constitute direct infringement.¹⁷⁵ On the other hand, a vociferous plaintiff is unlikely to concede the legality of certain advertised Slingbox uses.¹⁷⁶ In fact, a plaintiff may argue that one who converts a copyrighted program in a television signal to an internet stream—which all Slingbox users do—has created a derivative work,

167. Cf. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (implying lack of unified opposition to placeshifting influenced *Sony* Court's holding for defendants). After articulating a lack of widespread objection by copyright holders and unlikelihood of harm, the Court stated, "[T]he Betamax is, therefore, capable of substantial noninfringing uses." *Id.*

168. See *supra* note 105 and accompanying text (describing standard of liability under *Grokster*).

169. See *Sling Media*, *supra* note 4 (encouraging self-use only); *infra* notes 172-173 (investigating what constitutes direct infringement by Slingbox users by comparing them to *Grokster* defendants).

170. See *supra* note 152 (encouraging customers to broadcast to themselves in faraway places).

171. *Supra* note 152 (encouraging customers to broadcast to themselves while lacking inducements to broadcast to others).

172. See also *supra* text accompanying notes 92-93 (elaborating on *Grokster* defendants' supernode peer-to-peer networks); compare *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-20 (2005) (explaining *Grokster* defendants' business model required customers sharing files through peer-to-peer networks), with *Statement of Krikorian*, *supra* note 1, at 19 (implying Slingbox business model incapable of "indiscriminate redistribution" and sharing).

173. See *Grokster*, 545 U.S. 913 at 938-40 (evidencing distaste for defendants' claimed as Napster alternatives).

174. Cf. *Statement of Krikorian*, *supra* note 1, at 19-20 (stating placeshifting is not infringement); Topcik, *supra* note 2, at 9 (reporting belief placeshifting constitutes infringement); *infra* text accompanying notes 175-177 (illustrating potential dispute over what constitutes infringement).

175. See *Statement of Krikorian*, *supra* note 1, at 18-20 (encouraging placeshifting of content "already bought and paid for" but not other placeshifting); see also *supra* note 117 and accompanying text (inferring illegality of "Slingbox buddy" exchange).

176. Cf. Topcik, *supra* note 2, at 9 (reporting objection to Slingbox's advertised uses).

and is thus a direct infringer.¹⁷⁷

Sling Media should be able to distinguish itself from the *Grokster* defendants vis-à-vis the second prong of the *Grokster* test—“exercising a right” to limit direct infringement—given Sling Media’s obvious affirmative steps to do so.¹⁷⁸ Slingbox’s one-end-user copy protection and inability to record do not completely prevent infringement, as evidenced by the emergence of Slingbox buddies.¹⁷⁹ Nevertheless, these copy protections make infringement significantly more difficult.¹⁸⁰ While a court could conceivably find that Sling Media should have tried harder to limit infringement, such a finding would instill a duty of care on technology manufacturers that exceeds the scope of Justice Souter’s “exercise a right to stop or limit” mandate.¹⁸¹

B. Does Slingbox’s Ability to “Broadcast” Have any Bearing on this Controversy?

Unlike most other technologies at risk in the post-*Grokster* era, placeshifters possess the ability to broadcast.¹⁸² Inevitably, plaintiffs bringing suit against Slingbox would cite statutes and case law that overwhelmingly prohibit unauthorized retransmission of copyrighted material.¹⁸³ One can infer Sling Media’s likely retort to such claims from Blake Krikorian’s public comments and Congressional testimony, namely that Slingbox users are not broadcasting in the traditional sense of the word but are instead watching programming that they already purchased.¹⁸⁴ Sling Media could support this contention by pointing out that Congress designed statutes like those codified in 47 U.S.C. §§ 553 and 605 to prohibit the public from stealing, and obtaining devices to steal,

177. *Cf. supra* note 69 and accompanying text (discussing argument that commercial-skipping constitutes creation of derivative work).

178. *See Statement of Krikorian, supra* note 1, at 19 (suggesting Slingbox incapable of massive infringement); *infra* text accompanying note 179 (listing Sling Media’s two design features limiting Slingbox users’ infringement).

179. *See supra* note 117 and accompanying text (illustrating examples of infringement through emergence of Slingbox buddies).

180. *See Statement of Krikorian, supra* note 1, at 19 (stressing Slingbox’s characterization as personal-use system). *But see* Wallenstein, *supra* note 7 (revealing television executive’s fear that someday hackers will circumvent Slingbox’s copy protections).

181. *See supra* note 105 and accompanying text (expressing *Grokster*’s duty of care mandate); *supra* note 142 and accompanying text (discussing some content owners’ desire for broadcast flag copy protection).

182. *See Primary Slingbox Patent Application, supra* note 3 (describing Slingbox’s broadcasting capabilities); *supra* note 112 and accompanying text (detailing features of various Slingbox models). *But see supra* note 137 and accompanying text (revealing capabilities of YouTube). One might argue that YouTube is a broadcasting device, particularly as its motto is “Broadcast Yourself.” *Cf. id.* Others might conclude, however, that YouTube users merely *post* clips on a website, rather than broadcasting them. *Cf. id.*

183. *See supra* note 118 (demonstrating penalties against unauthorized reception of cable signal); *supra* note 120 and accompanying text (demonstrating judicial reluctance to extend fair-use defense in rebroadcasting situations).

184. *See Statement of Krikorian, supra* note 1 and accompanying text (noting Slingbox does not allow users to broadcast indiscriminately).

cable and satellite signals.¹⁸⁵

While Slingbox customers are distinguishable from the brazen cable and satellite thieves that these statutes target, plaintiffs could still argue that Slingbox is per se illegal because it frustrates the property rights of broadcast content owners.¹⁸⁶ If HBO does not want *The Sopranos* to be shown in Charlotte, for example, it has the option of not brokering a deal with a cable system in the region.¹⁸⁷ For major sports leagues in particular, Congress has expressly sanctioned their ability to limit and control their supply of broadcasts, to the point of antitrust immunity.¹⁸⁸ In other words, if Major League Baseball wishes to confine Astros games to Houston and Giants games to San Francisco, it can do so.¹⁸⁹ Nonetheless, by its inventor's own admission, Slingbox was specifically inspired by a desire to watch Giants games outside the San Francisco area.¹⁹⁰ In summary, given that retransmission laws were crafted prior to the advent of placeshifting technologies, one can only speculate as to whether a court would find them applicable to Slingbox.¹⁹¹

C. As a Matter of Policy, Should Copyright Laws Protect Slingbox?

In a potential suit against Slingbox, a court might not limit its analysis to the tenets of *Sony*, *Grokster*, and retransmission law.¹⁹² Despite some similarities between the VCR, peer-to-peer filing sharing, and Slingbox, Slingbox remains a novel device whose impact the crafters of copyright and retransmission laws could not have fully foreseen.¹⁹³ Consequently, applying Justice Stewart's reasoning in *Aiken*, if statutes and case law render Slingbox's legality ambiguous, one must scrutinize such legality by considering copyright law's

185. See *supra* notes 118-119 (inferring legislative goal of combating piracy).

186. *Cf.* Lampman, *supra* note 118, at 568-69 (profiling satellite pirates). Lampman describes satellite pirates as "a complex breed of white collar criminals. . . . Within their ranks are career hackers . . . owners of sports bars . . . satellite industry employees, and millions of average television viewers *looking for a free ride to pay television.*" *Id.* at 568-69 (emphasis added). *But cf.* *supra* note 27 and accompanying text (enumerating copyright owners' exclusive statutory rights to exploit their proprietary interests).

187. See *supra* notes 29-30 and accompanying text (indicating copyright owners' abilities to license some or all of their statutory rights).

188. See *supra* note 127 and accompanying text (describing Sports Broadcasting Act of 1961 and its effect).

189. *Cf.* *supra* note 127 and accompanying text (suggesting sports leagues' ability to legally operate as monopolists for broadcasting purposes).

190. *Statement of Krikorian, supra* note 1, at 19 (stating Slingbox specifically designed to allow Krikorian to view out-of-market San Francisco Giants games).

191. See Parcher, *supra* note 130, at 543-45 (expressing uncertainty about whether courts would hold Sling Media liable in a hypothetical suit).

192. See *infra* Parts III.C.1-2 (investigating policy arguments courts might consider in suit against Sling Media).

193. *Cf.* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (implying Congress cannot possibly foresee every technological advance impacting copyright law). The Court suspects that "[i]t may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past." *Id.*

underlying purpose.¹⁹⁴ The ultimate intended beneficiary of copyright law is society at large, not the author or his assignees.¹⁹⁵ The enrichment of copyright owners is not the purpose of copyright law, but rather a necessary means for stimulating creative works that benefit society.¹⁹⁶ Given these considerations, there are numerous public policy arguments in favor of and in opposition to a finding that placeshifting is fair use.¹⁹⁷

1. *Is Slinging Fair Use?: Arguments in Favor*

A principal policy argument in favor of a fair use finding is to prevent the chilling of innovation.¹⁹⁸ An adverse court decision for Slingbox would dissuade other inventors and venture capitalists from bringing useful, yet potentially infringing, technologies to the marketplace.¹⁹⁹ This would be particularly unfortunate for Sling Media, which seemingly took affirmative steps to limit the infringing capacity of Slingbox, relative to the *Grokster* defendants.²⁰⁰ In addition to deterring *future* innovations, a decision against Sling Media would represent a prohibition against technology that is presently innovative and useful.²⁰¹

194. See *supra* note 34 and accompanying text (suggesting appropriate analysis in terms of copyright law ambiguity).

195. See *supra* note 34 and accompanying text (stressing copyright monopoly granted for purpose of societal benefit).

196. See *supra* note 34 and accompanying text (calling author enrichment “immediate effect” of copyright monopoly rather than “ultimate aim”).

197. See *infra* Parts III.C.1-2 (investigating policy arguments courts might weigh in suit against Sling Media).

198. See *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 960 (2005) (Breyer, J., concurring) (predicting “chill of technological development” if *Sony* standard modified); see also LESSIG, *supra* note 26, at 23-24 (implying lengthy post-*Eldred* copyright term stifles creativity by preventing necessary creative borrowing). Thus, a legal defeat for Sling Media within the context of a post-*Eldred* massive copyright term would mean a loss for consumers both in terms of quality of available creative content and the technological options for consuming it. Cf. LESSIG, *supra* note 26, at 23-24.

199. See *Grokster*, 545 U.S. at 959-60 (Breyer, J., concurring) (predicting decrease in venture capital investment if *Sony* standard modified). Justice Breyer writes:

Inventors and entrepreneurs (in the garage, the dorm room, the corporate lab, or the boardroom) would have to fear (and in many cases endure) costly and extensive trials when they create, produce, or distribute the sort of information technology that can be used for copyright infringement. They would often be left guessing as to how a court . . . would decide The price of a wrong guess—even if it involves a good-faith effort to assess technical and commercial viability—could be large statutory damages (not less than \$750 and up to \$30,000 per infringed work). . . . The additional risk and uncertainty would mean a consequent additional chill of technological development.

Id. (citations and emphasis omitted).

200. Compare *Statement of Krikorian*, *supra* note 1, at 19 (assuring Slingbox can only sling to one end-user at a time), with *Grokster*, 545 U.S. at 939 (demonstrating *Grokster* defendants made no effort to develop filtering tools to limit infringement).

201. See *Statement of Krikorian*, *supra* note 1, at 19-20 (exemplifying Slingbox’s usefulness for local fire departments and television production); Sling Media, *supra* note 4 (demonstrating novel, innovative non-obvious uses of Slingbox). Consider that small battery-powered televisions have existed for years, but few

Another policy argument in favor of a fair use finding, is that it is undetermined whether copyright owners have or will suffer any net damages as a result of placeshifting technologies.²⁰² After *Sony*, and as a direct result of the VCR, copyright owners benefited from the boom of the home video market.²⁰³ Similarly, Slingbox allows television copyright owners the opportunity to regain much of the audience that they have lost to the internet and other modern entertainment substitutes.²⁰⁴ In short, people might watch significantly more television if placeshifting becomes widespread than they would if placeshifting is prohibited.²⁰⁵

A third policy argument in favor of Slingbox is that it encourages mobility among the populace, and that banning it would suppress one's constitutional right to travel.²⁰⁶ Suppose a businessperson acquires the opportunity to take a commercial or charitable jaunt from Birmingham to Boise but is reluctant to do so knowing that, during the trip, the Auburn University football game will only be televised locally.²⁰⁷ The availability of Slingbox might, therefore, be the clinching factor in the businessperson taking this trip.²⁰⁸ While this particular hypothetical is perhaps unremarkable, cumulative similar hypotheticals suggest an increase in economic activity as a result of the ability to placeshift.²⁰⁹

people are tactless or bold enough to bring them into funerals, night classes, or workplace cubicles. *Cf.* Sling Media, *supra* note 4. Mobile phones and desktop computers, however, allow for subtlety, thereby avoiding the scorn of bosses and loved ones. *Cf. id.*

202. *See supra* notes 77-78 and accompanying text (noting movie studios' monies lost to Betamax infringers recouped with home video sales).

203. *See supra* note 78 and accompanying text (alleging \$24.42 billion home video receipts by Hollywood in 2002).

204. *See* Wallenstein, *supra* note 7 (noting TV affiliates have lost viewers to internet use, particularly at work).

205. *See* Sling Media, *supra* note 4 (noting Slingbox users can watch TV via their mobile phone during funerals or night classes); Wallenstein, *supra* note 7 (noting Slingbox users will watch TV on computers at work rather than surfing internet).

206. *Cf.* *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (noting importance of right to travel); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964) (demonstrating Supreme Court's willingness to equate limiting right to travel with burdening interstate commerce). The *Heart of Atlanta* Court writes, "[T]here was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community . . . [T]he voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel." *Heart of Atlanta*, 379 U.S. at 253. Similarly, the *Saenz* Court writes, "The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz*, 526 U.S. at 498 (citing *United States v. Guest*, 383 U.S. 745, 787 (1966)).

207. *Cf.* Belson, *supra* note 6, at C1 (demonstrating subscribers can access their local channels while traveling).

208. *Cf.* Belson, *supra* note 6, at C1 (noting Slingbox inventors were "desperate" to view San Francisco Giants games while traveling on business).

209. *Cf.* Belson, *supra* note 6, at C1 (describing situation leading to Slingbox's invention similarly to asserted hypothetical).

2. *Is Slings Fair Use?: Opposing Arguments*

Many of the policy arguments against a fair use finding for placeshifting technologies revolve around the concept of reliance—i.e., a court's approval of Slingbox would be patently unfair to business parties acting with reasonable reliance on pre-Slingbox conditions.²¹⁰ For example, television content owners, such as HBO and MLB, granted internet and cell phone rights to their programming prior to Slingbox appearing on the market, relying on the fact that no technology would come along to subvert these deals.²¹¹ Similarly, expecting that it would be the only outlet for viewing out-of-market games, DirecTV paid the National Football League (NFL) \$3.5 billion over five years for exclusive rights through 2010.²¹² Finally, the cable industry has invested billions of dollars into new cable lines—the very same cable lines that many end-users of Slingbox plug their laptops into—with the reasonable assumption that the industry would be able to fully capitalize on this investment.²¹³

Going forward, a finding that placeshifting is fair use might devalue copyrighted content by reducing the assurances that content owners could give advertisers.²¹⁴ For example, content owners want to be able to promise local advertisers that they can target a particular region.²¹⁵ Such promises are impossible if significant portions of the viewing audience are watching from a laptop in another time zone.²¹⁶

While parties in a suit over placeshifting would never make the point, it is conceivable that judges presiding over such a suit might conclude that widespread placeshifting would create a society that watches too much television in inappropriate situations, thereby prejudicing such judges from crediting the aforementioned economic policy benefits of placeshifting.²¹⁷

210. See *infra* notes 211-212 and accompanying text (stating ways cable industry has acted in reliance).

211. See Sullivan, *Sling Slags Copyrights*, *supra* note 9 (reporting exclusive mobile distribution deal between HBO and Cingular Wireless). But see Ojeda-Zapata, *supra* note 131, at 1D (noting existing TV-on-cell services offered by Sprint and AT&T's Cingular).

212. Wallenstein, *supra* note 7 (reporting monetary figure of DirecTV deal); see also LaGesse, *supra* note 13 (noting EchoStar's deep pocket may entice lawsuit). As EchoStar-DirecTV's primary satellite market competitor—just purchased Sling Media, Direct TV now has particular incentive to inflict pecuniary legal wounds upon Slingbox's corporate parent. Cf. LaGesse, *supra* note 13. Others, however, speculate that DirecTV might instead merge with EchoStar. See Smith, *supra* note 3 (discussing AT&T/EchoStar merger possibility as well).

213. See *Statement of McSarrow*, *supra* note 10, at 76 (noting cable industry's significant investment in infrastructure).

214. See Wallenstein, *supra* note 7 (stating networks' desire to promise advertisers accurate geographic demographics of viewers).

215. See Wallenstein, *supra* note 7 (discussing and defining "proximity control").

216. Cf. Wallenstein, *supra* note 7 (speculating Slingbox could impair advertisers).

217. See *infra* text accompanying note 218 (identifying potential socially undesirable use of Slingbox); see also Dunn, *supra* note 113, at 4 (implying watching more television particularly in faraway locales not necessarily beneficial to public policy). Dunn writes:

While there are undoubtedly sadder ways to [utilize] a broadband connection when you're alone in

Consider that the Slingbox website, perhaps jokingly, suggests using Slingbox during funerals.²¹⁸ This extreme example notwithstanding, Slingbox represents a much more introverted device than the VCR for the simple reason that families are more likely to gather around a television than a smart phone.²¹⁹ Consequently, while Mr. Rogers's expert testimony about time-shifting's benefits to families may have saved the *Sony* defendants, Slingbox is unlikely to play such a card in its defense.²²⁰

D. Inadequacy of Grokster Tests

The *Sony* standard provided guidance for creators of new technologies for more than twenty years before the *Grokster* Court demanded additional considerations.²²¹ Only two years removed from *Grokster*, numerous technologies are in legal limbo as a result of its baffling holding and concurrences.²²² If Slingbox is any barometer, this ambiguity has had consequences.²²³ Blake Krikorian has articulated his initial difficulty in finding venture capital investors for Sling Media due to the uncertain state of copyright laws.²²⁴

Whether the test case is ultimately Slingbox or some other cutting-edge technology, such as YouTube or TiVoToGo, the Supreme Court or Congress could stimulate venture capital investment and eliminate substantial confusion by clarifying two principal points of confusion in *Grokster*.²²⁵ First, the duty of care that Justice Souter imposed is overly vague.²²⁶ Ideally, the Court or Congress will better define the steps that a company like Sling Media must take

your hotel room, my biggest criticism is that the Slingbox encourages us to forgo the delights of whatever exotic location we find ourselves in simply for a night in front of the TV. Now, that really is an abuse of technology.

Dunn, *supra* note 113, at 4.

218. Sling Media, *supra* note 4 (suggesting various intuitive and nonintuitive uses for Slingbox).

219. See Dunn, *supra* note 113, at 4 (noting slung signal inferior to signal broadcast directly to television via cable or satellite); Sullivan, *We're Good for Cable*, *supra* note 113 (criticizing Slingbox signal quality).

220. See *supra* note 67 and accompanying text (commenting copyright holder Fred Rogers opined time-shifting good for families); see also *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 951 (2005) (Breyer, J., concurring) (stating Court factored Rogers's testimony into conclusion that many copyright holders did not object to time-shifting).

221. *Grokster*, 545 U.S. at 959 (Breyer, J., concurring) (commending *Sony* rule for minimizing contributory infringement suits).

222. See *supra* Part II.E (noting Slingbox not sole cutting-edge technology that *Grokster* threatens).

223. See *infra* note 224 (expressing difficulty finding investors in uncertain copyright law climate).

224. Sullivan, *We're Good For Cable*, *supra* note 113 (claiming initial trouble finding Slingbox investors).

225. See *supra* note 100 and accompanying text (expressing different standards for noninfringing use); *supra* Part II.E (discussing technologies at risk in the post-*Grokster* era); *infra* note 226 and accompanying text (identifying ambiguity in requisite duty of care in *Grokster* holding).

226. Cf. *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (stating technologists must "exercise a right to stop or limit" infringement). It is unclear from Justice Souter's opinion precisely when one "exercises a right" and what constitutes adequate steps to limit infringement. Cf. *id.*

to avoid secondary liability.²²⁷ Is Slingbox's one-end-user protection enough, or does it also have a duty to monitor and report the emergence of Slingbox buddy solicitations on the internet?²²⁸ Second, as one can infer from the two *Grokster* concurrences, the meaning of the two words "capable of" within the "capable of substantial noninfringing use" mandate remains a source of debate.²²⁹ Thus, the public would benefit if Congress or the Court more clearly defined the degree of likelihood necessary to clear the "capable of" hurdle.²³⁰

IV. CONCLUSION

A placeshifting lawsuit against Sling Media would represent a logical event in the series of major modern secondary copyright infringement cases, which have so far covered the issues of time-shifting and file sharing. Neither Congress nor the Supreme Court has provided enough guidance for one to confidently ascertain whether placeshifting technologies violate federal copyright laws. Slingbox seems to possess enough substantial noninfringing uses to satisfy the *Sony* standard, although at least one crucial factor that apparently swayed the 5-4 *Sony* Court toward the technologists in 1984 is not present today. Namely, a paucity of modern copyright owners have expressed a willingness to embrace Slingbox to the extent that notable entities in the sports and entertainment industries embraced the Betamax. Sling Media is certainly less culpable under the *Grokster* standard than were the *Grokster* respondents. However, both prongs of the *Grokster* tests are too vaguely defined to determine if Sling Media has induced infringement or done enough to limit it.

Only two years removed from the *Grokster* holding and its multiple concurrences, jurists and scholars struggle to define the legal rule. For the sake of Slingbox and other useful cutting-edge technologies seeking venture capital, Congress or the Supreme Court should clarify *Grokster*. Ideally, the illuminated rule will resemble Justice Breyer's *Grokster* concurrence, unequivocally renewing the *Sony* standard, which reigned unambiguously for more than twenty years. Such a clarification would avail technologists, copyright owners, and the very public that copyright laws are ultimately designed to benefit.

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227. See Helton, *supra* note 132, at 3-4, 34-35 (proposing revisions to *Grokster* and *Sony* standards). Helton calls for a "reasonable methods" test within the bounds of "technological and financial feasibility" for devices capable of wide-scale distribution of copyrighted works. *Id.* at 34-35.

228. See *supra* note 226 (pointing to ambiguous language in *Grokster* rule and implications on duty of care).

229. *Supra* note 100 and accompanying text (comparing variant interpretations of *Sony* standard in *Grokster* concurrences).

230. *Cf. supra* note 224 (suggesting copyright law ambiguities inhibit venture capital for useful technologies).