

**Wake Forest University School of Law
Advanced Legal Research Pathfinders**

**Copyright Infringement via Internet
Peer-to-Peer File Sharing
By Bryan Knight**

Spring 2005
Last Updated: September 1, 2011

Disclaimer

Information on this page has been obtained by the author when he or she was a student in our Advanced Legal Research class from sources believed to be reliable. While these pathfinders are updated every year we do not guarantee the accuracy or completeness of any information included and are not responsible for any errors, omissions or damages arising from the use of this information. This page is made available with the understanding that we are supplying information, but are not attempting to render legal or other professional services. If such services are required, the assistance of an appropriate professional should be sought.

Table of Contents

I. Introduction

- a. Audience/Purpose**
- b. Issues**
- c. What is Peer-To-Peer File Sharing?**
- d. Overview of the Problem**

II. Finding the Law Quickly

- a. Access through a Law Firm or Law School**
- b. Free Access**

III. Common Law

- a. Contributory Copyright Infringement**
- b. Vicarious Copyright Infringement**
- c. Research Resources**

IV. Legislative Responses

- a. Digital Millennium Copyright Act**
- b. Research Resources for DMCA**
- c. Statutes**

V. Case Law

- a. Sony**
- b. Napster**
- c. Aimster**
- d. Grokster**
- e. Research Resources**

VI. Research Resources

- a. Law Review and Journals**
- b. Treatises**
- c. Case Law**
- d. Looseleafs**
- e. Websites**
- f. Legal Periodicals**
- g. ALR**
- h. Legal Encyclopedias**

VII. How will the Supreme Court Decide?

VIII. Conclusion

I. INTRODUCTION

1. Audience/ Purpose

This pathfinder is intended to provide an overview of copyright infringement via internet peer-to-peer file sharing. This pathfinder is targeted towards both attorneys and law students that are unfamiliar with the legal issues surrounding this area of law, the technology or whether the ability to attain free downloads will continue to exist. This pathfinder will address different resources that would be helpful for legal research or just pleasure reading. The goal is to explain the law in simple terms, provide a research guide of the most helpful resources, while addressing the least helpful resources, and provide a brief analysis of how the Supreme Court will most likely decide the *Grokster* case in May.

2. Issues

- a. Whether “pure” or “next generation” peer-to-peer file sharing technologies can be held liable for contributory copyright infringement?
- b. Whether “pure” or “next generation” peer-to-peer file sharing technologies can be held liable for vicarious copyright infringement?

3. What is Peer-to-Peer File Sharing?

a. Digital Technology: Digital technology enables audio recordings to be compressed into a digital file that uses little memory and therefore enables the recording to be downloaded or uploaded over the Internet with relative ease.¹ Once a user has converted a recording from a compact disk into a digital file on a computer’s hard drive, a peer-to-peer file sharing service enables that user to share the file with other users on the same network.²

b. Three Classes of Peer-to Peer Technology:

i) Hybrid Peer-to-Peer Technology (Napster): Napster was a hybrid because it did not completely abandon the local center concept of networks. In other words Napster maintained a centralized database of digital files. The process worked like this, first, a user went to the Napster website and downloaded the Napster software. In order to share files with others a user had to save his MP3 audio files to a “user library” directory on his hard drive.³ When a user logged in, the Napster software would search his user library for properly formatted MP3 files, and upload the file names from the user’s hard drive to

¹ Michael Suppappola, *The End of the World As We Know It? The State of Decentralized Peer-To-Peer Technologies In the Wake of Metro-Goldwyn-Mayer v. Grokster*, 4 Conn. Pub. L.J. 122, 124-25 (2004).

² Id.

³ Id.

the Napster service.⁴ The file names would then be stored in a “library” of file names available for transfer during the time the user was logged into the Napster system.⁵ Users were then able to search the Napster library for a particular file name.⁶ Note, that Napster is a “hybrid” technology because users must first search for and locate each other through Napster’s central database.⁷

ii) Pure Peer-to-Peer Technology (Grokster): Grokster, Morpheus, and Kazaa are examples of “pure” peer-to-peer technologies. Unlike in a hybrid model, there is no need for a central server.⁸ Here users simply go one of these websites and downloads the software, this software then directly connect the users to each other. These systems are often labeled decentralized because there is no centralized database of files that is being maintained. Pure peer-to-peer networks are self-operating and continue to run even when the software provider’s computers are unavailable.⁹

iii) Next Generation Peer-to-Peer Technologies (Freenet): Similar to “pure” systems, next generation networks require no central server because the users interact directly with each other.¹⁰ However, next generation networks also provide an increased amount of efficiency and anonymity. For instance, Freenet hides the source of file information, which has been described as “law-defying” due to the difficulty in discerning the identification of users who participate in file sharing on these networks.¹¹

4. Overview of the Problem

In the past copyright infringement for musical works and literary works could easily be found under the Copyright Act, because typically direct infringement was involved. This is why college kids that download Mp3 music files can be found guilty of copyright infringement, because they are direct infringers. However, the problem today arises when copyright infringement is sought against secondary infringers like Grokster and Kazaa. In the *Napster* case, Napster was found guilty of secondary copyright infringement because Napster maintained a centralized database of digital files, so they had knowledge of the copyright infringements and had the ability to supervise the infringements. However, “pure” and “next generation” peer-to-peer technologies present a new problem when trying to prove secondary liability because these companies simply distribute software, which enables users to share files among themselves.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

Thus, knowledge and the ability to supervise are very difficult to prove. The Supreme Court granted Certiorari to hear the *Grokster* case on May 7, 2005.

II. FINDING THE LAW QUICKLY

This section is meant for the law student or practicing attorney to find the applicable law quickly, without having to go through each researching step that is laid out in section VI (Research Resources). These sources are the most helpful.

1. Access through a law firm or local law school

a. Law Reviews and Journals

i) Michael Suppappola, *The End of the World As We Know It? The State of Decentralized Peer-To-Peer Technologies In the Wake of Metro-Goldwyn-Mayer v. Grokster*, 4 Conn. Pub. L.J. 122 (2004).

- This article is very helpful for explaining how peer-to-peer filing sharing works and what differentiates the different types of peer-to-peer networks

ii) Tom Graves, *Picking Up the Pieces of Grokster: A New Approach to File Sharing*, 27 Hastings Comm. & Ent. L.J. 137 (2004).

- This article was very helpful by discussing prior case law and communicating the current standard that the court uses to analyze secondary copyright infringement.

b. Treatises

i) Kent D. Stucky, Internet and Online Law (Law Journal Press, 2004):

- Section 6.08(c) gives a thorough account of the current law dealing with peer-to-peer file sharing.

c. Case Law

i) Metro-Goldwyn-Mayer Studios, Inc v. Grokster LTD, 380 F.3d 1154 (9th Cir. 2004).

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

iii) In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).

2. Free Access

- a. <http://www.mrsapo.com/> this site searches 41 other search engines, including Google, Yahoo, Altavista, MSN and AOL. It is very helpful for finding general articles relating to the common law, technology and new articles. Search “peer-to-peer file sharing and copyright infringement”

- b. <http://www.findlaw.com/> this site is very helpful for finding case law and statutes. Since statutes do not play a large role with this issue. It is most helpful to start searching for case law. Search “Metro-Goldwyn-Mayer Studios v. Grokster” and “A&M Records v. Napster”.
- c. <http://www.washlaw.edu/> this site was somewhat helpful for finding law journal articles. However, be aware that many of your searches may not find anything. I found two articles using “Grokster” and twenty articles using “Napster”.

III. COMMON LAW

The common law surrounding secondary copyright infringement claims will control the outcomes of these types of cases because the legislature has yet to specifically address secondary copyright infringement.

1. Contributory Copyright Infringement:

a. Standard: in order to prove contributory copyright infringement three elements must be proved: 1) direct infringement, 2) knowledge of the infringement, and 3) material contribution to the infringement.

b. Direct Infringement: This element requires direct infringement by a primary infringer. In both *Napster* and *Grokster* this element is not contested because direct infringement occurs when the users share copyrighted files.

c. Knowledge of the Infringement: This element allows constructive knowledge of the infringing activity to be imputed if a secondary infringer knew the technology could be used for copyright infringement. However, in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme court did not allow constructive knowledge to be imputed if the piece of technology was capable of commercially significant non-infringing uses. If so the knowledge requirement would be reduced to a reasonable requirement

The Circuit courts in *Napster*, *Aimster*, and *Grokster* have all determined that peer-to-peer file sharing possesses commercially significant non-infringing uses. Thus, in order for these companies to escape contributory copyright infringement they must show that they did not have reasonable knowledge of infringement.

d. Material Contribution to the Infringement: This element requires the secondary infringer to contribute in some way to the infringement. Such as, when Napster contributed to infringement when it provided a site and facilities to infringers, or when a company fails to remove copyrighted works from a peer-to-peer file sharing database.

2. Vicarious Copyright Infringement

a. Standard: in order to prove vicarious copyright infringement three elements must be proved: 1) direct infringement, 2) direct financial benefit, and 3) right and ability to supervise the infringers.

b. Direct Infringement: like in contributory infringement this element is not contested in peer-to-peer file sharing cases because direct infringement occurs when users share copyrighted works.

c. Direct Financial Benefit: this element requires a showing that the secondary infringer had direct financial benefit. This element is not contested in peer-to-peer file sharing cases because the network operator or software distributor, make money directly from advertisements on their website.

d. Right and Ability to Supervise the Infringers: This element requires a relationship between the defendant and the direct infringer. A relationship that would impose the right and ability of the network operator or software distributor to supervise the infringers. This element will determine whether software distributors like Kaaza or Grokster will be found liable for Vicarious Copyright Infringement.

3. Research Resources for Common Law

a. Case Law: this was the most helpful because the court opinions broke down each element and went through an in depth analysis.

i) Metro-Goldwyn-Mayer Studios, Inc v. Grokster LTD, 380 F.3d 1154 (9th Cir. 2004).

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

iii) In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).

IV. LEGISLATIVE RESPONSES

Congress has yet to specifically address how to handle secondary copyright infringement through peer-to-peer file sharing. This is why the courts have relied on the common law. Again, direct infringement is controlled under the Copyright Act but the problem arises with indirect infringement, like *Grokster* and *Kazaa*. However, academics argue that the Digital Millennium Copyright Act can be used to remedy these issues, if interpreted broadly. This section will prove helpful because it will acknowledge potentially applicable legislation and will acknowledge legislation that is not applicable.

1. Digital Millennium Copyright Act of 1998, 17 U.S.C. §512

- a. Legislative History: Congress enacted the Digital Millennium Copyright Act of 1998 (DMCA) to protect intellectual property rights in the digital age. The intent of the DMCA was to limit liability to Internet service providers, assist copyright owners in protecting their works, promote the continued growth of the Internet, and encourage cooperation between Internet service providers and copyright owners regarding copyright infringement.
- b. Difficulty Using The DMCA for Indirect Infringement: In 1998 when the DMCA was passed peer-to-peer file sharing did not exist, so the statute does not specifically address this issue.
- c. Arguments For The Use of the DMCA: Though the DMCA has not been applied to the majority of peer-to-peer file sharing cases, it has been used and some argue that the DMCA should read broadly and applied to more peer-to-peer file sharing cases.
 - i) Legislative Intent: One argument is that the DMCA's language and legislative intent contemplated future technology and codified common law elements of indirect liability. Further the legislators recognized the need for future technologies to protect copyrights in the digital age and to say that software developers who design and have control over the software have no control over the operation of their software ignores the circumstances of modern technology and expertise of those who create and profit from it.¹²
 - ii) Safe Harbor 512(d): In *In re Aimster* the proprietor of the peer-to-peer file sharing technology was found to qualify as a "service provider" under the DMCA 512(d), which is a safe harbor for internet service providers, like AOL, from liability when their users commit copyright infringement. However in *In re Aimster* liability was found because of DMCA 512(i)

¹² Robert A. Gilmore, *Peer-to-Peer: Copyright Jurisprudence In The New File-Sharing Wolrd, The Post Grokster Landscape of Indirect Copyright Infringement And The Digital Millennium Copyright Act*, 5 Fla. Coastal L.J. 85 (2004).

requires service providers to terminate access to users identified as repeat copyright infringers. Here Aimster was aware of copyright infringement but did nothing to stop it.

d. Applicability to Future Cases: The DMCA could potentially play a role in future peer-to-peer file sharing cases, especially when decentralized databases are involved. A decentralized database would differentiate the case from *In re Aimster*, which involved a centralized database, where Aimster had knowledge and control over the infringing activities. Whereas a decentralized database might not have knowledge or control over the infringing activities. Thus, the software provider or any other operator of a decentralized database might not be found liable under DMCA 512(i) and may receive a safe harbor from DMCA 512(d). However, this claim has not been successful in recent cases because the courts fail to apply the DMCA.

2. Research Resources for DMCA

a. Data for Statute

- i) Public Law 105-304 (October 8, 1998)
- ii) 112 Stat. 2860

b. Location

- i) <http://thomas.loc.gov/> (free): go to public laws and type in 105-304
- ii) Westlaw: Directory > Federal Materials > Federal Statutes > Type in 17 USC 512.
- iii) Lexis: Legal > Federal Legal > United States Code Annotated > Type in 17 USC 512.
- iv) CIS: 1998 Legislative Histories, Look up PL 105-304
- v) USCCAN: This is a free service at most legal libraries, which gives abridged versions of legal histories. All you need is the public law number.

3. Statutes That Seem Applicable But Are Not

- a. Copyright Act 17 U.S.C. §102: This statute is helpful for determining the rights of a copyright owner, but does not directly address the problem of indirect copyright infringement.
- b. Audio Home Recording Act 17 U.S.C. §1001: This statute does not allow an infringement action when a consumer uses a digital audio recording device for noncommercial uses.
- c. The Digital Performance Right In Sound Recordings Act of 1995: This statute allows copyright owners to give permissions for certain digital transmissions.

d. Helpful Research Resource:

i) June M. Besek, *Music On The Internet*, 765 PLI/ Pat 417 (2003).

- This article acknowledges the statutes that have been used in copyright infringement cases and also focuses on which statutes are most applicable for secondary copyright infringement.

ii) <http://www.riaa.com/> Once on this website go to “issues” then “copyright” then “copyright laws”. This website lists and provides brief summaries of all the statutes that are relevant to copyright law.

V. CASE LAW

When determining whether copyright infringement can be imposed on distributors of peer-to-peer technology, case law is the most helpful resource for determining the applicable law and determining how courts will interpret the law.

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

a. Facts: Sony Corporation was being sued for contributory copyright infringement because their Video Cassette Recorders (VCR) were being used to tape television shows, which were copyrighted.

b. Holding: The sale of video tape recorders could not give rise to contributory copyright infringement liability even though the defendant knew the machines were being used to commit infringement. Since VCRs were “*capable of substantial noninfringing uses*”, like playing cassettes bought or rented, then constructive knowledge of the infringing activity could not be imputed.

c. Importance: The Supreme Court allowed VCRs even though their users had the ability to infringe on broadcast companies copyrights, since the VCR was capable of substantial noninfringing uses. Currently this is the seminal case for contributory copyright infringement.

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

a. Facts: Napster operated a website that enabled users to log on and download peer-to-peer file sharing software. However, in order to share files the user was required to log on to Napster web site, then the file sharing software would transfer the user’s Mp3 digital files to Napster’s centralized database. Once the files were transferred they were available for others to download and vice versa. Napster was sued by a number of record companies for contributory copyright infringement and vicarious copyright infringement.

b. Holding: 1) Napster was found guilty for contributory copyright infringement because it satisfied all three elements. First, direct infringement occurred when users downloaded copyrighted songs. Second, Napster had sufficient knowledge of the infringing activities were taking place because it maintained the centralized database of digital files. Third, Napster’s software, website and centralized database all materially contributed to the users ability to download copyrighted songs. 2) Napster was found guilty for vicarious copyright infringement because it satisfied all three elements. First, direct infringement occurred. Second, Napster derived a direct financial benefit from their website advertisements. Third, Napster had the right and ability to supervise the users that were downloading copyrighted songs.

c. Importance: This court interpreted *Sony* to require a heightened knowledge requirement when the court determines that the technology was capable of substantial noninfringing uses and not a total exemption. This means when a company provides a means to infringe on others copyrights and this company has actual knowledge that such activity is taking place then contributory copyright infringement will be found.

3. In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).

a. Facts: Aimster operated a peer-to-peer file sharing system that differed from Napster. Aimster's servers never contained the infringing files like Napster. Its service provided the facilities by which downloaders were "matched" with uploaders.

b. Holding: Aimster found guilty for both contributory copyright infringement and vicarious infringement.

c. Importance: 7th Circuit interpreted *Sony* differently than the 9th Circuit. The 7th Circuit held that in order to benefit from the *Sony* Doctrine technologies must have actual substantial non-infringing uses in order to benefit. Also the 7th Circuit held that when Internet file sharing services are capable of both infringing and noninfringing uses then they must prove that it would be disproportionately costly to reduce the infringing uses in order to avoid liability.

4. Metro-Goldwyn-Mayer Studios, Inc v. Grokster LTD, 380 F.3d 1154 (9th Cir. 2004).

a. Facts: Grokster and Kazaa both distribute software that allows peer-to-peer file sharing without any kind of centralized database (like *Napster*). The software enables users to share files directly among one another, without the assistance of the distributors of the software (like *Napster* and *Aimster*).

b. Holding: 1) No contributory copyright infringement because 2 of the three elements were not satisfied. First, the knowledge requirement was not satisfied because the software distributors did not possess actual knowledge of copyright infringements taking place. Second, the software distributors did not materially contribute to the infringement because they did not provide a site and facility for infringement and because they had no way of stopping the infringements because users were sharing among themselves. 2) No vicarious copyright infringement because 1 of the three elements were not satisfied. The court found that the software distributors did not have the right and ability to supervise the infringing activity since the users were sharing files among themselves.

c. Importance: This case allows software distributors to make money off website advertisements, while at the same time avoid liability for the distributing software that enables users to infringe on others copyrights.

VI. RESEARCH RESOURCES

This list of research resources differs from section II (Finding the Law Quickly) in that it is more in depth. The order of the resources was based on the level of helpfulness that each resource provided. Using this list of resources, in the order given, is how a law student should plan to research this topic when writing a research paper or how an attorney should research this topic when writing a legal brief.

1. Law Reviews and Law Journals

a. Articles

i) Michael Suppappola, *The End of the World As We Know It? The State of Decentralized Peer-To-Peer Technologies In the Wake of Metro-Goldwyn-Mayer v. Grokster*, 4 Conn. Pub. L.J. 122 (2004).

- This article is very helpful for explaining how peer-to-peer filing sharing works and what differentiates the different types of peer-to-peer networks

ii) Tom Graves, *Picking Up the Pieces of Grokster: A New Approach to File Sharing*, 27 Hastings Comm. & Ent. L.J. 137 (2004).

- This article was very helpful by discussing prior case law and communicating the current standard that the court uses to analyze secondary copyright infringement.

iii) June M. Besek, *Music On The Internet*, 765 PLI/ Pat 417 (2003).

- This article acknowledges the statutes that have been used in copyright infringement cases and also focuses on which statutes are most applicable for secondary copyright infringement.

iv) Michael Landau, *Digital Music Downloads and Copyright Infringement*, 758 PLI/ Pat 405 (2003).

v) Robyn Axberg, *File-Sharing Tools And Copyright Law: A Study Of In Re Aimster Copyright Litigaton and MGM Studios, Inc. v. Grokster, LTD.*, 35 Loy. U. Chi. L.J 389 (2003).

vi) Lisa M. Zepeda, *A&M Records, Inc. v. Napster, Inc.*, 17 Berkley Tech. L.J. 71 (2002).

b. Search Methods

i) Westlaw: Search the “Journals and Law Reviews” Database. For general articles about peer-to-peer file sharing perform a terms and connectors search of [“contributory copyright infringement” /20 peer file sharing]. For articles relating to software distributors like Kazaa perform a natural language search “Grokster and Napster”.

ii) Lexis: Legal>Secondary Legal>Law Reviews, CLE, Legal Journals & Periodicals, Combined. Search [“contributory copyright infringement” w/20 peer file sharing]. Can also perform a natural language search using “Grokster and Napster”.

iii) Annotations from U.S.C.A.: at the end of the Digital Millenium Copyright Act 17 § 512 the annotations address five law review articles and law journals. These should only be used as a starting point, because the most recent article is from 2003 and probably will not address *Grokster*.

2. Treatises

- a. Kent D. Stucky, Internet and Online Law (Law Journal Press 2004):
 - Section 6.07 gives on overview of the common law for copyright infringement
 - Section 6.08(c) gives a thorough account of the current law dealing with peer-to-peer file sharing.
 - Very helpful for determining what the law is and what the important case law is.
 - *Westlaw*: Database “IOLAW”
 - *Lexis*: Legal>Area of Law – By Topic > Copyright Law > Treatises & Analytical Materials > Law Journal Press> Internet and Online Law.
- b. Nimmer on Copyrights (Mathew Bender & Company 2004)
 - Chapter 12B “Liability for Online Copyright Infringement” is very thorough, it does an excellent job of recounting the development of contributory and vicarious copyright infringement.
 - Provides an extensive history of previous case law.
- c. Howard B. Abrams, Law of Copyright (West 2004)
 - Chapter 14 §51 gives an excellent overview of contributory copyright infringement, vicarious copyright infringement and thoroughly explains both *Napster* and *Grokster*.
 - Provides a chapter on the types of remedies sought for contributory and vicarious copyright infringement.

3. Caselaw

a. Important Cases

- i) Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)
- ii) Metro-Goldwyn-Mayer Studios, Inc v. Grokster LTD, 380 F.3d 1154 (9th Cir. 2004).
- iii) A&M Records, Inc. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
- iv) In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).

4. Loosleafs

a. BNA Patent Trademark & Copyright Daily

- Daily reports (Monday through Friday) of legal issues dealing with patent, trademark and copyright.
- Coverage from January 2, 1990.
- Excellent coverage of the *Grokster* and *Napster* cases.
- Provides the most current legal analysis.

b. BNA Patent, Trademark & Copyright Journal

- Weekly report.
- Coverage from January 7, 1982.
- Provides short articles that do a good job of simplifying the issues, the law.

5. Websites

a. <http://www.mrsapo.com/> this site searches 41 other search engines, including Google, Yahoo, Altavista, MSN and AOL. It is very helpful for finding general articles relating to the common law, technology and new articles.

Search “peer-to-peer file sharing and copyright infringement”

b. <http://www.findlaw.com/> this site is very helpful for finding case law and statutes. Since statutes do not play a large role with this issue. It is most helpful to start searching for case law. Search “Metro-Goldwyn-Mayer Studios v. Grokster” and “A&M Records v. Napster”.

c. <http://www.washlaw.edu/> this site was somewhat helpful for finding law journal articles. However, be aware that many of your searches may not find anything. I found two articles using “Grokster” and twenty articles using “Napster”.

d. <http://fairuse.stanford.edu/> this site is dedicated to copyright issues. It has links to applicable copyright statutes as well as relevant cases. In addition this site also has articles posted. See: Home > Commentary & Analysis > Solving the “P2P” Problem: An Innovative Marketplace Solution.

e. <http://www.riaa.com/> this site is operated by the Recording Industry Association of America (RIAA). This group obviously favors the recording industry, but they provide many articles regarding music on the internet and peer-to-peer file sharing. The website may give a slanted opinion towards the recording industry, but it helps define what is at stake for the recording industry.

6. Legal Periodicals

I found the legal periodicals particularly helpful for understanding what was at stake for each party. These articles also gave commentary on what kinds of future copyright issues may arise, what direction the law is going, and who will be affected the most. Since most of these articles dealt with other things than just the substantive law, I would suggest the law student who is interested in this topic read the articles and for the practicing attorney to stick to the law review articles.

a. IP Law & Business (ALM Properties)

i) Daphne Eviatar, *Changing Its Tune; If The Music Industry Wants To Survive Online Piracy, In-House Lawyers At the Record Companies Must Adapt*, IP Law & Business Vol. 03, Issue 11 (2003).

ii) *Westlaw*: Database IPLBUS

iii) *Lexis*: Legal > Area of Law – By Topic > Copyright Law > Legal News > IP Law & Business

b. Internet Newsletter (ALM Properties)

i) Samuel Fineman, *Why Grokster Stands Where Napster Fell*, Internet Newsletter, Vol. 1 (May 14, 2003).

ii) *Westlaw*: Database: INBUSNEWS

iii) *Lexis*: Legal > Area of Law - By Topic > Copyright Law > Legal News > Intellectual Property Law Newsletters, Combined > Internet Newsletter.

7. American Law Reports (ALR)

Because this issue is so new I did not find any ALR articles that were directly on point.

a. *Liability As “Vicarious” or “Contributory” Infringer Under Federal Copyright Act*. 14 ALR Fed 825 (2005).

- Deals with the circumstances under which liability for copyright infringement may be imposed on one who is not a direct, primary participant in the infringement.
- Though this article is not directly on point, it does mention peer-to-peer file sharing and could be helpful to understand how vicarious and contributory copyright infringement is handled in other industries.

8. Legal Encyclopedias

Because this issue is so new the Legal Encyclopedias did not help. However, I am assuming once the Supreme Court rules on this issue the legal encyclopedias will catch up.

a. American Jurisprudence

- Performed index searches under copyright infringement using: “contributory”, “vicarious”, “musical works”, “internet”, “file sharing”, “on-line”. I also performed index searches using each of these titles as separate searches.
- Nothing in pocket parts.

b. Corpus Juris Secundum

- Performed index searches under copyright infringement using: “contributory”, “vicarious”, “musical works”, “internet”, “file sharing”, “on-line”. I also performed index searches using each of these titles as separate searches.
- Nothing in pocket parts.

VII. HOW WILL THE SUPREME COURT DECIDE?

May 7th 2005 the *Grokster* case will come before the Supreme Court. I predict that the Supreme Court will affirm the 9th Circuit's decision regarding vicarious copyright infringement, but reverse the 9th Circuit's decision on contributory copyright infringement.

The Supreme Court will affirm the 9th Circuit's decision that software developers, like *Groskster*, cannot be held liable for vicarious copyright infringement because these companies do not have the ability to supervise how their software is used. Since there is no centralized database of digital files, like existed in *Napster*, the court will not be able to impose this type of liability.

However, the Supreme Court will reverse the 9th Circuit's decision that software developers cannot be held liable for contributory copyright infringement because the Supreme Court will find that the software developers will satisfy all three common law elements for contributory copyright infringement. The first element, direct infringement, is not in dispute. The second element requires the software developers to have reasonable knowledge of the infringing activities. The 9th Circuit did not believe the software developers possessed this knowledge. However, I think based on policy reasons, that the Supreme Court will not allow software developers to produce a product that's sole purpose is to infringe others copyrights and allows the developers to simply claim "we didn't know", while at the same time profiting from this. Thus, the second element should be satisfied. The satisfaction of the third element seems even more obvious, however, the 9th Circuit found that the software developers did not satisfy the third element because they did not materially contribute to the infringing activities. This should not even have been an issue, the software developers clearly contribute to the user's ability to infringe on others copyrights, because without the software the users would not have the ability to infringe.

Base on public policy the Supreme Court will hold the software developers liable for contributory copyright infringement. Thus, discontinuing the ability to share digital files for free. So start downloading!

VIII. CONCLUSION

Peer-to-peer file sharing is obviously a new issue, which can make it difficult to research. Currently, the common law is the controlling law, which can be easily attained through case law and legal treatises. Though the legislature has not specifically addressed this issue, keep an eye on the legislature because I am sure peer-to-peer file sharing will be addressed once the Supreme Court rules on this issue. Especially if my prediction is correct and the Supreme Court imposed secondary copyright infringement on companies like *Grokster* and *Kazaa*.